23-270 DISTRICT EIGHTEEN

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 ) From Guilford

 v. )

 )

)

JORDAN NATHANIEL MITCHELL, )

 Defendant

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUES PRESENTED**

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I. Did the trial court err and prejudice Mr. Mitchell by declining his request for the voluntary intoxication instruction where, in the light most favorable to the defendant, there was substantial evidence from which a reasonable juror could have found that he was so intoxicated that he could not form the specific intent to commit the offenses charged?

II. Did the trial court plainly err by allowing the jury to convict Mr. Mitchell of possession of a firearm by a felon on a theory that was not set forth in the indictment by instructing the jury that they could convict him for possessing “a firearm” instead of the Ruger .22 caliber revolver specified in the indictment?

**STATEMENT OF THE CASE**

On 6 July 2021, Defendant Jordan Nathaniel Mitchell was indicted for breaking or entering, larceny after breaking or entering, possession of a firearm by a felon, breaking or entering a pharmacy, and misdemeanor resisting a public officer. (R pp 8-11) On 7 September 2021, he was indicted for additional counts of felony breaking and entering and larceny after breaking or entering. (R p 12)

 On 12 July 2022, the matter came on for trial by jury before the Honorable Patrick T. Nadolski. Before the State’s case, counsel advised that the defense planned to admit some elements of the charges and request a voluntary intoxication instruction.(T pp 44-46) The trial court conducted a *Harbison* inquiry to confirm that Mr. Mitchell intended to admit those facts. (T pp 45-46)After hearing the evidence, the jury found Mr. Mitchell guilty of two counts of breaking or entering, two counts of larceny after breaking or entering, possession of a firearm by a felon, and resisting a public officer. (R pp 53-57)

On 15 July 2022, Judge Nadolski found Mr. Mitchell to be a Class IV prior record level for sentencing purposes, arrested judgment as to the breaking and entering in file 21 CRS 73735, and sentenced Mr. Mitchell to an active sentence of 19 to 32 months (file 21 CRS 73734) followed by three consecutive active sentences of 11 to 23 months (files 21 CR 74321 counts 1 and 2, and 21 CRS 73733) with credit for 431 days spent in jail. Mr. Mitchell gave notice of appeal in open court. (R p 69)

**GROUNDS FOR APPELLATE REVIEW**

The judgment of the trial court is reviewable pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a).

**STATEMENT OF THE FACTS**

**Detective Brame**

In the early morning of 10 May 2021, Detective Brame responded to an incident at Walgreens, where security footage showed two men wearing hoodies inside the then-closed business. (T pp 199-200, 213) When she arrived, she found a white Jeep Cherokee parked at the back entrance. (T p 200) Noting that the Jeep was unlocked, she reached inside and took the keys out of the ignition. (T p 200)

 The store’s alarm was going off, and she could hear movement inside. (T p 202) When two men stepped out the back door, she gave “commands,” but they shut the door. (T p 202) The two men ran out the front door of the business, where law enforcement officers awaited them. (T pp 202-03) Officers stopped the two as they ran across the street and towards a field. (T pp 203-04)

 Officer Brame described Mr. Mitchell as “very sweaty” and “breathing heavily.” (T pp 217-18) Based on his state, someone called for emergency medical services. (T pp 218, 229)

**Sergeant Vaughn**

 When Mr. Mitchell came through the front door of Walgreens, Officer Vaughn saw something in his hand, but he could not be sure what it was. (T p 227) He saw him drop the item in the parking lot. (T p 228) Once both men were secured, he returned to the parking lot and found an “old-style gun in a holster and then a tire iron.” (T pp 230, 238) He identified the gun as a .22 Ruger revolver. (T p 229)

**Officer Goodlow and Detective Martin**

 When Officer Goodlow arrived, she secured the items inside the Jeep so it could be towed. (T pp 279-80) One of the items was a nine-millimeter Beretta, which she found on the passenger’s side dashboard. (T pp 280, 285)

 Also in the Jeep, which belonged to Mr. Mitchell’s brother, Detective Martin found a laptop computer, a Samsung TV, Razer headphones, an HP all-in-one printer and a Byrna Pepper Ball pistol. (T pp 290, 293) Detective Martin tried to talk to Mr. Mitchell, who was “pretty sleepy” and “hadn’t slept in a couple days,” and Mr. Mitchell put his head down. (T pp 289, 297-98) His answers were “rambling,” some responsive to the questions and some not. (T p 299)

**Officer Williams**

Officer Williams took pictures of the Ruger revolver and holster, a tire iron, and pill bottles that were found outside Walgreens, in addition to three boxes of Newport cigarettes, two packs of compression socks, and the Beretta. (T p 318) She testified that the revolver was damaged such that the barrel fell out. (T p 318)

 She photographed a “gray and black firearm that was found in the cup holder area.” (T p 323) While she believed it to be a “non-lethal self-defense weapon,” she did not know if it was an operable firearm. (T pp 323, 339)

 When she encountered Mr. Mitchell, he seemed “tired” and was having a hard time standing, as “he kept falling asleep.” (T p 344) At the same time, he “had a hard time being still.” (T p 344)

 **Walter Wilson**

Mr. Wilson was the owner of Wilson & Lysiak, Inc., a nearby structural engineering company that had been broken into earlier the same evening. (T p 365) He was alerted to the incident by his security system, which showed a Ford truck on the premises. (T p 369) When he arrived, someone had come in through the window and “things were missing.” (T p 370) He identified the 1953 Ruger found outside Walgreens as one of his missing items. (T p 370) His daughter, who worked with him, determined that a printer, a laptop, a 42-inch TV, some Razer headphones, and a Byrna pepper-spray gun were also missing from the premises. (T pp 377-78)

 **Officer Mericle**

 Officer Mericle interacted with Mr. Mitchell at the police station. (T p 394) He described him as “sleepy,” and talking to himself, “kind of not complet[ing] any thoughts or sentences.” (T pp 394-95) “He had a hard time standing up, which I think would relate to him being sleepy at that time, and he said that he was tired.” (T pp 394-95) His eyes were red. (T p 395) Someone called emergency medical services for him. (T p 395)

 **Conrad Alley**

 Mr. Alley, the general manager at Walgreens, watched the security footage of the incident. (T pp 403-04) He saw two people pry open the back garage-style door and enter the stock room. (T p 405) From there, they “went all over the store,” but only “a very small amount” was missing. (T p 405) Inventory showed that some prescription medicines were missing, the “main one” being a bladder medication recovered from outside the store. (T pp 405-06, 411)

 **Jordan Mitchell**

 At the time of the incident, Mr. Mitchell was using cocaine daily. (T p 440) Though he was not “too much of a drinker,” he consumed alcohol that day, in addition to 3.5 grams of powder cocaine. (T pp 440-41) He “kind of lost control of [him]self at the time somewhat.” (T p 442) He did not remember going to the premises of Wilson & Lysiak, though he recalled driving his brother’s Jeep in the area. (T pp 444-45)

 He remembered going into Walgreens, but he was “really high and everything” and “really lost it.” (T pp 446-47) By his description, he “crashed out.” (T p 447) At the close of the State’s evidence, Mr. Mitchell stipulated that on 31 March 2010, he had been found guilty of or pled guilty to a felony in violation of the laws of North Carolina. (T p 415)

 After hearing the evidence, the jury convicted Mr. Mitchell of breaking or entering and larceny on the premises of both Walgreens and Wilson & Lysiak. (R pp 53-57) In addition, the jury found him guilty of possession of a firearm by a felon and resisting a public officer. (R pp 54, 56) Mr. Mitchell gave notice of appeal.

**ARGUMENT**

**I. The trial court erred and prejudiced Mr. Mitchell by declining his request for the voluntary intoxication instruction where, in the light most favorable to the defendant, there was substantial evidence from which a reasonable juror could have found that he was so intoxicated that he could not form the specific intent to commit the offenses charged.**

**A. Standard of review**

 To determine whether a defendant is entitled to a requested instruction on voluntary intoxication, this Court reviews *de novo* whether each element of the defense is supported by substantial evidence when taken in the light most favorable to the defendant. *State v. Meader*, 2021 -NCSC- 37, ¶ 15, 856 S.E.2d 533, 537 (2021) (citing *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

**B. Preservation**

 Counsel filed notice of intent to assert the defense of voluntary intoxication based on Mr. Mitchell being “so intoxicated that he was unable to form the requisite specific intent” required for the charged crimes. (R pp 15-16)

 At trial, counsel preserved the issue by requesting and arguing for the instruction at the time of the jury charge. (T pp 494-507) The trial court denied the request and noted counsel’s objection to the ruling. (T p 507)

**C. Applicable law regarding voluntary intoxication**

 In certain instances, voluntary drunkenness, while not an excuse for a criminal act, may be sufficient to negate the requisite intent element. *State v. Propst,* 274 N.C. 62, 161 S.E.2d 560 (1968). However, “[n]o inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law.” *State v. Murphy,* 157 N.C. 614, 619, 72 S.E. 1075, 1077 (1911). “[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree.” *State v. Hamby,* 276 N.C. 674, 678, 174 S.E.2d 385, 387 (1970) (quoting *State v. Thompson,* 110 Utah 113, 123, 170 P.2d 153, 158 (1946)).

 A defendant is not entitled to an instruction on voluntary intoxication “in every case in which a defendant ... consum[es] intoxicating beverages or controlled substances.” *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). Even though a person's blood alcohol content is such that driving would violate the motor vehicle laws, this alone does not entitle the person to an instruction on voluntary intoxication. *State v. Medley,* 295 N.C. 75, 243 S.E.2d 374 (1978).

 To obtain a voluntary intoxication instruction, a defendant must produce substantial evidence to support a conclusion that he was so intoxicated that he could not form the specific intent to commit a crime. *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. The evidence must show that at the time of the crime the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming specific intent. *State v. Shelton,* 164 N.C. 513, 79 S.E. 883 (1913).

 Voluntary intoxication is a defense only for crimes that require a showing of specific intent. *State v. Arnett*, 2021 -NCCOA- 42, ¶ 32, 276 N.C. App. 106, 113 (2021) (citing *State v. Harvell*, 334 N.C. 356, 368, 432 S.E.2d 125, 132 (1993)). The felonious breaking or entering, larceny, and resisting charges herein required the jury to find the specific intent to commit the charged acts. *See* N.C. Gen. Stat. § 14-54(a) (“Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon”); *State v. Myrick*, 306 N.C. 110, 116, 291 S.E.2d 577, 580 (1982) (“[L]arceny is the taking and carrying away of the personal property of another, without his consent, and with the intent to deprive him of its possession permanently.”); *State v. Hole*, 240 N.C. App. 537, 541, 770 S.E.2d 760, 763 (2015)(discussing application of involuntary intoxication instruction to felony larceny); *see also State v. Peters*, 255 N.C. App. 382, 388, 804 S.E.2d 811, 816 (2017) (discussing requirement that the State prove a defendant acted willfully when resisting, delaying, or obstructing a public officer and noting that “[w]hen intent is an essential element of a crime the State is required to prove the act was done with the requisite specific intent, and it is not enough to show that the defendant merely intended to do that act.”).

 In determining whether to give the instruction, the court reviews the evidence in the light most favorable to the defendant, meaning that the defendant should receive “the benefit of all reasonable inferences.” *See* *State v. Tucker*, 867 S.E.2d 924, 927, 380 N.C. 234, 237, 2022 -NCSC- 15, ¶ 10 (2022) (discussing meaning of the phrase “in the light most favorable to the State” in the context of challenge to sufficiency of the evidence). Further, contradictions and discrepancies in the evidence are for the jury to resolve. *Id.* (citing *State v. Barnes*, 334 N.C. 67, 75–76, 430 S.E.2d 914 (1993) (cleaned up)).

 In *State v. Meader*, 2021-NCSC-37, 856 S.E.2d 533 (2021), the North Carolina Supreme Court reviewed the trial court’s denial of a voluntary intoxication instruction. In that case, the defendant was charged with breaking and entering a motor vehicle, misdemeanor larceny, and possession of stolen property. *Id.* at ¶ 1, 856 S.E.2d 535. In denying her request for the voluntary intoxication instruction, the trial court listed several factors: she was not slurring her words, she was speaking in easily understandable English, she answered the questions of law enforcement responsively, and it was clear that she was aware of what was going on around her. *Id.* at ¶12, 856 S.E.2d at 536.

 In addition, she was able to walk under her own power, and when directed to leave, she did so. *Id*. She was able to “clearly and easily” articulate that someone sold her oxycontin, a word that the trial court noted was “not a tongue-twister,” but which required some sobriety to pronounce. *Id*. Defendant also told law enforcement officers, “God bless you all. You have a hard job,” which the trial court took as some indication that she was responsive and aware of her surroundings. *Id*. at ¶12, 856 S.E.2d at 537.

 On review, the North Carolina Supreme Court noted that the defendant “did not slur her speech or hesitate when asked to provide biographical information, and defendant gave appropriate responses to the law enforcement officers’ questions when prompted.” *Id*. at ¶19, 856 S.E.2d at 538. In addition, when police arrived and arrested the defendant, she was able to navigate a flight of stairs with her hands cuffed behind her back. *Id*. Citing this evidence, the Supreme Court held that the defendant had shown, “at best, mere intoxication,” and the trial court did not err in denying the instruction. *Id*.

**D. Viewed in the light most favorable to Mr. Mitchell, there was substantial evidence that his mind and reason were so overthrown as to render him incapable of forming the specific intent to commit felonious breaking or entering, felonious larceny, and resisting of a public officer.**

 The present case lacks elements that the *Meader* court considered determinative in holding that the trial court did not err in denying the voluntary intoxication instruction. Unlike in *Meader,* where the trial court laid out the evidence in support of its denial *Id.* at ¶ 12, 856 S.E.2d at 536, the trial court here did not set forth its rationale for denying the requested instruction. (T p 507)

 Also unlike in *Meader*, where the substance the defendant had used remained “unidentified” *Id*. at ¶ 12, 856 S.E.2d at 537, there was direct testimony that Mr. Mitchell had used 3.5 grams of powder cocaine and some part of a twelve-pack of Tecate on the relevant date, evidence that, in the light most favorable to him, would have allowed a jury to find that he was very much intoxicated. (T p 440)

 Both cases involved video evidence. Officer Brame’s bodycam video (State’s Exhibit 1) showed Mr. Mitchell’s interactions with law enforcement at the time he was apprehended. In that video, Mr. Mitchell slurred his speech throughout. He had trouble getting into the car. (State’s Exhibit 1 at 10:00:30-10:01:15) When officers asked him if he was diabetic, Mr. Mitchell yelled repeatedly that he did not know. (Exhibit 1 at 10:02:17-42) One of the arresting officers noted that he was unable to answer her basic questions about his physical wellbeing, causing her to send for emergency medical services. (Exhibit 1 at 10:03:05-10) Several of the officers noted the smell of alcohol emanating from him. (Exhibit 1 at 10:03:05-20) This differed from the video in *Meader*, which showed the defendant speaking clearly, answering questions responsively, and navigating stairs while handcuffed. *Id.* at ¶12, 856 S.E.2d at 536.

 In addition, as to Mr. Mitchell’s ability to think and plan, Officer Brame testified that he left his brother’s Jeep parked outside Walgreens, unlocked and with the keys in the ignition, allowing her to remove the keys to prevent him from driving away. (T p 200) Visible inside the open Jeep were items taken from Wilson & Lysiak earlier that night. (T pp 290, 293) *See* *State v. Long*, 354 N.C. 534, 538–39, 557 S.E.2d 89, 92 (2001)(considering, in contrast, attempts to “hide defendant’s participation” in the crime as evidence of ability to think and plan). Then, too, the randomness of the items taken from Walgreens, including, most notably, bladder medication, could have supported a jury’s inference that the taker was too intoxicated to form the specific intent to commit larceny.

 As the evidence would have supported a finding that Mr. Mitchell was beyond “mere” intoxication, it was the province of the jury to evaluate, in the light most favorable to him, whether this evidence supported a finding that he was so intoxicated as to render him unable to form the intent to commit the charged crimes. By denying counsel’s request for the instruction, the trial court prevented the jury from doing so.

**E. Mr. Mitchell is entitled to a new trial because there is a reasonable possibility that a jury properly instructed as to voluntary intoxication would have found him unable to form the intent to commit the charged crimes.**

 A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. N.C. Gen. Stat. § 15A-1443(a). The burden of showing prejudicial error is on the defendant, *id*., and when this burden is met, a new trial is a proper remedy. *See State v. Green*, 258 N.C. App. 87, 93, 811 S.E.2d 666, 670 (2018).

 Had the trial court instructed the jury to consider whether voluntary intoxication prevented Mr. Mitchell from forming the specific intent required for conviction, there is a reasonable possibility that the jury would have reached a different result. In considering the voluntary intoxication instruction, the trial court acknowledged its significance to the defense’s case. (T pp 506-07)

 The jurors had before them the testimony of law enforcement officers that Mr. Mitchell was “sleepy” (T pp 289, 297-98), that he was not responsive to questions (T p 299), that he was “very sweaty,” (T p 217-18) and that his eyes were red (T p 395). In addition, Mr. Mitchell testified that he had “kind of lost control” (T p 442) after using a combination of cocaine and alcohol (T pp 440-41), evidence that the jury might have deemed sufficient to render him unable to reason or plan.

 State’s Exhibit 1, Detective Brame’s bodycam video, showed Mr. Mitchell unable to speak clearly or answer even whether he was diabetic so that officers could decide whether to call an ambulance. Given this evidence, the determination of whether Mr. Mitchell was too intoxicated to form specific intent should have been submitted to the jury.

 The trial court’s denial of counsel’s request for the voluntary intoxication instruction was error. The error prejudiced Mr. Mitchell. Because there is a reasonable probability that, had it been properly instructed on voluntary intoxication, the jury would have reached a different result, Mr. Mitchell should receive a new trial. *See* N.C. Gen. Stat. § 15A-1443(a); *Mash*, 323 N.C. 339, 372 S.E.2d 532.

**II. The trial court plainly erred by allowing the jury to convict Mr. Mitchell of possession of a firearm by a felon on a theory that was not set forth in the indictment by instructing the jury that they could convict him for possessing “a firearm” instead of the Ruger .22 caliber revolver specified in the indictment.**

**A. Standard of review**

 For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error “had a probable impact on the jury's finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Because Mr. Mitchell did not object to the instruction for possession of a firearm by a felon, that instruction is subject to review only for plain error. *Id.*

**B. The trial court errs by instructing the jury in a way that allows them to convict based on a theory not stated in the indictment.**

 The primary purpose of an indictment is “‘to enable the accused to prepare for trial.’” *State v. Silas*, 360 N.C. 377, 382, 627 S.E.2d 604, 607 (2006) *(quoting State v. Hunt,* 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003)). When the prosecution amends an indictment in such a manner that the defendant can no longer rely upon the statement of the intended felony in the indictment, such an amendment is a substantial alteration and is prohibited by N.C. Gen. Stat. § 15A–923(e). *Silas* at 382, 627 S.E.d2d at 607.

 A trial court commits prejudicial error when it “permit[s] a jury to convict upon some abstract theory not supported by the bill of indictment.” *State v. Shipp*, 155 N.C. App. 294, 300, 573 S.E.2d 721, 725 (2002) (citation and quotation marks omitted). As a result, trial courts “should not give [jury] instructions which present ... possible theories of conviction ... either not supported by the evidence or not charged in the bill of indictment.” *Id*. (citation and quotation marks omitted). “It is well established that a defendant must be convicted, if at all, of the particular offense charged in the indictment and that the State’s proof must conform to the specific allegations contained therein.” *State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102 (2014), *disc. rev. denied*, 268 N.C. 277, 775 S.E.2d 852 (2015) (citation, quotation marks, and brackets omitted).

 When allegations asserted in an indictment fail to “conform to the equivalent material aspects of the jury charge,” our Supreme Court has held that a fatal variance is created, and “the indictment [is] insufficient to support that resulting conviction.” *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) (citation omitted). For “a variance to warrant reversal, the variance must be material,” meaning it must “involve an essential element of the crime charged.” *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citations omitted).

 The determination of whether a fatal variance exists turns upon two policy concerns, namely, (1) insuring “that the defendant is able to prepare his defense against the crime with which he is charged and [ (2) ] ... protect[ing] the defendant from another prosecution for the same incident.” *Id*. (citations omitted). However, “a variance ... does not require reversal unless the defendant is prejudiced as a result.” *State v. Glidewell*, 255 N.C. App. 110, 113, 804 S.E.2d 228, 231–32 (2017) (quoting *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371, *disc. rev. denied*, 344 N.C. 636, 477 S.E.2d 53 (1996) (citation omitted)).

**C. Mr. Mitchell was indicted for possessing the “Ruger .22 caliber revolver,” but the jury instruction allowed him to be convicted for possessing “a firearm.”**

The indictment, which specified that Mr. Mitchell possessed a “Ruger .22 caliber revolver” on “5/10/21” (R p 9), served as notice to Mr. Mitchell of the State's theory of the offense: that he unlawfully possessed the .22 Ruger found in the Walgreens parking lot. However, the trial court instructed the jury that they could convict if, “after March 31st, 2010, the defendant possessed a firearm.” (R p 26)

 In addition to hearing evidence about the Ruger, the jury heard testimony about a Byrna Pepper Ball “self-defense weapon” (T p 323) and a nine-millimeter Beretta (T pp 279-80), both found in the Jeep. After retiring to deliberate, the jury sent out the question, “Does a firearm have to be operable to be a firearm under North Carolina law?” (R p 50) The question suggested that the jury doubted whether the old Ruger with the barrel falling off “counted” as a firearm within the meaning of the statute.

 The trial court responded to the question with a definition:

A firearm is any weapon, including a starter but, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or any firearm muffler or firearm silencer. This definition does not apply to an antique firearm. Antique firearm means that it was manufactured on or before 1898.

(R p 50) Even this clarification, which did not address operability, was broad enough to include the Ruger, the Beretta, or the self-defense weapon, meaning that the jury may well have considered one of the other two options—neither of which appeared in the indictment—and arrived at a decision that did not require them to resolve the operability question. A properly instructed jury, by contrast, would have focused its attention on whether Mr. Mitchell possessed the Ruger only.

 Given the loose fit of the instruction to the indictment and the jury’s uncertainty about whether the firearm needed to be operable, it is likely that the instruction had “a probable impact on the jury's finding that the defendant was guilty.” *Lawrence* at 518, 723 S.E.2d at 334. As a result, Mr. Mitchell should receive a new trial as to possession of a firearm by a felon.

**CONCLUSION**

For the reasons stated above, Defendant-Appellant Jordan Nathaniel Mitchell respectfully requests that this Court reverse his convictions and grant him a new trial.

Respectfully submitted this 26th day of May 2023.

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**Certificate of Compliance**

The undersigned hereby certifies that the portions of this brief required to be counted under Rule 28(j) of the North Carolina Rules of Appellate Procedure contain no more than 8,750 words. In making this certification, counsel is relying on the word count reported by her word-processing software.

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### **CERTIFICATE OF SERVICE**

 I certify that I filed the foregoing **Appellant's Brief** with the Office of the Clerk of the North Carolina Court of Appeals by electronically filing a PDF version of the document using the Court’s internet-based, computerized, electronic filing system.

 I further certify that I served the foregoing **Appellant's Brief** on the other parties to this appeal by electronically mailing PDF versions to the addresses of the attorneys for the other parties listed below:

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 This, the 26th day of May 2023.

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