No. COA 20-139 SIXTEENTH judicial district

NORTH CAROLINA COURT OF APPEALS

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State of North Carolina )

 )

v. ) From Robeson County

 ) 15 CRS 53022

SHANNON NICOLE CHAVIS )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUES PRESENTED**

1. Did the trial court err by denying Ms. Chavis’s motion to dismiss where the evidence showed that the taser at issue was not a “dangerous weapon?”
2. Did the trial court err by expressing a judicial opinion, during jury instructions, that the taser at issue was a dangerous weapon?
3. Did the trial court commit plain error where it failed to provide the jury with sufficient instruction on the term “serious bodily injury?”
4. Did Ms. Chavis receive *per se* ineffective assistance of counsel where her trial attorney conceded her guilt of common law robbery and the record does not show that her consent was knowing and voluntary?
5. Did the trial court reversibly err in multiple ways in holding Ms. Chavis in direct criminal contempt?

**STATEMENT OF THE CASE**

 Defendant-Appellant Shannon Nicole Chavis was indicted on 4 April 2016 for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Ms. Chavis was tried on these charges at the 25 February 2019 Criminal Session of the Superior Court in Robeson County before the Honorable James Gregory Bell. (R pp 1, 10; T p 1)

On 25 February 2019, the trial court held Ms. Chavis in direct criminal contempt and sentenced her to 30 days imprisonment in the Robeson County jail. (R pp 1, 22-26; T pp 10-11)

At the close of the State’s evidence, Ms. Chavis moved to dismiss both charges. The trial court denied her motion and the defense did not present evidence. The jury found Ms. Chavis guilty of both charges. (R pp 1, 43-44; T pp 123‑26, 149‑51)

On 27 February 2019, the trial court entered judgment and sentenced Ms. Chavis to 111 to 146 months of active imprisonment for the robbery charge, followed by 44 to 65 months of active imprisonment for the conspiracy charge. (R pp 1, 48-51) Both sentences were set to follow the 30 day sentence imposed for direct criminal contempt. (R pp 1, 22-26) Ms. Chavis entered oral notice of appeal in open court. (R pp 1, 52)

**GROUNDS FOR APPELLATE REVIEW**

Ms. Chavis appeals from final judgments of the Superior Court in Robeson County pursuant to ‑N.C. Gen. Stat. §§ 7A-27(b) and 15A‑1444‑.

**STATEMENT OF THE FACTS**

 On 25 February 2019, Ms. Chavis was on trial in Robeson County for the 2015 robbery of Raymond Pittman Jones. (T pp 1, 35-49) Defense counsel conceded during closing arguments that Ms. Chavis was guilty of common law robbery but argued that she was not guilty of robbery with a dangerous weapon. (T p 135) Following counsel’s closing, the trial court conducted a short *Harbison* inquiry to make sure Ms. Chavis had consented to admitting guilt of the lesser‑included offenses. (T pp 134‑36) She confirmed she had given her permission. (T p 138) In light of that concession, the central issue the jury had to decide was whether the weapon involved in the robbery—a stun gun described in State’s Exhibits 10 and 11 as “a flashlight taser”—qualified as a “dangerous weapon” within the meaning of the armed robbery statute. In making this determination, the jury was instructed that “a dangerous weapon is a weapon which is likely to cause death or serious bodily injury” but was not provided any definition of the term “serious bodily injury.” (T pp 141-42)

 The robbery that led up to Ms. Chavis’s trial occurred on 7 May 2015, shortly before 2 p.m. (T pp 53‑54, 72) The victim, an 81‑year-old man, was living in a small house near UNC Pembroke. (T pp 36, 42) Mr. Jones had previously dated Ms. Chavis’s mother and given Ms. Chavis money. (T pp 36-37, 43-44) Mr. Jones was on several different medications at the time, including prescriptions to address his high blood pressure, cholesterol, muscle spasms, arthritis, and pain. (T pp 39, 50, 65‑67) He had a pacemaker and had been treated several years earlier for cancer. (T pp 39, 67, 73) An investigating officer described him as a “very feeble” old man. State’s Exhibit 11 p 11.[[1]](#footnote-1) At trial, Mr. Jones recognized Ms. Chavis but could not remember her name. (T p 36)

Mr. Jones’ description at trial of the robbery largely mirrored what Ms. Chavis told the police eight days after the offense. Ms. Chavis, her sister Crystal, and her boyfriend Brian were staying at a Budget Inn when they formed a plan to rob Mr. Jones of some combination of guns, pills, and cash. They did not plan to assault him. (T pp 35-49); State’s Exhibit 11 pp 3-4, 7, 11-12. After making their plans, the group of three drove to Mr. Jones’ house in a gold-colored Cougar and parked. (T pp 61‑62)

Crystal, the driver, never left the car. State’s Exhibit 11 pp 2‑3, 9‑10. Brian got out, walked up to the side door of the house, knocked, and asked Mr. Jones about his pills. When Mr. Jones refused to let Brian in,[[2]](#footnote-2) Ms. Chavis went up to speak with Mr. Jones. Then, when Mr. Jones also refused to allow Ms. Chavis in, she pushed him back and forced her way inside. (T pp 37-38); State’s Exhibit 11 pp 2-3.

 Once Ms. Chavis was inside the house, Mr. Jones went for his walking stick to defend himself and threatened to hit Ms. Chavis with it.[[3]](#footnote-3) (T pp 39-40) Brian overheard Mr. Jones’ threat, rushed into the house, knocked Mr. Jones onto the couch and then to the floor. (T pp 39‑40, 45‑46); State’s Exhibit 11 pp 3-7. Brian held Mr. Jones down, punched him several times, went through his pockets, and took Mr. Jones’ wallet. In addition to punching him, Brian likely also hit Mr. Jones with his own walking stick. (T pp 78, 121-22); State’s Exhibit 7A (witness statement that Mr. Jones “said that the girl hit him with a taser and that they also hit him with a stick”).

 Both Mr. Jones and Ms. Chavis’s video-recorded statement addressed Ms. Chavis’s use of the taser during the robbery. Mr. Jones testified at trial that Ms. Chavis, using “the little gun she had,” tased him “two or three times” on “the back of [his] neck behind [his] ear area” while Brian was on top of him on the floor. (T p 40) Similarly, Ms. Chavis told police that “[a]fter Brian had hit him about two or three times, and then [Mr. Jones] was trying to get up and then I tased him.” State’s Exhibit 11 p 4. During this interview, Ms. Chavis used her hands to signal that the taser was small, around four or five inches long, and operated by the user’s thumb. State’s Exhibit 10, 10:10 – 10:18.

After the assault, but before Brian and Ms. Chavis finished ransacking the house and left, Mr. Jones got up off the ground and sat in his chair. State’s Exhibit 11 p 12. Brian, Ms. Chavis, and Crystal ultimately took two jars filled with around $270 in coins, $42 in cash from Mr. Jones’ wallet, and Mr. Jones’ cell phone. (T pp 16, 41) From start to finish, the robbery lasted somewhere between 5 and 20 minutes. (T pp 52, 81)

Several photos introduced during the trial, as well as witness testimony, showed the extent of Mr. Jones’ injuries. State’s Exhibit 4, a photograph of Mr. Jones taken shortly afterward, showed him with a knot on his forehead and bleeding from his right ear. State’s Exhibit 5, another photograph, showed the same bleeding, as well as what appear to be small burn marks on the back, right side of his neck. These marks corresponded with the descriptions of where Ms. Chavis used the stun gun. Mr. Jones’ neighbor, Shirley Lowery, describe seeing these injuries shortly after the robbery and explained that she called 911 to seek treatment for the bleeding in his ear. (T pp 73-79) The officer who responded to that call, Charles Maynor, described seeing “a burn mark behind [Mr. Jones’s] ear” and took the photos that were admitted as State’s Exhibits 1 through 7. (T pp 54‑59) EMS did not arrive until Maynor had already been there for 45 minutes. (T pp 63-64)

 Based on these events, Ms. Chavis was indicted for robbery with a dangerous weapon and conspiracy to commit that offense, with the robbery indictment naming “hands and a taser” as the dangerous weapon. (R p 10) Even though she was facing a Class D felony, Ms. Chavis asked at the start of trial to be placed on probation, and even after the jury returned verdicts, believed she was entitled to “three plea[]” offers from the State. (T pp 7-8, 154)

As the case proceeded through trial, the State offered testimony from five witnesses, including Mr. Jones, Mr. Jones’ neighbor, and two of the investigating officers. (T p 26) Following the presentation of the State’s case and the denial of Ms. Chavis’s motion to dismiss, the trial court held a short charge conference. (T pp 123‑27) Both sides agreed to the submission of common law robbery and conspiracy to commit common law robbery as lesser-included offenses of the crime charged. (T p 128) In closing, defense counsel conceded that Ms. Chavis was guilty of the lesser-included offenses, and following a short *Harbison* colloquy, Ms. Chavis confirmed that counsel had “[her] permission to concede that [she] was guilty” of those offenses. (T pp 134‑36)

Following this colloquy, the trial court instructed the jury on the offenses of which it could find Ms. Chavis guilty. (T pp 136-48) Regarding the most serious charge, robbery with a dangerous weapon, the trial court instructed the jury on the elements as follows:

All right. Robbery with a dangerous weapon. The defendant has been charged with robbery with a dangerous weapon, which is taking and carrying away the personal property of another from his person or in his presence without his consent by endangering or threatening a person’s life with a dangerous weapon--in this case it’s a taser--the taker knowing that she was not entitled to take the property and intending to deprive another of its use permanently.

For you to find the defendant guilty of this offense, the State must prove seven things beyond a reasonable doubt:

first, that the defendant took property from the person of another or in his presence;

second, that the defendant carried away the property;

third, the person did not voluntarily consent to the taking and carrying away of the property;

fourth, that the defendant knew he was not entitled to take the property;

fifth, that at the time of the taking the defendant intended to deprive that person of its use permanently;

sixth, that the defendant had a dangerous weapon in her possession at the time she obtained the property or that it reasonably appeared to the victim that the dangerous weapon was being used, in which case you may infer that said instrument was what the defendant’s conduct was--represented it to be,

and a dangerous weapon is a weapon which is likely to cause death or serious bodily injury, and, in this case, you are to consider whether the taser is a deadly weapon--dangerous--sorry--dangerous weapon;

seventh, that the defendant obtained the property by endangering or threatening the life of that person with the dangerous weapon.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant had in her possession a dangerous weapon and took and carried away property from the person or in the presence of a person without his voluntary consent by endangering or threatening his life with the use or threatened use of a dangerous weapon, the defendant knowing that he was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty of robbery with a dangerous weapon. If you do not so find--if you do not find the defendant guilty of robbery with a dangerous weapon, you must determine whether the defendant is guilty of common law robbery.

(T pp 141-42) (paragraph breaks added)

The trial court thus told the jury it would have to “consider” whether the taser at issue was a “dangerous weapon” and defined that term as “a weapon which is likely to cause death or serious bodily injury.” The trial court did not define the term “serious bodily injury.”

Even though the central issue the jury had to decide was whether the taser was a “dangerous weapon,” the trial court twice named the taser as a dangerous weapon during its instructions. First, during the instruction on robbery with a deadly weapon, the trial court referred to “a dangerous weapon - - in this case it’s a taser.” (T p 141) Second, during the instruction on conspiracy to commit robbery with a dangerous weapon, the trial court said the State would have to prove that Ms. Chavis “entered into an agreement . . . to commit robbery with a dangerous weapon . . . in this case a taser . . . .” (T p 144)

Following these instructions, the jury found Ms. Chavis guilty of robbery with a dangerous weapon and conspiracy to commit that offense. The trial court entered judgment and Ms. Chavis entered oral notice of appeal in open court. (R pp 43‑44, 48-52)

**ARGUMENT**

**I.** **The trial court erred by denying Ms. Chavis’s motion to dismiss because the evidence showed that the taser at issue was not a “dangerous weapon.”**

The evidence showed that Ms. Chavis was guilty of common law robbery and conspiracy to commit common law robbery. She admitted as much in closing. But the evidence also showed that she was not guilty of robbery with a dangerous weapon or conspiracy to commit that offense. As the trial court instructed the jury, to qualify as a dangerous weapon within the meaning of the armed robbery statute, a weapon must be likely to cause death or serious bodily injury.

The potentially “dangerous weapon” listed in the indictment, described in the evidence, and named in the jury instructions—a four or five inch “flashlight taser,”—did not meet this high standard. Even with an elderly victim burdened by medical problems, the taser caused only superficial burns to the back of his neck. The more serious injuries—a knot on his head and bleeding from his ear—almost certainly came from Brian punching Mr. Jones or hitting him with the walking stick. In contrast, the evidence did not show the taser was capable of causing death or serious bodily injury to Mr. Jones or anyone else. Ms. Chavis was therefore guilty of common law robbery and conspiracy to commit that offense, but not guilty of the greater charges. The trial court should have allowed the motion to dismiss in part, and this Court should reverse in part.

1. **Preservation and the standard of review.**

Without specific argument, Ms. Chavis made a global motion to dismiss based on insufficient evidence at the close of the State’s case in chief. (T p 123) The trial court denied the motion and Ms. Chavis declined to present evidence. (T pp 124-26) Ms. Chavis’s general motion to dismiss was sufficient to preserve all claims based on insufficient evidence. *E.g.*, *State v. Glisson*, 251 N.C. App. 844, 847, 796 S.E.2d 124, 127 (2017).

“The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*.” *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations 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. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

1. **The State’s evidence showed that the taser at issue was not a “dangerous weapon.”**

 A trial court should allow a defendant’s motion to dismiss based on insufficient evidence unless the record includes substantial evidence of each element of each offense. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). Evidence is substantial only where, viewed in the light most favorable to the State, it would suffice to support a rational conclusion that the defendant had committed the offense alleged. *Id.*, 782 S.E.2d at 881. Moreover, “[t]he Due Process Clause of the United States Constitution requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed.” *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (citation omitted); *accord* *State v. Helms*, 373 N.C. 41, 45, 832 S.E.2d 897, 899 (2019).

“The elements of robbery with a dangerous weapon are: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened.” *State v. Rivera*, 216 N.C. App. 566, 568, 716 S.E.2d 859, 860 (2011) (citing N.C. Gen. Stat. § 14-87). “The critical and essential difference between armed robbery and common law robbery is that . . . for armed robbery the victim must be endangered or threatened by the use or threatened use of a firearm or other dangerous weapon . . . .” *State v. Bailey*, 278 N.C. 80, 87, 178 S.E.2d 809, 813 (1971) (citation and internal quotation marks omitted)).

To qualify as a “dangerous” or “deadly” weapon, a weapon must be likely to cause death or seriously bodily injury. *See, e.g.*, *State v. Murrell*, 370 N.C. 187, 194 n.1, 804 S.E.2d 504, 509 n.1 (2017) (“A ‘well-accepted definition of a deadly weapon in this State’ is ‘a weapon which is likely to cause death or serious bodily injury.’” (quoting *State v. Sturdivant*, 304 N.C. 293, 303, 283 S.E.2d 719, 727 (1981))); *accord* *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (defining a deadly weapon as “any instrument which is likely to produce death or great bodily harm under the circumstances of its use”).[[4]](#footnote-4) Our General Statutes define “serious bodily injury” as follows:

“Serious bodily injury” is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4(a) (assault inflicting serious bodily injury); *accord* N.C. Gen. Stat. § 14-318.4 (using the same definition for felony child abuse); *see also* N.C. Gen. Stat. § 14-23.5(b) (using a similar definition for “serious bodily harm”).

“Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim’s perception of the instrument and its use.” *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985) (citations omitted)). “If all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.” *Rivera*, 216 N.C. App. at 568, 716 S.E.2d at 861 (citation omitted).[[5]](#footnote-5)

Here, Ms. Chavis was charged with robbery with a dangerous weapon, and conspiracy to commit that offense, based on the use of a small “flashlight taser.” That was the dangerous weapon alleged in the indictment. (R p 10) That was the only potentially dangerous weapon named in the jury instructions. (R pp 29-42; T pp 136‑49)

The evidence presented at trial showed that the taser was not a “dangerous weapon” within the meaning of the armed robbery statute. The facts of this case are uncomfortable and unsettling. Mr. Jones was 81 years old at the time of the robbery. In his advanced age, Mr. Jones was on multiple medications, had a pacemaker, and had survived cancer. Ms. Chavis pushed her way in to Mr. Jones’ house; Brian followed, knocked Mr. Jones down, punched him several times, and beat him with his own walking stick. While Mr. Jones was on the ground, Ms. Chavis tased Mr. Jones two or three times on the back of his neck. Then, after ransacking his house, the robbery netted a total of a little more than $300.

Yet at the end of the assault, Mr. Jones picked himself up and sat back in his chair, then walked outside to tell a neighbor what had happened. Because there was no evidence Ms. Chavis hit him with the taser, the most significant injuries Mr. Jones suffered—the knot on his head and bleeding from his right ear—almost certainly resulted from Brian punching him or hitting him with the walking stick. As State’s Exhibits 4 and 5 illustrate, the taser itself left little more than superficial burn marks. Moreover, EMS didn’t arrive to take Mr. Jones for treatment until officers had been on the scene for at least 45 minutes, suggesting that the medical professionals who responded did not view any of his injuries as life-threatening or even particularly urgent.

In sum, if the taser used here could not cause more than superficial injuries under the circumstances presented by this case, then it very likely could not cause death or serious bodily injury to anyone. Accordingly, the trial court should have allowed the motion to dismiss the more serious offenses while still submitting common law robbery and conspiracy to commit common law robbery to the jury.

1. **The appropriate remedy is to reverse in part the denial of the motion to dismiss and remand for a new trial on the lesser-included offenses.**

 By statute, the appropriate remedy is to reverse the denial of the motion to dismiss in part, and remand for a new trial on the lesser‑included offenses. N.C. Gen. Stat. § 15A‑1447‑ provides in relevant part:

If the appellate court finds that the evidence with regard to a charge is insufficient as a matter of law, the judgment must be reversed and the charge must be dismissed unless there is evidence to support a lesser included offense. In that case the court may remand for trial on the lesser offense.

N.C. Gen. Stat. § 15A-1447(c).

In the alternative, this Court should treat the verdicts as verdicts of guilt of the lesser-included offenses, common law robbery and conspiracy to commit common law robbery, and remand for resentencing and entry of judgment on those offenses. *See, e.g.*, *State v. Stokes*, 367 N.C. 474, 482, 756 S.E.2d 32, 38 (2014) (“By finding defendant guilty of second-degree kidnapping, the jury necessarily found beyond a reasonable doubt all the elements of the lesser included offense . . . . We leave the verdict undisturbed, but recognize it as a verdict of guilty of the lesser included offense.”).

1. **The trial court erred by expressing a judicial opinion, during jury instructions, that the taser at issue was a dangerous weapon.**

Because defense counsel conceded Ms. Chavis’s guilt of the lesser‑included offenses, the central question of fact the jury had to resolve was whether the taser at issue was a “dangerous weapon” within the meaning of the armed robbery statute. The trial court identified the taser as a dangerous weapon at least twice during its final instructions.

In violation of the statutory mandates imposed by N.C. Gen. Stat. §§ 15A‑1222 and 1232‑, the trial court’s instructions conveyed to the jury that the court itself thought the taser was in fact a dangerous weapon. Had the trial court not expressed its opinion on the subject, there is at least a reasonable possibility that at least one juror would have doubted whether the flashlight taser could inflict death or serious bodily injury. Accordingly, this Court should vacate the judgment and remand for a new trial.

1. **Preservation and the standard of review.**

A claim that the trial court violated or acted contrary to a statutory mandate is automatically preserved for appellate review, regardless of objection in the trial court, and is reviewed *de novo*. *E.g.* *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 128 (2017). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (citation omitted).

1. **The jury instructions amounted to an expression of a judicial opinion that the taser was a dangerous weapon, in violation of N.C. Gen. Stat. §§ 15A-1222 and 1232.**

In a criminal case, “[t]he trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury.” *State v. Allen*, 353 N.C. 504, 510, 546 S.E.2d 372, 375 (2001) (citation omitted).

Reflecting this “exalted station,” our General Assembly has passed two separate statutes barring a trial court from expressing its opinion regarding any fact to be proven to the jury. One applies during all stages of the proceedings. *See* N.C. Gen. Stat. § 15A-1222 (“The 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.”). The other applies specifically to jury instructions. *See*N.C. Gen. Stat. § 15A-1232 (“In 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.”).

“[I]t is virtually impossible to erase from the minds of the jurors prejudicial impressions resulting from the expression by the trial judge of his opinion on the facts.” *State v. Canipe*, 240 N.C. 60, 66, 81 S.E.2d 173, 178 (1954); *accord* *State v. McEachern*, 283 N.C. 57, 60, 194 S.E.2d 787, 789 (1973) (“Ordinarily, such expression of opinion cannot be cured by instructing the jury to disregard it.” (citation omitted)). “It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury.” *Allen*, 353 N.C. at 510, 546 S.E.2d at 376. Any expression of a judicial opinion on a key factual issue is harmful, whether intentional or accidental. *See, e.g.*, *State v. Carriker*, 287 N.C. 530, 535, 215 S.E.2d 134, 138 (1975) (“The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial. That the remarks were an inadvertence on the part of the able and experienced judge renders the comments nonetheless harmful.” (citations omitted)).

Here, because defense counsel conceded Ms. Chavis’s guilt of common law robbery, the central question for the jury to decide was whether the taser qualified as a “dangerous weapon” within the meaning of the armed robbery statute. On that central question, the trial court expressed its opinion at least twice, to Ms. Chavis’s detriment. First, during the instruction on robbery with a deadly weapon, the trial court referred to “a dangerous weapon *- -* ***in this case it’s a taser***.” (T p 141) (emphasis added) Second, during the instruction on conspiracy to commit robbery with a dangerous weapon, the trial court said the State would have to prove that Ms. Chavis “entered into an agreement . . . to commit robbery ***with a dangerous weapon*** . . . ***in this case a taser*** . . . .” (T p 144)

In contrast, the trial court told the jury only once, during a confused instruction, that it would even have to “consider” whether the taser was, in fact, a dangerous weapon:

For you to find the defendant guilty of this offense, the State must prove seven things beyond a reasonable doubt:

. . . .

sixth, that the defendant had a dangerous weapon in her possession at the time she obtained the property or that it reasonably appeared to the victim that the dangerous weapon was being used, in which case you may infer that said instrument was what the defendant’s conduct was—represented it to be, **and a dangerous weapon is a weapon which is likely to cause death or serious bodily injury, and, in this case, you are to consider whether the taser is a deadly weapon - - dangerous - - sorry - - dangerous weapon** . . . .

(T pp 141-42) (emphasis added) Thus, in the one and only passage where the trial court actually provided a definition of the term “dangerous weapon,” it also told the jury only that it must “consider”—rather than *decide*—whether the taser is a dangerous weapon. That could hardly cure the effect of the trial court repeatedly expressing an opinion on the only question of fact the jury had to decide. If anything, it exacerbated the problem by leaving unclear whether the jury must actually resolve that issue.

Had the jury been properly instructed, there is at least a reasonable possibility that “at least one juror would have harbored a reasonable doubt on the question” of Ms. Chavis’s guilt of the greater offenses. *Buck v. Davis*, \_\_\_ U.S. \_\_\_, \_\_\_, 197 L. Ed. 2d 1, 8 (2017). As reviewed, the evidence actually showed that the taser at issue was *not* a dangerous weapon: The fact that the taser did not cause more than superficial stippling to an unusually vulnerable victim showed that it was likely incapable of causing death or serious bodily injury to anyone. The trial court should not have even submitted the question to the jury. But having done so, the trial court was obliged by statute to refrain from expressing its opinion on the only question of fact the jury was then required to resolve.

 The evidence showed that Ms. Chavis was guilty of common law robbery and conspiracy to commit that offense. Because there is at least a reasonable possibility that the trial court’s comments tipped the balance toward conviction of the greater offenses, armed robbery and conspiracy to commit armed robbery, this Court should vacate the judgments and remand this case to superior court for either (1) a new trial on the greater offenses, or (2) entry of judgment on the lesser‑included offenses as the State elects.

1. **The trial court committed plain error where it failed to provide the jury with sufficient instruction on the term “serious bodily injury.”**
2. **Preservation and the standard of review.**

Because Ms. Chavis did not ask the trial court to provide the jury with a definition of the term “serious bodily injury,” this issue is unpreserved. “An appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases.” *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (citation omitted). To show plain error, a defendant must show that the error had a probable impact on the jury’s verdict. *Id.*, 819 S.E.2d at 371.

1. **The trial court plainly erred by failing to provide the jury with an instruction on the meaning of the term “serious bodily injury.”**

“The jury charge is one of the most critical parts of a criminal trial.” *State v. Walston*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). “The purpose of a charge to the jury is to give a clear instruction to assist the jury in an understanding of the case and in reaching a correct verdict, including how the law should be applied to the evidence. As a result, the trial court has a duty to instruct the jury on all substantial features of a case raised by the evidence.” *State v. Fletcher*, 370 N.C. 313, 324-25, 807 S.E.2d 528, 537 (2017) (citations, internal quotation marks, and ellipses omitted). This includes “the definition[s] of statutory terms . . . to the extent that it is necessary to clarify the nature of the decision that the jury is required to make.” *Id.* at 326 n.1, 807 S.E.2d at 538 n.1 (citation omitted).

Here, the trial court instructed the jury that it would have to “consider whether the taser is a deadly weapon” and defined “dangerous weapon” as “a weapon that is likely to cause death or serious bodily injury.” However, the trial court gave no definition of the term “serious bodily injury” at any point. The jury was therefore left to its own preexisting understanding of everyday language.

 The term “serious bodily injury” has no commonly understood everyday meaning. It does, however, have a fairly well-settled *legal* meaning. As reflected in multiple statutes, including N.C. Gen. Stat. § 14-32.4 (assault inflicting serious bodily injury) and section 14-318.4 (felony child abuse), to rise to the level of “serious bodily injury,” an injury must involve some level of “permanent disfigurement,” “coma,” “extreme pain,” permanent or long-term impairment of organ functioning, or “prolonged hospitalization.” Stated differently, a “serious bodily injury” is a truly grave injury. *See, e.g.*, *State v. Williams*, 201 N.C. App. 161, 182-84, 689 S.E.2d 412, 424-25 (2009) (holding the State had not proven a serious bodily injury when the female victim still had sore ribs five months after enduring a “vicious beating” in which the male defendant punched her to the ground, kicked her in the ribs, and strangled her to unconsciousness).

 Absent an instruction on the meaning of this term, the jury had no indication of the seriousness required. The most significant injuries were likely caused by Brian’s fists or the walking stick; there was no evidence that Ms. Chavis struck Mr. Jones in the head with the taser, and the taser itself caused only superficial burns to the back of Mr. Jones’ neck. Had the jury been provided an instruction on the term “serious bodily injury,” it is likely that the jury would have found the taser incapable of inflicting such injuries and convicted Ms. Chavis of only the lesser‑included offenses. Accordingly, this Court should vacate the judgments and remand for either (1) a new trial on the greater offenses, or (2) entry of judgment on the lesser offenses as the State elects.

1. **Ms. Chavis received *per se* ineffective assistance of counsel where her trial attorney conceded her guilt of common law robbery and the record does not show that her consent was knowing and voluntary.**

In closing, defense counsel conceded to the jury that Ms. Chavis was guilty of common law robbery and conspiracy to commit common law robbery. The record shows Ms. Chavis agreed to that concession. However, the record does not show that her agreement was made after a full appraisal of the consequences of the decision. Because the record does not show that Ms. Chavis’s concession was made knowingly as required by *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1984), this Court should vacate the judgments and remand for a new trial.

1. **Standard of review.**

“On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*.” *State v. McAllister*, 827 S.E.2d 538, 541 (N.C. App. 2019) (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.” *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (citation omitted).

1. **The record does not show that Ms. Chavis’s decision to admit guilt was made knowingly.**

In North Carolina, a defendant receives *per se* ineffective assistance of counsel, in violation of the Sixth Amendment, when their attorney concedes to the jury the defendant’s guilt of the charged offense, or any lesser-included offense, without the client’s express permission. *E.g.*, *State v. Wilson*, 236 N.C. App. 472, 476, 762 S.E.2d 894, 897 (2014). For a concession to rise to the level of a *Harbison* error, counsel’s statements must have the effect of admitting the defendant’s guilt.

Admitting facts sufficient to establish guilt of the charged offense or a lesser‑included offense will suffice. *See, e.g.*, *State v. Spencer*, 218 N.C. App. 267, 275, 720 S.E.2d 901, 906 (2012) (“We need not consider all of these statements, as defendant’s counsel’s statements during closing argument that defendant ‘chose to get behind the wheel after drinking, and he chose to run from the police[,]’ and ‘Officer Battle was already out of the way and he just kept on going, kept running from the police’ were concessions of guilt to resisting a public officer and eluding arrest.”(citation omitted)). In contrast, merely admitting a single element of an offense does not rise to that level, *Wilson*, 236 N.C. App. at 476, 762 S.E.2d at 897, nor does conceding the existence of an unfavorable fact, *State v. Wiley*, 355 N.C. 592, 620, 565 S.E.2d 22, 42 (2002). Defense “counsel’s statement must be viewed in context to determine whether the statement was, in fact, a concession of defendant’s guilt of a crime, or amounted to a *lapsus linguae*.” *State v. Mills*, 205 N.C. App. 577, 587, 696 S.E.2d 742, 748-49 (2010) (citation omitted); *accord* *State v. Goss*, 361 N.C. 610, 624-25, 651 S.E.2d 867, 876 (2007).

Critically, “*Harbison* requires that the decision to concede guilt to a lesser included crime ‘be made exclusively by the defendant.’” *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004) (quoting *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507). “Furthermore, ‘because of the gravity of the consequences, a decision to plead guilty must be made *knowingly and voluntarily* *by the defendant after full appraisal of the consequences*.’” *Id.*, 591 S.E.2d at 540 (quoting *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507) (emphasis added). In sum, as this Court has described, “*Harbison* and *Matthews* clearly indicate that the trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant’s counsel, *the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision*.” *State v. Maready*, 205 N.C. App. 1, 7, 695 S.E.2d 771, 776 (2010) (citations omitted) (emphasis added).

Here, while the record shows that Ms. Chavis allowed defense counsel to admit her guilt of lesser-included offenses, the record does not show that this decision was made *knowingly*—with full awareness of the consequences of the decision. At closing, defense counsel admitted either legal guilt of common law robbery and conspiracy to commit common law robbery, or facts that would establish guilt of those offenses. That argument prompted a short *Harbison* inquiry that proceeded in full as follows:

(Closing argument for the defendant began at 10:07 a.m.)

THE COURT: Let me send the jurors to the jury room for just a minute. Leave your pads in your seat, and then you’ll come back and hear the instructions.

(The jury left the courtroom at 10:16 a.m. The following proceedings were held in open court, in the absence of the jury.)

THE COURT: Let me ask the attorneys to step up while the jurors are stepping out.

(Counsel approached the bench and conferred with the Court.)

THE COURT: Ms. Chavis, do you mind standing up for just a minute. Tell me your name, again.

DEFENDANT: Shannon Chavis.

THE COURT: And you’re the defendant in this case.

DEFENDANT: Yes, sir.

THE COURT: All right. You heard [defense counsel’s] argument to the jurors?

DEFENDANT: Yes, sir.

THE COURT: And more or less, he argued that you were guilty of common law robbery and not the robbery with a dangerous weapon?

DEFENDANT: Yes, sir.

THE COURT: More or less conceding that you were guilty of something but not the most serious, right? Did you understand that?

DEFENDANT: Yes.

THE COURT: Okay. You and [defense counsel] talked about that?

DEFENDANT: Yes.

THE COURT: He told you the good and the bad about doing that?

DEFENDANT: Yes, sir.

THE COURT: He answered any questions you had about that?

DEFENDANT: Yes.

THE COURT: Are you satisfied with his legal services?

DEFENDANT: Yes.

THE COURT: And he did have your permission to concede that you were guilty of the lesser included of common law robbery when he made his argument to the jurors?

DEFENDANT: Yes.

THE COURT: All right. Have you got any questions?

DEFENDANT: No.

THE COURT: Thank you, ma’am. All right. We’re ready.

(The jury entered the courtroom at 10:18 a.m. The following proceedings were held in open court, in the presence of the jury.)

(T pp 134-36)

This two-minute exchange establishes that Ms. Chavis consented to defense counsel admitting her guilt of the lesser-included offenses, but not that she did so *knowingly*, after full appraisal of the consequences of the decision.

Regarding the nature of the offenses, this exchange did not review the classes of the offenses to which counsel admitted guilt, or how common law robbery differs from robbery with a dangerous weapon. *See* N.C. Gen. Stat. § 15A-1022(a)-(b) (describing the inquiry the trial court must make of the defendant personally before accepting a guilty plea). Similarly, the exchange did not address what sentences she could receive for the lesser-included offenses within the presumptive range as a PRL V, what maximum aggravated sentences she could receive as a PRL VI, or what the ultimate sentence might be if set to run consecutively versus concurrently. She was also not told that pleading guilty to common law robbery would move her up from a PRL V, with 14 points, to a PRL VI, with 18 points, for any future offenses if not habitualized. (R p 46) She was not told how pleading guilty could affect her PRL in the future if the State sought to prosecute her as a habitual felon.

Under the circumstances in this case, it might have made strategic sense to admit guilt of the lesser-included offenses and focus argument on whether the stun gun was a dangerous weapon. But that was Ms. Chavis’s choice to make after being fully informed of the consequences. Her request at the start of the trial that she be placed on probation for a Class D felony, as well as her statements during sentencing that she thought she was “entitled to three plea offers from [the] D.A.” indicate that she did not fully understand and appreciate her situation. (T pp 7‑8, 154)

“*Harbison* error amounts to a *per se* violation of a defendant’s right to the effective assistance of counsel,” *Goss*, 361 N.C. at 623, 651 S.E.2d at 875 (citation and internal quotation marks omitted), and is therefore reversible without a separate showing of prejudice. The appropriate remedy is a new trial. In the alternative, should this Court conclude the record is insufficient for this Court to determine whether her consent was given knowingly, this Court should dismiss the *Harbison* claim without prejudice to filing an MAR in the superior court. *See, e.g.*, *Spencer*, 218 N.C. App. at 276, 720 S.E.2d at 907.

1. **The trial court reversibly erred in multiple ways in holding Ms. Chavis in direct criminal contempt.**

 The trial court held Ms. Chavis in direct criminal contempt for refusing to put on clothes that were provided to her for trial. In doing so, the trial court made no finding of willfulness, and offered no indication that its findings reflected a beyond-a-reasonable-doubt evidentiary standard. Because each of these errors is fatal to the contempt order, this Court should reverse.

1. **Preservation and the standard of review.**

The “standard of review for contempt cases is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008) (citation and internal quotation marks omitted).

1. **The trial court’s order holding Ms. Chavis in direct criminal contempt is reversible for a number of reasons, including (1) the lack of any finding of willfulness, and (2) the lack of any indication that the trial court employed a beyond-a-reasonable-doubt standard.**

Criminal contempt is governed by Article 1 of Chapter 5A of North Carolina’s General Statutes. Section 5A-11 within that Article describes the wide variety of conduct that can serve as the basis of contempt, all of which must be willful. N.C. Gen. Stat. §§ 5A-11(a)(1)-(10). A related statute, N.C. Gen. Stat. § 5A-14, provides that a court cannot hold someone in contempt unless the necessary facts are proven beyond a reasonable doubt:

Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. **The facts must be established beyond a reasonable doubt.**

N.C. Gen. Stat. § 5A-14(b) (emphasis added).

Moreover, “criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards.” *O’Briant v. O’Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985) (citations omitted). The Fifth and Sixth Amendments, as applied to the States through the Fourteenth Amendment, prohibit a state from imposing criminal punishment without a determination by the finder of fact “that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *United States v. Gaudin*, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 449 (1995).

Accordingly, before an alleged contemnor can be found guilty of criminal contempt, Chapter 5A and the Fifth, Sixth, and Fourteenth Amendments require the trial court, as the finder of fact, to find (1) beyond a reasonable doubt, (2) that the alleged contemnor acted willfully. The omission of either is reversible error. *See, e.g.*, *State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979) (reversing a summary criminal contempt order because the order did not explicitly find that the trial court employed a “beyond a reasonable doubt” standard); *Phair*, 193 N.C. App. at 594, 668 S.E.2d at 112 (reversing a contempt order because the evidence did not show willfulness).

Here, Ms. Chavis was held in criminal contempt through a summary proceeding for refusing “to wear the clothing provided to her for trial.” (R p 24) To address this issue, the trial court issued essentially three different rulings and orders: an oral ruling in open court; a written order specifying the conduct at issue; and a pre-printed AOC misdemeanor judgment form that names criminal contempt as the offense. (R pp 24‑26; T pp 9-11) None of these rulings and orders found that Ms. Chavis acted willfully, as required by N.C. Gen. Stat. § 5A‑11‑. Similarly, none of them specified that the trial court employed a beyond‑a-reasonable-doubt standard, as required by N.C. Gen. Stat. § 5A‑14.

While it is doubtful that the proceedings could have justified holding Ms. Chavis in criminal contempt—it appears she *did* try the clothes on, but they didn’t fit (T pp 9-11)—the lack of the required findings is dispositive. Criminal contempt is a crime, and willfulness is an essential element of that crime. None of the trial court’s rulings includes a finding of willfulness, and none indicates that the trial court applied a beyond-a-reasonable-doubt standard. Accordingly, the trial court’s findings are insufficient to support its judgment holding Ms. Chavis in contempt, and this Court should reverse.

**CONCLUSION**

For the foregoing reasons, Ms. Chavis requests that this Court reverse in part the trial court’s ruling denying the motion to dismiss, vacate the judgments, and remand for a new trial on the lesser-included offenses, or in the alternative, entry of judgment on those lesser‑included offenses. In the alternative, Ms. Chavis requests that this Court vacate the judgments and remand for a new trial with proper jury instructions and the effective assistance of counsel. Ms. Chavis also requests that this Court reverse the contempt order, without remand.

Respectfully submitted this the 18th day of March, 2020.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

aaron.t.johnson@nccourts.org

 Glenn Gerding

 Appellate Defender

 North Carolina State Bar Number 23124

 Office of the Appellate Defender

 123 West Main Street, Suite 500

 Durham, North Carolina 27701

 919-354-7210

ATTORNEYS FOR DEFENDANT-APPELLANT

**CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28**

 I hereby certify that Defendant-Appellant’s Brief is in compliance with Rule 28(j) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen-point Century Schoolbook and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by the word-processing program used to prepare the brief.

This the 18th day of March, 2020.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that the original Defendant-Appellant’s Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Defendant‑Appellant’s Brief has been duly served upon Ms. Kenzie Rakes, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to krakes@ncdoj.gov.

This the 18th day of March, 2020.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

1. A video‑recording of Ms. Chavis’s statement to police was admitted as State’s Exhibit 10. A paginated transcript was admitted as State’s Exhibit 11. [↑](#footnote-ref-1)
2. Mr. Jones knew Ms. Chavis but didn’t know Brian. Other people had come to Mr. Jones’ house on other occasions seeking his pills. (T pp 42-44) [↑](#footnote-ref-2)
3. A photo depicting the stick was admitted as State’s Exhibit 3. The stick appears similar to the handle of a gardening tool, such as a shovel or a rake. [↑](#footnote-ref-3)
4. “The terms ‘dangerous’ and ‘deadly,’ when used to describe a weapon, are practically synonymous.” *Murrell*, 370 N.C. at 195 n.2, 804 S.E.2d at 509 n.2 (citations omitted). [↑](#footnote-ref-4)
5. *Cf.* *State v. Allen*, 317 N.C. 119, 123, 343 S.E.2d 893, 896 (1986) (“We concluded . . . that a BB rifle could not be a firearm or other dangerous weapon within the meaning of the armed robbery statute because it was incapable of endangering or threatening a person’s life.”). [↑](#footnote-ref-5)