No. COA22-987 TWELFTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

v. ) From Cumberland County

 )

ALKEEM HAIR )

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUES PRESENTED**

**I. Whether the trial court abused its discretion in denying the jury’s request to review the trial transcript?**

**II. Whether the trial court abused its discretion by joining the witness intimidation charge with the remaining offenses and by denying Mr. Hair’s motion to sever?**

**III. Whether the trial court plainly erred in admitting the hearsay cellphone records, geo tracking evidence, and Investigator Potter’s testimony about the tracking location of Ms. Washington’s cell phone because they were based on hearsay?**

**STATEMENT OF THE CASE**

 On 6 August 2019, the Cumberland County Grand Jury indicted Mr. Hair for first-degree murder and robbery with a dangerous weapon. The State later filed a superseding indictment. On 11 October 2021, the Cumberland County Grand Jury indicted Mr. Hair for first-degree murder, robbery with a dangerous weapon, and intimidating a witness. (R pp. 24-27) The robbery indictment alleged Mr. Hair took a glass jar containing marijuana and a cell phone. (R p. 26)

The matter came on for trial at the 21 March 2022 Criminal Session of Cumberland County Superior Court, the Honorable Claire V. Hill presiding. On 24 March 2022, the jury found Mr. Hair guilty of all the offenses charged. (R pp. 68-69) The trial court consolidated the first-degree murder and robbery sentences for judgment and sentenced Mr. Hair to life imprisonment without parole. The trial court sentenced Mr. Hair to a term of 14 to 26 months imprisonment for intimidating a witness to run at the expiration of the preceding sentence. Mr. Hair gave oral notice of appeal. (R pp. 72-75)

**STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

 Mr. Hair appeals from the final judgment of Cumberland County Superior Court pursuant to N.C.G.S. §§ 7A-27 and 15A-1444.

**STATEMENT OF THE FACTS**

Motion for Joinder and Motion to Sever

 The State filed a pre-trial motion to join the offense of intimidating a witness with the first-degree murder and robbery charges. (Pre-trial T pp. 4-5; R pp. 33-34) The State argued the victim in the witness intimidation case was the driver in the robbery and murder case. (Pre-trial T p. 5) Trial counsel objected to joining the witness intimidation charge based on the three-year gap between the alleged offenses and moved to sever the offenses. (Pre-trial T pp. 5-6) The State argued the cases were “not transactionally related but [the witness intimidation] is related to the [murder and robbery] case.” (Pre-trial T p. 7) The trial court granted the motion for joinder and denied the severance motion. (Pre-trial T p. 7)

 Trial counsel renewed his motion to sever the witness intimidation charge before jury selection. (T p. 3) Trial counsel also renewed the motion to sever during the trial. (T p. 518) After the presentation of evidence, trial counsel stated he was “renew[ing] prior motions.” (T p. 666)

State’s Evidence of Robbery and Murder

Antonio Johnson, Mr. Hair’s codefendant, testified on behalf of the State. Mr. Johnson identified Mr. Hair and Mr. McIver as suspects to the police three weeks after the alleged murder. (T p. 505) At the time of the trial, Mr. Johnson pled guilty to being an accessory to first-degree murder and was awaiting sentencing. (T pp. 474-475)

Mr. Johnson testified that on 16 July 2018 Mr. Hair wanted to go to Keshia Washington’s house to buy marijuana. (T pp. 476, 480) Sometime between 8:30 and 10:30 P.M., Mr. Johnson drove his girlfriend’s white dodge charger to Keshia’s house while Mr. Hair gave directions. (T pp. 478-481, 483) This charger had a Jamaican flag on the rearview mirror and a cracked passenger window. (T p. 478) Mr. McIver was also present and seated in the passenger seat. Mr. Hair was in the back seat. (T pp. 482-83)

 According to Mr. Johnson, Mr. Hair told him where to park. Mr. Johnson drove past Keshia’s house and parked on another street that was “a couple hundred yards” away. (T pp. 481-482) Mr. Johnson kept the car running while Mr. Hair and Mr. McIver got out and went toward Keshia’s house. (T p. 483) About five minutes later, Mr. Johnson heard three to ten gunshots. (T p. 484) Mr. Johnson thought someone was shooting at Mr. Hair and Mr. McIver so he went to find them. (T pp. 484-485) Mr. Johnson looked toward Keshia’s house and saw Mr. Hair and Mr. McIver running toward the car. (T p. 486) They told him to go, and Mr. Hair got into the back seat while Mr. McIver got into the passenger seat. (T p. 487) Mr. Johnson turned onto Murchison Road and Mr. Hair directed him to his girlfriend’s house. (T p. 481) According to Mr. Johnson, Mr. Hair had a glass mason jar of marijuana and a gun that he passed to Mr. McIver. (T pp. 489-491)

 Vickey McArthur lived about 50 to 100 feet away from her daughter, Keshia Washington. (T pp. 272-273) On 16 July 2018, Ms. McArthur was going outside around 9:30 p.m. when she heard gunshots. (T pp. 277-278) As she approached Keshia’s house, she saw two men she ultimately identified as Mr. Hair and Mr. McIver. (T pp. 277-278) Ms. McArthur described Mr. Hair as tall—approximately 6’2”—and light skinned with a short haircut. (T pp. 283-284) Mr. McIver was tall and dark-skinned with “dreads.” (T p. 279) Ms. McArthur testified the streetlight was on and the closest she got to Mr. McIver was about 10 to 15 feet away (T p. 280) Ms. McArthur had not seen Mr. McIver before that day. (T pp. 287-288) Ms. McArthur testified she was about fifteen feet away from Mr. Hair and had previously seen him at Keshia’s house several times, but she did not identify him to police on the night of the shooting. (T pp. 286, 315, 327) According to Ms. McArthur, Mr. Hair also helped her carry a tv stand to her house. (T p. 287)

On cross examination, Ms. McArthur testified she believed Mr. Hair was about 50 to 100 feet away. (T p. 312) Ms. McArthur further testified on cross examination that when she was interviewed at the police department, she “may have” pointed to a photograph on the table and asked detectives, “is that supposed to be him in this picture?” (T p. 312)

 Ms. McArthur testified Mr. Hair was going in and out of the house while Mr. McIver was standing in the yard. (T pp. 277, 283) Mr. Hair was wrapping something up in a bandana. According to Ms. McArthur, Mr. Hair told Mr. McIver, “hurry up cause that bitch [is] gonna call the police.” (T p. 283) However, Ms. McArthur told Detective Crews the dark-skinned man with dreadlocks in a white shirt and blue jeans “did the talking.” (T p. 639) Ms. McArthur saw Mr. Hair get into the back seat of a white dodge charger and Mr. McIver get into the front seat. (T p. 286) Ms. McArthur saw the car go to the end of the street. (T p. 297)

Ms. McArthur testified Keshia’s house was in Ms. McArthur’s name and Ms. McArthur was a felon. Ms. McArthur knew Keshia sold drugs and kept marijuana in a glass mason jar, a plastic bag, and a black and white purse. (T p. 275) Ms. McArthur testified she did not want to get in trouble, so she went inside the house and took a black and white bag containing marijuana, jewelry, and money. (T pp. 273-276, 299-300). Ms. McArthur testified she bought Keshia an iPhone about two weeks before the shooting, but she did not see it at the house. (T pp. 276, 300) Ms. McArthur did not describe the phone. Mr. Johnson testified he did not see anyone with a cellphone. (T p. 545)

Keshia was laying on the ground and ultimately died from multiple gunshot wounds. (T pp. 449, 467-468) 9-millimeter bullets and fragments were recovered from her body. (T pp. 427, 436, 465-466) Inside Keshia’s house, police found 40 caliber and 9-millimeter shell and cartridge casings in the living room. Bullets and bullet fragments were also found in the front bedroom. (T pp. 350-356, 361-363, 367) Forensic Technician Engel testified to processing a mason jar, but did not state where the jar was found. (T pp. 329, 365-366) Forensic Technician Engel also testified she did not get any prints off the jar. (T p. 370)

When Ms. Mc Arthur came out of Keshia’s house, Iesha Geddie, a friend of the family was there. (T pp. 300-301) After Ms. McArthur took the drugs and money to her house, her and Iesha flagged down Officer Percy Evans. (T pp. 301-302, 321-322, 326) Officer Evans testified Ms. McArthur did not say she knew one of the suspects. (T p. 327) Detective Crews testified he started talking to Ms. McArthur on the scene, but they were interrupted. (T pp. 618-619) Detective Crews met with Ms. McArthur two days later on 18 July 2018 and she told him people in the neighborhood were “telling her things.” (T p. 638) On cross-examination, Ms. McArthur testified that during her interview with Detective Crews she “may have said” that Iesha was always in a location where someone is killed but she did not specifically remember (T p. 307)

 After leaving Keshia’s house, Mr. Johnson drove to a trailer in Eastover and Mr. Hair went inside. The trailer was located on Georgia Avenue. (T p. 390) While Mr. Johnson and Mr. McIver were outside two dogs charged at them, so Mr. Johnson shot at them with the same gun Mr. Hair had given to Mr. McIver. (T pp. 492-493) EMS received a call for shots fired in that area around 10:07 p.m. on 16 July 2018. (T pp. 567-570, 632) Police later collected 40 caliber shell casings from this area. (T pp. 390-393, 435) Mr. Johnson testified he put the gun back in the car, but he did not know what happened to it after that. (T pp. 558-559) Afterwards, everyone went inside the trailer to smoke the marijuana that was in the glass jar. (T pp. 494-495) About thirty minutes later, Mr. Johnson dropped Mr. Hair off somewhere else and took Mr. McIver home. (T pp. 496-497)

Investigator William Potter testified he inserted information from Keshia’s Verizon cell phone records into mapping software to track the phone’s location on 16 July 2018. (T pp. 587-590) The cell phone records were offered and admitted into evidence, without objection, as State’s Exhibit 405. (T p. 594) Investigator Potter also used Mr. Johnson’s cellphone records, the mapping software, and traffic camera footage of a white dodge charger with a cracked passenger window to track Mr. Johnson’s location. (T p. 591-592) Video clips of the white charger and the mapping software images depicting the cell phone locations were admitted as State’s Exhibit 403. (T pp. 593-594) Exhibit 403 was published to the jury while Investigator Potter testified about the location of the white dodge charger and cell phones. (T pp. 595-611)

Investigator Potter described the white dodge charger traveling toward Keshia’s house. At 9:38 p.m. there is a video of a white charger turning onto Slater Avenue where Keshia’s house was located. Mr. Johnson’s cell phone was also “pinging” in the same area between 9:40 and 9:43 p.m. (T pp. 607-608) Keshia’s cell phone was also pinging in the same area between 9:46 p.m. and 9:47 p.m. (T p. 609) Mr. Johnson’s cell phone was traveling away from the Slater Avenue area where Keshia lived after the shooting between 9:48 and 9:49 p.m. (T p. 609) Mr. Johnson’s phone and the white charger were traveling toward Country Club Drive around 9:49 p.m. Keshia’s cell phone was also in the same area away from her home around 9:49-9:50 p.m. (T pp. 610-611) Finally, Investigator Potter testified Mr. Johnson’s phone was pinging near 2712 Georgia Avenue between 10:04 p.m. and 10:07 p.m. This is same area where someone reported shots being fired at a dog and where shell casings matching the homicide were recovered. (T p. 611)

 Days later, Mr. Johnson hid the white dodge charger behind an apartment complex. (T p. 499) The police ultimately found the car during their investigation. (T pp. 387, 397-98) There was a duffel bag in the trunk of the car with Mr. Johnson’s social security card. Police also found a 9-millimeter magazine, a 40-caliber magazine, and a holster in the trunk of the car. (T pp. 402-403, 514) There was also a broken iPhone in the car; however, Mr. Johnson testified the broken iPhone in the car was his. (T pp. 499-500) Detective Crews testified that when he interviewed Mr. Johnson, Mr. Johnson told him his phone was “shit” meaning it was “messed up or broken.” (T p. 641) There was an AT&T sim card on the driver’s floorboard. (T p. 411) The floor mat from the front passenger seat was positive for blood, but the forensic technician testified it could have been animal or human blood. (T p. 412)

State’s Evidence of Witness Intimidation

 On 9 July 2021, Mr. Johnson was in custody and being transported to court in handcuffs and leg irons. (T p. 523) Mr. Hair was also present, but he was not handcuffed. (T pp. 523-524) According to Mr. Johnson, Mr. Hair hit him in his jaw once. (T p. 524) Mr. Johnson testified that when people asked Mr. Hair why he was doing that, Mr. Hair said “that’s my codefendant. He trying to testify on me and give me life in prison.” (T p. 525)

 Deputy Dowless with the Cumberland County Sheriff’s office testified he saw Mr. Hair hit Mr. Johnson twice. (T pp. 562-564) According to Deputy Dowless, Mr. Johnson had a bloody lip, but Mr. Johnson testified he was not bleeding. (T pp. 525, 563)

Jury’s Request for Transcript

 During deliberations, the jury sent a note to the Court stating, “request of transcripts from the case.” (T pp. 758-759) The State said it believed the jury was asking for “real time transcripts from the case” or they were asking to see Mr. Johnson’s plea transcript. The trial court stated it would make inquiry on the record and trial counsel stated, “this isn’t television.” (T p. 759) The trial court stated, “even if we wanted to try to accommodate them our court reporter that was here during all the testimony is not with us this afternoon.” (T p. 759)

 The jury was brought in, and the trial court asked what transcripts they were referring to. The foreperson stated, “[t]he transcripts that were written out. We would want to hear—we want to read one of the testimonies.” The trial court stated, “[i]n my discretion, ladies and gentlemen, I’m denying your request to review part of the testimony.” (T p. 760) The trial court then instructed the jury about its duty to recall the evidence. (T p. 760)

**STANDARDS OF REVIEW**

Issue I is reviewed for an abuse of discretion. “An abuse of discretion occurs ‘where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.’” *State v. McVay*, 174 N.C. App. 335, 340 (2005) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

As to Issue II, appellate courts review the trial court’s ruling on consolidation or severance of cases for an abuse of discretion. *State v. Knight*, 262 N.C. App. 121, 124 (2018). However, the issue of “whether offenses are transactionally related is a question of law fully reviewable on appeal.” *State v. Chapman*, 342 N.C. 330, 343 (1995).

Issue III is subject to plain error review which results where the error had a probable impact on the jury’s verdict. *State v. Lawrence*, 365 N.C. 506, 518 (2012).

**ARGUMENT**

**I. The trial court abused its discretion in denying the jury’s request to review the trial transcript.**

The trial court abused its discretion when it denied the jury’s request to review the transcript of one of the witnesses. The trial court did not ask the jury to specify which witness it was referring to or ask the court reporter how long it would take to prepare the transcript. The trial court failed to exercise meaningful discretion and, in turn, abused its discretion because it did not have the “knowledge and understanding of the material circumstances surrounding” the jury’s request. This Court must reverse and remand for a new trial.

 Despite trial counsel’s failure to object, alleged violations of N.C.G.S. § 15A-1233 are automatically preserved for appellate review. *State v. Ashe*, 314 N.C. 28, 39-40 (1985); *see also State v. Stevenson*, 211 N.C. App. 583, 589-590 (2011) (noting counsel did not object and reviewing the issue for an abuse of discretion).

 N.C.G.S. § 15A-1233(a) provides:

If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

When determining whether to grant the jury’s request to review testimony or other evidence, the trial court must exercise sound discretion. *See State v. Corbett*, 339 N.C. 336, 336-37 (1994). “[S]ound judicial discretion means a discretion that is not exercised arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law[ ] and directed by the reason and conscience of the judge to a just result. This requires a knowledge and understanding of the material circumstances surrounding the matter calling for the exercise of sound discretion.” *State v. Tolley*, 290 N.C. 349, 367 (1970) (cleaned up) (internal quotations and citations omitted).

 In *State v. Stevenson*, 211 N.C. App. 583 (2011), this Court rejected the defendant’s argument that the trial court failed to “meaningfully evaluate and exercise its discretion” regarding the jury’s request for a transcript of a specific witness’s testimony. *Id.* at 589-590. The jury asked to see the defendant’s written statements, two other witnesses’ statements, photos of the crime scene, and a copy of a witness’s testimony. The trial court denied the request to review the transcript, but granted the other requests. The trial court informed the jury, “‘in the court’s discretion, the court will…deny the copy of Alisha Hemphill’s transcript request,’ but the court would grant the rest of the requests.” *Id.* at 589. (cleaned up).

 This Court noted there was nothing to suggest the trial court failed to give meaningful consideration to the jury’s request. *Id.* at 590. “Furthermore, when a trial court assigns no reason for a ruling which is to be made as a matter of discretion, the reviewing court on appeal presumes that the trial court exercised its discretion.” *Id.* (internal quotation and citation omitted). Ultimately, this Court held the trial court complied with the requirements of N.C.G.S. § 15A-1233 and exercised its discretion. *Id.*

In *State v. Buckner*, 342 N.C. 198 (1995), our Supreme Court held the trial court did not abuse its discretion in denying the jury’s request to review the transcript from three witnesses. *Id.* at 232-233. The Court noted the testimony of the witnesses was more than five hundred pages and determined the trial court denied the jury’s request because it was not “practical or feasible.” *Id.* at 232-233.

 The present case is distinguishable from both *Stevenson* and *Buckner*. Unlike *Stevenson*, the trial court abused its discretion in failing to exercise meaningful discretion because it did not have a “knowledge and understanding of the material circumstances surrounding the matter calling for the exercise of sound discretion.” *See Tolley*, 290 N.C. at 367. The trial court did not ask the jury which witness’s testimony it wanted to review. Therefore, unlike *Stevenson* where the trial court knew what specific witness’s testimony the jury wanted to review when it considered the request, the trial court in the present case did not. The trial court acknowledged that the court reporter who was present during the witness testimony was not present at the time; however, the trial court did not inquire about how long it would have taken to produce a transcript of the testimony from one witness.

 Moreover, unlike *Buckner*, the transcript of the entire trial in this case was only seven hundred and eighty pages and the testimony of each witness was less than one hundred pages. The trial court’s failure to inquire about which witness the jury was referring to and how long it would have taken to produce the transcript demonstrates the trial court did not have all of the information necessary to exercise meaningful discretion.

 It was crucial for the jury to review the transcript because this case was highly circumstantial. There was no physical evidence that connected Mr. Hair to the robbery and first-degree murder. The evidence tying Mr. Hair to the crime was the testimony of two witnesses who did not actually see what happened.

 Ms. McArthur testified she knew Mr. Hair and saw him on several occasions but did not tell police she saw him at the scene until days later after people in the neighborhood were “telling her things.” Additionally, when looking at a photograph during a police interview, she asked detectives “is that supposed to be him?” Ms. McArthur also testified that Mr. Hair told Mr. McIver to hurry up, but she told Detective Crews that Mr. McIver “did the talking.”

Ms. McArthur did not see Keshia’s cell phone when she took items from the crime scene, but she also did not describe the iPhone. Mr. Johnson did not see anyone with a cell phone, and he testified the broken iPhone found in the car was his. There was an AT&T sim card in the white dodge charger, but Keshia’s cell phone provider was Verizon. Mr. Johnson claimed he smoked weed from a glass jar with Mr. Hair at the trailer on Georgia Avenue for about thirty minutes, but Investigator Potter testified Mr. Johnson’s cell phone was only pinging near Georgia Avenue for three minutes. Finally, there was evidence law enforcement processed a glass jar, but did not find any fingerprints or testify where the jar was found.

The jury may have wanted the transcript of a witness’s testimony to resolve any number of these inconsistencies. Thus, Mr. Hair was prejudiced by the trial court’s abuse of discretion when it denied the jury’s request to review the transcript without having the “knowledge and understanding of the material circumstances surrounding” the jury’s request. *See generally State v. Long*, 301 N.C. 508, 511 (1980) (finding prejudicial error where trial court failed to exercise its discretion in denying juror’s request to review evidence that was material to determination of guilt or innocence). This Court must reverse and remand for a new trial.

**II. The** **trial court abused its discretion by joining the witness intimidation charge with the other offenses and by denying Mr. Hair’s motion to sever.**

At the 17 March 2022 pre-trial hearing, trial counsel objected to the State’s motion to join the witness intimidation charge with the murder and robbery charges. Trial counsel also moved to sever the offenses. The trial court granted the motion for joinder and denied the severance motion even though the offenses were not transactionally related. Trial counsel renewed his severance motion before jury selection, during the trial, and after the close of evidence thereby properly preserving this issue for appellate review. *See* N.C.G.S. § 15A-927(a); *see also State v. Larkin*, 237 N.C. App. 335, 348 (2014) (addressing preservation).

Given the three-year time gap between the offenses and the lack of similarity between offenses, the trial court’s consolidation of the charges for trial was unjust and prejudicial. Moreover, because the evidence of witness intimidation biased the jury against Mr. Hair and bolstered Mr. Johnson’s testimony, severance was necessary for a fair determination of Mr. Hair’s guilt or innocence on all charges. The trial court abused its discretion in granting the motion for joinder and denying the severance motion. This Court must reverse and remand for a new trial.

**A. The offenses were not transactionally related.**

N.C.G.S. § 15A-926 allows the trial court to join offenses when they “are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.” N.C.G.S. § 15A-926; *see also State v. Floyd*, 148 N.C. App. 290, 293 (2002). The trial court’s decision to join charges that are not transactionally related is improper as a matter of law. *See Larkin*, 237 N.C. App. at 348 (citation omitted).

A related statute, N.C.G.S. § 15A-927, provides that the trial court must grant a severance motion “[i]f before trial, it is found necessary to promote a fair determination of the defendant’s guilt or innocence of each offense; or [i]f during trial…it is found necessary to achieve a fair determination of the defendant’s guilt or innocence of each offense.” N.C.G.S. § 15A-927(b). In doing so, “[t]he court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.” *Id.*

 “The question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial.” *State v. Bracey*, 303 N.C. 112, 117 (1981); *see also State v. Howell*, 116 N.C. App. 609 (1994).

 In determining whether offenses are transactionally related and properly joined for trial, our appellate courts consider the time between offenses, common issues of fact, and modus operandi or similarity of the crimes. *See Larkin*, 237 N.C. App. at 349. For example, in *State v. Floyd*, 148 N.C. App. 290 (2002), the defendant was convicted of one count of larceny, three counts of robbery with a dangerous weapon, four counts of possession of a firearm by a felon, and one count of conspiracy to commit robbery with a weapon. *Floyd*, 148 N.C. App. at 291. The defendant and an accomplice committed these offenses in a “crime spree” over a two-week period. *Id.* at 291-293. In the State’s motion for joinder, the State argued the offenses were committed within a short span of time and the evidence in all the cases would be intertwined. *Id.* at 293.

 In *Bracey*, the defendant was convicted of one of three robberies that were committed over a ten-day period. *Bracey*, 303 N.C. at 114-115. In determining whether the charges should have been severed, our Supreme Court noted the evidence from the three robberies had “a similar modus operandi and similar circumstances in victims, location, times [,] and motive.” *Id.* at 118. The evidence was sufficient for joinder based on “a series of acts or transactions connected together or constituting parts of a single scheme or plan.” *Id.* Our Supreme Court noted the defendant failed to show severance was necessary to ensure “a fair determination by the jury on each offense.” The jury was able to separate the offenses based on the two not guilty verdicts and “[t]he offenses were not so separate in time and place and so distinct in circumstance that consolidation was rendered unjust and prejudicial to the defendant.” *Id.* Ultimately the Court held the cases were properly joined for trial without prejudice to the defendant. *Id.*

 Unlike the offenses in *Floyd* and *Bracey*, witness intimidation was not transactionally related to the murder and robbery charges. The State even conceded this point during the arguments regarding the motion for joinder and motion to sever. (Pre-trial T p. 7) The circumstances surrounding these offenses were not similar. Unlike, *Floyd* and *Bracey*, Mr. Hair’s case was not about a string of similar robberies or larcenies that shared a motive. Rather, the offenses alleged by the State involved different victims, locations, times, and motives. Moreover, Mr. Hair’s alleged crimes also did not occur within a ten-day or two-week crime spree period. There was a three-year gap between the offense dates for the witness intimidation and the murder and robbery charges. (R p. 26) Therefore, the offenses were not transactionally related, and the trial court erred as a matter of law by joining them.

**B. Mr. Hair was prejudiced by the trial court’s decision to join offenses and deny Mr. Hair’s motion to sever.**

Given the three-year time gap and the lack of similarity between the offenses, the “offenses [were] so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial.” *See Bracey*, 303 N.C. at 117.

 The jury heard testimony that Mr. Hair hit Mr. Johnson and said “that’s my co-defendant. He [is] trying to testify on me and give me life in prison.” (T p. 525) The witness intimidation charge caused the jury to presume Mr. Hair’s guilt as to the other offenses and gave Mr. Johnson’s testimony significantly more weight. In fact, our Supreme Court has noted that evidence of other crimes “prompts [ ] a ready acceptance of and belief in the prosecution’s theory that [a defendant] is guilty of the crime charged.” *See generally State v. Jones*, 322 N.C. 585, 589 (1988) (discussing admissibility of other crimes, wrongs, or acts). “Its effect is to predispose the mind of the juror to believe the [defendant] is guilty and thus effectually to strip him of the presumption of innocence.” *Id.*

Not only did the witness intimidation charge bias the jury against Mr. Hair and bolster Mr. Johnson’s testimony, but it also bolstered the evidence connecting Mr. Johnson to the crime. There was no physical evidence connecting Mr. Hair to the crime scene. It was Mr. Johnson’s and Ms. McArthur’s testimony that placed Mr. Hair outside of Keshia’s house getting into a white charger. However, Ms. McArthur’s testimony was problematic in that she claimed to know Mr. Hair, but did not tell police she knew one of the suspects until days later after people in the neighborhood were “telling her things.”

The State also did not present evidence regarding Mr. Hair’s cell phone location. Rather, the State presented evidence that Mr. Johnson’s cell phone, Keshia’s cell phone, and the white dodge charger were traveling away from Keshia’s house after the shooting.

Because the witness intimidation charge was not transactionally related to the murder or robbery and it biased the jury against Mr. Hair, it was necessary for the trial court to grant Mr. Hair’s motion for severance “to achieve a fair determination of [Mr. Hair’s] guilt or innocence of each offense.” See N.C.G.S. §15A-927(b). Consolidation of the offenses was unjust and prejudiced Mr. Hair. The trial court abused its discretion by granting the motion for joinder and denying the severance motion. This Court should reverse and remand for a new trial.

**III. The trial court plainly erred in admitting the hearsay cell phone records, geo tracking evidence, and Investigator Potter’s testimony about the tracking location of Ms. Washington’s cell phone because they were based on hearsay.**

In order to prove Mr. Hair stole Keshia’s cell phone, the State had Investigator Potter testify about how he used cell phone records to track Keshia and Mr. Johnson’s cell phones traveling away from the crime scene. Investigator Potter also testified he used traffic camera footage to track the white dodge charger to corroborate the location of the cell phones. A slide show illustrating this information for the jury was offered and admitted as State’s Exhibit 403 while Investigator Potter was testifying. Keshia’s Verizon cell phone records were offered and admitted as State’s Exhibit 405, however, the State did not have an employee from Verizon testify they were the custodian of records and lay the foundation for the business records exception. Nor did the State offer an affidavit from the custodian of records purporting to lay the foundation for the business records exception.

 The trial court plainly erred in admitting Keshia’s cell phone records because the State failed to lay any foundation demonstrating the records fell under an applicable hearsay exception. The trial court also plainly erred in admitting State’s Exhibit 403 and Mr. Potter’s testimony because they were based on the inadmissible hearsay. Because Investigator Potter’s testimony and the exhibits placed Keshia’s cell phone in the white charger with Mr. Hair, the evidence had a probable impact on the jury’s finding of guilt. This Court should vacate the robbery convictions and remand for a new trial.

1. **State’s Exhibit 403, State’s Exhibit 405, and Mr. Potter’s testimony should not have been admitted because they were based on inadmissible hearsay.**

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C.G.S. § 8C-1, R. 801(c). Hearsay is generally inadmissible unless the rules of evidence provide a hearsay exception. N.C.G.S. § 8C-1 R. 802; *see State v. Hicks*, 243 N.C. App. 628, 639 (2015). Moreover, the admission of testimony based on inadmissible hearsay is erroneous. *See State v. Finney*, 358 N.C. 79, 80-87 (2004).

The proponent of the hearsay evidence must satisfy the foundation requirements for the pertinent hearsay exception before the evidence can be admitted. *State v. Frierson*, 153 N.C. App. 242, 246-248 (2002). The business records exception provides that records of regularly conducted activity are not excluded by the hearsay rule if they are “(i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation…. N.C.G.S. § 8C-1, R. 803(6). The foundational requirements for the business records exception may be satisfied with an affidavit or through the testimony of a witness. *See* N.C.G.S. § 8C-1, R. 803(6); *see also In re S.W.*, 175 N.C. App. 719, 725 (2006) (stating an affidavit may be used to satisfy the foundational requirements of Rule 803(6)); *see also State v. Jackson*, 229 N.C. App. 644, 650-652 (2013) (addressing whether testimony was sufficient to lay a foundation and authenticate evidence).

Keshia’s Verizon cell phone records are out of court statements offered to prove the truth of the matter asserted, therefore inadmissible hearsay unless an exception applies. The State did not have an employee from Verizon testify that they were the custodian of records and lay the foundation for the business records exception. Nor did the State present an affidavit from the custodian of records purporting to lay the foundation for the business records exception. (T pp. 584-590) Instead, the State offered and admitted Keshia’s Verizon phone records through Investigator Potter. (T pp. 589-590) Investigator Potter did not and could not lay the foundation for the records to be admitted under the business records exception. Investigator Potter was not the custodian of Verizon’s cell phone records, and he did not testify the cell phone records were made and kept in the ordinary course of business. (T pp. 584-590); *See State v. Crawley*, 217 N.C. App. 509, 514-517 (2011) (addressing whether testimony of custodian of cell phone records was sufficient to satisfy business records exception).

Investigator Potter proceeded to testify about inadmissible hearsay when he explained how he tracked Keshia’s cell phone leaving the scene of the shooting. The State also admitted and published exhibit 403 to aid in explaining Investigator Potter’s testimony to illustrate the location of Keshia’s phone as evidence that Mr. Hair took the phone as alleged in the robbery indictment. (T pp. 591-611) The trial court erred in admitting Keshia’s cell phone records because they were inadmissible hearsay and the State failed to lay a foundation to demonstrate the records fell under an applicable hearsay exception. The trial court also erred in admitting State’s Exhibit 403 and Investigator Potter’s testimony because they were based on the inadmissible hearsay. *See Finney*, 358 N.C. at 80-87.

1. **The** **admission of the exhibits and Mr. Potter’s testimony amounted to plain error.**

In order to show plain error, “a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518 (2012). An error rises to the level of plain error when, viewed in light of the entire record, the error “had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* Thus when reviewing challenged evidence for plain error, this Court must determine whether the jury probably would have reached a different verdict if the challenged evidence had not been admitted. *See State v. Hammett*, 361 N.C. 92, 98 (2006). Our Supreme Court has declined to find plain error where there was substantial evidence to support the conviction. *See State v. Moore*, 366 N.C. 100, 109 (2012); *See also State v. Walker*, 316 N.C. 33, 40 (1986) (declining to find plain error where there was “overwhelming evidence of guilt”).

 The admission of State’s Exhibit 403, State’s Exhibit 405, and Investigator Potter’s testimony amounted to plain error because absent this evidence, there was not overwhelming evidence of a robbery. Investigator Potter’s testimony and the accompanying exhibits demonstrating that a white dodge charger, Mr. Johnson’s cell phone, and Keshia’s cell phone were in the same vicinity and traveling away from the scene of the shooting were the strongest evidence that Mr. Hair took the phone as alleged in the indictment.

Investigator Potter did not testify about tracking Mr. Hair’s cell phone records. Ms. McArthur and Mr. Johnson’s testimony placed Mr. Hair in the white charger after the shooting, but they did not testify to seeing Mr. Hair with an iPhone. (T pp. 545, 283, 296) The remaining evidence was Ms. McArthur’s testimony that she did not see Keshia’s iPhone when she went in the house to take drugs, money, and marijuana. Ms. McArthur did not describe the iPhone or identify the broken iPhone found in the trunk of the white charger as Keshia’s phone. (T pp. 299-300) Ms. McArthur also claimed to know Mr. Hair but did not identify him to the police until two days after the shooting. This was also after people in the neighborhood were “telling her things.” Mr. Johnson testified that the broken iPhone found in the car was his and Detective Crews testified that when he interviewed Mr. Johnson, he said his phone was broken. (T pp. 499-500, 641)

While the robbery indictment also alleged Mr. Hair took marijuana, it is highly likely the jury believed the robbery was based on the taking of the cell phone as the evidence that Mr. Hair took a jar of marijuana was scant and the jury instructions did not specify the property at issue. (T pp. 750-751; R pp. 60-61) Mr. Johnson, the codefendant who testified in exchange for a plea deal, stated he saw Mr. Hair with a jar of marijuana, and they smoked the marijuana in a trailer for 30 minutes. (T pp. 494-497) However, Investigator Potter testified that Mr. Johnson’s cell phone was only pinging in the area of Georgia avenue for three minutes. (T p. 611) Forensic Technician Engel testified to processing a mason jar, but did not state where the jar was found. (T pp. 365-366) Forensic Technician Engel also testified she did not get any prints off the jar. (T p. 370)

Because Investigator Potter’s testimony and the exhibits placed Keshia’s cell phone in the white charger with Mr. Johnson and Mr. Hair, the evidence had a probable impact on the jury’s finding of guilt. The admission of this evidence “‘tilted the scales’ and caused the jury to reach its verdict convicting [Mr. Hair].” *See Walker*, 316 N.C. at 39. Accordingly, this Court should vacate Mr. Hair’s robbery conviction and remand for a new trial.

**CONCLUSION**

 For the foregoing reasons, Mr. Hair respectfully requests this Court: (1) reverse and remand for a new trial; or (2) vacate the robbery conviction and remand for a new trial.

 Respectfully submitted, this the 29th day of December, 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 29th day of December, 2022.

 By Electronic Submission:

 Candace Washington

 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 Mr. Marc Sneed, Special Deputy Attorney General by sending it electronically to msneed@ncdoj.gov.

 This the 29th day of December, 2022.

 By Electronic Submission:

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