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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-222

Filed 7 May 2025

Wake County, Nos. 20CR212534-910, 20CR212535-910, 20CR212536-910,
20CR212537-910, 20CR212538-910, 20CR212539-910, 20CR212540-910
20CR212541-910

STATE OF NORTH CAROLINA

v.

CEASAR ARENAS, Defendant.

Appeal by defendant from judgments entered 25 April 2023 and 26 July 2023
by Judge Paul C. Ridgeway, and Judge G. Bryan Collins, respectively, in Superior
Court, Wake County. Heard in the Court of Appeals 10 September 2024.

*Attorney General Jeff Jackson, by Assistant Attorney General J. Joy Strickland,
for the State.*

William D. Spence for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments entered upon a jury's verdict finding him
guilty of statutory sex offense with a child 13, 14, or 15 and indecent liberties. On
appeal, Defendant argues that the trial court committed plain error by failing to
ensure Defendant's constitutional right to a unanimous jury verdict. Defendant also

argues that the trial court erred in sentencing him while he was not present. After careful review, we find the trial court committed no error in the jury instructions and these instructions protected Defendant's right to a unanimous jury. The trial court also did not err in making a clerical correction to the judgment without Defendant present, but we remand for correction of a clerical error in the amended judgment.

I. Factual Background and Procedural History

In 2008, when Ann was eleven years old, Ann's mother began a romantic relationship with Defendant. At trial, Ann presented extensive testimony chronicling her alleged sexual abuse by Defendant. Ann's mother met Defendant several months after Ann's father was killed in a construction accident. He then moved into the home with Ann and her mother and siblings. During the summer when Ann was 12 years old, she had a boyfriend and was "nervous" about going to his house. She told Defendant she didn't know how to kiss or what to say, so Defendant told her to get a plastic bag. She didn't know why he wanted a bag, but she got one, and she testified that he "put the bag on [her] lips and started kissing [her]." She was shocked, and then Defendant told her she was "a really good kisser" and he then began kissing her without the bag. She was "uncomfortable" and in "shock" and left the room.

On a "different day" from the kissing incident, Ann testified that Defendant called her into her mother's room and "tried to have sex with [her]." He grabbed her, started kissing her, and then began grabbing her breasts and "rubbing his fingers into [her] private part, which is [her] vagina." He took off most of Ann's clothes and

removed his own pants; he put her on the bed and put his penis into her vagina. Ann testified that, Defendant “didn’t put it all - - all in . . . [n]ot even half of it[,]” when they “heard somebody coming in the entrance . . . door.” Ann’s mother was returning home, and Defendant stopped, told Ann to put on her clothes, and told her not to say anything. At this point, she did not tell anyone “[b]ecause [she] was scared.”

After this, Defendant began making sexual comments and gestures to Ann and would call her to come out to a storage building in the yard where he kept electronics that he sold at a flea market. Ann testified that the next time Defendant tried to have sex with her was when she was “about 12, 13” in the storage building. Each time this happened, when Ann’s mother was not at home, Defendant followed a similar pattern of kissing her, grabbing her, removing her clothing, and sometimes penetrating her vaginally with his fingers, his penis, or both.

Episodes of sexual abuse like this happened “[p]lenty of times[,]” and “[m]ore than once” when Ann was age 12. She testified this happened “[m]ore than five times” when she was age 13. Normally, the abuse occurred either in the home, where she slept on the couch in the living room at ages 13 and 14, or in the storage building in the back yard. More than five times, she testified Defendant would come to her before she was awake early in the morning when everyone else in the house was asleep and he would begin grabbing her and he “would flip [her] over . . . and [Defendant] w[ould] be almost on top of [her].”

Ann testified in detail about many incidents of sexual abuse, including others similar to those described above. She also testified about times when Defendant sucked on her breasts, watched pornography in front of her, and would “take his penis out and start jerking off in front of [her].” She also testified about times when Defendant forced her to “suck his penis, too.” Defendant would tell Ann “not to tell nobody.” Sometimes he would threaten her that if she told anyone, he would do something to her “little brothers.” He also told Ann no one would believe her if she told anyone.

This sexual abuse continued repeatedly over the years from the time Ann was age 12 until she was 15. She testified that she could not remember “every single thing” that happened during these years, but she remembered “the first time when he did it” and “[t]he last time he did it.” The last time, Ann told Defendant, “if he wouldn’t stop, [she] would tell somebody or [she would] call the cops.” After this, “everything started getting hard for [her]” and “[Defendant] started getting more angry at [her].” In addition to Ann, two of Ann’s friends from the timeframe when the assaults allegedly took place testified at trial. Both witnesses testified that Ann told them that her stepfather touched her inappropriately.

A deputy with the Wake County Sheriff’s Office testified that in March 2011, a woman knocked on his door and told him her daughter’s friend, Ann, had been raped by her stepfather. The deputy visited North Garner Middle School, where Ann was enrolled at the time, and confirmed that Ann was a student at the school. Also in

2011, a different deputy officer with the Wake County Sheriff's Office and a social worker went to Ann's home to investigate the allegations Ann had made; however, due to an error, the alleged perpetrator was listed as Ann's *recently deceased father*, *not Defendant*.

When the law enforcement officer and social worker came to the house, Ann's mother, Defendant, and one of her sisters were also present. They asked Ann whether she had been abused by *her father*, and she denied the allegations. Ann testified that she "knew that [she] couldn't say anything that[s] who it was because [Defendant] was . . . present when [the law enforcement officer and social worker] were asking [her] questions." The case was subsequently closed. Ann eventually moved out of the home with her mother and Defendant, and with her sister's encouragement, she reported Defendant to the police.

On 1 September 2020, Defendant was indicted upon a true bill of indictment in Wake County for twenty-three offenses, including first degree statutory rape, first degree sexual offense with a child, and felonious taking indecent liberties with a child. The matter came on for trial 17 April 2023. On 25 April 2023, Defendant was found guilty upon a jury's verdict of two counts of felony statutory sex offense with a person who is 13, 14, or 15 and two counts of taking indecent liberties. Defendant was sentenced as a Prior Record Level I, to 200 months minimum and 300 months maximum in the custody of the North Carolina Department of Adult Corrections in 20 CR 212535. The trial court consolidated the judgments in 20 CR 212536 and 20

CR 212537, and sentenced Defendant as a Prior Record Level I, to 200 months minimum and 300 months maximum, with this sentence to run at the expiration of the sentence imposed in 20 CR 212535. From this judgment, Defendant gave timely oral notice of appeal in open court.¹

II. Discussion

Defendant contends that he presents two issues on appeal, but really he presents three. He first contends that, “[t]he trial court erred and plainly erred by failing to distinguish between separate counts of sex offense with a child 13, 14, or 15, in the charge and in the verdict sheets. The trial court thereby erred in failing to [e]nsure [Defendant’s] constitutional right to a unanimous jury verdict.” Defendant then identifies two different standards of review for his first issue, both harmless error as a constitutional issue arising from jury unanimity and plain error as an issue arising from the jury instructions. His argument conflates these two issues, but we will address each one separately.

A. Plain Error Review of Jury Instructions

“For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723

¹ As will be discussed below, on 11 July 2023, the North Carolina Department of Adult Corrections notified the Clerk of Wake County Superior Court that Defendant’s “[m]aximum sentence does not correspond to the minimum sentence imposed.” On 26 July 2023, a *different* superior court judge entered two “Amended Judgments” ordering that Defendant’s “sentence shall be modified to 200 to 249 months in NCDAC.”

S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (quotation marks and citation omitted). Plain error is “to be applied cautiously and only in the exceptional case,” where the error is one that “seriously affects the fairness, integrity[,] or public reputation of judicial proceedings.” *Id.* (citation, quotation marks, and brackets omitted).

First, as to the jury instructions, including the verdicts sheets which set out twenty-three separate counts with dates for each identified, Defendant did not object at trial, nor did Defendant request any additional instructions. The trial court meticulously instructed the jury as to each of the twenty-three counts separately and the verdict sheets also set out the twenty-three counts clearly by the file numbers, particular charges, and the date range for each count. On appeal, Defendant does not raise any argument about any portion of the jury instructions.

Defendant also did not object at trial or raise any argument on appeal as to the trial court’s response to the jury’s question regarding the separate charges.

THE COURT: So the first question is: Counts 6 and then 10 through 23, are they mapped to specific acts or incidents?

. . . .

So with respect to the first question, the answer is, no, they’re not mapped to specific incidents provided that the instant that you, the jury, finds to exist, if any, meets all of

the elements of the offense is within the time frame set out with respect to each count and follows the instruction that for you to find [D]efendant guilty on any of those counts, the offense must be separate and distinct from any other act that you found in any other count. So that would be my response that I can give you with respect to that question.

. . . .

THE COURT: Outside the presence of the jury: Any objection to the dialogue I just had with the jurors?

[DEFENSE COUNSEL]: No, Your Honor.

[THE STATE]: No, Your Honor.

Defendant’s main argument regarding the jury instructions is that the trial court did not give any “pointers” for each count indicating “which specific instance of statutory sex offense presented in evidence at trial (such as ‘fellatio in the living room’ or ‘digital penetration at storage enclosure’ or ‘digital penetration in living room’) would be sufficient, beyond a reasonable doubt, for a jury finding of guilty.”

Essentially, Defendant argues that, in the jury instructions or verdict sheet, the trial court should have stated the evidence or explained “the application of the law to the evidence.” N.C. Gen. Stat. § 15A-1232 (2023). But North Carolina General Statute Section 15A-1232 provides that, “[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and *shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.*” *Id.* (emphasis added). In addition, Defendant did not request any special instructions or any revisions to the verdict sheet to give “pointers”

linking specific evidence to specific charges, nor does he suggest on appeal how the trial court might have properly given such “pointers.” Defendant has not identified any error in the trial court’s jury instructions, much less plain error.

B. Jury Unanimity

Defendant’s main argument is not based on the jury instructions themselves, but is really an argument that the jury may not have reached a unanimous verdict where Defendant was charged with twenty-three separate offenses and the evidence tended to show Defendant committed many sexual assaults of various types over a period of years. He argues there is no risk of unanimity “where the defendant is charged with and convicted of the same number of offenses and the evidence supports that number of offenses.” But here, Defendant was charged with twenty-three separate offenses over a period of four years, while he was convicted of four and acquitted of nineteen.

Defendant acknowledges that he did not raise a constitutional issue as to jury unanimity at trial, but cites to *State v. Davis* in support of his contention that “violations of constitutional rights, such as the right to a unanimous verdict, are not waived by the failure to object at trial and may be raised for the first time on appeal.” 214 N.C. App 175, 179, 715 S.E.2d 189, 192 (2011) (citation, brackets, and ellipsis omitted).

Davis supports Defendant’s contention that he may raise this issue for the first time on appeal. *Davis* presented a similar factual situation to this case; there, the

defendant was accused of sexually assaulting his son in his home many times for a period of three years, beginning when his son was in 6th grade. The defendant “was indicted on twenty-four counts of indecent liberties with a child, six counts of first-degree statutory sex offense with a child under the age of thirteen, and six counts of second-degree sex offense.” *Id.* at 176, 715 S.E.2d at 190. The defendant was convicted on all thirty-six counts; he argued on appeal that the evidence supported only two offenses because the victim “did not testify to each sexual attack as a separate incident.” *Id.* at 177, 715 S.E.2d at 191.

This Court first rejected the defendant’s argument that the trial court should have dismissed all but two of the charges where the victim had “clearly described discrete instances of different types of sexual acts perpetrated upon him by [the] defendant over a long period of time.” *Id.* at 179, 715 S.E.2d at 192. This Court then addressed the defendant’s argument that “because the indictments do not distinguish the separate acts, there is a possibility the jury verdicts were not unanimous as to all of the convictions” and stated:

We note the trial court was not presented with this argument. Generally, a failure to object to an alleged error of the trial court precludes the defendant from raising the issue on appeal. However, violations of constitutional rights, such as the right to a unanimous verdict, are not waived by the failure to object at trial and may be raised for the first time on appeal. *Id.* at 592, 589 S.E.2d at 409. We direct [the] defendant’s attention to *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006), in conjunction with *Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402.

The defendant in *Lawrence* was indicted by short-form indictment and, in pertinent part, tried on five counts of first-degree statutory rape and three counts of taking indecent liberties with a child. *Lawrence*, 360 N.C. at 372, 627 S.E.2d at 611. The indictments charging [the] defendant with five counts of first-degree statutory rape each listed the dates of offense as May 1, 1999 thru December 6, 2000 and gave indistinguishable descriptions of the act giving rise to the charge. *Id.* at 372-73, 627 S.E.2d at 612. The indictments charging [the] defendant with three counts of taking indecent liberties with a child were likewise identical as to the dates of offense listed and the description of the act committed. *Id.* at 373, 627 S.E.2d at 611-12. Among the indictments for first-degree statutory rape, as well as those for taking indecent liberties with a child, the most substantial distinction was the case number assigned to each indictment. *Id.* at 373, 627 S.E.2d at 611-12. After hearing the evidence, a jury, in pertinent part, found the defendant guilty of five counts of first-degree statutory rape and three counts of taking indecent liberties with a child. *Id.* at 372, 627 S.E.2d at 611. On appeal, the defendant argued the indictments lacked the specific details necessary to link them to specific acts and incidents; thus, the court could not be sure that jurors unanimously agreed that the State proved each element that supported the crime charged in the indictment[.] *Id.* at 373, 627 S.E.2d at 612. As to the charges for taking indecent liberties with a child, our Supreme Court concluded that a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents. *Id.* at 375, 627 S.E.2d at 613.

In overruling the *Lawrence* defendant's argument challenging the unanimity of the jury's verdict on the five counts of first-degree statutory rape, the Court noted the facts and reasoning in *Wiggins*: the victim testified that she had intercourse with the defendant multiple times a week for an extended period of time, but during her testimony

she only specifically recounted four incidents of intercourse with [the] defendant. *Id.* at 375, 627 S.E.2d at 613 (citing *Wiggins*, 161 N.C. App. at 586, 593, 589 S.E.2d at 405, 409). Given this testimony and noting that the *Wiggins* defendant was indicted on only two counts of statutory sexual offense and five counts of statutory rape, there was no danger of a lack of unanimity between the jurors with respect to the verdict. *Id.*

Here, [in *Davis*,] the victim testified that [] he was forced to masturbate [the] defendant and perform fellatio weekly over a two[-]year period, with perhaps only three or four weeks that [the] defendant did not engage the victim in those sex acts. [The d]efendant was indicted on six counts of first-degree statutory sex offense with a child under the age of thirteen, six counts of second-degree sex offense, and twenty-four counts of indecent liberties with a child. Considering this testimony in light of the holdings in both *Lawrence* and *Wiggins*[,] we find no danger of a lack of unanimity between jurors as to the thirty-six guilty verdicts.

Davis, 214 N.C. App. at 179-81, 715 S.E.2d at 192-93 (quotation marks, brackets and ellipses omitted).

Similarly, in *State v. Bates*, this Court addressed jury unanimity in a case where the defendant was charged with “eleven counts of first-degree sexual offense, two counts of attempted first-degree sexual offense, ten counts of taking indecent liberties with a minor, and ten counts of lewd and lascivious conduct with a minor” and the defendant was found “guilty of six counts of first-degree sexual offense, two counts of attempted first-degree sexual offense, seven counts of taking indecent liberties with a minor, and six counts of lewd and lascivious conduct.” 172 N.C. App. 27, 32, 616 S.E.2d 280, 284 (2005), *cert. granted, cause remanded*, 360 N.C. 537, 634

S.E.2d 218 (2006) (*Bates I*).² The sexual assaults occurred on a regular basis during a period of several months.

In *Bates II*, as directed by *Lawrence*, this Court noted that we “consider four factors to determine whether [a criminal defendant] was denied a unanimous verdict: (1) the evidence; (2) the indictments; (3) the jury charge; and (4) the verdict sheets.” *State v. Bates*, 179 N.C. App. 628, 633, 634 S.E.2d 919, 922 (2006). “[T]here is no unanimity problem if it is possible to match a jury’s verdict of guilty with a specific incident after reviewing the evidence, indictment, jury charge, and verdict sheets.” *Id.* We will consider these factors in turn.

1. Evidence

Again, “[u]nder *Wiggins* and *Lawrence IV*, there is no unanimity problem if it is possible to match a jury’s verdict of guilty with a specific incident after reviewing the evidence, indictment, jury charge, and verdict sheets.” *Id.* at 632-33, 634 S.E.2d at 922.

Here, the jury found Defendant guilty in 20 CR 212535 of “Count Four:” statutory sexual offenses with a person 13, 14, or 15 years old between 16 April 2009 and 15 April 2012 and “Count Six:” indecent liberties with a child, between 16 April

² In *Bates I*, this Court granted the defendant a new trial. Upon the State’s petition for discretionary review, the Supreme Court of North Carolina treated the petition “as a petition for a writ of certiorari” which was “allowed for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006).” *State v. Bates*, 360 N.C. 537, 634 S.E.2d 218 (2006).

2009 and 15 April 2012; in 20 CR 212536, the jury found Defendant guilty of “Count Seven:” statutory sexual offense with a person 13, 14, or 15 years old, between 16 April 2009 and 15 April 2012; and in 20 CR 212537, the jury found Defendant guilty of “Count Ten:” taking indecent liberties with a child.

At trial, the State presented extensive testimony from the victim, Ann, regarding “specific incidents” as described in part above. She also testified that similar events happened many times; although she could not recall each specific incident of sexual abuse, specifically. We will not recount all of her testimony in detail, but she testified to at least as many incidents of each type of sexual offense as charged in the indictments. In this regard, the evidence is similar to that in *Lawrence* and *Davis*. As noted above, in *Davis*, this Court applied the analysis as directed by the Supreme Court of North Carolina in *Lawrence* and noted that:

In overruling the *Lawrence* defendant’s argument challenging the unanimity of the jury’s verdict on the five counts of first-degree statutory rape, the Court noted the facts and reasoning in *Wiggins*: the victim testified that she had intercourse with the defendant multiple times a week for an extended period of time, but during her testimony she only specifically recounted four incidents of intercourse with [the] defendant. *Id.* at 375, 627 S.E.2d at 613 (citing *Wiggins*, 161 N.C. App. at 586, 593, 589 S.E.2d at 405, 409).

Given this testimony and noting that the *Wiggins* defendant was indicted on only two counts of statutory sexual offense and five counts of statutory rape, there was no danger of a lack of unanimity between the jurors with respect to the verdict. *Id.* Here, [in *Davis*,] the victim testified that [] he was forced to masturbate [the] defendant and perform fellatio weekly over a two year

period, with perhaps only three or four weeks that [the] defendant did not engage [the victim] in those sex acts. [The d]efendant was indicted on six counts of first-degree statutory sex offense with a child under the age of thirteen, six counts of second-degree sex offense, and twenty-four counts of indecent liberties with a child. Considering this testimony in light of the holdings in both *Lawrence* and *Wiggins* we find no danger of a lack of unanimity between jurors as to the thirty-six guilty verdicts.

Davis, 214 N.C. App. at 180-81, 715 S.E.2d at 193 (quotation marks and brackets omitted).

Here, Defendant was only convicted of two counts of indecent liberties and two counts of statutory sex offense. Ann described a few events in more detail, specifically describing the time frame, location, how Defendant touched her, what he told her, and how she felt for each incident. She also testified that Defendant had done the same things to her on many other occasions, giving more detail as to some incidents and less for others.

The trial court instructed the jury on each charge *separately* and stressed both during the initial instructions and in response to the jury's question that the jury must find evidence that "meets all of the elements of the offense," "within the time frame set out with respect to each count[.]" and that "for you to find . . . [D]efendant guilty on any of those counts, the offense must be separate and distinct from any other act that you found in any other count." Next, we will consider the indictments.

2. Indictments

Here, the twenty-three indictments alleged that Defendant “unlawfully, willfully, and feloniously did engage a sexual act other than vaginal intercourse with [Ann], who on the date of the offense was between thirteen and fifteen years of age and [D]efendant was more than six years older than the victim and was not legally married to the victim”; that Defendant “unlawfully, willfully, and feloniously did take or attempt to take indecent liberties with [Ann], who was under the age of sixteen years on the date of the offense, for the purpose of arousing or gratifying sexual desire”; the indictments alleged these offenses took place “on or about [16 April] 2009 through [15] April 2012.”

Considering the indictments here, we observe that Defendant was indicted on twenty-three charges—as discussed below—the precise number of jury instructions the trial court judge read to the jury, and the corresponding number of “Counts” listed on the verdict sheets returned by the jury following deliberations. Next, we will consider the jury charge.

3. Jury Charge

When considering the jury instructions, we consider whether the jury “instructions were adequate to ensure that the jury understood that it must agree unanimously as to each verdict on each charge.” *Bates*, 179 N.C. App. at 633, 634 S.E.2d at 922.

Here, the trial court instructed the jury that, “[t]here are 23 counts in this case. I’m going to explain each one to you. Even though it may seem repetitive, each count

is important and bears your individual consideration of each count.” As to the charges of statutory sexual offense with a person who is 13, 14, or 15, “[f]or you to find [] [D]efendant guilty on this [count], the offense must be separate and distinct from any other act that you may have found in any other count.” Furthermore,

[a]ll 12 of you must agree on your verdict. You cannot reach a verdict by majority vote. When you have unanimously agreed upon a verdict as to each charge, your foreperson should record the verdicts, sign and date the verdict forms, and notify the bailiff by knocking on the jury room door.

The trial court proceeded to read twenty-three separate jury instructions, corresponding to the twenty-three charges for which Defendant was indicted. In each of those jury instructions, the trial court instructed the jury, “[f]or you to find [D]efendant guilty on this count, the offense must be separate and distinct from any other act that you have found in any other count.”

4. Verdict Sheets

Finally, in *Bates*, this Court considered whether “the presentation of the charges on the verdict sheets was adequate for the jury to distinguish the charges based on the evidence presented at trial.” *Id.* at 634, 634 S.E.2d at 923.

Here, the verdict sheets finding Defendant guilty corresponded to: 20 CR 212535, “Count Four:” statutory sexual offenses with a person who is 13, 14, or 15 years old between 16 April 2009 and 15 April 2012; “Count Six:” indecent liberties with a child, between 16 April 2009 and 15 April 2012; 20 CR 212536, “Count Seven:” statutory sexual offense with a person who is 13, 14, or 15 years old, between 16 April

2009 and 15 April 2012; and 20 CR 212537, “Count Ten:” taking indecent liberties with a child. Defendant was found not guilty of the remaining nineteen offenses charged.

After our careful review of the evidence, indictments, jury charge, and verdict sheets, we conclude that it is possible to match the jury’s verdict of guilty with *specific* incidents presented in evidence and in the trial court’s instructions. We agree with the State that the “clear and precise language of the instructions[,] coupled with the indictments and verdict sheets set out by file number . . . were more than adequate to ensure jury unanimity and [that] no error occurred.” Each of the four charges for which Defendant was found guilty, Count Four, Count Six, Count Seven, and Count Ten, can readily be traced back to their corresponding instructions, as those charges were given in the same sequential order as the indictments in this case.

In turn, those indictments alleged that Defendant “unlawfully, willfully, and feloniously did engage a sexual act other than vaginal intercourse with [Ann], who on the date of the offense was between thirteen and fifteen years of age and [D]efendant was more than six years older than the victim and was not legally married to the victim”; that Defendant “unlawfully, willfully, and feloniously did take or attempt to take indecent liberties with [Ann], who was under the age of sixteen years on the date of the offense, for the purpose of arousing or gratifying sexual desire” between 16 April 2009 and 15 April 2012. Because we conclude that it is possible to match the

jury's guilty verdicts with specific incidents, the trial court did not err in ensuring Defendant's constitutional right to a unanimous jury verdict.

C. Sentencing

Alternatively, Defendant argues that the trial court "erred in sentencing Defendant while Defendant was not present [at the re-sentencing] and based on incorrect information."

1. Standard of Review

"We review the propriety of an amended judgment entered outside the defendant's presence de novo." *State v. Lebeau*, 271 N.C. App. 111, 115, 843 S.E.2d 317, 320 (2020).

2. Amended Judgment

Defendant is correct to note that "[a] defendant has a right to be present at the time a sentence is imposed." *State v. Mims*, 180 N.C. App. 403, 413, 637 S.E.2d 244, 250 (2006). The dispositive question here, however, is whether the "amended judgment represented a substantive change from the sentence pronounced by the trial court [in Defendant's presence]." *Lebeau*, 271 N.C. App. at 115, 843 S.E.2d at 320 (citation, quotation marks, and brackets omitted). This Court has "found a change to be substantive where a trial court has materially altered the length or the terms of a defendant's sentence in the defendant's absence." *Id.*

However, "changes that merely correct clerical errors are not substantive." *Id.* at 115, 843 S.E.2d at 321. "A clerical error is one that results from a minor mistake

or inadvertence, especially in writing or copying something on the record, and *not from judicial reasoning or determination.*” *Id.* (emphasis added) (citation, quotation marks, and brackets omitted). Indeed, a change is “not substantive when it corrects a clerical error or clarifies that a sentence will comport with applicable statutory limits on the trial court’s sentencing discretion.” *Id.* at 116, 843 S.E.2d at 321. Where “the trial court’s discretion was bound in both procedural and substantive terms such that the amended sentence did not represent a novel exercise of judicial discretion in Defendant’s absence . . . the amendment reflects the only sentence the court could legally impose given the verdict rendered[.]” the amended sentence is a “non-discretionary byproduct of the sentence that was imposed in open court.” *Id.*

Here, Defendant argues that the initial trial court judge “sentenced [D]efendant under an incorrect sentencing chart, an error of law rather than a clerical error[.]” and that “three months later, [a second trial court judge] entered a new judgment[.]” Defendant then contends that the second trial court judge “entered judgments in the mistaken belief that [D]efendant had been convicted of 3 counts of indecent liberties rather than 2, and without [D]efendant and/or his attorney being present in court.” Additionally, “[D]efendant contends that [the second trial court judge] amended the two judgments based upon incorrect information, and that” if the second trial court judge “had been aware there was only one indecent liberties conviction in 20 CR 212537, [Defendant] would have been open to an argument

requesting a reduced and/or concurrent sentence, but which [D]efendant was not present to make.”

After careful review, we conclude that the amended judgment that reduced Defendant’s maximum sentence from 300 to 249 months constituted a clerical edit, because “th[at] amendment reflects the only sentence the court could legally impose given the verdict rendered” and the sentence in the amended judgment is a “non-discretionary byproduct of the sentence that was imposed in open court.” *Id.* As the State astutely notes in their appellate brief, “the trial court was obligated under the sentencing guidelines in effect for the offense dates associated with Defendant’s convictions to impose the corresponding maximum to the minimum term” for the offenses Defendant was convicted of. Because the amended judgment “clarifies that a sentence will comport with applicable statutory limits on the trial court’s sentencing discretion[.]” the change is *clerical*, not substantive. *Id.* Therefore, we conclude that the trial court did not err in entering the amended judgment without Defendant and defense counsel at the resentencing hearing.

However, under our standard of review, we consider the matter anew and observe that Defendant’s argument on appeal is correct as to the erroneous inclusion of a *third* count of indecent liberties in the amended judgment, rather than the two for which Defendant was found guilty. This error is also clerical, as it “results from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” *Id.* at 115, 843 S.E.2d at

320 (citation, quotation marks, and brackets omitted). Therefore, we remand for correction of this clerical error, but the trial court did not err in modifying Defendant's sentence from the presumptive maximum of 300 months to 249 months without Defendant or defense counsel's presence at the re-sentencing hearing.

III. Conclusion

We conclude that the trial court did not err in its jury instructions or by failing to ensure Defendant's constitutional right to a unanimous jury verdict, and that the trial court did not err in re-sentencing Defendant without his or his attorney's presence. However, because the trial court erroneously included a third count of indecent liberties in the amended judgment entered against Defendant, we remand for correction of this sole clerical error.

NO ERROR IN PART; REMANDED IN PART.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).