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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-726

Filed 19 August 2026

Jackson County, No. 23CR000450-490

STATE OF NORTH CAROLINA

v.

PETER MCNEELY

Appeal by Defendant from Judgment entered 6 February 2025 by Judge Sherri W. Elliott in Jackson County Superior Court. Heard in the Court of Appeals 26 February 2026.

Attorney General Jeff Jackson, by Assistant Attorney General Carolyn A. McLain, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon B. Mayes, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Peter McNeely (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of Indecent Liberties with a Child. The Record before us, including evidence presented at trial, tends to reflect the following:

On 13 November 2023, Defendant was indicted by a Jackson County grand

jury on one count of Indecent Liberties with a Child.¹ The Indictment listed the date range of the offense as 1 August 2016 to 1 August 2017.

A jury trial began on 4 February 2025. The alleged victim, T.M.,² testified. Defendant is T.M.'s biological father. T.M. was fourteen years old at the time of trial.

T.M. testified the incident (Incident) underlying the charge occurred when she was about six years old during a visit to Defendant at her paternal grandparents' home, where Defendant was living after separating from T.M.'s mother, Marsha McNeely (Mother). The State asked how often T.M. visited Defendant at her grandparents' house "around the time that [T.M. was] six[.]" T.M. answered, "I think I visited fairly often." On these visits, T.M. "always" stayed with Defendant in his bedroom and they slept in the same bed.

Describing the Incident, T.M. testified that shortly after she woke up one morning, Defendant also awoke, took off his clothes, and "encouraged" T.M. to "touch his penis[.]" which she did. T.M. testified she had been wearing "a pink nightgown with white stars on it[.]" which she had received as a Christmas gift. A photograph of T.M. wearing the nightgown was admitted into evidence for illustrative purposes. T.M. described the photograph as a "picture of me on Christmas" and confirmed the

¹ In the same Indictment, Defendant was charged with one count of first-degree statutory sexual offense, which was dismissed before trial. Therefore, Defendant was only tried on the Indecent Liberties charge.

² Pursuant to North Carolina Rule of Appellate Procedure 42, the parties agreed to use initials to protect the minor's privacy.

nightgown was the one she had on during the Incident.³ T.M. thought the photograph had been taken at age five, which “was the year before the [I]ncident.”

The State asked T.M. about when the Incident occurred:

[The State]: Was there anything else going on in your life that helps you know when this might have happened?

[T.M.]: Nothing particularly sticks out, but I do think it was in the fall because I remember there being leaves outside, like fallen leaves.

On cross-examination, defense counsel revisited this topic:

[Defense Counsel]: And why do you think [the Incident] was in the fall?

[T.M.] I don’t know exactly, honestly, but I do remember that there were fallen leaves outside the house.

. . . .

[Defense Counsel]: You understand the dates of offense here are . . . August 1st of [20]16 to August 1st of [20]17; correct?

[T.M.]: Yes.

. . . .

[Defense Counsel]: So you agree with me, August would be the summer?

[T.M.]: Of -- yeah.

[Defense Counsel]: So if it’s the fall because of the leaves falling on the trees -- that was your testimony; right?

³ The nightgown itself was also introduced into evidence. T.M. confirmed it was the same one she had been wearing during the Incident.

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[T.M.]: Yes.

[Defense Counsel]: So we can narrow this down to sometime between . . . end of September to maybe before Thanksgiving?

[T.M.]: Sounds right.

After T.M. finished testifying, the trial court received a written note with a question from a juror. The note read, “Does [Defendant] admit or deny he was without Boxer shorts (or any clothes) in Bed with the child? only yes or no please[.]” Defense counsel argued the trial court should “figure out” which juror asked the question and “release” that juror. The State suggested providing a curative jury instruction instead. Defense counsel stated, “I leave it to the court’s discretion how it wants to handle it.” The trial court gave a curative instruction.

The State presented evidence showing Mother made a report to the Jackson County Sheriff’s Office (JCSO) in early March 2018 indicating T.M. had told her about the Incident in January 2018; JCSO thereafter opened an investigation. On 5 March 2018, Paige Gilliland,⁴ a Senior Forensic Interviewer at the AWAKE children’s advocacy center in Jackson County, conducted a forensic interview with T.M., which was recorded on video. The State played a portion of the interview at trial for the purpose of corroborating T.M.’s testimony.

During the forensic interview, T.M. said she had been wearing a “nightgown”

⁴ Gilliland testified for the State as an expert “in forensic interview[ing] of child victims and characteristics of child abuse.”

that was “pink” and “had white stars” during the Incident. T.M. said she thought the Incident happened in fall 2017 when she was six. Gilliland asked, “Do you remember what season it was?” T.M. answered, “I think fall . . . because outside it was kind of dark and bleary.” T.M. said she did not go to school on the day of the Incident.

Mother testified after Gilliland. Mother stated T.M. had received the nightgown as a “Christmas Eve gift” in 2016.

A juror spoke up during a break in Mother’s testimony:

[Juror]: Your Honor?

[Trial Court]: No, you can’t ask me a question. You may not ask me a question.

[Bailiff]: Write it on a piece of paper.

[Trial Court]: You may not ask me a question. Thank you.

[Juror]: I apologize.

[Trial Court]: That’s okay. That’s fine, sir.

Neither the State nor defense counsel commented on this exchange.

On the second day of trial, the State moved to amend the Indictment’s “date of offense[,]” which alleged Defendant committed the crime between 1 August 2016 and 1 August 2017. The State sought to “extend” the Indictment’s date range to make 1 December 2017 the end date. The State made the Motion “due to the variance in the testimony as reflected so far with [T.M.], [Mother], and Paige Gilliland.”

The trial court denied the State’s Motion to Amend the Indictment by written

order. The trial court found that granting the State's request to extend the date range would be "unfairly prejudicial to Defendant, [whose] trial strategy was built around the inconsistency in the evidence [as] to the dates of offense."

After the close of the State's case, Defendant moved to dismiss the charge for insufficient evidence, which the trial court denied. After resting without presenting evidence, Defendant renewed his Motion to Dismiss, arguing:

[Defense Counsel]: . . . [T.M.] testified that [the Incident] had to have happened in the fall of [20]16 . . . and that was unequivocal. It is unequivocal that [T.M.] received the pink nightgown with the stars [T.M.] said she was wearing at the time [of the Incident] months later, [on] Christmas Eve 2016.

In response, the State acknowledged the evidence showed T.M. received the nightgown on Christmas Eve of 2016. But the State disputed defense counsel's claim that T.M. had testified the Incident "had to have happened" in fall 2016, noting that during the March 2018 forensic interview, T.M. said it occurred "last year when she was six[.]" which "would have been in 2017." The State added, "it's pretty clear that [the Incident] didn't happen in fall of 2016, . . . although [that is] . . . in the [Indictment's] time frame, but that it would have occurred after Christmas of 2016 and before August [2017][.]" As to the significance of T.M.'s testimony about the fall, the State argued:

[The State]: . . . [T.M. testified] she knew that there were leaves on the ground. Well, there are leaves on the ground right now in February. There are leaves on the ground a lot throughout the year. . . . seasons are fluid at the moment. It is what it is.

The trial court denied Defendant's renewed Motion to Dismiss and submitted the case to the jury. It instructed the jury the date range of the offense was 1 August 2016 to 1 August 2017, as stated in the Indictment.

The jury found Defendant guilty of Indecent Liberties with a Child. The trial court entered Judgment sentencing Defendant to 16 to 29 months of imprisonment. Defendant gave oral Notice of Appeal in open court.

Issues

The issues on appeal are whether the trial court: (I) erred by denying Defendant's Motion to Dismiss; and (II) abused its discretion by not declaring a mistrial *sua sponte*.

Analysis

I. Motion to Dismiss

Defendant contends the trial court erred by denying his Motion to Dismiss on the ground there was a fatal variance between the Indictment and the State's evidence at trial. Specifically, Defendant argues the State failed to present evidence the offense occurred within the time period alleged in the Indictment.

A. Standard of Review

This Court has held "any fatal variance argument is, essentially, an argument regarding the sufficiency of the State's evidence." *State v. Gettleman*, 275 N.C. App. 260, 271, 853 S.E.2d 447, 454 (2020) (citations omitted), *disc. review denied*, 377 N.C. 557, 858 S.E.2d 290 (2021). "A motion to dismiss for a variance is in order when the

prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the . . . offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.’ ” *State v. Tarlton*, 279 N.C. App. 249, 253, 864 S.E.2d 810, 813 (quoting *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997)), *disc. review denied*, 379 N.C. 684, 865 S.E.2d 846 (2021). Accordingly, we review the sufficiency of the evidence de novo, *State v. Lopez*, 295 N.C. App. 239, 246, 905 S.E.2d 272, 277 (2024) (citation omitted), where the question is “whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense[.]” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and quotation marks omitted).

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). “When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455-56 (citation omitted).

B. Fatal Variance

“It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.” *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (citation and quotation marks omitted). “The purpose of the indictment is to put the defendant on ‘notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense.’ ” *State v. Collins*, 245 N.C. App. 478, 486, 783 S.E.2d 9, 15 (2016) (quoting *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985)). “Thus, if the indictment’s allegations do not conform to the equivalent material aspects of the jury charge, this discrepancy is considered a fatal variance.” *State v. Locklear*, 259 N.C. App. 374, 380, 816 S.E.2d 197, 202-03 (2018) (citation, quotation marks, and brackets omitted).

As such, when information in an indictment is inconsistent with the evidence presented at trial, a defendant may argue there is a fatal variance. *See Tarlton*, 279 N.C. App. at 253, 864 S.E.2d at 813. “In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.” *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citations omitted).

“Generally, an indictment must include a designated date or period within which the offense occurred.” *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306

(1991) (citation omitted). However, our Supreme Court has repeatedly stated “the date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date.” *State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 382 (1984) (citing *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961)) (second citation omitted). Similarly, our General Statutes provide: “Error as to a date [in an indictment] or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.” N.C. Gen. Stat. § 15A-924(a)(4) (2025). *See also* N.C. Gen. Stat. § 15-155 (unless time was of the essence of the offense, no criminal judgment entered upon an indictment shall be stayed or reversed if the indictment omitted the time the offense was committed or stated the time imperfectly). Moreover, “variance between allegation and proof as to time is not material where no statute of limitations is involved.” *State v. Burton*, 114 N.C. App. 610, 612, 442 S.E.2d 384, 385 (1994) (citation and quotation marks omitted).

In cases involving sexual abuse of children, our Supreme Court has relaxed the temporal specificity requirements the State must allege in the indictment, “stat[ing] repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child’s uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence.” *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247,

249 (1984) (citations omitted). “Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring *years before*.” *Burton*, 114 N.C. App. at 613, 442 N.C. App. at 386 (emphasis in original) (citation omitted). Thus, “[u]nless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs.” *Everett*, 328 N.C. at 75, 399 S.E.2d at 306 (citations omitted).

Here, Defendant was charged with Indecent Liberties with a Child in violation of N.C. Gen. Stat. § 14-201.1, which provides:

A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-201.1(a). Time is not of the essence nor a required, essential element of this offense. Further, the offense is a felony, *id.* § 14-201.1(b), and “[i]n [North Carolina] no statute of limitations bars the prosecution of a felony[.]” *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969) (citation omitted). Defendant has not presented any argument to the contrary.

As Defendant argues, however, for offenses like Indecent Liberties with a Child for which time is not an essential element, “[a] variance as to time, . . . becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense.” *State v. Price*, 310 N.C. 596, 599, 313 S.E.2d 556, 559 (1984) (citation omitted). In *State v. Booth*, this Court explained the defendant’s burden when seeking to establish that a time variance prejudiced his defense:

[A] defendant suffers no prejudice when the allegations and proof substantially correspond; when [a] defendant presents alibi evidence relating to neither the date charged nor the date shown by the State’s evidence; or when a defendant presents an alibi defense for both dates. However, when the defendant relies on the date set forth in the indictment and the evidence set forth by the State substantially varies to the prejudice of [the] defendant, the interests of justice and fair play require that [the] defendant’s motion for dismissal be granted.

92 N.C. App. 729, 731, 376 S.E.2d 242, 244 (1989) (citations omitted).

Our Supreme Court has held a time variance can be prejudicial if the State employs a “bait and switch routine,” i.e., where the defendant comes to trial prepared to defend himself against the date in the indictment but at trial is forced to defend himself against the State’s evidence that differs from that date. *See State v. Christopher*, 307 N.C. 645, 650, 300 S.E.2d 381, 384 (1983) (fatal variance where the defendant prepared to defend against a crime alleged to have occurred only in December but at trial faced a bait and switch routine when the State’s evidence suggested the crime was committed over a three-month period); *Whittemore*, 255 N.C. at 592-93, 122 S.E.2d at 403-04 (vacating conviction for a fatal variance where, in

preparation for trial, defendants brought multiple witnesses to support their alibi on the date “fixed by the [S]tate” in the indictment, but at trial the prosecution presented evidence outside that time frame and the trial court erroneously instructed the jury the date in the indictment was immaterial). In other words, a time variance can constitute prejudicial error where “wide ranging discrepancies” between the date in the indictment and the date shown by the State’s evidence force the defendant to face “a trial by ambush.” *Christopher*, 307 N.C. at 650, 300 S.E.2d at 384. Thus, while the State generally may prove the defendant committed the crime on a date or during a period other than the one stated in the indictment when prosecuting an offense for which time is not of the essence, *see Sills*, 311 N.C. at 376, 317 S.E.2d at 382, this rule “cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense[.]” *Whittemore*, 255 N.C. at 592, 122 S.E.2d at 403.

Here, the trial court denied the State’s Motion to Amend the Indictment, which sought to extend the date range to 1 December 2017. Therefore, there was no “bait and switch” or “trial by ambush” by the State. Before and during trial, Defendant faced the same date range: 1 August 2016 to 1 August 2017. As such, Defendant had the opportunity to call alibi witnesses or present other evidence to counter the State’s theory he committed the crime in that window. But Defendant offered no alibi evidence at trial. In fact, he did not present any evidence. Instead, as the trial court noted in its order denying the State’s Motion to Amend, Defendant’s “trial strategy

was built around inconsistency in the evidence [as] to the dates of offense.” Defense counsel pursued this strategy by cross-examining the State’s witnesses, seeking to undermine their credibility and demonstrate inconsistencies in the State’s timeline. However, as the Indictment was not amended, Defendant relied on the same date range for the entire proceeding. *See Booth*, 92 N.C. App. at 731, 376 S.E.2d at 244. Thus, he cannot claim his defense was ambushed by a wide-ranging discrepancy between the Indictment and the State’s evidence at trial. *See Christopher*, 307 N.C. at 650, 300 S.E.2d at 384.

Indeed, to the extent there was a time variance, it tended to aid rather than prejudice Defendant’s defense. Mother’s testimony that T.M. received the nightgown on Christmas Eve in 2016 tended to show there was no possibility the Incident occurred between 1 August 2016 and Christmas 2016. Thus, at trial, Defendant arguably succeeded in weakening the State’s case by showing the offense could not have occurred in approximately the first five months of the date range.

However, even if the jury accepted the Incident could not have occurred before T.M. received the nightgown for Christmas in 2016, the jury could still conclude it happened sometime between Christmas 2016 and 1 August 2017. To address this issue, Defendant proposes an alternative theory of what the State’s evidence proved. According to Defendant: (1) the evidence T.M. received the nightgown for Christmas in 2016 showed the crime could only have occurred in 2017; (2) T.M. testified the Incident happened in the fall; and (3) the end date on the Indictment, 1 August 2017,

is in the “middle of the summer[,]” not the fall. Thus, Defendant claims the evidence “established” the offense happened, if at all, after the Indictment’s end date.

For this argument, Defendant relies on *State v. Khouri*, 214 N.C. App. 389, 716 S.E.2d 1 (2011). In *Khouri*, the defendant was charged with committing sexual offenses against his granddaughter while on a family vacation to a casino. *Id.* at 391, 716 S.E.2d at 4. The indictment alleged the offenses occurred between 30 March 2000 and 31 December 2000. *Id.* at 395, 716 S.E.2d at 6. However, at trial, the State presented “no evidence that the trip took place in 2000.” *Id.* Rather, “[the victim] and [her grandmother] both testified that the trip took place in early 2001.” *Id.* On appeal, the defendant argued the charges should have been dismissed because the State’s evidence was insufficient to show the offenses occurred in 2000 as alleged in the indictment. *Id.* This Court observed:

An indictment may be amended where the date of the crime is not an essential element of the offense. However, there is no indication in the record that the State made any attempt to amend [the] indictment . . . , to include the proper date range for the alleged crimes on the vacation to the casino. . . . Accordingly, these charges must be vacated for lack of substantial evidence that the crimes occurred in 2000.

Id. at 395-96, 716 S.E.2d at 6 (citation omitted).

Defendant asserts the facts of the instant case are analogous to *Khouri*. But the case is inapposite. In *Khouri*, the State’s evidence at trial was entirely that the offenses occurred outside the date range in the indictment. *See id.* Here, by contrast, the State presented evidence the offense could have happened within the Indictment’s

date range. Moreover, unlike the defendant in *Khoury*, Defendant advances a fatal variance argument, which requires him to demonstrate his defense was prejudiced by a variance between the Indictment's date range and the State's evidence. *See Booth*, 92 N.C. App. at 731, 376 S.E.2d at 244.

Defendant's argument is best characterized as a theory that the State's evidence exonerated him by showing he could not have committed the offense between 1 August 2016 to 1 August 2017. However, "[i]t is *not* the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (emphasis in original) (citations omitted). The test for whether a charge should go to the jury is not whether the defendant offered a viable alternative explanation but whether "a reasonable inference of [the] defendant's guilt may be drawn from the circumstances[.]" *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted). Whether conflicting evidence supports the defendant's theory of innocence or the State's theory of guilt is a question for the jury. *See State v. Holton*, 284 N.C. 391, 394, 200 S.E.2d 612, 614 (1973) ("Contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant the granting of the motion [to dismiss]." (citations omitted)). Resolving inconsistencies in witness testimony is also the jury's task. *See State v. Locklear*, 172 N.C. App. 249, 256, 616 S.E.2d 334, 339 (2005) (where child victim's testimony reflected an "imperfect

memory of specific dates[,]” any “discrepancies were credibility issues for the jury to weigh in determining [the] defendant’s guilt”). Thus, Defendant’s contention the State’s evidence “established” the offense could only have occurred after 1 August 2017 is more properly considered a defense theory to argue at trial. However, on appeal, Defendant’s hypothesis of innocence is immaterial to his burden of showing a time variance prejudiced his defense.

Moreover, there was substantial evidence from which a reasonable jury could conclude Defendant committed the offense within the Indictment’s date range. T.M. testified, “I do think [the Incident] was in the fall because I remember there being leaves outside, like fallen leaves.” In her forensic interview, T.M. said she did not go to school on the day of the Incident, and she thought it happened in the fall “because outside it was kind of dark and bleary.” This is evidence from which a jury could find the offense occurred between Christmas 2016 and 1 August 2017.

Additionally, T.M.’s inexact testimony about the date of the Incident is a matter of the evidence’s weight. As our appellate courts have recognized, “[c]hildren frequently cannot recall exact times and dates” and thus “a child’s uncertainty as to the time of the offense goes only to the weight to be given that child’s testimony.” *Burton*, 114 N.C. App. at 613, 442 S.E.2d at 386 (citing *Everett*, 328 N.C. at 75, 399 S.E.2d at 306). And in evaluating a motion to dismiss, the trial court is “concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury.” *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355

(1987) (citation omitted).

Thus, although the evidence as to time varied from the Indictment so as to effectively eliminate the first five months of the date range, the State presented substantial evidence Defendant committed the offense between Christmas 2016 and 1 August 2017. *See Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169. Therefore, because the State's evidence did not substantially vary from the Indictment to Defendant's prejudice, *see Booth*, 92 N.C. App. at 731, 376 S.E.2d at 244, time did not become a material or essential element of the offense, *see Norman*, 149 N.C. App. at 594, 562 S.E.2d at 457. Consequently, the trial court did not err by denying Defendant's Motion to Dismiss the Indecent Liberties with a Child charge for a fatal variance. *See* N.C. Gen. Stat. § 15A-924(a)(4).

II. Mistrial

Defendant argues the trial court abused its discretion by not declaring a mistrial *sua sponte* on the basis of juror questions Defendant claims demonstrated he could not receive a fair trial.

Defendant acknowledges his trial counsel did not move for a mistrial at any point during trial. Thus, Defendant concedes he did not directly preserve the mistrial issue for appellate review and argues only that the trial court should have declared a mistrial *sua sponte*. We review a trial court's failure to declare a mistrial *sua sponte* for abuse of discretion. *State v. Shore*, 258 N.C. App. 660, 677-78, 814 S.E.2d 464, 475 (2018). "Abuse of discretion results where the court's ruling is manifestly

unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Upon motion of a defendant or with his concurrence the [trial court] may declare a mistrial at any time during the trial. The [trial court] must declare a mistrial upon the defendant’s motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant’s case.

N.C. Gen. Stat. § 15A-1061. Additionally, “upon his own motion, a judge may declare a mistrial if . . . [i]t is impossible for the trial to proceed in conformity with the law[.]” *Id.* § 15A-1063(1). However, “[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict.” *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008) (citation and quotation marks omitted). “It is well settled that a motion for a mistrial and the determination of whether [a] defendant’s case has been irreparably and substantially prejudiced is within the trial court’s sound discretion.” *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996) (citing *State v. Williamson*, 333 N.C. 128, 423 S.E.2d 766 (1992)). “The trial court’s decision in this regard is to be afforded great deference since [it] is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable.” *Id.* (citation omitted).

Here, after T.M.’s testimony describing the Incident, the trial court received a written note from a juror, which asked, “Does [Defendant] admit or deny he was

without Boxer shorts (or any clothes) in Bed with the child? only yes or no please[.]” The trial court addressed the question outside the presence of the jury. Defense counsel argued the juror who asked the question was “jumping ahead of the curve, . . . [and] clearly doesn’t grasp they have to hear the evidence from the stand[,] and is asking us for non-testimonial statements.” Defense counsel continued, “we probably need to release that juror, if we can figure out who it was.” The State proposed giving curative instructions instead of excusing the juror. Defense counsel responded, “I leave it to the court’s discretion how it wants to handle” the issue.

The trial court called the jury back into the courtroom and provided instructions, in pertinent part, on the following issues: (1) the jury’s duty to decide the facts from the competent evidence presented by the parties; (2) to avoid being influenced by personal feelings, thoughts, sympathy, or prejudice against any party; (3) the fact Defendant had been charged with a crime is not evidence; (4) Defendant was innocent “unless and until the State proves [his] guilt beyond a reasonable doubt”; and (5) to avoid forming any opinion on the case until all the evidence was received. After the trial court gave this instruction, no further objections, motions, or arguments were made by defense counsel regarding the juror’s written question.

Defendant argues the trial court should have ordered a mistrial *sua sponte* because the written question “showed that at least one juror had shifted the burden to [Defendant] to prove he was innocent[,]” which “put the trial court on notice [Defendant] could not receive a fair trial[.]” We disagree.

The facts of the instant case are analogous to *State v. Shore*. In *Shore*, the defendant claimed the trial court abused its discretion by failing to declare a mistrial *sua sponte* in response to inappropriate conduct by a witness. 258 N.C. App. at 677-78, 814 S.E.2d at 475. This Court noted “[t]he record demonstrate[d] that the trial judge took immediate measures to address” the witness’s disruptive behavior. *Id.* at 680, 814 S.E.2d at 476. We also observed the “defendant did not request additional action by the trial court, move for a mistrial, or object to the trial court’s method of handling the alleged misconduct in the courtroom.” *Id.* Thus, we concluded, “[i]n light of the immediate and reasonable steps taken by the trial court to address [the witness’s] behavior, and the totality of the facts and circumstances of the case, . . . the trial court did not abuse its discretion when it did not *sua sponte* declare a mistrial.” *Id.*

Here, as in *Shore*, the Record demonstrates the trial court took immediate measures to deal with the potential prejudicial effects of the juror’s question. *See id.* The trial court gave the parties an opportunity to be heard. Defense counsel proposed identifying and releasing the juror; the State advocated a curative instruction. Defense counsel did not object to the State’s suggestion, leaving the decision “to the [trial] court’s discretion.” The trial court elected to give the jury a detailed instruction squarely aimed at curing the prejudicial undertones of the written question. Like in *Shore*, after the curative instruction, defense counsel “did not request any additional action by the trial court, move for a mistrial, or object to the trial court’s method of

handling” the issue. *Id.*

On appeal, Defendant argues the instruction was not sufficient to eliminate the question’s latent prejudice. Again, however, Defendant’s trial attorney did not ask the trial court to provide further instructions or request any other action. *See id.* Thus, Defendant cannot now argue the curative instruction was a prejudicially inadequate response to the juror’s query. *Cf. State v. Carr*, 54 N.C. App. 309, 311-12, 283 S.E.2d 175, 177 (1981) (rejecting defendant’s argument the trial court prejudicially erred by “failing to caution the jury with appropriate instructions concerning their behavior during the trial,” because defendant had failed to object at the times he contended the trial court was “remiss in its duty to instruct the jury” and did not request further jury instructions).

“It is assumed that jurors are individuals of sufficient character and intelligence to fully understand and comply with the court’s instructions, and it is presumed that they have done so.” *State v. Parton*, 303 N.C. 55, 73, 277 S.E.2d 410, 422 (1981) (citations omitted). Here, “the curative instruction was timely and specific[,]” and “[t]here is no evidence to indicate the jury was incapable of following the court’s instructions.”⁵ *State v. Eanes*, 300 N.C. App. 438, 444, 920 S.E.2d 914, 919

⁵ Defendant argues the presumption the jury followed the curative instruction was undermined by a juror’s subsequent interjection of a verbal question (“Your Honor?”) during a witness’s testimony. However, Defendant does not acknowledge what happened next. The trial court immediately cut the juror off, stating, “You may not ask me a question.” The juror apologized, and the trial court said, “That’s okay.” Defense counsel made no comment about the juror’s interjection. Absent

(2025) (citation omitted). Thus, “the trial court did not abuse its discretion when it did not *sua sponte* declare a mistrial.” *Shore*, 258 N.C. App. at 680, 814 S.E.2d at 476.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at Defendant’s trial and affirm the Judgment.

NO ERROR.

Judges WOOD and MURRY concur.

Report per Rule 30(e).

a request, objection, or motion at trial, Defendant did not preserve this issue. *See* N.C. R. App. P. 10(a)(1) (2026) (requiring a party’s “timely request, objection, or motion” regarding an issue at trial to preserve it for appellate review).

Even assuming *arguendo* this issue was preserved, it is of no avail. Defendant claims the verbal question showed the trial court’s earlier curative instruction was ineffective, arguing, “it became clear that the instruction did not cure the situation because a juror [subsequently] interjected during testimony to try and ask another question.” This is bare speculation. The interjection does not prove the jury was inherently incapable of following the prior curative instruction on a separate issue. Thus, that a juror asked a verbal question subsequent to the curative instruction given in response to the written question does not establish Defendant suffered substantial and irreparable prejudice requiring the trial court to declare a mistrial *sua sponte*. *Cf. State v. Malachi*, 371 N.C. 719, 733, 821 S.E.2d 407, 418 (2018) (“As this Court has said on numerous occasions, litigants are not entitled to receive ‘perfect’ trials; instead, they are entitled to receive ‘a fair trial, free of prejudicial error.’ ” (quoting *State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992))).