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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-547

Filed 2 September 2026

Alamance County, Nos. 23CR409026-000, 23CR409033-000, 23CR409255-000,
23CR000858-000

STATE OF NORTH CAROLINA

v.

DONNELL VINCELLE HOLLEY

Appeal by Defendant from Judgments entered 1 July 2024 and 3 July 2024 by Judge Andrew H. Hanford in Alamance County Superior Court. Heard in the Court of Appeals 26 February 2026.

Attorney General Jeff Jackson, by Special Deputy Attorney General Derek L. Hunter, for the State.

William D. Spence for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Donnell Vincelle Holley (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of Possession of Firearm by a Felon, Conspiracy to Commit Robbery with a Dangerous Weapon, and three counts of Second-Degree

Kidnapping. The Record before us, including evidence presented at trial, tends to reflect the following:

In the early morning hours of 7 August 2023, Christopher Carey, his four-year-old son K.C.,¹ and his roommate Marcus Britt were in their apartment in Graham. Carey and K.C. were in Carey’s bedroom. The doorbell rang. Britt opened the door, which connected to the living room. Defendant stood at the door. Another man, Jamari Ivey, was behind Defendant. Ivey pushed past Defendant into the apartment, pushed Britt onto the floor, and held him at gunpoint with a black handgun.

At trial, Carey testified he saw Defendant and Ivey enter the apartment as he was “walking out” of his bedroom into the hallway. From the hallway, Carey saw Ivey “come in, put the gun to my roommate’s head, [and] put him on the ground.” Carey further testified Defendant “met me in the middle of the hallway[,]” and “directed me . . . out of the hallway into the living room and told me to get on the floor[.]” Defendant did not have a weapon. Carey testified he would not have voluntarily complied with Defendant’s command, but he “got face down on the floor” because he saw Ivey had a gun. K.C., who had initially remained in Carey’s bedroom, then came “around the corner” into the living room. Ivey pointed the gun at K.C. and told him to sit on the couch, which he did.

Carey testified Defendant and Ivey “were both yelling at us [that] they would

¹ Initials used at trial and in the present appeal to protect the child’s privacy.

shoot us” and asking, “where’s everything at.” Carey said he had an Xbox, some marijuana, some cash, and a cell phone. Carey told Defendant and Ivey to take what they wanted and then get out of the house. Defendant then ransacked² the apartment. Carey testified his cell phone, Xbox, marijuana, and car keys were taken, as was Britt’s cell phone.

Carey testified Defendant told Ivey to shoot Carey and Britt as they were leaving the apartment. Ivey responded, “I can’t[,]” and the men left the apartment.

Britt realized he recognized their assailants, and “scream[ed] out, ‘I work with them. These are my coworkers. They just robbed us.’ ” This prompted Carey to run outside after Ivey and Defendant. Using Defendant’s nickname, Carey shouted, “That’s messed up, Vinny[,]” at which point “They started shooting back from a distance.” Shell casings were later recovered from the area outside the apartment.

Carey went back into the apartment and unsuccessfully attempted to call 911 using K.C.’s iPad. Carey was able to contact K.C.’s mother, who came to pick up the child. After Carey located his spare car key, he and Britt drove to the Graham Police Department (GPD) and reported the robbery.

Later that day, Carey and Britt bought new cell phones. Britt called Defendant using his phone. Carey recorded the call with his own device without informing

² The Transcript indicates Carey said, “then [Defendant] ramscats the whole house.” Later, per the Transcript, Carey used the word “ramsacked[.]” From context, we discern Carey used (or meant to use) the word “ransacked.”

Defendant he was doing so (the Recorded Phone Call). At trial, the State introduced the Recorded Phone Call into evidence over Defendant's objection. During the conversation, Defendant asked Britt to have Carey call him; Britt said Carey was "right here beside me" and informed Defendant the call was on speakerphone. Defendant, speaking with Carey and Britt, made statements admitting to the robbery. Defendant added he and Ivey had not known Carey's son, K.C., would be there when they came to rob the apartment.

Later that day, Britt and Carey drove to a residence "where [Defendant] had previously stayed." They witnessed Defendant and Ivey leaving the premises in a U-Haul truck. Carey and Britt later called GPD and identified the U-Haul.

The following day, GPD conducted a traffic stop of Defendant in the U-Haul. Pursuant to a search warrant, GPD officers searched the U-Haul, finding marijuana and an Xbox.

Before the State began its case-in-chief, Defendant made a Motion to Suppress the items GPD had recovered from the U-Haul, citing a defect in the search warrant. The trial court reserved ruling on the Motion. The State informed the trial court Carey "may say that he eventually got his Xbox back without saying anything about where it was recovered from." Defense counsel stated, "If I have a concern when [Carey] is testifying, I'll just object."

On direct examination, Carey testified the Xbox was the only stolen item he had recovered. The State asked, "And was it from that U-Haul truck that your Xbox

was recovered?” Carey responded, “Yes, ma’am.” Defense counsel did not object to this testimony.

The State called Alyssa Coleman as a witness. Coleman testified she and Defendant had been friends and co-workers. Before the robbery, she had invited Defendant to reside in her apartment after he told her he needed a place to stay. Around the time of the robbery, Coleman recalled seeing Defendant with a “black handgun.” The gun was “[i]n [Defendant’s] hand.” Coleman added, “I remember him putting [the gun] . . . in a backpack at one point.”

At the close of the State’s evidence, Defendant moved to dismiss the charges, which the trial court denied. After resting without presenting evidence, Defendant renewed his Motion to Dismiss, which was again denied.

After the jury returned guilty verdicts,³ the trial court consolidated the counts into five Judgments. The first Judgment sentenced Defendant to 97 to 129 months of imprisonment for Robbery with a Dangerous Weapon.⁴ The second Judgment imposed a sentence of 38 to 58 months for Conspiracy to Commit Robbery with a Dangerous Weapon. The third Judgment consolidated two of the Second-Degree

³ Defendant was tried on fifteen charges. The jury found him not guilty of Assault with a Deadly Weapon with Intent to Kill (AWDWIK) with respect to the shots allegedly fired at Carey outside the apartment and guilty of the other fourteen counts. The trial court arrested judgment on Defendant’s convictions for Conspiracy to Break and/or Enter, Conspiracy to Commit Larceny, and Larceny after Breaking/Entering. In the third Judgment, it consolidated two of the Second-Degree Kidnappings with the following convictions: one count of AWDWIK Carey inside Carey’s home, one count of Breaking and Entering, one count of Assault on a Child Under 12, and two counts of Assault by Pointing a Gun.

⁴ Defendant does not contest the Robbery with a Dangerous Weapon conviction on appeal.

Kidnapping counts with other counts and imposed a 38 to 58 month sentence. The fourth Judgment sentenced Defendant to an additional 38 to 58 months on the third Second-Degree Kidnapping count. The fifth Judgment sentenced Defendant to 19 to 32 months for Possession of Firearm by a Felon. The trial court ordered all the prison sentences to run consecutively.

Defendant gave oral Notice of Appeal in open court.

Issues

The issues on appeal are whether: (I) the trial court erred by denying Defendant's Motion to Dismiss; (II) the trial court plainly erred by admitting Carey's testimony his Xbox was recovered from the GPD search of the U-Haul truck; (III) the trial court abused its discretion by allowing the State to introduce the Recorded Phone Call into evidence; and (IV) the Record is sufficient to review Defendant's ineffective assistance of counsel claims on direct review.

Analysis

I. Motion to Dismiss

Defendant argues the trial court erred by denying his Motion to Dismiss the charges of: Second-Degree Kidnapping of Britt, K.C., and Carey; Possession of Firearm by a Felon; and Conspiracy to Commit Robbery with a Dangerous Weapon.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon [a] defendant's motion for dismissal, the question for the Court 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. If so, the motion is properly denied." *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. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation and quotation marks 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, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted). "Whether the State has offered such substantial evidence is a question of law for the trial court." *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

A. Kidnappings of Britt and K.C.

Defendant argues the trial court erred by denying his Motion to Dismiss the Second-Degree Kidnapping charges with respect to Britt and K.C. We agree.

"A defendant is guilty of the offense of second-degree kidnapping if he (1)

confines, restrains, or removes from one place to another (2) a person (3) without the person's consent, (4) for the purpose of facilitating the commission of a felony.” *State v. Allred*, 131 N.C. App. 11, 19-20, 505 S.E.2d 153, 158 (1998) (citation omitted); N.C. Gen. Stat. § 14-39(a)(2) (2025). “Our Supreme Court, however, has recognized that ‘certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim’ and has held that restraint ‘which is an inherent, inevitable feature of [the] other felony’ may not be used to convict a defendant of kidnapping.” *Id.* at 20, 505 S.E.2d at 158-59 (quoting *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)). “The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping ‘exposed [the victim] to greater danger than that inherent in the armed robbery itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.’” *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981) (alterations in original)).

As the State concedes, under our precedents, the evidence was insufficient to convict Defendant for Second-Degree Kidnapping of Britt and K.C. The evidence showed Britt opened the front door, which connected to the living room. Ivey entered the apartment and “pushed [Britt] down on the ground with a gun.”

As to K.C., Carey testified his son was still in Carey's bedroom at the time Carey joined Britt on the living room floor. K.C. then came “around the corner” into

the living room of his own volition. Ivey pointed a gun at K.C. and told him to sit on the living room couch, which he did.

Thus, neither Britt nor K.C. were removed from the living room to another location. Nor were they physically harmed. *See Allred*, 131 N.C. App. at 20, 505 S.E.2d at 159 (vacating second-degree kidnapping convictions as to two victims the defendant held at gunpoint during robbery where victims were “not moved . . . [or] injured”). Therefore, the restraint used against Britt and K.C. was an inherent part of the armed robbery and did not expose them to any greater danger than was required to complete the robbery. *See id.* Consequently, because the restraint inflicted upon Britt and K.C. was insufficient to support separate kidnapping convictions, the trial court erred by denying Defendant’s Motion to Dismiss these two charges. *See id.*

B. Kidnapping of Carey

Defendant argues the trial court erred by denying his Motion to Dismiss the Second-Degree Kidnapping charge with respect to Carey. We disagree.

At trial, Carey testified he was in his bedroom with K.C. when Britt answered the door. Carey was “walking out” of his bedroom into the hallway when he saw Defendant and Ivey enter the apartment. Carey next saw Ivey “put [Britt] on the ground” at gunpoint. Defendant then “met” Carey “in the middle of the hallway” and commanded him to get on the living room floor, which Carey did.

Carey’s testimony aligns with the experience of one of the victims in *State v. Allred*. This victim, a man named Graves, was asleep in his bedroom when the

defendant and an accomplice, after knocking on the front door, entered the residence and began robbing the house's other occupants in the living room. 131 N.C. App. at 13, 505 S.E.2d at 154-55. "The commotion in the living room woke Graves, so he got up to see what was happening." *Id.* at 13, 505 S.E.2d at 155. But before Graves reached his bedroom door, *id.*, as this Court observed,

the evidence shows that defendant's accomplice entered [Graves's] bedroom, grabbed him by the collar, dragged him into the living room, and ordered him to sit on the couch. Nothing was taken from Graves, and according to his testimony, no attempt was made to rob him of anything. Therefore, this removal was not an integral part of any robbery committed against him, but a separate course of conduct designed to prevent him from hindering defendant and his accomplice from perpetrating the robberies against the other occupants.

Id. at 21, 505 S.E.2d at 159 (citation omitted). We held the trial court "did not err in denying the defendant's motion to dismiss the kidnapping charge with respect to Graves[.]" *Id.*

As with Graves in *Allred*, Carey was in a separate part of the residence, the hallway, when Defendant and Ivey entered the living room through the front door. Ivey pointed the gun at Britt's head and "put [him] on the ground." Defendant approached Carey in the hallway and ordered him to join Britt on the living room floor; Carey complied. While Ivey held Carey, K.C., and Britt at gunpoint, Defendant collected items to steal.

Viewing the evidence in the light most favorable to the State, Carey's testimony was sufficient to show Defendant's "removal" of Carey from the hallway to

the living room was not an integral part of the armed robbery but “a separate course of conduct designed to prevent [Carey] from hindering” Defendant and Ivey from completing the robbery. *See id.* Thus, the evidence showed Defendant committed Second-Degree Kidnapping when he “remove[d]” Carey from the hallway to the living room “for the purpose of . . . facilitating the commission of a felony[.]” N.C. Gen. Stat. § 14-39(a)(2), namely, Robbery with a Dangerous Weapon, *id.* § 14-87(a). Therefore, the trial court did not err by denying Defendant’s Motion to Dismiss the Second-Degree Kidnapping charge with respect to Carey. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

C. Possession of Firearm by a Felon

Defendant was convicted of Possession of Firearm by a Felon in violation of N.C. Gen. Stat. § 14-415.1. “There are two elements to possession of a firearm by a felon: (1) [the] defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Mitchell*, 224 N.C. App. 171, 176, 735 S.E.2d 438, 442-43 (2012) (citation and quotation marks omitted). Defendant stipulated to a prior felony conviction at trial. Therefore, the only element of the offense we consider is possession.

Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

Id. at 177, 735 S.E.2d at 443 (citation and quotation marks omitted).

Here, the State presented evidence tending to show Defendant was in actual possession of a firearm. Coleman testified she saw Defendant with a “black handgun” in “his hand” around the time of the robbery. Coleman also remembered seeing Defendant put the same handgun in a backpack.

Thus, because the State presented substantial evidence Defendant possessed a firearm, the trial court did not err by denying the Motion to Dismiss the Possession of Firearm by a Felon charge.⁵ *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

D. Conspiracy to Commit Robbery with a Dangerous Weapon

“The crime of conspiracy is committed when two or more persons agree to perform an unlawful act.” *State v. Beck*, 385 N.C. 435, 438, 894 S.E.2d 729, 732 (2023) (citation omitted). “In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice.” *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citation omitted). “As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.” *Id.* (citation and quotation marks omitted).

⁵ Defendant also contends N.C. Gen. Stat. § 14-415.1, the statute making Possession of Firearm by a Felon a crime, is unconstitutional on its face and as applied to him. However, “[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal[.]” *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted). Defendant concedes he did not raise this constitutional challenge at trial. Therefore, this issue is not preserved for review. *See id.*

Alternatively, Defendant asks us to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to address this unpreserved issue. In our discretion, we decline to invoke Rule 2. *See State v. Simpson*, 295 N.C. App. 425, 435, 906 S.E.2d 72, 80 (2024) (“The decision to invoke Rule 2 is entirely discretionary and is used only in exceptional cases to prevent manifest injustice to a party.” (citation and quotation marks omitted)).

“Direct proof of conspiracy is rarely obtainable, and a conspiracy generally is established by a number of indefinite acts, which taken collectively point to [its] existence[.]” *State v. Burmeister*, 131 N.C. App. 190, 199, 506 S.E.2d 278, 283 (1998) (citing *State v. Smith*, 237 N.C. 1, 17, 74 S.E.2d 291, 302 (1953)). Thus, evidence of a conspiracy “may be circumstantial or inferred from the defendant’s behavior.” *State v. Shelly*, 176 N.C. App. 575, 586, 627 S.E.2d 287, 296 (2006) (citation omitted).

“In order for a defendant to be found guilty of the substantive crime of conspiracy, the State must prove there was an agreement to perform every element of the underlying offense.” *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010) (citation omitted). Therefore, in the present case, to overcome the Motion to Dismiss, the State had to present substantial evidence Defendant and Ivey agreed to commit each element of robbery with a dangerous weapon. *See State v. Cox*, 375 N.C. 165, 169, 846 S.E.2d 482, 485 (2020). The elements of robbery with a dangerous weapon are: “(1) the unlawful taking or attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened.” *Id.* at 169, 846 S.E.2d at 485-86 (citations omitted); N.C. Gen. Stat. § 14-87(a).

Defendant challenges the State’s evidence regarding the element of a prior agreement between himself and Ivey to commit Robbery with a Dangerous Weapon. He contends Carey’s testimony indicating only Ivey had a gun during the robbery raised “[t]he inference . . . that there was no agreement to use a gun.” Rather,

Defendant contends the proper inference is Ivey's use of the gun "was a 'spur of the moment' action" on Ivey's part. We disagree.

In *State v. Oliphant*, two defendants were convicted of conspiracy to commit robbery with a dangerous weapon. 228 N.C. App. 692, 694, 747 S.E.2d 117, 120 (2013), *disc. review denied*, 367 N.C. 289, 753 S.E.2d 677 (2014) (Mem.). The evidence showed both defendants had approached a woman from behind as she walked alone late at night talking on her cell phone. *Id.* at 704, 747 S.E.2d at 125. One defendant pointed a revolver at the victim and demanded her pocketbook, which she handed over. *Id.* at 694, 747 S.E.2d at 118. The other defendant reached for her phone, which she gave him. *Id.* In reviewing the sufficiency of the evidence to support the conspiracy to commit armed robbery charge, this Court reasoned the defendants' behavior demonstrated "a mutual implied understanding that they would together approach the victim, and with the aid of a firearm, relieve her of her possessions[.]" *Id.* at 704, 747 S.E.2d at 125. Consequently, we held there was sufficient evidence of the existence of a conspiracy to survive the motion to dismiss. *Id.*

In the instant case, Carey testified Defendant and Ivey entered his apartment together. Ivey held Carey, Britt, and K.C. at gunpoint. Per Carey, Defendant and Ivey "both yell[ed] at us [that] they would shoot us" and demanded to know "where's everything at." After Defendant ransacked the apartment and took assorted items, Defendant and Ivey left the premises together.

These facts are analogous to *Oliphant*. Carey's testimony describing

Defendant's conduct showed Defendant and Ivey had a "mutual, implied understanding that they would together" enter the apartment and "with the aid of a firearm, relieve [its occupants of their] possessions."⁶ *Id.* See also *Shelly*, 176 N.C. App. at 586, 627 S.E.2d at 296 (existence of conspiracy may be inferred from the defendant's behavior). Even accepting *arguendo* Defendant's suggestion the evidence raised an inference Ivey unilaterally decided to use the gun on an impulse, rather than pursuant to a prior agreement with Defendant, we must give the State the benefit of all reasonable inferences and resolve any contradictions in the evidence in its favor. See *Rose*, 339 N.C. at 192-93, 451 S.E.2d at 223.

Thus, the evidence showed Defendant and Ivey had a mutual, implied understanding to commit robbery with a dangerous weapon. See *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835. Therefore, the evidence sufficiently established Defendant entered a criminal conspiracy by agreeing with Ivey to commit a crime. See *Beck*, 385 N.C. at 438, 894 S.E.2d at 732. Consequently, the trial court did not err by denying Defendant's Motion to Dismiss the charge of Conspiracy to Commit Robbery with a Dangerous Weapon. See *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

II. Plain Error

Defendant challenges the admission of Carey's testimony indicating his Xbox

⁶ In the Recorded Phone Call played at trial, Defendant said he and Ivey had not known Carey's son, K.C., would be there when they came to rob the apartment. This evidence further indicates the existence of a prior agreement between Defendant and Ivey to commit the robbery.

was recovered from the U-Haul truck searched by GPD. Defendant concedes he did not object to this testimony at trial. “When trial counsel fails to object to the admission of evidence, the trial court’s admission of the evidence is reviewed for plain error.” *State v. Clark*, 380 N.C. 204, 209, 868 S.E.2d 56, 60 (2022) (citation omitted). “To establish plain error defendant must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury’s finding that defendant was guilty.” *Id.* at 209, 868 S.E.2d at 60-61 (citation, quotation marks, and brackets omitted). “Probable impact” means that “absent the error, the jury probably would have returned a different verdict.” *State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (citation and quotation marks omitted). To carry this burden, Defendant must show that different verdict “is significantly more likely than not.” *Id.* at 159, 900 S.E.2d at 787.

In his appellate brief, Defendant argues Carey’s testimony “very likely affected the jury’s verdict[,]” and without it, “the jury would have returned a different verdict.” He continues, “[t]he trial court plainly erred in failing to strike this evidence *ex mero motu* and instructing the jury to disregard it.” This is the sum total of Defendant’s plain error argument. He cites no legal authority for these contentions.

Under our Rules of Appellate Procedure, a brief to this Court must “contain citations of the authorities upon which the appellant relies” in the “body of the [brief’s] argument[.]” N.C. R. App. P. 28(b)(6) (2026). “Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”

Id. “[I]t is the appellant’s burden to show error occurring at the trial court, and it is not the role of this Court to create an appeal for an appellant or to supplement an appellant’s brief with legal authority or arguments not contained therein.” *Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018) (citation omitted). “Accordingly, if an argument contains no citation of authority in support of an issue, the issue will be deemed abandoned.” *Id.* (citation omitted). *See also In re C.D.A.W.*, 175 N.C. App. 680, 688, 625 S.E.2d 139, 144 (2006) (holding an issue was abandoned under Rule 28(b)(6) where it was “void of any discernible argument or citation as authority for such a claim”).

Because Defendant has failed to submit any meaningful argument as to how the trial court committed plain error by failing to take corrective action in response to Carey’s testimony about recovering his Xbox from the U-Haul, this issue is deemed abandoned on appeal. *See Thompson*, 261 N.C. App. at 292, 819 S.E.2d at 627.

III. Admission of Recorded Phone Call

Defendant contends the Recorded Phone Call was inadmissible.⁷ Specifically, Defendant argues Carey recorded the call in violation of North Carolina’s Electronic Surveillance Act, because “neither . . . Britt nor [D]efendant actually gave . . . Carey consent to record their conversation[.]” We disagree.

⁷ Because Defendant objected to the introduction of the Recorded Phone Call at trial, this issue is preserved for appellate review. *See* N.C. R. App. P. 10(a)(1) (“[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]”).

“The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence.” *State v. Sisk*, 238 N.C. App. 553, 555, 766 S.E.2d 694, 696 (2014) (citation and quotation marks omitted). “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).

Under our Electronic Surveillance Act, “a person is guilty of a Class H felony if, *without the consent of at least one party to the communication*, the person: (1) Willfully intercepts, . . . any wire, oral, or electronic communication.” N.C. Gen. Stat. § 15A-287(a)(1) (emphasis added). “ ‘Intercept’ means the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device.” *Id.* § 15A-286(13). Thus, “intercepting . . . a communication does not violate G.S. § 15A-287 where at least one party to the communication consents to the interception thereof.” *Kroh v. Kroh*, 152 N.C. App. 347, 352, 567 S.E.2d 760, 763 (2002) (citations and internal quotation marks omitted).

In the instant case, Carey testified that later on the day of the robbery, he and Britt called Defendant using Britt’s phone. Using his own device and without informing Defendant, Carey recorded the conversation. During the call, Defendant told Britt to have Carey call him; Britt told Defendant Carey was with him and that their call was on speakerphone. During his conversation with Carey and Britt,

Defendant made statements admitting to the robbery.

Carey was a “party to the communication” under Section 15A-287(a) because he was a participant in the phone call. And because Carey recorded the call himself, there was “at least one party” who gave “consent” to the call being “intercept[ed][.]” N.C. Gen. Stat. § 15A-287(a)(1). *See also Kroh*, 152 N.C. App. at 352, 567 S.E.2d at 763 (under Section 15A-287, a person who intercepts a communication by recording it can only “consent” to the interception, and thus render it lawful, if he is a party to that communication). Thus, because the Recorded Phone Call was lawfully recorded, it was admissible as a matter of law, *see Sisk*, 238 N.C. App. at 555, 766 S.E.2d at 696, and we cannot say its admission was arbitrary or manifestly unsupported by reason, *see Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Therefore, the trial court did not abuse its discretion by admitting the Recorded Phone Call and allowing the State to play it for the jury. *See id.*

IV. Ineffective Assistance of Counsel

Defendant next contends he received constitutionally defective representation on the grounds his trial attorney: (1) did not object to Carey’s testimony indicating he recovered his Xbox from the U-Haul; and (2) did not cross-examine Carey about criminal charges pending against him in the same jurisdiction.

In general, ineffective assistance of counsel (IAC) claims should be considered through motions for appropriate relief and not on direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) (“The accepted practice is to raise

claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal.”); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant’s appeal because issues could not be determined from the record on appeal and stating that to “properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A-1415”). A motion for appropriate relief is preferable to direct appeal because in order to “defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant’s thoughts, concerns, and demeanor. Only when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance.” *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations, quotation marks, and alteration omitted).

“IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). However, “should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent MAR proceeding.” *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

In order to prevail on an IAC claim, a defendant “must show that counsel’s

representation fell below an objective standard of reasonableness[.]” *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different[.]” *id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. *See also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for IAC claims under N.C. Const. art. I, §§ 19, 23).

Here, we are unable to decide Defendant’s IAC claims based on the “cold record” on appeal. *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citations omitted). We thus conclude “further development of the facts would be required before application of the *Strickland* test[.]” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citation omitted). Therefore, we dismiss Defendant’s IAC claims without prejudice to permit Defendant to pursue a motion for appropriate relief in the trial court.

Conclusion

Accordingly, for the foregoing reasons, we vacate the two Second-Degree Kidnapping convictions with respect to Britt and K.C. and remand this matter for resentencing. Otherwise, we conclude there was no error at Defendant’s trial and affirm the Judgments finding him guilty of Second-Degree Kidnapping with respect to Carey, Possession of Firearm by a Felon, and Conspiracy to Commit Robbery with a Dangerous Weapon and dismiss Defendant’s IAC claims without prejudice.

STATE V. HOLLEY

Opinion of the Court

VACATED IN PART; DISMISSED WITHOUT PREJUDICE IN PART; NO
ERROR IN PART. REMANDED FOR RESENTENCING.

Judges WOOD and MURRY concur.

Report per Rule 30(e).