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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-438

Filed 18 November 2026

Mecklenburg County, Nos. 21CR014747-590,21CR216246-590,21CR216248-590

STATE OF NORTH CAROLINA

v.

SHELTON JAMAL SMITH, Defendant.

Appeal by Defendant from final judgment and sentences entered 11 June 2024 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 October 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Meghan E. Boyd Ward, for the State.

Sarah Holladay, for defendant-appellant.

STADING, Judge.

Shelton Jamal Smith ("Defendant") appeals from judgment entered after a jury found him guilty of attempted first-degree murder and assault with a firearm on a law enforcement officer. The jury also found that Defendant had committed the offense for the purpose of avoiding arrest, an aggravating factor for sentencing purposes. On appeal, Defendant argues the trial court erred when calculating his

prior record level ("PRL"). Defendant also maintains that the trial court abused its discretion when overruling an objection to the prosecutor's argument. Defendant further contends the trial court erred when taking judicial notice and instructing the jury that Defendant possessed a firearm at the time of the incident. For the reasons conceded by the State, we vacate the judgment and remand solely for the limited purpose of appropriately calculating Defendant's PRL and sentencing him accordingly. We hold the trial court did not otherwise err.

I. Background

This case arises from two separate trials after a mistrial due to a hung jury on some of Defendant's charges at his initial trial. The record from each of Defendant's trials tends to show that, on 27 May 2021, Defendant became the focus of an investigation by Charlotte-Mecklenburg Police Department ("CMPD") of an armed robbery that involved a shooting. Detective Shawn Steward of CMPD investigated the armed robbery. After reviewing a surveillance video, Detective Steward identified three suspects and a vehicle connected to the armed robbery. The vehicle was a Mercury Grand Marquis, "which was tan in color with a white front bumper and a left red front quarter panel."

Detective Steward shared the confirmed details of his investigation with Detective Trey Hinton, Officer William Salazar, and Sergeant Wiggins of CMPD. Shortly thereafter, Detective Steward learned that a vehicle matching the description of the Mercury Grand Marquis was observed earlier at a nearby Budget Inn.

Detective Steward then located "a live video surveillance feed of that motel," and observed the vehicle in the parking lot of the Budget Inn. The live footage showed Defendant walking back and forth between the vehicle and a motel room. After identifying Defendant as a suspect in the armed robbery, Detective Steward notified officers in the area over radio so they could "start staging" and "coordinate how they wanted to approach" Defendant. Multiple officers arrived at the parking lot.

As Detective Hinton approached the vehicle in the parking lot, Defendant took off running. Detective Hinton pursued Defendant on foot through the premises breezeway, into another parking lot, and eventually onto Regan Drive towards Sugar Creek. Officer Salazar and Sergeant Wiggins also pursued Defendant on foot. As Defendant and the officers were approaching Regan Drive, Defendant's hand was in his pocket or his waistband. While Detective Hinton yelled for Defendant to get on the ground, Defendant turned and looked back at him. Detective Hinton observed that Defendant had a gun in his right hand which prompted Detective Hinton to draw his weapon. As Detective Hinton closed in on Defendant—approximately twelve to fifteen feet away—Defendant turned around and fired a gun at him. Detective Hinton heard a bullet go past his head and then heard a second shot. Sergeant Wiggins was approximately thirty yards away from Defendant when shots were fired in their direction. In response, Detective Hinton returned fire and Defendant fell to the ground after being struck in the leg.

Kelli Phillips, a Special Agent with the State Bureau of Investigation,

investigated the scene. Before Agent Phillips's arrival, police had recovered a Colt .25 caliber handgun found in close proximity to Defendant. Also located on the scene, were 6.35 mm spent shell casings, corresponding to a .25 caliber measurement. Agent Phillips identified each shell casing found at the scene at trial, including the headstamp on the casing identifying the brand and caliber. Agent Phillips also identified the .25 caliber handgun, with live rounds of 6.35 mm ammunition in the magazine and chamber, found near the location where Defendant had fallen. Jennifer Pohlheber, a forensic scientist with CMPD's Crime Lab, determined that the two 6.35 mm shell casing were fired from the weapon found near where Defendant had fallen.

On 21 June 2021, the Mecklenburg County Grand Jury returned true bills of indictment charging Defendant with two counts of attempted first-degree murder, two counts of assault with a firearm on a law enforcement officer, possession of firearm by felon, and armed habitual felon. On 13 July 2022, the State served Defendant with a notice of aggravating factors.

Defendant's initial trial took place on 14 November 2022. Before trial, the State moved to join all offenses, Defendant offered no objection, and the trial court allowed the motion for joinder. Upon deliberating, on 30 November 2022, the jury found Defendant guilty of possession of firearm by felon. However, the jury found Defendant not guilty of one attempted first-degree murder charge and one assault

with a firearm on a law enforcement officer charge.[1] And the jury hung on the remaining counts of attempted first-degree murder and assault with a firearm on a law enforcement officer.[2] The trial court therefore declared a mistrial as to those charges. Concerning the armed habitual felon indictment, the trial court stated, "[i]t appeared to me the armed habitual doesn't apply so there wouldn't be a second phase." The State did not "proceed[ ] on the aggravating factor." The trial court entered a prayer for judgment continued on the possession of firearm by felon conviction by noting "PJC for sentencing date to be determined." On 13 July 2023, the trial court sentenced Defendant to imprisonment for a term of 17 to 30 months based off a sentencing worksheet assessing him seven felony sentencing points and classifying his PRL as III.[3]

On 4 June 2024, Defendant was retried on the charges that ended in a hung jury and on the armed habitual felon indictment. During jury selection at this trial, Defendant's trial counsel asked questions about Defendant's possession of a firearm and the prosecutor argued "collateral estoppel applies." The same discussion ensued after Defendant's first closing argument.

During Defendant's first closing, his trial counsel argued to the jury that

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[1] These charges were for the attempted first-degree murder of and assault with a firearm on Sergeant Wiggins.

[2] These charges were for the attempted first-degree murder of and assault with a firearm on Detective Hinton.

[3] The seven felony sentencing points were calculated from a robbery committed in the Commonwealth of Virginia with a conviction date of 19 July 2013 and a misdemeanor robbery committed in Mecklenburg County with a conviction date of 18 August 2010.

"[t]here's no evidence at all that the State has indicated or proven there was a gun," and "you don't see anything about him indicating that there was a gun." He also argued "we submit to you that there is reasonable doubt as to whether or not these things were in his hands at any point[.]" Outside the jury's presence, the prosecutor argued to the trial court that Defendant's trial counsel stated Defendant "did not have a gun in his possession." Defendant's trial counsel argued possession did not equate to Defendant holding the firearm in his hands.

To resolve the matter, the trial court decided to use "the pattern language for judicial notice" and say, '[t]he Court takes judicial notice, as previously been determined by proof beyond a reasonable doubt, that the defendant possessed a firearm at the time of this incident." The trial court continued, "[a]rguing whether it was in his hand or not is free game. Arguing whether he fired it is free game." In response, Defendant's trial counsel objected and the trial court noted his objection for the record. The trial court thus instructed the jury:

> Now, the Court takes judicial notice that it has previously been determined by proof beyond a reasonable doubt that the defendant, Shelton Jamal Smith, possessed a firearm at the time of this incident. A judicially noticed fact is one not subject to reasonable dispute in that it is capable of accurate and ready determination by sources whose accuracy cannot reasonably be questioned. You may, therefore, accept a judicially noticed fact as conclusive, but you're not required to do so. You should give it such weight as you decide it should receive in connection with all the other evidence presented.

Upon deliberating, the jury found Defendant guilty of attempted first-degree

murder, assault with a firearm on a law enforcement officer, and of being an armed habitual felon. The jury also found that Defendant committed these offenses for the purpose of avoiding or preventing a lawful arrest—an aggravating factor. On 11 June 2024, the trial court sentenced Defendant for the attempted first-degree murder conviction, a class B2 felony, to imprisonment for a term of 214 to 269 months in the presumptive range based off a sentencing worksheet assessing him eleven felony sentencing points and classifying him as a PRL IV.[4] The trial court sentenced Defendant for the assault with firearm on a law enforcement officer, a class D felony elevated to a class C felony on account of Defendant's armed habitual felon conviction, to imprisonment for a term of 120 to 156 months—the mandatory minimum under N.C. Gen. Stat. § 14-7.71(a) (2025). Defendant filed his notice of appeal on 11 June 2024.

II. Analysis

Defendant argues that, at his subsequent trial, the trial court erred in sentencing him by factoring in four felony sentencing points for the conviction of possession of firearm by felon from his initial trial. Defendant also argues the trial court abused its discretion by overruling his objection to the prosecutor's argument that Defendant's counsel "misrepresent[ed] the truth" and "manipulated evidence."

[4] The eleven felony sentencing points were calculated from a robbery committed in the Commonwealth of Virginia with a conviction date of 19 July 2013, a misdemeanor larceny committed in Mecklenburg County with a conviction date of 18 August 2010, and the possession of firearm by felon conviction from Defendant's initial trial in Mecklenburg County on 30 November 2022.

Lastly, Defendant maintains the trial court impermissibly took judicial notice when instructing the jury that "it has previously been determined by proof beyond a reasonable doubt that [Defendant] possessed a firearm at the time of the incident." We consider each argument in turn.

A. Calculation of Defendant's PRL

We first consider Defendant's argument that his conviction for possession of firearm by felon from the initial trial cannot be used to calculate his PRL for sentencing at the conclusion of the subsequent trial. Defendant maintains the trial court erred in calculating his sentence by including a joinable offense when determining his PRL. The State concedes this assignment of error. We note this argument and our analysis is limited to consideration of Defendant's PRL for the sentence of his attempted first-degree murder conviction at his subsequent trial.[5] Defendant argues, and the State also concedes, resentencing is necessary under binding precedent. Both parties assert that *State v. Watlington*, 234 N.C. App. 601, 759 S.E.2d 392 (2014) and *State v. High*, 271 N.C. App. 771, 845 S.E.2d 150 (2020) are controlling. Even so, we independently consider the applicability of this authority.

"The determination of an offender's prior record level is a conclusion of law that

[5] The PRL assessed to Defendant after his initial trial is uncontested. We also note after his subsequent trial, the trial court sentenced Defendant in accordance with the mandatory minimum for his assault with firearm on a law enforcement officer conviction elevated by his status as an armed habitual felon.

is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Hicks*, 243 N.C. App. 628, 641, 777 S.E.2d 341, 350 (2015) (citation omitted). "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . the jury, finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2025). Our statutes address the number of points assigned to a defendant based on the classification of prior convictions, the number of points underlying a PRL, and multiple convictions obtained in a calendar week of superior court. *See id.* § 15A-1340.14(b)–(d) (2025).

In *Watlington*, the defendant was tried on six charges all related to a single robbery.[6] 234 N.C. App. at 608, 759 S.E.2d at 396. The State moved to join all charges before trial. *Id.* At the defendant's first trial in October 2012, the jury found the defendant guilty of three of the charges, but the court declared a mistrial when the jury was unable to reach a unanimous verdict on the remaining three charges. *Id.* The defendant was retried and found guilty on the remaining charges in November 2012. *Id.* On appeal, the defendant argued that the three October convictions should not have been used to calculate his PRL during sentencing for the three November

[6] Charges related to other incidents were also joined for trial but are not relevant to our analysis.

convictions because they were joined with the charges that resulted in the November convictions. *Id*. at 608, 759 S.E.2d at 396. This Court reasoned that, though our statutes did not specifically address the use of joined offenses in calculating a defendant's PRL, it would "be unjust to punish a defendant more harshly simply because, in his first trial, the jury could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that defendant on some of those same charges." *Id*. at 609, 759 S.E.2d at 397.

In *High*, the defendant was tried for first-degree murder and robbery with a dangerous weapon stemming from a single transaction. 271 N.C. App. at 772, 845 S.E.2d at 152. The jury found the defendant guilty on both charges. *Id*. While serving the sentence for his convictions, the defendant filed a motion for appropriate relief. *Id*. The trial court heard the defendant's motion for appropriate relief and pursuant to a plea agreement with the State, the trial court vacated the defendant's first-degree murder conviction and the defendant pleaded guilty to second-degree murder. *Id*. When sentencing the defendant for second-degree murder, the trial court treated the related conviction for robbery with a dangerous weapon as a prior conviction, which elevated his PRL. *Id*. On appeal, this Court held that the trial court's use of the defendant's robbery conviction in calculating the defendant's prior record level was erroneous because the robbery was not a "prior" conviction, regardless of whether the defendant stipulated to use of the same. *Id*. at 777, 845 S.E.2d at 155.

Here, all of Defendant's charges, arising from a single incident, were joined at the time of Defendant's initial trial. Given the highly analogous facts of *Watlington*, we are compelled to employ its logic. As in *Watlington*, here "[i]t is clear that, had the jury in the first trial reached guilty verdicts on [the charges joined for trial that resulted in convictions at the subsequent trial], none of the [convictions from the initial trial] could have been used when calculating Defendant's prior record level." *Watlington*, 234 N.C. App. at 608, 759 S.E.2d at 396. Since we are bound by the precedent of a prior panel of this Court, we remand for the sole purpose of recalculating Defendant's PRL consistent with this opinion. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

B. State's Closing Argument

We next consider Defendant's argument that the trial court "abused its discretion in overruling an objection to the prosecutor's argument that defense counsel 'misrepresent[ed] the truth.' "

Generally, "parties are given wide latitude in their closing arguments to the jury." *State v. Fletcher*, 370 N.C. 313, 319, 807 S.E.2d 528, 534 (2017) (citation modified). "The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). An abuse of discretion occurs when "the ruling could not have been the result of a reasoned decision." *Id.* (citation modified). "Thus, the question before us

is whether the trial court failed to make a reasoned decision when it overruled defendant's timely objection . . . ." *Id.*

A two-part analysis is used to determine whether "the trial court committed prejudicial error in overruling defendant's timely objection to" a remark made during the prosecutor's closing argument. *State v. Copley*, 374 N.C. 224, 228, 839 S.E.2d 726, 729 (2020). First, we "determine if the remarks were improper, and then determine if the remarks were of such a magnitude that their inclusion prejudiced the defendant." *Id.* (citation modified) (quoting *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534). Thus, even "[a]ssuming that the trial court's refusal to sustain the defendant's objection was erroneous, the defendant must show that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534 (citation omitted); *see also Copley*, 374 N.C. at 228, 839 S.E.2d at 729 ("Assuming that the trial court's refusal to sustain the defendant's objection was erroneous, the defendant must show that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." (citation omitted)). That is, "we must also look to the evidence presented by the State to determine whether there is a reasonable possibility the jury would have acquitted defendant if the prosecutor's remarks had been excluded." *Copley*, 374 N.C. at 231, 839 S.E.2d at 730 (citation omitted). Since the "analysis of prejudice is ultimately dispositive, we focus our attention there." *Id.* at 228, 839 S.E.2d at 729.

When assessing the prejudicial effect of an alleged improper closing argument,

> we examine "the statements 'in context and in light of the overall factual circumstances to which they refer.' " *Id.* (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687 (1995)). For example, to evaluate the context here, we consider the entirety of the closing argument, the evidence presented at trial, and the instructions to the jury.

State v. Goins, 377 N.C. 474, 479, 858 S.E.2d 590, 593 (2021).

Here, during his first closing argument, Defendant's trial counsel argued:

> And I want you to look at the body cam footage and see whether or not -- yourself will see whether or not -- where the hand -- and I think you ought to focus at where the hand of the -- of Mr. Smith was during the course of this chase which would give rise to a claim that a gunshot would have passed Officer Hinton's head. I would submit to you that you're going to find that the hand -- prior to any shooting -- and we submit to you you're going to see that the first shots and the only shots, but we'll submit to you that the shot -- the first shot that took place came from the gun of Officer Hinton.
>
> . . . .
>
> And we submit to you is that you -- that when you hear the -- the -- the body cam footage, all you hear in those seconds that led up to the three seconds where the guns were fired is that you hear Officer Hinton, "He has a gun," and then you hear instantaneously him firing those first series of four shots and then that last shot. We submit to you you don't hear any of that pop before and that, in fact, if indeed you see the -- Mr. Smith turn around after he says he has a gun, and clearly his gun is -- and Officer Hinton's gun is visible, that at that point clearly any man would be provoked if indeed it -- to fire if he indeed fired, but we submit that he didn't.

Thereafter, while playing Detective Hinton's body camera footage for the jury

during the State's closing argument, the prosecutor told the jury:

> Let's talk about ingenuity of counsel, because he will have you believe when you watch the video in conjunction with the audio of it that you don't see the defendant shooting the gun before Officer Hinton does. But watch the video and listen to the audio. It is completely distorted. It's not in sync[ ]. You hear the gunshots before you even see anything.
>
> And you can tell that. You know how you can tell? Because Officer Hinton - - you hear a gunshot, and then you see Officer Hinton shooting his gun. Even the slides goes back, and then the smoke comes out of his gun, and that's after you hear a gunshot. That's ingenuity, right? The audio and the video does not match because both were slowed down. You can tell specifically on several different occasions. Let's watch it.
>
> (Video played.)
>
> [The State]: And, again, we just heard another gunshot and then later five seconds later we see gun smoke come out of Officer Hinton's gun. It's ingenuity, folks. It's crafty.
>
> (Video played.)
>
> [The State]: It's ingenuity, and it's craftiness, and it misrepresents the truth.

Defendant's counsel then objected to the State's closing but did not provide a basis for the objection; the trial court overruled the objection.

Defendant maintains the State's closing argument prejudiced him since "the only issue for the jury to decide was whether [Defendant] unlawfully fired a gun at Officer Hinton," and the evidence against him was "not overwhelming." Despite arguments to the contrary, Defendant has not met his burden to show "that there is

a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *Copley*, 374 N.C. at 228, 839 S.E.2d at 729 (citation omitted). Indeed, absent the challenged portion of the State's closing argument, the State presented evidence tending to show: "[D]efendant [took] off running," and then a lengthy foot chase ensued. Detective Hinton then "noticed that [Defendant] was running normally with his left hand, but his right hand was in his pants pocket or in his pants and his arm was at about a 90-degree angle . . . ." And when Defendant was about fifteen feet away from him, Detective Hinton saw "a gun in [Defendant's] hand." At this point, Defendant "turns back and starts firing at [him]." Detective Hinton heard gun fire, saw smoke and "a slight muzzle flash," and felt the bullet go "directly" past his head. This evidence in the form of Detective Hinton's testimony was substantiated by the testimony of the other officers who witnessed the sequence of events, namely Officer Salazar and Sergeant Wiggins. Moreover, two shell casings were located nearby and forensically determined to have been fired from the Colt .25 caliber handgun found near Defendant.

Our review leads us to conclude the State adduced "compelling evidence of defendant's guilt" of attempted first-degree murder and assault with a firearm on a law enforcement officer. *Id.* at 231–22, 839 S.E.2d at 731. Defendant has failed to show a reasonable possibility that the jury would have acquitted him absent the State's remarks during closing arguments. *See id.* at 228, 839 S.E.2d at 729. Defendant's argument to this point is overruled.

C. Judicial Notice and Jury Instructions

Defendant last argues that, at this retrial, the trial court erred by taking judicial notice and instructing the jury that it was previously determined by proof beyond a reasonable doubt that Defendant possessed a firearm at the time of this incident. Specifically, Defendant contends that collateral estoppel did not apply because the manner of his possession was not necessary and essential to his previous conviction for possession of firearm by felon. Defendant also maintains that even if collateral estoppel applies, his trial counsel's argument was not contrary to the verdict in his initial trial. Defendant further argues that the trial court's instruction taking judicial notice had the effect of expressing a judicial opinion. And with respect to each alleged error, Defendant argues they were "so prejudicial that a new trial is required."

1. Collateral Estoppel and Defendant's Argument

This section of our analysis begins by addressing Defendant's arguments that collateral estoppel did not apply and his argument was proper.

"Whether the doctrine of collateral estoppel is applicable and bars a specific claim or issue is a question of law subject to *de novo* review." *State v. Jones*, 256 N.C. App. 266, 269, 808 S.E.2d 280, 283 (2017) (citation omitted). "The doctrine of collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 270, 808 S.E.2d at 283

(citation modified). As noted by this Court, "collateral estoppel precludes parties from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *State v. Williams*, 252 N.C. App. 231, 235, 796 S.E.2d 823, 826 (2017) (citation modified). This doctrine is applicable to both civil and criminal actions. *See id.*

For collateral estoppel to apply, the following is required:

> (1) the same parties, (2) the same issue, (3) that the issue was raised and actually litigated in the prior action, (4) that the issue was material and relevant to the disposition of the prior action, and (5) that the determination of the issue was necessary and essential to the prior judgment.

Id. (citations omitted).

Here, the record shows that Defendant's trial counsel argued the manner of possession but also argued a lack of evidence that there was a firearm. Defendant's trial counsel's assertion there was a lack of evidence that Defendant had a firearm logically and necessarily means that Defendant could not have possessed a firearm. Yet, at Defendant's initial trial, the jury found him guilty of possession of firearm by felon, a verdict that necessarily determined beyond a reasonable doubt that Defendant possessed a firearm at the time of the incident. Indeed, our de novo review leads us to conclude this issue had been previously litigated in the prior action, was material and relevant to the prior action, and that issue was necessary and essential to the jury's verdict in his initial trial. *See Jones*, 256 N.C. App. at 269, 808 S.E.2d at 283; *see also William*, 252 N.C. App. at 235, 796 S.E.2d at 826. Defendant's trial

counsel's argument at the retrial that the State had not proven there was a firearm therefore sought to relitigate an issue already decided. Consequently, debate over the element of possession, whether constructive or actual, was barred by collateral estoppel.

2. Judicial Notice

Defendant also maintains that the trial court abused its discretion by taking judicial notice of the prior determination that he possessed a firearm.

"[T]he decision as to whether judicial notice of facts should be taken is left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State v. McDougald*, 38 N.C. App. 244, 248, 248 S.E.2d 72, 77 (1978). Put differently, "a trial court's decision concerning judicial notice will not be overturned absent an abuse of discretion." *Muteff v. Invacare Corp.*, 218 N.C. App. 558, 568, 721 S.E.2d 379, 386 (2012). *See generally Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (noting that an abuse of discretion occurs when "the ruling could not have been the result of a reasoned decision" (citation modified)).

Under the North Carolina Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201 (2025). "An indisputable fact is one that is so well established as to be a matter of common knowledge." *State v. Bucklew*, 280 N.C. App.

494, 503, 867 S.E.2d 362, 373 (2021) (citation modified). Rule 201 only applies to "adjudicative facts." N.C. Gen. Stat. § 8C-1, Rule 201. " 'A trial court may take judicial notice of earlier proceedings in the case cause,' including matters in the file not offered into evidence." *State v. Isaacs*, 261 N.C. App. 696, 700, 821 S.E.2d 300, 303 (2018) (citation omitted).

Here, the trial court took judicial notice of a fact "beyond reasonable controversy." *Id.* at 699–700, 821 S.E.2d at 303. It is undisputed that, at Defendant's initial trial, he was convicted for possession of firearm by felon arising from the same facts at issue in his subsequent trial. *See* N.C. Gen. Stat. § 8C-1, Rule 201. Defendant does not offer an argument proffering how the trial court abused its discretion by judicially noticing the issue resolved in his initial trial. Instead, Defendant's argument centers on whether the instruction itself was in error and prejudicially confused the jury. The trial court did not err by taking judicial notice that Defendant had "possessed a firearm at the time of this incident."

Furthermore, Defendant cannot show the prejudice of which he complains. First, his characterization of judicial notice of a conviction, rather than an issue of fact, is not supported by the instruction provided to the jury, which provided: "Now, the Court takes judicial notice that it has previously been determined by proof beyond a reasonable doubt that the defendant, Shelton Jamal Smith, possessed a firearm at the time of this incident." Second, while we hold Defendant's argument is meritless, even assuming error, Defendant cannot show prejudice. *See generally State v. Austin*,

378 N.C. 272, 277–78, 861 S.E.2d 523, 528 (2021).

The jury convicted Defendant of attempted first-degree murder. "A person commits the crime of attempted first-degree murder if he specifically intends to kill another person unlawfully; he does an overt act calculated to carry out that intent, going beyond mere preparation; he acts with malice, premeditation, and deliberation; and he falls short of committing the murder." *State v. Cozart*, 131 N.C. App. 199, 202–03, 505 S.E.2d 906, 909 (1998).

Here, sufficient evidence exists to permit a reasonable juror to find the elements of attempted first-degree murder were met. Specific to Defendant's retrial, Officer Salazar's testimony detailed that while Defendant was running from the officers, his "[r]ight arm was tucked into his waistline pocket." He then saw Defendant "turn his body, . . . extend his right arm," and heard what he "recognized as gunfire." Sergeant Wiggins further testified that he noticed Defendant had his right hand in his waist area. He also "observed a gun . . . approximately 10 feet away from the suspect's feet on the ground." Likewise, Detective Hinton, who was closest to Defendant, recalled "his right hand was in his pants pocket or in his pants." He continues by describing a lengthy foot chase. Detective Hinton recalled, Defendant "stays on the road running with one arm either in his pants pocket or in his pants[.]" Then, when Detective Hinton was "maybe 15 feet" from Defendant, he saw Defendant had "a gun in his hand," "could see the barrel, the slide, of the firearm in his right hand." Detective Hinton then testified that Defendant "turns back and starts firing

at me." He added, "I saw smoke and like a slight muzzle flash, and I heard a gun go off[.]" Further, he "felt [a bullet] go directly past [his] head[.]" Additionally, evidence supports that "State's Exhibit Items 12 and 14," two spent shell casings collected at the scene, were fired from "State's Exhibit 16," the Colt .25 caliber handgun found near Defendant.

This evidence is sufficient to satisfy the elements of attempted first-degree murder. *See id.*; *see also*, *e.g.*, *State v. Weathers*, 339 N.C. 441, 451, 451 S.E.2d 266, 271 (1994) ("Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily are not susceptible to proof by direct evidence." (citation modified)). Defendant's firing a gun at Detective Hinton is an overt act, going beyond mere preparation. Defendant's intent to kill Detective Hinton with malice can be inferred from his shooting at Detective Hinton's head from a distance of about fifteen feet. Defendant's premeditation and deliberation can be inferred from the fact of the lengthy foot chase while grabbing at his pocket or waistband for a period of time.

The elements of assault with a firearm on a law enforcement officer are: "(1) an assault; (2) with a firearm; (3) on a law enforcement officer; (4) while the officer is engaged in the performance of his duties." *State v. Dickens*, 162 N.C. App. 632, 636, 592 S.E.2d 567, 571 (2004); *see also* N.C. Gen. Stat. § 15A-14.34.5(a) (2025). "An assault is an overt act or attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or violence must be

sufficient to put a person of reasonable firmness in fear of immediate physical injury." *Dickens*, 162 N.C. App. at 636, 592 S.E.2d at 571 (citation modified). "In proving the element of assault, the State does not have to show the defendant pointed a firearm at a law enforcement officer." *Id.* "Furthermore, to be guilty of this offense, the defendant must have known or had reasonable grounds to know that the victim was a law enforcement officer." *Id.*

Here, there is sufficient evidence that Defendant committed an assault with a firearm by shooting at Detective Hinton's head from a distance of approximately fifteen feet. Additionally, Defendant had reasonable grounds to know that the victim was a law enforcement officer since the evidentiary record also provides that Defendant fled upon the arrival of the officers who were predominantly uniformed and in marked patrol vehicles. Detective Hinton, in particular, was wearing his "regular police uniform[.]" Finally, there is sufficient evidence that Detective Hinton was engaged in the performance of his duties as he investigated a robbery.

The trial court's instruction, which took judicial notice of Defendant's possession of firearm arising out of the same incident, was not in error and did not prejudice Defendant.

3. Judicial Opinion

Defendant further argues that judicial notice and the subsequent jury instruction constituted an improper "expression of judicial opinion" from which he was prejudiced.

A "judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2025). Similarly, "[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.* § 15A-1232 (2025). Accordingly, "whenever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions." *State v. Austin*, 378 N.C. 272, 276, 861 S.E.2d 523, 527–28 (2021) (citation modified). "When an alleged statutory violation by the trial court is properly preserved, . . . we review for prejudicial error pursuant to N.C.G.S. § 15A-1443(a)." *Id.* (citations omitted).

Under that statute:

> A defendant is prejudiced by error relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2025).

"When reviewing alleged improper expressions of judicial opinion under this standard, we utilize a totality of the circumstances test to determine whether the

trial court's comments crossed into the realm of impermissible opinion." *Austin*, 378 N.C. at 277, 861 S.E2d at 528 (citation modified). For a defendant to demonstrate such prejudice pursuant to subsection 15A-1443(a), "a defendant must also show that the comments had such a prejudicial effect that there is a reasonable possibility of a different result absent the error." *Austin*, 378 N.C. at 277–78, 861 S.E.2d at 528.

Yet, given that the judicial notice merely restated a prior jury's determination on an issue that had become confused at the current trial, and since the trial court reminded the jury it was not required to accept the fact as conclusive, and because trial courts are afforded broad discretion in deciding whether to take judicial notice at all, it cannot be said that the trial court's notice was based on an error of law or was not the result of a reasoned decision. *See McDougald*, 38 N.C. App. at 248, 248 S.E.2d at 77.

This conclusion is reinforced by the totality of the circumstances surrounding the trial court's decision to include the instruction. *See Austin*, 378 N.C. at 277, 861 S.E2d at 528. As analyzed above, there were arguments made to the jury crossing the boundary beyond the manner of possession into whether Defendant even possessed the weapon at all. Even so, the trial court agreed "[a]rguing whether it was in his hand or not is free game." Defendant in fact made such arguments during his first closing and was only collaterally estopped from arguing about possession. Moreover, the trial court explained to the jury: "You may, therefore, accept a judicially noticed fact as conclusive, but you're not required to do so. You should give

it such weight as you decide it should receive in connection with all the other evidence presented." We therefore cannot say the trial court abused its discretion when giving a curative instruction with a properly judicially noticed fact. *See Bucklew*, 280 N.C. App. at 503, 867 S.E.2d at 373; *see also* N.C. Gen. Stat. § 8C-1, Rule 201. In any event, Defendant cannot demonstrate prejudice. *See Austin*, 378 N.C. at 277–78, 861 S.E.2d at 528.

III. Conclusion

We hold the trial court neither committed error in overruling Defendant's objection to the State's closing argument nor when giving the instruction judicially noticing Defendant's possession of a firearm. We vacate the judgment and remand solely for the limited purpose of appropriately calculating Defendant's PRL and sentencing him accordingly.

NO ERROR IN PART; REMANDED IN PART.

Judges COLLINS and GORE concur.

Report per Rule 30(e).