No. COA20-273 **JUDICIAL DISTRICT 29B**

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Henderson County**
	)	
SHERRY LEE LANCE	**)**	

****

BRIEF FOR THE STATE

****

INDEX

TABLE OF CASES AND AUTHORITIES iii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 15

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DIMSISS BECAUSE THE EVIDENCE ESTABLISHED THAT THE DWELLING HOUSE WAS OCCUPIED BY ANOTHER PERSON 15

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO EXCLUDE THE OPINION TESTIMONY OF CASEY SILVERS BECAUSE THE TRIAL COURT BASED ITS DECISION ON THE FACTORS SET FORTH IN 702(a) AND DAUBERT AFTER HEARING THE AMPLE FOUNDATION TESTIMONY OF THE EXPERT WITNESS 21

A. Rule of Evidence 702(a) and McGrady 23

B. Analysis of Factors 1 and 2 24

C. Three Prong Reliability Test 25

D. NFPA 921 and Negative Corpus 29

E. No Prejudicial Error 32

III. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN ITS INSTRUCTION

TO THE JURY ON INSURANCE FRAUD 33

IV. THE COURT SHOULD REMAND THIS MATTER FOR A NEW HEARING ON RESTITUTION 36

CONCLUSION 36

CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2) 38

CERTIFICATE OF SERVICE 39

TABLE OF CASES AND AUTHORITIES

Cases

Crocker v. Roethling, 363 N.C. 140, 675 S.E.2d 625 (2009) 22

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) 24

State v. Abernathy, 295 N.C. 147, 244 S.E2d 373 (1978) 17

State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975) 17, 20

State v. Blake, 319 N.C. 599, 356 S.E.2d 352 (1987) 16

State v. Cook, 193 N.C. App. 179, 666 S.E.2d 795 (2008) 32

State v. Eubanks, 83 N.C. App. 338, S.E.2d 884 (1986) 18-19

State v. Fritsch, 351 N.C. 373, 526 S.E.2d 451 (2000), *cert. denied*, 531 U.S. 890, 121 S. Ct. 213 (2000) 16

State v. Hunt, 250 N.C. App. 238, 792 S.E.2d 552 (2016) 36

State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978) 19

State v. Lasiter, 361 N.C. 299, 643 S.E.2d 909 (2007) 22

State v. Lawrence, 365 N.C. 506, 723 S.E.2d 326 (2012) 33, 36

State v. McGrady, 368 N.C. 880, 787 S.E.2d 1 (2016) ..... i, 23-24, 27

State v. Murphy, 261 N.C. App. 78, 819 S.E.2d 604 (2018) 36

State v. Rouse, 198 N.C. App. 378, 679 S.E.2d 520 (2009) 16

State v. Shaw, 305 N.C. 327, 289 S.E.2d 325 (1982) 16, 17, 19

State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982) 16

State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251 (1989), *rev. denied*, 325 N.C. 276, 384 S.E.2d 528 (1989) 17-18

State v. White, 288 N.C. 44, 215 S.E.2d 557 (1975) 16

State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986) 35

State v. Wilson, 340 N.C. 720, 459 S.E.2d 192 (1995) 36

White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985) 22

Statutes

N.C. Gen. Stat. § 15A–1443 32

Rules

Fed. R. Evid. 702 27

N.C.P.I.-CRIM. 215.12 20

N.C. R. App. P. 10 33

N.C. R. App. P. 28 31

N.C. R. Evid. 401 23

N.C. R. Evid. 701 23

N.C. R. Evid. 702 ..... i, 22-29, 31-32

Other

National Fire Prevention Act 921
(2017 ed.) ..... i, 4, 6, 24, 26, 28-32

No. COA20-273 **JUDICIAL DISTRICT 29B**

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Henderson County**
	)	
SHERRY LEE LANCE	**)**	

****

BRIEF FOR THE STATE

****

ISSUES PRESENTED

I. **WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS THE CHARGES OF SECOND-DEGREE ARSON AND CONSPIRACY TO COMMIT SECOND-DEGREE ARSON?**

II. **WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISQUALIFY CASEY SILVERS AS AN EXPERT WITNESS IN THE FIELD OF FIRE AND ARSON INVESTIGATION?**

III. **WHETHER THE TRIAL COURT'S JURY INSTRUCTION FOR INSURANCE FRAUD WAS PROPER BASED ON THE ALLEGATIONS IN THE INDICTMENT?**

IV. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S ORDER FOR RESTITUTION?

STATEMENT OF THE CASE

This case commenced on 3 February 2017 when a Henderson County grand jury returned true Bills of Indictment against Sherry Lee Lance (hereinafter "Defendant") on the charges of felony second-degree arson, felony conspiracy to commit second-degree arson, and felony insurance fraud. (R.pp 8-10) On those charges, Orders for Defendant's arrest were issued that same day. (R.pp 2-7) Defendant pled not guilty and was tried by jury in Henderson County Superior Court, the honorable Athena Brooks presiding, on 5 November 2019. (T.pp 1-3) At the close of the State's evidence, Defendant made a motion to dismiss the State's case, which was denied by the court. (T.pp 315-323) On 4 November 2019, the jury returned unanimous verdicts finding Defendant guilty on all three charges. (R.pp 104-106) Defendant was sentenced in the presumptive range to ten (10) to twenty-one (21) months incarceration with credit given for fourteen (14) days previously spent in confinement. (R.pp 112-113) Defendant was ordered to pay $40,000 in restitution to the victim of the crime. (R.pp 107) Defendant, through counsel, gave oral notice of appeal in open court on 7 November 2019. (R.p 114, T.p 388)

STATEMENT OF THE FACTS

On 7 September 2016, a dwelling house located on Baldwin Circle in Fletcher, North Carolina was destroyed by fire. (T.pp 103-104) Ronald Lance was the owner of the home. (T.p 103) Defendant and Ms. Jonnie Turner had leased the home from Mr. Lance for around two years prior to the fire. (T.pp 103-104) Defendant never notified Mr. Lance of any problems with the stove, concerns about fuses, fire hazards in the home, or concerns about the house in general. (T.pp 106, 108)

The State intended to offer the testimony of Casey Silvers as an expert witness in the field of fire and arson investigation. (T.p 110) Prior to testifying for the State, counsel for Defendant was permitted to conduct a *voir dire* examination of Casey Silvers before offering argument in support Defendant's Motion to Disqualify Mr. Silvers. (T.p 110)

Casey Silvers is a senior fire investigator with EFI Global, a fire investigation and engineering firm. (T.pp 111, 116, 172)[1] As a senior fire investigator, he conducts origin and cause investigations for fires and explosions. (T.pp 112, 172) An origin and cause investigation is used to determine where a fire originated and, using the scientific method, to

[1] The court heard testimony from Casey Silvers during the Defendant's Motion to Disqualify (T.pp 110-149) and during the State's case in chief (T.pp 172-224). Because the testimony was substantially similar, and for brevity, the State will combine the testimony of Casey Silvers into one factual recitation, and will parallel cite these portions of the transcript when possible.

determine how the fire started. (T.p 174)

Mr. Silvers testified that he received education in the field of fire and explosion investigation primarily through the Asheville Fire Department where he worked for fifteen years. (T.pp 111, 173) He also completed courses in fire and explosion investigation, electrical aspects of fire investigation, expert testimony, and evidence collection through the National Fire Academy. (T.pp 111, 173) He attends yearly seminars and classes in the fields of fire and explosion investigations where he is tested on his knowledge in those fields. (T.pp 111, 173) He was formerly a deputy fire marshal and assistant fire marshal with the Asheville Fire Department. (T.pp 112, 173) He is a North Carolina certified fire investigator, and also a certified fire investigator through the International Association of Arson Investigators ("IAAI"). He completes nearly 40 hours of in person training yearly to maintain the IAAI certification. (T.pp 112, 173) He has taught classes in the field of arson detection for the National Fire Academy and he was an instructor with the Blue Ridge Community College. (T.p 112) He has testified as an expert witness in at least two other civil and criminal trials in North Carolina. (T.p 115) He has investigated over 800 fires in his career. (T.pp 116, 174)

At the motion hearing, Mr. Silvers testified that he was very familiar with the term negative corpus in NFPA 921 and its definition. (T.p 144) He

agreed that the term is not consistent with the scientific method and that it uses the elimination of accidental causes to conclude that a fire was caused by human agency. (T.p 144) Mr. Silvers reiterated that he did not conclude that this fire had an incendiary cause, or human cause, only that he could not exclude the hypothesis of incendiary cause based on his investigation. (T.p 145) When asked by the Court, Mr. Silvers stated his conclusion that the fire patterns and the mass loss in a specified area without an identifiable fuel load that would be consistent to the burning were all indicative of an incendiary fire and that is why that hypothesis could not be excluded. (T.p 156) He could not exclude the incendiary hypothesis, even with the negative lab result for ignitable liquids, because there are other incendiary sources such as charcoal, cleaning chemicals, or ordinary combustibles that, when present, would not give a positive result for ignitable liquids but that can still generate fires. (T.p 156) After the *voir dire* examination, Judge Brooks ruled that Mr. Silvers would be allowed to testify but that, to avoid juror confusion, she would give a limiting instruction regarding Mr. Silvers' finding that he could not exclude an incendiary cause of the fire. (T.p 163)

Mr. Silvers was tendered by the State as an expert in arson and fire investigation, with a renewed objection at trial from Defendant, and accepted by the court. (T.pp 110, 174) Prior to Mr. Silvers' testimony, the Court read the jury a limiting instruction regarding their ability to accept or disregard

an expert's opinion. (T.p 175)

Mary Ann Myers with State Farm Insurance Company assigned Mr. Silvers to investigate the fire that occurred on 7 September 2016 at 2 Baldwin Circle in Fletcher, North Carolina. (T.pp 117, 176) He visited the home on 15 September 2016. (T.pp 119, 177) The home was a two bedroom one bathroom single story square structure and was furnished and consistent with being lived in. (T.pp 177-178)

Mr. Silvers testified that the scientific method he uses to conduct fire or arson investigations includes developing the need for the investigation or research, gathering data, analyzing the data, forming hypotheses on fire causes, attempting to disprove the hypotheses, then attempting to confirm remaining hypotheses as to fire origin and cause. (T.pp 118, 185-186) This scientific method is recommended by the NFPA 921 standard. (T.p 117)

Mr. Silvers first wanted to identify where the fire occurred. (T.p 186) When he first arrives at a fire scene, his practice is to start with an exterior examination "looking at ventilation openings, building construction, elevation changes, [and] things along the exterior of the structure." (T.p 120) From there, he then entered Defendant's home to look at fire patterns on walls, surfaces, materials, and windows and doors throughout different compartments of the structure. (T.p 186) He examines each room in the home in order of least to most damaged. (T.p 121) Using this method, when

he finally gets to a room that he believes, based on fire patterns, to be a room of origin, he focuses on that room and collects as much data as he can from that room. (T.p 121)

He examined electrical service within the structure to consider whether electrical failure could have caused the fire and also examined electrical conductors to identify where the fire occurred. (T.pp 121, 187) After examining the structure, making observations, and gathering available information, he uses fire dynamics to evaluate the effects of the fire on different materials in the structure, what temperature they burn, and what temperature they melt and leave behind residue, all of which contribute to the understanding of where the fire occurred. (T.p 187) In addition to examining the structure, he reviewed fire reports, investigations, and witness statements gathered and produced by the Fletcher Fire Department. (T.pp 122, 187) He also reviewed witness statements and interviews gathered from Mary Ann Myers with State Farm. (T.pp 122, 187)

As part of his site examination for this fire, he also observed and collected physical evidence and items from the home. (T.pp 187-188) The physical evidence he collected included four pieces of evidence and fire debris from the kitchen area, the area in which he believes the fire occurred. (T.pp 121, 188) Fire debris was collected and sent to a lab to test for the presence of ignitable liquids. (T.pp 121, 188) The results from those tests indicated

that the samples did not meet the threshold of identifying an ignitable liquid. (T.pp 138-139, 189) Mr. Silvers provided a detailed analysis of his examination of the fire, consumption, and smoke patterns in the kitchen that led him to the conclusion that the fire originated in the kitchen of the home, specifically at the lower position in the rear entry area. (T.pp 155-156, 189-192) Mr. Silvers then provided a detailed analysis and description of the burn pattern in the area of the origin of the fire that was indicative of an accelerant or ignitable liquid being used underneath the cabinetry. (T.pp 138, 193) Mr. Silvers testified that certain objects leave behind identifiable burn patterns. (T.pp 193) Ignitable liquids are liquids that will burn when ignited such as petroleum products, whereas accelerants are any material that can be used to light and accelerate a fire such as paper products or rags. (T.p 195) He did find items in the area of the fire that appeared to be rags, but they were negative for ignitable liquids. (T.p 195)

Casey Silvers provided a detailed explanation of his analysis of electrical circuits in the home and how this supported his conclusion that the fire originated in the kitchen in an area near the rear entry door and the range oven. (T.pp 130-133, 196-197) His analysis of the electrical wiring in the area also led him to the conclusion that electrical wiring was not the ignition source of the fire. (T.pp 129-133, 198-199) He considered potential combustible materials in the area of the fire origin such as wood structural

members, sheet rock, and linoleum flooring with hardwood underneath, and based on their ignition temperatures, he was further able to rule out electrical branch circuits as an ignition source. (T.pp 129, 141, 200)

He also considered discarded smoking material as an ignition source, but ruled it out based on its inability to ignite adjacent combustible materials. (T.pp 133, 200) He was able to rule out unattended cooking as an ignition source because witness statements indicated that the range had not been in use for 24 hours prior to the fire, that there were no known issues with the range itself, that his analysis of the range showed no electrical arcing, and that he analyzed conductors that supplied the range, lights, and water heater and none showed evidence of electrical failure. (T.pp 129, 201) He ruled out the trash can burning from discarded cigarettes because there were no remnants of thermal plastic in the area, and in a trash can fire he would expect to find melted pooling plastic from such a fire. (T.pp 135-136, 202)

He was able to rule out lightning or weather as a cause of the fire based on his review of weather reports from accredited weather stations. (T.pp 136, 203) Witness interviews conducted by State Farm indicated there was nothing present to sustain combustion in the area of fire origin. (T.pp 137, 203) Mr. Silvers observed areas of low burn on the areas underneath the kitchen cabinets that burned relative to the top side of those cabinets that did

not burn. (T.p 203) The fire flow in the room showed that it was very low across the floor and this was a fire pattern that was consistent with materials having been placed on the floor to generate fire at a low level. (T.pp 138, 203-204) Mr. Silvers explained that, although the samples taken tested negative for ignitable liquid, a negative test does not mean that an ignitable liquid was never present, it only means it did not contain enough to be identified. (T.pp 138-139, 204) He explained that fire debris that is collected has gone through a process called pyrolysis, which is a chemical breakdown of that material in which the material and any ignitable liquid can burn away. (T.p 204)

Mr. Silvers also rendered his opinion that he was able to exclude all potential ignition sources with the exception of an incendiary causation. (T.pp 142, 206) At this point in his investigation, he then proposed a hypothesis that the fire was intentionally set, and then tried to disprove that hypothesis by coming up with alternative explanations for the patterns and observations he made. (T.p 206) Based on the science and data observed, he was not able to explain why the patterns and observations he made were present and, therefore, he could not exclude an incendiary causation. (T.pp 142-143, 206) He did not offer an opinion that an incendiary cause was the cause of this fire, he gave his opinion that an incendiary cause could not be excluded. (T.pp 142-143, 206, R.p 37)

On cross-examination at trial, Mr. Silvers further elaborated that he

could not disprove an incendiary cause because other physical evidence at the scene, such as burn patterns and other observable evidence, was consistent with ignitable liquids being present. (T.p 213) Mr. Silvers was asked whether the lab test was the only test he used to attempt to disprove this hypothesis. (T.p 214) His response was that he tested everything available to him using both inductive and deductive reasoning, data known to him from his experience and education, and using patterns that are prevalent when types of ignitable liquids are used, and, in doing so, he was unable to disprove that hypothesis. (T.p 215) The fire scene he observed was consistent with the use of an ignitable liquid. (T.pp 142-143, 215)

Ronald Diaz is a detective with the Fletcher Police Department. He visited the home on 8 September 2016. (T.p 228) He noticed a large hole in the kitchen floor that he believed was unusual. (T.p 229) The fire marshal and other investigators at the scene told him that they believed that area was the point of origin for the fire. (T.p 229) He looked throughout the home and noticed a lack of clothing in closets, to include footwear, and other clothing items. (T.p 229) Based on these circumstances, he contacted the National Insurance Crime Bureau to provide them with Defendant's information and to see if she had submitted a claim on a renter's insurance policy that she had opened four months prior. (T.p 230)

Detective Diaz then learned that Defendant's mother, Jonnie Turner,

had leased a local storage unit on 6 September 2016, the day before the fire. (T.p 231) Activity logs for the gate controlling access to the facility showed that someone used the pin code assigned to Ms. Turner three times on 6 September 2016 and one time on 7 September 2016. (T.p 232) He believed it was reasonable to assume that items had been moved from the home into the storage unit, so he obtained a search warrant to search the unit. (T.p 232) He searched the storage unit that was leased to Ms. Turner and he found a large amount of personal, hygiene, and household items belonging to Ms. Turner and Defendant including photo albums, a cremation urn, keepsakes, and personal documents identifying Defendant and Ms. Turner. (T.p 234)

Detective Diaz spoke with Mary Ann Myers at State Farm from whom he received a loss inventory form that listed items reported burned in the fire. (T.p 251) He also viewed video footage obtained from the storage facility and observed footage of Defendant and Ms. Turner accessing the storage unit on 6 September 2016 and placing items from the vehicle into the storage unit. (T.pp 253-254) He then viewed footage of Defendant and Ms. Turner returning to the storage unit on 9 November 2016 and removing items from the storage unit. (T.p 254) Detective Diaz had contacted Defendant earlier in the day on 9 November 2016 and asked to speak with her, but Defendant told him that she was in Georgia and was returning on 14 November 2016. (T.p 255)

Shelia McKinley owned Fletcher Storage Center in 2016 and maintained its records. (T.p 262) She identified the lease agreement that Ms. Turner signed with Fletcher Storage Center on 6 September 2016. (T.p 264) Defendant was listed on the lease agreement as someone who could occupy the space with Ms. Turner. (T.pp 264-265) Mrs. McKinley also maintained video footage of access to the facility gate and testified that the unit leased by Ms. Turner was accessed three times on 6 September 2016 and once on 7 September 2016. (T.pp 269-271) A portion of video produced by Mrs. McKinley was also played to the jury showing access to Ms. Turner's unit on 9 November 2016. (T.p 278) She testified that the pin code assigned to Ms. Turner was not used between 7 September 2016 and 9 November 2016. (T.p 280)

Mary Ann Myers was previously employed by State Farm as a claims adjuster in the special investigation unit where she investigated suspicious claims. (T.p 281) Defendant maintained a renter's insurance policy with State Farm that covered the contents of her home. (T.p 282) Defendant submitted a loss inventory form to State Farm of things she claimed were lost in the fire on 7 September 2016. (T.p 283) Ms. Myers met with Defendant nine days after the fire to obtain a recorded statement. (T.p 285) Defendant told her that she lived with her mother at the time of the fire and that a man named Troy Williams had moved out a couple of days before the fire. (T.p

286) Defendant told Ms. Myers that she was behind on her rent and many other monthly bills. (T.pp 286-287) Defendant had lived at the property for three years and told Ms. Myers that the refrigerator and a lamp in the kitchen would sometimes give a small electrical shock, that a burner on the stove did not work, and that a pull string in the bathroom would buzz. (T.pp 289-290) Defendant told her that at the time of the fire she was dumpster diving behind retail stores when she got the call that there was a fire at her home. (T.p 291) State Farm denied paying the insurance claim submitted by Defendant. (T.p 293)

Cayla Young is the stepdaughter of Defendant. (T.pp 298-299) Defendant visited Ms. Young in 2018 and told her that she was in trouble for setting a house fire. (T.p 299) Defendant told her that there were some people living with her that had already gone to the sheriff's office and given statements that they heard Defendant say that she was planning to burn the house down. (T.pp 300-301) Ms. Young asked Defendant if she burned the home and Defendant responded "Nooooo." (T.p 302) Defendant told Ms. Young that she was going to sue her landlord for not doing anything about a humming sound coming from an electrical component. (T.p 303) Ms. Young asked Defendant if she was "going to sue your landlord for you getting in trouble for burning your house down?" and Defendant responded "Yeah." (T.p 303)

Philip Rathburn is Defendant's father. (T.p 305) In, or around, July 2017 Defendant went to live with Mr. Rathburn in Chesnee, South Carolina. (T.p 306) Ms. Turner came with Defendant to stay with Mr. Rathburn. (T.p 307) Defendant admitted to Mr. Rathburn that she set her home in Fletcher, North Carolina on fire. (T.p 308) Ms. Turner told Defendant not to tell Mr. Rathburn, and Defendant responded "it will be all right" to tell him. (T.p 308) She did not say how she set the fire, but she did tell Mr. Rathburn that she was talking with a fire inspector and told them that she was dumpster diving at the time of the fire. (T.p 308) Defendant told Mr. Rathburn that the reason she set fire to the home was for her renter's insurance. (T.p 310)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS BECAUSE THE EVIDENCE ESTABLISHED THAT THE DWELLING HOUSE WAS OCCUPIED BY ANOTHER PERSON.

At the conclusion of the State's case in chief, Defendant moved to dismiss the charges of second-degree arson and conspiracy to commit second-degree arson arguing that her mother was not "another person" as required by one of the essentials elements of each charge. The trial court properly denied Defendant's motion to dismiss because established precedent is clear that a conviction on these charges only requires that the dwelling house be occupied by a person other than the defendant. This Court reviews the denial

of a motion to dismiss for insufficient evidence de novo. *State v. Rouse*, 198 N.C. App. 378, 381, 679 S.E.2d 520, 523 (2009).

To survive a motion to dismiss based on the sufficiency of the evidence, the State must present substantial evidence of (1) each essential element of the charged offense and (2) the defendant being the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000), *cert. denied*, 531 U.S. 890, 121 S. Ct. 213 (2000). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

Common law arson is defined as the willful and malicious burning of the dwelling house of another person. *State v. White*, 288 N.C. 44, 50, 215 S.E.2d 557, 561 (1975). Our Supreme Court has held that a house is considered a dwelling house when someone lives in it. *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982). The Supreme Court has also held that a house is the dwelling of another when someone other than the defendant resides there. *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982). Because of the compelling need to protect persons from willful and malicious burning of a dwelling, the element of another is satisfied by a showing that some

other person or persons, together with the defendant, were joint occupants of the same dwelling. *Id.* at 338, 289 S.E.2d at 331. Temporary absence from a dwelling by one or all of the people who live in a residence does not affect the status of the home as an inhabited dwelling for purposes of the crime of arson. *State v. Ward*, 93 N.C. App. 682, 379 S.E.2d 251 (1989), *rev. denied*, 325 N.C. 276, 384 S.E.2d 528 (1989).

A criminal conspiracy is an agreement between two or more persons to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975). "To constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object; rather, a mutual, implied understanding is sufficient…to constitute the offense." *State v. Abernathy*, 295 N.C. 147, 164, 244 S.E2d 373, 384 (1978).

On appeal, Defendant argues that the charges of second-degree arson and conspiracy to commit second-degree arson should be dismissed because a co-conspirator is not "another person" for the purposes of common law arson. This argument is without merit because it not supported by, and is contrary to, established precedent of this Court and our Supreme Court. On appeal, Defendant is only contesting the sufficiency of the evidence of the element of the dwelling house "of another person," and is not arguing that evidence of the other elements of the crimes was not sufficient.

At trial, the State presented ample evidence showing that the dwelling house in question was leased to, and occupied by, Defendant and Defendant's mother Ms. Jonnie Turner. (T.pp 103-104) Mary Ann Myers testified that Defendant told her during an interview that she lived with her mother at the home at the time of the fire. (T.p 286) Defendant also told Ms. Myers that a man named Troy Williams had moved out a couple of days before the fire. (T.p 286) Casey Silvers testified that from his post fire examination of the home, he found normal furnishing and personal effects that led him to conclude that the home was occupied at the time of the fire. (T.p 211) Cayla Young testified that Defendant told her that "there were some people staying with her that had already gone to the sheriff's department and given their statements… that they had heard her planning to burn the house down." (T.p 301) Detective Ronald Diaz testified that video footage showed Defendant and her mother driving to a storage unit, the day before the fire, to place belongings and personal items in the storage unit. (T.p 254) Philip Rathburn, Defendant's father, testified that Defendant admitted to him that she set fire to the home for her renter's insurance. (T.pp 309-310)

A structure is a 'dwelling of another' for the purposes of arson when it is inhabited by a person other than (or in addition to) the defendant at the time of its burning. *State v. Ward*, 93 N.C. App. 682, 685–87, 379 S.E.2d 251, 253–54, *disc. review denied*, 325 N.C. 276, 384 S.E.2d 258 (1989); *State v.*

Eubanks, 83 N.C.App. 338, 349 S.E.2d 884 (1986). Our Supreme Court has applied this precedent to co-tenancy in the case of *State v. Shaw* where the defendant was charged with common law arson for the burning of the rented home that he occupied with his wife, father in-law, and three children. *Shaw,* 305 N.C. 327, 289 S.E.2d 325 (1982). Defendant argued that the house was not the dwelling home of another because he also resided there. *Id.*

Our Supreme Court held that "the common law arson requirement that the dwelling burned be that of "another" is satisfied by a showing that some other person or persons, together with the defendant, were joint occupants of the same dwelling unit." *Id.* at 338, 289 S.E.2d at 331. In *Shaw*, the Court referred to prior precedent in *State v. Jones* where the Court noted that "the main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned." *Id.* at 337, 289 S.E.2d at 331, quoting *State v. Jones,* 296 N.C. 75, 77–78, 248 S.E.2d 858, 860 (1978). The Court found that the need for "protection from willful and malicious burning of a dwelling house" was so compelling that it was wise to apply it to joint occupancy situations. *Shaw,* 305 N.C. 337-338, 289 S.E.2d 331.

This holding is also reflected in the pattern jury instructions for second-degree arson, where, for single unit dwellings, a jury is instructed that "[i]f this [home] was the dwelling house of the defendant as well as that of

(an)other person(s), it would be the dwelling house of someone other than the defendant." N.C.P.I.-CRIM. 215.12 June 2019. In the instant case, the evidence clearly established that Defendant and her mother, and possibly others, were co-tenants at the time of the arson. Therefore, it was not error for the trial court to conclude that the evidence at trial was sufficient to show that the home was the dwelling house "of another" for the purposes of second-degree arson and conspiracy to commit second-degree arson and to deny Defendant's motion to dismiss.

Defendant contends that because she and her mother were co-conspirators, the home was not a dwelling house "of another." Defendant argues that there is no need to protect a co-conspirator from the risk of burning of the dwelling house and therefore the well-established precedent to the contrary should be modified to exclude situations where the torched dwelling house was only occupied by the defendant and a conspirator. This argument sharply diverges from current case law and is unconvincing for many reasons.

The crime of conspiracy is a separate and distinct crime from the crime of second-degree arson. A conspiracy by definition is complete when an agreement is reached between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975). A co-conspirator may not, and by

definition need not, participate in the actual crime that the co-conspirators first agreed to commit. Therefore, the need for "protection from willful and malicious burning of a dwelling house" that was identified in *Shaw* will remain just as paramount between cohabitating co-conspirators because there is no certainty that a conspirator will actually participate in the commission of the arson in such a way that their safety will be guaranteed. Undersigned counsel could find no prior precedent that a dwelling "of another" does not include a co-conspirator. Therefore, the Court should not depart from the long established rule that "of another" includes some person other than the Defendant, and redefine it to exclude co-conspirators.

The denial of the Defendant's Motion to Dismiss both charges was proper because the State presented sufficient evidence of each essential element of the charges, specifically that the home was occupied by someone other than Defendant. Therefore, the denial should be upheld on appeal.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO EXCLUDE THE OPINION TESTIMONY OF CASEY SILVERS BECAUSE THE TRIAL COURT BASED ITS DECISION ON THE FACTORS SET FORTH IN 702(a) AND DAUBERT AFTER HEARING THE AMPLE FOUNDATION TESTIMONY OF THE EXPERT WITNESS.

At the hearing on Defendant's motion to disqualify and at trial, the trial judge heard substantial testimony from Mr. Silvers on how he used an

acceptable fire investigation method to examine Defendant's house and to reach conclusions regarding the origin and cause of the fire. Defendant did not offer any competing expert, exhibit, or learned treatise for the trial court's consideration or to discredit the State's expert. The trial court did not abuse its discretion in allowing the State's expert to offer his conclusions on the cause of the fire because, after hearing the testimonial foundation for Mr. Silvers' opinion, the trial court explicitly based its decision to allow the testimony on the factors contained in *Daubert* and in Rule 702(a) of the North Carolina Rules of Evidence. (T.pp 160-162)

Our Supreme Court holds that a trial court's discretionary decision to admit or exclude expert testimony is entitled to deference on appeal. *Crocker v. Roethling*, 363 N.C. 140, 152, 675 S.E.2d 625, 634 (2009). This is because the trial judge, in witnessing *voir dire*, "has the advantage of seeing and hearing the witness[]" and making observations which the cold record denies to a court on review. *Crocker v. Roethling*, 363 N.C. at 152, 675 S.E.2d at 634 (quoting *State v. Lasiter*, 361 N.C. 299, 305, 643 S.E.2d 909, 912 (2007)). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

A. Rule of Evidence 702(a) and McGrady

In *State v. McGrady* our Supreme Court offered a detailed analysis and interpretation of the 2011 amendment to Rule of Evidence 702 and the standard for admitting expert testimony in North Carolina. 368 N.C. 880, 787 S.E.2d 1 (2016). Expert testimony must satisfy all of the three parts of Rule of Evidence 702(a) to be admissible. *Id.* at 889, 787 S.E.2d at 8. First, the testimony must be based on "scientific, technical or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. R. Evid. 702(a). The Court noted that "the relevance inquiry discussed in both *Daubert* and *Howerton*" was an inquiry involved in the first factor identified in Rule 701(a) and that "the testimony must meet the minimum standard for logical relevance that Rule 401 establishes." *Id.* Second, the witness must demonstrate that they are "qualified as an expert by knowledge, skill, experience, training, or education." N.C. R. Evid. 702(a). "This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony." *McGrady* at 889, 787 S.E.2d at 9. Third, the witness' testimony must meet "the three-pronged reliability test" contained in Rule 702(a)(1-3) that: "(1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The

witness [must have] applied the principles and methods reliably to the facts of the case." *McGrady* at 890, 787 S.E.2d. at 9. (quoting N.C. R. Evid. 702(a)(1)–(3).) The Supreme Court noted that on this part, "[t]he trial court 'must have the same kind of latitude in deciding how to test an expert's reliability ... as it enjoys when it decides whether that expert's relevant testimony is reliable.'" *McGrady* at 890, 787 S.E.2d. at 9. (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). The standard discussed in *McGrady*, rather than strict adherence to NFPA 921, is the standard that governs admissibility of expert witness testimony in North Carolina.

B. Analysis of Factors 1 and 2

The trial court offered a detailed explanation of the evidence that it considered in support of the first two factors identified in *McGrady* and required by Rule 702(a) to make its determination that it would admit the expert testimony of Casey Silvers. (T.pp 160-162) In properly applying the first factor of admissibility, the trial court noted that "the expert's testimony will in fact assist the trier or fact with an otherwise somewhat confusing area of specialized knowledge." (T.p 161) The trial court went on to state that the expert's specialized knowledge "will assist the trier of fact to understand the evidence or determine some facts." (T.p 161) The trial court correctly

determined that Mr. Silvers' testimony would be relevant to the facts and issues in controversy and that his specialized knowledge would assist the trier of fact in understanding the evidence or determining facts such as what the evidence collected from the fire scene showed, where the fire occurred, and potential sources of the fire.

This determination was supported by the detailed testimony from Casey Silvers regarding his work history, training in the area of fire investigation and evidence collection, certifications as a fire investigator, ongoing yearly education, work as a teacher in his field, work as a senior fire investigator, work investigating over 800 fires, and his prior testimony as an expert in other civil and criminal cases. (T.pp 111-116) Regarding the second factor of admissibility, this testimony was sufficient to support the trial court's conclusion that Mr. Silvers "is qualified by his knowledge, skill, experience, training and education, that he [sic] based upon his training, education is competent to testify in these matters." (T.p 161)

C. Three Prong Reliability Test

The trial court next analyzed the factors "under the three prong reliability test" contained Rule 702(a)(1-3). (T.p 161) Here, the trial court demonstrated its awareness and understanding of the three prongs identified in Rule 702(a)(1-3). The trial court first noted that it only needed to apply

this analysis to Mr. Silver's opinion on causation and not on origin because that was no longer contested by Defendant. (T.p 161) Defendant previously withdrew her motion to disqualify the State's expert, and the Defendant's counsel stated that he was not objecting to Mr. Silvers' opinion on the fire origin. (T.pp 149, 157) The trial court found that Mr. Silvers' opinion on the fire origin was "based upon data, evidence, observations, [sic] testing principles that the expert relied upon to determine that conclusion, not the least of which was his own investigation at the scene sifting through all the layers of the fire." (T.p 162) The trial court did not offer explicit findings relative to Rule 702(a)(2) and (3). Nevertheless, the trial court's admission of the testimony of Casey Silvers was well reasoned, consistent with Rule 702(a), and well supported by the record and transcript.

On appeal it is apparent that Mr. Silvers' investigation of the cause of the fire was based on sufficient facts and data and was consistent with Rule 702(a)(1). Mr. Silvers testified at length about the facts and data he gathered and interpreted, such as his method of investigation and use of the procedures recommended by NFPA 921; his detailed inspection of the interior and exterior of the home for smoke, flame, and burn patterns; his method of examining each room; his examination of the electrical branch circuits in affected rooms; methodically sifting through layers of fire debris and collecting samples; examining room contents for potential ignition sources;

reviewing weather reports for the area; and reviewing fire reports, investigations, and witness statements. Mr. Silvers testified that this data and information is then used in the next phase of his investigation. This testimony provides an adequate basis to determine that his testimony was based on sufficient facts and data.

After discussing its findings relative to Rule 702(a)(1), the trial court then addressed how it would handle the issue of Mr. Silver's conclusion on his exclusion of all possible fire causes with the exception of an incendiary cause. The trial court determined that it would allow the conclusion with a limiting instruction to the jury that "that is not to be relied upon, that that means a certain thing." (T.p 162) The trial court wanted to avoid juror confusion on this issue and to be clear to the jury that Mr. Silvers "couldn't exclude [an incendiary cause] by his scientific means" and that did not mean "that's what happened." (T.p 164)

Mr. Silvers' conclusion that he could exclude all ignition sources with the exception of an incendiary cause, while perhaps not an opinion on its own, was satisfactory to the trial court after applying a Rule 702 analysis. Although the trial court did not make specific findings relative to 702(a)(2) and (3), such findings are not required under Rule 702. In *McGrady*, our Supreme Court noted that Rule 702a "does not mandate particular 'procedural requirements for exercising the trial court's gatekeeping function

over expert testimony.'" *McGrady* at 892, 787 S.E.2d at 11. (quoting Fed. R. Evid. 702 advisory committee's note to 2000 amendment) The trial court did not err in its application of Rule 702(a), nor in its ruling to allow Mr. Silvers to offer this conclusion at trial.

Mr. Silvers' investigation of the cause of the fire was based on reliable principles and methods and was consistent with Rule 702(a)(2). On this factor, the record shows that Mr. Silvers holds two certifications as a certified fire investigator; that he is thoroughly educated in conducting fire investigations and takes annual training on conducting fire investigations; that he uses the scientific method recommended by NPFA 921; and that he applies his specialized knowledge and training to test hypotheses and to exclude them to reach a final opinion on fire cause. This testimony provides an adequate basis to conclude that his conclusions and his testimony at trial were the result of the application of accepted standards, the scientific method and principles of fire investigation, and were based on reliable principles and methods.

Mr. Silvers' testimony, consistent with Rule 702(a)(3), established that he applied the scientific principles and methods of fire investigation to the specific facts of this case and the fire scene he investigated. At the motion hearing, and at trial, Mr. Silvers gave the court an exhaustive explanation of how he formulated, tested, and attempted to eliminate all possible fire cause

hypotheses; how his hypotheses and experiments were all consistent with NFPA 921; and the reasons he was able to exclude each hypothesis on fire cause, save one. Based on the science and data observed, he was not able to explain why the patterns and observations he made were present at origin site of the fire and; therefore, he could not exclude an incendiary causation hypothesis. (T.p 206) He did not give an opinion that an incendiary cause was the cause of this fire. This exhaustive testimony provides an adequate basis to conclude that his testimony was based on reliable principles and methods, specifically the application of the scientific method as adopted by NFPA 921.

The trial court properly applied Rule 702(a) in admitting the testimony of Casey Silvers. The ruling is supported by the record and is the result of sound reasoning. Therefore, it should be upheld on appeal.

D. NFPA 921 and Negative Corpus

There is no indication that Casey Silvers deviated from the standard set by NFPA 921. Mr. Silvers testified that he followed the scientific method recommended by NFPA 921 in investigating the fire that occurred at Defendant's home and in testing and eliminating hypotheses as to cause. (T.pp 117-118, 174, 185-186, 214) On appeal, Defendant contends that Mr. Silvers deviated from NFPA 921 and used an unreliable approach to reach

his conclusions. This is not correct, and even if it were correct, NFPA 921 is not the standard for admitting expert testimony.

Section 19.6.5 of the 2017 of National Fire Prevention Act 921 on Fire and Explosion Investigation states:

> Appropriate Use. The process of elimination is an integral part of the scientific method. All potential ignition sources present, or believed to be present in an area of origin should be identified and alternative hypotheses should be considered and challenged against the facts. Elimination of a testable hypothesis by disproving the hypothesis with reliable evidence is a fundamental part of the scientific method. However, the process of elimination can be used inappropriately. Identifying the ignition source for a fire by believing to have eliminated all ignition sources found, known, or suspected to have been present in the area of origin, and for which no supporting evidence exists, is referred to by some investigators as *negative corpus*. Determination of the ignition source must be based on data or logical inferences drawn from the data. Negative corpus has typically been used in classifying fire as incendiary, although the process has also been used to characterize fires as accidental. The negative corpus process is not consistent with the scientific method, is inappropriate, and should not be used because it generates untestable hypotheses, and may result in incorrect determinations of the ignition source and first fuel ignited. Any hypotheses formulated for the causal factors (e.g., first fuel, ignition source, and ignition sequence), must be based on the analysis of facts and logical inferences that flow from those facts. Those facts and logical inferences are derived from evidence, observations, calculations, experiments, and the laws of science. Speculative information cannot be included in the analysis.

NFPA 921, ¶ 19.6.5 (2017 ed.)

This section identifies negative corpus as determining an ignition source, which is unsupported by data or logical inferences, by eliminating all known ignition sources. This is not what Mr. Silvers did because his

conclusion was only that he could "not exclude an incendiary causation." (T.p 206) He also concluded that he "believe[d] the use of ignitable liquid" was the cause of the fire. (T.p 213) He did not offer an opinion in his report or to the jury that the ignition source for the fire was an incendiary cause. To the contrary, at the motion hearing he states that he did not classify this fire. (T.p 143) Because he did not offer an opinion as to the ignition source of the fire, only that an incendiary source could not be disproved, Casey Silvers did not utilize the approach disfavored by NFPA 921.

On appeal, Defendant attempts to cast doubt on Mr. Silvers' testimony by referencing a number of sources that discuss NFPA 921. It is important to note that the trial court found that no learned treatise was offered by the Defendant at the motion hearing. (T.p 161) Therefore, any purportedly authoritative non-legal sources or journals on the topic of fire investigation or fire science now offered by Defendant on appeal should not be considered by this Court because they were not considered by the trial court and because they are improperly before the Court pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure.

Rule 702 and *Daubert,* and not NFPA 921, exclusively govern the standard for admissibility of expert testimony. Deviation from NFPA 921 will not bar expert testimony if the trial court is satisfied that the factors of Rule 702, including that the testimony is the product of reliable principles

and methods, are met. Here, the trial court heard substantial testimony that Mr. Silvers based his investigation on the scientific method which itself is a reliable method. If Mr. Silvers had deviated from NFPA 921, the trial court would not have erred in admitting his testimony because the record is sufficient to support a discretionary decision under Rule 702(a).

E. No Prejudicial Error

Even if Defendant can show that it was error to admit this testimony, Defendant cannot show that it was prejudicial error. Even when an abuse of discretion occurs, a defendant is not entitled to a new trial unless the error was prejudicial. *State v. Cook,* 193 N.C. App. 179, 185, 666 S.E.2d 795, 799 (2008). Prejudicial error exists "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." N.C. Gen. Stat. § 15A–1443(a) (2015). Defendant bears the burden of showing prejudice. *Id.* Defendant cannot show prejudicial error because, in the absence of this one conclusion, it is likely that the jury would have reached the same conclusion. The State offered compelling evidence of Defendant's guilt through the testimony of multiple witnesses and most importantly the testimony of Philip Rathburn that Defendant confessed to starting the fire for insurance proceeds. With this compelling evidence, it is not likely that the outcome at trial would have differed.

III. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN ITS INSTRUCTION TO THE JURY ON INSURANCE FRAUD.

Defense counsel did not object to the jury instruction on the charge of insurance fraud. (T.p 378) A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict. N.C. R. App. P. 10(a)(2). Because defendant did not object at trial, this Court reviews the instructions for plain error. N.C. R. App. P 10(a)(4)

A seminal case on plain error in jury instructions is *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 333 (2012). In *Lawrence*, our Supreme Court held that the adoption of the plain error rule does not mean that every failure to give a proper instruction mandates reversal, regardless of the defendant's failure to object at trial. To so hold would negate Rule 10(b)(2) [now codified as 10(a)(2)] which is not the intent or purpose of the plain error rule. *Id* at 517, 723 S.E.2d at 333.

Lawrence also held that to establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict. *Id.* at 518, 723 S.E.2d at 334. Even when the plain error rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. *Id.* at 517, 723 S.E.2d at 333.

In this case, the indictment charged Defendant with insurance fraud to State Farm for presenting "a written and oral statement as part of and in support of a claim for payment pursuant to an insurance policy, Renter's Insurance policy (Policy No. 33CTX7722), owned by the defendant, knowing that the statement contained false and misleading information, defendant claimed that her personal property was destroyed by an accidental fire. The statement concerned a fact and matter material to the claim." (R.p 10) In the jury instructions, the Court correctly told the jury that "the defendant has been charged with presenting a false statement under an insurance policy with the intent to defraud the insurance company." (T.p 375) That "…to find the defendant guilty of this offense the state must prove five things beyond a reasonable doubt." (T.p 375) The charge relevant to this appeal is "[s]econd, that the defendant presented an oral statement as part of or in support of a claim for payment or a benefit pursuant to the insurance policy." (T.p 375)

The evidence at trial was clear on the statement made by Defendant to State Farm. At trial, Mary Ann Myers, the State Farm agent assigned to the claim, testified that she met with Defendant to take her in-person recorded statement regarding her claim and the fire. (T.pp 283, 285) During this recorded statement, Defendant told Ms. Myers that she thought that the fire was electrical because of electrical problems in the home. (T.p 290) She

told Ms. Myers multiple details regarding her actions on the night of the fire, including that she left her home to go dumpster diving with her mother, and while doing so, a police officer called to tell her that her home was on fire. (T.p 291) This oral statement to Ms. Myers was false, and the statements from Defendant were offered to further an insurance claim that Defendant had falsely filed with State Farm. The evidence fully supported the court's instructions to the jury.

"The failure of the allegations to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction." *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986). When comparing the indictment, the evidence presented, and finally the jury instructions, there was perfect conformity in these three items, and thus no variance regarding an oral statement made to an insurance company in support of the claim. Furthermore, the jury instructions given to the jury were proper because they did not allow the jury to convict Defendant on grounds other than those charged in the indictment.

Defendant waived any objection to the court's instructions. The instruction was proper and there was no error in the court's instructions, and certainly no plain error. The facts presented on this issue do not make it "the rare case in which an improper instruction will justify reversal of a

criminal conviction when no objection has been made in the trial court." *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 333 (2012).

IV. THE COURT SHOULD REMAND THIS MATTER FOR A NEW HEARING ON RESTITUTION.

The restitution order in this case is not adequately supported by the record or transcript. "[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) Unsworn statements made by a prosecutor are insufficient to support a restitution order as is "the mere presentation of [a restitution] worksheet. *Wilson*, 340 N.C. at 727, 459 S.E.2d at 196. In this case, the appropriate remedy is to vacate the restitution order and "to remand the case solely for resentencing on restitution." *State v. Murphy*, 261 N.C. App. 78, 85, 819 S.E.2d 604, 608 (2018); *see also State v. Hunt*, 250 N.C. App. 238, 792 S.E.2d 552 (2016).

CONCLUSION

For the foregoing reasons the State requests that this Court uphold Defendant's convictions and find no error on the part of the trial court on issues one through three. Furthermore, the State requests that the restitution order be vacated and the case be remanded for resentencing solely on the issue of restitution.

This the 2nd day of October, 2020.

JOSHUA H. STEIN
ATTORNEY GENERAL

/s/ Thomas J. Felling
Thomas J. Felling
Assistant Attorney General

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6610
N.C. State Bar #42824
tfelling@ncdoj.gov

CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)

Undersigned counsel certifies that the Brief for the State is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Word, the program used to prepare the brief.

This the 2nd day of October, 2020.

JOSHUA H. STEIN
ATTORNEY GENERAL

/s/ Thomas J. Felling
Thomas J. Felling
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Brief for the State** was served upon the Attorney of record for Defendant-Appellant by electronic mail, at the electronic mail addresses set out below:

Warren D. Hynson
Attorney at Law
whynson@amrlawnc.com

This the 2nd day of October, 2020.

JOSHUA H. STEIN
ATTORNEY GENERAL

/s/ Thomas J. Felling
Thomas J. Felling
Assistant Attorney General