No. COA 20-781 TWENTY‑SEVENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

 v. ) From Lincoln County

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ROBERT BRADLEY CRANFORD )

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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 Mr. Cranford’s motion to dismiss where the photographs at issue—while pornographic—were not “obscene” within the meaning of N.C. Gen. Stat. § 14‑190.1 and the First Amendment?
2. Should the trial court’s judgment be reversed because its findings of fact were insufficient to support its determination that the photos at issue were “obscene” within the meaning of N.C. Gen. Stat. § 14-190.1 and the First Amendment?
3. Did the trial court reversibly err where (1) it failed to hold a substantive in-court, on-the-record colloquy with Mr. Cranford personally regarding the waiver of his right to a trial by jury; (2) it consented to a bench trial without a knowing and voluntary waiver; and (3) it held the bench trial the day after the waiver, where N.C. Gen. Stat. § 15A-1201(e) grants defendants a 10-day period during which they can revoke their waiver?

**STATEMENT OF THE CASE**

 Defendant-Appellant Robert Bradley Cranford was indicted on 21 May 2018 for two counts of disseminating obscenity. These charges came on for trial at the 24 February 2020 Criminal Session of the Superior Court in Lincoln County before the Honorable Lisa C. Bell, judge presiding. (R pp 1, 7-8; Waiver T p 1)[[1]](#footnote-1)

On 26 February 2020, the parties started jury selection. (R p 1; Waiver T pp 2-15) During a break that afternoon, between 3:20 and 3:40 p.m., Mr. Cranford’s trial counsel, the assistant district attorney, and Judge Bell met in her chambers. During that in‑chambers conference, Mr. Cranford, through counsel, waived his right to a trial by jury and elected to be tried through a bench trial. (R p 1; Waiver T pp 15‑16) Both Mr. Cranford and defense counsel signed a written and sworn waiver form. (R pp 1, 10-11) However, the trial court did not conduct a substantive in-court, on‑the-record colloquy regarding Mr. Cranford’s waiver of his right to a trial by jury. (R p 1; Waiver T pp 15-20)

The bench trial was held the next day on 27 February 2020. (R p 1; Trial T p 1) Following the presentation of evidence and defense counsel’s motion to dismiss based on insufficient evidence, the trial court found Mr. Cranford guilty on both counts. To explain its verdicts, the trial court made oral findings of fact but did not reduce its findings to writing. (R pp 1, 25-31; Trial T pp 123-29)

The trial court entered judgment on its verdicts, consolidated the charges, and sentenced Mr. Cranford to a presumptive‑range sentence of 4 to 14 months of active imprisonment, suspended for 24 months of supervised probation. Following the entry of judgment, Mr. Cranford entered oral notice of appeal in open court. (R pp 1, 34-37; Trial T pp 129‑33)

**GROUNDS FOR APPELLATE REVIEW**

Mr. Cranford appeals from a final judgment of the Superior Court in Lincoln County pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A‑1444‑‑.

**STATEMENT OF THE FACTS**

 From around 2012 through July of 2017, Mr. Cranford was involved in a romantic relationship with Lena.[[2]](#footnote-2) During the course of their relationship, they took many intimate photos together documenting their sexual activity. (Trial T pp 8‑11) Both of them used their phones to take these photos, which depicted a series of sex acts and provocative poses involving either just Lena or the two of them together. (Trial T pp 11‑13); State’s Exhibits 1, 2, 4, 5.[[3]](#footnote-3) Lena and Mr. Cranford would occasionally review the photos together for “titillation” and “to reminisce about past experiences.” (Trial T p 38) Lena expected these photos would remain private, and she did not give Mr. Cranford permission to share them with anyone else. (Trial T pp 12-13)

 Their romantic relationship ended badly, and Mr. Cranford did not take it well. Lena broke up with Mr. Cranford, and he told her not to tell anyone about the circumstances surrounding their breakup. (Trial T pp 13‑15) In late July of 2017, a few weeks after their relationship ended, Mr. Cranford came to believe that Lena had been “gossip[ing]” about him with their mutual friends. Mr. Cranford contacted Lena through Facebook Messenger and attached a number of the sexual photos they’d taken together. State’s Exhibits 2, 4.

 On the night of 2 September 2017, Mr. Cranford sent a text message to a mutual friend, Bennett Johnson. This text message contained a series of photographs of Lena that were “kind of explicit.” (Trial T p 58) Johnson did not respond. (R p 16) Instead, Johnson showed the photos to Lena a couple days later, then deleted them. Because Johnson deleted the photos, the exact images Mr. Cranford sent him were not entered into evidence at trial. However, Johnson confirmed that the same or similar photos had been admitted as State’s Exhibit 2. (Trial T pp 58-60)

That same night, Mr. Cranford sent explicit photos of Lena to at least one other person. Shortly after midnight on 3 September 2017, Mr. Cranford sent a message to another mutual friend, William Church, through Facebook Messenger. (R p 15) This message included nearly 30 sexually explicit photos of Lena. (Trial T p 47) Church responded, “Nice pics you sent . . . but . . . why did you send them to me?” Mr. Cranford answered that the photos were not intended for Church, but stated the photos were sent in response to Lena “talking trash” about him. These photos were admitted as State’s Exhibit 5. (Trial T pp 47‑49)

Based on the text message to Johnson and the Facebook message to Church, Mr. Cranford was indicted on 21 May 2018 for two counts of disseminating obscenity. (R pp 7-8) Mr. Cranford’s case came on for trial on 26 February 2020 before Judge Lisa Bell. (Waiver T p 1)

On the first day, the parties started jury selection and several potential jurors were excused. (R pp 1, 8; Waiver T pp 2-15) During a break that afternoon, sometime between 3:20 and 3:40 p.m., Mr. Cranford’s trial counsel, the assistant district attorney, and Judge Bell met in the trial court’s chambers. Mr. Cranford was not present.

During that in‑chambers conference, defense counsel waived Mr. Cranford’s right to be tried by a jury and elected a bench trial on his behalf. (R pp 1, 8; Waiver T pp 15-16) Once back in court, the trial court summarized what had happened in chambers in Mr. Cranford’s absence, then released the jury pool:

(Afternoon recess taken at 3:20 p.m.)

THE COURT: Before I ask you all to resume, Mr. Cranford, I just had a conference in chambers with your attorney, Mr. Black, and Ms. Hoza, and there’s been representation to me with regard to how the matter will proceed, and Mr. Black had your permission and you agree with what he has represented to me as to how the matter will proceed; is that right?

MR. CRANFORD: Yes, ma’am.

THE COURT: And do you want to confer about that at all?

MR. BLACK: He said we’re good.

THE COURT: All right.

MS. HOZA: The State has no objection.

THE COURT: All right. Ladies and gentlemen, an [un]usual situation for all of you, but a relatively recent change in the law permits a matter to be tried by a judge without a jury, and there was some discussions with counsel prior to today about proceeding in that manner, and it has now been decided that that’s how we’re going to proceed.

So all of you, your service is completed. You are free to go. This concludes your service for two years. If any of you are interested in the ultimate outcome of this matter, you can contact the district attorney’s office and someone there will let you know. Otherwise, if you need a note for work or school, you can get that from the first floor of the clerk’s office, and if you’ll please leave quietly, we are in session. Thank you all very much for your time.

(Jurors excused at 3:40 p.m.)

THE COURT: All right. The jury pool is out and the door is closed.

(Waiver T pp 15-16)

Both Mr. Cranford and defense counsel went on to sign a written form to confirm his waiver of his right to trial by jury. (R pp 10-11) However, aside from directing a single question toward him, the trial court did not otherwise address Mr. Cranford personally during the waiver colloquy to explain the charges or possible punishments; to explain the trial judge would be solely responsible for making findings of fact and conclusions of law; to explain he had a right to a trial by a jury of twelve; to explain he would have a right to participate in the selection of that jury; to explain any verdict would have to be unanimous; or otherwise to ensure that Mr. Cranford’s waiver was knowing and voluntary. It appears that the single “Yes, ma’am” were the only words Mr. Cranford uttered at the hearing. (Waiver T p 16)

The bench trial started the next morning, and the State presented evidence showing Mr. Cranford had sent the photos at issue to Bennett Johnson and William Church. (Trial T pp 7-101) At the close of the State’s evidence, and the close of all the evidence, the trial court denied Mr. Cranford’s motions to dismiss based on insufficient evidence. (Trial T pp 102-08)

In closing, Mr. Cranford’s primary defense was to challenge the evidence showing that he had intentionally disseminated the photographs at issue. (Trial T pp 117-18, 122-23) In addition, to counter the State’s argument that the materials at issue were obscene under *State v. Bryant*, 20 N.C. App. 223, 201 S.E.2d 211 (1973), a nearly 50 year old case, defense counsel argued that community standards regarding depictions of sexual activity had changed in the intervening decades, particularly with the advent of cable television and Internet pornography. (Trial T pp 114‑15, 119-21) Defense counsel also argued that “[i]f this is obscenity . . . then both Mr. Cranford and [Lena are] guilty of a Class 1 misdemeanor of producing obscenity in the same line of statutes as disseminating obscenity.” (Trial T p 122)

Following the parties’ closing arguments, the trial court rendered its verdicts. It found Mr. Cranford guilty of both charges of disseminating obscenity. (Trial T pp 123-24) The trial court also informed the parties that it would put on the record the factual findings supporting its verdicts. (Trial T p 124) In doing so, it found as fact that “the State has proven beyond a reasonable doubt that Mr. Cranford intentionally disseminated obscene images to Mr. Johnson and Mr. Church.” (Trial T p 128)

The trial court also made findings regarding “the nature of the images” the State had charged were legally obscene. Specifically, the trial court made the following findings of fact:

As to the nature of the images, the statute provides -- which is 14-190.1 -- provides subpart (b) -- subpart (1) of (b), A material depicts -- or “The material is obscene if it depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section.” Subsection (c) defines “sexual conduct” as “vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or masturbation, excretory functions, or lewd exhibition of uncovered genitals.” The photographs that were disseminated included simulated -- whether simulated intercourse, there was oral intercourse depicted in some of the photographs and masturbation in other photographs as well as masturbation with items. And I find there also lewd exhibition of uncovered genitals.

And the nature of the images as being offensive is the community established in part just by their nature and statutory definition but also by the reaction of the witnesses who testified that they were offensive to Mr. Church, they were offensive to Mr. Johnson, and that they were of such a graphic nature that law enforcement did not feel it appropriate to leave them on public computers or phones subject to being -- subject to discovery requests or otherwise.

So those would be my findings that the – there was intentional delivery.

(Trial T pp 126-27)

 In these findings, the trial court thus found that the photographs depicted sexual activity defined by statute and were “patently offensive” when considered against the contemporary community standards prevailing in Lincoln County.[[4]](#footnote-4) However, the trial court did not find (1) that the photographs at issue appeal to a prurient interest in sex; (2) that the photographs at issue lack serious literary, artistic, political, or scientific value; or (3) that the photographs at issue are not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

 The trial court offered to reduce its findings and conclusions to writing, but the parties declined. (Trial T pp 128-29) The trial court imposed a probationary sentence and Mr. Cranford entered notice of appeal. (Trial T pp 129-33)

**ARGUMENT**

**I. The trial court erred by denying Mr. Cranford’s motion to dismiss where the photographs at issue—while pornographic—were not “obscene” within the meaning of N.C. Gen. Stat. § 14‑190.1 and the First Amendment.**

This is a revenge-porn case that was erroneously pursued as an obscenity prosecution. Whether or not Mr. Cranford had any business sending private photos to unwitting parties, the photographs themselves are not obscene. Rather, the photos at issue are ordinary, amateur pornography. The United States Supreme Court has repeatedly drawn a distinction between materials that are merely pornographic, which remain protected by the First Amendment, and materials that are obscene, which are not.

For a depiction of sexual activity to qualify as legally “obscene,” (1) it must be patently offensive as measured against contemporary community standards; (2) it must, taken as a whole, appeal to the “prurient” interest in sex, as measured against contemporary community standards; and (3) it must lack any serious literary, artistic, political, or scientific value, as measured against a reasonable person standard. Most importantly here, “prurience” focuses on a shameful or morbid interest in sex, as contrasted with a normal or healthy interest in sex. In other words, to qualify as legally “obscene,” the sexual activity depicted must be truly depraved, deviant, or disgusting.

The photos at issue do not remotely fit that description. As the trial court summarized, the photos showed ordinary sexual activity: “oral intercourse,” “masturbation,” “masturbation with items,” and “exhibition of uncovered genitals.” They do not even depict ordinary vaginal intercourse. Accordingly, because these photos were merely pornographic, but not legally obscene, the trial court erred by denying Mr. Cranford’s motion to dismiss. This Court should reverse.

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

Mr. Cranford moved to dismiss based on insufficient evidence at the close of the State’s evidence. (Trial T p 102) He also made a renewed motion to dismiss at the close of all the evidence. (Trial T pp 107-08) These motions preserved for appellate review all issues regarding the sufficiency of the State’s evidence. *See State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) (“Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time.”).[[5]](#footnote-5)

“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 trial court should have dismissed the charges, or found Mr. Cranford not guilty, because the photos at issue were not legally obscene.**

 A trial court is required to 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. And where a defendant is charged with disseminating obscenity, but the reviewing court determines that the materials are not legally obscene, the appropriate remedy is to reverse the judgment of conviction. *See Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (“We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene. No other basis appearing in the record upon which the judgment of conviction can be sustained, we reverse . . . .”).

Mr. Cranford was charged under N.C. Gen. Stat. § 14-190.1 with two counts of disseminating obscenity. The constitutional law governing obscenity—a category of speech unprotected by the First Amendment—went through a rocky period of change and refinement between the 1950s and 1970s. *Compare* *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (offering one formulation of an obscenity test), *with* *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957) (offering another). In that time period, the Court “struggled . . . to define obscenity in a manner that did not impose an impermissible burden on protected speech.” *Ashcroft v. ACLU*, 535 U.S. 564, 574 (2002) (citing *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part) (referring to the “intractable obscenity problem”)).

The Supreme Court eventually settled on a three-part test in 1973 in *Miller v. California*. It defined obscenity as follows:

The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Miller v. California*, 413 U.S. 15, 24 (1973) (citations and internal quotation marks omitted).

The Court’s constitutional framework has been interwoven into North Carolina’s statute barring the dissemination of obscenity, N.C. Gen. Stat. § 14-190.1. Tracking *Miller* nearly verbatim, that statute defines obscenity as follows:

For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C. Gen. Stat. § 14-190.1(b). Subsection (c), in turn, defines “sexual conduct” to include “[v]aginal, anal, or oral intercourse, whether actual or simulated, normal or perverted,” or “[m]asturbation, excretory functions, or lewd exhibition of uncovered genitals,” or “[a]n act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.” N.C. Gen. Stat. § 14‑190.1(c).‑

 Since *Miller* was decided in 1973, the Court has clarified several aspects of the test employed to determine whether sexually explicit content can be proscribed, despite the broad protections of the First Amendment, on the basis that it is legally obscene. First, the Court has held that the first two prongs of the *Miller* test—“patent offensiveness” and “prurient interest”—are evaluated against “contemporary community standards,” *e.g.* *Smith v. United States*, 431 U.S. 291, 300-01 (1977), and therefore evolve over time, while the third prong—redeeming social value—is evaluated against a reasonable person standard, *e.g. Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). This Court has long held the same. *E.g.* *State v. Watson*, 88 N.C. App. 624, 627-28, 364 S.E.2d 683, 685 (1988).

 Second, the Supreme Court has recognized that pornography has become widespread in the age of the internet. As early as 2003, the Court noted that “there is . . . an enormous amount of pornography on the Internet, much of which is easily obtained.” *United States v. Am. Library Ass’n*, 539 U.S. 194, 200 (2003). This development—the widespread availability of pornography to any adult who cares to look—will inevitably affect what a community might consider a “patently offensive” display of sexual activity, or what might be considered appealing to a prurient interest. What might have been obscene in 1973 would not necessarily be obscene today.

Third, and relatedly, the Supreme Court has repeatedly confirmed that sexually explicit material and pornography is protected by the First Amendment, unless and until it crosses the line into the truly obscene. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 288 (2008) (“We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment. But to protect explicit material that has social value, we have limited the scope of the obscenity exception, and have overturned convictions for the distribution of sexually graphic but nonobscene material.” (citations omitted)); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002) (“As a general rule, [adult] pornography can be banned only if obscene . . . .”). Several federal Circuit courts have reiterated this point just as clearly. *See, e.g.*, *United States v. Van Donk*, 961 F.3d 314, 326 (4th Cir. 2020) (opining that the “pornography ban [at issue there] encompasses various materials that enjoy First Amendment protection”); *United States v. Shannon*, 743 F.3d 496, 500 (7th Cir. 2014) (“Adult pornography, unlike child pornography, enjoys First Amendment protection . . . .”); *United States v. Wilson*, 565 F.3d 1059, 1067 (8th Cir. 2009) (holding that “the First Amendment protects non-obscene adult pornography”).

Fourth, and perhaps most importantly for this case, the Supreme Court has clarified what counts as a “prurient interest” in sex. The term “prurient interest” does not refer to “normal, healthy sexual desires.” *Brockett v. Spokane Arcades*, 472 U.S. 491, 498 (1985). Rather, “prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex . . . .” *Id.* at 504; *see also* *Roth*, 354 U.S. at 487 n.20 (“A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.” (citation omitted)).

Thus, as this Court recognized nearly a quarter century ago, the Supreme Court has “disallowed any definition” of prurience “which could be read to include a normal, healthy sexual interest.” *State v. Johnston*, 123 N.C. App. 292, 300, 473 S.E.2d 25, 30 (1996). Even our pattern jury instruction defines “[a] prurient interest” as “an unhealthy, abnormal, lascivious, shameful or morbid sexual interest.” N.C.P.J.I. 238.10B (pattern instruction for felony dissemination of obscenity).

 Measured against these standards—and particularly the understanding that a “prurient interest” is an unhealthy, abnormal, shameful, morbid interest in sex—the photos at issue in this case simply are not legally “obscene” within the meaning of *Miller* or N.C. Gen. Stat. § 14-190.1. They don’t depict anything that might qualify as obscene in the age of widespread online pornography, such as sex with an animal, sex with a child,[[6]](#footnote-6) or violent sex that appears to be non-consensual. They don’t depict sexual activity that is risqué but still almost certainly non‑obscene, such as consensual adult incest, sex with multiple partners at the same time or in short succession, sex involving severe bondage or restraint, or sexual acts that subvert traditional gender roles. The photos at issue do not even depict ordinary vaginal intercourse.

 In sum, the photos at issue were merely pornographic, and therefore protected. They do not appeal to any shameful or abnormal or morbid interest in sex. Even Lena testified that she found them “titillat[ing]” rather than disgusting. (Trial T p 38) For that reason, they were not legally “obscene,” and the trial court erred by denying Mr. Cranford’s motions to dismiss. This Court should reverse.[[7]](#footnote-7)

1. **Should this Court conclude that a rational finder of fact, applying the correct legal standards, could find that one or more photos were obscene but that others were not, the appropriate remedy is a new trial.**

 As reviewed, several photos were entered into evidence in this case through State’s Exhibits 1, 2, 4, and 5. Several of them, such as the photos of Lena merely posing nude, were clearly not obscene. *See Jenkins*, 418 U.S. at 161 (holding in 1974 that “nudity alone is not enough to make material legally obscene under the *Miller* standards”). However, despite making specific findings of fact, the trial court did not make clear exactly *which* photos served as the basis of its verdicts. Accordingly, in the event this Court concludes that *any* of the photos at issue could be deemed legally “obscene,” it will still remain unclear whether the trial court found Mr. Cranford guilty for disseminating non-obscene photographs versus obscene ones.

“It is well established that where a defendant’s conviction may have rested on a constitutional ground or an unconstitutional ground and it cannot be determined which ground the jury relied upon, the conviction must be vacated.” *State v. Shackelford*, 264 N.C. App. 542, 561, 825 S.E.2d 689, 701-02 (2018) (citing *Griffin v. United States*, 502 U.S. 46, 53 (1991) (“[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.”)); *see also* *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (“The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside.”). There is no reason this rule should not apply here.

Accordingly, in the event this Court determines that one or more of the photos at issue could be permissibly found to be legally obscene, but others could not, this Court should still vacate the judgment and remand for further proceedings.

1. **The trial court’s judgment should be reversed because its findings of fact were insufficient to support its determination that the photos at issue were “obscene” within the meaning of N.C. Gen. Stat. § 14-190.1 and the First Amendment.**

While it could have returned only general verdicts, the trial court chose to make specific findings of fact to explain and justify its verdicts finding Mr. Cranford guilty of disseminating obscenity. However, those findings omitted several essential elements of the offense as codified in N.C. Gen. Stat. § 14‑190.1. Specifically, the trial court did not find (1) that the photographs at issue appeal to a prurient interest in sex; (2) that the photographs at issue lack serious literary, artistic, political, or scientific value; or (3) that the photographs at issue are not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

Depictions of sex can qualify as “obscene” within the meaning of *Miller* and section 14-190.1 only if they appeal to a prurient interest and lack any serious literary, artistic, political, or scientific value. The omission of such findings is therefore fatal to the trial court’s determination that Mr. Cranford was guilty of disseminating obscenity. Because the trial court’s findings of fact were insufficient to support an ultimate finding or conclusion that the materials at issue were legally obscene, this Court should reverse the trial court’s judgment.

1. **Standard of review.**

When a trial judge makes findings of fact and conclusions of law in a criminal bench trial, an appellate court applies the standard of review applicable to orders granting or denying a motion to suppress: It reviews whether the findings are supported by competent evidence, in which case, they are binding on appeal; and it reviews *de novo* whether the conclusions of law are both legally correct and supported by the findings of fact. *State v. Cheeks*, 267 N.C. App. 579, 595, 833 S.E.2d 660, 671-72 (2019), *appeal docketed* 421P19; *see also* *State v. Mastor*, 243 N.C. App. 476, 480, 777 S.E.2d 516, 519 (2015) (“The standard of appellate review for a decision rendered in a non-jury trial 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.” (citation omitted)).

1. **The judgment should be reversed because the trial court’s findings of fact omitted several essential elements of the offense.**

After announcing that it was finding Mr. Cranford guilty of disseminating obscene materials, the trial court informed the parties that it would put on the record the factual findings supporting its verdicts. (Trial T p 124) In doing so, the trial court made specific findings regarding “the nature of the images” the State had charged were legally obscene. Specifically, the trial court made the following findings regarding the images themselves:

As to the nature of the images, the statute provides -- which is 14-190.1 -- provides subpart (b) -- subpart (1) of (b), A material depicts -- or “The material is obscene if it depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section.” Subsection (c) defines “sexual conduct” as “vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or masturbation, excretory functions, or lewd exhibition of uncovered genitals.” The photographs that were disseminated included simulated -- whether simulated intercourse, there was oral intercourse depicted in some of the photographs and masturbation in other photographs as well as masturbation with items. And I find there also lewd exhibition of uncovered genitals.

And the nature of the images as being offensive is the community established in part just by their nature and statutory definition but also by the reaction of the witnesses who testified that they were offensive to Mr. Church, they were offensive to Mr. Johnson, and that they were of such a graphic nature that law enforcement did not feel it appropriate to leave them on public computers or phones subject to being -- subject to discovery requests or otherwise.

So those would be my findings that the – there was intentional delivery.

(Trial T pp 126-27)

These findings were facially sufficient to address three of the elements listed in N.C. Gen. Stat. § 14-190.1: first, that the photographs depicted sexual conduct specifically defined by state law; second, that they were patently offensive under contemporary Lincoln County standards; and third, that Mr. Cranford intentionally disseminated them to others.

Critically, however, the trial court’s findings overlooked at least three essential elements of the offense as codified in N.C. Gen. Stat. § 14‑190.1. First, the trial court did not find the essential element that the photographs appeal to a “prurient” interest in sex. *See* N.C. Gen. Stat. § 14-190.1(b)(2). Second, the trial court did not find the essential element that the images lacked any serious literary, artistic, political, or scientific value. *See* N.C. Gen. Stat. § 14-190.1(b)(3). And third, the trial court did not find the essential element that the photographs are not protected or privileged under the Constitution of the United States or the Constitution of North Carolina. *See* N.C. Gen. Stat. § 14-190.1(b)(4). Without these findings, the photographs at issue could not legally be deemed “obscene.”

Accordingly, the trial court’s findings of fact were insufficient to support its determination that one or more of the photographs at issue were legally “obscene” within the meaning of *Miller* and our state obscenity statute. For this additional reason, the trial court’s judgment should be reversed. *See, e.g.*, *In re Wade*, 67 N.C. App. 708, 711, 313 S.E.2d 862, 865 (1984) (“The foregoing findings of fact which represent all the facts as found by the court are not sufficient to sustain the court’s conclusion that respondent committed the crimes of breaking and entering and larceny. [T]he decision of the trial court is [r]eversed.”).

1. **The trial court reversibly erred where (1) it failed to hold a substantive in-court, on-the-record colloquy with Mr. Cranford personally regarding the waiver of his right to a trial by jury; (2) it consented to a bench trial where the record does not show that Mr. Cranford’s waiver was knowing and voluntary; and (3) it held the bench trial the day after the waiver, where N.C. Gen. Stat. § 15A-1201(e) grants defendants a 10-day period during which they can revoke their waiver.**

In the event this Court concludes that the photos at issue could be found to be obscene within the meaning of N.C. Gen. Stat. § 14-190.1 and the First Amendment, and that the trial court’s findings support its legal conclusions, the underlying judgment should still be vacated and the case remanded for a new trial. N.C. Gen. Stat. § 15A‑1201 allows a trial judge to consent to a bench trial only after the trial court addresses the defendant personally and determines that any waiver of their right to a trial by jury is knowing and voluntary.

Here, the trial court’s waiver colloquy was insufficient to comply with the statute and Article I, section 24 of the North Carolina Constitution. Not only was the initial waiver done in chambers by defense counsel, the trial court only asked one question of Mr. Cranford personally. The in-court colloquy was also insufficient to show that Mr. Cranford’s waiver was knowing and voluntary. Because these errors were both structural and prejudicial, this Court should vacate the trial court’s judgment and remand for further proceedings.

1. **Standard of review.**

This Court reviews *de novo* whether the trial court has complied with the statutory mandates imposed by N.C. Gen. Stat. § 15A-1201. *E.g.* *State v. Rutledge*, 267 N.C. App. 91, 95, 832 S.E.2d 745, 747 (2019).

1. **The trial court erred in multiple ways by failing to conduct a substantive in-court colloquy with Mr. Cranford regarding the waiver of his right to trial by jury.**

“North Carolina has historically mandated trial by jury in all criminal cases.” *State v. Boderick*, 258 N.C. App. 516, 522, 812 S.E.2d 889, 893 (2018) (citing N.C. Const. art. I, § 24). “Unlike the right to a jury trial established by the Sixth Amendment of the U.S. Constitution, the right to a jury trial pursuant to Article I, Section 24 could not be waived.” *Id.*, 812 S.E.2d at 893 (citations and quotation marks omitted).

That changed with the passage of an amendment to our state constitution in 2014 and legislation amending N.C. Gen. Stat. § 15A‑1201. Subsection (b) of that statute now allows a defendant to waive their right to a trial by jury and be tried in a bench trial. It provides in pertinent part:

 A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact . . . shall be heard and judgment given by the court.

N.C. Gen. Stat. § 15A-1201(b). This provision makes clear that a bench trial may only proceed “with the consent of the trial judge.”

Once a defendant provides notice of their intent to waive their right to a trial by jury through one of the methods outlined in subsection (c), subsection (d) directs the trial court how it must proceed:

Upon notice of waiver by the defense pursuant to subsection (c) of this section, the State shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury. The decision to grant or deny the defendant’s request for a bench trial shall be made by the judge who will actually preside over the trial. **Before consenting to a defendant’s waiver of the right to a trial by jury, the trial judge shall do all of the following**:

**(1)** **Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury**.

(2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant’s waiver of a jury trial.

N.C. Gen. Stat. § 15A-1201(d) (emphasis added). Then, once a defendant has waived their right to a trial by jury, subsection (e) allows the defendant a period of 10 business days to revoke their waiver as a matter of right:

 Once waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of this section, the defendant may revoke the waiver one time as of right within 10 business days of the defendant’s initial notice pursuant to subsection (c) of this section if the defendant does so in open court with the State present or in writing to both the State and the judge. In all other circumstances, the defendant may only revoke the waiver of trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State. Once a revocation has been granted pursuant to this subsection, the decision is final and binding.

N.C. Gen. Stat. § 15A-1201(e).

 Here, the trial court engaged with Mr. Cranford in only the most minimal fashion during the proceedings surrounding the waiver of his right to be tried by jury. During a break in jury selection, defense counsel, the ADA, and the trial court met in chambers, without Mr. Cranford present. At that in-chambers meeting, defense counsel waived Mr. Cranford’s right to a trial by jury on Mr. Cranford’s behalf. Once back in court, the trial court raised the issue with Mr. Cranford personally to ask whether he “agree[d] with what [defense counsel] has represented to [it] with regard to how the matter will proceed[.]” (Waiver T p 15) Mr. Cranford’s two-word response—“Yes, ma’am.”—were the only words he personally uttered at the hearing. The bench trial then took place the next day.

 This waiver proceeding violated N.C. Gen. Stat. § 15A-1201 in at least three ways. First, because any substantive discussion of the waiver of Mr. Cranford’s right to trial by jury would have occurred, if at all, in chambers with defense counsel, the trial court violated the requirement imposed by subsection (d) that it review the matter with Mr. Cranford personally. Conducting the substantive discussions in chambers likely also violated subsection (d)’s requirement that “the matter . . . be heard in open court.”

 Second, and relatedly, the trial court violated the statutory mandate imposed by subsection (d) that it consent to a bench trial only after it has sufficiently addressed the issue to “determine whether the defendant fully understands and appreciates the consequences of the . . . decision to waive the right to trial by jury.” N.C. Gen. Stat. § 15A‑1201(d)(1)‑. Aside from directing a single question toward him, the trial court did not address Mr. Cranford personally during the waiver colloquy to explain the charges or possible punishments; to explain that it would be solely responsible for making findings of fact and conclusions of law; to explain that Mr. Cranford had a right to a trial by a jury of twelve that he would be able to help select; or to explain that any jury verdict would have to be unanimous.

While this Court has held that no “specific inquiries are required in the statute to make the determination of [a d]efendant’s understanding and appreciation of the consequences to waive his trial by jury,” *Rutledge*, 267 N.C. App. at 97-98, 832 S.E.2d at 748 (internal quotation marks omitted), a trial court should at least explain the most basic differences between a bench trial and a jury trial. Otherwise, a waiver of this constitutional right cannot be knowing and voluntary, and this provision of the statute would be meaningless.

 And third, subsection (e) creates a “cooling off” period of 10 business days during which a defendant who has waived his right to be tried by jury may revoke that waiver as a matter of right. By consenting to Mr. Cranford’s waiver, then proceeding to trial the next day, Mr. Cranford was denied the benefit of that cooling-off period and any chance to reconsider his decision to waive his right to a jury trial.[[8]](#footnote-8) This, too, was error.

1. **These errors were both structural and prejudicial.**

Where the finder of fact is “improperly constituted for purposes of N.C. Const. art. I, § 24,” the error is structural and “automatic reversal is required.” *Boderick*, 258 N.C. App. at 524, 812 S.E.2d at 895 (citation and internal quotation marks omitted). This type of error occurs where there is “no constitutionally sufficient waiver of [a d]efendant’s right to a jury trial . . . .” *State v. Hamer*, 845 S.E.2d 846, 865 (N.C. Ct. App. 2020) (McGee, C.J., dissenting), *appeal docketed* 279A20.

Moreover, these errors were prejudicial even under the ordinary reasonable-possibility prejudice standard. *See* N.C. Gen. Stat. § 15A‑1443‑. Had the trial court not erred by consenting to a bench trial in the absence of an adequate waiver colloquy, Mr. Cranford would have been tried by a jury of twelve. At such a jury trial, the trial court would likely have given the pattern jury instruction for disseminating obscenity. The jury would thus have been instructed (1) that sexually explicit material is only obscene when it appeals to a “prurient interest,” and (2) that “[a] prurient interest is an unhealthy, abnormal, lascivious, shameful or morbid sexual interest.” *See* N.C.P.J.I. 238.10B.

As reviewed, the images at issue in this case were ordinary amateur pornography. They did not appeal to an abnormal, shameful, or morbid sexual interest, and they did not rise to the level of the obscene. Had a jury of twelve been directed to consider the question, there is more than a reasonable possibility that at least one juror would have considered the photographs non-obscene and therefore voted to find Mr. Cranford not guilty. For that reason, the errors in the waiver proceedings were prejudicial, and Mr. Cranford should receive at least a new trial.

**CONCLUSION**

For the foregoing reasons, Mr. Cranford requests that this Court vacate the judgment without remand. In the alternative, Mr. Cranford requests that this Court vacate the judgment and remand for a new trial.

Respectfully submitted this the 22nd day of January, 2021.

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**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 22nd day of January, 2021.

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. Brittany Brown, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to bbrown@ncdoj.gov.

This the 22nd day of January, 2021.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

1. This case involves two transcripts that are not consecutively paginated. For clarity, the transcript of the proceedings on 26 February 2020, during which the parties conducted partial jury selection and Mr. Cranford elected a bench trial, shall be cited as “(Waiver T p X).” The transcript of the bench trial held on 27 February 2020 shall be cited as “(Trial T p X).” [↑](#footnote-ref-1)
2. A pseudonym. (R p 2) [↑](#footnote-ref-2)
3. Copies of these exhibits have been submitted to this Court. [↑](#footnote-ref-3)
4. The parties had agreed that Lincoln County would be considered the relevant “community” for purposes of the obscenity charges. (Waiver T pp 16-17) [↑](#footnote-ref-4)
5. Should this Court conclude, despite *Golder*, that defense counsel’s argument somehow waived any other sufficiency claims, Mr. Cranford asks that this Court invoke Rule 2 to review this issue. A sufficiency claim that turns on the meaning of the First Amendment has clear constitutional significance and should be resolved on the merits. In addition, because there is no plausible strategic reason not to pursue a winning sufficiency claim, any such waiver would reflect the ineffective assistance of counsel. [↑](#footnote-ref-5)
6. *See Free Speech Coalition*, 535 U.S. at 240 (“While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not.”). [↑](#footnote-ref-6)
7. Reviewing the photographs submitted to this Court as State’s Exhibits 1, 2, 4, and 5 to determine whether they could be deemed legally “obscene” may be an awkward task. But this Court is not alone.

 Decades ago, when the Supreme Court was still settling the general contours of this area of the law, the Court would hold “Movie day” to view the materials in obscenity cases. Movie Day was widely considered “the humorous highpoint of most terms.” In his later years, Justice Harlan’s eyesight was failing, and he would have to “watch[] the films from the first row, a few feet from the screen, able only to make out the general outlines. His clerk or another Justice would describe the action” for him.

“‘By Jove,’ Harlan would exclaim. ‘Extraordinary.’” Bob Woodward & Scott Armstrong, The Brethren 198 (1979) (paragraph break added). [↑](#footnote-ref-7)
8. Mr. Cranford is aware that this Court held in *Rutledge* that reading the statute literally would “allow a defendant to *force* a mandatory ten-day continuance,” a reading of the statute it considered “absurd.” *Id.* at 99, 832 S.E.2d at 749. Mr. Cranford believes a plain reading of the statute is not absurd because the trial court can always choose not to consent to a bench trial. He raises this issue to preserve it in the event of further appellate review. [↑](#footnote-ref-8)