No. COA22-632 TWENTY-SIXTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

 v. ) From Mecklenburg County

 )

TAIQUAN RODGERS )

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DEFENDANT-APPELLANT’S BRIEF

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**INDEX**

TABLE OF AUTHORITIES iii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE GROUNDS FOR APPELLATE

REVIEW 2

STATEMENT OF THE FACTS 3

ARGUMENT 8

I. The trial court abused its discretion by admitting Sealy’s DNA opinion testimony without fulfilling its gatekeeping duty to determine the reliability of the DNA testimony under Rule of Evidence 702 and *State v. McGrady* 8

A. Standard of Review and Preservation 8

B. Rule 702’s reliability test requires sufficient data, reliable principles, and the reliable application of those principles to the data 9

C. The trial court failed to perform its “gatekeeping” duty when it denied defense counsel’s request to voir dire Sealy. The trial court compounded this error by denying counsel’s request to give an offer of proof concerning the foundation for Sealy’s DNA opinion testimony 11

D. The The trial court abused its discretion in admitting the testimony when Sealy’s testimony did not satisfy Rule 702’s reliability prongs and by not making any reliability findings 18

E. The trial court’s error prejudiced Mr. Rodgers 31

II. The trial court erred in denying Mr. Rodgers’s motions to dismiss because the evidence of sexual battery and larceny was insufficient to support the verdicts 32

A. Standard of Review 32

B. Sexual Battery 33

C. Larceny 35

CONCLUSION 38

CERTIFICATE OF COMPLIANCE WITH RULE 28(J) 39

CERTIFICATE OF SERVICE 40

**TABLE OF AUTHORITIES**

Cases

*Daubert v. Merrell Dow Pharms., Inc.*,

 509 U.S. 579 (1993) 9, 28

*General Electric Co. v. Joiner*,

 522 U.S. 136 (1997) 11

*Howerton v. Arai Helmet, Ltd.*,

 358 N.C. 440 (2004) 8

*In re S.A.A.*,

 251 N.C. App. 131 (2016) 33

*Kumho Tire Co. v. Carmichael*,

 526 U.S. 137 (1999) 11, 12, 28

*Manson v. Brathwaite*,

 432 U.S. 98 (1977) 15

*State v. Accor*,

 277 N.C. 65 (1970) 15, 16

*State v. Bagley*,

 183 N.C. App. 514 (2007) 32

*State v. Bowman*,

 84 N.C. App. 238 (1987) 33

*State v. Brown*,

 116 N.C. App. 445 (1994) 17

*State v. Brown*,

 162 N.C. App. 333 (2004) 32, 33

*State v. Campbell*,

 373 N.C. 216 (2019) 35, 36, 38

*State v. Chapman*,

 294 N.C. 407 (1978) 17, 18

*State v. Fletcher*,

 370 N.C. 313 (2017) 31

*State v. Futrell*,

 112 N.C. App. 651 (1993) 14, 23, 28

*State v. Hennis*,

 323 N.C. 279 (1988) 9

*State v. Lawrence*,

365 N.C. 506 (2012) 31

*State v.* *McGrady*,

 368 N.C. 880 (2016) *passim*

*State v. Moore*,

 312 N.C. 607 (1985) 36, 37

*State v. Murphy*,

 225 N.C. 115 (1945) 36

*State v. Parker*,

 315 N.C. 249 (1985) 9

*State v. Patino*,

 207 N.C. App. 322 (2010) 34

*State v. Phillips*,

 844 S.E.2d 651 (S.C. 2020) 14, 23, 28

*State v. Piland*,

 263 N.C. App. 323, 338 (2018) 22, 23

*State v. Rose*,

 339 N.C. 172, 192 (1994) 32

*State v. Rudd*,

 60 N.C. App. 425 (1983) 17, 18

*State v. Sasek*,

 271 N.C. App. 568 (2020) 22, 23

*State v. Slone*,

 76 N.C. App. 628 (1985) 33

*State v. Smith*,

 134 N.C. App. 123 (1999) 15, 21

*State v. Smith*,

 300 N.C. 71 (1980) 32

*State v. Stanford*,

 169 N.C. App. 214 (2005) 34, 35

*State v. Waddell*,

 289 N.C. 19 (1975) 15, 16

*State v.* *Ward*,

 364 N.C. 133 (2010) 10, 28

*United States v. Holguin*,

 Nos. 19-50158, 19-50169, 19-50173, 2022 U.S. App. LEXIS 28477 (9th Cir. Oct. 13, 2022) *passim*

*United States v. Kenyon*,

 481 F.3d 1054 (8th Cir. 2007) 13

*United States v. Sepulveda*,

 15 F.3d 1161 (1st Cir. 1993) 13, 14

*United States v. Wade*,

 388 U.S. 218 (1967) 15

**STATUTES**

N.C.G.S. § 7A-27 2

N.C.G.S. § 8C-1, Rule 102 12

N.C.G.S. § 8C-1, Rule 702 11, 27, 29, 31

N.C.G.S. § 14-27.33 33

N.C.G.S. § 14-72 35

N.C.G.S. § 15A-1443 31

N.C.G.S. § 15A-1444 2

**OTHER AUTHORITIES**

Kimberly Schweitzer and Narina Nunez, *What Evidence Matters Most to Jurors? The Prevalence and Importance of Different Homicide Trial Evidence to Mock Jurors*, 25(3) Psychiatry, Psych. & L. 437 (2018) 15

**RULES**

N.C. R. App. P. 10(a)(1) (2022) 9

N.C. R. Evid. 104(a) 10

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# ISSUES PRESENTED

## Whether the trial court erred by admitting Sealy’s DNA opinion testimony without fulfilling its gatekeeping duty to determine the reliability of the DNA testimony under Rule of Evidence 702 and *State v. McGrady*.

## Whether the trial court erred in denying Mr. Rodgers’s motions to dismiss because the evidence of sexual battery and larceny was insufficient to support the verdicts.

# STATEMENT OF THE CASE

On 30 September 2019, a Mecklenburg County Grand Jury indicted Mr. Rodgers on one count each of felony larceny after breaking and entering, first-degree burglary, and misdemeanor sexual battery. (R pp 8-10) Mr. Rodgers’s case was tried between 30 November and 7 December 2021 in Mecklenburg County Superior Court, Judge Robert C. Ervin presiding. (T p 1) A jury found Mr. Rodgers guilty of all three counts on 7 December 2021. (R pp 61-63) The trial court sentenced Mr. Rodgers to 11 to 23 months imprisonment on the larceny after breaking and entering charge, 97 to 129 months on the first-degree burglary charge, and 150 days suspended with 36 months of supervised probation on the sexual battery charge. (R pp 67-72) The trial court also ordered Mr. Rodgers to register as a sex offender for 30 years. (R pp 75, 77) Mr. Rodgers entered written notice of appeal on 8 December 2021. (R p 79)

# STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

 Mr. Rodgers appeals from final judgments of the Superior Court pursuant to N.C.G.S. §§ 7A-27(b)(1) and 15A-1444(a).

# STATEMENT OF THE FACTS

The only evidence connecting Taiquan Rodgers to a break in at T.L.’s[[1]](#footnote-1) home was opinion testimony from Charlotte-Mecklenburg Police Department (CMPD) analyst Jennifer Sealy. Over Mr. Rogers’s Rule 702 objection and without allowing defense counsel the opportunity to voir dire the witness, the trial court allowed Sealy to opine that Mr. Rodger’s DNA was consistent with a touch DNA sample—containing a very small amount of DNA—collected from the suspected point of entry. (T p 594)

On 12 August 2019, someone entered T.L.’s home on Hoskins Ridge Lane in Charlotte. T.L. was asleep in bed in her room with her two sons. She felt someone touching her side and buttocks on the right side over her shorts. (T pp 354, 356) As T.L. turned over to see who was touching her, “the person was walking out of [her] room.” (T p 355) T.L. initially thought the person could have been her cousin because her cousin was the only other person with a key to her home. (T p 357) By the time T.L. got out of bed to determine what was happening, the person “was already, like, two steps from walking out the front door[.]” T.L. did not see anything in the intruder’s hands. (T p 379) T.L. followed the person out of the front door, heard her fence rattle, and called police. (T p 357)

T.L. never saw the intruder’s face and assumed it was a male because of the person’s height. (T pp 356, 385) The person wore a hoodie with designs on it and burgundy pants. (T p 358) There was no evidence from the State that Mr. Rodgers owned any clothing matching this description. T.L. could not see the person’s hair or determine the person’s race because the hood was up, and she only saw the person from behind. (T p 384) T.L. did not identify Mr. Rodgers as the person who touched her and did not recognize him in open court. (T p 380)

On the night of the incident, T.L.’s neighbor, Chinomso Nwigwe, was returning home from work. As he was about to park his car, Nwigwe saw someone “speedily” emerge from between houses, get into a car, and “zoom” off. (T p 397) Nwigwe thought the person was male because of the speed with which the person moved. (T pp 397-98) Later, Nwigwe spoke to T.L. and told her he was not sure if the person he had seen was a man or a woman. (T p 400) Nwigwe never identified Mr. Rodgers as the person he saw that night.

T.L.’s neighbor, Nelson Garcia, had a Nest surveillance camera monitoring from his front porch on the night of the incident. (T p 401-02) The State played a clip from the Nest video showing an individual with a hooded sweatshirt running between houses in the dark at approximately 1:45 a.m.[[2]](#footnote-2) (State’s Ex. 18) The video only shows the individual from behind and does not show the individual’s head or face because the hood was up. Mr. Garcia did not recognize the person in the video and did not identify Mr. Rodgers in open court. (T pp 423-25)

 A crime scene technician collected T.L.’s shorts, took photographs of the scene, and processed disturbed areas for possible fingerprint and DNA evidence. (T pp 449-50, 452) The technician collected DNA samples from the window thought to be the point of entry and from the inside knob and deadbolt on the front door. (T pp 455, 472)

Of the latent fingerprints obtained, three were analyzed: one was T.L.’s; Mr. Rogers was excluded as a source of the other two prints. (T pp 495, 498-99)

After police began their investigation of the incident, T.L. called family members to come get her and her sons while police conducted the investigation. The next day, T.L. noticed that her pocketbook and some video games were missing. (T p 378) T.L. did not see the intruder carrying anything when she followed the person out of her home. (T p 379) The State presented no evidence that Mr. Rogers ever had any of the stolen items.

The only evidence tying Mr. Rodgers to the crimes came from CMPD analyst Jennifer Sealy. (T p 567) Sealy explained generally what DNA is and how a person might or might not leave behind DNA from simply touching something. (T pp 568-71) On direct examination, Sealy testified to the difference between single source and mixture DNA samples. She then testified generally about the police crime lab’s DNA testing protocols. She did not testify about quantity or quality thresholds for analyzing samples. (T pp 572-75)

Sealy analyzed DNA swabs taken from T.L.’s front doorknob. Sealy obtained a mixed sample that she believed came from three individuals. One of the profiles matched T.L., and Sealy could not make a conclusion on the identity of the other two. (T pp 584-85) Sealy also analyzed a DNA sample from T.L.’s shorts. Again, Sealy found a mixture of two contributors: one being T.L. and the other inconclusive. (T p 586)

Sealy was unable to obtain enough DNA material from the swabs taken from the “bottom sash rail” of the window alleged to have been the point of entry. (T p 587) When the prosecutor asked Sealy about the swab from a different spot on the “bottom sash” of that window, defense counsel objected on foundation and due process grounds and asked for “permission to voir dire.” (T p 587) The trial court denied the voir dire request and allowed Sealy to answer. Sealy told the jury that she pulled a partial, single-source profile from that sample and compared the profile to Mr. Rodgers’s known DNA profile. (T pp 587, 591)

When the prosecutor asked Sealy for the results of her comparison, defense counsel objected on “702A” and foundation and due process grounds. Defense counsel, again, asked for permission to voir dire the witness. (T p 591) Instead of giving defense counsel the opportunity to question the witness outside the jury’s presence, the trial court asked Sealy several questions with the jury present and overruled defense counsel’s objection. (T pp 591-93) Sealy told the jury the sample retrieved from the window sash was “consistent” with Mr. Rodgers’s DNA profile. (T p 594) Sealy could not say the sample was a “match” to Mr. Rodgers’s known profile because the sample was an incomplete, partial sample. (T p 594)

Defense counsel moved to dismiss all charges based on insufficient evidence at the close of the State’s case and at the close of all evidence, though he presented none. (T pp 649, 681-84) The trial court denied the motions. (T pp 681, 684)

During its deliberation, the jury asked the trial court for a “breakdown of each charge.” (T p 763) The trial court reinstructed the jury on each charge. (T pp 764-69) After further deliberation, the jury asked the trial court for a “breakdown of felony larceny after breaking and/or entering,” “misdemeanor sexual battery,” and “misdemeanor simple assault[.]” (T p 774) The trial court again reinstructed the jury on these charges. (T pp 778-80) After approximately 5 hours of total deliberation spanning two days, the jury returned guilty verdicts on all charges. (T p 783)

# ARGUMENT

## The trial court abused its discretion by admitting Sealy’s DNA opinion testimony without fulfilling its gatekeeping duty to determine the reliability of the DNA testimony under Rule of Evidence 702 and *State v. McGrady*.

The trial court abused its discretion in admitting Sealy’s expert testimony without adequately determining the reliability of her opinion as required by law. *State v.* *McGrady*, 368 N.C. 880, 893 (2016). The court failed to do so in two ways: (1) by denying counsel’s request for voir dire and to make an offer of proof; and (2) by admitting the Sealy’s opinion testimony when the testimony did not satisfy Rule 702’s reliability test. Admitting this DNA evidence without an adequate foundation was an abuse of discretion. Because the State’s DNA evidence was the only evidence tying Mr. Rodgers to the crimes, there is a reasonable possibility that without it, the jury would not have convicted him. Accordingly, this Court should vacate the judgments.

### Standard of Review and Preservation

A trial court’s ruling on a Rule 702 challenge is reviewed for an abuse of discretion. *Id.* (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458 (2004)). A trial court abuses its discretion when its “ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285 (1988); *State v. Parker*, 315 N.C. 249, 258-59 (1985).

Mr. Rodgers timely objected to Sealy’s opinion testimony based on Rule “702”, foundation, and due process. (T p 591) Defense counsel also asked to “voir dire” Sealy. Defense counsel approached the bench and asked to provide an offer of proof of what her voir dire questioning of Sealy might show. (T pp 593-94, 669-69) The trial court overruled the objection after asking a handful of its own questions. Thus, Mr. Rodgers preserved his objection to Sealy’s opinion testimony. N.C. R. App. P. 10(a)(1) (2022).

### Rule 702’s reliability test requires sufficient data, reliable principles, and the reliable application of those principles to the data.

Prior to 2011, North Carolina’s interpretation of its Evidence Rule 702 eschewed the *Daubert[[3]](#footnote-3)* approach used under Federal Rule of Evidence 702. *McGrady*, 368 N.C. at 886 (cleaned up). In 2011, the General Assembly amended Rule 702 to impose a higher “level of rigor” on our courts in testing the reliability of expert evidence before allowing the jury to consider it. *Id.* at 892-93. Thus, North Carolina’s Rule 702 now imposes “exacting standards” for the admission of expert testimony. *Id.* at 885 (citation and quotation marks omitted). As a “*Daubert* state,” our courts use this heightened admissibility standard to “scrutinize expert testimony *before* admitting it.” *Id*. at 888, 892 (emphasis added).

“Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a).” *Id.* at 892 (citations omitted). The trial court finds the facts necessary to answer this question. *Id.* (citing N.C. R. Evid. 104(a) commentary). The trial court then concludes, based on these findings, whether the proffered expert testimony satisfies Rule 702(a)’s requirements of qualification, relevance, and reliability. *Id.* at 893. The State, as the proponent of the expert evidence, bears the burden of establishing the admissibility of the evidence under each of these three prongs. *State v.* *Ward*, 364 N.C. 133, 140 (2010). Failure of the proponent to satisfy any one of Rule 702’s prongs renders the expert evidence inadmissible. *McGrady*, 368 N.C. at 889. These prerequisites to admission impose a gatekeeping role on the trial court. Here, the State did not satisfy the third prong—that Sealy’s opinion testimony was reliable.

The 2011 amendment mirrored Fed. R. Evid. 702’s language and incorporated into our Rule 702 a “three-pronged reliability test” the evidence must satisfy to be admissible:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702(a). In adopting the federal rule’s language, the General Assembly codified federal precedent regarding the trial court’s “gatekeeping” function explained in *Daubert*, *Kumho*, and *Joiner*.[[4]](#footnote-4) *McGrady*, 368 N.C. at 888.

### The trial court failed to perform its “gatekeeping” duty when it denied defense counsel’s request to voir dire Sealy. The trial court compounded this error by denying counsel’s request to give an offer of proof concerning the foundation for Sealy’s DNA opinion testimony.

 The trial court failed to conduct its “gatekeeping” role of determining whether Sealy’s testimony was reliable when it: (i) denied defense counsel’s request to voir dire Sealy, and (ii) denied counsel’s request to make an offer of proof. *McGrady*, 368 N.C. at 893.

#### Denial of Request for Voir Dire

The trial court erred by denying defense counsel’s request for voir dire and allowing the expert to testify. (T p 591)

Although there is no required procedure for how a trial court must perform its gatekeeping function, our Supreme Court recognized that novel or complex areas of expertise require procedures like obtaining affidavits, conducting an in limine hearing, or conducting voir dire. *McGrady*, 368 at 893 (citing *Kumho*, 526 U.S. at 152)*.* “In simpler cases, however, the area of testimony may be sufficiently common or easily understood that the testimony’s foundation can be laid with a few questions in the presence of the jury.” *Id.* (citing *Kumho*, 526 U.S. at 152). Trial courts “should use a procedure that, given the circumstances of the case, will ‘secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.’ ” *Id.* (quoting N.C.G.S. § 8C-1, Rule 102(a) (2015)).

Federal courts have extolled the virtues of voir dire to assist the trial court in upholding its gatekeeping duty. *See* *United States v. Holguin*, Nos. 19-50158, 19-50169, 19-50173, 2022 U.S. App. LEXIS 28477, at \*10 (9th Cir. Oct. 13, 2022). In *Holguin*, the Ninth Circuit explained:

[E]ven if not required, it will often be beneficial for district courts to conduct some proceeding, focused on the reliability of expert testimony, such as a *Daubert* hearing or voir dire of proffered expert testimony. . . . Without such proceedings, it may be difficult in many cases for the [trial] court to clearly discern an expert’s methodology and to evaluate how that methodology connects to the expert’s opinions. When an expert’s methodology is directly presented and probed, the district court will be well positioned to make the reliability findings that our cases require[.]

*Id.*

And, voir dire is all the more important when a party objects to expert testimony and *requests* voir dire. *See* *United States v. Sepulveda*, 15 F.3d 1161, 1184 n.15 (1st Cir. 1993) (“When uncertainty attends a proffer of opinion evidence, voir dire screenings are standard fare. . . . But although appellants moved in limine to forfend [the expert’s] testimony, they apparently never sought permission to conduct a voir dire.”) (citations omitted). While federal circuit court precedent typically is not controlling, our Supreme Court has recognized its importance for interpreting our amended Rule 702. *McGrady*, 368 N.C. at 888.

This is not a case where the expert’s testimony is simple and closely tied to the expert’s training and experience such that there was no need for voir dire. *See* *McGrady*, 368 N.C. at 893; *C.f. United States v. Kenyon*, 481 F.3d 1054, 1061 (8th Cir. 2007) (“When a district court is satisfied with an expert’s education, training, and experience, and the expert’s testimony is reasonably based on that education, training, and experience, the court does not abuse its discretion by admitting the testimony without a preliminary hearing.”) (citations omitted).

Rather, expert testimony regarding DNA evidence, like the key evidence in this case, falls on the complex end of the evidentiary spectrum. *See* *McGrady*, 368 N.C. at 893; *State v. Futrell*, 112 N.C. App. 651, 659 (1993) (“The methodology of DNA testing is complex and the terminology difficult.”); *State v. Phillips*, 844 S.E.2d 651, 661 (S.C. 2020) (“DNA—particularly touch DNA—is a complicated scientific field of study that requires detailed explanation.”). Thus, as a complex field of study, foundation for such testimony cannot be laid “with a few questions” in the jury’s presence. *See McGrady*, 368 N.C. at 893.

Here, defense counsel objected to the expert testifying about the results of a comparison between the partial DNA found at the scene and Mr. Rodgers’s DNA. (T p 591) Trial counsel asked for voir dire. The trial court did not grant the request. Instead, it stated, “Let me ask a couple of questions[,]” engaged in a short colloquy with Sealy in the jury’s presence, and overruled the objection. (T pp 591-93)

Because of the complexity of the touch DNA evidence, the trial court should have granted defense counsel’s request to question Sealy outside the jury’s presence. *See* *McGrady*, 368 N.C. at 893 (describing appropriate procedures for evaluating admissibility of expert opinion testimony); *Holguin*, 2022 U.S. App. LEXIS 28477, at \*10; *Sepulveda*, 15 F.3d at 1184 n.15.

Cases involving challenges to eyewitness identification testimony are instructive here. Both DNA and eyewitness identification evidence are used to identify a defendant. Juries give both types of evidence extraordinary weight, thus increasing the importance of careful preliminary procedures to ensure the reliability of the evidence the jury hears. [[5]](#footnote-5)

Indeed, our courts favor voir dire hearings when defendants challenge identification testimony based on potentially suggestive out-of-court identification procedures. *See State v. Smith*, 134 N.C. App. 123, 129 (1999) (the trial court erred by failing to conduct a voir dire hearing to determine the admissibility of the officer’s identification evidence); *State v. Waddell*, 289 N.C. 19, 30 (1975) (“When the State offers evidence of identification and there is an objection and a request for a voir dire hearing, the trial judge should conduct a voir dire and hear the evidence from both the defendant and the State, find facts and determine the admissibility of the proffered evidence.”); *State v. Accor*, 277 N.C. 65, 79 (1970) (recognizing the need for a voir dire hearing where all material facts can be elicited and factual questions relevant to the admissibility of the evidence can be answered).

Whether certain DNA opinion testimony is reliable is a different question from whether an out-of-court identification procedure was suggestive and whether it tainted in-court identification testimony. However, the two questions address the same issue: the foundation and admissibility of in-court identification testimony. DNA evidence is at least as persuasive to a jury as eyewitness testimony.[[6]](#footnote-6) Here, defense counsel timely objected to Sealy’s DNA identification testimony and asked to voir dire the witness. Thus, the trial court should have allowed defense counsel to voir dire Sealy to elicit the relevant facts and to determine the factual questions regarding the admissibility of her opinion testimony. *See State v. Accor*, 277 N.C. at 79.

By denying voir dire, the trial court failed to perform its gatekeeping duty in a fully informed and fair manner. *See Waddell*, 289 N.C. at 30; *McGrady*, 368 N.C. at 893. The procedure it chose failed to satisfy *McGrady’s* directive that the procedures chosen should secure fairness in administration and further the cause of ascertaining truth and ensuring that proceedings are justly determined. *McGrady*, 368 N.C. at 893. Granting defense counsel an opportunity to voir dire Sealyunder the circumstances of this case—which involved a miniscule amount of touch DNA—was necessary to achieve these goals. The trial court erred when it admitted Sealy’s testimony without allowing defense counsel the opportunity to voir dire her to challenge the reliability of her opinion.

#### Denial of the Offer of Proof

The trial court abused its discretion by not allowing defense counsel to make an offer of proof as to what the voir dire examination might elicit from Sealy. *See* *State v. Brown*, 116 N.C. App. 445, 447 (1994). In *Brown*, the trial court denied the defendant’s attempts to call a witness to testify and did not allow the defendant to make an offer of proof as to what the witness’s testimony would be. *Id.* This Court held that the trial court erred in denying the offer of proof because trial counsel was prevented from making a sufficient record. *Id.* at 447. The *Brown* Court reasoned: “ ‘A judge should be loath to deny an attorney [the] right to have the record show the answer a witness would have made’ ” because our appellate courts may not concur in the judge’s ruling. *Id.* (quoting *State v. Chapman*, 294 N.C. 407, 415 (1978)). This Court has also held a trial court abuses its discretion where a defense is substantially inhibited by the trial court denying counsel the opportunity to make a complete record. *State v. Rudd*, 60 N.C. App. 425, 427-28 (1983) (remanding for a new trial).

After the trial court engaged in its colloquy with Sealy, defense counsel asked to approach the bench. (T pp 593-94) Defense counsel requested to make an offer of proof as to what her voir dire might elicit from Sealy; the trial court denied that request “in [its] discretion.” (T pp 668-69) Although defense counsel was able to ask some reliability questions during cross examination, this was not an adequate substitute for voir dire or an offer of proof. *Chapman*, 294 N.C. at 415. Mr. Rodgers’s defense was substantially inhibited because his counsel was not able to make a complete record of the foundational questions she would have asked on voir dire. *See* *Rudd*, 60 N.C. App. at, 427-28. Further, the time to assess the reliability of Sealy’s opinion testimony was before the trial court admitted the testimony. *McGrady*, 368 N.C. at 893.

### D. The trial court abused its discretion in admitting the testimony when Sealy’s testimony did not satisfy Rule 702’s reliability prongs and by not making any reliability findings.

Even if this Court concludes the trial court did not err by admitting Sealy’s testimony without allowing voir dire or an offer of proof, the trial court still erred by admitting Sealy’s testimony for three reasons: (i) the trial court’s cursory questions to Sealy did not establish reliability; (ii) the trial court failed to make findings on reliability; and (iii) Sealy’s testimony demonstrated the unreliability of her opinion. Because Sealy’s unfounded opinion testimony was the only evidence putting Mr. Rogers at the crime scene, the error prejudiced him and he should receive a new trial.

1. *The Trial Court’s Questions were Insufficient.*

Before overruling defense counsel’s objection to the DNA comparison opinion and denying counsel’s request for voir dire, the trial court engaged in the following colloquy with Sealy:

THE COURT: You’ve indicated that there are 24 loci. Is that correct?

WITNESS: That’s correct?

THE COURT: On a full DNA sample?

WITNESS: For a male, that’s correct.

THE COURT: Okay. In this instance, how many loci were there on the DNA profile – partial profile taken from underneath the window?

WITNESS: May I refer to my notes?

THE COURT: Yes.

WITNESS: There was information at each location except for three.

THE COURT: So 8, or 21 of the 24?

WITNESS: Correct.

THE COURT: Is there a standard for the number of loci that must be present on a partial DNA profile to permit comparison?

WITNESS: Yes.

THE COURT: What’s that standard?

WITNESS: Well, it is when we’re looking at a profile and we’re examining the -- for the information to make an interpretation, we need at least 7 loci that give us complete information, and of those 7, at least 4 must be complete genotypes as opposed to some information missing as well. And so, when I’m talking about 24, that’s 21 plus the 3, but when we’re talking about a partial profile it’s okay to be missing the 3 that are the sex determining. So it’s -- of the 24 it’s really 21 that we’re looking at. Of those, at least 7 need information, and from those 7, at least 4 need to be absolutely unambiguous.

THE COURT: Were the three that are sex determinant present?

WITNESS: May I refer to my notes?

THE COURT: Yes.

THE COURT: Yes.

(Witness reviews notes.)

WITNESS: Yes.

THE COURT: Okay, and what entity sets the standard for how many loci need to be present to permit the comparison of a partial sample?

WITNESS: We would need at least 7.

THE COURT: But what entity established that standard? Is that the crime lab? The FBI? The accrediting entity?

WITNESS: Oh, I see what you’re saying. Validations are done at the crime lab that we have done using this particular -- these reagents, this process, and so, our technical lead, we have a standard operating procedures and within that there’s interpretation guidelines. And we follow those interpretation guidelines in order to make any type of analysis, and using those interpretation guidelines, I determined that there is enough quantity and quality of data present in order to make a determination interpretation of the single source profile.

THE COURT: And so that’s the lab’s -- the Charlotte Mecklenburg crime lab’s standard?

WITNESS: Correct, each lab would be different dependent upon on what their thresholds are.

THE COURT: All right. In light of that, overruled.

(T pp 591-93)

The trial court’s questions to Sealy did not serve as an appropriate substitute for defense counsel’s voir dire examination. *See* *McGrady*, 368 N.C. at 893; *Smith*, 134 N.C. App. at 129. The trial court’s questions to Sealy boiled down to: (1) how many loci had allele data; and (2) who set the standard for how many loci were required to have data in order to interpret and compare the sample. These questions and Sealy’s answers did not address the three prongs required under Rule 702: The trial court did not ask how much DNA was extracted from the sample, how that tiny amount of DNA would affect the reliability of Sealy’s conclusion, how the police crime lab’s thresholds and internal validation procedures compared to other, independent labs’, or whether Sealy applied the police crime lab’s protocols reliably. As discussed below, Sealy’s testimony on cross answered some of these questions in a manner that undermined the reliability of her opinion testimony and highlighted the inadequacy of the trial court’s inquiry.

#### The trial court erred by not making reliability findings.

The trial court also abused its discretion in admitting Sealy’s testimony without making reliability findings after trial counsel objected to the testimony on Rule 702 grounds.

Although trial courts have wide discretion in making admissibility determinations and on the procedures used to make those determinations, they do not have discretion about *whether* to make those determinations. *McGrady*, 368 N.C. at 893; *Holguin*, 2022 U.S. App. LEXIS 28477, at \*11 (“While a district court’s inquiry is flexible . . . the flexibility afforded to the gatekeeper goes to *how* to determine reliability, not *whether* to determine reliability. . . . A district court abdicates its gatekeeping role, and necessarily abuses its discretion, when it makes no reliability findings.”) (citations and quotations omitted). When a party challenges the foundation for an expert’s opinion, the trial court must make findings of reliability before admitting the testimony. *Holguin*, 2022 U.S. App. LEXIS 28477, at \*15-16 (When a defendant challenges the expert opinion’s reliability, the trial court abuses its discretion by not making express reliability findings).

Although this court has held—in the context of drug identification testimony—that experts do not necessarily need to provide precise details about how they reached their opinions, *State v. Piland*, 263 N.C. App. 323, 338 (2018); *State v. Sasek*, 271 N.C. App. 568, 573-75 (2020), the methods for testing DNA and interpreting the results are more complex and require more explanation than methods used in drug analyses. In drug cases, the test will simply determine whether or not the evidence contains a controlled substance. In DNA cases, especially cases involving partial profiles obtained from minute amounts of touch DNA, the risk of unreliable results creates the need to examine the foundation for the expert’s ultimate opinion more closely. *See* *Futrell*, 112 N.C. App. at 659; *Phillips*, 844 S.E.2d at 661 (“Rather, DNA—particularly touch DNA—is a complicated scientific field of study that requires detailed explanation.”).

Moreover, in *Piland* and *Sasek*, the defendants did not object to the expert testimony. *Piland*, 263 N.C. App. at 338; *Sasek*, 271 N.C. App. at 571. Consequently, the defendants could not show plain error where the experts testified that they at least performed a chemical analysis. *Piland*, 263 N.C. App. at 339-40; *Sasek*, 271 N.C. App. at 574-75. But here, defense counsel objected on 702 grounds, asked to voir dire the witness, and asked to make an offer of proof. Thus, defense counsel alerted the trial court that a more in-depth inquiry into Sealy’s foundation for her opinion was necessary.

Trial courts must assess the reliability of expert testimony to ensure that it complies with Rule 702(a)’s three-pronged test. The court has discretion to consider any of the particular factors articulated in previous cases, or other factors it may identify, but it cannot admit the evidence without first making the required reliability determination based on *some* reasons. Otherwise, its decision is, by definition, arbitrary. *Holguin*, 2022 U.S. App. LEXIS 28477, at \*15-16.

Here, trial counsel objected to Sealy’s testimony and asked to voir dire Sealy. (T p 591) The trial court made no findings on the record; it simply overruled the objection and allowed Sealy’s opinion after asking a few cursory questions. (T pp 591-93) Had the trial court allowed trial counsel to voir dire Sealy, the trial court may have been able to make the required reliability findings. *McGrady*, 368 N.C. at 893; *Holguin*, 2022 U.S. App. LEXIS 28477, at \*10. Because the trial did not, and because the trial court did not make any reliability findings, it abdicated its gatekeeping duty.

1. *Sealy’s Testimony Demonstrated the Unreliability of her Opinion.*

The trial court abused its discretion by admitting Sealy’s testimony because Sealy’s opinion testimony did not satisfy Rule 702’s reliability prongs. Because the court did not adequately determine the reliability of Sealy’s opinion *before* allowing Sealy’s to give it, the court failed to perform its gatekeeping duty. *McGrady*, 368 N.C. at 892-93; *Holguin*, 2022 U.S. App. LEXIS 28477, at \*15-16. However, even Sealy’s trial testimony failed to establish Sealy: (i) based her opinion on sufficient data; (ii) used reliable principles in analyzing the DNA evidence; or (iii) reliably applied those principles in analyzing the evidence.

1. Sealy’s opinion was not based on sufficient facts or data.

The record suggests Sealy’s opinion was not based on sufficient data. On cross examination, Sealy testified that the original amount of DNA the police lab used to replicate for analysis was 2.7 picograms. (T p 604) The lab’s protocols warn that “extreme caution” should be used when analyzing an original, partial sample of less than 250 picogramsof DNA and prohibit analysis of any sample less than 1 picogram of DNA. (T pp 588, 624-25) Thus, the DNA collected here was well below the cutoff for when “extreme caution” is required and almost at the level where analysis is prohibited. The relatively tiny amount of DNA would have affected the reliability of any results Sealy obtained—as she explained. (T pp 612-13).

First, such a small amount of original DNA resulted in lower Relative Fluoresence Unit (RFU) values of the alleles, or smaller peaks at every locus examined. An allele is a genetic marker represented as a peak present at one of the twenty-four sites (loci) analysts use to determine a person’s genetic sequence for forensic purposes. (T pp 597-98) Generally, a person has two alleles at every locus. (T p 598) An RFU is a value correlating to the amount of genetic material comprising the allele at a given locus. (T p 607) The more genetic material, the higher the RFU value and the higher the corresponding allele peak height depicted on an electropherogram. (T pp 607-08)

Sealy explained her lab had two RFU thresholds that governed DNA testing. (T pp 606-07, 609) The lab’s analytical threshold was 75 RFU. (T p 612) Any allele peaks below this threshold could not be reported under the lab’s protocols. (T p 609) The lab’s stochastic threshold was 350 RFU. (T p 614) Any peaks with an RFU value below this threshold would indicate an increased risk of stochastic effects. Stochastic effects, put simply, increase the chances the results could not be repeated with subsequent testing.[[7]](#footnote-7)

In this case, the small amount of DNA resulted in three loci with no allele/peak data and eleven missing one allele or peak. (T pp 618-19) Moreover, the RFU value for *every allele/peak at every locus was below the lab’s stochastic threshold.* (T p 619) In fact, most of the RFU values were less than half the stochastic threshold, and some of them were very close to the analytical threshold of 75 RFU that would have prevented reporting those alleles. (T pp 619-22) This means there was an increased risk of stochastic effects at *every* locus. (T p 626) Thus, there was an increased chance that the test results, and Sealy’s opinion based on them, were not reliable.

Additionally, Sealy testified the lab’s protocols state when a sample has alleles below the stochastic threshold and there are indications of a potential second contributor, then the data are “uninterpretable.” (T pp 625-26) Sealy testified that “it was possible” that there was a second contributor to the sample in question even though she characterized the sample as a partial, single source sample. (T p 626-27) Sealy explained that she thought the sample was a single source sample because the peak heights were very balanced. (T p 627) However, she acknowledged that RFU values below the stochastic threshold can affect peak height balance. (T p 627) Again, the RFU values at every locus in this sample were below the stochastic threshold. Thus, Sealy’s own testimony cast serious doubt over whether she had a sufficient amount of DNA—and thus, RFU values—to analyze. Without sufficient data, Sealy’s opinion fails the reliability test under Rule 702. N.C.G.S. § 8C-1, Rule 702(a) (An expert may testify to an opinion when *all* of the reliability prongs are met.). The trial court erred in overruling Mr. Rogers’s objection.

1. There was no evidence that the lab’s protocols were reliable.

Rule 702 requires the principles and methods an analyst used in forming an opinion be reliable. N.C. Gen. Stat. § 8C-1, Rule 702(a)(2). Here, the governing principles Sealy used to analyze the DNA evidence were the police lab’s protocols. Sealy testified the police lab’s analytical threshold—the RFU value below which results would be unreportable—was 75 RFU. (T p 612) Although all of the alleles in the electropherogram were above this value, some were very close to it. And, all the RFU values were below the stochastic threshold. Moreover, Sealy testified every lab sets its own thresholds based on internal validation. (T pp 591-93) As explained above, lower RFU values suggest less reliable results. Sealy did not testify as to how her lab’s analytical threshold compared to other labs’ thresholds. She also did not explain why the police lab chose its thresholds or the internal validation used to determine those thresholds.

Two of the factors *Daubert* suggests trial courts use to test a protocol’s reliability are the technique’s known error rate and whether the techniques the expert used are generally accepted in the relevant scientific field. *Daubert*, 509 U.S. at 593-94. Trial courts should consider these factors when they are reasonable measures for determining expert testimony reliability. *Kumho*, 526 U.S. at 152. Because expert testimony regarding DNA evidence is so complex and technical, these factors are reasonable measures of reliability. *McGrady*, 368 N.C. at 893; *Futrell*, 112 N.C. App. 651, 659; *Phillips*, 844 S.E.2d at 661.

Here, the trial court merely asked who set the police lab’s protocols. (T p 593) Sealy responded that every lab sets its own protocols. (T p 593) Sealy did not provide any known error rates for testing of samples as small as the sample here. Based on Sealy’s testimony, there is no evidence as to the lab’s potential or known rate of error for samples like the one in this case or whether the police lab’s protocols and techniques are generally accepted in the field. Thus, Sealy’s testimony—on cross-examination—did not establish the police crime lab’s protocols were reliable. Because the State, as the proponent of Sealy’s opinion testimony, had the burden of establishing the foundational requirements for admissibility, *Ward*, 364 N.C. at 140, and because there was no showing that the protocols used by Sealy and the police lab were reliable, the trial court erred in admitting Sealy’s opinion.

1. There was no showing that Sealy reliably applied the lab’s protocols in her analysis.

Finally, Rule 702(a) requires the expert to apply “the principles and methods reliably to the facts of the case.” N.C.G.S. § 8C-1, Rule 702(a)(3). Here, the police lab’s protocols—whether or not they were reliable on their own—were the relevant governing principles. Although the trial court asked a couple of questions about the lab’s protocols, it asked no questions about whether Sealy reliably applied them.

The trial court’s failure to inquire about whether Sealy reliably applied the principles and methods to the facts here was fatal to its decision to admit the evidence. N.C.G.S. § 8C-1, Rule 702(a) (all reliability prongs must be met for an expert opinion to be admissible). Indeed, the evidence adduced on cross examination shows that, had the court fulfilled its gatekeeping function and asked about this reliability prong, Sealy’s testimony would have fallen short. As explained above, the lab’s protocols direct analysts to use “extreme caution” when dealing with original samples with less than 250 picograms of DNA. (T pp 624-25) Sealy did not explain what “using extreme caution” meant in this context, or whether Sealy did it. Her testimony on cross indicates she did not. The protocols set a stochastic threshold of 350 RFU, meaning any allele with an RFU value less than that has an increased risk of being random or unrepeatable. Moreover, the protocols prohibit interpreting samples when all the allele values are below the stochastic threshold and there are indications of a second contributor to the sample. (T pp 625-26)

Sealy testified she extracted 2.7 picograms of DNA from the original sample, that all of the allele values were below the stochastic threshold (T pp 604, 619), and that it was possible there was a second contributor to the sample. (T pp 626-27) The testimony indicating an increased risk of unrepeatable results—and the possibility the sample was uninterpretable—suggests Sealy should have tested the sample again to determine whether the results were reliable. The record does not reflect Sealy tested and compared the sample more than once.

At trial, the State focused on Sealy’s testimony that the likelihood of selecting a random individual with the same DNA profile as the profile found on the window was 1 in 1.5 quadrillion. (T p 595) The State will likely highlight this astronomical probability to support the reliability of Sealy’s opinion on appeal. However, that probability is only as reliable as the electropherogram data generated in Sealy’s analysis. For the reasons stated above, Sealy’s electropherogram data was likely not reliable.

Sealy’s testimony could not and did not fix the trial court’s error in allowing her opinion over defense counsel’s objection without ensuring it was reliable. To the contrary, Sealy’s testimony exposed grave concerns about the reliability of her opinion testimony. The trial court’s admission of that opinion without a proper foundation was an abuse of discretion. N.C.G.S. § 8C-1, Rule 702(a)(1)-(3); *McGrady*, 368 N.C. at 889.

### The trial court’s error prejudiced Mr. Rodgers.

The trial court’s error in admitting Sealy’s testimony prejudiced Mr. Rodgers because the DNA evidence was the only evidence linking Mr. Rodgers to the crimes. This Court reviews preserved evidentiary errors to determine whether there was a reasonable possibility the error impacted the jury’s verdict. N.C.G.S. § 15A-1443(a); *State v. Fletcher*, 370 N.C. 313, 325 (2017). Even if this Court were to somehow conclude Mr. Rodgers did not appropriately preserve this issue, the error constitutes plain error. Under plain error review, this Court must determine whether the error had a probable impact on the jury verdict. *State v. Lawrence*, 365 N.C. 506, 518 (2012).

Here, Sealy’s opinion that Mr. Rodgers’s DNA was consistent with the touch DNA found at the scene was the only evidence linking Mr. Rodgers to the crimes. No other testimony or evidence placed Mr. Rodgers at T.L’s house. T.L. never saw the perpetrator’s face. She could not tell the person’s race or gender. Neither the video evidence, nor the other witnesses identified Mr. Rodgers as being the perpetrator or meaningfully narrowed the pool of possible suspects. Although fingerprints were lifted at the scene, none matched Mr. Rodgers. Mr. Rodgers was never seen in possession of any of the missing items. No clothing matching that of the intruder was ever associated with Mr. Rodgers. Thus, without Sealy’s testimony, the State could not prove that Mr. Rodgers committed the alleged crimes in this case, and the jury likely would have reached a different verdict. Thus, Mr. Rodgers has shown prejudice under either the preserved or plain error standard. Consequently, this Court should vacate the judgments.

## The trial court erred in denying Mr. Rodgers’s motions to dismiss because the evidence of sexual battery and larceny was insufficient to support the verdicts.

### Standard of Review

This Court reviews rulings on motions to dismiss de novo. *State v. Bagley*, 183 N.C. App. 514, 523 (2007). In order to survive a motion to dismiss, there must be “substantial evidence” of each element of the crime and that the defendant is the perpetrator of the crime. *Id.* (citations omitted). “Substantial evidence” is evidence which a reasonable mind could conclude supports a finding of guilt beyond a reasonable doubt. *State v. Smith*, 300 N.C. 71, 78-79 (1980). Competent and incompetent evidence is considered when assessing sufficiency, and it is to be considered in the light most favorable to the State, including reasonable inference drawn from the evidence. *State v. Rose*, 339 N.C. 172, 192 (1994). “However, our courts have repeatedly held mere speculation or suspicion to be insufficient when considering the propriety of a motion to dismiss.” *State v. Brown*, 162 N.C. App. 333, 338 (2004).

### Sexual Battery

The trial court erred in denying Mr. Rodgers’s motion to dismiss the charge of misdemeanor sexual battery because the evidence did not support a finding that any touching was for the purpose of sexual gratification. Our sexual battery statute provides: “A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person….” N.C.G.S. § 14-27.33(a). Thus, sexual battery is a specific intent crime with an essential element that the sexual contact be for the purpose of sexual arousal, gratification, or abuse. *Id.*

The element of acting for sexual arousal *may* be inferred from the act itself. *In re S.A.A.*, 251 N.C. App. 131, 135 (2016). “In many cases concerning conduct alleged to constitute taking indecent liberties, it has been unnecessary to closely examine whether the challenged conduct by defendant was motivated by the purpose of arousing or gratifying sexual desire. The conduct in those cases obviated extensive discussion regarding the purpose of the act.” *State v. Brown*, 162 N.C. App. at 337 (citing *State v. Slone*, 76 N.C. App. 628 (1985) (defendant placed his hand underneath a twelve-year-old victim’s softball shorts and fondled her); *State v. Bowman*, 84 N.C. App. 238 (1987) (defendant laid on top of victim with his pants unzipped, kissed her, and touched her privates)).

However, our courts have required context—in addition to the touching—surrounding sexual contact to support inferences of sexual purpose when the purpose was not obvious. *See State v. Patino*, 207 N.C. App. 322, 328 (2010) (the evidence was sufficient where it showed the defendant had previously asked the victim for a date and brushed against her thigh before “the defendant grabbed [the victim’s] crotch[.]”); *State v. Stanford*, 169 N.C. App. 214, 217 (2005) (evidence was insufficient where it showed that the defendant’s hand brushed the alleged victim’s breast for a couple of seconds before the alleged victim asked the defendant what he was doing, and the defendant apologized).

Here, the evidence presented did not permit a reasonable inference that the touching was for the purpose of sexual arousal or gratification. T.L. testified that she awoke to someone “touching on [her] side and [her] buttocks on [her] right side[.]” (T p 354) As T.L. turned over in her bed to see who was touching her, “the person was walking out of [her] room.” (T p 355) T.L. explained that the person touched her over the shorts she was wearing. (T p 356) Unlike the cases in which our courts have allowed for an inference of sexual gratification, the record here does not include any other indications, beyond a simple touching, that would support such an inference.

Moreover, like in *Stanford*, the record only showed that T.L. was touched on the thigh and buttocks, over her shorts, and that the touch was brief—the person who touched T.L. stopped and was walking out of her room by the time T.L. turned over to see who was touching her. *See* *Stanford*, 169 N.C. App. at 217 (defendant briefly brushed against the alleged victim’s breast for “only a couple seconds.”). Thus, the evidence did not support an inference of sexual purpose. *See id.* (“To the contrary, the evidence suggests nothing more than an accidental encounter.”). Consequently, the trial court erred in denying Mr. Rodgers’s motion to dismiss the sexual battery charge.

### Larceny

The trial court erred in denying Mr. Rodgers’s motion to dismiss the larceny after breaking and entering charge because the State did not present substantial evidence Mr. Rodgers took and carried away T.L.’s personal property. A larceny conviction requires proof the defendant has taken personal property belonging to another person, carried the property away without consent, and with the intent to permanently deprive the person of the property, knowing the defendant is not entitled to the property. N.C.G.S. § 14-72.

The facts here are similar to the facts in *State v. Campbell*, 373 N.C. 216 (2019). In *Campbell*, the evidence showed the defendant had been inside a church for several early morning hours on a Thursday. *Id.* at 224. The church noticed missing electronic equipment the following Sunday. Defendant’s wallet was found near where some items were missing. *Id.* The State never recovered the stolen property and was unable to tie the property to the defendant. *Id.* The *Campbell* Court reversed Mr. Campbell’s larceny conviction, holding that “[u]nder well-settled caselaw, evidence of a defendant’s mere opportunity to commit a crime is not sufficient to send the charge to the jury[,]” *Id*. at 221, and the evidence before the Court “merely proved that defendant was present inside the church for several hours during the four-day period in which the equipment was taken.” *Id.* at 225.

In reaching its conclusion, the *Campbell* Court cited several cases that applied the same principle that the opportunity to commit a crime is not enough to prove guilt. *State v. Murphy*, 225 N.C. 115 (1945) was one of those cases. There, two defendants assaulted a man and left him unconscious in the street. Two women moved him to a porch. When he regained consciousness, he discovered he was missing his wallet. The two defendants were charged with assault and robbery. The robbery convictions were overturned for insufficient evidence because the victim was unconscious when his wallet was taken, and the defendants were not the only people present in the time frame that the wallet disappeared. “Under such circumstances, to find that any particular person took the money is to enter the realm of speculation[,]” *Id*. at 117, and a charge cannot be sustained based merely on suspicion or conjecture of the defendant’s guilt. *Id.* at 116.

The *Campbell* Court also cited *State v. Moore*, 312 N.C. 607 (1985), another case where it held the evidence insufficient to prove a robbery charge. There, the defendant sexually assaulted a store clerk and left her in a bathroom. Sometime after the defendant left, the clerk ran to a neighboring business and summoned police. Approximately two hours after the assault, the clerk notice her wallet was missing from a stool where she had left it. The Court concluded that though defendant had the opportunity to take the victim’s wallet, other might have also. The Court held that the evidence disclosed no more than the defendant’s opportunity to commit the robbery, which was insufficient to sustain his conviction. *Id*. at 612-13.

Here, like in *Campbell*,the record does not show the person who entered T.L.’s house through the window was the person who stole things. T.L. saw someone in her house. T.L. did not see that person carrying anything away upon leaving. (T p 379) T.L. testified that she left her home during the police investigation. (T p 378) She stated she only noticed the missing items after she returned to the house the next morning. (T pp 378, 390) There was no evidence about how the police left the home after completing their investigation. There was evidence that someone else had a key to T.L.’s home. The State presented no evidence that Mr. Rodgers ever possessed any of the stolen items.

The evidence, at best only raises a suspicion or conjecture that the person who entered T.L.’s home was the same person who took items not discovered missing until the next day. *Id.* at 223. Therefore, the trial court should have granted Mr. Rodgers’s motion to dismiss the larceny charge.

# CONCLUSION

 For the foregoing reasons, Mr. Rodgers respectfully requests this Court reverse the larceny and sexual battery judgments. For any judgment that survives a sufficiency review, Mr. Rodgers requests this Court vacate the judgments and remand for a new trial.

 Respectfully submitted this the 21st day of November, 2022.

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# CERTIFICATE OF COMPLIANCE WITH RULE 28(J)

Undersigned counsel hereby certifies that this brief complies with North Carolina Rule of Appellate Procedure 28(j), in that it is printed in 13-point Century Schoolbook font and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare this brief.

 This the 21st day of November, 2022.

 By Electronic Submission:

 Brandon Mayes

 Assistant Appellate Defender

# CERTIFICATE OF SERVICE

 I hereby certify that a copy of Defendant-Appellant’s Brief has been duly served by sending it electronically to Ms. Rebecca Lem, Assistant Attorney General at RLem@ncdoj.gov.

 This the 21st day of November, 2022.

 By Electronic Submission:

Brandon Mayes

Assistant Appellate Defender

1. This brief refers to the adult victim by her initials pursuant to IDS policy regarding the identity of all victims in sexual crime cases. [↑](#footnote-ref-1)
2. State’s Exhibit 18, a CD with Garcia’s surveillance clips, was admitted, but the jury only saw a clip from approximately 1:45 am on 12 August 2019. (T pp 423-25) State’s Exhibit 18 also contains daytime footage, which was never published to the jury. [↑](#footnote-ref-2)
3. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). [↑](#footnote-ref-3)
4. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). [↑](#footnote-ref-4)
5. *See* *United States v. Wade*, 388 U.S. 218 (1967) (recognizing eyewitness identification has a strong impact on juries regardless of its accuracy); *Manson v. Brathwaite*, 432 U.S. 98, 111-112 (1977) (recognizing “[t]he driving force behind *United States v. Wade*, 388 U.S. 218 (1967)” and its companion cases “was the Court’s concern with the problems of eyewitness identification” and the desire to preclude the jury from hearing “eyewitness testimony unless that evidence has aspects of reliability”); *See also,* Kimberly Schweitzer and Narina Nunez, *What Evidence Matters Most to Jurors? The Prevalence and Importance of Different Homicide Trial Evidence to Mock Jurors*, 25(3) Psychiatry, Psych. & L. 437 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6818361/. (mock jurors rank DNA as the most important evidence). [↑](#footnote-ref-5)
6. Schweitzer and Nunez, supra note 5. [↑](#footnote-ref-6)
7. Stochastic is defined as “involving a random variable” or a process “involving chance or probability.” https://www.merriam-webster.com/dictionary/stochastic [↑](#footnote-ref-7)