279 N.C. App.—No. 3 **Pages 261-513**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 5, 2022

MAILING ADDRESS: The Judicial Department
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[1]Resigned 19 November 2021.
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Filed 21 September 2021

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ABUSE OF PROCESS

Sufficiency of pleadings—improper acts—ulterior motive—criminal charges against policemen—withholding exculpatory evidence—After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the trial court in plaintiffs' lawsuit against a city official and other police officers (defendants) improperly dismissed plaintiffs' abuse of process claim. Plaintiffs sufficiently pleaded improper acts by defendants occurring after plaintiffs' criminal prosecution began and sufficiently pleaded that defendants "acted with an ulterior motive" by withholding exculpatory evidence on plaintiffs' charges in order to pressure them into leaving the police department. **Fox v. City of Greensboro, 301.**

ADMINISTRATIVE LAW

Judicial review—service of petition—motion for extension of time—good cause—Where a managed-care provider (Aetna) filed a contested case petition because it was not awarded a state contract by the Department of Health and Human Services (DHHS) and thereafter appealed the administrative law judge's unfavorable

decision to the superior court, the superior court did not abuse its discretion by denying Aetna's motion for an extension of time to serve its petition for judicial review upon DHHS and the other parties after Aetna had failed to perform service within the mandatory 10-day period following the filing of its petition (pursuant to N.C.G.S. § 150B-46). The superior court's good-cause evaluation was supported by reason and was not arbitrary. **Aetna Better Health of N.C., Inc. v. N.C. Dep't of Health and Human Servs., 261.**

Judicial review—service requirement—mandated by statute—subject matter jurisdiction—Where a managed-care provider (Aetna) filed a contested case petition because it was not awarded a state contract by the Department of Health and Human Services (DHHS) and thereafter appealed the administrative law judge's unfavorable decision to the superior court, the superior court did not err by dismissing Aetna's petition for judicial review for lack of subject matter jurisdiction. Aetna's failure to timely serve DHHS and the other parties within the 10 days after the petition was filed, as required by N.C.G.S. § 150B-46, warranted dismissal, and Aetna's filing of an amended petition for judicial review could not circumvent the mandatory 10-day service requirement. **Aetna Better Health of N.C., Inc. v. N.C. Dep't of Health and Human Servs., 261.**

APPEAL AND ERROR

Criminal case—request for jury instruction—self-defense—invited error—waiver of appellate review—In a prosecution for assault on a female and other charges arising from an altercation between defendant and his child's mother, the trial court did not err by denying defendant's request for a jury instruction on self-defense—which he made right before the court was about to instruct the jury—where defendant failed to file a pre-trial notice to assert self-defense (as required under N.C.G.S. § 15A-905(c)(1)) and expressly agreed to the court's instructions both before and after they were given. Rather, defendant's failure to object to the tendered instructions constituted invited error that waived his right to appellate review, including plain error review. Furthermore, given the overwhelming evidence of his guilt, defendant could not show that his denied request had prejudiced him. **State v. Hooper, 451.**

Preservation of issues—closing argument in medical malpractice trial—no objection—In a bifurcated medical malpractice case, where plaintiff did not object to defendants' closing argument regarding video surveillance of her that they introduced during the liability phase, she did not preserve for appeal her argument that defendants improperly suggested that the video had been introduced for substantive, and not for impeachment, purposes. **Hill v. Boone, 335.**

Preservation of issues—traffic stop—drug seizure—meritorious argument— The Court of Appeals invoked Appellate Rule 2 to review defendant's constitutional challenge to the seizure of drugs from his pants pocket after he was pulled over for a seatbelt violation because, in the event he did not properly preserve the issue for appeal, he presented a meritorious argument that required review in order to prevent manifest injustice. **State v. Johnson, 475.**

Remand from Supreme Court—higher court's interpretation of evidence—same or less taxing standard—On remand from the Supreme Court to consider the remaining issues in defendant's appeal—whether the trial court committed plain error in allowing certain testimony and in its jury instructions—the Court of Appeals

APPEAL AND ERROR—Continued

held that, assuming arguendo the trial court erred, the alleged errors did not amount to plain error because the Supreme Court, in its opinion considering a different argument raised by defendant, evaluated the strength of the evidence in the case while applying a less taxing standard of review and concluded that, in light of the virtually uncontested evidence of defendant's guilt (not relying upon the evidence that defendant challenged in the case before the Court of Appeals), defendant could not meet his burden. **State v. Goins, 448.**

Standard of review—bifurcated trial—medical malpractice—admission of evidence during liability phase—In an appeal challenging the admission of evidence—video surveillance footage—related to compensatory damages during the liability portion of a bifurcated medical malpractice trial, the Court of Appeals applied a de novo standard to first determine whether the video was relevant for impeachment purposes and whether it was properly authenticated. Although the court would have employed an abuse of discretion standard to determine whether the evidence should have been excluded under Evidence Rule 403, plaintiff abandoned that issue by failing to argue it on appeal. **Hill v. Boone, 335.**

ATTORNEY FEES

Criminal case—civil judgment—notice and opportunity to be heard—The trial court's order requiring defendant to pay attorney fees after he pleaded guilty to multiple drug offenses was vacated and the matter remanded for further proceedings where the court did not personally ask defendant if he wanted to be heard on the issue of attorney fees. **State v. France, 436.**

Subject matter jurisdiction—fees awarded after appeal of underlying matter—child custody proceeding—award not dependent upon outcome—After finding a father in civil contempt for violating a child custody order, the trial court retained jurisdiction to award attorney fees pursuant to N.C.G.S. § 50-13.6 to the mother—even after the father's appeal of the contempt order had been filed and perfected—because the attorney fees award was not dependent upon the outcome of the contempt proceeding, as the award was based on the statutory findings that the mother was an interested party who acted in good faith and lacked sufficient means to defray the costs of litigation. **Blanchard v. Blanchard, 269.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning order—constitutionally protected status as parent—sufficiency of findings—In a neglect and dependency case, the trial court's permanency planning order awarding guardianship to the children's grandfather was affirmed where the court's factual findings supported its conclusion that the mother acted in a manner inconsistent with her constitutionally protected status as a parent and where, contrary to the mother's argument, the court was not required to find that she had done so willfully. The court found that the children's neglect adjudication was based on their exposure to their brother's death, which resulted from abuse in the home by the mother's boyfriend; the mother avoided taking one of her children to the doctor so the department of social services would not discover the child's burn wounds, which were also allegedly caused by the boyfriend; and the mother failed to comply with multiple aspects of her case plan, including participation in therapy and domestic violence services. **In re J.R., 352.**

Permanency planning—cessation of reunification efforts—sufficiency of evidence—In a neglect and dependency case, the trial court properly ceased reunification efforts with the children's mother where competent evidence showed that such efforts would be unsuccessful or inconsistent with the children's health or safety. Specifically, the mother was not making adequate progress in her family services case plan where she refused to participate in recommended therapy, failed to engage in domestic violence services, and failed to secure proper housing. The circumstances leading to the children's neglect adjudication further supported a cessation of reunification efforts, where the children's younger brother died as a result of abuse in the home by the mother's boyfriend and where the mother had previously concealed the boy's injuries resulting from that abuse from the department of social services. **In re J.R., 352.**

Permanency planning—guardianship—verification—guardian's understanding of legal significance of appointment—In a neglect and dependency case, the trial court's permanency planning order awarding guardianship to the children's grandfather was affirmed where the court properly verified—as required under N.C.G.S. §§ 7B-600(c) and 7B-906.1(j)—that the grandfather understood the legal significance of guardianship. Competent evidence at the permanency planning hearing supported the court's verification, including the court's thorough colloquy with the grandfather, the grandfather's testimony, and evidence from a social worker and the guardian ad litem showing that the grandfather had taken good care of the children during the year that they lived with him. **In re J.R., 352.**

CHILD CUSTODY AND SUPPORT

Contempt motion—seeking civil and criminal contempt—notice of alleged contemptuous actions—hearing on civil contempt—Where a mother's contempt motion alleging that her children's father had willfully violated the parties' custody order sought to hold the father in both civil and criminal contempt, the Court of Appeals did not need to address whether the father's due process rights were violated by lack of notice of the nature of the contempt charges, because the father had proper notice of his alleged contemptuous actions and the trial court considered only civil contempt at the hearing. **Blanchard v. Blanchard, 280.**

Contempt order—purge conditions—allowing the mother phone or video access to the children—Where a father was found in civil contempt for failing to provide his children's mother with daily phone or video access to the children, in violation of the parties' custody order, the purge conditions in the contempt order—requiring the father to unblock the mother's number from his cell phone and ensure that the children's iPad was able to connect to calls with the mother (or allow his own phone to be used for the calls), and giving him time to purge the contempt in order to avoid incarceration—were proper and affirmed by the appellate court. The father's arguments to the contrary were meritless. **Blanchard v. Blanchard, 280.**

Contempt order—purge conditions—not modification of custody order—Where a father was found in civil contempt for failing to provide his children's mother with daily phone or video access to the children, in violation of the parties' custody order, the purge conditions in the contempt order—requiring the father to unblock the mother's number from his cell phone and communicate with her to arrange the calls with the children—did not improperly modify the parties' custody order. While the custody order did not set out exact times and methods for the telephone or video communication between the parties and the children, the purge conditions were

consistent with the custody order and applied only until the father had purged the contempt. **Blanchard v. Blanchard, 280.**

Custody order—violation—reasonable telephone or video access to children—bad faith—The trial court's order holding a father in civil contempt for willful violation of a custody order was properly supported by the evidence and factual findings where the custody order required the father to provide daily unrestricted and reasonable telephone or video contact with the children to the mother while the children were visiting him, yet the father blocked the mother on his cell phone and arbitrarily chose to turn on the children's iPad each evening from 6:00 p.m. to 6:30 p.m. without informing the mother that she should call during that time period. **Blanchard v. Blanchard, 280.**

CHILD VISITATION

Frequency and duration—failure to specify—limited discretion given to parties—In a neglect and dependency case, where the trial court ceased reunification efforts with the mother and awarded guardianship to the children's grandfather, the court's order providing for the mother's visitation with the children was reversed and remanded where the court failed to specify the minimum frequency and duration of the mother's visits, as required under N.C.G.S. § 7B-905.1(c). Although the order stated that the mother would have supervised visitation for "a minimum of four hours per month," it was unclear whether this provision required a minimum of one visit of four hours per month or multiple shorter visits totaling four hours per month. However, the court did not improperly delegate its judicial authority by leaving the day and time of each visit to be agreed upon by the mother and the grandfather. **In re J.R., 352.**

CONSPIRACY

Civil—conspiracy to provide false information—criminal charges against policemen—After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the trial court in plaintiffs' lawsuit against a city official and other police officers (defendants) properly dismissed plaintiffs' civil conspiracy claim, where plaintiffs accused defendants of agreeing to provide false information to the SBI and withholding exculpatory evidence on plaintiffs' criminal charges. North Carolina law does not recognize a cause of action for civil conspiracy to provide false statements in order to secure someone's arrest. Moreover, plaintiffs failed to allege specific facts regarding how or when defendants agreed to the purported conspiracy. **Fox v. City of Greensboro, 301.**

CRIMES, OTHER

Intimidating a witness—variance between indictment and evidence—not fatal—In an assault trial where defendant was also charged with intimidating a witness, there was no fatal variance between the indictment for the intimidation charge and the State's evidence where the variance did not affect an essential element of the offense and was therefore mere surplusage. Although the indictment alleged that defendant told a third person to tell a witness that defendant would have the witness deported if he testified about the assault, but there was no evidence that defendant

told the third person to convey the message to the witness or that the witness received the message, the gist of the offense involved obstruction of justice and did not require the witness to actually receive the intimidating message. **State v. Clagon, 425.**

CRIMINAL LAW

Jury instructions—intimidating a witness—"attempted to deter"—There was no error in the trial court's jury instruction—on the charge of intimidating a witness—that defendant "attempted to deter" a witness from testifying against defendant in an assault case, because that phrase was not a deviation from the pattern jury instructions and, even if it was, defendant failed to show it likely misled the jury in light of the entirety of the instructions. **State v. Clagon, 425.**

Prosecutor's closing arguments—victim's blood the source of DNA in defendant's car—reasonable inference—In a first-degree murder trial, the prosecutor's statements that DNA found in defendant's car came from the victim's blood were based on reasonable inferences from the evidence regarding blood and DNA that were recovered from the car, even if the evidence contained some discrepancies, which may have resulted from the use of chemical cleaners inside the car. **State v. Bradley, 389.**

Prosecutor's closing statements—about second missing woman being dead—reasonable inference—proper purpose—In a trial for the first-degree murder of a woman, the prosecutor was properly allowed to state during closing that a second woman—whose disappearance led to an investigation that was closely intertwined with the victim's—was dead. A pretrial ruling that limited how the State could refer to the status of the second missing woman, whose body had not been found, was intended to prohibit any mention that defendant had been convicted of the second woman's death. Not only did evidence support a reasonable inference that the second missing woman was dead, but also the references to her at closing were for a proper purpose, including defendant's identity as the victim's killer, motive, and a common plan or scheme, which the trial court reinforced through a limiting instruction to the jury. **State v. Bradley, 389.**

Prosecutor's closing statements—presence of "evil"—race of defendant and victims visible on visual aid—In a first-degree murder trial, the prosecutor's statements during closing regarding the presence of "evil" were not so grossly improper as to require ex mero motu intervention by the trial court. Although defendant argued on appeal that the statements were particularly improper for occurring while the prosecutor displayed a posterboard to the jury with pictures of defendant, who is Black, and the victim and two other women who were involved with defendant, all of whom are white, the prosecutor made no references to race during closing, defendant had an opportunity to review the posterboard beforehand and had no objection to it being shown, and the jury had already observed the race of each person on the posterboard through evidence that was presented during trial. **State v. Bradley, 389.**

Prosecutor's closing statements—shifting burden to defendant—curative instruction—In a first-degree murder trial, defendant was not entitled to a mistrial after the prosecutor made statements during closing suggesting that defendant had the burden of proving his own innocence and that defendant was responsible for the inclusion of second-degree murder as a lesser-included offense on the verdict

sheet. The trial court gave a curative instruction to the jury based on defendant's timely objection, and juries are presumed to follow a court's instructions. **State v. Bradley, 389.**

DAMAGES AND REMEDIES

Restitution—assault case—lack of supporting evidence—The trial court's order requiring defendant to pay restitution in the amount of $23,189.22 to the victim in a trial for assault with a deadly weapon inflicting serious injury was vacated for lack of any evidence to support that amount and the matter was remanded for rehearing. **State v. Clagon, 425.**

DOMESTIC VIOLENCE

Protective order—sought by minors against step-parent—denied—no findings of fact—In a consolidated appeal from the denial of two minors' motions for a domestic violence protective order against their father's wife, where the trial court did not make any findings of fact, the orders were vacated and the matters remanded for entry of new orders with findings of fact and appropriate conclusions of law. **D.C. v. D.C., 371.**

EASEMENTS

Gates erected—gravel road across neighboring property—unreasonable interference—In a dispute between neighboring landowners, where plaintiffs erected gates across a portion of a gravel road on their property through which defendants had an easement, the trial court properly ordered plaintiffs to remove the gates because, although the gates were necessary to the plaintiffs' reasonable enjoyment of their agricultural land (by helping to contain plaintiffs' horses), they unreasonably interfered with defendants' easement rights (defendants had to open the gates by typing a code on a temperamental, inconveniently located keypad that sometimes locked defendants out, the gates malfunctioned in cold weather, and plaintiffs' horses sometimes blocked the gates). However, the portion of the court's judgment declaring that plaintiffs had no right at all to erect gates across the easement was modified to allow plaintiffs to erect gates provided that they did not unreasonably interfere with defendants' easement rights. **Taylor v. Hiatt, 506.**

EVIDENCE

Authentication—video surveillance—cross-examination of person depicted in video—In a bifurcated medical malpractice trial brought by plaintiff after she had foot surgery, video surveillance of plaintiff introduced by defendants during the liability phase was not authenticated by typical means where defendants did not introduce testimony from the video's creator and instead cross-examined plaintiff to ask if she appeared in the video on various dates and times, which she confirmed. Although plaintiff's responses, without more, would have been insufficient, her admissions regarding depictions of her grandchild—including his age—in the video, which served to establish her health status during a relevant time period, constituted authentication of those portions such that they could be used for impeachment purposes. **Hill v. Boone, 335.**

Introduced for impeachment purposes—limiting instruction not requested— In a bifurcated medical malpractice trial in which video surveillance of plaintiff was properly admitted during the liability phase for impeachment purposes, the trial court was not required to give a limiting instruction absent a request from plaintiff. **Hill v. Boone, 335.**

Murder trial—evidence of another missing person—Evidence Rule 403—probative value— In a prosecution for the first-degree murder of a woman whose body was found only after an investigation into the disappearance of a second woman who had connections to defendant, the trial court did not abuse its discretion by determining that, pursuant to Rule 403, evidence regarding the second woman was more probative than prejudicial because there was an obvious connection between the disappearances of both women, the investigations were closely intertwined, and the evidence demonstrated a common plan or scheme by defendant in targeting both women. **State v. Bradley, 389.**

Murder trial—evidence of another missing person—Evidence Rule 404(b)—cases intertwined— In a prosecution for the first-degree murder of a woman whose body was found only after an investigation into the disappearance of a second woman who had connections to defendant, there was no error in the admission of evidence regarding the second woman because the investigations into each woman's disappearance were temporally and factually interrelated, there were numerous similarities between both women, and nearly every trial witness had some connection to both investigations. The evidence was properly admitted under Rule 404(b) to provide a complete development of the facts and to establish the weight and probative value of the State's evidence. **State v. Bradley, 389.**

Relevance—damages evidence introduced during liability phase—impeachment— In a bifurcated medical malpractice trial in which defendants introduced video surveillance of plaintiff during the liability phase, the video was properly admitted for impeachment purposes after plaintiff opened the door to her credibility by testifying about the nature of the pain she felt and the resulting physical limitations she suffered after she had foot surgery. **Hill v. Boone, 335.**

FALSE PRETENSE

"Person within this State"—corporate victim—sufficiency of evidence— In a prosecution for obtaining property by false pretenses, assuming without deciding that "person within this State" (pursuant to N.C.G.S. § 14-100, referring to a victim) is an essential element of the offense, the State nevertheless met this requirement by presenting evidence that the large quantity of cell phones defendant ordered from a corporation at a discount, on the pretense that the phones were for a non-existent charity, were shipped to one of the corporation's retail stores located in North Carolina and that one of the corporation's agents met with defendant's collaborator in various North Carolina locations. **State v. Pierce, 494.**

Valuation of property—to elevate felony—fair market value—sufficiency of evidence— In a prosecution for obtaining property by false pretenses in which defendant obtained a large quantity of cell phones at a discount on behalf of a non-existent charity with plans to resell the phones at the full retail value, the State presented substantial evidence, including actual fraud loss values, from which a jury could conclude that the value of the property obtained—meaning fair market value—was $100,000.00 or more, elevating each of four counts to a Class C felony

pursuant to N.C.G.S. § 14-100(a), regardless of any amount defendant may have paid when obtaining the phones. **State v. Pierce, 494.**

HOMICIDE

Castle doctrine defense—questions of fact regarding applicability—for jury to decide—The trial court did not err by declining to adjudicate defendant's castle doctrine defense to her first-degree murder charge in a pretrial hearing, and defendant's argument that the castle doctrine statute's use of the word "immunity" meant that the issue had to be resolved by the judge rather than the jury was meritless. There were questions of fact regarding the applicability of the defense, and the trial court properly permitted the case to proceed to jury trial. **State v. Austin, 377.**

First-degree—premeditation and deliberation—sufficiency of evidence—In a first-degree murder trial, the State's evidence, though circumstantial, was sufficient to support a reasonable inference that defendant acted with premeditation and deliberation in killing the victim, given the brutal nature of the killing and the efforts undertaken to conceal the body and the crime. The victim died from four lacerations to her skull and internal epidural hemorrhaging from repeated blunt force trauma; she had numerous other wounds inflicted from either strangling or blunt force trauma; her body was found stripped, bound with duct tape, wrapped in black trash bags, and buried in a shallow grave; and chemical cleaners had been used to wash the inside of defendant's car. **State v. Bradley, 389.**

Jury instructions—castle doctrine—language mirroring the statute—The trial court's jury instructions on the castle doctrine in defendant's prosecution for first-degree murder were not erroneous where they accurately stated the law, including the rebuttable presumption that defendant had a reasonable fear of imminent death or serious bodily harm to herself or another, using language that mirrored the statute. **State v. Austin, 377.**

Sufficiency of evidence—castle doctrine defense—premeditation and deliberation—unarmed victim pleading on ground—There was sufficient evidence for the jury to convict defendant of first-degree murder where an unwelcome visitor (the victim) had been fighting with her on her driveway and she stood over the victim, who was lying unarmed on the ground saying, "please, please, just let me go," and then took several steps back and shot the victim in the head. The evidence allowed the jury to conclude that the State had rebutted the castle doctrine defense's presumption of defendant's reasonable fear of imminent death or serious bodily harm, and it was also sufficient to allow the conclusion that defendant acted with premeditation and deliberation. **State v. Austin, 377.**

MALICIOUS PROSECUTION

Elements—malice—governmental immunity—lack of probable cause—criminal charges against policemen—After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the doctrine of governmental immunity barred plaintiffs' malicious prosecution claim against a city official and other police officers (defendants) where plaintiffs—who accused defendants of providing false or misleading information to the SBI and withholding exculpatory evidence on plaintiffs' criminal charges, but who admitted during depositions that they lacked specific knowledge of

what information defendants shared with the SBI—could not meet their burden of showing defendants acted with malice. Further, because there was substantial evidence supporting a probability that plaintiffs committed the crimes they were charged with, plaintiffs could not show defendants acted without probable cause in investigating those charges. **Fox v. City of Greensboro, 301.**

MENTAL ILLNESS

Involuntary commitment—sufficiency of findings and evidence—threat to others—The trial court's involuntary commitment order declaring respondent to be mentally ill and dangerous to others was reversed where, as the State conceded, the trial court's findings and the evidence—the attending psychiatrist's conclusory opinion, an incomplete involuntary commitment recommendation form, and respondent's testimony—were inadequate to support a conclusion that respondent, who allegedly had threatened a judge, was dangerous to others. **In re K.V., 368.**

RAPE

First-degree rape—second-degree sexual offense—convictions not mutually exclusive—The trial court did not err by accepting the jury's verdicts finding defendant guilty of both first-degree forcible rape and second-degree forcible sexual offense, even though the rape conviction required the jury to find defendant inflicted serious personal injury on the victim while the sexual offense conviction did not. Even if the verdicts had been inconsistent, they were still valid because defendant committed two separate acts, each of which supported one conviction, and therefore the convictions were not mutually exclusive (that is, guilt of one crime did not exclude guilt of the other), and because the State presented substantial evidence as to each element of each crime. **State v. Brake, 416.**

SEARCH AND SEIZURE

Traffic stop—duration—officer safety measures—reasonable suspicion of other crimes—Defendant's motion to suppress drugs and paraphernalia was properly denied where, although his vehicle was initially stopped for a broken taillight, the stop was not unconstitutionally prolonged because the officers diligently pursued investigation into the reason for the stop, conducted ordinary inquiries including license and warrant checks, and took necessary safety precautions after one passenger who was found to have active warrants stated he had a gun on his person. Moreover, there was reasonable suspicion of criminal activity where one officer had observed the same vehicle earlier in the night involved with a hand-to-hand transaction, which justified a canine sniff for narcotics. Challenged findings were either irrelevant to the ultimate question of whether the stop was unreasonably prolonged or supported by evidence. **State v. France, 436.**

Traffic stop—seatbelt violation—request for consent to search person—voluntariness—During a traffic stop for a seatbelt violation, an officer's request for consent to search defendant's person without reasonable articulable suspicion of unrelated criminal activity resulted in an unconstitutional extension of the traffic stop. In light of the unlawful detention, defendant's consent to the search of his person was not voluntary, and his motion to suppress drugs found in his pants pocket should have been granted. **State v. Johnson, 475.**

STATUTES OF LIMITATION AND REPOSE

Abuse of process—criminal charges against policemen—withholding exculpatory evidence—last tortious act—After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, plaintiffs' abuse of process claim against a city official and other police officers (defendants) was not time-barred. Because the three-year limitations period for abuse of process claims commences upon the last tortious act complained of, and because plaintiffs alleged a number of continuous tortious acts by defendants following plaintiffs' arrest—such as withholding exculpatory evidence on plaintiffs' criminal charges and using the pending prosecution to try to force plaintiffs out of the police department—the limitations period on plaintiffs' abuse of process claim began to run on the day that the last tortious act concluded. **Fox v. City of Greensboro, 301.**

N.C. COURT OF APPEALS

2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

Opinions will be filed on the first and third Tuesdays of each month.

[279 N.C. App. 261, 2021-NCCOA-486]

AETNA BETTER HEALTH OF NORTH CAROLINA, INC., Petitioner

NORTH CAROLINA PROVIDER OWNED PLANS, INC., d/b/a
MY HEALTH by HEALTH PROVIDERS, Intervenor

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent

and

WELLCARE OF NORTH CAROLINA, INC., BLUE CROSS AND BLUE SHIELD
OF NORTH CAROLINA, AMERIHEALTH CARITAS NORTH CAROLINA, INC.,
UNITEDHEALTHCARE OF NORTH CAROLINA, INC., and
CAROLINA COMPLETE HEALTH, INC., Respondents-Intervenors

No. COA21-97

Filed 21 September 2021

1. Administrative Law—judicial review—service requirement—mandated by statute—subject matter jurisdiction

Where a managed-care provider (Aetna) filed a contested case petition because it was not awarded a state contract by the Department of Health and Human Services (DHHS) and thereafter appealed the administrative law judge's unfavorable decision to the superior court, the superior court did not err by dismissing Aetna's petition for judicial review for lack of subject matter jurisdiction. Aetna's failure to timely serve DHHS and the other parties within the 10 days after the petition was filed, as required by N.C.G.S. § 150B-46, warranted dismissal, and Aetna's filing of an amended petition for judicial review could not circumvent the mandatory 10-day service requirement.

2. Administrative Law—judicial review—service of petition—motion for extension of time—good cause

Where a managed-care provider (Aetna) filed a contested case petition because it was not awarded a state contract by the Department of Health and Human Services (DHHS) and thereafter appealed the administrative law judge's unfavorable decision to the superior court, the superior court did not abuse its discretion by denying Aetna's motion for an extension of time to serve its petition for judicial review upon DHHS and the other parties after Aetna had failed to perform service within the mandatory 10-day period following the filing of its petition (pursuant to N.C.G.S. § 150B-46). The superior court's good-cause evaluation was supported by reason and was not arbitrary.

Appeal by petitioner from order entered 18 November 2020 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 26 May 2021.

Hedrick Gardner Kincheloe & Garofalo LLP, by Patricia P. Shields, Linda Stephens, M. Duane Jones, and Tatiana M. Terry; Hunton Andrews Kurth LLP by Nash Long and Kevin J. Cosgrove; Hahn Loeser & Parks LLP by Marc J. Kessler and E. Sean Medina, for Petitioner-Appellant Aetna Better Health of North Carolina, Inc.

Haynswoth Sinkler Boyd, P.A., by Robert Y. Knowlton, Elizabeth H. Black, Boyd B. Nicholson, Jr.; and Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, and Special Deputy Attorney General John R. Green, Jr. for Respondent-Appellee North Carolina Department of Health and Human Services.

Alexander Ricks PLLC, by Rodney E. Alexander and Mary K. Mandeville, and Mayer Brown, LLP, by Rodger V. Abbot, Luke Levasseur, and Marcia G. Madesen, for Respondent-Intervenor-Appellee AmeriHealth Caritas of North Carolina, Inc.

Brooks, Pierce, McLendon, Humphry & Leonard, LLP, by Jennifer K. Van Zant, Jessica Thaller-Moran, and Eric F. Fletcher, for Respondent-Intervenor-Appellee Blue Cross and Blue Shield of North Carolina.

Wyrick Robbins Yates & Ponton, LLP, by Lee M. Whitman, Paul J. Puryear, Jr., for Respondent-Intervenor-Appellee Carolina Complete Health, Inc.

Alston & Bird LLP, by Jessica L. Sharron; and Tharrington Smith LLP, by F. Hill Allen and Colin Shive, for Respondent-Intervenor-Appellee UnitedHealthcare of North Carolina, Inc.

Morningstar Law Group, by Shannon R. Joseph; and Holland & Knight, by Karen D. Walker, for Respondent-Intervenor-Appellee Wellcare of North Carolina, Inc.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe, Robert A. Leandro, and Melanie Black Dubis, for Respondent-Intervenor-

Appellee North Carolina Provider Owned Plans, Inc. d/b/a My Health by Health Providers.

TYSON, Judge.

¶ 1 Aetna Better Health of North Carolina, Inc. ("Aetna") appeals from an order entered dismissing their petition for lack of subject matter jurisdiction and denying their motion for an extension of time for service of process. We affirm.

I. Background

¶ 2 The North Carolina Department of Health and Human Services ("DHHS") is responsible for overseeing and operating North Carolina's Medicaid plan. DHHS is transitioning North Carolina's Medicaid delivery system from a fee-for-service model to a managed care model operated by Prepaid Health Plans, pursuant to North Carolina's Medicaid Transformation Act. S.L. 2015-245; *see* N.C. Gen. Stat. § 122C-115(e) (2019). This Act directed DHHS to develop a request for proposals to award prepaid health contracts. S.L. 2015-245, § 4. In 2018, DHHS formed an evaluation committee ("Committee") to review and score proposals.

¶ 3 Aetna is a managed-care provider, one of eight entities who submitted proposals for Medicaid managed-care services. The Committee issued its recommendations on 24 January 2019, which identified four statewide contracts for Medicaid managed care services to be awarded. On 4 February 2019, DHHS awarded contracts to WellCare of North Carolina, Inc. ("Wellcare"), Blue Cross and Blue Shield of North Carolina ("BCBS"), AmeriHealth Caritas of North Carolina ("AmeriHealth"), and UnitedHealthcare of North Carolina, Inc. ("United Healthcare"). DHHS also awarded a regional contract to Carolina Complete Health, Inc. ("CCH") (collectively "Intervenors").

¶ 4 Aetna, along with the two other entities who were not awarded contracts, protested DHHS' contract and award decisions by filing contested case petitions in the Office of Administrative Hearings ("OAH"). Aetna filed its contested case petition and motion for preliminary injunction on 16 April 2019. The Administrative Law Judge ("ALJ") denied Aetna's motion for preliminary injunction on 26 June 2019. The ALJ consolidated all three petitions on 26 July 2019.

¶ 5 The ALJ entered an order on 9 September 2020 granting DHHS' motion for summary judgment of all claims. The decision included a "notice of appeal," paragraph which provides:

> [u]nder the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides . . . . **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. . . N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all Parties.

¶ 6 Aetna timely filed its Petition for Judicial Review in superior court on 23 September 2020. The remaining companies not receiving an offer also filed a Petition for Judicial Review. Aetna served its Petition on counsel of record in the proceedings. Aetna filed a notice of Petition with the OAH, which transmitted notice to all counsel of record.

¶ 7 Aetna failed to serve a copy of its Petition on DHHS' designated service of process agent, Lisa Granberry Corbett or any member of her office as required, pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j)(4) (2019). On 8 October 2020, Intervenors and DHHS filed motions to dismiss and served them on Aetna the same day. On 12 October 2020 at 9:00 a.m., Aetna personally served Corbett. At 10:18 a.m. the same day, Aetna filed an amended Petition for Judicial Review and personally served Corbett at 10:30 a.m.

¶ 8 On 13 October 2020, Aetna moved for an extension of time to serve its Petition for Judicial Review and served the amended Petition for Judicial Review on Intervenors' counsel. The superior court heard the motions to dismiss on 9 November 2020, denied Aetna's request for an extension of time for service of process, and granted DHHS' and Intervenors' motions to dismiss for lack of jurisdiction by order entered 23 November 2020. Aetna appeals.

II. Jurisdiction

¶ 9 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issues

¶ 10 Aetna raises four arguments in their brief. We consolidate and restructure their arguments as follows, whether the superior court erred by: (1) granting DHHS' and Intervenors' motion to dismiss; and, (2) denying Aetna's motion to extend the time for service.

IV. Motion to Dismiss

¶ 11 **[1]** Aetna argues the superior court erred by granting DHHS' and Intervenors' motion to dismiss.

A. Standard of Review

¶ 12 "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Analysis

1. Controlling Statutes

¶ 13 Our Supreme Court has held: "No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute." *Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res.*, 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994) (citations omitted).

¶ 14 "[B]ecause the right to appeal to an administrative agency is granted [only] by statute, compliance with statutory provisions is necessary to sustain the appeal." *Gummels v. N.C. Dep't of Human Resources*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990) (citation omitted). Aetna has the right to appeal pursuant to N.C. Gen. Stat. § 150B-43 (2019).

¶ 15 N.C. Gen. Stat. § 150B-45(a) articulates the filing requirement for judicial review in the superior court: "the person seeking review *must file a petition within 30 days* after the person is served with a written copy of the decision. . . in the county where the contested case which resulted in the final decision was filed." N.C. Gen. Stat. § 150B-45(a) (2019) (emphasis supplied). N.C. Gen. Stat. § 150B-46 provides the mandatory service requirement: "Within 10 days after the petition is filed with the court, the party seeking the review *shall serve copies of the petition* by personal service or by certified mail *upon all who were parties of record* to the administrative proceedings." N.C. Gen. Stat. § 150B-46 (2019) (emphasis supplied).

¶ 16 Here, Aetna failed to timely serve DHHS or any other party within the "10 days after the petition is filed" as is mandated by N.C. Gen. Stat. § 150B-46. Prior to serving DHHS, Aetna amended its Petition on 12 October 2020 and served its amended Petition the same day. Aetna

argues "the relation-back provision of Rule 15(c) allows the service of an amended pleading where the original pleading was not properly served."

2. Rone v. Winston-Salem/Forsyth Cnty Bd. of Educ.

¶ 17 Aetna cites *Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 207 N.C. App. 624, 701 S.E.2d 284, 289 (2010) for the proposition Rule 15 allows a petition to be amended. *Rone* is not controlling as the pleading therein was *amended after service was timely completed* pursuant to N.C. Gen. Stat. § 150B-46. *Id.*

¶ 18 To allow Rule 15 to control timeliness of service, when a party did not complete service pursuant to N.C. Gen. § 150B-46, would contravene our prior precedents and the legislative intent, and could lead to gamesmanship to overcome dilatory lapses. N.C. Gen. Stat. § 150B-46; *Gummels*, 98 N.C. App. at 677, 392 S.E.2d at 114. Rule 15 applies "to all proceedings in superior court *except when a differing procedure is prescribed by statute*." N.C. Gen. Stat. §1A-1, Rule 1 (2019) (emphasis supplied).

3. Statutory Construction

¶ 19 In determining the application of N.C. Gen. Stat. § 150B-46 of the Administrative Procedures Act and Rule 15 of the Rules of Civil Procedure, we are guided by several principles of statutory construction. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the [plain] language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted).

¶ 20 "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (alteration, citation and internal quotation marks omitted). "Statutes *in pari materia* must be read in context with each other." *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976).

¶ 21 Further, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the

law shall control[.]" *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citations omitted).

¶ 22 Aetna's arguments would effectively nullify N.C. Gen. Stat. § 150B-46. Aetna's amended Petition for Judicial Review did not assert additional or amend any causes of action. It was "amended" merely in an attempt to avoid the strict application of N.C. Gen. Stat. § 150B-46. Aetna's argument is overruled.

V. Motion for Extension of Time for Service

¶ 23 **[2]** Aetna argues the trial court abused its discretion in denying its motion for an extension to serve the petition.

A. Standard of Review

¶ 24 The determination of whether good cause exists to extend the time for service rests within the sound discretion of the superior court. *N.C. Dep't of Pub. Safety v. Owens*, 245 N.C. App. 230, 232-233, 782 S.E.2d 337, 339 (2016). When we review for an abuse of discretion, this Court cannot reverse the trial court's decision unless the appellant shows the decision was "manifestly unsupported by reason" or was "so arbitrary that it could not have been the result of a reasoned decision." *Atkins v. Mortenson*, 183 N.C. App. 625, 628, 644 S.E.2d 625, 628 (2007) (citation omitted).

B. Analysis

¶ 25 "[U]nlike [N.C. Gen. Stat.] § 150B-45 which allows the superior court [discretion] to grant additional time for the *filing* of the petition, there is no express provision in G.S. 150B-46 which authorizes the superior court to extend the time for *serving* the petition." *Owens*, 245 N.C. App. at 233, 782 S.E.2d at 339 (emphasis supplied). Nevertheless, to avoid a potential "harsh result" arising from the timely filing but untimely service of a Petition, this Court has held "the superior court has the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided for under G.S. 150B-46." *Id.* at 234, 782 S.E.2d at 340.

¶ 26 Here, the superior court's good cause evaluation was supported by reason and was not arbitrary. The trial court's order contains a lengthy analysis of good cause. Aetna argued the parties had an agreement to serve each other through counsel by email, the opposing parties had misled Aetna and had "unclean hands," and "sought to engineer a situation in which Aetna's petition would be dismissed for this minor service defect."

¶ 27 The superior court did not find these assertions credible. The superior court acknowledged Aetna claimed, "it did not accomplish proper service because of an alleged 'agreement' for all pleadings [to be served] upon counsel *via* email upon filing." The superior court explicitly rejected these assertions and found, "there was no such agreement" and "with respect to this judicial review proceeding in particular, there was no evidence or argument that the Department or any other party agreed to waive the statutory service requirements necessary to vest jurisdiction in the superior court for a petition for judicial review."

¶ 28 The superior court clearly determined Aetna had accused the opposing parties of procedural gamesmanship, rather than acknowledging a procedural mistake during service and asking the court to excuse that mistake "for good cause shown." *Id.* at 232, 782 S.E.2d at 339. The court concluded, although little evidence showed that the untimely service had caused any prejudice for the other parties, Aetna had not demonstrated good cause for the court to extend the otherwise mandatory deadline. *Id.*

¶ 29 When "the trial court acts within its discretion, this Court may not substitute its own judgment for that of the trial court." *Gunter v. Maher*, 264 N.C. App. 344, 347, 826 S.E.2d 557, 560 (2019). The trial court's decision was not arbitrary. It was a reasoned decision rendered after careful evaluation of the parties' competing positions. In particular, Aetna failed to simply "own up" to a critical mistake in perfecting mandatory service of its Petition for Judicial Review on opposing parties. Aetna has shown no abuse of discretion in the superior court's good cause determination. *Id.* Aetna's argument is overruled.

VI. Conclusion

¶ 30 For seventy years, our Supreme Court has held: "There can be no appeal from the decision of an administrative agency except pursuant to specific statutory provision therefor. Obviously then, the *appeal must conform to the statute granting the right* and regulating the procedure." *In re State ex. rel. Emp't Sec. Comm'n*, 234 N.C. 651, 653, 68 S.E.2d 311, 312 (1951) (citations and internal quotation marks omitted) (emphasis supplied).

¶ 31 Our Supreme Court has further held: "The statutory requirements are *mandatory and not directory*. They are conditions precedent to obtaining a review by the courts and [which] must be observed. *Noncompliance therewith requires dismissal.*" *Id.* (emphasis supplied) (citations and internal quotation marks omitted).

¶ 32 "[T]he service requirements are jurisdictional, and the superior court did not err in dismissing the petition where [a party] . . . was not properly served." *Isenberg v. N.C. DOC*, 241 N.C. App. 68, 73, 772 S.E.2d 97, 100 (2015). The superior court did not err in granting DHHS' motion to dismiss nor abuse its discretion in denying Aetna's motion to extend the time for service of process "for good cause." The superior court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and WOOD concur.

NICOLE J. BLANCHARD, Plaintiff
v.
DAVID M. BLANCHARD, Defendant

No. COA20-165

Filed 21 September 2021

Attorney Fees—subject matter jurisdiction—fees awarded after appeal of underlying matter—child custody proceeding—award not dependent upon outcome

After finding a father in civil contempt for violating a child custody order, the trial court retained jurisdiction to award attorney fees pursuant to N.C.G.S. § 50-13.6 to the mother—even after the father's appeal of the contempt order had been filed and perfected—because the attorney fees award was not dependent upon the outcome of the contempt proceeding, as the award was based on the statutory findings that the mother was an interested party who acted in good faith and lacked sufficient means to defray the costs of litigation.

Appeal by defendant from order entered 20 August 2019 by Judge Paige B. McThenia in District Court, Mecklenburg County. Heard in the Court of Appeals 26 January 2021.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Jonathan D. Feit and Haley E. White, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

STROUD, Chief Judge.

I. Procedural and Factual Background

¶ 1 More detailed facts of this case can be found in this Court's opinion in COA19-866, *Blanchard v. Blanchard*, filed concurrently with this opinion. We will repeat some of the background when relevant to this opinion. David M. Blanchard ("Father") and Nicole J. Blanchard ("Mother") were married and had three children. Father and Mother separated on 2 March 2015, and Mother filed a complaint including a claim for custody of the children on 5 March 2015. A consent order resolving custody issues was entered on 6 November 2015 (the "Custody Order"), but Mother alleged that Father was not complying with certain provisions of the Custody Order, and she filed a "Motion for Contempt" (the "Contempt Motion") on 3 January 2019. Mother's Contempt Motion also requested an award of attorney's fees. The trial court found Father to be in violation of the Custody Order by an order for civil contempt entered 2 April 2019 (the "Contempt Order"). The Contempt Order reserved the issue of attorney's fees to be heard at a later date. Father filed a notice of appeal from the Contempt Order on 10 April 2019, which was later perfected—that appeal is COA19-866, which we resolve and file concurrently with this opinion.

¶ 2 On 17 June 2019, the trial court held a hearing on the issue of attorney's fees. Father argued that his appeal in COA19-866 had divested the trial court of jurisdiction to hear the matter. After reviewing briefs on this issue from both parties, the trial court determined it was not divested of jurisdiction to rule on the request for attorney's fees. By order entered 20 August 2019 (the "Fee Order"), the trial court ordered Father to pay reasonable attorney's fees Mother had incurred as a result of the contempt action. Father appealed the Fee Order by filing a notice of appeal on 25 September 2019.

II. Analysis

¶ 3 In Father's sole argument, he contends his 10 April 2019 appeal from the Custody Order, COA19-866, divested the trial court of jurisdiction to consider the issue of attorney's fees during the pendency of the appeal in COA19-866. Father further contends that because the trial court lacked jurisdiction to enter the Fee Order, the Fee Order is void and must be vacated. We disagree.

¶ 4 Father frames the issue before us as follows:

> The question presented by this appeal is whether during the pendency of an appeal of a civil contempt

> order in a custody case the trial court is divested of jurisdiction to hear an N.C. Gen. Stat. § 50-13.6 (2017) attorney fee claim for time spent litigating the custody contempt matter.

Father therefore acknowledges that the attorney's fees were granted to Mother under N.C. Gen. Stat. § 50-13.6.

¶ 5 Father primarily argues that a holding in *Balawejder v. Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679 (2011), compels this Court to vacate the Fee Order as void for lack of subject matter jurisdiction. Mother contends that *Balawejder* was decided contrary to the prior established precedent of our appellate courts and, therefore, does not control on the issue before us. Father agrees that if two opinions are directly conflicting on an issue, the earlier opinion controls and, as to the relevant issue, the reasoning and holdings of the later opinion would be a nullity.

¶ 6 Both parties cite *Huml v. Huml*, 264 N.C. App. 376, 826 S.E.2d 532 (2019), acknowledging "that if there is a conflicting line of cases, this Court" is "bound to follow" "the older of the two cases." In *Huml*, this Court held:

> Where there is a conflict in cases issued by this Court addressing an issue, we are bound to follow the "earliest relevant opinion" to resolve the conflict:
>
> > Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court. Further, our Supreme Court has clarified that, where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines. With that in mind, we find *Skipper* and *Vaughn* are irreconcilable on this point of law and, as such, constitute a conflicting line of cases. Because *Vaughn* is the older of those two cases, we employ its reasoning here.
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> *State v. Gardner*, 225 N.C. App. 161, 169, 736 S.E.2d 826, 832 (2013) (citations and quotation marks omitted).

Huml, 264 N.C. App. at 395, 826 S.E.2d at 545; *see also Graham v. Deutsche Bank Nat. Tr. Co.*, 239 N.C. App. 301, 306–07, 768 S.E.2d 614, 618 (2015). Therefore, if we determine that an earlier opinion of this Court, or any opinion from our Supreme Court, directly conflicts with the relevant

holdings in *Balawejder*, we must reject the conflicting holding(s) found in *Balawejder* and follow the controlling precedent. But we must first determine if the holding in *Balawejder* actually conflicts with any prior opinions of this Court, or any opinions of our Supreme Court.

¶ 7 In order to undertake this analysis, we first consider the statutes relevant to Father's arguments, as the trial court's jurisdiction to consider statutory relief is granted by the General Assembly, and determined by this Court upon review by first considering the language used by the General Assembly. N.C. Gen. Stat. § 50-13.6 states in relevant part:

> In an action or *proceeding* for the *custody* . . . of a minor child . . . the court may in its discretion order payment of *reasonable* attorney's fees to an *interested party acting in good faith* who has *insufficient means* to defray the expense of the suit.

N.C. Gen. Stat. § 50-13.6 (2017) (emphasis added).

¶ 8 Father contends that the requirements of N.C. Gen. Stat. § 1-294 (2017) divested the trial court of jurisdiction to consider attorney's fees under N.C. Gen. Stat. § 50-13.6 and, therefore, the Fee Order is void for lack of subject-matter jurisdiction. N.C. Gen. Stat. § 1-294 states: "When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, . . . but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." N.C. Gen. Stat. § 1-294 (2017).

¶ 9 The issue of the subject matter jurisdiction retained by the trial court when one of its orders or judgments in an action is appealed is not new to the appellate courts of this state, as noted in this statement by our Supreme Court of the general rule:

> An appeal from a judgment rendered in the Superior Court takes the case out of the jurisdiction of the Superior Court. Thereafter, pending the appeal, the judge is *functus officio*. *Bledsoe v. Nixon*, 69 N.C. 81; *State v. Lea*, 203 N.C. 316, 166 S.E. 292; V*aughan v. Vaughan*, 211 N.C. 354, 190 S.E. 492; *Ridenhour v. Ridenhour*, 225 N.C. 508, 35 S.E.2d 617; *Lawrence v. Lawrence*, 226 N.C. 221, 37 S.E.2d 496.

Hoke v. Greyhound Corp., 227 N.C. 374, 375, 42 S.E.2d 407, 408 (1947) (some citations omitted): *see also McClure v. Cty. of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007). However, the general rule has

clear statutory exceptions, including the exception in N.C. Gen. Stat. § 1-294. *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551.

¶ 10 In *McClure*, this Court addressed an order for attorney's costs and attorney's fees based upon "N.C. Gen. Stat. §§ 6–1, 6–20, 6–19.1 and 7A–314" and "the Open Meetings Law, N.C. Gen. Stat. § 143–318.16B." *McClure*, 185 N.C. App. at 466, 648 S.E.2d at 548. Under the relevant statutes in *McClure*, attorney's fees could only be awarded to the "prevailing party." N.C. Gen. Stat. § 6-1 (2019) (noting attorney's fees may be awarded "[t]o the party for whom judgment is given"); N.C. Gen. Stat. § 6-19.1 (2019) ("[T]he court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees[.]"); N.C. Gen. Stat. § 143-318.16B (2019) (noting the trial court "may award the prevailing party or parties a reasonable attorney's fee"); *see also Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 13, 545 S.E.2d 745, 752 (2001) ("[S]ection 6–20 does not authorize a trial court to include attorney's fees as a part of the costs awarded under that section, unless specifically permitted by another statute."); N.C. Gen. Stat. § 7A-314 (2019) (controlling "fees for "experts" and other "witnesses[,]" not attorney's fees). The Court in *McClure* discussed the application of N.C. Gen. Stat. § 1-294 in this context:

> The question of whether the trial court had jurisdiction to decide the issue of attorney's fees is addressed by N.C. Gen. Stat. § 1–294, the pertinent portion of which reads:
>
> > When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.
>
> . . . .
>
> This Court has dealt in a number of cases with the question of whether a trial court has jurisdiction to enter an award of attorney's fees following the filing of notice of appeal. In *Brooks v. Giesey*, 106 N.C. App. 586, 590–91, 418 S.E.2d 236, 238 (1992), this Court stated that:
>
> > Under a statute such as section 6–21.5, *which contains a "prevailing party" requirement*, the

> parties should *not be required to litigate fees when the appeal could moot the issue*. Furthermore, upon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction *with regard to all matters embraced within or affected by* the judgment which is the subject of the appeal. N.C. Gen. Stat. § 1–294 (1983).

This logic was followed in the case of *Gibbons v. Cole*, 132 N.C. App. 777, 782, 513 S.E.2d 834, 837 (1999). In that case, the trial court entered an order, dismissing plaintiff's complaint. At the time of the hearing, defendants moved for an award of attorney's fees and filed affidavits in support of the motion. The trial court in the written order of dismissal set a hearing on the motion for attorney's fees for a later date, in order to allow plaintiffs an opportunity to review and respond to the affidavits. Prior to the hearing on attorney's fees, plaintiffs filed notice of appeal. A hearing was subsequently held, and attorney's fees were awarded to defendants. We held that "the appeal by plaintiffs from the judgment on the pleadings deprived the superior court of the authority to make further rulings in the case until it returns from this Court." *Id.*

There are several cases which appear to indicate a contrary result but are distinguishable. In *In re Will of Dunn*, 129 N.C. App. 321, 500 S.E.2d 99 (1998), this Court held that in a will caveat case, the trial court could enter an award of attorney's fees after the filing of notice of appeal, because the "decision to award costs and attorney's fees was not affected by the outcome of the judgment from which caveator appealed[.]" *Id.* at 329, 500 S.E.2d at 104–05. This holding is restricted to caveat proceedings *where the trial court has the discretion to award attorney's fees as costs to attorneys for both sides*. *Id.* at 330, 500 S.E.2d at 105. In the case of *Surles v. Surles*, 113 N.C. App. 32, 437 S.E.2d 661 (1993), the trial court orally announced its judgment in a child custody case in open court, expressly reserving the issue of attorney's fees. Prior to the entry of a written judgment, one of the parties gave notice of appeal.

> Subsequently, the trial court conducted a hearing on a motion for attorney's fees. Written orders on the custody matter and attorney's fees were entered after the notice of appeal was filed. This Court held that the trial court "retained the authority to consider the issue since attorney's fees were within the court's 'oral announcements' " and the written orders "conformed substantially" to those "oral announcements." *Id.* at 43, 437 S.E.2d at 667.

McClure, 185 N.C. App. at 469-70, 648 S.E.2d at 550-51 (emphasis added).

¶ 11 In *McClure*, this Court stated as an additional basis for finding the trial court lacked jurisdiction to enter the order for attorney's fees: "Further, the facts in *Gibbons* are indistinguishable from the instant case." *Id.* at 471, 648 S.E.2d at 551 (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and holding this Court was bound by its earlier decision in *Gibbons*). In *Gibbons*, this Court held:

> Here, the trial court's decision to award attorneys fees *was clearly affected by the outcome of the judgment* from which plaintiffs appealed. *Accordingly*, the appeal by plaintiffs from the judgment on the pleadings deprived the superior court of the authority to make further rulings in the case until it returns from this Court. G.S. 1–294; *Oshita v. Hill*, 65 N.C. App. 326, 330, 308 S.E.2d 923, 927 (1983). We vacate the trial court's award of attorneys fees and we remand to the trial court for further consideration regarding attorneys fees as the circumstances require.

Gibbons v. Cole, 132 N.C. App. 777, 782, 513 S.E.2d 834, 837 (1999) (emphasis added). Ultimately, the Court in *McClure* "reverse[d] the trial court's order awarding plaintiff attorney's fees for lack of jurisdiction" based on the fact that the underlying order was on appeal, and "the award of attorney's fees was based upon the plaintiff being the 'prevailing party' in the proceedings" so "the exception set forth in N.C. Gen. Stat. § 1–294 [wa]s not applicable." *McClure*, 185 N.C. App. at 469–72, 648 S.E.2d at 550–52. However, as in *Gibbons*, the issue of attorney's fees was "remand[ed] . . . to the superior court for consideration of the question of attorney's fees consistent with this opinion"—*i.e.*, pursuant to a statute falling within the exception granted in N.C. Gen. Stat. § 1–294. *Id.* at 472, 648 S.E.2d at 552.

¶ 12 Husband interprets *Balawejder* as conflicting with *McClure*, but this Court in *Balawejder* actually relied upon *McClure* in its analysis: "When, as in the instant case, the award of attorney's fees *was based upon the plaintiff being the 'prevailing party' in the proceedings*, the exception set forth in N.C. Gen. Stat. § 1–294 is not applicable." *Balawejder*, 216 N.C. App. at 320, 721 S.E.2d at 690 (emphasis added) (citing *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551). Conversely, when an award of attorney's fees will not be affected by the ultimate decision in the appeal of the underlying action, no matter which party prevails nor how the issues are decided, the exception in N.C. Gen. Stat. § 1–294 is applicable, and *jurisdiction to decide the issue of attorney's fees remains with the trial court*—without regard to the appellate status of the underlying substantive ruling of the trial court. N.C. Gen. Stat. § 1–294; *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551. Of course, *McClure* predates *Balawejder*, as do *Dunn*, *Gibbons*, and other opinions decided consistent with the plain language in N.C. Gen. Stat. § 1–294. The clear precedent demonstrates that the trial court is *not* divested of jurisdiction if the award of attorney's fees is *not dependent upon* the outcome of the appeal of the rulings on the substantive issues. *See Swink v. Weintraub*, 195 N.C. App. 133, 160, 672 S.E.2d 53, 70 (2009).

¶ 13 We also note *Balawejder* had some procedural irregularities and defects in the record and the specific statutory and factual basis for the award of attorney's fees in *Balawejder* was not noted in our opinion and, therefore, could not have been a factor in this Court's analysis and decision in that opinion. *See generally Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679. In *Balawejder*, the trial court's order addressed issues of modification of child custody and child support but, as noted, the basis upon which the trial court ordered the attorney's fees is not identified in the opinion. *Id.* at 304, 721 S.E.2d at 681. In addition, the plaintiff in *Balawejder* claimed to be appealing from a " 'Memorandum of Judgment/Order entered by Rebecca Thorn Tin, District Court Judge, entered on July 2010 [sic] that awarded Defendant attorney's fees in this Matter,' " but no such order was included in the record. *Id.* at 319, 721 S.E.2d at 690. Instead, the record included an attorney's fees order entered on 1 October 2010, from which the plaintiff had not given proper notice of appeal. *Id.* Nonetheless, the *Balawejder* Court stated that the award of attorney fees in that case was based upon the plaintiff being the "prevailing party." *Id.* at 320, 721 S.E.2d at 690. This Court's decision in *Balawejder*—holding that if the award of attorney's fees is predicated on the party to whom the fees were awarded prevailing on appeal, the exception to the general rule, both of which are set forth in N.C. Gen. Stat. § 1–294, does not apply—is consistent with the analyses in

McClure and other cases cited above. *Id.* Having found that the basis for the award of attorney's fees in *Balawejder* was *dependent on the outcome of the appeal* from the underlying substantive order, this Court further determined, in accordance with N.C. Gen. Stat. § 1–294, that the trial court had been divested of jurisdiction by the appeal of that prior order. *Id.*

¶ 14 We hold "under the controlling reasoning of *McClure*, *Gibbons*, [] *Brooks*," *Safie Mfg. Co.*, *Herring*, *Hinson*, *Green*, *Cox*, and other opinions herein cited, that it is *only* when "an award of costs is directly dependent upon whether the judgment is sustained on appeal[,]" that, under N.C. Gen. Stat. § 1–294, the "trial court lacks jurisdiction to enter an award of costs . . . once notice of appeal has been filed as to the [underlying] judgment." *Swink*, 195 N.C. App. at 160, 672 S.E.2d at 70. Therefore, the question relevant to the analysis in this case is whether the award of attorney's fees to Mother under N.C. Gen. Stat. § 50-13.6 constituted a "matter included in the action and not affected by the judgment appealed from." N.C. Gen. Stat. § 1-294. Nothing in the plain language of the statute suggests a determination that an interested party has acted in good faith or has insufficient means to cover the costs associated with the action are determinations contingent on the ultimate outcome of an appeal, by either party, from the underlying judgment. *Id.* In prior cases, awards of attorney's fees under N.C. Gen. Stat. § 50-13.6 have been upheld even for the party who did not prevail at trial. *See Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002). For example, in *Burr*, this Court affirmed in part an order awarding attorney's fees to the defendant, who was not the prevailing party. *Id.* at 506, 570 S.E.2d at 224. In *Burr*, the trial court awarded custody to the plaintiff and ordered the defendant to pay child support, but also ordered plaintiff, the prevailing party, to pay defendant's attorney fees as to the child custody and support claims. *Id.* at 506–07, 570 S.E.2d at 224.

¶ 15 *Burr* helps demonstrate that the clear intent of N.C. Gen. Stat. § 50-13.6 is to allow the trial court the discretion to ensure one parent in a custody action will not have an inequitable advantage over the other parent—based upon a parent's inability to afford qualified counsel. *See Id.* at 506, 570 S.E.2d at 224. North Carolina General Statute § 50-13.6 concerns leveling the field in a custody action by ensuring each parent has competent representation. N.C. Gen. Stat. § 50-13.6. The trial court's authority to award attorney's fees under N.C. Gen. Stat. § 50-13.6 does not depend upon who "wins" any particular ruling in a custody proceeding. *See Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224 ("Plaintiff here argues that because defendant did not prevail at trial, the award of at-

torney's fees to defendant was improper. We disagree."). This Court in *Burr*, citing our Supreme Court, recognized two findings the trial court must make to award attorney's fees under N.C. Gen. Stat. § 50-13.6:

> Th[e] award of attorney's fees is not left to the court's unbridled discretion; it must find facts to support its award. *See Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 30 (1975), *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980). Specifically, the trial court was required to make two findings of fact: that the party to whom attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. *Hudson*, 299 N.C. at 472, 263 S.E.2d at 723. "When the statutory requirements have been met, the amount of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Hudson*, 299 N.C. at 472, 263 S.E.2d at 724.

Burr, 153 N.C. App. at 506, 570 S.E.2d at 224.

¶ 16 In *Wiggins*, the plaintiff argued that, after the appeal of the order denying the plaintiff's motion for civil contempt in a custody action, the trial court was without jurisdiction to order attorney's fees under N.C. Gen. Stat. § 50-13.6, "because [the] defendant was not both the moving and prevailing party[.]" *Wiggins*, 198 N.C. App. at 696, 679 S.E.2d at 877. This Court concluded:

> If the proceeding is one covered by N.C. Gen. Stat. § 50-13.6, as is the case here, *and the trial court makes the two required findings regarding good faith and insufficient means*, then *it is immaterial whether the recipient of the fees was* either the movant or *the prevailing party*. Thus, we hold the trial court had statutory authority to award fees to defendant in this case.

Id. at 696–97, 679 S.E.2d at 877 (emphasis added).

¶ 17 In this case, the trial court made extensive findings of fact in the Fee Order, which are not challenged by Father, and thus binding on appeal. *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). The trial court also made the following unchallenged ultimate findings and conclusions, which are supported by the findings of fact:

> Pursuant to N.C.G.S. § 50-13.6 and applicable North Carolina case law, []Mother is an interested party, acting in good faith, and lacks sufficient means to fully defray the costs of litigation in relation to her Motion for Contempt, and she therefore is entitled to an award of attorney's fees incurred in connection with her Motion for Contempt.

¶ 18 None of the necessary findings made by the trial court were dependent on Mother's success at trial, and none will be affected by our decisions in Father's appeal of the underlying custody order in COA19-866. Since the award of attorney's fees in the Fee Order was not dependent upon the outcome of the contempt proceeding in the underlying custody action, Father's appeal of the Custody Order in COA19-866 did not divest the trial court of jurisdiction to enter the Fee Order granting Mother attorney's fees under N.C. Gen. Stat. § 50-13.6. N.C. Gen. Stat. § 1-294; N.C. Gen. Stat. § 50-13.6; *Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224; *Wiggins*, 198 N.C. App. at 696–97, 679 S.E.2d at 877. The trial court, having retained jurisdiction to award Mother attorney's fees under N.C. Gen. Stat. § 50-13.6, even after the appeal in COA19-866 was filed and perfected, conducted a hearing and entered the Fee Order including the unchallenged ultimate findings and conclusions that Mother, an interested party, acted in good faith and lacked sufficient means to defray the costs of litigation. These findings were sufficient to support the award of attorney's fees under N.C. Gen. Stat. § 50-13.6. For the reasons discussed above, we hold that the trial court had jurisdiction to enter an award of attorney's fees under N.C. Gen. Stat. § 50-13.6 after Father appealed the order in COA19-866, and Father fails to demonstrate any error in the Fee Order. We therefore affirm.

AFFIRMED.

Judges ZACHARY and GORE concur.

BLANCHARD v. BLANCHARD

[279 N.C. App. 280, 2021-NCCOA-488]

NICOLE J. BLANCHARD, Plaintiff
v.
DAVID M. BLANCHARD, Defendant

No. COA19-866

Filed 21 September 2021

1. Child Custody and Support—contempt motion—seeking civil and criminal contempt—notice of alleged contemptuous actions—hearing on civil contempt

Where a mother's contempt motion alleging that her children's father had willfully violated the parties' custody order sought to hold the father in both civil and criminal contempt, the Court of Appeals did not need to address whether the father's due process rights were violated by lack of notice of the nature of the contempt charges, because the father had proper notice of his alleged contemptuous actions and the trial court considered only civil contempt at the hearing.

2. Child Custody and Support—custody order—violation—reasonable telephone or video access to children—bad faith

The trial court's order holding a father in civil contempt for willful violation of a custody order was properly supported by the evidence and factual findings where the custody order required the father to provide daily unrestricted and reasonable telephone or video contact with the children to the mother while the children were visiting him, yet the father blocked the mother on his cell phone and arbitrarily chose to turn on the children's iPad each evening from 6:00 p.m. to 6:30 p.m. without informing the mother that she should call during that time period.

3. Child Custody and Support—contempt order—purge conditions—allowing the mother phone or video access to the children

Where a father was found in civil contempt for failing to provide his children's mother with daily phone or video access to the children, in violation of the parties' custody order, the purge conditions in the contempt order—requiring the father to unblock the mother's number from his cell phone and ensure that the children's iPad was able to connect to calls with the mother (or allow his own phone to be used for the calls), and giving him time to purge the contempt in order to avoid incarceration—were proper and affirmed by the appellate court. The father's arguments to the contrary were meritless.

4. Child Custody and Support—contempt order—purge conditions—not modification of custody order

Where a father was found in civil contempt for failing to provide his children's mother with daily phone or video access to the children, in violation of the parties' custody order, the purge conditions in the contempt order—requiring the father to unblock the mother's number from his cell phone and communicate with her to arrange the calls with the children—did not improperly modify the parties' custody order. While the custody order did not set out exact times and methods for the telephone or video communication between the parties and the children, the purge conditions were consistent with the custody order and applied only until the father had purged the contempt.

Appeal by Defendant from order entered 2 April 2019 by Judge Paige B. McThenia in District Court, Mecklenburg County. Heard in the Court of Appeals 9 June 2020.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Jonathan D. Feit and Haley E. White, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant-Father appeals from the trial court's order (the "Contempt Order") holding him in civil contempt of provisions of a consent order regarding custody of the children (the "Custody Order") involving communication between the children and Plaintiff-Mother when the children were in his care. On appeal Father has raised a constitutional due process argument claiming he did not have sufficient notice as to whether Mother sought to hold him in civil or criminal contempt as to specific allegations of violations of the Custody Order. We need not address this argument because prior to hearing, Mother elected to proceed only as to civil contempt on two specific allegations, and the trial court heard and ruled on only these allegations. Father also contends the trial court erred by holding him in civil contempt and that the purge conditions were improper. Because the trial court's findings of fact support its conclusions of law, the trial court did not err by holding Father in civil contempt. Because the trial court set forth clear and specific purge conditions, and these conditions are not modifications of the Custody

Order, we affirm the trial court's order. This opinion is filed contemporaneously with Father's appeal of the trial court's order awarding Mother attorney's fees, COA20-165. The attorney's fees order was entered after Father's appeal of the Custody Order.

I. Factual and Procedural Background

¶ 2 Mother and Father were married in 2007, had three children, and separated on 2 March 2015. Mother filed the complaint including a claim for custody on 6 March 2015. The Custody Order was entered on 6 November 2015 and granted primary physical custody of the children to Mother and regular specific visitation to Father. The "General Provisions Governing Custody" section of the Custody Order also included a provision regarding daily telephone and FaceTime contact between the children and each parent when the children are with the other parent (the "FaceTime Provision"). Under the FaceTime Provision, "[e]ach party shall generally have unrestricted but reasonable telephone contact with the minor children. The parties agree to make the minor children available to the non-custodial parent for phone or FaceTime contact for fifteen minutes each evening."

¶ 3 Mother alleged that Father had been violating the FaceTime Provision in the Custody Order, and she filed a "Motion for Contempt" (the "Contempt Motion") on 3 January 2019, in which she moved the trial court to "[i]ssue a Show Cause Order, directing that a hearing be conducted . . . and, at such hearing, order Father to show cause as to why [he] should not be held in contempt for his violations of the Custody Order." The Contempt Motion requested the trial court find Father in civil contempt, force Father's compliance with the terms of the FaceTime Provision, and find him in criminal contempt, "as a result of his willful failure to comply with the provisions of the Custody Order as set forth" in the Contempt Motion. Mother also requested the trial court order "a reasonable attorney's fee for all time and costs expended . . . in connection with the preparation, filing, and prosecution of" the Contempt Motion "and make such payment a purging condition of Father's contempt[.]" Mother requested that the trial court "order Father to show cause as to why [he] should not be held in contempt for his violations of the Custody [O]rder[.]"

¶ 4 The trial court entered an Order to Show Cause (the "Show Cause Order") on 10 January 2019, in which it found "probable cause to believe that a civil and/or criminal contempt [by Father] has occurred, and a hearing should be conducted on the[] allegations" contained in Mother's Contempt Motion. (Emphasis removed.) Father was ordered to appear before the trial court on 12 February 2019 "and show cause, if any, as to

why [he] should not be held in contempt." Father filed a Motion to Dismiss and in the Alternative Motion for More Definite Statement (the "Motion to Dismiss") on 1 February 2019, in which Father requested that the trial court either "dismiss with prejudice [the Contempt Motion] . . . on the basis of N.C.R.C.P. 12(b)(6), N.C.G.S. 5A-23(g), and/or violation of [Father's] constitutionally protected right to due process of law pursuant to the 5th and 14th Amendments" or, in the alternative, to grant Father's "Motion for a More Definite Statement[.]" In Father's motion, he argued that Mother had "failed to state a claim upon which relief can be granted"—contending that because "[a] person who is found in civil contempt under [] Article [2, Chapter 5A] shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter[,]" N.C. Gen. Stat. § 5A-23(g) (2019), it was impossible for him to know whether Mother's motion to show cause, which included claims of both civil and criminal contempt—based upon the same evidence—would result in a civil contempt hearing or a criminal contempt hearing. Father's requests were based on his argument that Mother had not specifically stated in the Contempt Motion the alleged violations of the Custody Order that would be pursued as civil contempt and those that would be prosecuted as criminal contempt. Father contended that Mother "not providing clear notice in the [Contempt Motion] nor the . . . Show Cause [Order] prevents Father from having clear notice as to which form of contempt is sought and makes Father susceptible to gross errors in the proceedings and his defenses in such proceedings; this violates Father's right to due process." Father filed a Motion to Continue (the "Motion to Continue") one week later, arguing that he should be given time to argue the Motion to Dismiss before the hearing on the Contempt Motion. Father's motions were heard and denied on 12 February 2019, just prior to commencement of the contempt hearing.

¶ 5 Father's Motion to Continue was formally denied by order entered 15 February 2019, and the trial court's denial of the Motion to Dismiss was formally denied within the trial court's 2 April 2019 Order (Re: Civil Contempt) (the "Contempt Order"). In the Contempt Order, the trial court found Father to be in violation of the Custody Order. The issue of attorney's fees was reserved to be heard at a later date. Father appealed.

II. Interlocutory Appeal

¶ 6 The Contempt Order on appeal is an interlocutory order as it does not resolve all pending claims. The appeal of a contempt order affects a substantial right and is immediately appealable. *See Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002) ("The appeal of any contempt order, however, affects a substantial right and is therefore immediately appealable. *Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198

(1976); *see Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000)").

III. Analysis

A. Standards of Review

> The standard of review of orders from contempt proceedings is limited to determining whether competent evidence supports the findings of fact and whether those findings support the conclusions of law. *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). Where the admitted evidence supports the trial court's findings, those findings are binding on appeal "even if the weight of the evidence might sustain findings to the contrary." *Hancock v. Hancock*, 122 N.C. App. 518, 527, 471 S.E.2d 415, 420 (1996). "[T]he credibility of the witnesses is within the trial court's purview." *Scott v. Scott*, 157 N.C. App. 382, 392, 579 S.E.2d 431, 438 (2003).

Wilson v. Guinyard, 254 N.C. App. 229, 235, 801 S.E.2d 700, 705 (2017).

¶ 7 We also review *de novo* the trial court's "apprehension of the law" to determine if the trial court considered the issues under the correct legal standards. *See generally id.* So long as the trial court applied the correct law in its analysis and ruling, we conduct the regular *de novo* review to determine if the trial court's legal conclusions are supported by its findings of fact. *Id.*

B. Due Process Requirements

¶ 8 **[1]** In Father's first argument, he contends that "[t]he trial court violated [his] due process rights by denying his request to be notified of the nature of the contempt charges prior to the beginning of the [contempt] hearing." We disagree.

¶ 9 Father argues that "the trial court violated [Father's] due process rights by denying his request to be notified of" the "criminal or civil nature of the allegations" of "the contempt charges prior to the beginning of the hearing." (Capitalization altered.) The sole allegation in Father's argument is that the notice given to him failed to inform him whether each of Mother's seven allegations of Father's violation of the Custody Order would be pursued for civil contempt or would be prosecuted for criminal contempt; and that this alleged failure to provide Father proper notice violated his due process rights as guaranteed by the Constitution of the United States.

¶ 10 On 12 February 2019, just prior to the contempt hearing, Father argued that his motions to dismiss should be considered and decided before the contempt hearing and requested a continuance of the contempt hearing. Mother's attorney informed the trial court that "we'll probably have to bifurcate since there are some issues related to criminal and some issues related to civil [contempt,]" and Mother's attorney estimated the hearing would take "an hour." The trial court responded: "I think we can't do anything over twenty minutes." Mother's attorney suggested "that we . . . pursue the civil contempt issue within the twenty minute rule, and if we don't have time to hear the criminal we can find another date[.]"

¶ 11 Father's attorney responded: "We were just told ten minutes ago . . . whether those [allegations] are civil or criminal." Father's attorney explained: "So there's not [] sufficient notice, and Father is entitled to time to prepare an appropriate defense and address the matters specifically as criminal or specifically as civil[,]" because

> the procedures for a civil trial and procedures for a criminal trial are very different, and the constitutional safeguards are very different. So it is Father's fundamental constitutional right . . . to not to have yourself incriminated and right to not testify against yourself and the due process clause of the 14th Amendment as to know what procedures you're going to go forward with before you get there.

¶ 12 More specifically, Father argued that Mother failed to state a claim "as she did not clearly state whether she [was] seeking to hold Father in civil contempt or criminal contempt for each individual allegation made" against Father. Father further alleged this lack of a more specific notice violated his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. Father stated: "For civil contempt, the [trial court] follows civil procedure[,]" whereas "[f]or criminal contempt, the [trial court] follows criminal procedure." Father contended that because "[a] person cannot be held in both civil and criminal contempt[,]" he had "a right to know which type of contempt [was] sought before the hearing so that his defense [could] be properly made."

¶ 13 The trial court asked Father: "But you've [been informed of] all of the *allegations*, correct?" (Emphasis added.) Father confirmed that he did, but again argued that Mother's motion did "not specify whether they are civil contempt *allegations* or criminal contempt *allegations*." (Emphasis added.)

¶ 14 The trial court denied Father's Motion for Continuance by order entered 15 February 2019. In the Contempt Order the trial court

"denied . . . Father's Motion to Dismiss and Motion for More Definite Statement[,]" stating:

> After considering the arguments of counsel and the relevant case law presented, the [trial court] concluded that [Mother] was not required to elect civil or criminal contempt as to each alleged violation within a specified period of time prior to the contempt hearing; it is sufficient that the Order to Show Cause gave notice to [Father] that there was probable cause to believe a civil and/or criminal contempt had occurred based on the allegations in [Mother]'s Motion for Contempt.

¶ 15 Mother contends Father "failed to preserve his due process challenge for appellate review." Mother notes that Father did not file a notice of appeal from either the trial court's Order to Show Cause or the order denying his Motion to Continue, and argues that because he did not appeal from these orders, Father failed to preserve this issue for review. Mother also argues that prior cases have not required the moving party to elect either civil or criminal contempt before the hearing.

¶ 16 Both parties have made extensive arguments on the due process issue, but based upon the record before us, we need not address this issue because Father had proper notice of the alleged contemptuous actions, and the trial court only considered civil contempt at this hearing. Father argues Mother should have been required to elect before the hearing whether to pursue civil or criminal contempt, and although we do not address whether Mother was *required* by law to make this election, she *did* in fact inform Father, prior to the hearing, which allegations would form the basis of her action for civil contempt.

¶ 17 At the start of the hearing, due to the time constraints on the trial court, Mother elected to "pursue the civil contempt issue within the twenty-minute rule, and if we don't have time to hear the criminal we can find another date." In addition, the civil contempt hearing was limited to allegations contained in "paragraphs 5 and 6 [of Mother's] Motion for Contempt[.]"[1] The trial court held Father in civil contempt based solely on his violations of the allegations of paragraphs 5 and 6 of the Contempt Motion—specifically, the trial court found that Father violated the provision in the Custody Order requiring each party to provide "Unrestricted Telephone Contact" by making "the minor children available to the non-custodial parent for phone

1. The Contempt Motion included other alleged violations of the Custody Order in paragraphs 3,4,7, and 8. These allegations were not addressed at the hearing or in the Contempt Order.

or FaceTime contact for fifteen minutes each evening." The Contempt Order is the only order before this Court on appeal.

¶ 18 Mother's Contempt Motion and the Show Cause Order gave Father detailed notice of the factual allegations regarding his failure to allow phone or FaceTime access prior to the hearing, and the trial court only heard Mother's claim of civil contempt regarding the allegations in paragraphs 5 and 6 of the Contempt Motion. Although the Contempt Motion did present other allegations of violations of the Custody Order, and in it Mother requested criminal contempt, the trial court did not address those issues at the contempt hearing or in the Contempt Order. Father's arguments ask this Court to speculate about issues which may have arisen *if* the trial court had denied his Motion to Continue and his Motion to Dismiss and *then* held a hearing *on both civil and criminal contempt* on *all the allegations* in Mother's Contempt Motion. However, the hearing was "bifurcated," and the trial court considered *only* civil contempt based on the two specifically identified allegations. We will address on appeal only the arguments based on the issues presented and decided at the hearing and included in the trial court's order. *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 286, 291, 517 S.E.2d 401, 404–05 (1999) ("Courts have no jurisdiction to determine matters that are speculative, abstract, or moot, and they may not enter anticipatory judgments, or provide for contingencies which may arise thereafter."). Our review is limited to the proceedings that actually occurred, are relevant to the trial court's findings, conclusions, and rulings resulting in the Contempt Order, and the Contempt Order itself. We dismiss Father's due process arguments.

C. Compliance at Time of the Hearing

¶ 19 **[2]** In his second argument, Father contends "the trial court erred in holding [him] in civil contempt when he was in compliance at the time of the hearing." Father argues that "trial court's own findings of fact show that [Father] was in compliance with the FaceTime access provisions of the custody order at the time of the hearing so he could not have been held in contempt." Father contends that since Finding of Fact 17 states that he had turned on the iPad from 6:00 p.m. to 6:30 p.m., he had complied with the Custody Order, stating "the trial court erred in holding [him] in civil contempt when he was in compliance at the time of the hearing." We disagree.

¶ 20 The trial court found these facts relevant to Father's argument:

> 4. The Custody Order provides, among other things, as follows:

> C(g). Unrestricted Telephone Contact. Each party shall generally have *unrestricted but reasonable* telephone contact with the minor children. The parties agree to *make the minor children* available to the non-custodial parent for *phone* or *FaceTime* contact for fifteen minutes each evening.

. . . .

12. Since the entry of the Custody Order, [Father] has willfully violated the terms of the Custody Order by *willfully failing to provide [Mother] with FaceTime access* to the minor children during his periods of custodial time.

13. On April 28, 2018, three (3) days after getting remarried, [Father] emailed [Mother] informing her that he set up the minor children's iPad for FaceTime so that [Mother] could FaceTime the minor children directly, and that he would ensure that the iPad was turned on and charged. Prior to this, [Mother] sent and received FaceTime calls with the minor children through [Father]'s phone.

14. On April 29, 2018, [Father] *blocked [Mother]'s phone number from his cell phone.* As a result, email was [Mother]'s only means of communication with [Father], and the only way she could request FaceTime calls with the minor children when her calls to the minor children's iPad went unanswered. Since that time, *[Father] has continuously ignored [Mother]'s repeated requests to FaceTime the minor children* during [Father]'s custodial time, despite [Mother] informing [Father] that her calls to the minor children's iPad had gone [un]answered.

15. From April 30, 2018 through September 2018, *[Mother] called the minor children's iPad at least sixty four (64) times*, but *none* of her calls were answered. During this time, *[Father] only allowed [Mother] FaceTime access to the minor children on three (3) occasions.*

16. *Beginning* in or *around September 2018*, [Mother] could *no longer FaceTime the minor children's iPad*

> from her phone *because the children's iPad was either turned off, not connected to WiFi, or FaceTime was disabled.*
>
> 17. [Father] *arbitrarily chose* to turn the minor children's iPad on each evening from 6:00 p.m. to 6:30 p.m. *without informing [Mother]* that she should call during that thirty (30) minute time period. From May 2018 *through the hearing of this Motion*, [Mother] sent numerous text messages and emails to [Father] asking to FaceTime the minor children. *[Father] did not respond to any of [Mother]'s FaceTime requests*.
>
> 18. On one occasion, after [Mother] requested a FaceTime call with the minor children, [Father] sent her a copy of his marriage license. [Father] saved [Mother]'s contact information in his phone as "Psycho Bitch." *This conduct evidences the willful nature* of [Father]'s failure to allow [Mother] FaceTime access to the minor children.
>
> 19. [Mother]'s counsel wrote [Father]'s counsel on *seven (7) occasions* [between 25 June 2018 and 2 November 2018] *regarding [Father]'s refusal to allow [Mother] to FaceTime* the minor children. Despite [Mother]'s counsel's efforts, *[Father] continued to deny [Mother] FaceTime access to the minor children.*

(Emphasis added.)

¶ 21 Father does not challenge the findings of fact as unsupported by the evidence but argues that the findings demonstrate that because he had the children's iPad on each evening from 6:00 p.m. to 6:30 p.m., he complied with the terms of the Custody Order. Father's argument takes a portion of finding 17 out of context in order to argue it was made in error, asserting the "[b]ecause the [trial] court specifically found that [Father] was providing access between 6 p.m. and 6:30 p.m., finding 12 that [Father] has failed to provide access must be interpreted as" a finding that Father was in compliance with the FaceTime Provision at the time of the contempt hearing. The full sentence in finding 17 reads: "Father arbitrarily chose to turn the minor children's iPad on each evening from 6:00 p.m. to 6:30 p.m. *without informing [Mother] that she should call during that thirty (30) minute time period.*" (Emphasis added.) Without citation to the transcript, Father also argues that "[t]he

uncontroverted testimony was that a week or two before trial, Father made Mother aware of the accessibility window, and that Father had had the children available during that time." But it is the trial court that determines the credibility and weight of the evidence and, here, the trial court found Mother's evidence of Father's refusal to respond to her many requests regarding her inability to contact the children more credible than Father's contentions to the contrary.

¶ 22 At the hearing, Father contended that the Custody Order does not "direct a specific time for the facetime to occur[,]" only that Father ensure "availability for fifteen minutes in the evening[.]" Father contends that the thirty minute window in which he claimed to have made the iPad available for FaceTime calls—from 6:00 p.m. to 6:30 p.m.—proved his compliance with the specific language of the Custody Order. Father is correct that the Custody Order did not specify an exact time for the contact, but it did provide for "*unrestricted but reasonable* telephone contact" and for the parties "to *make the* minor children *available* to the non-custodial parent for *phone* <u>*or*</u> *FaceTime* contact for fifteen minutes each evening." (Emphasis added.) Both parties understood the Custody Order and what was required to follow it in good faith. *See Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003).

¶ 23 The trial court's findings addressed the changes in Father's compliance with the Custody Order following his remarriage:

> [T]hree (3) days after getting remarried, [Father] emailed [Mother] informing her that he set up the minor children's iPad for FaceTime so that [Mother] could FaceTime the minor children directly, and that he would ensure that the iPad was turned on and charged. Prior to this, [Mother] sent and received FaceTime calls with the minor children through [Father]'s phone.
>
> 14. On April 29, 2018, [Father] blocked [Mother]'s phone number from his cell phone.

¶ 24 After blocking Mother's phone number from his phone, Father was repeatedly informed and was well-aware that Mother had not been able to contact the children, but he still refused to make the children available as required by the Custody Order. Father argues that the trial court's other findings, such as Father blocking Mother's number from his phone, sending Mother a copy of his marriage license, and saving Mother's contact information in his phone as "psycho Bitch," are irrelevant to the question of whether he complied with the Custody Order. But these findings are relevant, as they demonstrate why Father suddenly be-

gan to block Mother's phone calls. This was not a random technological glitch or a few missed calls; Father's actions, as found by the trial court, demonstrate exactly *why* Father intentionally changed the method of communication, and thus show the willfulness of his actions.

¶ 25 Clearly, the trial court did not find Father's testimony that he was unaware of any problems regarding phone or FaceTime contact credible, as it included the following findings—unchallenged by Father—in the Contempt Order: "Father has continuously ignored [Mother]'s repeated requests to FaceTime the minor children during Father's custodial time, despite [Mother] informing Father that her calls to the minor children's iPad had gone [un]answered[;]" "[Mother] called the minor children's iPad at least sixty four (64) times, but none of her calls were answered. During this time, Father only allowed [Mother] FaceTime access to the minor children on three (3) occasions[;]" "[b]eginning . . . around September 2018, [Mother] could no longer FaceTime the minor children's iPad . . . because the children's iPad was either turned off, not connected to WiFi, or FaceTime was disabled[;]" "[f]rom May 2018 *through the hearing of this Motion*, [Mother] sent numerous text messages and emails to Father asking to FaceTime the minor children. Father *did not respond to any of [Mother]'s FaceTime requests*[;]" "[Mother]'s counsel wrote Father's counsel on seven (7) occasions [between 25 June 2018 and 2 November 2018] regarding Father's refusal to allow [Mother] to FaceTime the minor children. Despite [Mother]'s counsel's efforts, *Father continued to deny [Mother] FaceTime access* to the minor children[;]" and "Father *arbitrarily chose* to turn the minor children's iPad on each evening from 6:00 p.m. to 6:30 p.m. *without informing [Mother]* that she should call during that thirty (30) minute time period." (Emphasis added.)

¶ 26 These and other findings demonstrate the trial court considered, but rejected, Father's testimony (1) that he was unaware of Mother's FaceTime concerns and difficulties, (2) that he did not believe Mother had tried to FaceTime the children in the time period between her filing of the Contempt Motion and the contempt hearing, and (3) that he had never "purposely denied facetime" or "phone contact" between the children and Mother. Concerning Father's testimony regarding "phone contact," the trial court also found as fact, unchallenged by Father: "On April 29, 2018, Father blocked Mother's phone number from his cell phone. As a result, email was Mother's only means of communication with Father" by which "she could request FaceTime calls with the minor children when her calls to the minor children's iPad went unanswered."

¶ 27 Father's argument relies upon the unsupported contention that he can engage in conduct that contravenes the clear intention of the

Custody Order, so long as the Custody Order did not specifically name the *precise means* by which Father was required to comply with its obvious purpose. However, as this Court has noted:

> Our Supreme Court, in determining whether a party was in contempt for violating a temporary restraining order, stated that " '[t]he order of the court must be obeyed implicitly, *according to its spirit and in good faith.*' " A party " 'must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially so.' "

Middleton, 159 N.C. App. at 226, 583 S.E.2d at 49 (emphasis added) (citations omitted). Implicit in every order is the understanding that its terms will be honored in good faith—that the parties bound by it will act under the dictates of common sense and reasonableness. *See, e.g.*, *American Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888 (1979) (finding contempt where the contemnor's acts violated the "spirit" of the order).

¶ 28 Although the Custody Order did not set out the details of the "unrestricted Telephone Contact" between the parties and children, for about three and one-half years after the entry of the Custody Order, the parties had developed a method of communication and used it consistently until immediately after Father's remarriage—when he unilaterally changed how Mother could contact the children, and refused to respond to Mother's notifications that she was unable to do so.

¶ 29 We hold that the evidence supports all of the trial court's findings of fact, including finding of fact 12, and the findings support the trial court's ultimate findings and conclusions that the Custody Order was still "valid and enforceable[,]" that the purposes "of the Custody Order may still be served by Father[‘s] compliance" with the "Unrestricted Telephone Contact" provision, that Father had "at all times, been fully aware of the Custody Order" and its requirements, that Father "has had the ability to comply with the Custody Order[,]" and, therefore, that "Father['s] failure to comply with the terms of the Custody Order as set forth [in the telephone and FaceTime provisions] is willful and constitutes a civil contempt of Court." This argument is without merit.

D. Purge Conditions

¶ 30 **[3]** Father argues that even if he was properly found to be in civil contempt, the purge conditions in the Contempt Order were "improper" and, therefore, "the [C]ontempt [O]rder should be vacated." We disagree.

¶ 31 The trial court's decree set out the purge conditions:

> 4. [Father] has the present ability to comply with the terms of the Custody Order. [Father] may purge himself of the contempt by unblocking Mother's number from his cell phone so that she can call or text Father to arrange a time for Mother to visit with the minor children via FaceTime; install FaceTime on the children's [iP]ad and ensure that it is functioning properly; ensure that the children's [iP]ad is charged and connected to Wifi so that Mother can FaceTime with the children on the [iP]ad; and, if the children's [iP]ad is not functioning, allow the children to FaceTime with Mother on Father's phone.
>
> 5. The [trial court] recognizes that the purpose of civil contempt is to obtain compliance with a court order and that the only sanction for civil contempt is imprisonment until a defendant complies with that order. The [trial court] also recognizes that [Father's] present ability to comply with the terms of the Custody Order requires that [he] be present in the home for a period of time to install FaceTime on the children's [iP]ad, ensure that it is functioning properly, and ensure that the children's [iP]ad is charged and connected to Wifi (or arrange for someone else to perform these tasks on his behalf), and that [Father] must have actual possession of his phone in order to unblock Mother's number and arrange a time for her to contact the children. The [trial court,] therefore, is postponing [Father's] report date to the Mecklenburg County Jail until April 12, 2019 in order to allow [Father] the opportunity to take the necessary steps to purge himself of the contempt and thus come into compliance with the terms of the Custody Order. Prior to [Father] being taken into custody, this [c]ourt shall hear briefly from the parties about the actions [he] has taken to purge himself of contempt. The [trial court] shall conduct a review hearing on April 10, 2019 from 12:00 to 12:15 p.m.

¶ 32 Father first contends that "[t]he purge conditions *do not set a date by which [Father] will have purged himself* of contempt and *so the contempt order should be vacated.*" (Emphasis added.) Father also

contends that the purge conditions are improper because the order "sentences [Father] to jail without the appropriate findings that he has the ability to purge contempt and avoid incarceration." Father contends the improper purge conditions were the ones requiring him to "unblock[] Mother's number from his cell phone[,]" "install[] FaceTime on the children's [iP]ad[,] and ensure that it is functioning properly."

¶ 33 "A contempt order 'must specify how the person may purge himself of the contempt.' N.C. Gen. Stat. § 5A–22(a)[.]" *Wellons v. White*, 229 N.C. App. 164, 181, 748 S.E.2d 709, 722 (2013). Citing *Wellons*, Father argues that "[t]he purge conditions must specify when compliance has purged the contempt—a party may not be held in contempt indefinitely." Father appears to interpret *Wellons* as containing a holding from this Court that if "the purge conditions . . . do not set a date by which [a contemnor] purge will be complete, the contempt order should be vacated." Father is incorrect. In *Wellons*, the trial court held: "[T]he district court erred by failing to provide [the contemnor] a method to purge his contempt." *Id.* at 182, 748 S.E.2d at 722. This Court then set forth the deficiencies of the contempt order:

> On 5 July 2012, the district court "declared [the contemnor] to be in direct and [willful] civil contempt of the prior Orders of the Court." It suspended [the contemnor]'s arrest based on the following condition: "[The contemnor] can purge his contempt by fully complying with the terms of the [30 March 2012] Interim Order, the prior Orders of 28 December 2007 and 27 July 2010. and this Order." The order did not establish a date after which [the contemnor]'s contempt was purged ***or provide any other means for [the contemnor] to purge the contempt***.

Id. (emphasis added). In *Wellons*, we simply held that the purge conditions in the contempt order "were 'impermissibly vague[,]' " *id.*, because they did not clearly inform the contemnor what actions he had to undertake to purge his contempt and secure his release—therefore, it was possible the contemnor could be held indefinitely, with no meaningful way to purge his contempt. In *Wellons*, the trial court did not clearly state the purge conditions, it simply required the contemnor to comply with the prior court orders indefinitely—so in that case the contemnor would never be able to purge the contempt as long as the orders were in effect. *Id.*

¶ 34 In *Kolczak v. Johnson*, 260 N.C. App. 208, 817 S.E.2d 861 (2018), this Court reversed a civil contempt order based upon the mother's violation of visitation provisions of a custody order. *Id.* at 220, 817 S.E.2d at 869.

In *Kolcazk*, the order set forth several conditions for the mother's visitation, including not allowing the children to have any contact whatsoever with her new husband, who had been involved in and arrested for various crimes, or his criminal associates. *Id.* at 213, 817 S.E.2d at 865. The mother was also required to notify the father within 24 hours if she or her new husband were arrested again; he was arrested again, and the mother did not properly notify the father. *Id.* The trial court found that mother was in contempt of the order for her failure to notify the father of an arrest and allowing her husband to be present at her residence when the children were there, as well as registering the children in a summer camp without consulting the father in violation of first-refusal provisions. *Id.* The contemptuous actions all arose from visitation provisions of the custody order, and all were discrete incidents which had occurred in the past. *Id.* Although the trial court held the mother in civil contempt, the order did not include *any* purge condition. *Id.*

¶ 35 In *Kolczak*, this Court discussed the difficulty of creating an appropriate purge condition in this situation:

> [I]n this case, the contempt is primarily based upon communication and visitation provisions of the orders, not child support. It is not apparent from the order how an appropriate civil contempt purge condition could "coerce the defendant to comply with a court order" as opposed to punishing her for a past violation. *Wellons v. White*, 229 N.C. App. 164, 181, 748 S.E.2d 709, 722 (2013). And here the trial court did not order vague purge conditions; it ordered none at all.
>
> We believe this case is more similar to *Wellons* than *Lueallen*. *Compare Lueallen*, 790 S.E.2d 690; *Wellons*, 229 N.C. App. 164, 748 S.E.2d 709. In *Wellons*, the Court addressed a father's denial of the grandparent's visitation privileges established by a prior order. *See Wellons*, 229 N.C. App. at 165, 748 S.E.2d at 711. In *Wellons*, the trial court held the father in civil contempt for denial of visitation and ordered that he comply with the terms of the prior orders as a purge condition, but this Court reversed the contempt order[.]
>
> . . . .
>
> We have previously reversed similar contempt orders. For instance, in *Cox* a contempt order stated the defendant could purge her contempt by not:

> > placing either of the minor children in a stressful situation or a situation detrimental to their welfare. Specifically, the defendant is ordered not to punish either of the minor children in any manner that is stressful, abusive, or detrimental to that child.
>
> There, we reversed because the trial court failed to clearly specify what the defendant can and cannot do to the minor children in order to purge herself of the civil contempt.
>
> Similarly, in *Scott* a contempt order stated: Defendant may postpone his imprisonment indefinitely by (1) enrolling in a Controlled Anger Program approved by this Court on or before August 1, 2001 and thereafter successfully completing the Program; (2) by not interfering with the Plaintiff's custody of the minor children and (3) by not threatening, abusing, harassing or interfering with the Plaintiff or the Plaintiff's custody of the minor children.
>
> There, although we indicated the requirement to attend a Controlled Anger Program may comport with the ability of civil [violators] to purge themselves, we reversed because the other two requirements were impermissibly vague.
>
> In the case at hand, the district court did not clearly specify what Mr. White can and cannot do to purge himself of contempt. Although the district court referenced previous orders containing specific provisions, it did not: (i) establish when Mr. White's compliance purged his contempt; or (ii) provide any other method for Mr. White to purge his contempt. We will not allow the district court to hold Mr. White indefinitely in contempt. Consequently, we reverse the portion of the 5 July 2012 order holding Mr. White in civil contempt.

Id. at 219–20, 817 S.E.2d at 868–69. Unlike *Kolczak* or *Wellons*, here the trial court did "clearly specify what [Father could] do to purge himself of contempt." *Id.*

¶ 36 In the order on appeal, the trial court acknowledged the difficulty in constructing a purge condition in a contempt order for a refusal to

comply with an order regarding visitation, which is always an ongoing obligation. Unlike *Kolzcak*, *id.*, here the trial court's order clearly sets forth exactly what Father needed to do to purge himself of contempt: he had to set up FaceTime on the children's iPad to allow Mother the communication with the children set out in the Custody Order. Since he could not personally accomplish this task while in jail, the trial court allowed him time to take the specific steps set out in the order. In this type of situation, the trial court must tailor the purge conditions to the needs of the particular case.

¶ 37 Here, the trial court postponed Father's time to report to the jail to April 12, 2019 to allow time for him to take "the necessary steps to purge himself of the contempt and thus come into compliance with the terms of the Custody Order." The trial court also set a time for a "review hearing" on April 10 to "hear briefly from the parties about the actions Father] has taken to purge himself of contempt."[2]

¶ 38 Father argues the trial court's order is internally contradictory because the order acknowledges that "if Father is in jail he cannot purge by complying" and to remedy the "apparent contradiction, the trial court 'delays' the report to jail date to allow him time to comply." But if Father had not complied with the purge condition by April 10, at the review hearing, Father would then go to jail and would have no ability to purge the contempt.

¶ 39 Although the trial court did allow Father the time to purge himself of contempt by setting up the children's iPad properly and thus avoid reporting to jail, the trial court's order is not internally contradictory. In fact, the trial court set out exactly what Father would need to do to purge the contempt and allowed him time to take these actions personally, but the order also noted that Father could "arrange for someone else to perform these tasks on his behalf." In this manner, the trial court's purge provisions are similar to those often imposed in civil contempt orders for nonpayment of child support. A contemnor may be held in civil contempt and imprisoned immediately, with a purge condition of payment of a sum of money. Once the contemnor is in jail, he must arrange for payment of the amount set as the purge condition to purge the contempt and be released from jail. If the contemnor has sufficient cash in his physical possession to pay the purge payment immediately,

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2. The trial court rendered its order at the close of the hearing on 12 February 2019. In open court, the trial court informed the parties of the purge conditions and that Father would have "two months" to take the actions needed "to make it possible that [Mother] has contact with" the children. The written and signed Contempt Order was filed on 2 April 2019.

he can immediately purge the contempt and not be imprisoned. But if the contemnor does not have sufficient cash in his physical possession to pay the purge payment and the contempt order directs that he be immediately taken into custody, he will be imprisoned and, in jail, he does not have the ability to personally go to get the funds to pay the purge payment—even if he has those funds readily available at home or in a bank account. But from jail, he can contact another person—a friend, a family member, his banker, or his attorney—to arrange for someone else to retrieve his funds and make the purge payment. In this respect, the trial court's purge conditions here are quite similar to those commonly imposed in cases where a financial purge payment is ordered—though, unlike payment of past due child support, there is no way to quantify a loss of past visitation and no way to replace the missed communications between a parent and her children. The trial court noted this problem:

> The Court recognizes that the purpose of civil contempt is to obtain compliance with a court order and that the only sanction for civil contempt is imprisonment until a defendant complies with that order. The Court also recognizes that [Father's] present ability to comply with the terms of the Custody Order requires that [Father] be present in the home for a period of time to install FaceTime on the children's iPad, ensure that it is functioning properly, and ensure that the children's iPad is charged and connected to Wi-Fi (or arrange for someone else to perform these tasks on his behalf), and that [Father] must have actual possession of his phone in order to unblock Mother's number and arrange a time for her to contact the children.

¶ 40 The trial court gave Father time to set up the children's iPad properly before reporting to jail, and if he took the actions directed by the order, he would not have to report to jail. If he failed to take these actions personally and was imprisoned, he could still "arrange for someone else to perform these tasks on his behalf." Either way, Father had the "present ability" to comply with the Custody Order and with the purge conditions in the Contempt Order. Thus, the order is not internally contradictory.

¶ 41 Father also argues that although paragraphs 5 "seems to say that April 10 is the day upon which purge is complete," "paragraph 4 talks about an ongoing obligation. Essentially, paragraph 4 tells him to come into compliance and stay in compliance with the terms of the custody order." In this regard, Father argues this order is like the order in

Wellons and is thus improper. *See Wellons*, 229 N.C. App. at 182, 748 S.E.2d at 722. But we do not read the Contempt Order as requiring indefinite compliance with the Custody Order as a purge condition. Paragraph 4 simply sets out the specific conditions which would need to exist to allow the communications between Mother and the children as directed by the Custody Order, while paragraph 5 sets out the specific time for the review hearing, based upon the trial court's decision *to give Father the opportunity* to return to his home and set up the iPad personally. Apparently, Father did not appreciate the trial court extending him this opportunity and would have preferred immediate imprisonment, so he could then write a letter or make a phone call from jail to "arrange for someone else to perform these tasks on his behalf." But the trial court was within its discretion to give Father this opportunity to purge his contempt before having to report to jail.

E. Amending the Custody Order

¶ 42 **[4]** Father's last argument is that the "purge conditions improperly modify the parties' custody order." He contends:

> In setting its purge conditions, the trial court required [Father] to unblock [Mother] from his phone. The court also required [Father] to arrange [Mother]'s FaceTime windows with [Mother]. The parties' custody order does require some communication (e.g. consultation on legal custody issues, notification of certain things), but the order does not require that the parties communicate by telephone. The order also does not provide that the parties must consult to determine when [Mother] can FaceTime the children. By requiring [Father] to unblock [Mother] from his phone and to engage in regular (daily?) communication with [Mother] to arrange each FaceTime event, the trial court improperly modified the parties' custody order, and those provisions of the order should be vacated.

¶ 43 Father is correct that the Custody Order did not set out exact times and methods for the "Unrestricted Telephone Communication" between the parties and children, but it did provide that "[e]ach party shall generally have unrestricted but reasonable telephone contact with the minor children. The parties agree to make the minor children available to the non-custodial parent for phone or FaceTime contact for fifteen minutes each evening." The purge conditions in the Contempt Order do not change this provision of the Custody Order but only set out the actions

Father must take to purge the contempt by setting up the iPad in a manner to allow the reasonable contact directed by the Custody Order.

¶ 44 The purge provisions here are comparable to those in *Wilson v. Guinyard*, 254 N.C. App. 229, 801 S.E.2d 700 (2017). In *Wilson*, the mother lived in North Carolina and the father in South Carolina. *Id.* at 230, 801 S.E.2d at 702. The custody order provided for the parties to meet at "South of the Border Amusement Park" to exchange the child for visitation. *Id.* The order also set out times for the exchanges but required each party to notify the other of delays in travel "due to unforeseen circumstances." *Id.* The mother filed a motion for contempt alleging the father was "habitually late" without valid reasons and on at least one instance the child missed a day of school after the father had missed a scheduled exchange. *Id.* at 231, 801 S.E.2d at 702. At the hearing, she presented evidence the father was late to over forty exchanges, sometimes up to two hours late. *Id.* at 231, 801 S.E.2d at 702–03. The trial court held the father in civil contempt and set as purge conditions that the "[d]efendant could purge himself of contempt by both picking up and dropping off their son in Durham for the next three weekend visits. The Court further provided that if the defendant was more than thirty minutes late to either pick up or drop off [the child], a weekend visitation would be forfeited." *Id.* at 238, 801 S.E.2d at 706.

¶ 45 This Court held the purge conditions requiring the father to exchange the child at a different location than established by the custody order for "the next three weekend visits" and for forfeiture of a visit for being more than 30 minutes late was not a modification of the custody order:

> These provisions do not constitute a modification of custody. *See Tankala v. Pithavadian*, __ N.C. App. __, __, 789 S.E.2d 31, 33 (2016) (holding a trial court's order providing additional dates and locations for custodial visitation not inconsistent with the governing child custody order is not a modification of the terms of custody).
>
> Permanent joint legal custody and secondary physical custody remained with Defendant both before and after the contempt order. These provisions more specifically identify what Defendant can and cannot do regarding the visitation times in order to purge himself of the civil contempt and insure [sic] Defendant's compliance with the previous court orders. *See Cox*,

> 133 N.C. App. at 226, 515 S.E.2d at 65; *Scott*, 157 N.C. App. at 394, 579 S.E.2d at 439. The trial court did not improperly modify custody or impose improper purge conditions.

Id.

¶ 46 As in *Wilson*, the trial court's purge conditions set out requirements for Father to purge the civil contempt and the conditions are consistent with the Custody Order. *Id.* The purge provisions of the Contempt Order apply only until Father has taken the actions required to purge the contempt. The Contempt Order does not modify the Custody Order. This argument is without merit.

IV. Conclusion

¶ 47 The trial court acted reasonably and within its discretion. "The [Contempt O]rder provides flexibility for unusual circumstances . . . , which [Father] clearly and repeatedly abused." *Wilson*, 254 N.C. App. at 237, 801 S.E.2d at 706. For the reasons discussed above, we affirm.

AFFIRMED.

Judges TYSON and COLLINS concur.

WILLIAM THOMAS FOX and SCOTT EVERETT SANDERS, Plaintiffs
v.
THE CITY OF GREENSBORO; MITCHELL JOHNSON, individually and in his official capacities; TIMOTHY R. BELLAMY, individually and in his official capacities; GARY W. HASTINGS, individually and in his official capacities; ERNEST L. CUTHBERTSON, individually and in his official capacities; JOHN D. SLONE, individually and in his official capacities; NORMAN O. RANKIN, individually and in his official capacities; AND MARTHA T. KELLY, individually and in her official capacities, Defendants

No. COA20-438

Filed 21 September 2021

1. Malicious Prosecution—elements—malice—governmental immunity —lack of probable cause—criminal charges against policemen

After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the doctrine

of governmental immunity barred plaintiffs' malicious prosecution claim against a city official and other police officers (defendants) where plaintiffs—who accused defendants of providing false or misleading information to the SBI and withholding exculpatory evidence on plaintiffs' criminal charges, but who admitted during depositions that they lacked specific knowledge of what information defendants shared with the SBI—could not meet their burden of showing defendants acted with malice. Further, because there was substantial evidence supporting a probability that plaintiffs committed the crimes they were charged with, plaintiffs could not show defendants acted without probable cause in investigating those charges.

2. Conspiracy—civil—conspiracy to provide false information—criminal charges against policemen

After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the trial court in plaintiffs' lawsuit against a city official and other police officers (defendants) properly dismissed plaintiffs' civil conspiracy claim, where plaintiffs accused defendants of agreeing to provide false information to the SBI and withholding exculpatory evidence on plaintiffs' criminal charges. North Carolina law does not recognize a cause of action for civil conspiracy to provide false statements in order to secure someone's arrest. Moreover, plaintiffs failed to allege specific facts regarding how or when defendants agreed to the purported conspiracy.

3. Statutes of Limitation and Repose—abuse of process—criminal charges against policemen—withholding exculpatory evidence—last tortious act

After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, plaintiffs' abuse of process claim against a city official and other police officers (defendants) was not time-barred. Because the three-year limitations period for abuse of process claims commences upon the last tortious act complained of, and because plaintiffs alleged a number of continuous tortious acts by defendants following plaintiffs' arrest—such as withholding exculpatory evidence on plaintiffs' criminal charges and using the pending prosecution to try to force plaintiffs

out of the police department—the limitations period on plaintiffs' abuse of process claim began to run on the day that the last tortious act concluded.

4. Abuse of Process—sufficiency of pleadings—improper acts—ulterior motive—criminal charges against policemen—withholding exculpatory evidence

After two police officers (plaintiffs) were tried on charges of unlawfully accessing a government computer and obstruction of justice for allegedly thwarting investigations by the State Bureau of Investigation (SBI) of police misconduct, the trial court in plaintiffs' lawsuit against a city official and other police officers (defendants) improperly dismissed plaintiffs' abuse of process claim. Plaintiffs sufficiently pleaded improper acts by defendants occurring after plaintiffs' criminal prosecution began and sufficiently pleaded that defendants "acted with an ulterior motive" by withholding exculpatory evidence on plaintiffs' charges in order to pressure them into leaving the police department.

Judge JACKSON concurring in part and dissenting in part.

Appeal by Plaintiffs from order entered 14 August 2012 by Judge Joseph Turner and order entered 18 December 2019 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 10 March 2021.

Morrow, Porter, Vermitsky, & Taylor, PLLC, by John C. Vermitsky, for Plaintiffs-Appellants.

Nelson Mullins Riley & Scarborough, LLP, by G. Gray Wilson, Stuart H. Russell, and Lorin J. Lapidus, for Defendants-Appellees.

WOOD, Judge.

¶ 1 Plaintiffs William Fox ("Fox") and Scott Sanders ("Sanders") (collectively, "Plaintiffs") appeal two separate orders. Plaintiffs first appeal an order dismissing their civil conspiracy and abuse of process claims. Plaintiffs also appeal an order granting summary judgment in favor of Defendants with respect to their malicious prosecution cause of action. After careful review of the record and applicable law, we affirm in part and reverse in part.

I. Factual and Procedural Background

¶ 2 In 1984, Defendant Mitchell Johnson ("Defendant Johnson") became employed by the City of Greensboro. In early 2000, Defendant Johnson became the Deputy City Manager. While Defendant Johnson was the Deputy City Manager, the City Manager Ed Kitchen ("Kitchen") asked Defendant Johnson "to review a letter from the NAACP expressing concerns" of racial misconduct within the Greensboro Police Department ("GPD"). In the summer of 2005, while Defendant Johnson's review of the concerns raised was ongoing, Kitchen retired, and Defendant Johnson became the City Manager.

¶ 3 In 2005, Plaintiffs were law enforcement officers with the GPD. Plaintiffs were assigned to the "Special Intelligence Section" ("SIS"), a subdivision of the Special Investigations Division ("SID") within the GPD. The SIS was "a unit designed to investigate, among other things, allegations of criminal police misconduct, outlaw motorcycle gangs, street gangs, dangerous persons, organized crime," and to "protect celebrities or high risk targets visiting Greensboro, North Carolina."

¶ 4 In or around June 2005, GPD Officer James Hinson ("Hinson") and other African American officers raised concerns that Chief of Police David Wray ("Chief Wray") and "a group of Caucasian officers coined the 'Secret Police' " were racially targeting African American police officers. Hinson alleged the SIS, including Plaintiffs, were involved in the "Secret Police."

¶ 5 The allegations of racial discrimination and targeting centered around the SIS's use of an alleged "Black Book." The "Black Book" was a black binder containing pictures of nineteen African American officers and various male African American individuals allegedly used "as part of an effort to target African American police officers for criminal investigations." The SIS asserted that the "Black Book" was a legitimate investigative tool being used to investigate an allegation of sexual assault by an on-duty African American officer. The "Black Book" contained photographs of minority male officers who were on-duty during the alleged sexual assault of an informant.

¶ 6 Due to the allegations of racial misconduct, Defendant Johnson asked Chief Wray about the NAACP's concerns and the existence of the Black Book. Chief Wray's written response led Defendant Johnson to "believe that [Wray] denied the existence of anything matching the description of the 'Black Book.' " Defendant Johnson reported to the NAACP that the "Black Book" did not exist.

¶ 7 In August 2005, Defendant Johnson attended a meeting with African American GPD officers at their request. During this meeting, Defendant Johnson heard the officers' concerns regarding the Wray administration. Around this time, Defendant Johnson also learned of concerns regarding the SID from the State Bureau of Investigation ("SBI"). Due to repeated concerns regarding the GPD, Defendant Johnson contacted City Attorneys "to find an outside entity to review the conduct of the Wray administration to determine if there was any truth to the concerns." The City's legal department ("City Legal"), in response, recommended Risk Management Associates ("RMA"), an independent consulting company, to review the Wray administration. Defendant Johnson hired RMA to "review the conduct of the . . . Wray [a]dministration[,]" but "did not ask RMA to investigate any particular individual."

¶ 8 While the RMA investigation was ongoing, Defendant Johnson "had the legal department of the City of Greensboro investigate general administrative issues in the GPD." The RMA report caused Defendant Johnson to believe Chief Wray "had not been truthful about the 'Black Book' and raised other serious concerns about the leadership of the [GPD]." As a result, Defendant Johnson then "chose to place Wray on administrative leave" on January 6, 2006. At that time, Defendant Timothy Bellamy ("Defendant Bellamy"), the Assistant Chief of Police, became the interim Chief of Police. Shortly after Chief Wray was placed on administrative leave, he resigned as Chief of Police on January 9, 2006.[1] After Chief Wray's resignation, Defendant Bellamy was tasked with reviewing the RMA and City Legal reports.

¶ 9 Upon his review of the RMA report, Defendant Bellamy had "very serious concerns about the leadership of the Wray administration." According to the report, Officer Randall Brady ("Brady") revealed to the RMA that "he was keeping in the trunk of his police car a book that matched the description of the 'Black Book.' " According to Sanders, Brady secured the "Black Book" in the trunk of his patrol vehicle to avoid speculation that the "Secret Police" were showing the "Black Book" to a variety of individuals in an effort to incriminate minority officers.

¶ 10 Upon securing the "Black Book" from Brady's trunk, Defendant Bellamy gave the "Black Book" to Internal Affairs ("IA"). IA then began its investigation. Thereafter, Defendant Bellamy assigned Captain Gary Hastings ("Defendant Hastings") "with the task of securing and

1. The Federal Bureau of Investigation ("FBI") began an investigation of the Wray administration on January 12, 2006. The FBI did not substantiate any violation of civil rights or federal law.

reviewing materials within [SID] . . . for possible criminal activity." Defendant Hastings "put together a team" of officers from the Criminal Investigation Division ("CID") to review the activity of the SID and Wray administration.

¶ 11 While Defendant Hastings was investigating the SID, Defendant Bellamy met with Guilford County District Attorney Doug Henderson ("Henderson") about the RMA report and Defendant Hastings's investigative findings. Henderson informed Defendant Bellamy that the Guilford County District Attorney's Office could not participate in the investigation and that the North Carolina Attorney General's Office would need to be contacted about the concerns regarding alleged criminal conduct within the GPD.

¶ 12 Henderson drafted a letter to Assistant Attorney General James Coman ("Coman") in March 2006. Henderson also wrote a letter to the Director of the SBI, requesting a criminal investigation of the Wray administration on March 13, 2006. On April 4, 2006, Coman responded to Henderson, "accepting responsibility to determine whether or not a criminal investigation should be undertaken by the [SBI]." Coman and a Special Deputy Attorney General traveled to Greensboro throughout April and May 2006 to review police reports and tapes. On June 9, 2006, a meeting was held at the SBI District Office in Greensboro, where it was determined the SBI would mount an investigation of the Wray administration.

¶ 13 Throughout the SBI investigation, agents met with and interviewed approximately seventy-five individuals, including Plaintiffs and Defendants Johnson, Bellamy, and Hastings. Agents also reviewed "69 CDs of audio recordings that were retrieved from Detective Scott Sanders' city computer and other sources." One witness, Dana Bailey ("Bailey"), discussed how Sanders asked her to create lineups of male African American officers.

¶ 14 Bailey was employed by the GPD in 2000 and worked as an investigative specialist. In or around January 2003, Sanders asked Bailey to put together lineups consisting of five officers. Bailey believed the officers were Hinson, Snipes, Wallace, Fulmore and Norman Rankin ("Defendant Rankin"). Bailey stated her lineups were created using Department of Motor Vehicles ("DMV") photographs, and she cropped any photograph of an officer in uniform "so it looked similar to others in the lineup."

¶ 15 In January 2005, Sanders asked Bailey to put together a list of every officer who had worked on a particular date and shift. Bailey did so, and Sanders requested "16 or 17 more lineups," and told her "the request

was by the authority of Deputy Chief Brady." Bailey created the lineups, and she mentioned in her SBI interview that "all of the officers she did lineups on were black." Sanders did not mention what the lineups were for, nor did Bailey "want to know what they were for." During the investigation of the GPD, Bailey reported some computers were taken for investigation, but one of hers was not. "[I]t bothered [Bailey] that a complete investigation would not be done if that computer was not taken and looked at."

¶ 16 Defendant Hastings was also interviewed by the SBI. Defendant Hastings's interview revealed Defendant Bellamy "designated Hastings as the operational commander for the inventory, review, and analysis of the seized property belonging to the [SID]." Defendant Hastings "was made the commander for any subsequent criminal investigation involving any allegation or evidence of a crime." Defendant Hastings stated the CID "seized a 'ton' of stuff including electronic media, such as audio cassette tapes, VHS tapes, other video tapes, recordable CDs, computer drives, cellular telephones, and recordable DVDs." While Defendant Hastings was investigating the SID, Defendant Bellamy re-assigned members of the SIS and SID to other divisions.

¶ 17 While Defendant Hastings and his team were reviewing the materials seized from the SID, Defendant Hastings "recalled that one of his homicide detectives, [Defendant Rankin], had been transferred from his division to Special Intelligence." Defendant "Hastings ha[d] received information that Officer John Sloan[2] [sic] ("Defendant Slone") had been instructed to keep [Defendant Rankin] busy in some investigation that he had been assigned to handle." Defendant Hastings "suspected [Defendant] Rankin was placed in Special Intelligence and assigned some investigation as window-dressing to offset the perception that black officers in that unit were not allowed to investigate other officers."

¶ 18 Defendant Rankin was also interviewed during the SBI investigation. Brady assigned Defendant Rankin to the SID to work on a special assignment on June 23, 2005. Defendant Rankin was tasked with investigating "a sensitive matter," involving an informant. When Brady assigned Defendant Rankin to the SID, he called Fox and Ernest Cuthbertson ("Defendant Cuthbertson") to help investigate the case. During this meeting, Brady "made some comment about [Sanders] being tied up on the . . . Hinson investigation and some other things and that was why he needed to assign the case to [Defendants] Rankin and Cuthbertson."

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2. Throughout the record, Defendant Slone is referred to as "Sloan." It appears from the complaint and the parties' briefing that the appropriate spelling is "Slone."

¶ 19 Defendant Rankin was assigned to investigate allegations that certain GPD officers solicited prostitutes. Defendant Rankin was instructed to contact Sanders because Sanders had additional information about the case. Defendant Rankin did so, and Sanders provided him with names and contact information. The allegations regarding prostitution came from an informant who went by the name "CC." Defendant Rankin recalled CC would only speak with Defendant Slone.

¶ 20 Defendants Slone and Rankin discussed CC, and why CC was important to the investigation. Defendant Slone later told Defendant Rankin that "Sloan [sic] had been instructed to lead [Defendants] Rankin and Cuthbertson in the wrong direction and give them false information to keep them from ever meeting with [the informant]."

¶ 21 In his SBI interview, Defendant Slone discussed a phone call he received from Sanders. Sanders told Defendant Slone the SID was not working the investigation, but Chief Wray had assigned Defendants Rankin and Cuthbertson to investigate the case. Defendant Slone detailed a meeting he had with Plaintiffs, where Plaintiffs expressed concerns regarding Defendants Rankin and Cuthbertson's competency. Defendant Slone was led to believe "by Brady, Fox, and Sanders" that Defendants Cuthbertson and Rankin were "dirty cops." According to Defendant Slone, he was assigned to work the case, and was tasked with ensuring Defendants Rankin and Cuthbertson did not obtain certain evidence. Defendant Slone also told SBI agents that Plaintiffs were to be blind copied on any e-mails between Defendants Slone, Rankin, and Cuthbertson.

¶ 22 Winston-Salem law enforcement officer Theodore Hill ("Hill") corroborated Defendant Slone's statements.[3] Hill recounted a meeting he attended with Defendant Slone and two detectives at a gas station parking lot. "Hill related that [Defendant Slone] was trying to give the other detectives some information he had obtained," but the detectives "did not want it because if they took the information, they would have to give it to whoever was working on some case." Hill recalled the information Defendant Slone was trying to give to the detectives "was supposed to be a picture of a police officer with a stripper or someone else."

¶ 23 Defendant Slone and Hill's statements to the SBI are further corroborated by Defendant Rankin's interview. Defendant Rankin was

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3. Fox filed "truthfulness concerns" regarding Defendant Slone, alleging Defendant Slone's statements were inconsistent. GPD Sergeant Mike Loy ("Loy"), working in IA, drafted a memorandum regarding Defendant Slone's inconsistent statements. Notably, Defendant Slone's statements are corroborated, in part, by Hill and Defendant Rankin.

assigned to investigate allegations of police officers soliciting prostitutes. After Defendant Rankin received his assignment, he thought "it was like an invisible wall was being put up to keep him from talking to" the informant. Later, Defendant Slone admitted to Defendant Rankin he was asked to "lead [Defendants] Rankin and Cuthbertson in the wrong direction and give them false information to keep them from ever meeting with the informant."

¶ 24 Fox also participated in the SBI investigation. Fox denied knowing Sanders was getting blind copies of e-mails between officers and claimed he was led to believe CC "and [Defendant Rankin] did not get along." He further denied "setting [Defendant] Rankin up to fail."

¶ 25 Throughout their investigation, SBI agents became concerned that Plaintiffs obstructed investigations and unlawfully accessed a federal government computer. Specifically, the agents were concerned Sanders accessed a federal computer assigned to officer Julius Fulmore ("Fulmore").

¶ 26 Fulmore had been assigned a laptop computer by an agent of the Department of Housing and Urban Development ("HUD") and used the laptop until June 4, 2004. Fulmore did not allow any other officer to use the computer, and it was in his sole possession. Fulmore told SBI agents that Sanders went to the HUD agent for consent to search the HUD laptop twice. The HUD agent did not consent to a search and told Sanders he would need Fulmore's permission or a letter from Sanders's supervisor requesting permission to access the computer. Fulmore did not consent to any individual searching the HUD computer and the record does not reveal a request from Sanders or his supervisor for permission to access the laptop.

¶ 27 On December 20, 2003, Sanders asked SBI agent Gary Rick Cullop ("Cullop") to examine a computer for him. Cullop stated he removed the hard drive from the computer and made a "mirror copy" of the hard drive. According to Cullop's SBI interview, "he did not know by what consent he searched the computer for Sanders." Cullop believed "someone in Sanders' chain of command gave permission for the search." Cullop did not know the computer was owned by HUD and the federal government.

¶ 28 On September 18, 2006, the SBI agents investigating the Wray administration presented Cullop with a computer. The computer SBI agents presented to Cullop was the same computer given to Fulmore by the

HUD agent. Cullop confirmed that the computer he inspected for Sanders was the same computer presented to him on September 18, 2006.[4]

¶ 29 On September 17, 2007, Sanders was indicted for one count of accessing a government computer in violation of N.C. Gen. Stat. § 14-454.1(b); felonious obstruction of justice; and felonious conspiracy "to undermine a legitimate criminal investigation." That same day, Fox was indicted for felonious obstruction of justice and felonious conspiracy to obstruct justice. Plaintiffs were arrested on September 21, 2007.[5] Consequently, Plaintiffs were suspended without pay and were instructed not to issue any comments regarding the investigation.

¶ 30 Sanders's criminal trial for one count of accessing a government computer began on February 16, 2009. During Sanders's trial, Defendant Hastings testified on his behalf and was believed to be a beneficial witness for Sanders. Four days later, Sanders was acquitted of accessing a government computer. The remaining charges against both Plaintiffs were dismissed on February 23, 2009.[6]

¶ 31 On April 1, 2011, Plaintiffs brought suit against the City of Greensboro; Defendants Bellamy, Hastings, Slone, Cuthbertson, Johnson, and Martha Kelly ("Defendant Kelly"); and the RMA in the federal district court for the Middle District of North Carolina. The District Court dismissed all of Plaintiffs' asserted causes of action, upon motion by the named defendants, on August 27, 2011. *See Fox v. City of Greensboro*, *et al.*, 807 F. Supp. 2d 476 (M.D.N.C. 2011).

¶ 32 On January 20, 2012, Plaintiffs filed suit against Defendants Johnson, Bellamy, Hastings, Kelly,[7] Slone, Rankin, and Cuthbertson in Forsyth County Superior Court (collectively, "all Defendants"). Plaintiffs asserted a civil conspiracy cause of action against all Defendants in both

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4. Cullop was able to confirm the computer presented by the SBI agents was the same computer he examined for Sanders by matching the serial number from the computer to his notes.

5. Plaintiffs speculate that former Attorney General Roy Cooper, judges, politicians, and the SBI's political motivations caused Coman to seek criminal indictments.

6. Coman's affidavit demonstrates he "told the attorneys for Sanders and Fox that if Sanders was acquitted, [Coman] would drop all remaining criminal charges against Sanders and Fox." Plaintiffs' attorney, Seth Cohen, submitted an affidavit corroborating this statement.

7. We need not address the merits of Plaintiffs' claims regarding Defendant Kelly. Plaintiffs voluntarily dismissed their claims against Defendant Kelly on October 8, 2018. *See Hous. Auth. of City of Wilmington v. Sparks Eng'g. PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011).

their official and individual capacities. Plaintiffs further alleged abuse of process and malicious prosecution causes of action against Defendants Johnson, Bellamy, Hastings, and Kelly in both their official and individual capacities. Plaintiffs asserted additional claims for declaratory judgment and punitive damages.

¶ 33 Plaintiffs allege Defendant Johnson wrongfully ordered the investigation of Plaintiffs, directed City Attorneys to lie to Plaintiffs, controlled the flow of information to the SBI, instigated Plaintiffs' arrest, and failed to provide the SBI with exculpatory information. It was further alleged Defendant Johnson provided City Council with false and misleading information about the "Black Book," and improperly provided the media and public with false and misleading information.[8]

¶ 34 Regarding Defendant Bellamy, Plaintiffs contend he "help[ed] to create false accusations that [Plaintiffs] were wrongfully targeting minority officers"; controlled the flow of information to the RMA, City Attorneys, and SBI; and provided false and misleading information during the multiple investigations of the Wray administration. According to Plaintiffs' complaint, Defendant Bellamy "helped to create a false transcript" of an audio recording between Sanders, Wray, and others; failed to provide exculpatory information regarding Plaintiffs' criminal charges; and "[failed] to timely act to investigate . . . truthfulness allegations" that Defendant Slone provided false information during the investigations.

¶ 35 Defendant Hastings was accused of aiding in the creation of false accusations against Plaintiffs; "[a]uthoring memorandum accusing [Plaintiffs] of illegal and immoral conduct"; instructing Defendant Kelly to destroy memoranda regarding the investigation of Plaintiffs; and helped to create a false transcript of an audio recording involving Sanders. Plaintiffs further alleged Defendant Hastings provided false and misleading information to City Council and police personnel.

¶ 36 Plaintiffs contend Defendants Slone, Rankin, and Cuthbertson participated in creating false accusations against Plaintiffs, and knowingly provided the RMA and SBI with false or misleading information during the investigations of the Wray administration. It was further alleged that Defendant Kelly, a GPD Captain, knew of the false information provided during the SBI investigation and failed to take appropriate action.

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8. Throughout the investigations of the Wray administration, Defendants Johnson and Bellamy engaged in press releases regarding the "Black Book." Plaintiffs contend the statements made to the press, as well as statements made to City Council, were inflammatory, misleading, and false. Plaintiffs further contend these statements played a role in the SBI investigation and the decision to criminally indict Plaintiffs.

Defendant Kelly was further accused of destroying memoranda regarding the investigations, including a memorandum referred to as "Memo 9." Memo 9 allegedly "contained exculpatory evidence that [Plaintiffs] had not acted improperly."

¶ 37 All Defendants moved to dismiss Plaintiffs' complaint for improper venue, failure to state a claim upon which relief can be granted, and failure to comply with Rule 9 of our rules of civil procedure. The case was transferred to Guilford County Superior Court by consent order in March 2012.

¶ 38 The Guilford County Superior Court granted all Defendants' motion to dismiss in part, dismissing Plaintiffs' civil conspiracy and abuse of process claims on August 13, 2012. The trial court denied Defendants Johnson, Bellamy, and Hastings's motion to dismiss Plaintiff's malicious prosecution cause of action. Plaintiffs appealed to this Court on September 13, 2012.

¶ 39 Plaintiffs' appeal was dismissed as interlocutory on October 1, 2013.[9] *See Fox v. City of Greensboro*, No. 13-171-2, 2013 N.C. App. LEXIS 1321 (N.C. Ct. App. Dec. 17, 2013). Plaintiffs filed a petition for discretionary review with the North Carolina Supreme Court on January 21, 2014. This petition was denied in April 2014.

¶ 40 Defendants Johnson, Bellamy, Hastings, and Kelly moved for judgment on the pleadings on the basis of collateral estoppel in the Guilford County Superior Court on August 4, 2014. These Defendants contended Plaintiffs' malicious prosecution claim was barred by the doctrine of collateral estoppel "given the final judgment in the prior case *Fox v. City of Greensboro*, 807 F. Supp. 2d 476 (M.D.N.C. 2011)." This motion was denied.

¶ 41 On October 16, 2014, Defendants Johnson, Bellamy, Hastings, and Kelly appealed to this Court. This Court issued its opinion on October 6, 2015, holding, "Plaintiffs are not collaterally estopped from bringing their malicious prosecution claims under state law." *Fox v. Johnson*, 243 N.C. App. 274, 288, 777 S.E.2d 314, 325 (2015). These Defendants petitioned our Supreme Court for discretionary review on November 9, 2015. The petition for discretionary review was denied on January 28, 2016. On May 12, 2016, this case was designated as exceptional pursuant

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9. Plaintiffs' appeal was originally heard on August 13, 2013, and an opinion was filed on October 1, 2013. Plaintiffs filed a petition for rehearing on November 1, 2013, which was allowed on November 21, 2013. On December 17, 2013, a superseding opinion was issued, dismissing Plaintiffs' appeal as interlocutory.

to Rule 2.1(a) of the General Rules of Practice. Thereafter, the parties engaged in discovery.

¶ 42 Plaintiffs and Defendants Johnson, Bellamy, Hastings, and Kelly were deposed. Sanders conceded in his deposition that he had "no personal knowledge of any discussion or conversation any defendant had with anyone at the SBI," other than reading through their SBI interviews "after the fact." Sanders further conceded that he "had no personal knowledge of any of these [D]efendants" instructing other law enforcement officers "not to provide information to the SBI." When asked about the contents of Memo 9, Sanders admitted he did not know if it related to the criminal charges brought against him.

¶ 43 During Fox's deposition, he conceded he did not know the contents of Memo 9, and he "[did not] know what that memo had to do with." Fox testified he had "very little contact" with Defendants Bellamy and Hastings. Fox conceded that he did not believe "the charges were personal against [him,]" but that the charges "were just a means to an end." Further, Fox stated his belief that Defendant Hastings's "actions or motivation was prompted by [Hastings's] relationship with Wray."

¶ 44 Defendants Johnson, Bellamy, and Hastings moved for summary judgment with respect to Plaintiffs' malicious prosecution claim in July 2019. The trial court granted this motion on November 6, 2019. Plaintiffs appealed on December 31, 2019.

II. Discussion

¶ 45 Plaintiffs raise several arguments on appeal, each will be addressed in turn.

A. Motion for Summary Judgment

¶ 46 **[1]** Plaintiffs first contend the trial court erred in granting summary judgment in favor of Defendants Johnson, Bellamy, and Hastings with respect to Plaintiffs' malicious prosecution cause of action. Defendants Johnson, Bellamy, and Hastings contend Plaintiffs' claim is barred by the affirmative defense of governmental immunity.

¶ 47 We review the "grant of a motion for summary judgment . . . [to determine] whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Becker v. Pierce*, 168 N.C. App. 671, 674, 608 S.E.2d 825, 828 (2005) (quoting *Hoffman v. Great Am. Alliance Ins. Co.*, 166 N.C. App. 422, 425, 601 S.E.2d 908, 911 (2004)).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.

Hoffman, 166 N.C. App. at 424-26, 601 S.E.2d at 911 (internal quotation marks and citations omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021).

> In order to support a malicious prosecution claim, [a] plaintiff must establish the following four elements: "(1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff."

Martin v. Parker, 150 N.C. App. 179, 182, 563 S.E.2d 216, 218 (2002) (quoting *Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994)); *see also Cook v. Lanier*, 267 N.C. 166, 169, 147 S.E.2d 910, 914 (1966). "In cases for malicious prosecution in which the earlier proceeding is civil, rather than criminal, in nature, our courts require a plaintiff to additionally plead and prove a fifth element: 'special damages.' " *Fuhs v. Fuhs*, 245 N.C. App. 367, 372, 782 S.E.2d 385, 388 (2016).

¶ 48 Here, the parties do not dispute the "earlier proceeding" terminated "in favor of the plaintiff," as Sanders was acquitted of accessing a federal computer and the remaining charges against Plaintiffs were dismissed. Nor do the parties dispute that the earlier proceeding was criminal in nature. Thus, our review is limited to the remaining elements.

1. Governmental Immunity

¶ 49 Because Defendants Johnson, Bellamy, and Hastings contend Plaintiffs' malicious prosecution and civil conspiracy claims are barred

by the affirmative defense of governmental immunity, we first determine whether these Defendants acted with malice. *See Lambert v. Town of Sylva*, 259 N.C. App. 294, 301, 816 S.E.2d 187, 193 (2018) ("Governmental immunity is an affirmative defense."); *see also Turner v. City of Greenville*, 197 N.C. App. 562, 566, 677 S.E.2d 480, 483 (2009). "An affirmative defense is a defense that introduces a new matter in an attempt to avoid a claim, regardless of whether the allegations of the claim are true." *Strickland v. Hedrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 37 (2008) (quoting *Williams v. Pee Dee Elec. Membership Corp.*, 130 N.C. App. 298, 301-02, 502 S.E.2d 645, 647-48 (1998)).

¶ 50 "Under the doctrine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function." *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993) (citations omitted). When individual officers are named as defendants, the action "is one against the State for the purposes of applying the doctrine of sovereign immunity." *Houpe v. City of Statesville*, 128 N.C. App. 334, 341, 497 S.E.2d 82, 87 (1998). "[T]he actions of a city and its officials in investigating and disciplining a city police officer accused of criminal activity are likewise encompassed within the rubric of 'governmental functions.' " *Id.* at 341, 497 S.E.2d at 87.

¶ 51 While police officers are "public officials" for the purposes of governmental immunity, they "are not shielded from liability if their alleged actions were corrupt or malicious . . . ." *Shuping v. Barber*, 89 N.C. App. 242, 248, 365 S.E.2d 712, 716 (1988) (citations omitted); *see also Strickland*, 194 N.C. App. at 10, 669 S.E.2d at 67; *Cline v. James Bane Home Bldg., LLC.*, 278 N.C. App. 12, 2021-NCCOA-266, ¶26 ("Public official's immunity precludes suits against public officials in their individual capacities and protects them from liability '[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption . . . .' " (citation omitted)). "[A]n official may be held liable when he acts maliciously or corruptly, when he acts beyond the scope of his duties, or when he fails to act at all." *Turner*, 197 N.C. App. at 566, 677 S.E.2d at 483 (citation omitted). Thus, only tortious "actions that are malicious, corrupt, or outside the scope of official duties will pierce the cloak of official immunity." *Id.* (citation, internal quotation marks, brackets, and ellipsis omitted). "[I]f the plaintiff alleges an intentional tort claim, a determination of governmental immunity is unnecessary since, in such cases, neither a public official nor a public employee is immunized from suit in his individual capacity."

Beck v. City of Durham, 154 N.C. App. 221, 230, 573 S.E.2d 183, 189 (2002) (citation, internal quotation marks, and brackets omitted).

¶ 52 A plaintiff alleging malicious or intentional acts by a governmental official faces a high bar:

> It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence. Moreover, evidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise.

Strickland, 194 N.C. App. at 10-11, 669 S.E.2d at 68 (citations, internal quotation marks, and brackets omitted.) Thus, to determine whether Plaintiffs' malicious prosecution claim against Defendants Johnson, Bellamy, and Hastings in their official capacities is barred under the doctrine of government immunity, we must first determine whether Defendants Johnson, Bellamy, and Hastings acted with malice.

¶ 53 "In order to give a cause of action for malicious prosecution, such prosecution must have been maliciously instituted." *Cook*, 267 N.C. at 170, 147 S.E.2d at 914 (citations omitted). " 'Malice' in a malicious prosecution claim may be shown by offering evidence that defendant 'was motivated by personal spite and a desire for revenge' or that defendant acted with ' "reckless and wanton disregard" ' for plaintiffs' rights." *Becker*, 168 N.C. App. at 676, 608 S.E.2d at 829 (citation omitted); *see also Moore v. City of Creedmoor*, 345 N.C. 356, 371, 481 S.E.2d 14, 24 (1997) (citation omitted).

¶ 54 Plaintiffs must "offer evidence tending to prove that the wrongful action of instituting the prosecution was done for actual malice in the sense of personal ill-will, or under the circumstances of insult, rudeness or oppression, or in a manner which showed the reckless and wanton disregard of [Plaintiffs'] rights." *Mathis v. Dowling*, 230 N.C. App. 311, 316, 749 S.E.2d 284, 288 (2013) (citation omitted). "In an action for malicious prosecution, the malice element may be satisfied by a showing of either actual or implied malice. Implied malice may be inferred from want of probable cause in reckless disregard of the plaintiff's rights."

Kirschbaum v. McLaurin Parking Co., 188 N.C. App. 782, 789-90, 656 S.E.2d 683, 688 (2008) (quoting *Nguyen v. Burgerbusters, Inc.*, 182 N.C. App. 447, 452, 642 S.E.2d 502, 506-07 (2007)).

> Evidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest, e.g., to enforce collection of a debt is admissible both to show the absence of probable cause and to create an inference of malice, and such evidence is sufficient to establish a prima facie want of probable cause.

Cook, 267 N.C. at 170, 147 S.E.2d at 914 (citation, internal ellipses, and alteration omitted).

¶ 55 Here, Plaintiffs contend Defendants Johnson, Bellamy, and Hastings acted with ill-will by "with[holding] exculpatory evidence from the SBI in an effort to incite criminal charges against Plaintiffs"; "destroy[ing] exculpatory evidence"; "manipulating the 'black book' by providing a modified version to the SBI"; and providing false or misleading statements to the SBI, media, and to fellow law enforcement officers.

¶ 56 A review of the record, however, demonstrates that Plaintiffs lack specific knowledge of what information Defendants Johnson, Bellamy, and Hastings provided to the SBI. Specifically, Sanders conceded in his deposition that he had "no personal knowledge of any discussion or conversation any defendant had with anyone at the SBI," other than reading through their SBI interviews "after the fact." Sanders further conceded that he "had no personal knowledge of any of these defendants" instructing other law enforcement officers "not to provide information to the SBI." Assuming *arguendo* that there were inconsistencies in Defendants Johnson, Bellamy, and Hastings's SBI, IA, and RMA interviews, Plaintiffs failed to establish these inconsistencies were intentional and not mere misstatements over the course of an approximately two-year long investigation.

¶ 57 Further, Plaintiffs thought Chief Wray was "the real target of the SBI's investigation." Fox testified during his deposition that he had "very little contact," with Defendants Bellamy and Hastings. Fox conceded that he did not believe "the charges were personal against [him,]" but that the charges "were just a means to an end." Further, Fox stated his belief that Defendant Hastings's "actions or motivation was prompted by [Defendant Hastings's] relationship with Wray." Moreover, Defendant Hastings testified in Sanders's criminal trial, and was found to be "a helpful witness" for Sanders.

¶ 58 Notably, Plaintiffs do not argue the actions taken by Defendants Johnson, Bellamy, and Hastings were against departmental policy or standard procedure where there are concerns of racial and criminal misconduct within a police department. While Plaintiffs take issue with their suspension; a "gag order," that prevented them from speaking about their pending criminal charges; and statements made during several investigations, Plaintiffs do not argue this was an unusual response to public concerns of corruption and racial misconduct. Because Plaintiffs failed to show any statement was made maliciously, "in the sense of personal ill-will," we find Plaintiffs' malicious prosecution claim against Defendants Johnson, Bellamy, and Hastings in their official capacities is barred by the doctrine of governmental immunity.

2. Probable Cause

¶ 59 "Where the claim is one for malicious prosecution, probable cause has been properly defined as the existence of such facts and circumstances, known to the defendants at the time, as would induce a reasonable man to commence a prosecution." *Best*, 337 N.C. at 749, 448 S.E.2d at 510 (internal quotation marks, alterations, and citations omitted); *see also Cook*, 267 N.C. at 170, 147 S.E.2d at 914 (citation omitted). "Whether probable cause exists is a mixed question of law and fact," however, "the existence of probable cause is a question of law for the court." *Best*, 337 N.C. at 750, 448 S.E.2d at 510 (citing *Cook*, 367 N.C. at 171, 147 S.E.2d at 914).

¶ 60 To determine probable cause, we must consider "whether a man of ordinary prudence and intelligence under the circumstance would have known that the charge had no reasonable foundation." *Wilson v. Pearce*, 105 N.C. App. 107, 113-14, 412 S.E.2d 148, 151 (1992) (citation omitted). "The critical time for determining whether or not probable cause existed is when the prosecution begins." *Hill v. Winn-Dixie Charlotte, Inc.*, 100 N.C. App. 518, 521, 397 S.E.2d 347, 349 (1990) (citation omitted). The existence of probable cause will defeat a malicious prosecution claim. *Adams v. City of Raleigh*, 245 N.C. App. 330, 335, 782 S.E.2d 108, 113 (2016). "Probable cause does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required." *Id.* at 337, 782 S.E.2d at 114 (internal quotation marks and citation omitted). "A probability of illegal activity . . . is sufficient." *Id.* (citation omitted).

¶ 61 Here, there was substantial evidence to support a "probability" that Sanders had impermissibly accessed a government computer. While Plaintiffs contend all Defendants provided false and misleading information during the SBI investigation, Plaintiffs do not contest Cullop's

assertions that Sanders asked Cullop to make a "mirror copy" of a laptop computer. Nor do Plaintiffs argue Cullop's notes regarding the serial number of the laptop he examined are inaccurate. Further, the HUD agent that allowed Fulmore to use the laptop in question made several statements to the SBI regarding Sanders's requests to access Fulmore's computer. Moreover, Sanders conceded in his IA interview that he "placed [a] monitoring device[]" on a city computer. Sanders further stated he put a "key-catcher" device on two officers' computers, in order to capture these officers' usernames and passwords.

¶ 62 There was also evidence presented that would lead "a man of ordinary prudence and intelligence" to believe Plaintiffs obstructed justice and conspired to do so. Defendant Slone stated in his SBI interview Sanders had instructed him not to provide certain evidence to Defendant Rankin during a meeting between Defendant Slone and Plaintiffs. While Plaintiffs argue this statement was false, misleading, and inconsistent with Defendant Slone's statements during the IA and RMA investigations, Hill corroborated Defendant Slone's statements. Hill recounted the meeting he attended with Defendant Slone and two detectives. "Hill related that [Defendant Slone] was trying to give the other detectives some information he had obtained," but the detectives "did not want it because if they took the information, they would have to give it to whoever was working on some case." Hill recalled the information Defendant Slone was trying to give to the detectives "was supposed to be a picture of a police officer with a stripper or someone else."

¶ 63 Defendant Slone and Hill's statements to the SBI are further corroborated by Defendant Rankin's interview. Defendant Rankin was assigned to investigate allegations of police officers soliciting prostitutes. After Defendant Rankin received his assignment, he thought "it was like an invisible wall was being put up to keep him from talking to" an informant. Later, Defendant Slone admitted he was asked to "lead [Defendants] Rankin and Cuthbertson in the wrong direction and give them false information to keep them from ever meeting with the informant."

¶ 64 Based upon Defendants Slone and Rankin's statements to the SBI, corroborated in part by Hill, "a reasonable and prudent man, under the circumstances" would believe the obstruction of justice charge was not without a foundation. Our review reveals Plaintiffs failed to meet their burden to show that Defendants Johnson, Bellamy, and Hastings acted with malice or without probable cause. We hold the trial court did not err by granting summary judgment with respect to Plaintiffs' malicious prosecution cause of action.

B. Motion to Dismiss

¶ 65 Plaintiffs contend that the trial court erred in granting Defendants' motions to dismiss their civil conspiracy and abuse of process claims. We review an order granting a motion to dismiss *de novo*. *S.N.R. Mgmt. Corp. v. Danube Partners, 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008). We consider "whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Chidnese v. Chidnese*, 210 N.C. App. 299, 304, 708 S.E.2d 725, 730 (2011).

¶ 66 As a preliminary matter, we note, "North Carolina is a notice pleading state." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation omitted).

> Under the "notice theory of pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted "to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine res judicata, and to show the type of case brought."

Sutton v. Duke, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (citation and internal alteration omitted); *see also Hill v. Perkins*, 84 N.C. App. 644, 647, 353 S.E.2d 686, 688 (1987). Under our State's notice theory of pleading, plaintiffs must allege facts, not mere conclusions, to support their asserted causes of action. *See Sutton*, 277 N.C. at 98-99, 176 S.E.2d at 163. "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)." *Raritan River Steel Co. v. Cherry, Bekart, & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988) (citation omitted). However, "if a complaint pleads facts which serve to defeat the claim it should be dismissed." *Id.* (citing *Sutton*, 277 N.C. at 102, 176 S.E.2d at 166).

3. Civil Conspiracy

¶ 67 **[2]** Plaintiffs contend the trial court erred in dismissing their civil conspiracy cause of action against Defendants Johnson, Bellamy, Hastings, Kelly, Slone, Rankin, and Cuthbertson. Specifically, Plaintiffs contend they sufficiently alleged the cause of action under Rule 8 of our rules of civil procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 8(a) (2021). All Defendants contend that if Plaintiffs sufficiently pled factual allegations to survive a motion to dismiss, Plaintiffs' civil conspiracy claim is barred by the doctrines of intra-corporate or government immunity.

¶ 68 We note "that there is not a separate civil action for civil conspiracy in North Carolina." *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (citing *Shope v. Boyer*, 268 N.C. 401, 404-05, 150 S.E.2d 771, 773-74 (1966); *Fox v. Wilson*, 85 N.C. App. 292, 300, 354 S.E.2d 737, 742-43 (1987)).

> In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all.

Shope, 268 N.C. at 405, 150 S.E.2d at 773-74 (citation omitted); *Fox*, 85 N.C. App. at 301, 354 S.E.2d at 743 (citation and quotation marks omitted); *see also Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981) ("The common law action for civil conspiracy is for damages caused by acts committed pursuant to a conspiracy rather than for the conspiracy, i.e., the agreement, itself." (citation and internal alteration omitted)).

> A threshold requirement in any cause of action for damages caused by acts committed pursuant to a conspiracy must be the showing that a conspiracy in fact existed. The existence of a conspiracy requires proof of an agreement between two or more persons. Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission to a jury.

Dove, 168 N.C. App. at 690-91, 608 S.E.2d at 801 (internal citations and quotation marks omitted). "Thus to create civil liability for conspiracy," *Dickens*, 302 N.C. at 456, 276 S.E.2d at 357, the Plaintiffs must have alleged "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do an lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Privette v. Univ. of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989) (citation omitted); *see also Elliott v. Elliott*, 200 N.C. App. 259, 264, 683 S.E.2d 405, 409 (2009). Circumstantial evidence may be used to prove the existence of an agreement; however, "the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission

of the issue to a jury." *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337 (citing *Edwards v. Ashcraft*, 201 N.C. 246, 159 S.E. 355 (1931). *See also State v. Martin*, 191 N.C. 404, 132 S.E. 16 (1926)).

¶ 69 "We must judge the sufficiency of the complaint by the facts alleged and not by the pleader's conclusions. . . . The repeated use of the words combined, conspired, and agreed together to injure [Plaintiffs] . . . [are] insufficient." *Shope*, 268 N.C. at 405, 150 S.E.2d at 774 (internal citation omitted). Recovery, in the context of a civil conspiracy claim, "must be on the basis of [the sufficiency] of [the] alleged wrongful overt acts." *Dove*, 168 N.C. App. at 690, 608 S.E.2d at 800 (citation omitted).

¶ 70 Here, Plaintiffs' "claims [are] essentially derived from allegations that [Defendants] knowingly gave false information" to the RMA and SBI. *See Hawkins v. Webster*, 78 N.C. App. 589, 590, 337 S.E.2d 682, 683 (1985). This Court, however, has previously held that "[a] civil action may not be maintained for a conspiracy to give false testimony." *Id.* at 592, 337 S.E.2d at 684 (citation omitted). In *Hawkins*, this Court affirmed the dismissal of a civil conspiracy claim where the plaintiff alleged "defendants knowingly gave false information to the FBI and IRS agents who conducted the investigation that resulted in criminal charges being filed against [the plaintiff]." *Id.* at 590, 337 S.E.2d at 683. Similarly, this Court declined to find a civil conspiracy cause of action where a plaintiff alleged "the Defendants conspired together to commit the unlawful acts of having Plaintiffs falsely arrested and assert[ed] that Defendants 'knowingly provid[ed] false and misleading affidavits and other false information in order to secure the issuance of [] bogus arrest warrants." *Strickland*, 194 N.C. App. at 19, 669 S.E.2d at 72-73 (internal quotation marks omitted).

¶ 71 Moreover, Plaintiffs failed to allege any specific factual allegations about the purported conspiracy. Plaintiffs' complaint is devoid of any factual allegations regarding a meeting or agreement between all Defendants. While Plaintiffs pleaded all Defendants "reached an agreement," and "agreed to gather information," such claims constitute mere conclusions regarding an alleged agreement. *See Shope*, 268 N.C. at 405, 150 S.E.2d at 774. The complaint is devoid of any factual allegations regarding how or when all Defendants reached such an agreement.

¶ 72 Viewing Plaintiffs' complaint in light of our precedent, "a conspiracy to provide false [statements] in order to secure Plaintiffs' arrest . . . is not recognized in North Carolina." *Strickland*, 194 N.C. App. at 19, 669 S.E.2d at 73. Therefore, the trial court did not err when it dismissed Plaintiffs' civil conspiracy cause of action. As Plaintiffs failed to sufficiently plead factual allegations to support their claim of civil conspiracy, we need not

address whether Plaintiffs' claim is barred by the affirmative defenses of intra-corporate immunity or government immunity.

C. Abuse of Process

¶ 73 Next, Plaintiffs contend the trial court erred in dismissing their abuse of process claim asserted against Defendants Johnson, Bellamy, and Hastings. The trial court's order dismissing Plaintiffs' claim for abuse of process does not provide its reasoning for granting the motion to dismiss. On appeal, however, Plaintiffs first address whether their claim was barred by the applicable statute of limitations. The parties dispute whether Plaintiffs preserved any remaining arguments regarding the sufficiency of their pleadings with respect to this cause of action.

1. Statute of Limitations

¶ 74 **[3]** Plaintiffs first contend their abuse of process claim is not barred by the applicable statute of limitations because the limitations period commences upon "the termination of the acts which constitute the abuse complained of." *See* 1 AM.JUR.2d, Abuse of Process, § 27. Because to support a claim of abuse of process, Plaintiffs must sufficiently plead acts that occur after the institution of the process, we conclude that the limitations period commences upon the last tortious act about which Plaintiffs complained.

> Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all.
>
> The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: Hard cases must not make bad law.

Congleton v. City of Asheboro, 8 N.C. App. 571, 573-74, 174 S.E.2d 870, 872 (1970) (internal quotation marks and citations omitted).

¶ 75 Abuse of process is an intentional tort, and the tort of abuse of process has a three-year limitations period. *See Barnette v. Woody*, 242

N.C. 424, 431, 88 S.E.2d 223, 227 (1955) (citation omitted); *see also Cox v. Jefferson-Pilot*, 80 N.C. App. 122, 124, 341 S.E.2d 608, 610 (1986). "Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues." *Rafferty v. Wm. C. Vick Constr. Co.*, 291 N.C. 184, 184, 230 S.E.2d 405, 407 (1976) (internal quotation marks, citation, and emphasis omitted). "[A] cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue . . . ." *Id.* at 182, 230 S.E.2d at 407 (citation omitted).

¶ 76 Plaintiffs, relying on secondary sources and *Barnette v. Woody*, argue the applicable limitations period commenced upon "the termination of the acts which constitute the abuse complained of." *See* 1 AM.JUR.2d, Abuse of Process, § 27 (1994); *see also* J.A. Brock, Annotation, When the Statute of Limitations Begins to Run Against Action for Abuse of Process, 1 A.L.R.3d 953 (2016). In *Barnette*, the plaintiff alleged the defendant conspired "to procure the admission of the plaintiff to the State Hospital." 242 N.C. at 426, 88 S.E.2d at 224. The plaintiff was committed to the State Hospital on March 21, 1950 and was released on June 8, 1950. *Id.* The plaintiff brought a civil action seeking punitive and actual damages, but it was not clear "whether [the plaintiff] is seeking to recover on an action for malicious prosecution, abuse of process, or for false imprisonment." *Id.* at 430, 88 S.E.2d at 227. Our Supreme Court proceeded to apply a three-year statute of limitations from the date of the plaintiff's release from a state hospital. *Id.* at 431, 88 S.E.2d at 227 ("Hence, the three-year statute of limitations pleaded by the defendants, G.S. § 1-52, would not be a bar to an action for malicious prosecution or abuse of process.").

¶ 77 Plaintiffs contend *Barnette* supports the proposition that the applicable statute of limitations commenced when the claim for abuse of process accrued, that is, upon the last tortious act after process was instituted. We agree.

¶ 78 Defendants Johnson, Bellamy, and Hastings argue Plaintiffs' claim accrued upon their arrest on September 21, 2007, and thus, is time barred. Defendants Johnson, Bellamy, and Hastings rely on *Cox v. City of Jefferson-Pilot* to argue Plaintiffs' claim accrued upon their arrest date. In *Cox*, the dispositive issue was whether the plaintiff was mentally competent to enter into a general release of liability. *See Cox*, 80 N.C. App. at 124-25, 341 S.E.2d at 610. The plaintiff argued he was mentally incompetent at the time he executed a release of liability and, thus, the statute of limitations was tolled during his incompetency. *Id.* The plaintiff's wife had previously been arrested for embezzling approxi-

mately $152,000.00 from her employer. *Id.* at 122, 341 S.E.2d at 609. The plaintiff was subsequently arrested and jailed for approximately two weeks. *Id.* After the plaintiff's arrest, his wife's employer and its insurance company filed a civil suit against the plaintiff and his wife, attaching the couple's property. *Id.* at 123, 341 S.E.2d at 609. The civil suit was settled by a consent judgment, signed by both the plaintiff and his wife. *Id.* Thereafter, on September 26, 1978, the plaintiff executed a release of liability in favor of the employer and insurance company. *Id.*

¶ 79 In 1983, the plaintiff filed a civil action in which he did not specify a cause of action but alleged his wife's employer and its insurance company wrongfully initiated his arrest and the seizure of his property. *Id.* The plaintiff further alleged he was mentally incompetent at the time he executed the release. *Id.* On appeal, he asserted he sufficiently pleaded an abuse of process claim. *Id.* at 124, 341 S.E.2d at 610. This Court found the plaintiff was mentally competent at the time he entered into a general release of liability. *Id.* at 126, 341 S.E.2d at 611. As such, the limitations period was not tolled, and Plaintiff's abuse of process cause of action was time barred. *Id.* at 128, 341 S.E.2d at 612.

¶ 80 Here, in contrast, Plaintiffs did not execute a release of liability in favor of any named defendant. Instead, Plaintiffs "pleaded continuing tortious acts after the arrest date," the last of which concluded upon the dismissal of all remaining charges against Plaintiffs on February 23, 2009. These acts include Defendants Johnson, Bellamy, and Hastings's purported failure to provide exculpatory information during the course of the investigations and Sanders' criminal trial; and the continuous use of the pending criminal prosecution of Sanders and Fox "in an attempt to elicit information from Fox and Sanders," and force them out of the GPD. Thus, the statute of limitations for Plaintiffs' abuse of process cause of action did not run until February 23, 2012, three years after the termination of the last alleged act of abuse of process of which the Plaintiffs complained.

¶ 81 While our dissenting colleague proposes that we conclude the limitations period commenced upon the institution of the process, to do so would muddle the distinction between the claims of malicious prosecution and abuse of process and would ignore precedent establishing an improper act after the initiation of the process as an essential element of a colorable abuse of process claim. *See Chidnese*, 210 N.C. App. at 304, 708 S.E.2d at 731; *see also Fox v. Barrett*, 90 N.C. App. 135, 138, 367 S.E.2d 412, 414 (1988) (affirming the dismissal of an abuse of process cause of action where the plaintiff failed to allege "any improper act by defendant occurring *subsequent to* the initiation of the prior lawsuit." (emphasis in original)).

2. *Sufficiency of the Pleadings*

¶ 82 **[4]** Plaintiffs further contend they sufficiently pleaded actions by Defendants Johnson, Bellamy, and Hastings that arose to abuse of process.[10] We agree.

> Protection against wrongful litigation is afforded by a cause of action for either abuse of process or malicious prosecution. The legal theories underlying the two actions parallel one another to a substantial degree, and often the facts of a case would support a claim under either theory. The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued.

Chidnese, 210 N.C. App. at 304, 708 S.E.2d at 731 (citations and internal quotation marks omitted). "Abuse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process . . . to accomplish some purpose not warranted or commended by the writ." *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965) (citations omitted); *see also Melton v. Rickman*, 225 N.C. 700, 703, 36 S.E.2d 276, 278 (1945) ("[M]alicious prosecution is the prosecution with malice and without probable cause, abuse of process is the misuse of legal process for an ulterior purpose."). Thus, the distinction between malicious prosecution and abuse of process is that malicious prosecution requires a claim to be improperly instituted, whereas abuse of process requires a wrongful or improper act after the institution of process. *Chidnese*, 210 N.C. App. at 304, 708 S.E.2d at 731 (citations omitted); *see also Fox*, 90 N.C. App. at 138, 367 S.E.2d at 414.

¶ 83 "Abuse of process requires both an ulterior motive and an [improper] act in the use of the legal process . . . [during] the regular prosecution of the proceeding, and that both . . . relate to . . . defendant's purpose to achieve . . . [using] the process some end foreign to those it was designed to effect." *Fuhs v. Fuhs*, 245 N.C. App. 367, 375, 782 S.E.2d 385,

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10. Defendants Johnson, Bellamy, and Hastings contend this argument is not preserved for appellate review, *see* N.C. R. App. P. 28(a), because Plaintiffs' "abuse of process argument in their principal appellants concerns ***only*** the statute of limitations." (emphasis in original). However, in their appellate brief, Plaintiffs argue several alleged acts by Defendants Johnson, Bellamy, and Hastings constitute tortious acts for an abuse of process cause of action.

390 (2016) (citation and emphasis omitted); *see also Klander v. West*, 205 N.C. 524, 529, 171 S.E.2d 782, 783 (1933) (recognizing "the two essential elements are the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding"). The "ulterior motive" requirement for an abuse of process claim is satisfied "when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process used." *Fuhs*, 245 N.C. App. at 375, 782 S.E.2d at 390 (citation omitted). "The act requirement is satisfied when the plaintiff alleges that *once the prior proceeding* was initiated, the defendant committed some willful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter." *Id.* (emphasis added).

¶ 84 Defendants Johnson, Bellamy, and Hastings contend Plaintiffs' claim must fail as Plaintiffs did not plead any improper act by these Defendants after Plaintiffs' indictment. *See Fox*, 90 N.C. App. at 138, 367 S.E.2d at 414 (affirming the dismissal of an abuse of process cause of action where the plaintiff failed to allege "any improper act by defendant occurring *subsequent to* the initiation of the prior lawsuit." (emphasis in original)); *see also Hewes v. Wolfe*, 74 N.C. App. 610, 610-13, 330 S.E.2d 16, 18-20 (1985) (affirming the denial of a motion to dismiss the plaintiff's abuse of process cause of action where defendant brought an earlier civil action for the misappropriation of partnership assets and subsequently filed a notice of *lis pendens* on the plaintiff's property). "[T]he gravamen of a cause of action for abuse of process is the improper use of the process *after it has been issued*." *Chidnese*, 210 N.C. App. at 311, 708 S.E.2d at 735 (citation omitted) (emphasis in original).

¶ 85 In the instant case, Plaintiffs alleged

> 73. Defendants Johnson, Bellamy, . . . and Hastings, acting in their official capacities as duly assigned agents of the City of Greensboro, and the City of Greensboro willfully and maliciously took actions in the use of the legal process that were not proper in the regular prosecution of the proceeding by, *inter alia*,
>
> i. Using the threat of prosecution, and the proceeding itself, as leverage against Fox and Sanders in an attempt to elicit information from Fox and Sanders;
>
> ii. Using the threat of prosecution, and the proceeding itself, as leverage to pressure Fox and Sanders out of the [GPD]; and

> iii. Failing to produce exculpatory information with respect to the charges against Fox and Sanders despite defendants' affirmative duty to provide said information. Defendants were charged with an affirmative duty to provide said information due to:
>
> > 1. The fiduciary relationship between the defendants and Fox and Sanders;
> >
> > 2. The defendants' involvement in the initiation of the investigation of Fox and Sanders; and
> >
> > 3. The defendant's involvement in the investigation of Fox and Sanders.
>
> 74. Defendants Johnson, Bellamy, . . . Hastings, and the City of Greensboro acted with an ulterior motive or purpose by taking the aforementioned actions for the purposes of discrediting former Chief of Police David Wray, advancing the defendants' own careers, and for the purpose of appeasing a segment of the African American community.

While Defendants Johnson, Bellamy, and Hastings are correct in that Plaintiffs must allege acts *after* the initiation of the proceeding, Plaintiffs satisfied this requirement by pleading Defendants Johnson, Bellamy, and Hastings failed to produce exculpatory information during the investigation of Plaintiffs and Sanders' subsequent criminal trial.[11]

¶ 86 Additionally, Plaintiffs asserted allegations that Defendants Johnson, Bellamy, and Hastings "acted with an ulterior motive" by failing to produce such information in order to gain "leverage to pressure Fox and Sanders out of the [GPD]," and "in an attempt to elicit information from Fox and Sanders." These acts constitute continuous actions by Defendants Johnson, Bellamy, and Hastings, as the duty to provide exculpatory information arose during the investigation of the Wray administration and did not cease until Plaintiffs were no longer under the threat of criminal prosecution. Because Plaintiffs sufficiently alleged

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11. While the record on appeal reveals Defendant Hastings testified on Sanders's behalf during Sanders's trial for impermissibly accessing a government computer, we do not consider this fact in our analysis. Plaintiffs' abuse of process claim was dismissed on August 13, 2012. In reviewing the grant of a motion to dismiss, we consider "whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Chidnese*, 210 N.C. App. at 304, 708 S.E.2d at 730 (emphasis added) (citation omitted).

Defendants Johnson, Bellamy, and Hastings acted with an ulterior motive, we hold the trial court erred in dismissing Plaintiffs' abuse of process claim. *See Hewes v. Wolfe*, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (finding allegations the defendant acted "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs[]" sufficient to survive a motion to dismiss). Accordingly, we reverse the trial court's order with respect to this cause of action, and remand for further proceedings.

III. Conclusion

¶ 87 After careful review, we hold the trial court did not err by dismissing Plaintiffs' civil conspiracy claim against all Defendants. Nor did the trial court err in granting summary judgment with respect to Plaintiffs' malicious prosecution claim against Defendants Johnson, Bellamy, and Hastings. However, the trial court erred in dismissing Plaintiffs' abuse of process cause of action, as the claim was not time barred and Plaintiffs sufficiently pleaded facts to support their claim. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Judge ZACHARY concurs.

Judge JACKSON concurs in part and dissents in part by separate opinion.

JACKSON, Judge, concurring in part and dissenting in part.

¶ 88 I concur in part, joining the majority opinion except for the portion holding that the statute of limitations for Plaintiffs' abuse of process claim had not run until 23 February 2012. In my view, the allegations pleaded in the fourth count of Plaintiffs' complaint allege two separate abuse of process claims: (1) for the threat and initiation of criminal proceedings against Plaintiffs in September 2007; and (2) for alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), in the trial of Plaintiff Sanders, while Plaintiff Fox was awaiting trial.

¶ 89 With respect to the first claim, I would hold that the statute of limitations had run on 17 September 2010—three years after Plaintiffs were indicted on these charges in Guilford County Superior Court. I would therefore affirm the trial court's grant of the motion to dismiss this claim because it was tolled until 20 September 2011, and Plaintiffs did not initi-

ate this action until January 2012—well after September 2010, when the three-year statute of limitations had run, and several months after the September 2011 re-filing deadline, when the tolling period had expired.[1]

¶ 90 With respect to the second claim, however, I would hold that the allegations in the complaint fail to demonstrate whether or when the claim for abuse of process because of the *Brady* violation accrued. I would therefore vacate the trial court's order granting the motion to dismiss in part and remand the case to the trial court for further proceedings on this claim. Accordingly, I respectfully dissent from the portion of the majority opinion related to the statute of limitations on Plaintiffs' abuse of process claim(s).

IV. Standard of Review

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007) (internal marks and citations omitted).

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1. On 23 March 2010, Plaintiffs filed a federal lawsuit asserting this claim. *Fox v. City of Greensboro*, 807 F. Supp.2d 476, 480 (M.D.N.C. 2011). Under 28 U.S.C. § 1367(d), it was tolled during the pendency of the federal case until 30 days after 27 August 2011, when the case was dismissed. *See* 28 U.S.C. § 1367(d) (2019) (providing for tolling of state law claims brought in federal court "while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period"); *Fox*, 807 F. Supp.2d at 500-01 (dismissing Plaintiffs' state law claims without prejudice).

V. Analysis

D. Abuse of Process Compared to Malicious Prosecution

¶ 91 "The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing [] process to issue, while abuse of process lies for its improper use after it has been issued." *Barnette v. Woody*, 242 N.C. 424, 431, 88 S.E.2d 223, 227 (1955). Whereas "[i]n an action for malicious prosecution the plaintiff must prove malice, want of probable cause and termination of the prosecution or proceeding in plaintiff's favor[,] . . . the only essential elements of abuse of process are[] . . . the existence of an ulterior purpose and . . . an act in the use of the process not proper in the regular prosecution of the proceeding." *Id.*, 88 S.E.2d at 227-28 (citations omitted). Thus, while a claim of malicious prosecution requires a showing that "the defendant (1) initiated or participated in the earlier proceeding, (2) did so maliciously, (3) without probable cause, and (4) the earlier proceeding ended in favor of the plaintiff[,]" *Turner v. Thomas*, 369 N.C. 419, 425, 794 S.E.2d 439, 444 (2016) (citation omitted), in an action for abuse of process, the plaintiff need only show "(1) that the defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used, and (2) that the defendant committed some act that is a malicious misuse or misapplication of that process after issuance to accomplish some purpose not warranted or commanded by the writ[,]" *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 602, 646 S.E.2d 826, 831 (2007) (internal marks and citation omitted). Accordingly, unlike an action for malicious prosecution, which can only be brought after a prior proceeding terminates in the plaintiff's favor, *Turner*, 369 N.C. at 425, 794 S.E.2d at 444, an action for abuse of process can be commenced as soon as the process at issue is filed or interposed, *see*, *e.g.*, *Hewes v. Wolfe*, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (holding that assertion of a claim for abuse of process was proper once the defendants "filed notices of *lis pendens* and notices of lien on property owned by [the] plaintiffs").

E. When the Statute of Limitations Begins to Run

¶ 92 Generally speaking, "a cause of action accrues [] and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) (citations omitted). Application of this general rule to a claim for abuse of process suggests that the statute of limitations for abuse of process begins to run as soon as the plaintiff's cause of action accrues, i.e., upon the filing or interposition of the allegedly abusive process.

Cf. Hewes, 74 N.C. App. at 614, 330 S.E.2d at 19. Yet the question of when the three-year statute of limitations begins to run appears unsettled under North Carolina law, as the parties' divergent positions and the authority cited in support of these positions illustrates.

¶ 93 Plaintiffs cite our Supreme Court's decision in *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955), in support of their argument that the statute of limitations began to run "from the termination of the acts which constitute[d] the abuse complained of." (Citation omitted.) The plaintiff in *Barnette* was involuntarily committed to a mental institution for 76 days and subsequently brought an action for abuse of process against various individuals involved in her involuntary commitment. *Id.* at 426-31, 88 S.E.2d at 224-27. The defendants pleaded the three-year statute of limitations in defense because the process at issue was filed with the Clerk of Superior Court of Person County on 21 March 1950 and the plaintiff did not initiate the action until 26 May 1953—three years, two months, and five days after the process was filed. *See id.* at 428, 431, 88 S.E.2d at 225, 227. Our Supreme Court rejected the argument that the plaintiff's claim was time-barred because it was filed more than three years after the date the process was filed with the Clerk of Superior Court, seeming to reason that the statute of limitations began to run upon the plaintiff's release, or on some other day after 21 March 1950. *Id.* at 431, 88 S.E.2d at 227.

¶ 94 Defendants cite our Court's decision in *Cox v. Jefferson-Pilot*, 80 N.C. App. 122, 341 S.E.2d 608 (1986), in support of their argument that the statute of limitations began to run on the date of Plaintiffs' arrests. In *Cox*, the plaintiff was interrogated, arrested, and jailed for 14 days after his wife was charged with embezzling funds from her employer. *Id.* at 122, 341 S.E.2d at 609. After the charges against him were dismissed, the plaintiff brought an action against his wife's employer for abuse of process. *Id.* at 123, 341 S.E.2d at 609-10. Our Court held that the statute of limitations for the plaintiff's claim began to run on the day the plaintiff was arrested and charged in connection with his wife's embezzlement. *See id.* at 122-24, 341 S.E.2d at 609-10. Thus, while consistent with the general rule that statutes of limitation begin to run when the underlying cause of action accrues, our holding in *Cox* appears to conflict with our Supreme Court's decision in *Barnette*.

¶ 95 I believe that the comments to the Second Restatement of Torts suggest a resolution of this apparent conflict. *See* Restatement 2d of Torts § 682 cmt. a. These comments state that "[t]he gravamen of the misconduct [in an action for abuse of process] . . . is the misuse of process, no matter how properly obtained, for any purpose other than

that which it was designed to accomplish." *Id.* That is, "subsequent misuse of [] process, [] properly obtained, constitutes the misconduct for which [] liability is imposed[.]" *Id.* Accordingly, I interpret our Supreme Court's decision in *Barnette* to describe a situation where process was properly filed, but the process was subsequently abused, despite being filed for a proper purpose at the outset. The recitation of the facts that precedes the Court's opinion in *Barnette* supports this interpretation, in my view: in the facts, it is noted that the Clerk of Superior Court of Person County had initially ordered the plaintiff to be involuntarily committed for 30 days, and subsequently ordered that she continue to be committed for an additional 30 days; our Supreme Court also stated, however, that the plaintiff was not released until after being confined in the mental institution for 76 days—16 days longer than ordered. *See* 242 N.C. at 428, 431, 88 S.E.2d at 225-26, 227.

¶ 96 I would therefore hold that the three-year statute of limitations for abuse of process begins to run at the time the cause of action accrues, which is as soon as the process is improperly filed or interposed, *see Hewes*, 74 N.C. App. at 614, 330 S.E.2d at 19, or when process properly filed or interposed becomes misused subsequently, as I believe happened in *Barnette*.

F. Abuse of Process Alleged in Plaintiffs' Complaint

¶ 97 As noted above, I believe the allegations pleaded in the fourth count of Plaintiffs' complaint allege two separate claims for abuse of process: (1) for the threat and initiation of criminal proceedings against Plaintiffs in September 2007; and (2) for alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), in the trial of Plaintiff Sanders, while Plaintiff Fox was awaiting trial. Plaintiffs alleged in the fourth count of their complaint in relevant part as follows:

> 73. Defendants Johnson, Bellamy, Kelly and Hastings, acting in their official capacities as duly assigned agents of the City of Greensboro, and the City of Greensboro willfully and maliciously took actions in the use of legal process that were not proper in the regular prosecution of the proceeding by, *inter alia*,
>
> i. Using the threat of prosecution, and the proceeding itself, as leverage against Fox and Sanders in an attempt to elicit information from Fox and Sanders;

ii. Using the threat of prosecution, and the proceeding itself, as leverage to pressure Fox and Sanders out of the Greensboro Police Department; and

iii. Failing to produce exculpatory information with respect to the charges against Fox and Sanders despite defendants' affirmative duty to provide said information. Defendants were charged with an affirmative duty to provide said information due to:

1. The fiduciary relationship between the defendants and Fox and Sanders;

2. The defendants' involvement in the initiation of the investigation of Fox and Sanders; and

3. The defendants' involvement in the investigation of Fox and Sanders.

¶ 98 Regarding the first claim—the actions alleged in subsections i. and ii. of paragraph 73 of Plaintiffs' complaint—I would hold that the statute of limitations had run on 17 September 2010, three years after Plaintiffs were indicted on the charges in Guilford County Superior Court. Assuming the truth of the allegations in the complaint, as we must when reviewing a motion to dismiss, *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428-29, I believe Plaintiffs' cause of action for abuse of process stemming from the charges in September 2007 accrued on the date they were indicted—17 September 2007—because as I understand it, this claim is that the indictment itself was legal process improperly filed in Guilford County Superior Court with an ulterior motive. Accordingly, I would affirm the trial court's grant of the motion to dismiss on this claim because Plaintiffs did not initiate this action until January 2012, several months after the expiration of the 30-day deadline to re-file the claim after the federal lawsuit was dismissed without prejudice to state-law claims on 27 August 2011.

¶ 99 Regarding the second claim—the actions alleged in subsection iii. of paragraph 73 of Plaintiffs' complaint—I would hold that the allegations in the complaint fail to demonstrate whether or when the claim for abuse of process because of the *Brady* violation accrued. The allegations in subsection iii. of paragraph 73 do not specify when the alleged failure to produce exculpatory information occurred, and it appears that this alleged failure to produce exculpatory information could have occurred within the three-year statute of limitations, and it might be likely

that it did. I would therefore vacate the trial court's order granting the motion to dismiss in part and remand the case to the trial court for further proceedings on this claim.

VI. Conclusion

¶ 100 In sum, I concur in the majority opinion in part, and dissent from it in part, because the allegations in the complaint allege two separate abuse of process claims, and I would hold that the statute of limitations has run on one, but it is impossible to tell whether it has on the other.

HORTENSE PAMELA HILL, Plaintiff
v.
DAVID WARNER BOONE, M.D., and RALEIGH ORTHOPAEDIC CLINIC, P.A., Defendants

No. COA20-488

Filed 21 September 2021

1. Appeal and Error—standard of review—bifurcated trial—medical malpractice—admission of evidence during liability phase

In an appeal challenging the admission of evidence—video surveillance footage—related to compensatory damages during the liability portion of a bifurcated medical malpractice trial, the Court of Appeals applied a de novo standard to first determine whether the video was relevant for impeachment purposes and whether it was properly authenticated. Although the court would have employed an abuse of discretion standard to determine whether the evidence should have been excluded under Evidence Rule 403, plaintiff abandoned that issue by failing to argue it on appeal.

2. Evidence—authentication—video surveillance—cross-examination of person depicted in video

In a bifurcated medical malpractice trial brought by plaintiff after she had foot surgery, video surveillance of plaintiff introduced by defendants during the liability phase was not authenticated by typical means where defendants did not introduce testimony from the video's creator and instead cross-examined plaintiff to ask if she appeared in the video on various dates and times, which she confirmed. Although plaintiff's responses, without more, would have been insufficient, her admissions regarding depictions of her grandchild—including his age—in the video, which served to establish

her health status during a relevant time period, constituted authentication of those portions such that they could be used for impeachment purposes.

3. Evidence—relevance—damages evidence introduced during liability phase—impeachment

In a bifurcated medical malpractice trial in which defendants introduced video surveillance of plaintiff during the liability phase, the video was properly admitted for impeachment purposes after plaintiff opened the door to her credibility by testifying about the nature of the pain she felt and the resulting physical limitations she suffered after she had foot surgery.

4. Evidence—introduced for impeachment purposes—limiting instruction not requested

In a bifurcated medical malpractice trial in which video surveillance of plaintiff was properly admitted during the liability phase for impeachment purposes, the trial court was not required to give a limiting instruction absent a request from plaintiff.

5. Appeal and Error—preservation of issues—closing argument in medical malpractice trial—no objection

In a bifurcated medical malpractice case, where plaintiff did not object to defendants' closing argument regarding video surveillance of her that they introduced during the liability phase, she did not preserve for appeal her argument that defendants improperly suggested that the video had been introduced for substantive, and not for impeachment, purposes.

Appeal by Plaintiff from judgment entered 17 September 2019 by Judge Stephan R. Futrell in Wake County Superior Court. Heard in the Court of Appeals 11 May 2021.

Knott and Boyle, PLLC, by W. Ellis Boyle and Benjamin Van Steinburgh, for plaintiff-appellant.

Yates McLamb & Weyher, LLP, by John W. Minier and Alexandra L. Couch, for defendants-appellees.

MURPHY, Judge.

¶ 1 Evidence regarding damages may not typically be admitted during the liability portion of a bifurcated trial pursuant to N.C.G.S. § 1A-1,

Rule 42(b)(3). However, as here, when Plaintiff opened the door to evidence relevant for impeachment purposes by testifying regarding her current health condition during the liability portion of such a bifurcated trial, the opposing party was allowed to ask questions and present relevant evidence for the limited purpose of impeaching that testimony, even though such evidence would otherwise be inadmissible due to its relation to damages. When using a videotape to impeach a party's testimony, the videotape must be properly authenticated, which was accomplished here by Plaintiff's admission that she is the person in the videotape and that the videotape portrayed a time period relevant for impeachment purposes. Finally, the trial court was not required to give a limiting instruction regarding evidence admitted for impeachment purposes in the absence of a request for such an instruction.

BACKGROUND

¶ 2 Plaintiff Hortense Pamela Hill sued Dr. David Warner Boone and Raleigh Orthopaedic Clinic, P.A. (collectively, "Defendants") for malpractice arising from surgeries to her right foot. On 2 May 2014, Dr. Boone operated on Plaintiff's right foot to remedy calcaneocuboid osteoarthritis. He used a 45 mm screw, which traveled 7 to 10 mm past the bottom of Plaintiff's bone into soft tissue. When Plaintiff reported experiencing pain in different areas of her foot, Dr. Boone took an x-ray from a different angle than previous x-rays taken after surgery, discovered the screw used in the initial surgery was too long, and recommended an additional surgery. During the second surgery on 13 June 2014, Dr. Boone removed the original screw and replaced it with a 36 mm screw.

¶ 3 In her *Complaint* filed 15 March 2017, Plaintiff alleged Dr. Boone negligently performed the 2 May 2014 surgery, and claimed she suffers "unremitting pain in her right foot . . . [which is] more intense after she walks for even a few feet" and that she "cannot stand more than a few minutes without severe pain in her right foot." She also claimed she could not "partake in activities she previously enjoyed such as dancing, bowling, going to the movies, being a spectator at sporting events, traveling, and walking her dog."

¶ 4 On 14 February 2019, Plaintiff moved to bifurcate the trial pursuant to N.C.G.S. § 1A-1, Rule 42(b)(3), which the trial court granted on 18 March 2019. The trial court's decision to bifurcate the trial is not challenged by either party on appeal.

¶ 5 At trial, Plaintiff testified she currently uses a scooter and that she was not using a scooter to get around in November of 2013 when she re-injured her foot or prior to that. She testified that she continues

to take the same amount of nerve blocking medication because of pain in her right foot as she did in 2014, the pain decreased but never went away after the surgery, and that she could not find anything that could be done to take the pain away–"basically it *is* . . . there and that's it." (Emphasis added). On cross-examination, she also stated "[t]he toes is what I meant can't touch anything. . . . It's my big toe and my three toes next to it is what can't touch anything."

¶ 6 On cross-examination and over Plaintiff's objection, Defendants played and asked questions regarding an exhibit compiling videos of Plaintiff obtained via private surveillance, which "shows Plaintiff walking, visiting various stores, navigating street curbs on her allegedly injured foot, climbing stairs, driving around town, loading her car with groceries, babysitting her grandson, pushing a stroller, and carrying her grandson while navigating curbs, among other things."

¶ 7 Plaintiff had been deposed on 30 August 2017, where she described the current condition of her foot extensively. At trial, Defendants' first reference to that deposition occurred prior to playing the videotape surveillance and during a question by Defendants about Plaintiff quitting a job in 1999, to which Plaintiff objected. After that initial reference to the deposition, Defendants showed the videotape surveillance for the purpose of impeaching her testimony; then, Defendants played a video of Plaintiff's deposition testimony where Plaintiff claimed she could not drive, walk, or wear shoes as she used to, could not walk her dog, would not be able to take her new grandchild in a stroller because she "can't walk," "[n]o one can touch [her] foot[,]" and "can't have a blanket, a sock or shoe or anything on [her] foot . . . [i]t feels like it's on fire . . . [and she is] in pain constantly." Although Plaintiff objected to the prior reference to the deposition, Plaintiff did not object to Defendants playing the video of the deposition.[1]

¶ 8 While Defendants cite the 26 March 2019 transcript to claim the deposition was introduced without objection "while cross-examining Plaintiff at trial," the introduction without objection referenced in Defendants' brief occurred on 26 March 2019, upon Defendants' re-direct examination of their own witness. While Plaintiff was on the stand, after

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1. The admission of the video of Plaintiff's deposition testimony is not dispositive to our analysis, as it was not admitted prior to the videotape surveillance, and did not open the door for the videotape surveillance. The videotape surveillance of Plaintiff was admitted first, so other testimony by Plaintiff would have had to open the door, and not the deposition video. *See generally State v. Smith*, 155 N.C. App. 500, 509-10, 573 S.E.2d 618, 624-25 (2002) (holding a party opens the door to impeachment through prior evidence or testimony he or she introduces), *disc. rev. denied*, 357 N.C. 255, 583 S.E.2d 287 (2003).

the initial objected-to reference to the deposition and subsequent playing of the videotape surveillance, Defendants played the deposition video while cross-examining Plaintiff, without further objection. Plaintiff reaffirmed her deposition testimony, stating:

> [DEFENDANTS' COUNSEL:] And during that deposition there were a number of questions where I was asking how you were doing after Dr. Boone's surgeries?
>
> [PLAINTIFF:] Yes.
>
> [DEFENDANTS' COUNSEL:] And at that point you told me that you had to be in bed most of time, right?
>
> [PLAINTIFF:] To keep my foot up, yes.

¶ 9 Outside of the presence of the jury, the trial court allowed the videotape surveillance to be admitted for Defendants' purported impeachment purposes only.

¶ 10 During closing arguments, Defendants made the following statement regarding the videotape surveillance and Plaintiff's testimony, to which Plaintiff did not object:

> You've seen the surveillance tapes, and a picture paints 1,000 words. But -- and this thing about $20,000[.00] -- $22,000[.00], how dare you spend $22,000[.00] following her around, sneaking around videoing her -- she attacked Dr. Boone and his livelihood and his profession and his integrity. And on that deposition that you saw on the video, she didn't know we were going to get all her medical records and double-check, and we were going to do surveillance and double-check. And she attacked him aggressively on that. She said she couldn't dance anymore because of his surgery. Remember that. That's pretty aggressive.
>
> *That's just a -- to attribute her ability to dance to this surgery, given all the past, is an unfair attack and goes to her credibility. That's why we showed you all that stuff.*

(Emphasis added).

¶ 11 The jury found for Defendants on liability on 29 March 2019. The trial judge entered judgment in favor of Defendants on 17 September 2019.

¶ 12 Plaintiff timely appealed pursuant to N.C.G.S. § 7A-27(b)(1) and argues the trial court improperly allowed Defendants to play the videotape surveillance, as it did not pertain to the liability portion of the bifurcated trial and was not properly authenticated. According to Plaintiff, Defendants improperly introduced the videotape surveillance as evidence and "featured" the videotape surveillance in their closing argument. Plaintiff also argues the trial court was required to give a limiting instruction regarding the videotape surveillance, and that Defendants improperly referenced the videotape surveillance in the closing of the liability portion of the trial, implying Defendants used the videotape surveillance as substantive evidence.

ANALYSIS

A. Standard of Review

¶ 13 **[1]** According to N.C.G.S. § 1A-1, Rule 42(b)(3):

> Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars ($150,000[.00]), the [trial] court shall order separate trials for the issue of liability and the issue of damages, unless the [trial] court for good cause shown orders a single trial. Evidence relating *solely* to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable. The same trier of fact that tries the issues relating to liability shall try the issues relating to damages.

N.C.G.S. § 1A-1, Rule 42(b)(3) (2019) (emphasis added).

¶ 14 Both parties argue the standard of review is abuse of discretion for this appeal, which is incorrect. *See State v. Coleman*, 254 N.C. App. 497, 501-02, 803 S.E.2d 820, 824 (2017) (noting we apply the correct standard of review, despite an appellant's incorrect assertion of the standard of review). We note

> [t]he paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice. In discharging this duty, the [trial] court possesses broad discretionary powers sufficient to meet the circumstances of each case. This supervisory power encompasses the authority to structure the trial logically and to set the order of proof. Absent

> an abuse of discretion, the trial judge's decisions in these matters will not be disturbed on appeal.
>
> The North Carolina Rules of Civil Procedure [specifically, Rule 42(b),] expressly preserve these inherent supervisory powers with regard to severance and bifurcation.

In re Will of Hester, 320 N.C. 738, 741-42, 360 S.E.2d 801, 804 (citations omitted), *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987); *see Clarke v. Mikhail*, 243 N.C. App. 677, 694, 779 S.E.2d 150, 163 (2015) (stating "we are asked to review the trial court's reasoning" in denying a motion for a bifurcated trial under N.C.G.S. § 1A-1, Rule 42(b)(3) for abuse of discretion), *disc. rev. denied*, 782 S.E.2d 892 (2016); *Webster Enters., Inc. v. Selective Ins. Co. of the Southeast*, 125 N.C. App. 36, 46, 479 S.E.2d 243, 249-50 (1997) (citation omitted) ("The trial court is vested with broad discretionary authority in determining whether to bifurcate a trial. This Court will not superimpose its judgment on the trial court absent a showing the trial court abused its discretion by entering an order manifestly unsupported by reason.").

¶ 15 However, Plaintiff is not arguing on appeal that the trial court erred in granting a bifurcated trial, which would merit an abuse of discretion review. Rather, Plaintiff argues that the videotape evidence, allowed for impeachment purposes, pertained to damages rather than to issues of liability, and was not properly authenticated. The proper standard of review for whether the videotape surveillance evidence was relevant for impeachment purposes is first de novo under Rule 401.[2] *See Clarke*, 243 N.C. App. at 695, 779 S.E.2d at 163 (emphasis added) (noting, despite the trial court's denial of the motion to bifurcate under N.C.G.S. § 1A-1,

2. According to Rule 607, "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C.G.S. § 8C-1, Rule 607 (2019). However, "the impeaching proof must be relevant within the meaning of Rule 401 and Rule 403[.]" *State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987) (emphasis omitted). We examine whether the videotape surveillance "was offered for a proper, relevant purpose, to wit: impeachment." *Holland v. French*, 273 N.C. App. 252, 262, 848 S.E.2d 274, 282 (2020); *see generally State v. Cherry*, 298 N.C. 86, 98, 257 S.E.2d 551, 559 (1979) ("The language of [a] statute [governing a phase of a bifurcated trial] does not alter the usual rules of evidence or impair the trial judge's power to rule on the admissibility of evidence. . . . Generally, evidence is relevant and admissible when it tends to shed any light on the matter at issue."), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980).

We also note that we review de novo whether a trial court complied with a statutory mandate, in this case the prohibition in N.C.G.S. § 1A-1, Rule 42(b)(3) of the admission of damages evidence during the liability portion of a bifurcated trial. *See In re E.A.*, 267 N.C. App. 396, 399, 833 S.E.2d 630, 632 (2019).

Rule 42(b)(3), "[o]ur review confirms [the disputed evidence was] both *relevant* and that the trial court did not abuse [its] discretion in determining that the [disputed evidence was] not unfairly prejudicial to [the] [p]laintiff"). Accordingly, we first apply a de novo standard of review to determine whether the videotape surveillance was offered for a relevant purpose. If we determine the videotape surveillance was relevant for impeachment purposes, we typically also analyze whether it should have been excluded under Rule 403, which would be reviewed for abuse of discretion. *See Holland*, 273 N.C. App. at 266, 848 S.E.2d at 284. However, Plaintiff did not address Rule 403 in her brief, and has abandoned this argument on appeal. N.C. R. App. P. 28(a) (2021) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

¶ 16 "The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Holmes*, 263 N.C. App. 289, 302, 822 S.E.2d 708, 720 (2018), *disc. rev. denied*, 372 N.C. 97, 824 S.E.2d 415 (2019). "Trial court rulings on relevancy technically are not discretionary." *Id.* "Whether evidence is relevant is a question of law, [and] we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010).

¶ 17 Further, the correct standard of review regarding authentication of a videotape is de novo. *State v. Clemons*, 852 S.E.2d 671, 677-78 & n.3 (N.C. App. 2020); *see also State v. Snead*, 239 N.C. App. 439, 443, 768 S.E.2d 344, 347 (2015) ("A trial court's determination as to whether a videotape has been properly authenticated is reviewed *de novo* on appeal."), *rev'd in part on other grounds*, 368 N.C. 811, 783 S.E.2d 733 (2016).

¶ 18 Accordingly, we conduct a de novo review to determine whether the videotape surveillance was both relevant for impeachment purposes and properly authenticated.

¶ 19 We note it would be error under N.C.G.S. § 1A-1, Rule 42(b)(3) to allow the videotape surveillance for substantive purposes in the liability portion of the bifurcated trial. The videotape surveillance clearly depicts evidence that would ordinarily solely be related to compensatory damages and prejudice Plaintiff's case as to liability. However, if the door was opened by Plaintiff on direct examination with testimony regarding her current health status, the videotape surveillance would be relevant for impeachment purposes. *See generally State v. Safrit*, 145 N.C. App. 541, 549, 551 S.E.2d 516, 522 (2001); *Harrison v. Garrett*, 132 N.C. 172, 176-77, 43 S.E. 594, 596 (1903). Arguments related to whether Plaintiff properly

opened the door deserve close scrutiny because of the public policy expressed by our General Assembly in N.C.G.S. § 1A-1, Rule 42(b)(3) –"[e]vidence relating *solely* to compensatory damages *shall not be admissible* until the trier of fact has determined that the defendant is liable." N.C.G.S. § 1A-1, Rule 42(b)(3) (2019) (emphases added). We first address whether the video was properly authenticated because, if it was not, this would end our inquiry.

B. Authentication of the Videotape Surveillance

¶ 20 **[2]** "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) (2019). Our initial review of the transcript and exhibits reveals the videotape surveillance was not properly authenticated under typical requirements. Defendants offered no testimony from the creator of the video to show that the recording process was reliable and "that the matter in question is what its proponent claims." *See State v. Snead*, 368 N.C. 811, 814, 783 S.E.2d 733, 736 (2016) (quoting N.C.G.S. § 8C-1, Rule 901(a) (2015)).

¶ 21 However, Defendants attempted to authenticate the videotape surveillance by cross-examining Plaintiff. While playing the videotape surveillance, which portrayed Plaintiff with a time-and-date stamp on the screen, Defendants asked Plaintiff the following questions:

> [DEFENDANTS' COUNSEL:] Is this you? Is that your car?
>
> [PLAINTIFF:] Correct.
>
> . . . .
>
> [DEFENDANTS' COUNSEL:] Can you tell if that's you?
>
> [PLAINTIFF:] Yes, it's me.
>
> [DEFENDANTS' COUNSEL:] And this is a different scene on [16 October 2017]?
>
> [PLAINTIFF:] Yes.
>
> . . . .
>
> [DEFENDANTS' COUNSEL:] This is still you, correct?
>
> [PLAINTIFF:] Yes.
>
> [DEFENDANTS' COUNSEL:] Is that you?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] On [16 October 2017]?

[PLAINTIFF:] Yes.

. . . .

[DEFENDANTS' COUNSEL:] Is that you?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] Where are you there?

[PLAINTIFF:] At Home Depot, I guess, or Lowe's. I'm not sure.

[DEFENDANTS' COUNSEL:] And this is the afternoon, according to our timestamp, of [16 October] at 2:53 p.m.[?]

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] And here's [25 October]. Is that you?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] [25 October] at 10:23 a.m. according to the timestamp, right?

[PLAINTIFF:] Correct.

. . . .

[DEFENDANTS' COUNSEL:] Is this you here?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] [21 December], just, for the record, 2017, 10:32 a.m. Is that you?

[PLAINTIFF:] Yes.

. . . .

[DEFENDANTS' COUNSEL:] Is this you in the New York Mets shirt?

[PLAINTIFF:] Correct.

[DEFENDANTS' COUNSEL:] [26 April 2018] according to the timestamp.

[PLAINTIFF:] Correct.

. . . .

[PLAINTIFF'S COUNSEL:] Your Honor, I raise a separate objection to (inaudible). That's her grandchild and (inaudible) I don't think that should be shown.

[THE COURT:] Overruled.

[DEFENDANTS' COUNSEL:] Is this you on [26 April 2018] at 1:20 p.m.?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] Is that your grandchild that you're with?

[PLAINTIFF:] Correct.

[DEFENDANTS' COUNSEL:] In the stroller?

[PLAINTIFF:] Yes.

. . . .

[DEFENDANTS' COUNSEL:] Now, we're going to a new scene. Is that you?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] Carrying your -- is that your grandchild?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] [11 May 2018]?

[PLAINTIFF:] Yes.

[DEFENDANTS' COUNSEL:] And according to the timestamp 11:44 and now 11:45 a.m.?

[PLAINTIFF:] Correct.

. . . .

[DEFENDANTS' COUNSEL:] And any trouble carrying the grandson here?

[PLAINTIFF:] Yes, as you can see I'm limping more, a little more.

> [DEFENDANTS' COUNSEL:] How old is he in May of 2018?
>
> [PLAINTIFF:] He was born in September of [2017], so he may be about six months.
>
> [DEFENDANTS' COUNSEL:] Do you see where he's sitting in the front of the shopping cart? Can you see that?
>
> [PLAINTIFF:] Yes.
>
> [DEFENDANTS' COUNSEL:] How did he get in that?
>
> [PLAINTIFF:] I put him in there.

¶ 22 Plaintiff's confirmation that the videotape surveillance apparently portrayed her and confirmation of what the video purported to suggest was the time and date of the videos did not constitute a confirmation that the video portrayed her on those days or times, or even at a relevant time period to show her current health status. Such attempts by Defendants to authenticate the videotape surveillance via Plaintiff's admission, without more, would have been insufficient.

¶ 23 However, Plaintiff's testimony regarding her grandchild, who was with her in some of the videos, constitutes an admission regarding her health status at a relevant time period–2017 and 2018–as she admits when her grandchild was born and approximately how old he was in the video. Plaintiff's admission regarding a depiction of her at a relevant time period vis-à-vis her health status, years after the surgery and close to the trial date, constituted an authentication of the portions of the videotape surveillance that included her grandchild, and were appropriate to use, if relevant, for impeachment purposes.[3] *See id.* at 815, 783 S.E.2d at 737 ("Given that [the party allegedly portrayed in the video] freely admitted that he is one of the two people seen in the video stealing shirts and that he in fact stole the shirts, he offered the trial court no reason to doubt the reliability or accuracy of the footage contained in the video."). The videotape surveillance was authenticated via Plaintiff's admissions regarding her grandchild, and we now determine whether the videotape surveillance was relevant for impeachment purposes.

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3. We note Plaintiff did not make an argument regarding the exclusion of the entire video in the event a portion is determined to be authenticated.

C. Relevance of the Videotape Surveillance for Impeachment Purposes

¶ 24 **[3]** A longstanding principle within our jurisprudence provides that "[t]he primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case." *State v. Bell*, 249 N.C. 379, 381, 106 S.E.2d 495, 498 (1959). "Impeachment evidence has been defined as evidence used to undermine a witness's credibility, with any circumstance tending to show a defect in the witness's perception, memory, narration or veracity relevant to this purpose." *State v. Gettys*, 243 N.C. App. 590, 595, 777 S.E.2d 351, 356 (2015), *disc. rev. denied and appeal dismissed*, 368 N.C. 685, 781 S.E.2d 798 (2016).

¶ 25 The opposing party can impeach a witness by offering evidence of that witness's prior inconsistent statements or dishonesty. *See Thompson v. Lenoir Transfer Co.*, 72 N.C. App. 348, 350-51, 324 S.E.2d 619, 620-21 (1985); *State v. Aguallo*, 322 N.C. 818, 824, 370 S.E.2d 676, 679 (1988) ("Prior statements by a [party] [including prior testimony] are a proper subject of inquiry by cross-examination."); *State v. Anderson*, 88 N.C. App. 545, 548, 364 S.E.2d 163, 165 (1988) (marks and citation omitted) ("[I]mpeachment is an attack upon the credibility of a witness, and is accomplished by such methods as showing the existence of bias; a prior inconsistent statement; untruthful or dishonest character; or defective ability to observe, remember, or recount the matter about which the witness testifies.").

¶ 26 "It is well-settled law in North Carolina that where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *Safrit*, 145 N.C. App. at 549, 551 S.E.2d at 522 (marks omitted); *see generally Harrison*, 132 N.C. at 176-77, 43 S.E. at 596. If Plaintiff opened the door to impeachment regarding her current health status via testimony on direct examination, Defendants could have impeached her with the authenticated videotape surveillance of her carrying her grandchild while walking and performing other activities on her feet.[4]

4. In addition to arguing the videotape surveillance only pertained to damages, Plaintiff cites an unpublished case to argue she did not open the door to impeachment via the video. *See Kosek v. Barnes*, COA 06-76, 181 N.C. App. 149, 639 S.E.2d 453, 2007 WL 3581 (2007) (unpublished). However, this unpublished case is unpersuasive, as there we deferred to the trial court's ruling to exclude certain evidence to impeach *under Rule 403* during the compensatory damages phase of a bifurcated trial. *Id.* at *2-*3. Our analysis in

¶ 27 While Plaintiff did not open the door to impeachment via the claims in her *Complaint* and deposition, as argued briefly by Defendants on appeal,[5] that she was unable to drive, stand, walk, or have her foot touched due to unremitting pain, her following testimony on direct examination opened the door to further questions regarding the nature of her pain: that she currently uses a scooter after not using one before the injury and subsequent surgery; her current need to take the same amount of nerve blocking medication as she took immediately after her second surgery due to continued pain; the permanent nature of her injury and pain; and that the pain "was [a] burning, numbing, tingly, aching pain where nothing could touch [her] foot." Such testimony, taken together, opened the door to questions about the nature of Plaintiff's recent and current pain on cross-examination.

¶ 28 In response to questions on cross-examination regarding the nature of her pain, Plaintiff testified that her toes cannot touch anything. According to Plaintiff, "[i]t's my big toe and my three toes next to it is what can't touch anything." Plaintiff's statement that her toes cannot touch anything allowed Defendants to impeach her testimony via the videotape surveillance. The videotape surveillance, which showed Plaintiff engaging in activities such as walking, lifting, navigating a curb, and opening the driver's side door of her car, was relevant to contradict her credibility, particularly her truthfulness about unremitting pain, that her toes cannot touch anything, and inferences that she needed a scooter to move after her injury and surgery. The videotape surveillance evidence was relevant for impeachment purposes under Rule 401. The trial court did not err in allowing Defendants to play the videotape surveillance for the jury while impeaching Plaintiff's testimony.

D. Lack of a Limiting Instruction

¶ 29 **[4]** Plaintiff argues the trial court was required to give a limiting instruction regarding the videotape surveillance and cites *State v. Strickland* to support her argument. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970). According to *Strickland*,

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Kosek affirmed that a witness's credibility is impeachable, but such evidence must comply with Rules 401 and 403. *Id.* As acknowledged above, Plaintiff abandoned any argument regarding Rule 403.

5. Defendants' brief includes the following statement to further the argument that the trial court properly admitted the videotape surveillance to impeach Plaintiff's testimony: "Defendants admitted into evidence and showed the jury portions of Plaintiff's videotaped deposition *without any objection from Plaintiff's counsel.*"

> [a]side from the constitutional and procedural questions here presented, we think it appropriate to observe that the use of properly authenticated moving pictures to illustrate a witness' testimony may be of invaluable aid in the jury's search for a verdict that speaks the truth. However, the powerful impact of this type of evidence requires the trial judge to examine carefully into its authenticity, relevancy, and competency, and–if he finds it to be competent–to give the jury proper limiting instructions at the time it is introduced.

Id. at 262, 173 S.E.2d at 135.

¶ 30 At the time Defendants introduced the video while cross-examining Plaintiff, her counsel objected, and the trial court overruled the objection. The trial court did not give a limiting instruction. Rather, the trial court's subsequent references to the videotape surveillance stated it was for impeachment purposes only, but those references occurred outside of the presence of the jury. Plaintiff did not request the jury be given a limiting instruction. Plaintiff argues the trial court committed reversible error by not *sua sponte* issuing a limiting instruction regarding the video. This is not the law in North Carolina.

¶ 31 Our Supreme Court has held "[t]he trial court is not required to instruct the jury with respect to evidence . . . in the absence of a request to do so." *Williams v. Bethany Volunteer Fire Dept.*, 307 N.C. 430, 435, 298 S.E.2d 352, 355 (1983) (holding that, where they failed to request a limiting instruction, "[parties] cannot [] complain [on appeal] that they were hurt by the introduction of evidence whose thrust they may have been able to limit"). "The admission of evidence which is competent for a restricted purpose without limiting instructions will not be held [to be] error in the absence of a request . . . for such limiting instructions." *Holland*, 273 N.C. App. at 267, 848 S.E.2d at 285; *see also State v. Whitley*, 311 N.C. 656, 664, 319 S.E.2d 584, 589 (1984) ("The admission without limitation of evidence which is competent for a restricted purpose will not be held to be error in the absence of a request . . . for limiting instructions."); *State v. Maccia*, 311 N.C. 222, 228-29, 316 S.E.2d 241, 245 (1984) ("Although it is true that the jury was not instructed in the present case to limit its consideration of the evidence to purposes of impeachment, it does not appear from the record that the defendant requested a limiting instruction. The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions."); *State v. Handsome*, 300 N.C. 313,

319, 266 S.E.2d 670, 675 (1980) ("[W]here the defendant does not request that the limiting instruction be given, as he did not in this case, it is not error when the instruction is not given."). As Plaintiff did not request a limiting instruction, the trial court did not commit error by not issuing a limiting instruction regarding the videotape surveillance.

E. Reference to Videotape Surveillance in Defendants' Closing Argument

¶ 32 **[5]** Finally, Plaintiff argues Defendants improperly referenced the videotape surveillance in closing, implying Defendants used it as substantive evidence. During closing, Defendants stated:

> [DEFENDANTS' COUNSEL:] . . . . You've seen the surveillance tapes, and a picture paints 1,000 words. But -- and this thing about $20,000[.00] -- $22,000[.00], how dare you spend $22,000[.00] following her around, sneaking around videoing her -- she attacked Dr. Boone and his livelihood and his profession and his integrity. And on that deposition that you saw on the video, she didn't know we were going to get all her medical records and double-check, and we were going to do surveillance and double-check. And she attacked him aggressively on that. She said she couldn't dance anymore *because of his surgery*. Remember that. That's pretty aggressive.
>
> That's just a -- to attribute her ability to dance to this surgery, given all the past, *is an unfair attack and goes to her credibility. That's why we showed you all that stuff*. But, to finish my discussion on the law, before we get all that -- and I want to show you that videotape again, so you will understand how aggressive the attack was and why the fight back from the defense was proportionate. It was appropriate. This is the second half of the law. I told you that standard of care.
>
> [PLAINTIFF'S COUNSEL:] Objection, Your Honor. This is beyond the jury instructions.

(Emphases added).

¶ 33 Plaintiff did not object to Defendants' reference to the videotape surveillance during closing, but rather objected to a later reference to the standard of care and the law. Plaintiff's argument regarding Defendants'

reference to the videotape surveillance during closing is not preserved for appeal. *See* N.C. R. App. P. 10(a)(1) (2021) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *State v. Thompson*, 265 N.C. App. 576, 586, 827 S.E.2d 556, 563 (2019) (holding that a party fails to preserve for appellate review a challenge to remarks made during closing argument in the absence of an objection).

CONCLUSION

¶ 34 The videotape surveillance of Plaintiff was authenticated by her admission that she was both the subject of the videotape and that she was carrying her grandchild at a relevant period of time. The videotape surveillance was used for a proper purpose when Plaintiff opened the door to impeachment through her testimony regarding the current nature of her injury, and the videotape surveillance was relevant for impeachment purposes, as it related to Plaintiff's credibility as a witness. The trial court was not required to give a limiting instruction regarding the videotape surveillance when Plaintiff did not request such an instruction, and Plaintiff waived her challenge to Defendants' reference to the videotape surveillance in closing by not objecting to such a reference.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

IN RE J.R.

[279 N.C. App. 352, 2021-NCCOA-491]

IN THE MATTER OF J.R. AND J.C.

No. COA21-207

Filed 21 September 2021

1. Child Abuse, Dependency, and Neglect—permanency planning order—constitutionally protected status as parent—sufficiency of findings

In a neglect and dependency case, the trial court's permanency planning order awarding guardianship to the children's grandfather was affirmed where the court's factual findings supported its conclusion that the mother acted in a manner inconsistent with her constitutionally protected status as a parent and where, contrary to the mother's argument, the court was not required to find that she had done so willfully. The court found that the children's neglect adjudication was based on their exposure to their brother's death, which resulted from abuse in the home by the mother's boyfriend; the mother avoided taking one of her children to the doctor so the department of social services would not discover the child's burn wounds, which were also allegedly caused by the boyfriend; and the mother failed to comply with multiple aspects of her case plan, including participation in therapy and domestic violence services.

2. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—verification—guardian's understanding of legal significance of appointment

In a neglect and dependency case, the trial court's permanency planning order awarding guardianship to the children's grandfather was affirmed where the court properly verified—as required under N.C.G.S. §§ 7B-600(c) and 7B-906.1(j)—that the grandfather understood the legal significance of guardianship. Competent evidence at the permanency planning hearing supported the court's verification, including the court's thorough colloquy with the grandfather, the grandfather's testimony, and evidence from a social worker and the guardian ad litem showing that the grandfather had taken good care of the children during the year that they lived with him.

3. Child Abuse, Dependency, and Neglect—permanency planning—cessation of reunification efforts—sufficiency of evidence

In a neglect and dependency case, the trial court properly ceased reunification efforts with the children's mother where competent evidence showed that such efforts would be unsuccessful

or inconsistent with the children's health or safety. Specifically, the mother was not making adequate progress in her family services case plan where she refused to participate in recommended therapy, failed to engage in domestic violence services, and failed to secure proper housing. The circumstances leading to the children's neglect adjudication further supported a cessation of reunification efforts, where the children's younger brother died as a result of abuse in the home by the mother's boyfriend and where the mother had previously concealed the boy's injuries resulting from that abuse from the department of social services.

4. Child Visitation—frequency and duration—failure to specify —limited discretion given to parties

In a neglect and dependency case, where the trial court ceased reunification efforts with the mother and awarded guardianship to the children's grandfather, the court's order providing for the mother's visitation with the children was reversed and remanded where the court failed to specify the minimum frequency and duration of the mother's visits, as required under N.C.G.S. § 7B-905.1(c). Although the order stated that the mother would have supervised visitation for "a minimum of four hours per month," it was unclear whether this provision required a minimum of one visit of four hours per month or multiple shorter visits totaling four hours per month. However, the court did not improperly delegate its judicial authority by leaving the day and time of each visit to be agreed upon by the mother and the grandfather.

Appeal by Respondent-Mother from orders entered 29 December 2020 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 24 August 2021.

Keith Smith for Petitioner-Appellee Mecklenburg County Youth and Family Services.

Parker Poe Adams & Bernstein LLP, by W. Coker Holmes, for Appellee Guardian ad Litem.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for Respondent-Appellant Mother.

COLLINS, Judge.

¶ 1 Mother appeals from orders awarding guardianship of her sons, James and Justin,[1] to their maternal grandfather and awarding Mother visitation. Mother argues that the trial court erred by concluding that she acted in a manner inconsistent with her constitutionally protected status as a parent, determining that the guardian understood the legal significance of guardianship, ceasing reunification efforts, and failing to specify the minimum frequency and duration of visits. We affirm in part and remand in part for the trial court to specify the minimum frequency and duration of Mother's visitation.

I. Procedural History

¶ 2 Petitioner Mecklenburg County Youth and Family Services filed a juvenile petition on 31 July 2019, alleging that James and Justin were neglected and dependent. On 17 October 2019, the trial court entered an order adjudicating James and Justin neglected and dependent and a disposition order. The trial court placed the juveniles with Petitioner, established the primary plan as reunification with the juveniles' parents, and established a secondary plan of guardianship.

¶ 3 The trial court held a permanency planning hearing on 11 December 2020. Following the hearing, the trial court entered a Permanency Planning Hearing Order, a Guardianship Order, and a Guardianship Visitation Order. The orders placed the juveniles in the guardianship of their maternal grandfather, ceased reunification efforts, awarded Mother visitation, and waived further statutory review hearings. Mother timely gave notice of appeal.[2]

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1. We use pseudonyms for all minors in this opinion to protect their identities. *See* N.C. R. App. P. 42(b).

2. Both the Permanency Planning Hearing Order and the Guardianship Visitation Order contain the visitation provisions Mother challenges, but Mother's two notices of appeal did not specifically designate the Guardianship Visitation Order as an order from which she appeals. *See* N.C. R. App. P. 3(d) (notice of appeal must "designate the judgment or order from which appeal is taken"). However, "[i]t is well established that a mistake in designating the order appealed from should not result in loss of the appeal as long as the intent to appeal from a specific [order] can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (citation and quotation marks omitted). Mother's intent to appeal the trial court's award of visitation is clear from her second notice of appeal and there is no indication that either appellee was misled by the mistake. We will therefore review Mother's challenge to the visitation provisions found in both the Permanency Planning Hearing Order and the Guardianship Visitation Order.

II. Factual Background

¶ 4 Mother has had four children: Justin in 2015, James in 2016, Jackson in 2017, and Mary in 2020.[3] Mother has a history of child protective service agency involvement with her children beginning in October 2015. Petitioner referred Mother to services, including domestic violence and mental health services, in October 2015, October 2016, April 2017, January 2018, December 2018, and April 2019.

¶ 5 In July 2019, Jackson was burned, allegedly in a bath, while in the custody of Mother's boyfriend Daquan McFadden. Mother called a medical hotline to seek treatment advice in lieu of taking Jackson to the doctor because she wanted to avoid further DSS involvement.

¶ 6 On 29 July 2019, Mother and McFadden were staying at a hotel with James, Justin, and Jackson. Mother left the hotel room from about 8 p.m. to midnight. When she returned to the hotel room, where McFadden had remained with the children in her absence, she went to sleep. The next morning, Officer Mike Dashti of the Charlotte Mecklenburg Police Department responded to a 911 call from the hotel room. Dashti arrived and observed Mother on the phone with 911. Dashti found Jackson lying on the bathroom floor unresponsive, with no pulse, and cold to the touch. Dashti observed blood on Jackson's nose and face, a bruise on Jackson's forehead, and a 10-to-12-inch bloodstain on a pillow on one of the beds.

¶ 7 Resuscitation efforts were unsuccessful and Jackson was pronounced dead at the hospital. An autopsy indicated that Jackson had suffered a

> blunt force injury to his head, a large subdural hematoma, a hematoma to his liver, facial abrasions and head contusions on his forehead and lip area, a bite mark on his left shoulder, and lesions healing on his scrotum and buttocks.

The autopsy concluded that Jackson's manner of death was homicide, caused by "an acute blunt force trauma injury[.]"

¶ 8 Mother was charged with felony child abuse; McFadden was charged with Jackson's murder. The State dismissed the criminal charge against Mother on 31 August 2020.

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3. James' and Justin's fathers are not parties to this appeal.

¶ 9 Petitioner filed the juvenile petition on 31 July 2019, alleging that James and Justin were neglected and dependent, and the trial court awarded Petitioner nonsecure custody. Petitioner initially placed James and Justin in a home where both their fathers lived. On 17 October 2019, the trial court adjudicated James and Justin neglected and dependent and entered a disposition order. The trial court maintained the juveniles in Petitioner's custody and established the primary plan as reunification with the juveniles' parents, with a secondary plan of guardianship. In December 2019, Petitioner placed James and Justin with their maternal grandfather after allegations that James' father hit Justin.

¶ 10 Prior to the adjudication hearing, Petitioner prepared a proposed Family Services Agreement ("case plan") for Mother. The trial court adopted this case plan in its adjudication order. The case plan required Mother to, inter alia, (1) complete a "F.I.R.S.T." assessment;[4] (2) "comply with mental health treatment, [] follow all therapeutic recommendations[,]" and take any necessary medication as prescribed; (3) complete parenting classes; (4) obtain employment to meet the juveniles' basic needs; and (5) "maintain an appropriate, safe, and stable living environment for herself and her children[.]"

¶ 11 The trial court held a permanency planning hearing on 11 December 2020. Following the hearing, the trial court entered a Permanency Planning Hearing Order, a Guardianship Order, and a Guardianship Visitation Order. In the Permanency Planning Hearing Order, the trial court made the following findings of fact regarding Mother's progress on her case plan:

> 16. The mother is employed at Wal-Mart but has reduced her hours from 30 to 20 because of her SSI. She receives approximately $790 per month in SSI. The mother completed parenting classes . . . on June 30, 2020. The mother is living with a family friend and paying rent. She has her own room with a queen bed and room for her and her baby [Mary] . . . . It is not appropriate for these two juveniles as it is not big enough. The mother had a F.I.R.S.T. assessment on April 23, 2020. The mother was recommended to undergo an assessment and drug screen at Anuvia; however, she refused and hung up on the F.I.R.S.T. program staff. The drug screen is a part of the screening process with F.I.R.S.T. The mother was referred

4. The record does not include a definition of this acronym.

to Family First for a substance abuse assessment on at least three separate occasions (5/15/2020, 9/24/2020, and 10/29/2020). On all three occasions, she refused treatment. She did follow through with being assessed during the last referral on November 13, 2020 and was recommended to receive both Outpatient Therapy at a frequency of two times per week and Trauma Therapy; however, the mother informed . . . the assessing clinician, that she did not believe in therapy and did not want to engage. The mother has been discharged twice from Family First and is subject to be discharged on December 14, 2020 if she does not respond. She has also not signed her Person-Centered Plan which needs to be signed before the treatment services can begin. A referral was made to Thrive for a mental health assessment. The mother has not done a mental health assessment at this time. The mother has consistently maintained with professionals that she did not think therapy was appropriate for her. The mother has also not engaged in domestic violence services at this time.

. . . .

21.f. Despite recommendations, the mother has consistently stated she will not take part in mental health services despite concerns on her behavior, temper, and grief of loss of her child.

21.h. Mother does not have housing that can meet the needs of these juveniles.

21.i. She is renting a room from a friend that has a Queen bed and pack and play for [Mary].

. . . .

21.k. [Mother's] criminal case was dismissed on August 31, 2020 and since then minimal progress was made by the mother on her case plan.

21.l. The court does not have confidence that the mother will follow through with the items of the case plan. While the court understands she was not able to do certain things on her plan due to pending criminal

> charges, her many other actions and statements indicate she will not follow through with the services.
>
> . . . .
>
> 22.b. The mother is not making adequate progress within a reasonable time under the plan.
>
> . . . .
>
> 22.i. The mother is acting in a manner inconsistent with the health or safety of the juveniles.

¶ 12 The trial court concluded that Mother had "acted in a manner inconsistent with [her] constitutionally protected rights as a parent." The trial court also found that further reunification efforts "clearly would be unsuccessful or would be inconsistent with the juveniles' health and safety and need for a safe, permanent home within a reasonable period of time." The trial court determined that the maternal grandfather was "ready and able to accept the guardianship of the juveniles," "under[stood] the legal significance of the appointment and has adequate resources to care appropriately for the juveniles." The trial court therefore ceased reunification efforts and appointed the maternal grandfather the guardian of the juveniles.

¶ 13 In the Permanency Planning Hearing Order and Guardianship Visitation Order, the trial court awarded Mother multiple forms of visitation. The trial court awarded Mother "regular visitation" as follows:

> [Mother] shall have supervised visitation with the minor children to occur a minimum of four hours per month. The visits are to be supervised by [the maternal grandfather] or an approved responsible adult. The day and time of each visit will be agreed upon between [Mother and the maternal grandfather].

Mother appeals.

III. Discussion

A. Award of Guardianship

¶ 14 Mother challenges the Permanency Planning Hearing Order's award of guardianship of the juveniles to their maternal grandfather. "This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citation omitted). Unchallenged

findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). We review de novo the conclusion of law that a parent acted in a manner inconsistent with the constitutionally protected status of a parent. *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018).

1. Actions Inconsistent with Mother's Constitutionally Protected Status as a Parent

¶ 15 **[1]** Mother first argues that the trial court erred by concluding that she acted in a manner inconsistent with her constitutionally protected status as a parent. Specifically, Mother contends that actions inconsistent with the constitutionally protected status of a parent must be "willful, volitional actions of the parent." Mother argues that findings in the trial court's Permanency Planning Hearing Order are therefore deficient because they do not address whether her cognitive "limitations affected her allegedly inconsistent conduct or whether [she] could even appreciate the consequences of her conduct such that she could intentionally and willfully engage in conduct that is truly inconsistent with that of a parent."

¶ 16 At a permanency planning hearing, the court may set guardianship as the juvenile's permanent plan and appoint a guardian for the juvenile if the court finds that doing so is in the juvenile's best interests. N.C. Gen. Stat. §§ 7B-906.2(a)(3) (2020); 7B-600(a) (2020). However, a natural parent has a "constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child[.]" *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). This constitutionally protected interest "is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Id.* "Prior to granting guardianship of a child to a nonparent, a district court must clearly address whether [the] respondent is unfit as a parent or if [her] conduct has been inconsistent with [her] constitutionally protected status as a parent[.]" *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017) (quotation marks and citation omitted).[5]

¶ 17 In support of her argument that the trial court was required to find that her conduct was willful and intentional, Mother cites *In re A.L.L.*, 376 N.C. 99, 852 S.E.2d 1 (2020). *In re A.L.L.* is inapposite, however,

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5. While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B. *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011).

because it concerned the termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(7), not the appointment of a guardian under sections 7B-600(a) and 7B-906.2(a)(3). *See In re A.L.L.*, 376 N.C. at 110-11, 852 S.E.2d at 9. Unlike the statutes at issue in the present case, section 7B-1111(a)(7) expressly requires "willful" abandonment of a juvenile or "voluntary" abandonment of an infant. N.C. Gen. Stat. § 7B-1111(a)(7) (2020).

¶ 18 Mother also cites *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 710 S.E.2d 235 (2011), but *Rodriguez* is likewise inapposite. In *Rodriguez*, the paternal grandparents sued the natural mother for custody under Chapter 50 and the trial court awarded visitation. *Id.* at 269, 710 S.E.2d at 237-38. We held that the trial court erred by concluding that the mother had acted inconsistently with her constitutionally protected status as a parent because the juveniles had previously been adjudicated dependent, but not abused or neglected, and there were no additional findings of fact sufficient to show that the mother had acted inconsistently with her status as a parent. *Id.* at 279, 710 S.E.2d at 243.

¶ 19 Here, by contrast, the trial court adjudicated James and Justin neglected and dependent, and Mother does not challenge this adjudication. Neglect "clearly constitute[s] conduct inconsistent with the protected status parents may enjoy." *Price*, 346 N.C. at 79, 484 S.E.2d at 534. The neglect adjudication was premised on a finding that the juveniles lived "in an environment injurious to their welfare because they were exposed to the homicide of their brother, [Jackson], and live[d] in the home where their brother died as a result of abuse." The trial court further found that Mother had previously called a medical hotline for advice on treating a burn on Jackson "instead of taking the child to the doctor because she did not want another DSS case."

¶ 20 Moreover, following the permanency planning hearing, the trial court found that Mother had failed to comply with multiple aspects of her case plan. Specifically, the trial court found that Mother's housing was insufficient for James and Justin because it was too small; Mother repeatedly refused to engage in therapy and other assessments; Mother indicated that she "did not believe in therapy and did not want to engage"; and Mother did not engage in domestic violence services.

¶ 21 Mother argues that "[t]he evidence does not support the finding that [Mother] is not actively participating in and cooperating with the plan because so much of the plan bears no logical nexus to the reasons why James and Justin came into custody." This argument is foreclosed by Mother's failure to challenge the trial court's adjudication order wherein

the trial court specifically found that the case plan was "in the [children's] best interests and appropriate to address the issues that led to the [children's] placement[.]" This unchallenged finding of fact is binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

¶ 22 Together, the trial court's findings of fact support the conclusion of law that Mother had acted in a manner inconsistent with her constitutionally protected status as a parent. The trial court did not err by applying the best interest of the juvenile standard and awarding guardianship.

2. Verification under N.C. Gen. Stat. §§ 7B-600(c) and 7B-906.1(j)

¶ 23 **[2]** Mother also argues that the trial court erred by concluding that the maternal grandfather understood the legal significance of guardianship as required by N.C. Gen. Stat. §§ 7B-600(c) and 7B-906.1(j).

¶ 24 Prior to appointing a guardian under Chapter 7B, "the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c) (2020); *see also* N.C. Gen. Stat. § 7B-906.1(j) (2020) (same). "The Juvenile Code does not require that the court make any specific findings in order to make the verification. It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship." *In re L.M.*, 238 N.C. App. 345, 347, 767 S.E.2d 430, 432 (2014) (quotation marks and citations omitted). At a permanency planning hearing "[t]he court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c). This evidence may include reports and home studies conducted by the guardian ad litem or department of social services. *See In re J.E.*, *B.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007) (trial court which received and considered department of social services home study reports complied with section 7B-600).

¶ 25 The trial court conducted the following colloquy with the maternal grandfather at the permanency planning hearing:

> THE COURT: Mr. Steele, do you understand that, if I appoint you the guardian of these two children that, first and foremost, you would be the one mainly financially responsible for them? That's on you.
>
> MR. STEELE: Right.

THE COURT: Do you understand that?

MR. STEELE: Yes.

THE COURT: All right. And you understand that, if I appoint you the guardian, that you would have the care, custody, and control of the juvenile[s] and may arrange for a suitable placement for the juvenile[s]? Do you understand that?

MR. STEELE: A suitable placement?

THE COURT: Yes, sir.

MR. STEELE: What do you mean by that?

THE COURT: That means that you would be responsible for providing any type of placement for them.

MR. STEELE: Yes.

THE COURT: Okay. And that you may also represent the juvenile[s] in legal actions before any court. Do you understand that?

MR. STEELE: Yes.

THE COURT: Do you understand that you may consent to certain actions on the part of the juvenile[s] in place of the parent, including marriage, enlisting in the armed forces of the United States, and enrolling in school?

MR. STEELE: Yes.

THE COURT: Do you also understand that, if I appoint you the guardian, that you may consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile[s]?

MR. STEELE: Yes.

¶ 26 Social worker Cawan Jenkins also testified that the maternal grandfather "underst[ood] what guardianship would entail[.]" Moreover, Jenkins' court summaries, the guardian ad litem's two reports, and the maternal grandfather's testimony reflect that James and Justin had lived with the maternal grandfather for approximately one year. During that time, the maternal grandfather took the juveniles to medical and therapy appointments, ensured their visitation with their parents, and financially provided for the juveniles.

¶ 27 Finally, the maternal grandfather testified as follows on direct examination:

> Q. You're aware that [Petitioner] is recommending that the Court grant you guardianship of the juveniles today?
>
> A. Yes.
>
> . . . .
>
> Q. What is your understanding of the legal significance of the appointment of guardianship?
>
> A. I mean . . . I think that word speaks for itself, "guardianship." I got to be there for them. It's no off day. It's no off day. I've got to be there for them. Like they're just kids. They're little boys, so it's all on me. I mean I hope I'm wording this right, but it's all on me to walk them through the steps. . . .
>
> It's all on me to walk them through the steps, hold their hand, and you know, try and get them by this, past this. Make sure their appointments are there. Consistently make sure they have a place to stay, you know, like they have been. It's a lot of stuff with it, and there's no day off. There's no day off.

¶ 28 The trial court's colloquy with the maternal grandfather, the maternal grandfather's testimony, and the evidence submitted by the social worker and guardian ad litem was competent evidence in support of the trial court's conclusion that the maternal grandfather "understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile[s]." The trial court did not err in making the verification required by sections 7B-600(c) and 7B-906.1(j).

B. Cessation of Reunification Efforts

¶ 29 **[3]** Mother argues that the trial court erred by ceasing reunification efforts because the record does not show that such efforts clearly would be unsuccessful or inconsistent with the juveniles' health or safety.

¶ 30 "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re M.T.-L.Y.*, 265 N.C. App. 454, 466, 829 S.E.2d 496, 505 (2019) (citation omitted).

¶ 31 At any permanency planning hearing, the trial court may cease reunification efforts upon making "written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b). To determine whether reunification efforts "clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety," the trial court must make written findings concerning:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d); *In re D.C.*, 275 N.C. App. 26, 29, 852 S.E.2d 694, 697 (2020).

¶ 32 Here, the trial court found that reunification efforts with Mother "clearly would be unsuccessful or would be inconsistent with the juveniles' health and safety and need for a safe, permanent home within a reasonable period of time." The trial court also made the following findings, as required by section 7B-906.2(d):

> 22.b. The mother is not making adequate progress within a reasonable time under the plan.
>
> . . . .
>
> 22.e. The mother is not actively participating in and cooperating with the plan, YFS and the guardian *ad litem* for the juveniles.
>
> . . . .
>
> 22.g. The mother . . . [has] remained available to the Court, YFS, and [the] guardian *ad litem* for the juveniles.
>
> . . . .
>
> 22.i. The mother is acting in a manner inconsistent with the health or safety of the juveniles.

Mother acknowledges that these findings comply with section 7B-906.2(d), but argues that they are unsupported or contradicted by evidence in the record. We disagree.

¶ 33 Credible evidence in the record supports the findings that Mother was not making adequate progress within a reasonable time under her case plan and was not actively participating in and cooperating with the plan, Petitioner, and the guardian ad litem. A court summary prepared by social worker Jenkins and admitted into evidence indicated that Mother refused to complete recommended mental health assessments and drug screenings on multiple occasions. The trial court also admitted into evidence a letter from a Family First Program Manager stating that

> [Mother] was referred to Family First on at least 3 separate occasions: 5/15/20, 9/24/20 and 10/29/20. On all three occasions, [Mother] refused treatment. She did follow through with being assessed during the last referral on 11/13/20 and was recommended to receive both OPT at a frequency of 2x per week and Trauma Therapy; however, [Mother] informed [the] assessing clinician, that she did not believe in therapy and did not want to engage. Please note that [Mother] was discharged twice and currently her case is still open and subject to be discharged on 12/14/20 if she does not respond. She also has yet to sign her Person-Centered Plan (PCP) which needs to be signed by [Mother] and service order approved before treatment services can begin.

¶ 34 Jenkins' summary also reflected that Mother had not engaged in domestic violence services despite a history of domestic violence with child protective service involvement. At the permanency planning hearing, Jenkins testified that Mother failed to follow through with the recommendations of the assessments she did complete, "which include[d] substance abuse services, outpatient services as well as a mental health assessment." The guardian ad litem's two reports, which were also admitted into evidence, reflect that Mother had "outbursts of anger and yelling" towards the social worker supervising her video visitation with the juveniles in July 2020; Mother had "not sought Mental health services to assess her needs"; and "[w]ith further explanation, [Mother] seemed to understand how therapy or counseling may help her be her best for herself and her children, but in the next conversation, she would again argue the need for it." Mother suggests that her cooperation with the case plan was hindered by her pending criminal charge,

but does not challenge the trial court's finding that she made minimal progress on her case plan even after the charge was dismissed on 31 August 2021.

¶ 35 Credible evidence also supports the finding that Mother was "acting in a manner inconsistent with the health or safety of the juveniles." The trial court found that James and Justin were previously adjudicated neglected and dependent based on the circumstances of Jackson's death, James and Justin's exposure to Jackson's death, and Mother's decision not to seek medical treatment for Jackson's burns to avoid further DSS involvement. Mother also failed to secure appropriate housing for James and Justin to live with her. Specifically, the social worker testified that the room where Mother was staying was not appropriate for James and Justin to join her because there was not enough space.

¶ 36 Mother contends that her continued custody of Mary contradicts the trial court's finding that she was acting in a manner inconsistent with the juveniles' health or safety. The trial court had discretion to weigh this evidence, *In re T.H.*, 266 N.C. App. 41, 45, 832 S.E.2d 162, 165 (2019), and could consider it in light of the active child protective service involvement with Mary at the time of the permanency planning hearing and evidence that Mother asks her father to babysit Mary "for days at a time."

¶ 37 The trial court's finding that further reunification efforts clearly would be unsuccessful or would be inconsistent with the juveniles' health or safety was supported by credible evidence in the record, and these findings support the trial court's cessation of reunification efforts.

C. Visitation Order

¶ 38 **[4]** Lastly, Mother argues that the trial court violated N.C. Gen. Stat. § 7B-905.1(c) by failing to specify the minimum frequency and duration of her visits with James and Justin.

¶ 39 "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (citations omitted). Where the trial court places the juvenile with a guardian, "any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian." N.C. Gen. Stat. § 7B-905.1(c) (2020).

¶ 40 The trial court's Visitation Order provides that Mother

> shall have supervised visitation with the minor children to occur a minimum of four hours per month.

> The visits are to be supervised by [the maternal grandfather] or an approved responsible adult. The day and time of each visit will be agreed upon between [Mother] and [the maternal grandfather].

¶ 41 This provision can be read to require a minimum of one visit of four hours per month, or it can be read to require multiple visits of shorter duration for a total of four hours per month. Throughout much of the history of the case, Mother's supervised visitation was two hours, twice per month. The Guardian ad Litem recommended supervised visitation twice per month. Petitioner's court report referred to supervised visitation "twice per month for a total of two hours each time." When rendering the order, the trial court stated that it was "going to adopt the visitation plan that was submitted by [Petitioner][,]" which provided for supervised "visitation with the minor children to occur a minimum of four hours per month."

¶ 42 Although the Visitation Order's provision did specify a minimum amount of visitation of 4 hours per month, the provision does not unambiguously articulate the minimum frequency and length of the visits. Accordingly, we remand for the trial court to set the minimum frequency of the visitation, as required by section 7B-905.1(c).

¶ 43 Mother also argues that the visitation order amounts to an impermissible delegation of judicial authority. We disagree. "While our case law recognizes that some decision-making authority may be ceded to the parties with respect to visitation, it also reveals that an order is less likely to be sustained as judicially-imposed structure decreases and the decision-making party's unfettered discretion increases." *Peters v. Pennington*, 210 N.C. App. 1, 20, 707 S.E.2d 724, 738 (2011). In this case, the trial court did not grant the guardian any unfettered discretion to modify or suspend visitation. Instead, the trial court left only the day and time of each visit to be agreed upon by Mother and the guardian. The trial court did not abuse its discretion by granting this limited degree of flexibility to the parties.

IV. Conclusion

¶ 44 The trial court's findings of fact supported its conclusion of law that Mother acted inconsistently with her constitutionally protected status, and the trial court appropriately verified the maternal grandfather's understanding of the legal significance of guardianship. Accordingly, the trial court did not err in awarding guardianship of James and Justin to the maternal grandfather. The trial court did not err by ceasing reunification efforts and did not impermissibly delegate judicial authority in its

award of visitation. We remand to the trial court to specify the minimum frequency and duration of visitation as required by section 7B-905.1(c).

AFFIRMED IN PART, REMANDED IN PART.

Chief Judge STROUD and Judge DIETZ concur.

IN RE K.V.

No. COA20-828

Filed 21 September 2021

Mental Illness—involuntary commitment—sufficiency of findings and evidence—threat to others

The trial court's involuntary commitment order declaring respondent to be mentally ill and dangerous to others was reversed where, as the State conceded, the trial court's findings and the evidence—the attending psychiatrist's conclusory opinion, an incomplete involuntary commitment recommendation form, and respondent's testimony—were inadequate to support a conclusion that respondent, who allegedly had threatened a judge, was dangerous to others.

Appeal by Respondent from order entered 10 July 2020 by Judge Richard S. Holloway in Burke County District Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. McKee, for the State.

Carella Legal Services, PLLC, by John F. Carella, for Respondent-Appellant K.V.

INMAN, Judge.

¶ 1 Respondent-Appellant K.V. ("Mr. Vickers")[1] appeals from an involuntary commitment order declaring him mentally ill and dangerous to

1. We use a pseudonym to protect the privacy of the respondent and for ease of reading.

others. The State concedes, and we agree, that the record evidence and the trial court's findings are insufficient to support the conclusion that Mr. Vickers was dangerous to others. We reverse the involuntary commitment order.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 Mr. Vickers was arrested in Polkton, North Carolina, on 19 April 2019 and charged with threatening a judge presiding in a child welfare case. He was incarcerated pending trial. Fourteen months later, in June 2020, he was deemed incapable to proceed as a defendant in the criminal prosecution and was involuntarily committed to Broughton Hospital. He was reexamined upon admission, and the admitting psychiatrist recommended further involuntary commitment for up to 30 days. The psychiatrist, however, failed to indicate which statutory basis supported further involuntary commitment. The examination form noted Mr. Vickers had allegedly threatened a judge and was "dangerous," but failed to indicate whether he was a threat to himself or others and did not include any basis for deeming him dangerous.

¶ 3 The trial court held a hearing on the involuntary commitment recommendation on 10 July 2020. The attending psychiatrist at Broughton Hospital testified for the State, opining that Mr. Vickers: (1) suffered from an unspecified psychotic disorder; (2) was not dangerous to himself; and (3) was a danger to others. However, the psychiatrist further testified that Mr. Vickers "has not been aggressive or self injurious," and had not made any threats to others since his admission. She also testified that she had not forced medication on Mr. Vickers because "[i]t's unethical to force medication on a patient *who is not a danger to himself or others*." (emphasis added). The State offered no evidence about Mr. Vickers's conduct during his fourteen months in the Rowan County Jail immediately preceding his admission to Broughton Hospital.

¶ 4 Mr. Vickers testified that he had no history of mental illness and denied making a "true threat" against a judge. He testified that he made no threat in court or in the presence of the judge, but posted a "Facebook rant" expressing his feelings about "what happened in the past to the Court and how my family got divided because of a bunch of falsehoods and lies meant to destroy my family."

¶ 5 The trial court entered an order involuntarily committing Mr. Vickers for an additional fourteen days based on conclusions that Mr. Vickers suffered from a mental illness and was dangerous to others. In support of its conclusions, the trial court recited the attending psychiatrist's testimony that Mr. Vickers suffered from an unspecified

psychiatric disorder, had refused medication, and had cursed at Broughton Hospital staff. Mr. Vickers appealed.

II. ANALYSIS

¶ 6 Mr. Vickers contends that the involuntary commitment order must be vacated without remand because the trial court failed to find—and the evidentiary record does not disclose—facts showing him to be dangerous to others. The State concedes both issues.

¶ 7 In order to involuntarily commit an individual as mentally ill and dangerous to others, a trial court must make findings based on clear, cogent, and convincing evidence showing that:

> [w]ithin the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated.

N.C. Gen. Stat. § 122C-3(11)(b) (2019); *see also* N.C. Gen. Stat. § 122C-268(j) (2019) (imposing the clear, cogent, and convincing evidence standard to determinations of dangerousness to others). The State concedes that the trial court's findings were inadequate to support a conclusion of dangerousness to others. It further concedes that the evidence presented to the trial court—the attending psychiatrist's conclusory opinion,[2] the incomplete 29 June 2020 involuntary commitment recommendation form, and Mr. Vickers's testimony—fails to clearly, cogently, and convincingly show Mr. Vickers was a threat to others. The State likewise agrees that it is appropriate to set aside the trial court's order without remand under these circumstances. *See*, *e.g.*, *In re N.U.*, 270 N.C. App. 427, 433, 840 S.E.2d 296, 300-01 (2020) ("As neither the record evidence nor the findings of fact support the trial court's conclusion that Respondent was dangerous . . . , we reverse the trial court's involuntary commitment order.").

¶ 8 Because we are convinced that no reasonable trier of fact could find that Mr. Vickers was a danger to himself or others within the scope of the involuntary commitment statute, we reverse, rather than vacate, the

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2. In a later order dismissing another involuntary commitment hearing held on 24 July 2020, the trial court found that the attending psychiatrist's conclusion that Mr. Vickers was dangerous to others was "not based in the relevant past and [was] conclusory and d[id] not provide clear findings that substantiate mental illness and dangerousness."

trial court's order. *Id.*; *see also In re Booker*, 193 N.C. App. 433, 437, 667 S.E.2d 302, 305 (2008) (holding that when the facts found by the trial court do not support a determination of dangerousness to self or others, "we must reverse the trial court's order" (citation omitted)).

III. CONCLUSION

¶ 9 For the foregoing reasons, we reverse the involuntary commitment order.

REVERSED.

Judges DIETZ and GRIFFIN concur.

D.C., and J.M., *Guardian Ad Litem for minor child* D.C., Plaintiff
v.
D.C., Defendant

E.C., and J.M., *Guardian Ad Litem for minor child* E.C., Plaintiff
v.
D.C., Defendant

Nos. COA21-140, COA21-141

Filed 21 September 2021

Domestic Violence—protective order—sought by minors against step-parent—denied—no findings of fact

In a consolidated appeal from the denial of two minors' motions for a domestic violence protective order against their father's wife, where the trial court did not make any findings of fact, the orders were vacated and the matters remanded for entry of new orders with findings of fact and appropriate conclusions of law.

Appeals by Plaintiffs from orders entered 23 September 2020 by Judge S. A. Grossman in Cabarrus County District Court. By order entered 12 March 2021 this Court allowed cases COA21-140 and COA21-141 to be consolidated for purposes of hearing only. This Court now orders that COA21-140 and COA21-141 be consolidated for decision in this opinion. Heard in the Court of Appeals 10 August 2021.

Hartsell & Williams, P.A., by Austin "Dutch" Entwistle III, for plaintiffs-appellants.

No appellee brief filed.

MURPHY, Judge.

¶ 1 When a trial court sits without a jury in a hearing regarding a motion for a domestic violence protection order under Chapter 50B of our General Statutes, Rule 52(a)(1) of the North Carolina Rules of Civil Procedure requires the trial court to make findings of fact, as well as separately state its conclusions of law based on those findings of fact. After making the required findings of fact and conclusions of law, the trial court "shall" direct the entry of the appropriate judgment.

¶ 2 Here, after a consolidated hearing without a jury, the trial court failed to make any findings of fact in its orders denying Plaintiffs' motions for domestic violence protective orders against Defendant. We vacate the trial court's orders in this matter and remand for the entry of findings of fact by the trial court, followed by appropriate conclusions of law.

BACKGROUND

¶ 3 Plaintiffs D.C.[1] and E.C., who are minors, each filed a *Complaint and Motion for Domestic Violence Protective Order* against their biological father's wife, Defendant D.C., on 16 July 2020. The hearing regarding whether to grant a Domestic Violence Protective Order ("DVPO") was consolidated. At the time of the hearing, a Chapter 50 custody dispute was ongoing between Plaintiffs' biological mother, J.M., and Plaintiffs' biological father, D.C.

¶ 4 In their nearly identical Complaints, Plaintiffs alleged:

> [Defendant] has repeatedly gotten right in [Plaintiffs'] face[s] screaming as loud as she can as [to] how she wants to knock [Plaintiffs'] teeth out or otherwise do bodily harm to [Plaintiffs]. [Plaintiffs] have witnessed [Defendant] hit [Plaintiffs' biological father] and also hit her grandson []. The most recent time [Defendant] got in [Plaintiffs'] face[s] yelling and threatening [them] was on or about [8 July 2020]. [Plaintiffs are] afraid for [their] safety and in fear of continued harassment such that [they are] suffering substantial emotional distress and don't want [Defendant] to be

1. Abbreviations are used for all relevant persons throughout this opinion to protect the identity of the juveniles and for ease of reading.

> around [them] at all anymore. Besides [] witnessing [Defendant] actually hitting or otherwise physically attacking [their biological father] and her grandson, [Defendant] has destroyed property in fits of rage at least in part to intimidate [Plaintiffs]. [Defendant] has repeatedly acted [to invoke fear in Plaintiffs] and it has been successful. [Plaintiffs are] in fear for [their] [lives]from [Defendant].

¶ 5 The trial court granted an *Ex Parte Domestic Violence Order of Protection* for each Plaintiff on 17 July 2020 ("*Ex Parte* Orders"), which prohibited Defendant from contact with Plaintiffs. The *Ex Parte* Orders were continued to the date of the hearing.

¶ 6 At the hearing regarding Plaintiffs' DVPO motions on 23 September 2020, Plaintiffs separately testified as follows: Defendant gets up close and in their faces, threatens physical assault, and scares them; Defendant threatened to knock one Plaintiff's teeth out; Plaintiffs believe Defendant would actually physically harm them; and they believe Defendant would continue her behavior if Plaintiffs returned to her home. Defendant did not present any evidence.

¶ 7 The trial court used the DVPO form provided by the Administrative Office of the Courts, AOC-CV-306, which provides multiple locations for the trial judge to include preprinted and freeform findings of fact, to enter its orders. At the conclusion of the bench hearing on Plaintiffs' motions for a DVPO, the trial court entered its orders on the form entitled *Domestic Violence Order of Protection* for each plaintiff on 23 September 2020 ("Orders"). In the Orders, the trial court did not make any findings of fact other than who was present at the hearing, concluded that each Plaintiff "failed to prove grounds for issuance of a [DVPO]," and dismissed the action, declaring "any ex parte order issued in this case [] null and void."

¶ 8 After the parties rested at the hearing, the trial court made the following comments in open court[2]:

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2. Plaintiffs raise concerns in their briefs suggesting that the trial court misapprehended the law. We note that on the cold record the trial court's statements could be interpreted as a misapprehension or misapplication of the law. However, due to our resolution of this appeal, we need not address this issue and believe it is quite possible that the comments were made in a conversational style in order to politely engage with the litigants and were not an expression of any misconceptions that the trial court may have had. In order to fully dispel any concerns upon remand, we provide the following observations. First, Chapter 50 and Chapter 50B actions are not mutually exclusive. *See* N.C.G.S. § 50B-7(a) (2019) (emphasis added) ("The remedies provided by [Chapter 50B] are *not exclusive but*

> Honestly, [Defendant's] conduct is not conducive to working these things out as [they] need to be worked out for the benefit of [Plaintiffs]. I suspect [Defendant] now realizes that, but I think this is a Chapter 50 [custody dispute] case, [Plaintiffs' counsel]. This is not a Chapter [50B domestic violence] case. There's -- if it were [a Chapter 50B case], virtually every parent ever would be in the courtroom.
>
> What I heard from [Plaintiffs], and I commend you for taking your feelings and trying to do the right thing, I don't think this is the right thing. I appreciate that you're looking out after yourselves, both of you young people, but this is a situation where a parent, and [Defendant] is in a position of a parent, has been somewhat out of control, but I don't see that this is much different than what at least 50 percent of all parents have done, stupidly, but this is [a] Chapter 50 action. I'm going to deny the orders in all cases.

¶ 9 Both Plaintiffs timely appealed. In this consolidated appeal,[3] Plaintiffs argue each "Order is [facially] defective as the trial court made no findings of fact." Plaintiffs also argue the trial court's "comments . . . at the hearing reveal that [its] basis for denying [Plaintiffs'] claims ha[d] no basis in law or fact."

ANALYSIS

¶ 10 Typically, "[w]hen the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Kennedy v. Morgan*, 221 N.C. App. 219, 220-21, 726 S.E.2d 193, 195 (2012). However, Rule 52(a)(1) of the North Carolina Rules of Civil Procedure requires, "[i]n all actions tried upon the facts without a jury or with an advisory

are additional to remedies provided under Chapter 50 and elsewhere in the General Statutes."). Second, if a trial court determines that an act qualifying as domestic violence occurred, the trial court is required to issue a DVPO. *See* N.C.G.S. § 50B-3(a) (2019) (emphasis added) ("If the [trial] court . . . finds that an act of domestic violence has occurred, the [trial] court *shall grant* a [DVPO] restraining the defendant from further acts of domestic violence.").

3. Although Plaintiffs pursued two separate appeals, COA21-140 and COA21-141, given the similarity of the facts and issues, and for purposes of judicial economy, we consolidate the appeals.

jury, the [trial] court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2019).

¶ 11 Our Supreme Court has interpreted this requirement as follows:

> Where, as here, the trial court sits without a jury, the judge is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. The purpose of the requirement that the [trial] court make findings of those specific facts which support its ultimate disposition of the case is to *allow a reviewing court to determine from the record whether the judgment – and the legal conclusions which underlie it – represent a correct application of the law*. The requirement for appropriately detailed findings *is thus not a mere formality or a rule of empty ritual*; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.
>
> . . . .
>
> In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. It is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal.
>
> . . . .
>
> Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of

> the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 712-14, 268 S.E.2d 185, 188-90 (1980) (emphases added and original emphases omitted) (marks and citations omitted).

¶ 12 Here, the trial court failed to make any findings of fact, much less specific findings, in the Orders. It was required to enter findings of fact supporting its conclusions of law that each Plaintiff "failed to prove grounds for issuance of a [DVPO]." Such a failure to make findings of fact prevents us from conducting meaningful appellate review, and we must vacate the Orders and remand to the trial court for the entry of orders that comply with the North Carolina Rules of Civil Procedure and our caselaw.

CONCLUSION

¶ 13 The importance of the policy behind the rule in *Coble* is clear here, where the trial court included no findings of fact in the Orders denying Plaintiffs' motions for DVPOs. We vacate the Orders due to the failure to make findings of fact, and we remand for entry of new orders that include findings of fact and conclusions of law based on those findings.

VACATED AND REMANDED.

Judges ARROWOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
NANCY BENGE AUSTIN

No. COA20-198

Filed 21 September 2021

1. Homicide—castle doctrine defense—questions of fact regarding applicability—for jury to decide

The trial court did not err by declining to adjudicate defendant's castle doctrine defense to her first-degree murder charge in a pretrial hearing, and defendant's argument that the castle doctrine statute's use of the word "immunity" meant that the issue had to be resolved by the judge rather than the jury was meritless. There were questions of fact regarding the applicability of the defense, and the trial court properly permitted the case to proceed to jury trial.

2. Homicide—sufficiency of evidence—castle doctrine defense—premeditation and deliberation—unarmed victim pleading on ground

There was sufficient evidence for the jury to convict defendant of first-degree murder where an unwelcome visitor (the victim) had been fighting with her on her driveway and she stood over the victim, who was lying unarmed on the ground saying, "please, please, just let me go," and then took several steps back and shot the victim in the head. The evidence allowed the jury to conclude that the State had rebutted the castle doctrine defense's presumption of defendant's reasonable fear of imminent death or serious bodily harm, and it was also sufficient to allow the conclusion that defendant acted with premeditation and deliberation.

3. Homicide—jury instructions—castle doctrine—language mirroring the statute

The trial court's jury instructions on the castle doctrine in defendant's prosecution for first-degree murder were not erroneous where they accurately stated the law, including the rebuttable presumption that defendant had a reasonable fear of imminent death or serious bodily harm to herself or another, using language that mirrored the statute.

Appeal by defendant from judgment entered 24 May 2019 by Judge Lisa C. Bell in Caldwell County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for defendant.

DIETZ, Judge.

¶ 1 Defendant Nancy Austin appeals her conviction for first degree murder after she shot and killed Dylan Short in her driveway.

¶ 2 Just before the shooting, Short drove his car into Austin's driveway knowing that he was not welcome there and refused to leave. Short then shoved Austin's adult daughter, in view of Austin, and a fight broke out. After Austin pulled out a gun and demanded that Short leave her property, Short reached for the gun and, at some point, a gunshot went off. After further fighting, a bystander saw Austin standing over Short, who lay on the ground in the driveway pleading "Please, please, just let me go. Let me go." Austin then stepped several feet back and shot Short in the head, killing him.

¶ 3 The State charged Austin with murder, and Austin asserted the castle doctrine defense, which is codified in North Carolina General Statute § 14-51.2. The trial court declined to resolve the defense in a pre-trial hearing and also denied Austin's motion to dismiss at trial, concluding that there were fact issues to be resolved by a jury.

¶ 4 As explained below, the trial court properly declined to resolve the castle doctrine defense before trial. Where, as here, there are fact disputes concerning the castle doctrine's applicability, those fact questions must be resolved by a jury. The trial court also properly denied the motion to dismiss because the State presented sufficient evidence to rebut the castle doctrine's presumption in favor of the lawful occupant of a home, thus creating a fact issue concerning the doctrine's applicability. Finally, the trial court's jury instructions, viewed as a whole, properly instructed the jury on the elements of the castle doctrine. We therefore reject Austin's arguments and find no error in the trial court's judgment.

Facts and Procedural History

¶ 5 In 2013, Defendant Nancy Austin lived in a home with her daughter, Sarah, and Sarah's child. Dylan Short is the father of Sarah's child. Short was once in a relationship with Sarah, but the two later broke up.

¶ 6 After a violent incident between Short and Sarah at Austin's home in the summer of 2012, Austin told Short he was not welcome on the

property. Sarah resumed a relationship with Short in November 2013. In December 2013, Austin and Short exchanged Facebook messages in which Austin disapproved of Short's relationship with her daughter. Austin also accused Short of attempting to run her off the road, which he acknowledged.

¶ 7 On 26 December 2013, Short spent the day with Sarah and then followed her home without her permission. Short had not been to the house in over a year. Austin was outside in the driveway, near a "no trespassing" sign, when Short arrived. Sarah, who had already arrived, got out of her car and took her child inside.

¶ 8 Short yelled at Sarah to stop and to talk to him. Austin told Short to leave. Sarah also told Short to leave, and Short then pushed her. Short was unarmed at the time. At this point, Austin took out a gun, pointed it at Short, told her daughter to go inside, and told Short to leave. Short refused to leave, telling Austin he did not have to leave because his child was inside the home.

¶ 9 Austin testified that she looked to see if her daughter had gone inside and, when she turned back, Short had "jumped" on her and reached for the gun. As Sarah was walking inside, she heard a gunshot. When she turned back around, Short and Austin were entangled, and Short was reaching around Austin's back toward the gun. Sarah ran toward them and pushed Short. Sarah fell to the ground with Short, struggled with him, then moved on top of him and put her hands around his neck. Sarah got up again to go back into the house and, as she walked away, heard a second gunshot. She turned around and saw that Austin, who was standing up at this time, had shot Short, who was on the ground. Austin told Sarah to call 911, which she did.

¶ 10 In statements to police officers that evening, Austin explained that she had previously told Short not to come on her property, that when he arrived, she told him to leave, and that Short refused to leave. She also told the officers about the struggle in the driveway and that Short had knocked her to the ground and grabbed for her gun. Lastly, she told the officers that Short was on the ground and within three feet of her when she shot him.

¶ 11 The State charged Austin with the first degree murder of Short. The case went to trial. At trial, Billy Herald, who was working on a nearby property about twenty-five to forty yards away from Austin's home, testified that he had witnessed some of the incident. Herald testified that he saw Sarah drive into Austin's driveway at a fairly high speed and then saw Short pull up behind her, yelling at her to stop. Herald stopped watch-

ing until he heard Short shout, "she's got a loaded gun," a few minutes later. He looked back and saw Short on his left knee with his hand up, and Austin pointing a gun at him. He stopped watching again and then, shortly after, he heard a gunshot. He looked back and saw Short behind Austin and Austin's daughter jumping on top of Short, then Short falling to the ground. Herald testified that he then saw Austin stand over Short, take two steps back, and then shoot Short at a distance of five to six feet away. Before Austin shot Short, Herald heard him say, "Please, please, just let me go. Let me go."

¶ 12 Dr. Patrick Lantz, who performed the autopsy, testified that Short died from a single gunshot wound to the face. Lantz stated that he observed stippling on Short's face, indicating that the shooting occurred at an intermediate range. Finally, Lantz testified that he would not expect stippling of this nature in a shooting with a range farther than three feet, but that it would depend on the ammunition used.

¶ 13 On 24 May 2019, the jury found Austin guilty of first degree murder and the court sentenced her to life without parole. Austin gave notice of appeal in open court.

Analysis

¶ 14 Every issue Austin asserts on appeal concerns some aspect of a self-defense provision in our General Statutes commonly called the "castle doctrine." *See* N.C. Gen. Stat. § 14-51.2.

¶ 15 "The 'castle doctrine' is derived from the principle that one's home is one's castle and is based on the theory that if a person is bound to become a fugitive from her own home, there would be no refuge for her anywhere in the world." *State v. Cook*, 254 N.C. App. 150, 157, 802 S.E.2d 575, 579 (2017) (Stroud, J. dissenting). The castle doctrine is a form of self-defense, but it is broader than the traditional self-defense doctrine because, when the statutory criteria are satisfied, the defendant no longer has the burden to prove key elements of the traditional self-defense doctrine. N.C. Gen. Stat. § 14-51.2(b). With this overview in mind, we turn to Austin's specific arguments on appeal.

I. Pre-trial determination of castle doctrine defense

¶ 16 **[1]** Austin first argues that the trial court erred by refusing to adjudicate her castle doctrine defense in a pre-trial hearing. Austin contends that, when a criminal defendant asserts the castle doctrine defense and moves to dismiss, the defendant has "the right to have a judge, rather than a jury, evaluate the evidence to determine whether she was immune under the statute."

¶ 17 Austin's argument turns on the specific language in the operative portion of the castle doctrine statute, which provides that a person satisfying the castle doctrine criteria "is immune from civil or criminal liability." N.C. Gen. Stat. § 14-51.2(e). Austin argues that the use of the word "immunity" means that this is a question that must be resolved by the judge, not the jury.

¶ 18 The flaw in this argument is that the word "immunity" has different legal meanings depending on the context and, here, the context indicates that this is not a traditional immunity from prosecution that must be resolved by the court before trial. A traditional immunity is "not merely an affirmative defense to claims; it is a complete immunity from being sued in court." *Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018). In other words, it creates not merely an assurance that no judgment can be entered against the person, but a right not to be forced into court to defend oneself. *Id.*

¶ 19 In the criminal context, the General Assembly signals a grant of this type of immunity by referring to it as "immunity from prosecution." So, for example, the statute requiring trial courts to resolve an immunity issue pre-trial applies when the defendant "has been granted immunity by law from prosecution." N.C. Gen. Stat. § 15A-954(a)(9). This type of immunity often arises when the government seeks to compel a person to testify who might otherwise assert the right against self-incrimination. *See generally* N.C. Gen. Stat. § 15A-1051 *et seq.*

¶ 20 Our General Statutes use the phrase "immunity from prosecution" repeatedly when describing this type of immunity in the criminal context. *See, e.g.*, N.C. Gen. Stat. § 14-205.1 (granting "immunity from prosecution" to minors involved in soliciting prostitution); N.C. Gen. Stat. § 75-11 (granting "full immunity from criminal prosecution and criminal punishment" to persons compelled to testify against a corporation in certain consumer cases); N.C. Gen. Stat. § 90-96.2 (granting "limited immunity from prosecution" in the context of reporting drug overdoses); N.C. Gen. Stat. § 90-113.27 (granting "immunity from prosecution" to certain participants in needle exchange programs).

¶ 21 Here, by contrast, the castle doctrine provides immunity from "criminal liability." In this context, the immunity is from a conviction and judgment, not the prosecution itself. This conclusion is further supported by the distinction between traditional immunities from prosecution, which typically involve little or no fact determination, and the castle doctrine defense, which, as explained below, can involve deeply fact-intensive questions. Accordingly, we reject Austin's argument that the castle doctrine statute granted her "the right to have a judge, rather than a jury,

evaluate the evidence to determine whether she was immune under the statute." Where, as here, the trial court determined that there were fact questions concerning the applicability of the castle doctrine defense, the trial court properly permitted the case to proceed to trial so that a jury can resolve those disputed facts.

II. Motion to dismiss

¶ 22 **[2]** Austin next argues that the trial court erred by denying her motion to dismiss for insufficiency of the evidence, based on the castle doctrine and a lack of premeditation and deliberation.

¶ 23 "This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). When a criminal defendant moves to dismiss, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65–66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 24 The castle doctrine functions by creating a presumption of reasonable fear of imminent death or serious bodily harm in favor of a lawful occupant of a home, which in turn justifies the occupant's use of deadly force. N.C. Gen. Stat. § 14-51.2. Specifically, the statute provides that the "lawful occupant of a home" is "presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself when using defensive force that is intended or likely to cause death or serious bodily harm to another" if both of the following apply: (1) "The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home," and (2) the person using "defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred." N.C. Gen. Stat. § 14-51.2(b)(1)–(2). The statute's definition of "home" includes the home's curtilage, such as the driveway at issue in this case. N.C. Gen. Stat. § 14-51.2(a)(1).

¶ 25 In effect, this provision eliminates the needs for lawful occupants of a home to show that they reasonably believed the use of deadly force

was necessary to prevent imminent death or serious bodily injury to themselves or others—a requirement of traditional self-defense. Instead, that belief is presumed when the statutory criteria are satisfied.

¶ 26 But, importantly, the statute has a separate section providing that this presumption "shall be rebuttable" and "does not apply" in certain circumstances set out in the statute:

> The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:
>
> (1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.
>
> (2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used.
>
> (3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.
>
> (4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.
>
> (5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or

> workplace and (ii) has exited the home, motor vehicle, or workplace.

N.C. Gen. Stat. § 14-51.2(c).

¶ 27 One fair reading of this provision is that the presumption is rebuttable *only* in the five enumerated circumstances listed in the statute. That is, the statute announces that the presumption can be overcome and then provides the only five specific factual scenarios in which that is so.

¶ 28 But this Court and our Supreme Court rejected that interpretation several years ago. In *State v. Cook*, law enforcement officers kicked the door to the defendant's bedroom while executing a search warrant and the defendant fired two shots at the door, narrowly missing one of the officers. The defendant asserted that he did not hear the officers announce their presence, that he thought an intruder was breaking into his house, that he was scared for his life, and that "he did not take aim at or otherwise have any specific intent to shoot the 'intruder' when he fired the shots." 254 N.C. App. 150, 152, 802 S.E.2d 575, 577 (2017), *aff'd*, 370 N.C. 506, 809 S.E.2d 566 (2018).

¶ 29 The dissenting judge in the Court of Appeals argued that the defendant was entitled to a castle doctrine instruction and the trial court erred by refusing to provide that instruction. *Id.* at 160, 802 S.E.2d at 581. The majority rejected that assertion, holding that "a defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C. Gen. Stat. § 14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of *imminent* harm." *Id.* at 156, 802 S.E.2d at 578. The Supreme Court affirmed the Court of Appeals in a *per curiam* decision. *State v. Cook*, 370 N.C. 506, 809 S.E.2d 566 (2018).

¶ 30 We are bound by *Cook* to hold that the castle doctrine's rebuttable presumption is not limited to the five scenarios listed in the statute. Instead, as explained in *Cook*, if the State presents substantial evidence from which a reasonable juror could conclude that a defendant did not have a reasonable fear of imminent death or serious bodily harm, the State can overcome the presumption and create a fact question for the jury. Thus, the castle doctrine, as interpreted in *Cook*, is effectively a burden-shifting provision, creating a presumption in favor of the defendant that can then be rebutted by the State.

¶ 31 Here, the State presented evidence that a bystander saw Austin standing over Short, who was lying unarmed in Austin's driveway and pleading "Please, please, just let me go. Let me go." The bystander saw

Austin take several steps back and then shoot Short in the head from three to six feet away. Taken in the light most favorable to the State, this is sufficient evidence from which the jury could determine that the State had rebutted the presumption and shown that Austin did not have a reasonable fear of imminent death or serious bodily harm when she shot Short in the head as he lay on the ground in her driveway.

¶ 32 Likewise, this evidence readily is sufficient to overcome a motion to dismiss based on lack of premeditation and deliberation. *See State v. Childress*, 367 N.C. 693, 695, 766 S.E.2d 328, 330 (2014). Accordingly, the trial court did not err by denying Austin's motion to dismiss.

III. Jury instruction on Section 14-51.2

¶ 33 **[3]** Finally, Austin argues that the court erred in its jury instruction on the castle doctrine and that this error prejudiced her.

¶ 34 This Court reviews challenges to the trial court's jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). We examine the instructions "as a whole" to determine if they present the law "fairly and clearly" to the jury. *State v. Chandler*, 342 N.C. 742, 751–52, 467 S.E.2d 636, 641 (1996). The purpose of a jury instruction "is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006). An error in jury instructions "is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Dilworth*, 274 N.C. App. 57, 61, 851 S.E.2d 406, 409 (2020).

¶ 35 Here, the court instructed the jury that "Nancy Austin was justified in using deadly force if . . . [she] reasonably believed that the degree of force she used was necessary to prevent an unlawful and forceful entry or to terminate Dylan Short's unlawful and forcible entry into her home." The court then instructed the jury on the castle doctrine using language that mirrors the statute:

> Under North Carolina law, a lawful occupant of her home does not have a duty to retreat from an intruder under these circumstances. Furthermore, a person who unlawfully and by force enters or attempts to enter a person's home is presumed to be doing so with the intent to commit an unlawful act involving force or violence.
>
> In addition, Nancy Austin is presumed to have held a reasonable fear of imminent death or serious bodily

> harm to herself or another when using defensive force that is intended or likely to cause death or serious bodily harm if both of the following apply:
>
> One, Dylan Short was in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered Nancy Austin's home; and Nancy Austin knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred. The presumption of Nancy Austin's reasonable fear of imminent death or serious bodily harm may be rebutted if you find beyond a reasonable doubt that Dylan Short had discontinued all efforts to unlawfully and forcefully enter the home and that Dylan Short had exited the home.

¶ 36 Every portion of this instruction is an accurate statement of the law. Moreover, this language was crafted with significant input from the parties during the charge conference.

¶ 37 During the conference, the trial court informed the parties that the court believed the castle doctrine presumption could be rebutted by evidence beyond the five enumerated criteria in the statute but explained that the court had not prepared any specific instructions on what additional evidence could be considered to rebut the presumption:

> One thing that was not discussed yesterday and has not been included in my draft [of the jury instructions] are the – we didn't discuss about the presumptions, the rebuttability of the presumption and what is required to rebut the presumption.
>
> I did bring up my interpretation of the statute being those five enumerated exceptions aren't the only – I don't think the statute says those are the limited reasons – or the limited ways in which the presumption can be rebutted, because of the way the statute's worded. But we didn't get to a discussion of that yesterday, so that is one part of your proposed instruction that's not included in the draft but wasn't intentionally excluded.

¶ 38 The State then explained that it believed the fifth enumerated criteria in the statute, N.C. Gen. Stat. § 14-51.2(c)(5), applied and that it was reluctant to propose additional instructions fleshing out other possible

evidence that could rebut the presumption, beyond the express statutory criteria, because "the risk that the State would run, Your Honor – and we talked about it, trying to figure out some nonstatutory. Because the State's reading and interpretation of that is that these are not just the only ways that this could be rebutted, but there are others. But since we don't have a lot of guidance with jury instructions – because they didn't even address the way that it could be rebutted, in the jury instruction. So we didn't want to go outside of what the law is providing in the statute, even though we do agree that there are additional ways that that could possibly be shown."

¶ 39 Ultimately, the court chose not to include any additional instructions on how the castle doctrine presumption could be rebutted and simply instructed the jury that the castle doctrine created a presumption. The court also included a statement, consistent with the statute, that the presumption automatically is rebutted if the State proved "beyond a reasonable doubt that Dylan Short had discontinued all efforts to unlawfully and forcefully enter the home and that Dylan Short had exited the home."

¶ 40 The crux of Austin's argument is that the State should be barred on appeal from arguing that the jury could consider any basis to rebut the presumption other than the specific statutory criteria in N.C. Gen. Stat. § 14-51.2(c)(5) because the State "expressly disavowed any reliance on any non-statutory basis to rebut the presumption" during the charge conference. We are not persuaded that the State's discussion with the trial court meant what Austin contends. But, in any event, the State, like any other party, cannot stipulate to what the law is. *State v. Hanton*, 175 N.C. App. 250, 253, 623 S.E.2d 600, 603 (2006). "In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented." *Smith*, 360 N.C. at 346, 626 S.E.2d at 261.

¶ 41 Importantly, the trial court did not instruct the jury that the statutory criteria in N.C. Gen. Stat. § 14-51.2(c)(5) was the only means of rebutting the presumption, which would not be an accurate statement of the law under *Cook*. Instead, the court instructed the jury, correctly, that Austin was "presumed to have held a reasonable fear of imminent death or serious bodily harm to herself or another." The court also instructed the jury that, if it found beyond a reasonable doubt that the specific statutory criteria in Section 14-51.2(c)(5) was satisfied, the presumption was rebutted as a matter of law. The court chose not to provide additional instructions to the jury concerning the particular circumstances, beyond the statutory criteria, that could overcome the presumption of reasonable fear of imminent death or serious bodily harm, instead leaving the jury to make that determination from the facts presented in the case.

¶ 42 When viewed as a whole, the trial court accurately instructed the jury on the castle doctrine defense and its rebuttable presumption using language that mirrored the statute. *Chandler*, 342 N.C. at 751–52, 467 S.E.2d at 641. We thus reject Austin's arguments with respect to the presumption instruction.

¶ 43 Austin also argues that the trial court erred by treating the castle doctrine as "distinct from self-defense" because "there is a unitary justification defense for the use of defensive force." But again, the trial court properly instructed the jury on the issue of self-defense and the castle doctrine separately, using language that mirrored that statute and the applicable law. Indeed, Austin's trial counsel told the trial court that Austin had "no problem" with the castle doctrine and self-defense instructions being separated, stating that they "should be seen as separate" because there are "different elements." We thus reject this argument as well.

¶ 44 Finally, Austin also asserts several other instructional arguments that were not preserved in the trial court. We review these issues for plain error. *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error is "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings." *Id.* Here, because the trial court's instructions as a whole properly instructed the jury on the law concerning self-defense and the statutory castle doctrine, we find no error with respect to these unpreserved instructional arguments and certainly no plain error.

Conclusion

¶ 45 We find no error in the trial court's judgment.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JAMES OPLETON BRADLEY, Defendant

No. COA20-566

Filed 21 September 2021

1. Evidence—murder trial—evidence of another missing person —Evidence Rule 404(b)—cases intertwined

In a prosecution for the first-degree murder of a woman whose body was found only after an investigation into the disappearance of a second woman who had connections to defendant, there was no error in the admission of evidence regarding the second woman because the investigations into each woman's disappearance were temporally and factually interrelated, there were numerous similarities between both women, and nearly every trial witness had some connection to both investigations. The evidence was properly admitted under Rule 404(b) to provide a complete development of the facts and to establish the weight and probative value of the State's evidence.

2. Evidence—murder trial—evidence of another missing person —Evidence Rule 403—probative value

In a prosecution for the first-degree murder of a woman whose body was found only after an investigation into the disappearance of a second woman who had connections to defendant, the trial court did not abuse its discretion by determining that, pursuant to Rule 403, evidence regarding the second woman was more probative than prejudicial because there was an obvious connection between the disappearances of both women, the investigations were closely intertwined, and the evidence demonstrated a common plan or scheme by defendant in targeting both women.

3. Criminal Law—prosecutor's closing arguments—victim's blood the source of DNA in defendant's car—reasonable inference

In a first-degree murder trial, the prosecutor's statements that DNA found in defendant's car came from the victim's blood were based on reasonable inferences from the evidence regarding blood and DNA that were recovered from the car, even if the evidence contained some discrepancies, which may have resulted from the use of chemical cleaners inside the car.

4. Criminal Law—prosecutor's closing statements—about second missing woman being dead—reasonable inference—proper purpose

In a trial for the first-degree murder of a woman, the prosecutor was properly allowed to state during closing that a second woman—whose disappearance led to an investigation that was closely intertwined with the victim's—was dead. A pretrial ruling that limited how the State could refer to the status of the second missing woman, whose body had not been found, was intended to prohibit any mention that defendant had been convicted of the second woman's death. Not only did evidence support a reasonable inference that the second missing woman was dead, but also the references to her at closing were for a proper purpose, including defendant's identity as the victim's killer, motive, and a common plan or scheme, which the trial court reinforced through a limiting instruction to the jury.

5. Criminal Law—prosecutor's closing statements—shifting burden to defendant—curative instruction

In a first-degree murder trial, defendant was not entitled to a mistrial after the prosecutor made statements during closing suggesting that defendant had the burden of proving his own innocence and that defendant was responsible for the inclusion of second-degree murder as a lesser-included offense on the verdict sheet. The trial court gave a curative instruction to the jury based on defendant's timely objection, and juries are presumed to follow a court's instructions.

6. Criminal Law—prosecutor's closing statements—presence of "evil"—race of defendant and victims visible on visual aid

In a first-degree murder trial, the prosecutor's statements during closing regarding the presence of "evil" were not so grossly improper as to require ex mero motu intervention by the trial court. Although defendant argued on appeal that the statements were particularly improper for occurring while the prosecutor displayed a posterboard to the jury with pictures of defendant, who is Black, and the victim and two other women who were involved with defendant, all of whom are white, the prosecutor made no references to race during closing, defendant had an opportunity to review the posterboard beforehand and had no objection to it being shown, and the jury had already observed the race of each person on the posterboard through evidence that was presented during trial.

7. Homicide—first-degree—premeditation and deliberation—sufficiency of evidence

In a first-degree murder trial, the State's evidence, though circumstantial, was sufficient to support a reasonable inference that defendant acted with premeditation and deliberation in killing the victim, given the brutal nature of the killing and the efforts undertaken to conceal the body and the crime. The victim died from four lacerations to her skull and internal epidural hemorrhaging from repeated blunt force trauma; she had numerous other wounds inflicted from either strangling or blunt force trauma; her body was found stripped, bound with duct tape, wrapped in black trash bags, and buried in a shallow grave; and chemical cleaners had been used to wash the inside of defendant's car.

Appeal by Defendant from judgment entered 4 April 2019 by Judge Douglas B. Sasser in New Hanover County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Elisha Tucker ("Ms. Tucker"), a resident of New Hanover County and girlfriend of Defendant James Opleton Bradley ("Defendant"), was reported missing by her mother in October 2013. Six months later, after law enforcement investigation of Ms. Tucker's case had gone cold, Shannon Rippy Van Newkirk ("Ms. Rippy"), Defendant's co-worker and another of his romantic interests, disappeared from her home in Wilmington. Defendant made numerous false statements about his possible involvement in Ms. Rippy's disappearance, leading police to search Defendant's jobsite for her body. There, police found a woman's nude corpse, bound in the fetal position by duct tape and wrapped in three trash bags, in a shallow grave beneath a tree stump. An autopsy later revealed the body belonged to Ms. Tucker. Ms. Rippy has never been found.[1]

1. Defendant was tried and convicted for the murder of Ms. Rippy in 2017, and this Court affirmed his conviction in 2018. *State v. Bradley*, 262 N.C. App. 373, 820 S.E.2d 129, 2018 WL 5796233 (2018) (unpublished), *petition for disc. rev. denied*, 372 N.C. 61, 822 S.E.2d 630 (2019).

¶ 2 Defendant appeals from a judgment entered following a jury verdict finding him guilty of first-degree murder in the death of Ms. Tucker. Defendant asserts prejudicial error in: (1) the admission of evidence concerning Ms. Rippy's disappearance; (2) allegedly improper closing arguments by the State; and (3) the denial of his motion to dismiss the first-degree murder charge for insufficient evidence of premeditation and deliberation. After careful review, we hold Defendant has failed to demonstrate prejudicial error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 3 The record below tends to show the following:

1. *Ms. Tucker's Disappearance*

¶ 4 On 21 October 2013, Rose Waldron ("Ms. Waldron") reported her 34-year-old daughter, Ms. Tucker, missing. Ms. Waldron had filed several missing persons reports previously, as her daughter lived a troubled life that included a heroin addiction, prostitution, homelessness, and a series of abusive relationships.

¶ 5 Wilmington Police Detective Carlos Lamberty ("Det. Lamberty") was named the lead investigator on Ms. Tucker's missing person case. Det. Lamberty patrolled several areas in Wilmington where Ms. Tucker was known to frequent, checked hotels and motels where she had previously stayed, released a department-wide call for information, and solicited tips through local media. All of these efforts failed to lead to the discovery of Ms. Tucker's whereabouts.

2. *The Rippy Disappearance and Investigation*

¶ 6 On 6 April 2014, Roberta Lewis ("Ms. Lewis") went to visit her daughter, Ms. Rippy, for her 54th birthday at her apartment in Wilmington. When Ms. Rippy did not come to the door, Ms. Lewis left and attempted to contact her daughter by phone over the next several hours. Ms. Lewis still had not heard from her daughter by the following morning, leading her to contact the Wilmington Police Department.

¶ 7 An officer forcibly entered the apartment in an effort to locate Ms. Rippy, but she was not inside. Nothing was missing from the apartment other than Ms. Rippy's purse. Her moped—her only source of transportation due to a revoked driver's license following several DWIs—was still parked outside. A written missing person report was filed shortly thereafter, and the matter was assigned to Det. Lamberty.

¶ 8 Wilmington police began their investigation into Ms. Rippy's disappearance by obtaining her cellular phone records, which revealed several

calls to Defendant on the night before her disappearance. Given these call records, and in light of the fact that Defendant and Ms. Rippy were co-workers at a company called Mott Landscaping, police decided to try and locate Defendant at his home for an interview. Officers conducted their first interview with Defendant on 9 April 2014. He expressed surprise at her disappearance but told police she was severely depressed and had recently expressed suicidal ideations to him. He also told police at a follow-up interview two days later that he had last seen Ms. Rippy on 3 April 2014.

¶ 9 Det. Lamberty, along with fellow Detective Kevin Tully ("Det. Tully"), were able to discern from Ms. Rippy's cellular location data that she had travelled south from a bar in downtown Wilmington on 5 April 2014, the night before her disappearance. Dets. Lamberty and Tully reviewed traffic camera images from that evening and found footage of a truck matching the description of Defendant's vehicle travelling southbound consistent with the cellular location data from Ms. Rippy's phone. Dets. Lamberty and Tully also located surveillance footage from a gas station for the night in question, which showed Defendant buying items inside the station while Ms. Rippy was seated inside his truck.

¶ 10 Having caught Defendant in a lie about his last contact with Ms. Rippy, police obtained and executed a search warrant on Defendant's home and truck. They also interviewed Defendant again. Defendant acknowledged that he had been lying and explained that he had actually given her a ride to a nearby business on the night before Ms. Rippy's disappearance. This statement, too, proved to be untrue, as neither Defendant, his truck, nor Ms. Rippy appeared on the surveillance footage obtained from the business identified by Defendant. Police continued to press Defendant on these inconsistencies, eventually leading him to say that he had last seen Ms. Rippy on 5 April 2014 when she jumped out of his vehicle near Greenfield Lake while on the phone with Steven Mott ("Mr. Mott"), the owner of Mott Landscaping. In a later statement, Defendant told police that he knew he was under suspicion "because of other reasons in his past[2] and that . . . he was the last person to see her alive."

¶ 11 Defendant also told detectives that he had taken at least one woman to a vacant lot owned by Mott Landscaping to engage in sexual activity. Police spent several weeks searching properties owned by and associated with Mott Landscaping for Ms. Rippy without success. Searches of

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2. Defendant was convicted for the first-degree murder of his 11-year-old stepdaughter in 1990. *See Bradley*, 2018 WL 5796233 at *2-3 (discussing the facts of Defendant's conviction for the murder of his stepdaughter).

the wooded areas around Defendant's home and Greenfield Lake were likewise unsuccessful.

3. The Recovery of Ms. Tucker's Body

¶ 12 Law enforcement continued to comb areas connected to Mott Landscaping and Defendant for Ms. Rippy's body over the ensuing weeks. On 29 April 2014, Wilmington police searched a farm owned by Mr. Mott in Pender County that Defendant was responsible for mowing and clearing. In the course of that search, officers found a naked body inside three black trash bags buried in a shallow grave. The body was found in the fetal position, its legs bound with duct tape. The State Crime Lab's analysis of the duct tape found on the body would later show it to be consistent with duct tape recovered from Defendant's apartment. Bleach and black trash bags were found in a nearby workshop. Though Det. Lamberty originally believed the body to be Ms. Rippy, an autopsy later revealed it to be Ms. Tucker.

4. Investigation Into Ms. Tucker's Murder

¶ 13 Already arrested for Ms. Rippy's disappearance, Defendant became a suspect in the Tucker investigation, resulting in additional searches of his home and effects for evidence pertinent to that case. Det. Lamberty requested a second search warrant for Defendant's truck and removed the driver's side floormat, carpet, and padding for DNA analysis. Several screening tests for blood returned positive results for portions of the floor padding and carpeting, and additional testing conclusively established the presence of human blood on those items. Samples from the padding and carpeting were also subjected to DNA analysis. Although the portions of the padding and floormat which conclusively tested positive for human blood failed to produce usable DNA samples, a section of the padding that tested inconclusively for blood tested uniquely positive for Ms. Tucker's DNA.

¶ 14 Police also discovered that a man named Peter Koke ("Mr. Koke"), who had previous dealings with Mr. Mott, Ms. Rippy, and Defendant, was propositioned by Ms. Tucker in July of 2013. When Mr. Koke declined her services, Ms. Tucker entered into a vehicle with Defendant. Mr. Koke had seen Ms. Tucker and Defendant together at other times and, on one occasion, witnessed a shouting match occur between Defendant and Ms. Rippy.

¶ 15 A detective with the Wilmington Police Department also met with a woman named Crystal Sitosky ("Ms. Sitosky") about Defendant's involve-

ment with Mses. Rippy and Tucker. Ms. Sitosky, who struggled with an opioid addiction, first met Defendant in July of 2012 when he began flirting with her outside her probation office. Ms. Sitosky saw Ms. Tucker in Defendant's car during this conversation, which ended when she and Defendant exchanged numbers. Ms. Sitosky later saw Defendant again when she called him after her car was immobilized with a flat tire. She continued to see Defendant periodically because he provided her with money for drugs. Defendant repeatedly expressed a desire to form a romantic relationship with Ms. Sitosky, but she rebuffed his advances each time. She also met with Defendant at both the Mott Landscaping lot where he had engaged with sexual activity with other women and the tract in Pender County where Ms. Tucker's body was found. Defendant gave Ms. Sitosky a phone at one point, which contained photographs of Ms. Tucker and her children. He also hinted to Ms. Sitosky that he was romantically interested in Ms. Rippy, but that they were not in a relationship.

5. The Trial

¶ 16 Defendant was indicted for the first-degree murder of Ms. Tucker on 5 December 2016 and was tried beginning 22 January 2019. Prior to trial, the State moved to admit 404(b) evidence of the investigation into Ms. Rippy's disappearance, as well as copies of stories Defendant had written about murderers titled "The Beast Within" and "Serial Killer." Following a *voir dire* hearing, the trial court entered a written order concluding that the circumstances of Ms. Rippy's disappearance were sufficiently similar and proximate to Ms. Tucker's death to be admissible under Rule 404(b) to show: (1) how police came to discover Ms. Tucker's body; (2) identity; (3) motive; and (4) plan, preparation, and *modus operandi* of Defendant. The trial court also ruled the probative value of that evidence was not outweighed by the danger of unfair prejudice, and that a limiting instruction would be given to the jury. The trial court further ruled that Defendant's short stories were more prejudicial than probative and therefore inadmissible under Rule 403.

¶ 17 At trial, 23 witnesses testified consistent with the above recitation of the facts. The State elicited additional testimony that police recovered a "Rug Doctor" carpet cleaner from Defendant's apartment, that Defendant had washed his truck several times since the disappearances of Mses. Tucker and Rippy, and that the inability to recover DNA from the conclusive human blood samples on the truck carpeting and padding may have been caused by the use of chemical cleaners. Defendant moved to dismiss the first-degree murder charge at the close of evidence. The trial court denied Defendant's motion.

6. Closing Arguments

¶ 18 Following the presentation of evidence, the prosecutor began his closing argument by opining about notions of good and evil, telling the jury that the love between parents and children is good, but "just as there is good and beauty in the world, there's also evil. And you don't need a law degree to know what [the killing of Ms. Tucker] is. This, ladies and gentlemen, is pure evil." He then asserted that while there were some differences between Mses. Rippy and Tucker, they both shared a common connection to Defendant. Defendant's counsel objected, arguing that the evidence of Ms. Rippy's disappearance was introduced for limited purposes, and that this argument was outside the scope of the trial court's prior ruling. The trial court overruled the objection, and the prosecutor continued, emphasizing that the limited purposes for which evidence around Ms. Rippy's disappearance was introduced was to show "the identity of the killer. It goes to motive, is there a plan, is there a modus operandi."

¶ 19 Later in closing, the prosecutor stated that "[y]ou know, sometimes evil wears a mask. Sometimes you have to dip below the surface. Sometimes evil is readily apparent, like when you're looking at the grotesque deformities on the body of [Ms. Waldron]'s baby [Ms. Tucker]. But, no, when you're looking at this defendant, you have to dip below the surface." At another point, the prosecutor asked the jury, "[i]s [Ms. Rippy] in the belly of an alligator in Greenfield Lake? . . . Is she in the belly of that pig out on Hoover Road? Is she in a hole somewhere? . . . How does it end? Her life is over. We just haven't found the body for a funeral yet." Defendant objected and moved to strike on the ground that any suggestion Ms. Rippy was dead was outside the scope of the earlier Rule 404(b) ruling by the trial court. Following a hearing outside the presence of the jury, the trial court overruled Defendant's objection and allowed the prosecutor to continue. The prosecutor resumed argument by saying "Shannon Rippy is gone too, but she's not forgotten. She's dead, but we'll never stop looking." Defendant objected again and was overruled.

¶ 20 The prosecutor's closing also referenced the DNA evidence tested by the State Crime Lab, contending that Ms. Tucker's blood was found in Defendant's truck. Defendant objected and moved to strike the argument but was overruled. Later, the prosecutor offered that "there's actually only five ways to defend any case," and began explaining why no defense could disprove Defendant's guilt. Defendant objected, moved for a mistrial, and moved to strike. The trial court sustained that objection and allowed the motion to strike, though it ultimately denied the motion for mistrial. It then gave a curative instruction that the Defendant is pre-

sumed innocent, the prosecutor's argument must be disregarded, and that Defendant has no burden in a criminal prosecution. The prosecutor resumed his argument by reiterating that "the only burden of proof in this case is on [the State]. . . . There's no burden on the defense attorneys, to be clear."

¶ 21 Finally, in a later segment of closing argument, the prosecutor argued to the jury that Defendant could not contend both that he was innocent or at most guilty of second-degree murder, as each position contradicted the other. Defendant objected and moved for a mistrial on the basis that the prosecutor's argument suggested Defendant was responsible for the lesser-included second-degree murder charge on the verdict sheet. The trial court reviewed the transcript of arguments, concluded that the State had not made such a suggestion, and denied the motion for mistrial. It did, however, sustain Defendant's objection and give a curative instruction that the verdict sheet was prepared by the court and not the parties.

7. Conviction and Appeal

¶ 22 After two-and-a-half hours of deliberations, the jury found Defendant guilty of first-degree murder. The trial then proceeded to the sentencing phase, and the prosecutor urged the jury to impose the death penalty based on Defendant's two prior first-degree murder convictions and the heinous, atrocious, or cruel nature of Ms. Tucker's murder. The jury was unable to reach a unanimous recommendation. The trial court then imposed a sentence of life without parole. Defendant gave notice of appeal in open court.

II. ANALYSIS

¶ 23 Defendant asserts the trial court prejudicially erred in: (1) admitting substantial evidence of the investigation into Ms. Rippy's disappearance under Rules 404(b) and 403 of the North Carolina Rules of Evidence; (2) failing to properly address allegedly improper closing arguments by the State; and (3) denying his motion to dismiss the first-degree murder charge for insufficient evidence of premeditation and deliberation. Defendant further asserts that all of the foregoing errors, if insufficiently prejudicial standing alone, were so cumulatively prejudicial as to warrant a new trial. We address each argument in turn.

1. Evidence of Ms. Rippy's Disappearance Under Rules 404(b) and 403

¶ 24 Defendant first contends that the evidence of Ms. Rippy's disappearance was: (1) not sufficiently similar to be admitted under Rule 404(b);

and (2) was so voluminous as to be more prejudicial than probative under Rule 403. Defendant requests plain error review in the event trial counsel failed to timely object to the challenged evidence.

a. Preservation

¶ 25 Our appellate rules provide that, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C. R. App. P 10(a)(1) (2021). Our Supreme Court has held that "[t]o be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citation and quotation marks omitted). It is therefore insufficient to rely on objections lodged pre-trial or outside the presence of the jury. *Id.* Nor is it adequate to lodge an objection after similar evidence has previously been admitted without protest, as "the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Hudson*, 331 N.C. 122, 151, 415 S.E.2d 732, 747–48 (1992) (citation and quotation marks omitted).

¶ 26 Here, Defendant conceded prior to trial that some evidence of Ms. Rippy's disappearance was admissible under Rule 404(b) to show how police came to discover Ms. Tucker's body. Several witnesses testified at trial about Ms. Rippy without any objection by Defendant under Rules 404(b) and 403. Defendant first objected based on Rule 404(b) during Det. Lamberty's testimony—well after other witnesses, including Ms. Rippy's mother and other police officers, had testified on the same subjects and to substantially identical facts. Because Defendant did not lodge a timely objection to the evidence of Ms. Rippy's disappearance that he now challenges on appeal, he has failed to preserve his Rule 404(b) and 403 arguments for prejudicial error review. *Ray*, 264 N.C. at 277, 697 S.E.2d at 322; *Hudson*, 331 N.C. at 151, 415 S.E.2d at 747–48.

¶ 27 Though Defendant failed to preserve his evidentiary arguments, his principal brief seeks plain error review of these issues. We review this portion of his appeal under that standard. *See* N.C. R. App. P. 10(a)(4) (2021) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").[3]

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3. In its brief, the State suggests that plain error review is entirely unavailable because "Defendant fails to show exceptional circumstances warranting plain error review." This statement inverts our application of the plain error standard; we will conduct plain error review when "specifically and distinctly contended" in a defendant's principal brief,

b. Plain Error Review

¶ 28 In order to demonstrate plain error, a defendant must "show that error occurred and the error 'had a probable impact on the jury's finding of guilty.' " *State v. Doisey*, 138 N.C. App. 620, 625, 532 S.E.2d 240, 244 (2000) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)). The error cannot be merely "obvious or apparent," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, and instead must be a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Id.* (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

c. Standards of Review for 404(b) and 403 Error

¶ 29 We apply two different standards of review to discern whether the trial court erred under Rules 404(b) and 403. As explained by our Supreme Court:

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

d. The Trial Court Did Not Err Under 404(b)

¶ 30 **[1]** Rule 404(b) is a "rule of *inclusion* of relevant evidence or other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990) (emphasis in original).

¶ 31 The rule itself expressly identifies several purposes for which evidence may be admitted, including to show "motive, opportunity, intent,

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N.C. R. App. P. 10(a)(4), but we will only hold plain error exists following that review upon a showing by the defendant that his is an "exceptional case." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (citation and quotation marks omitted). *Cf. State v. Patterson*, 269 N.C. App. 640, 645, 839 S.E.2d 68, 72 (2020) (dismissing a defendant's appeal under plain error review when he failed to argue "why the alleged error rises to plain error" and thus precluded "any meaningful review for plain error").

preparation, plan, . . . [or] identity." N.C. R. Evid. 404(b). Because this list "is not exclusive," *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852 (1995), evidence is admissible under the Rule to show, among other things, "the chain of circumstances or context of the charged crime . . . if the evidence of other crimes serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury." *Id.* at 284, 457 S.E.2d at 853.

¶ 32 Evidence offered for a proper purpose under Rule 404(b) must adhere to "the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). The crime charged and the evidence in question need not "rise to the level of the unique and bizarre," *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988), though there must be "some unusual facts present in both crimes that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citation and quotation marks omitted). In discerning whether the 404(b) evidence was properly admitted, we examine the similarities identified by the trial court rather than the differences between the crime charged and the proffered evidence. *State v. Wilson-Angeles*, 251 N.C. App. 886, 893, 795 S.E.2d 657, 664 (2017) (citations omitted).

¶ 33 The trial court entered a written order with findings of fact and conclusions of law in support of its decision to admit evidence of Ms. Rippy's disappearance under Rule 404(b). The trial court's findings of fact—none challenged on appeal—include the following:

> 16. . . . [B]oth Rippy and Tucker struggled with substance abuse issues.
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> 17. . . . [B]oth Rippy and Tucker had limited financial resources.
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> 18. . . . [B]oth Rippy and Tucker sometimes relied on the Defendant for transportation.
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> 19. . . . [B]oth Rippy and Tucker had criminal convictions connected to their substance abuse issues.
>
> 20. . . . Defendant was romantically interested in both Rippy and Tucker and worked to gain their trust and confidence through sustained relationships.

¶ 34 The trial court made additional findings demonstrating how the Rippy and Tucker investigations were temporally and factually interrelated: (1) the disappearances occurred nine months apart at most; (2)

police searched the Mott property where Ms. Tucker's body was found because Defendant and Ms. Rippy both worked for Mott Landscaping and Defendant was a suspect in Ms. Rippy's disappearance; (3) police initially believed the body found on the Mott property was Ms. Rippy; (4) Defendant was arrested for Ms. Rippy's murder on the day Ms. Tucker's body was found; and (5) Defendant told police that he had cleaned his car several times after Ms. Rippy had disappeared, and "the forensic evidence that placed Tucker's DNA inside the Defendant's Tahoe was barely visible and appears to have been degraded by some sort of chemical substance which would be consistent with efforts by the Defendant to clean the vehicle."

¶ 35 The trial court concluded based on its findings that evidence of Ms. Rippy's disappearance and the ensuing investigation was "essential [to] help provide a complete story to the jury," and also admissible to prove Defendant's identity, motive, intent, premeditation, deliberation, plan, preparation, and modus operandi. The trial court further concluded that the disappearances were "temporally proximate," and their circumstances were "similar in nature."

¶ 36 We hold that the trial court did not err in admitting the challenged evidence.

¶ 37 Defendant does not argue that the evidence was admitted for improper purposes; instead, he asserts that "the only information necessary to complete the story [of Ms. Tucker's death] was testimony about why detectives were on the property where Tucker's body was found," and the "superficial similarities" between Mses. Rippy and Tucker were inadequate to satisfy the Rule's similarity requirements.

¶ 38 Contrary to Defendant's contention, it was not possible to provide a natural and complete development of the facts without testimony concerning Ms. Rippy's disappearance and the police investigation that followed, leading to the discovery of Ms. Tucker's body. The disappearances and investigations are "inextricably intertwined," *White*, 340 N.C. at 286, 457 S.E.2d at 853.[4]

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4. We note that practically every witness had some connection to both investigations. The detectives who testified, including Det. Lamberty, handled both cases. Ms. Sitosky came forward to report her knowledge of the relationship between Defendant and Ms. Tucker because she saw a letter from Ms. Rippy's mother about her missing daughter in the local newspaper. Mr. Mott, originally a person of interest in the Rippy investigation, owned the property where Ms. Tucker's body was found but was also Ms. Rippy's employer and on-and-off-again boyfriend. Mr. Koke, who was propositioned by Ms. Tucker and saw her with Defendant, had prior dealings with Defendant and Ms. Rippy.

¶ 39 Simply telling the jury that detectives were searching for a missing person at the Mott property would not offer an adequate picture of Defendant's connection to that missing person. The evidence was necessary to establish the weight and probative value of the State's other evidence. For example, Mr. Mott—who was initially a suspect in Ms. Rippy's disappearance and who testified that Defendant was solely responsible for maintaining the tract of land where Ms. Tucker's body was found—told the jury that he never met Ms. Tucker and knew nothing about her murder. If jurors heard nothing about Ms. Rippy and Defendant's apparent involvement in her disappearance, they would rightly wonder whether Mr. Mott's testimony was truthful given: (1) Ms. Tucker's dismembered body was found on his land; and (2) his property was already being searched for a different missing woman. *Cf. State v. Washington*, 277 N.C. App. 576, 582, 2021-NCCOA-219, ¶ 21 (holding 404(b) evidence of a prior theft of a handgun used to commit a murder was admissible in the murder trial in part because it "explained why the legal gun owner was not considered a suspect and showed the thoroughness of law enforcement's investigation").

¶ 40 The investigation of Ms. Rippy's disappearance likewise bears upon Ms. Sitosky's credibility. She testified that she had seen Defendant and Ms. Tucker together on numerous occasions but only reported this information to police because she "had read in the newspaper about [Defendant] being arrested, [and] [Ms. Rippy]'s mom had wr[itten] a letter to the newspaper in response to, you know, her daughter missing, and it touched my heart. . . . I almost felt like I had to say something or do something. . . . I wanted to be helpful." Defendant's suspected involvement in the disappearance of Ms. Rippy demonstrated why Ms. Sitosky came forward to police. *See White*, 340 N.C. at 285–86, 457 S.E.2d at 853 (holding evidence was admissible under Rule 404(b) to show context in an intertwined case because it was necessary "to assess [the witness's] credibility or what weight to give his testimony").

¶ 41 The evidence uncovered in the investigation of Ms. Rippy's disappearance also cast the State's physical evidence in a more probative light. Police found human blood present on the carpeting of Defendant's truck, but the blood samples failed to produce identifiable DNA. The inverse was true of the padding beneath the carpet, with analysis verifying the presence of Ms. Tucker's DNA, but the lab was unable to confirm human blood as the source. Police also uncovered evidence that Defendant kept carpet cleaners in his home and bleach at the workshop on the Mott property where Ms. Tucker's body was found. While these two facts alone are not incriminating, it takes on probative value

alongside: (1) testimony that Defendant admitted to cleaning his vehicle *during the investigation of Ms. Rippy's disappearance*; and (2) expert testimony that chemical cleaners may have caused the deterioration of the samples found in Defendant's car. In short, the investigation into Ms. Rippy's disappearance is inseparable from Ms. Tucker's murder. The trial court did not err in allowing this evidence to "enhance the natural development of the facts" because it was "necessary to complete the story of the charged crime for the jury." *Id.* (citations omitted).

¶ 42 We also disagree with Defendant's characterization of the similarities between Mses. Rippy and Tucker as "superficial." He relies on our decision in *State v. Gray*, 210 N.C. App. 493, 512, 709 S.E.2d 477, 490 (2011), for the proposition that the similarities between the two women were so generic as to be inconsequential. But the similarities noted by the trial court in this case are more numerous and probative than those found inadequate in *Gray*. In that case, the alleged 404(b) victim and the alleged victim in the crime charged were of different sexes, in different states, and victims of different sex acts, with the only similarities being their youth and that the defendant had access to both through social relationships. 210 N.C. App. at 512–13, 709 S.E.2d at 490–91.

¶ 43 Here, by contrast, both victims: (1) were residents of the Wilmington area; (2) were of the same sex; (3) disappeared within nine months of each other at most, prompting missing persons reports from their mothers; (4) had legal, financial, and substance abuse problems, facts particularly pertinent given Ms. Sitosky's testimony that Defendant supplied her with money under like circumstances; (5) relied on Defendant for transportation; (6) had "sustained relationships" with Defendant; and (7) were subjects of his sexual attention. The similarities noted by the trial court were sufficient to warrant admission of evidence about Ms. Rippy under Rule 404(b). *See State v. Hembree*, 368 N.C. 2, 12, 770 S.E.2d 77, 84–85 (2015) (holding evidence of uncharged murder was sufficiently similar under Rule 404(b) when the trial court found both female victims were murdered, white, prostitutes, drug users, located in the same county, and acquaintances and sexual partners of the defendant).

e. The Trial Court Did Not Err Under Rule 403

¶ 44 **[2]** Defendant argues the trial court abused its discretion in concluding the evidence of Ms. Rippy's disappearance was more probative than prejudicial under Rule 403, relying principally on *Hembree*. Because *Hembree* is distinguishable and the trial court appears to have carefully considered potential prejudice, we hold the Defendant has failed to show the trial court abused its discretion in this ruling.

¶ 45 In *Hembree*, the bodies of two murdered women were discovered independently in South Carolina; one was left half-naked in a culvert, while the other was found burned along a dirt road. 368 N.C. at 4, 770 S.E.2d at 80. The defendant—who at one point confessed to murdering both women in North Carolina before disposing of them across the border—was tried for the murder of the half-naked woman. *Id.* Prior to trial, the State moved to introduce evidence of the burned woman's murder under Rule 404(b). 368 N.C. at 6, 770 S.E.2d at 81. The trial court admitted that evidence under Rules 404(b) and 403, concluding it showed a common plan or scheme and was more probative than prejudicial. *Id.* Once trial commenced, however, the State focused primarily on the death of the burned woman, introducing at least sixteen graphic photographs of the burned body and testimony from a witness describing what the burned body felt like to touch. *Id.* at 6–7, 770 S.E.2d at 81–82. The State also introduced evidence of the cause of death for both women; while there was some evidence that the half-naked woman had died an accidental death by cocaine overdose, the State's evidence that the burned woman had died by strangulation was "more certain." *Id.* at 7, 770 S.E.2d at 82. In fact, on the whole, "there was more evidence presented concerning the [burned woman's] murder than there was for the murder" actually being tried. *Id.*, 770 S.E.2d at 81 (quotation marks omitted). Defendant was convicted of the half-naked woman's murder, sentenced to death, and appealed. *Id.* at 9, 770 S.E.2d at 83.

¶ 46 On appeal, our Supreme Court held that the trial court erred in admitting the evidence of the burned woman's death. *Id.* at 16, 770 S.E.2d at 87. The Court reached that result based for four reasons: (1) the central issue at trial was the victim's unclear cause of death, and the certainty provided by the evidence that the burned woman was strangled "likely weighed heavily in the jury's deliberations[;]" (2) the State introduced testimony from a witness who described what it felt like to touch the burned body alongside more than a dozen "stark and unsettling" photographs of the charred remains; (3) evidence of the burned body focused on the differences between the two deaths "rather than a similarity as anticipated under Rule 404(b)[;]" and (4) "the lack of an obvious connection between the offenses" rendered the 404(b) evidence less probative than in other cases. *Id.* at 14–16, 770 S.E.2d at 86–87. Thus, because the victim's "cause of death was uncertain, and the Rule 404(b) evidence was so emotionally charged," our Supreme Court held the trial court erred by admitting:

> an excessive amount of evidence about [the burned woman], particularly photographic evidence, when

> the probative value of the sum total of that evidence was substantially outweighed by the risks that it would confuse the issues before the jury, or lead the jury to convict based on evidence of a crime not actually before it.

Id. at 16, 770 S.E.2d at 87.

¶ 47 *Hembree* is distinguishable from this case. First, unlike in *Hembree*,[5] there is an obvious connection between the disappearances of Mses. Rippy and Tucker, as revealed by the two police investigations that became intertwined. Second, this case did not involve 404(b) evidence in the form of highly inflammatory and gruesome photographs of Ms. Rippy that ran the risk of inflaming the jury's passions; the only graphic images the jury saw were those of Ms. Tucker's dismembered body. Third, the evidence did not serve to highlight the differences between Mses. Rippy and Tucker. Instead, the evidence admitted demonstrated how Defendant targeted both women pursuant to a common plan or scheme. Lastly, there was substantial evidence beyond Ms. Rippy's disappearance introduced by the State, including the testimonies of Ms. Sitosky and Mr. Koke linking Defendant to Ms. Tucker, the discovery of Ms. Tucker's body at a location Defendant was responsible for clearing and maintaining, the presence of Ms. Tucker's DNA alongside human blood on the flooring of Defendant's car, and the recovery of duct tape from Defendant's home consistent with tape used to bind Ms. Tucker's body. Given these distinctions, *Hembree* is inapposite.

¶ 48 The trial court's deliberate and discretionary weighing of potential unfair prejudice against the evidence's probative value is also pertinent to our analysis. In its order, the trial court excluded evidence of Defendant's short stories about serial killers as more prejudicial than probative under Rule 403, "indicating [its] careful consideration of the evidence." *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161. The order further discloses that the trial court conducted this analysis as to the 404(b) evidence that was admitted, concluding "[t]hat the danger of unfair prejudice does not substantially outweigh the relevance of this

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5. We note that in *Hembree*, the Supreme Court surveyed instructive cases from other jurisdictions and found *Flowers v. State*, 773 So.2d 309 (Miss. 2000), in which evidence of three other murders was admitted in the trial of a fourth murder, most similar. It then quoted a lengthy excerpt from *Flowers*, including the following language: "It is the 'necessity' by the State to use the other evidence of three killings in order to tell a coherent story that is the key to its admissibility. *The case at bar is not one of those cases so interconnected that mention of the other three murders is necessary to tell the whole story*." *Hembree*, 368 N.C. at 15, 770 S.E.2d at 86 (quoting *Flowers*, 773 So.2d at 324) (emphasis added).

evidence to the disappearance of Rippy in connection with the current trial for Tucker's murder." And the trial court admitted 404(b) evidence with an appropriate limiting instruction. We cannot say that the trial court abused its discretion under Rule 403 given the factors above. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161 (holding no abuse of discretion in the admission of Rule 404(b) evidence under Rule 403 for these reasons).

2. Closing Arguments

¶ 49 Defendant next contends that the trial court erred at closing argument in: (1) allowing the prosecutor to argue Ms. Tucker's blood was found in Defendant's car over Defendant's objection; (2) allowing the prosecutor to rely on 404(b) evidence of Ms. Rippy's disappearance for purposes outside those for which it was admitted; (3) denying Defendant's mistrial motion when the prosecutor's argument impermissibly shifted the burden of proof of guilt to the defense; (4) denying Defendant's mistrial motion after the prosecutor suggested the presence of second-degree murder on the verdict sheet meant Defendant had invited such a conviction; and, (5) failing to intervene *ex mero motu* after the prosecutor argued his personal opinions to the jury. After review of the record under the mandated highly deferential standards of review, we hold that Defendant has failed to show prejudicial error individually or collectively.

a. Standards of Review

¶ 50 A trial court's ruling on defendant's objection to closing argument is reviewed for abuse of discretion. *State v. Lopez*, 363 N.C. 535, 538, 681 S.E.2d 272, 273 (2009) (citing *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002)). So, too, is a trial court's denial of a motion for mistrial. *State v. Williams*, 7 N.C. App. 51, 52, 171 S.E.2d 39 (1969). We will hold the trial court abused its discretion only when its ruling "could not have been the result of a reasoned decision." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (citation and quotation marks omitted). Application of this standard in the context of closing arguments requires us to "first determine[] if the remarks were improper. . . . Next, we determine if the remarks were of such magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* Prejudice is identified by "assess[ing] the likely impact of any improper argument in the context of the entire closing," *State v. Copley*, 374 N.C. 224, 230, 839 S.E.2d 726, 730 (2020) (citations omitted), and by "look[ing] to the evidence presented by the State to determine whether there is a reasonable possibility the jury would have acquitted defendant if the

prosecutor's remarks had been excluded." *Id.* at 231, 839 S.E.2d at 730 (citations omitted).

¶ 51 Closing arguments that fail to garner an objection when made are reviewed to determine whether the "remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. To show gross impropriety, a defendant must demonstrate that "the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994) (citations and quotation marks omitted). "[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996).

¶ 52 Both the trial court and the prosecutor enjoy significant leeway at closing argument. *See State v. Cummings*, 361 N.C. 438, 465, 648 S.E.2d 788, 804 (2007) ("[T]he trial court has broad discretion to control the scope of closing arguments." (citations omitted)); *State v. Flowers*, 347 N.C. 1, 36, 489 S.E.2d 391, 411 (1997) ("[P]rosecutors are given wide latitude in the scope of their argument." (citation omitted)). A prosecutor may therefore "argue to the jury the law, the facts in evidence and all reasonable inferences drawn therefrom," *Flowers*, 347 N.C. at 36–37, 489 S.E.2d at 412 (citation omitted), but is prohibited from "plac[ing] before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *Id.* at 36, 489 S.E.2d at 412 (citation and quotation marks omitted). In discerning whether the prosecutor's remarks were improper, "we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Thompson*, 359 N.C. 77, 110, 604 S.E.2d 850, 873 (2004) (citation and quotation marks omitted).

b. Statements About Ms. Tucker's Blood

¶ 53 **[3]** The prosecutor repeatedly argued during closing that Ms. Tucker's blood was present in Defendant's car, and Defendant objected to these statements numerous times. The trial court overruled these objections each time.

¶ 54 A prosecutor may argue any reasonable inferences from the evidence introduced at trial. *State v. Boyd*, 214 N.C. App. 294, 305–06, 714 S.E.2d 466, 475 (2011). Here, the State introduced expert testimony and

lab results showing the conclusive presence of human blood on sections of carpeting and padding of the driver's seat flooring in Defendant's car, though no DNA samples were recoverable from those sections. Other evidence produced opposite results, as Ms. Tucker's DNA was found on a section of the floor padding that returned inconclusive (but not negative) results for human blood. The State's experts testified that these discrepancies may well have been the result of chemical cleaners, and other evidence showed Defendant had: (1) cleaned his car several times after Ms. Tucker disappeared; and (2) had bleach in his workshop and carpet cleaners in his home. Finally, the section of flooring containing Ms. Tucker's DNA does not appear prone to incidental contact with other sources of DNA, as it was located beneath both a rubber floormat and a layer of carpeting below the driver's seat. All of this evidence leads to a reasonable inference that the DNA—found alongside sections testing positive for human blood—was sourced from Ms. Tucker's blood. For these reasons, we hold the trial court did not err in overruling Defendant's objections to this portion of closing argument.

c. Statements About Ms. Rippy's Death

¶ 55 **[4]** Defendant also argues that the trial court erred in allowing the prosecutor, over Defendant's objections, to argue that Ms. Rippy was dead during closing arguments. Defendant takes specific issue with the prosecutor's statements in light of the trial court's admonition, made during the pre-trial 404(b) motion hearing, that it "want[ed] to make sure that there's no intention of the State ever going in with any witness and to ever discussing the death of Ms. Rippy Van Newkirk. It would just be, again, as to her disappearance."

¶ 56 Despite Defendant's argument to the contrary, the trial court's evidentiary rulings did not preclude the State from arguing in closing that Ms. Rippy was deceased. The State introduced testimony, without objection, that the Wilmington Police Department changed the internal designation of Ms. Rippy's investigation from a missing persons case to murder. Later, when Defendant requested the written internal report reflecting this new designation be redacted once in evidence, the State made clear its intention to argue to the jury that Ms. Rippy was dead:

> [W]e're not saying that he's been convicted of that murder, which we all know in this room; but that's far different that saying that it's now termed a murder by WPD, which it is the second that he's arrested for it, which is the standard business practice of the WPD.

> . . . [W]e are not embracing the fact that Ms. [Rippy] might be in Tahiti right now. She's dead, and he did it. We're not saying he did it in front of this jury . . . . But we're not running from the fact that she's dead, and I intend to argue that she's dead in my closing argument.

The trial court then denied Defendant's motion, noting that the State had not sought to elicit any evidence of Defendant's conviction for Ms. Rippy's murder. Based on this evidentiary ruling made at trial,[6] and given the trial court permitted the State to argue Ms. Rippy was dead over Defendant's objection, it appears the trial court only limited evidence of Defendant's *conviction* for Ms. Rippy's murder and did not intend to bar evidence suggesting—or arguments asserting—that she was dead.

¶ 57 Again, a prosecutor may argue "all the facts in evidence as well as any reasonable inferences that may be drawn from those facts," *State v. Riley*, 137 N.C. App. 403, 413, 528 S.E.2d 590, 597 (2000), and it is reasonable to infer from the evidence presented that Ms. Rippy is deceased. The State introduced testimony that: (1) Defendant volunteered in a police interview that he "was the last person to see [Ms. Rippy] alive," suggesting he believed Ms. Rippy could be dead; (2) the Wilmington Police Department reclassified Ms. Rippy's case from a missing persons investigation to first-degree murder; and (3) no one had located Ms. Rippy or her body after five years of continuing criminal and volunteer investigations into her whereabouts.[7] Given this testimony, the trial court did not err in denying Defendant's objection to the prosecutor's argument that Ms. Rippy is dead based on a reasonable inference from the evidence presented.

¶ 58 Nor does it appear the prosecutor referenced the death of Ms. Rippy for an improper purpose. Instead, the prosecutor used that inference

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6. We note that pre-trial rulings on the admissibility of evidence are preliminary, and the trial court's final determination is made at the time evidence is introduced. *See State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) ("Rulings on these motions . . . are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial . . . ." (citation and quotation marks omitted)).

7. Although North Carolina law governing the estates of missing persons has abolished the common law presumption of death based on absence, N.C. Gen. Stat. § 28C-1 (2019), we note that the modern trend amongst jurisdictions is to recognize a presumption of death after five years. *See* Am. Jur. 2d Death § 399 (2021) (noting that the Uniform Probate Code provides for a presumption of death after five years' absence and is now "followed in several jurisdictions"). The State commenced closing arguments in this case ten days prior to the five-year anniversary of Ms. Rippy's disappearance.

to downplay Defendant's anticipated attempts "to say that there's a lot of differences between these women" and to emphasize an additional similarity between them to show "who's the identity of the killer, [Ms. Tucker's] killer. It goes to is there a motive, is there a plan, is there a modus operandi." Later, the prosecutor argued "I want to be very clear, I am not asking that you punish him for [Ms. Rippy's] case today. In fact, that is absolutely an impermissible use. Instead, what it does is it goes to modus operandi." The remaining mentions of Ms. Rippy's death likewise show the inference was drawn for the jury for these permissible purposes. Read in context, alongside the trial court's specific instruction to the jury that evidence of Ms. Rippy's disappearance could only be used for the limited permissible purposes outlined above, we hold that Defendant has failed to demonstrate any abuse of the trial court's wide discretion in overruling his objections to these statements by the prosecutor. *See, e.g., State v. Murillo*, 349 N.C. 573, 603–4, 509 S.E.2d 752, 770 (1998) (holding prosecutor's argument that the defendant—an expert marksman who was previously convicted for involuntary manslaughter in shooting of his first wife and was now on trial for first-degree murder in the shooting death of his fourth wife—likely did not accidentally shoot both wives was not improper when it was a reasonable inference from the evidence and was argued for a proper 404(b) purpose).

d. Prosecutor's Burden-Shifting and Verdict Sheet Comments

¶ 59 **[5]** Defendant next asserts that the trial court erred in denying his motion for a mistrial after it sustained Defendant's objections to comments from the prosecutor that suggested Defendant: (1) bore the burden of proving his own innocence; and (2) was responsible for the inclusion of second-degree murder as a lesser-included offense on the verdict sheet. Defendant's counsel immediately objected to the comments, the trial court sustained the objections after hearing arguments outside the presence of the jury, and the trial court gave curative instructions to the jury once closing statements resumed. Defendant asserts on appeal that the curative instructions were inadequate; our precedents, however, lead us to hold otherwise.

¶ 60 Our Supreme Court has held that "[w]here, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured." *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982) (citations omitted). We have applied this rule to hold that any prejudice in a prosecutor's closing argument was cured when the defendant timely objected, the court held a bench conference to resolve the objection, and the trial judge issued a cura-

tive instruction once proceedings resumed. *State v. Peterson*, 179 N.C. App. 437, 468–69, 634 S.E.2d 594, 617 (2006). Our Supreme Court has noted such curative instructions may serve to alleviate prejudice even when the record shows the instruction was both incomplete and somewhat untimely. *See State v. Barden*, 356 N.C. 316, 381–82, 572 S.E.2d 108, 149 (2002) (declining to hold a delayed, incomplete, and ambiguous instruction was ineffective "because a jury is presumed to follow a court's instructions" (citation omitted)). The curative instructions provided in this case fall within the holdings in *Woods*, *Barden*, and *Peterson*. The trial court did not err in denying Defendant's motions for mistrial under these circumstances.

e. Statements of Personal Opinion

¶ 61 **[6]** Defendant further argues that the trial court erred in not intervening *ex mero motu* to the comments by the prosecutor about "evil." Those statements, in the context of the prosecutor's larger argument, are as follows:

> The world is a beautiful place and there is good in it. . . . We know that there's good in the world because [our children] are born innocent and playful.
>
> . . . .
>
> But, you know, the job of a parent, of course, is to keep our children from harm. And just as there is good and beauty in the world, *there's also evil*. And you don't need a law degree to know what this is. *This, ladies and gentlemen, is pure evil.*
>
> I'm not going to show you the contents of inside that bag. You've seen it. Suffice it to say, it's heinous, it's brutal, it's a lonely way to die.
>
> . . . .
>
> The world is a beautiful place. . . . *You know, sometimes evil wears a mask.* Sometimes you have to dip below the surface. *Sometimes evil is readily apparent*, like when you're looking at *the grotesque deformities on the body of Rose's baby [Ms. Tucker]. But, no, when you're looking at this defendant, you have to dip below the surface.*

(Emphasis added). Defendant asserts that these comments were particularly improper because the prosecutor displayed a posterboard to

the jury with a picture of Defendant—who is Black—alongside images of Mses. Tucker, Sitosky, and Rippy—all of whom are white.

¶ 62 Presuming, *arguendo*, the prosecutor's statements were referring to Defendant—rather than the murder of Ms. Tucker—as evil, such derogatory comments do not rise to the level of gross impropriety requiring the trial court's intervention *ex mero motu*. *See State v. Larrimore*, 340 N.C. 119, 163, 456 S.E.2d 789, 812–13 (1995) (holding prosecutor's statements that the defendant was "*the ultimate*[,] . . . *the quintessential evil*" and "*one of the most dangerous men in this State*" were not grossly improper (emphasis in original)). The trial court gave Defendant an opportunity to review the posterboard before it was shown to the jury, and Defendant's counsel told the court that "we don't have any objection to—to what [the prosecutor] is going to introduce." Additionally, the jury was already well aware of the races of Defendant and Mses. Tucker, Sitosky, and Rippy without the use of the State's visual aid; Defendant was present in the courtroom for trial, Ms. Sitosky testified before the jury, and the State introduced photographs of Mses. Tucker and Rippy into evidence and published them to the jury. Finally, the prosecutor never drew attention to or referenced the races of Defendant or the three women in closing. While we are cognizant of racial bias, we do not see any gross impropriety in the prosecutor's conduct given that: (1) Defendant did not object to the prosecutor's comments about evil or the use of the posterboard; (2) neither the prosecutor nor the posterboard commented on race; (3) the posterboard did not implicate race beyond the inclusion of photographs of persons the jury had already observed over the several days of trial; and (4) Defendant points to no caselaw where gross impropriety has been found on this theory. As such, we decline to hold that the trial court erred in failing to intervene *ex mero motu*.

f. Cumulative Prejudice in Closing Argument

¶ 63 Defendant concludes his discussion of closing arguments by asserting that the cumulative effect of the alleged improper remarks is so prejudicial as to warrant a new trial. Having held that Defendant has not shown error in the trial court's actions during closing argument, we further hold that Defendant cannot show error through cumulative prejudice.

3. Motion to Dismiss

¶ 64 **[7]** Defendant also asserts that the trial court erred in denying his motion to dismiss the first-degree murder charge for insufficient evidence of premeditation and deliberation with specific intent to kill. We hold the trial court did not err based on the evidence when taken in the light most favorable to the State.

a. Standard of Review

¶ 65 We review the denial of a motion to dismiss for insufficiency of the evidence *de novo*. *State v. Phachoumphone*, 257 N.C. App. 848, 861, 810 S.E.2d 748, 756 (2018). Denial is proper when "there is substantial evidence (1) of each essential element of the offense charged . . . , and (2) of defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is defined as "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012). Further, "[a]ny contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted).

b. Evidence of Premeditation and Deliberation

¶ 66 Premeditation and deliberation are necessary elements of first-degree murder. N.C. Gen. Stat. § 14-17(a) (2019). Our Supreme Court has defined premeditation and deliberation as follows:

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing. Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.
>
> An unlawful killing is deliberate and premeditated if done as part of a fixed design to kill, notwithstanding the fact that the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant's ability to reason.

State v. Hunt, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) (citations omitted).

¶ 67 Circumstantial evidence showing premeditation and deliberation includes, but is not limited to, the following:

> (1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by the defendant, ill will or previous difficulty between the parties, and (4) evidence that the killing was done in a brutal manner.

State v. Bullard, 312 N.C. 129, 161, 322 S.E.2d 370, 388 (1984) (citation omitted). Other circumstantial evidence may include "the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled." *State v. DeGregory*, 285 N.C. 122, 129, 203 S.E.2d 794, 800 (1974) (citations omitted). Also pertinent is "any unseemly conduct towards the corpse of the person slain, or any indignity offered it by the slayer, as well as concealment of the body." *State v. Sokolowski*, 351 N.C. 137, 145, 552 S.E.2d 65, 70 (1999) (citation omitted).

¶ 68 Defendant argues that the State's circumstantial evidence in this case was insufficient to allow a reasonable inference that he acted with premeditation and deliberation in killing Ms. Tucker, contending that: (1) the killing was not particularly "brutal" as the term is used in the first-degree murder context; and (2) the Defendant's disposal and concealment of the body was more indicative of Defendant's mindset after the killing than before it.

¶ 69 Relevant caselaw on whether a killing was brutal and thus indicative of premeditation and deliberation does not support Defendant's position. For example, in *State v. Hager*, 320 N.C. 77, 83, 357 S.E.2d 615, 618 (1987), our Supreme Court held that a murder was completed in a brutal manner when the victim "died as a result of the defendant's vicious beating of him about the head with the butt of a rifle with such force as to cause an intracranial hemorrhage." The medical examiner in this case testified that Ms. Tucker died from four lacerations to her skull and internal epidural hemorrhaging from repeated blunt force trauma. Ms. Tucker also suffered even more grievous wounds, including: (1) hemorrhaging in her neck from strangulation or blunt force;[8] and

8. While the evidence was inconclusive as to whether the neck hemorrhage was caused by strangulation or blunt force trauma, we note that "[t]he jury may infer premeditation and deliberation from the circumstances of a killing, *including that death was by strangulation*." *State v. Richardson*, 328 N.C. 505, 513, 402 S.E.2d 401, 406 (1991) (citations omitted) (emphasis added). Thus, the injury to Ms. Tucker's neck suggests premeditation and deliberation, whether it was inflicted by strangulation or blows beyond those to her ribs and skull.

(2) four broken ribs caused by blunt force trauma inflicted at the time of death. While Defendant points to cases involving even more extreme attacks than those shown here to argue that this case did not include a brutal killing, the incidence of more barbaric murders does nothing to diminish the viciousness of Ms. Tucker's murder.

¶ 70 We are similarly unconvinced by Defendant's contention that the manner and method of the disposal of Ms. Tucker's body does not show premeditation. Our caselaw is replete with holdings that postmortem mistreatment and concealment of a body may support a reasonable inference of premeditation and deliberation. *See, e.g.*, *State v. Pridgen*, 313 N.C. 80, 94, 326 S.E.2d 618, 627 (1985) (holding evidence that "[t]he body was concealed at the side of a deserted dirt path" showed premeditation and deliberation); *State v. Rose*, 335 N.C. 301, 319, 439 S.E.2d 518, 527 (1994) (holding "evidence of an elaborate process of removing the body," including hiding and eventually burning the body, was "evidence from which a jury could infer premeditation and deliberation"), *abrogated on other grounds*, *State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001); *Sokolowski*, 351 N.C. at 149, 522 S.E.2d at 72 ("[T]his Court has held that unseemly conduct towards a victim's corpse and efforts to conceal the body are relevant as circumstantial evidence of premeditation and deliberation." (citing *Rose*, 335 N.C. at 318, 439 S.E.2d at 527); *State v. Parker*, 354 N.C. 268, 280–81, 553 S.E.2d 885, 895 (2001) (holding defendant's attempt to cover up the crime by mistreating and concealing the body in a car on a dirt road and otherwise disposing of physical evidence was indicative of premeditation and deliberation); *State v. Dawkins*, 162 N.C. App. 231, 240, 590 S.E.2d 324, 331 (2004) (holding "evidence of an elaborate process of concealing the body by wrapping it in a towel, blanket, and trash bag; weighing the body down with weights and anchors; transporting the body to [a lake]; and disposing of the laden body to sink after the victim had been killed" was "evidence from which the jury could permissibly infer premeditation and deliberation").

¶ 71 In this case, the State introduced substantial evidence of: (1) undignified treatment and concealment of Ms. Tucker's body; and (2) efforts to destroy evidence of the murder. Police located Ms. Tucker's body in a shallow grave beneath a tree stump in the back corner of a rural field. The body had been stripped naked, arranged in a fetal position, and was bound with duct tape. Ms. Tucker's corpse was wrapped in three black trash bags before being transported to the grave and buried. The State introduced additional evidence suggesting Defendant sought to conceal his handling of the body by using chemical cleaners to wash the interior

of his vehicle following Ms. Tucker's disappearance. We have no difficulty holding, based on our precedents, that the above conduct, coupled with the brutal nature of the killing, suffices to support a reasonable inference of premeditation and deliberation on the part of Defendant when viewed in the light most favorable to the State.

4. Cumulative Prejudice

¶ 72 In his final argument, Defendant asserts that all of the above errors, if insufficiently prejudicial standing alone, were so cumulatively prejudicial as to warrant a new trial. As discussed above, Defendant has failed to show any error by the trial court, and we hold that Defendant cannot show cumulative prejudice absent such error.

III. CONCLUSION

¶ 73 For the foregoing reasons, we hold Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
JALEN TIWAYNE BRAKE

No. COA20-476

Filed 21 September 2021

Rape—first-degree rape—second-degree sexual offense—convictions not mutually exclusive

The trial court did not err by accepting the jury's verdicts finding defendant guilty of both first-degree forcible rape and second-degree forcible sexual offense, even though the rape conviction required the jury to find defendant inflicted serious personal injury on the victim while the sexual offense conviction did not. Even if the verdicts had been inconsistent, they were still valid because defendant committed two separate acts, each of which supported one conviction, and therefore the convictions were not mutually exclusive (that is, guilt of one crime did not exclude guilt of the other), and because the State presented substantial evidence as to each element of each crime.

Appeal by defendant from judgments entered 2 October 2019 by Judge Marvin K. Blount III in Wilson County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for defendant-appellant.

TYSON, Judge.

¶ 1 Jalen Tiwayne Brake ("Defendant") appeals a jury's verdict finding him guilty of first-degree forcible rape and second-degree forcible sexual offense and claims the two convictions are inconsistent and contradictory. We find no error.

I. Background

¶ 2 "B.J." traveled to Wilson, North Carolina on 7 October 2017 to attend a trail ride (the parties agree to use of a pseudonym to protect the identity of the complainant). The trail ride included an event with tents, concessions, and dancing. B.J. attended the trail ride with her friends, Kristen Johnson, Tara Beaver, and Tara's daughter. B.J. admittedly consumed "a significant amount" of vodka during the three-hour drive enroute to the trail ride. The four women arrived in Wilson between 9:00 p.m. and 11:00 p.m. B.J. was intoxicated.

¶ 3 The four women went to the dance floor when they arrived. A disc jockey was playing music and some attendees were dancing. The four women met with Darius Tysor, a friend of both Tara and Kristen.

¶ 4 Defendant, who had recently turned sixteen, was attending the trail ride with his family. Defendant testified he had consumed four or five shots of corn liquor and four beers that evening. Defendant was present on the dance floor and testified B.J. was drunk, and "she was falling all up on me, grabbing on me . . . and she was just pushing her body up against me and everything."

¶ 5 After some time, Tara, Kristen, and Darius went to their car to get water, leaving B.J. on the dance floor with Defendant. B.J. testified she danced with Defendant and then "walked off with him," but she could not recall "why." Defendant and B.J. walked far enough away that they were not within eyesight of the dance floor.

¶ 6 B.J. testified Defendant became physically forceful with her. He got on top of her, kissed her, and "tr[ied] to do stuff." B.J. testified, "he kept being really forceful so I just remember thinking in my head, [B.J.], just relax, sit back and act like you're going to be okay so you can kind of catch him off guard and I kicked him."

¶ 7 B.J. told Defendant "no" and to "stop," and she kicked him and punched at him. Defendant stood up. B.J. thought the incident was over, so she started to stand up. When B.J. got onto her knees, Defendant hit her in the face and the back of her head.

¶ 8 B.J. testified, "I was on my knees and he was standing over me just like pummeling my head. I was crying. He kept telling me to shut the f**k up, bitch, don't, stop crying." B.J. continued, "I thought he was going to break my teeth out . . . I didn't know if he was going to hit me in just the wrong spot and it was going to kill me."

¶ 9 Defendant stopped hitting B.J., pulled his pants down and inserted his penis into her mouth. Defendant told B.J. if she bit him, he would "f**k**g kill" her. Defendant repeated this warning several times. B.J. testified, "at that point I just decided to stop fighting because I didn't want him to kill me . . . I've never experienced anything like it. And I was just terrified." She stated Defendant was not "all the way erected" when his penis was thrust into her mouth.

¶ 10 Defendant pushed B.J. onto the ground upon her back, he removed her pants, boots, and underwear and got on top of her. B.J. was not sure if Defendant fully penetrated her, but testified she could feel the pressure. Defendant then stood up, pulled his pants halfway up, pulled his belt around, and walked away towards the tent area.

¶ 11 B.J. arose from the ground. She put on her pants but left off her boots. She walked to the dance floor to find a law enforcement officer. B.J. found deputies and told them she had been assaulted. She was taken to the hospital in an ambulance.

¶ 12 B.J.'s injuries were photographed at the hospital. These photographs showed her face was swollen and bruised. The photographs also documented redness on the back of her head from being repeatedly hit, a scratch on her right arm, swelling of her left arm from blocking Defendant's blows, scratches on her back and thighs, and redness on her knees. While at the hospital, B.J. was administered a rape kit, samples were collected, and she was examined by a physician.

A. Darius Tysor's Testimony

¶ 13 Darius testified he went to the trail ride to meet with Tara and Kristen. Darius did not drink because he had planned to drive the four women home. Darius met the four women on the dance floor when they arrived. When Tara and Kristen went to the car to get water, Darius went with them. Darius noticed B.J. was dancing with Defendant as the group walked away from the dance floor. When the group returned to the dance floor, B.J. and Defendant were gone.

¶ 14 Darius and Kristen looked for B.J. around the campground. The next time they saw B.J., she was walking towards the deputies on the side of the dance floor. Darius testified B.J. looked like she had been beat up and was hysterical. Darius said B.J. was not wearing her boots.

¶ 15 Darius and Kristen looked for B.J.'s boots and found them lying beside a fence about 100 to 150 yards from the dance floor. After they found the boots, they began to look for Defendant.

B. Kristen Johnson's Testimony

¶ 16 Kristen Johnson testified she recalled seeing B.J. dance with Defendant. B.J. asked for water, so the group left B.J. on the dance floor and went to the car. When they returned, B.J. was no longer on the dance floor.

¶ 17 Kristen testified that she and Darius began looking for B.J. and Defendant. Kristen testified the next time she saw B.J. it was about 20-30 minutes from the last time she had seen her. Kristen testified she saw B.J. with some deputies, and Kristen "started freaking out because I could see her face so I went up to her and I said, who did this to you. I thought she had got (sic) jumped, her injuries were so bad." Kristen said B.J. was crying and replied, "He did it." When deputies asked if B.J. had been seen, or had danced with any other men that night, Kristen stated B.J. had not.

¶ 18 Kristen and Darius spoke with Defendant's uncle who took them to the tent where Defendant was located. Kristen observed Defendant was face down in the tent and he appeared to be "passed out." Defendant had dirt and grass on the back of his shirt. Defendant's pants were down around his knees.

C. Deputy Moore's Testimony

¶ 19 Wilson County Sheriff's Deputy Shonday Moore ("Deputy Moore") was working security at the trail ride on 7 October 2017. Deputy Moore

was standing near the dance floor with some other officers when he saw B.J. a little after midnight. Deputy Moore testified B.J. was staggering towards them and appeared to have been involved in an altercation. B.J. had swollen facial features and grass stains all over her clothes. B.J. reported she had been assaulted.

¶ 20 Deputy Moore noticed that B.J.'s pants were unzipped, and she was not wearing any shoes. B.J. had grass stains on her socks and clothes and had grass in her hair as well. Deputy Moore asked if "things went further," and B.J. said that she did not know if penetration had taken place, but she told Deputy Moore the subject had tried, but she was unsure of the extent of the assaults. B.J. described her attacker as a black male with short, dreadlock-like style hair.

¶ 21 Deputy Moore testified B.J. was "tore all to pieces," very upset, became hysterical and started to hyperventilate. The prosecutor asked Deputy Moore at trial, "did [B.J.] tell you whether or not she fought back or not?" Deputy Moore replied, "She did tell me that she did fight back. She said she was fighting back but it wasn't working."

D. Detective Jackson's Testimony

¶ 22 Wilson County Sheriff's Detective Julie Jackson ("Detective Jackson") was called to the hospital where B.J. was taken to investigate her assault. Detective Jackson arrived at the hospital shortly after 1:20 a.m. and interviewed B.J.

¶ 23 B.J. told Detective Jackson the "individual that she was on the dance floor with was the subject she walked away with and went to the woods with." B.J. told Detective Jackson about the altercation and the subject had "possibly tried to penetrate her but she was unsure if penetration was made."

¶ 24 Defendant was arrested and transported to the sheriff's department. Detective Jackson went to the sheriff's office and collected an oral DNA swab from Defendant.

E. DNA Evidence

¶ 25 A registered nurse collected various samples from B.J. for the rape kit while B.J. was at the hospital. One sample was a vaginal swab.

¶ 26 April Perry ("Perry"), a forensic scientist and body fluid analyst at the North Carolina State Crime Laboratory, testified at trial. Perry testified she examined the smear associated with the vaginal swabs under a microscope and identified sperm on the slide. Perry stated she forwarded the smear for DNA analysis. Perry noted that the sperm she had

observed on the smear were intact with the tails still attached, indicating they had been deposited into the vagina less than 12 to 24 hours prior.

¶ 27 Erin Wolfe ("Wolfe"), a forensic scientist at the North Carolina State Crime Laboratory, testified as an expert in DNA analysis. Wolfe was assigned to perform the DNA analysis for B.J.'s vaginal swabs and Defendant's known blood sample. Wolfe's analysis determined the major contributor profile of the DNA from the swab sample obtained from inside B.J.'s vagina at the hospital matched the Defendant's DNA profile.

F. Detective Rouse's Testimony

¶ 28 Wilson County Sheriff's Detective Michael Rouse ("Detective Rouse") interviewed Defendant around 1:00 a.m. on 8 October 2017. Detective Rouse asked Defendant if there was any reason Defendant's DNA would be anywhere on the victim. Defendant said no, and he denied having sexual intercourse with anyone that night.

G. Defendant's Testimony

¶ 29 Defendant testified he had danced with B.J. on the dance floor. He stopped dancing with her and walked away. Defendant claims B.J. returned and started dancing with him again. Defendant and his friends discussed how B.J. was pressing against him on the dance floor. Defendant testified he left the dance floor by himself and went to his tent.

¶ 30 Defendant further testified B.J. subsequently went into Defendant's tent with his friend, Stephon. Defendant claims he and B.J. had consensual sex. B.J. left the tent and walked off with Stephon. Defendant then went to sleep. Stephon did not testify at trial.

II. Procedural history

¶ 31 Defendant was indicted for one count of first-degree forcible rape under N.C. Gen. Stat. § 14-27.21, one count of first-degree forcible sexual offense under N.C. Gen. Stat. § 14-27.26, and one count of misdemeanor assault inflicting serious injury under N.C. Gen. Stat. § 14-33(c)(1). Prior to trial, the State dismissed the misdemeanor charge.

¶ 32 At trial, after the conclusion of the State's evidence, defense counsel moved to dismiss Defendant's charge of first-degree forcible rape. This motion was denied. Counsel renewed this motion at the conclusion of all evidence. This motion was also denied.

¶ 33 The jury returned verdicts and found Defendant guilty of first-degree forcible rape and second-degree forcible sexual offense. The trial judge sentenced Defendant to a term of active imprisonment of 240 to 348

months for the first-degree forcible rape conviction and 73 to 148 months imprisonment for the second-degree forcible sexual offense, with the sentences to run concurrently. Defendant appealed.

III. Jurisdiction

¶ 34 This appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1), 15A-1444(a) (2019).

IV. Issue

¶ 35 Whether the trial court erred by accepting the jury's verdicts finding Defendant guilty of first-degree rape and second-degree sexual offense when the former verdict requires the jury to find Defendant inflicted serious injury on the prosecuting witness and the latter verdict does not.

V. Standard of Review

¶ 36 Where a defendant asserts an issue of inconsistent verdicts, the standard of review is *de novo*. *State v. Blackmon*, 208 N.C. App. 397, 403, 702 S.E.2d 833, 837 (2010).

VI. Analysis

¶ 37 Defendant asserts the jury's verdicts finding him guilty of first-degree rape and second-degree sexual offense are inconsistent and contradictory. "[A] distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent and contradictory." *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010). "It is firmly established that when there is sufficient evidence to support a verdict, mere inconsistency will not invalidate the verdict." *Id.* (citation and internal quotation marks omitted). "[W]hen a verdict is inconsistent and contradictory, a defendant is entitled to relief." *Id.* (citation omitted).

¶ 38 Our Supreme Court has long held: "If two statutes are violated even by a single act and each offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the one statute." *State v. Birckhead*, 256 N.C. 494, 500, 124 S.E.2d 838, 843 (1962) (alterations, citations and internal quotation marks omitted).

A. Indictments and Jury Verdicts

¶ 39 Defendant was indicted for first-degree forcible rape under N.C. Gen. Stat. § 14-27.21 and for first-degree forcible sexual offense under N.C. Gen. Stat. § 14-27.26.

¶ 40 The elements of first-degree forcible rape require the jury to find the defendant: (1) engaged in vaginal intercourse with another, (2) by

force, (3) against the will of the other person, and (4) inflicted serious personal injury upon the victim. N.C. Gen. Stat. § 14-27.21(a) (2019). The elements of second-degree forcible rape involve the first three elements of first-degree rape, but not the fourth element of serious personal injury. N.C. Gen. Stat. § 14-27.22(a) (2019).

¶ 41 The elements of first-degree forcible sexual offense are: (1) engaged in a sexual act with another, (2) by force, (3) against the will of the other person, and (4) inflicted serious personal injury upon the victim. N.C. Gen. Stat. § 14-27.26(a) (2019). The elements of second-degree forcible sexual offense involve the first three elements of first-degree forcible sexual offense, but not the fourth element of serious personal injury. N.C. Gen. Stat. § 14-27.27(a) (2019).

¶ 42 Injuries to constitute "serious personal injury" have been held to include: "a bruised and swollen cheek, a cut lip, and two broken teeth." *State v. Jean*, 310 N.C. 157, 170, 311 S.E.2d 266, 273 (1984).

¶ 43 Defendant argues that based upon the jury instructions, if the jury determined that Defendant had inflicted serious injury on B.J., the jury should have rendered verdicts of guilty of first-degree forcible rape and first-degree forcible sexual offense.

¶ 44 Defendant minimizes B.J.'s physical injuries sustained as a result of Defendant's assaults. B.J.'s injuries were photographed and documented by medical professionals and testified to by several witnesses and law enforcement. Further, a conviction of second-degree forcible sexual offense does not require evidence and a finding of inflicting serious injury. *See* N.C. Gen. Stat. § 14-27.27(a). Defendant's argument has no merit.

B. Two Counts Supported by Two Separate Acts

¶ 45 B.J. testified to the violence of Defendant's attacks as she tried to stand up after Defendant tried to kiss her while laying on top of her upon the ground, "I remember like where he was hitting me I thought he was going to break my teeth out or something. I didn't know if he was going to hit me in just the wrong spot and it was going to kill me."

¶ 46 Defendant thrust his penis into B.J.'s mouth with threats of further violence to "kill" her, if she bit him. As B.J. testified, it was apparent to her at the beginning of the assault Defendant was unable to insert his penis because he did not have an erection. After Defendant removed his penis from B.J.'s mouth, he pushed her onto the ground, removed her jeans, boots and underwear, and attempted to thrust his penis into her vagina.

¶ 47 The jury could have determined Defendant inflicted these serious personal injuries on B.J. to overcome her resistance to being raped and that he had committed the second-degree sexual offense, by forcing his penis into her mouth. Sufficient evidence supports the jury's determination Defendant's infliction of personal injuries on B.J. were all done by Defendant in order to forcibly rape her.

¶ 48 Even if the verdicts are inconsistent, they are not contradictory verdicts barred by our Supreme Court's ruling in *Mumford*. 364 N.C. at 399, 699 S.E.2d at 915. *Mumford* declares that jury verdicts may be influenced by many factors. *Id.*

> [I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

Id. at 399, 699 S.E.2d at 915.

¶ 49 Our Supreme Court held, "[t]hat the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible . . . . verdicts cannot be upset by speculation or inquiry into such matters." *Id.* (citation omitted). "[I]f the inconsistent verdicts are determined to be merely inconsistent, rather than mutually exclusive, then the verdicts will stand so long as the State has presented substantial evidence as to each element of the charges." *Blackmon*, 208 N.C. App. at 403, 702 S.E.2d at 838 (citation omitted).

¶ 50 "Verdicts are mutually exclusive when a verdict purports to establish that the [defendant] is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other." *Mumford*, 364 N.C. at 400, 699 S.E.2d at 915 (citation and internal quotation marks omitted).

¶ 51 Here, the jury reached their conclusion on the first-degree forcible rape and rendered a verdict of guilty of second-degree sexual offense. The jury's verdict could also be a demonstration of "lenity" towards Defendant and, the verdict should not be disturbed. *Id.* at 399, 699 S.E.2d at 915.

¶ 52 These crimes are not mutually exclusive because guilt of one criminal act does not exclude guilt of the other. Sufficient evidence supports the guilty verdicts by the jury. Defendant has failed to show any prejudicial error and is not entitled to a new trial.

¶ 53 "If Defendant required greater specificity, he could have moved for a bill of particulars under N.C. Gen. Stat. § 15A-925 (2019) and/or for a special verdict sheet under N.C. Gen. Stat. § 15A-1340.16 (2019)." *State v. Flow*, 277 N.C. App. 289, 304, 2021-NCCOA-183 ¶ 70, 859 S.E.2d 224, 233 (2021).

VII. Conclusion

¶ 54 The evidence presented at trial supports each conviction under N.C. Gen. Stat. § 14-27.21 and a lesser-included offense under § 14-27.27. Defendant's actions, resulting in the two distinct charges, are not inconsistent and mutually exclusive. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
WILLIS R. CLAGON, DEFENDANT

No. COA20-618

Filed 21 September 2021

1. Crimes, Other—intimidating a witness—variance between indictment and evidence—not fatal

In an assault trial where defendant was also charged with intimidating a witness, there was no fatal variance between the indictment for the intimidation charge and the State's evidence where the variance did not affect an essential element of the offense and was therefore mere surplusage. Although the indictment alleged that defendant told a third person to tell a witness that defendant would have the witness deported if he testified about the assault, but there was no evidence that defendant told the third person to convey the message to the witness or that the witness received the message,

the gist of the offense involved obstruction of justice and did not require the witness to actually receive the intimidating message.

2. Criminal Law—jury instructions—intimidating a witness—"attempted to deter"

There was no error in the trial court's jury instruction—on the charge of intimidating a witness—that defendant "attempted to deter" a witness from testifying against defendant in an assault case, because that phrase was not a deviation from the pattern jury instructions and, even if it was, defendant failed to show it likely misled the jury in light of the entirety of the instructions.

3. Damages and Remedies—restitution—assault case—lack of supporting evidence

The trial court's order requiring defendant to pay restitution in the amount of $23,189.22 to the victim in a trial for assault with a deadly weapon inflicting serious injury was vacated for lack of any evidence to support that amount and the matter was remanded for rehearing.

Appeal by Defendant from judgments entered 19 November 2019 by Judge Walter H. Godwin, Jr., in Washington County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy Johnson, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant.

GRIFFIN, Judge.

¶ 1 Willis R. Clagon ("Defendant") appeals from two judgments entered upon a jury verdict for (1) assault with a deadly weapon inflicting serious injury and (2) intimidating a witness.[1] Defendant argues that (1) there was a fatal variance between the State's proof and its charge of intimidating a witness; (2) the trial court erred by using the phrase "attempted to deter" in its jury instruction for the charge of intimidating a witness; and (3) the trial court's restitution order was unsupported by the State's evidence. We discern no error in the first two issues. We vacate and remand on the issue of restitution.

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1. Defendant also filed a petition for writ of certiorari to appeal an order finding him in criminal contempt. We deny the petition.

I. Factual and Procedural Background

A. Indictment

¶ 2 On 8 April 2019, Defendant was indicted for (1) assault with a deadly weapon inflicting serious injury ("AWDWISI") and (2) intimidating a witness. The indictment for intimidating a witness stated, in pertinent part, that "[t]he intimidation consisted of [Defendant] telling Darryl Derstine to tell Nicholas Ramos that he would have Nicholas Ramos deported if he testified against [] Defendant and was for the purpose of keeping Nicholas Ramos from testifying against [Defendant]."

B. State's Evidence

¶ 3 Defendant was tried by jury in Washington County Superior Court from 18 to 19 November 2019. The State's evidence tended to show the following:

¶ 4 Larry Brooks and Defendant were employed at Crossties Plus as of 29 November 2018. That day, Mr. Brooks and Defendant had an "altercation." At first, they only exchanged words, but then Defendant pushed Mr. Brooks, and Mr. Brooks swung at Defendant in response, without hitting him. Defendant walked away, and Mr. Brooks went back to work. A few minutes later, Defendant returned with a machete, which he swung at Mr. Brooks multiple times. The machete blade hit Mr. Brooks' shoulder and left wrist.

¶ 5 Darryl Derstine drove Mr. Brooks to the hospital. Mr. Brooks spent about two hours at the hospital, and then approximately a day and a half at another hospital where he received surgery to repair his severed ligaments. He spent around two months in physical therapy after the incident. He had not regained full use of his left hand when the case was called for trial. Mr. Brooks did not testify as to the monetary amount of his medical expenses, and no evidence in the Record shows the amount.

¶ 6 Nicholas Ramos, another Crossties Plus employee, was working nearby during the alleged assault. Mr. Derstine testified that, "sometime within the next couple of months" after the incident, he had a phone conversation with Defendant concerning Mr. Ramos. Mr. Derstine testified that in the phone call, Defendant

> started talking about that he had told his lawyer . . . that Nick [Ramos] was illegal.
>
> . . .
>
> [Defendant] said he mentioned ICE, like immigration, and implied that they would -- might be coming

> around and then . . . he said, "I know Nick has a family here, and that's too bad." He said, "I have a family here too, and I'm going to look out for my interest first. I will not have him testify against me."
>
> [PROSECUTOR:] Did he . . . say anything else about having Nick deported?
>
> [MR. DERSTINE:] He never actually said, "I will have Nick deported." He contextualized the conversation in that context of immigration in that . . . Nick isn't supposed to be here in his mind, and then he said, "It's too bad about his family, but I have a family too. I'm going to look out for my interest first. I will not have him testify against me."

¶ 7 Similarly, a Crossties Plus employee, James Strite, testified that he "knew [that Defendant] said there is an employee here that is, quote, illegal, and I won't have him testifying against me."

¶ 8 Investigator Charles Arnold, who had responded to the call about the incident, testified that he

> had went [sic] back to . . . the sawmill on January 29th and spoke with Mr. Derstine in reference to [Defendant] calling up there several times from jail -- or calling after he was released from jail and saying that he knew – he knew Nick [Ramos] was here illegally and that it would be a shame if, you know, ICE was called and he was – you know I took it as be deported.
>
> I asked Mr. Derstine if . . . Nick would be willing to talk to me, and he said, "Nick is very scared of [Defendant]."
>
> . . .
>
> It wasn't for a while later that I received a message that Nick would talk.

¶ 9 During cross-examination, Investigator Arnold testified the following:

> [DEFENSE COUNSEL:] And [Nicholas Ramos's] cooperation in this case was not deterred in any way that you can tell.
>
> [INVESTIGATOR ARNOLD:] No, ma'am.

> [DEFENSE COUNSEL:] And to your knowledge [Defendant], once he turned himself in, never called ICE or any other deportation agency --
>
> [INVESTIGATOR ARNOLD:] No, ma'am.
>
> . . .
>
> [DEFENSE COUNSEL:] No letters were seized from [Defendant's] jail cell where he said ICE is going to be here, and to your knowledge no ICE agent is in this courtroom.
>
> [INVESTIGATOR ARNOLD:] No, ma'am.

¶ 10 Mr. Ramos testified that Mr. Derstine had not told him "about a phone call he had with [Defendant.]" Additionally, Mr. Ramos denied that he was, "for lack of a better word[,] . . . scared to come here today and have to testify[.]"

C. Jury Instructions

¶ 11 For the charge of intimidating a witness, the trial court proposed giving jury instructions of

> intimidating a witness and the paragraphs within that the defendant intimidated by attempting to deter any person who was summoned or who was acting as a witness in the defendant's case, intimidating means to make timid, fearful, or inspire or affect with fear or frighten and that the threat consisted of threatening to have authorities to deport the witness and then the concluding instructions.

The trial court gave the following jury instructions for the charge of intimidating a witness:

> Now the defendant has been charged with intimidating a witness. For you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt: First, that a person was acting as a witness in a -- in a court of this state; second, that the defendant attempted to deter any person who was acting as a witness in the defendant's case. Intimidating means to make timid or fearful, inspire or affect with fear or frighten; third, that the defendant acted

> intentionally; and, fourth, that the defendant did so by threatening to have the authorities deport the witness.
>
> So if you find from the evidence beyond a reasonable doubt that on or about the alleged date a person was acting as a witness in the defendant's case in a court of this state and that the defendant intentionally attempted to deter the witness by threatening to have the authorities deport the witness it would be your duty to return a verdict of guilty; however, if you do not so find or if you have a reasonable doubt to one or more of these things, it would be your duty to return a verdict of not guilty.

The parties did not object to the court's proposed jury instruction for the charge of intimidating a witness, either before or after the instructions were given.

¶ 12 During deliberations, the jury asked, "What are the criteria for finding an intimidating a witness verdict?" The trial court brought the jury back in the courtroom and repeated essentially the same instructions for the charge of intimidating a witness.

D. Motions to Dismiss

¶ 13 Defendant moved to dismiss both charges at the close of the State's evidence and at the close of all the evidence. The trial court denied Defendant's motions to dismiss.

E. Sentencing and Appeal

¶ 14 The jury found Defendant guilty of both charges. The trial court sentenced Defendant to 45-66 months for the AWDWISI conviction and 22-36 months for the intimidating a witness conviction. At the State's request, the trial court also awarded $23,189.22 in victim restitution. Defendant timely appealed.

II. Analysis

¶ 15 Defendant argues that (1) there was a fatal variance between the State's proof and its charge of intimidating a witness; (2) the trial court erred by using the phrase "attempted to deter" in its jury instruction for the charge of intimidating a witness; and (3) the trial court's restitution order was unsupported by the State's evidence. We disagree that the variance was fatal and that the jury instructions deviated from the agreed-upon pattern instructions. We agree, and the State concedes, that the trial court's restitution order was unsupported by evidence.

A. No Fatal Variance

¶ 16 **[1]** Defendant argues that there was a fatal variance between the State's proof and its charge of intimidating a witness. Although there was a variance between the evidence and the indictment, the variance was not fatal.

1. Preservation

¶ 17 Defendant's motion to dismiss preserved his variance argument for appellate review. Previously, this Court has held that "[t]o preserve the issue of a fatal variance for review, a defendant must state at trial that a fatal variance is the basis for the motion to dismiss." *State v. Redman*, 224 N.C. App. 363, 367-68, 736 S.E.2d 545, 549 (2012) (citing *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137, *appeal dismissed and disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010)). Defendant's motions to dismiss did not specifically articulate a fatal variance argument; the motions were based generally on alleged insufficiencies of evidence. However, our Supreme Court recently clarified that "merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (emphasis in original). "[A] variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009). In accordance with *Golder*, we hold that the issue was preserved. 374 N.C. at 249, 839 S.E.2d at 790.

2. Standard of Review

¶ 18 We review *de novo* the issue of a fatal variance. *State v. Cheeks*, 267 N.C. App. 579, 612, 833 S.E.2d 660, 681 (2019), *aff'd*, 377 N.C. 528, 858 S.E.2d 566 (2021).

3. Analysis

¶ 19 "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." *State v. Waddel*l, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). For a variance to require dismissal, "the defendant must show a fatal variance between the offense charged and the proof as to '[t]he gist of the offense.' This means that the defendant must show a variance regarding an essential element of the offense." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (quoting *Waddell*, 279 N.C. at 445, 183 S.E.2d at 646) (citing *State v. Williams*, 295 N.C. 655, 663, 249 S.E.2d 709, 715 (1978)). "The purpose for prohibiting a variance between allegations contained in an indictment and evidence established at trial

is to enable the defendant to prepare a defense against the crime with which the defendant is charged and to protect the defendant from another prosecution for the same incident." *State v. Taylor*, 203 N.C. App. 448, 455-56, 691 S.E.2d 755, 762 (2010) (citation omitted).

¶ 20 Here, there was a variance between the indictment and the State's evidence for the charge of intimidating a witness. The indictment stated that "[t]he intimidation consisted of [Defendant] telling Darryl Derstine to tell Nicholas Ramos that he would have Nicholas Ramos deported if he testified against the Defendant[.]" No evidence tended to show Defendant expressly told Darryl Derstine to convey the message to Nicholas Ramos. Evidence tended to show Nicholas Ramos did not actually receive the message, i.e., Nicholas Ramos testified that Darryl Derstine did not tell him "about a phone call he had with [Defendant.]"

¶ 21 However, the variance here was not fatal because it did not relate to the "the gist" of the offense. " 'The gist' of the offense of intimidating a witness is 'the obstruction of justice.' " *State v. Neely*, 4 N.C. App. 475, 476, 166 S.E.2d 878, 879 (1969). Whether a witness actually receives the threatening communication in question is "irrelevant" to the crime of intimidating a witness. *State v. Barnett*, 245 N.C. App. 101, 108, 784 S.E.2d 188, 193-94, *rev'd in part on other grounds*, 369 N.C. 298, 794 S.E.2d 306 (2016) (reasoning that the fact that the witness and her daughter did not receive the threatening letters was "irrelevant"). The indictment's reference to Defendant "telling Darryl Derstine to tell Nicholas Ramos" was mere surplusage, and the variance between that reference and the evidence does not merit reversal. *See Pickens*, 346 N.C. at 645-46, 488 S.E.2d at 172 (holding no fatal variance between "handgun" in evidence versus "shotgun" in indictment, because indictment's averment to a "shotgun" was "not necessary, making it mere surplusage in the indictment").

B. Jury Instruction

¶ 22 **[2]** Defendant argues that the trial court erred by using the phrase "attempted to deter", which he contends was a deviation from the pattern jury instructions, in its jury instruction for the charge of intimidating a witness. We disagree.

1. Preservation

¶ 23 Defendant again failed to object at trial to the jury instructions. However, an error in jury instructions is preserved for appellate review, even without objection, "when the trial court deviates from an agreed-upon pattern instruction." *State v. Lee*, 370 N.C. 671, 672-73, 811 S.E.2d 563, 564-65 (2018).

2. Standard of Review

¶ 24 "Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citing *State v. Ligon*, 332 N.C. 224, 241-242, 420 S.E.2d 136, 146-147 (1992); *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990)).

> This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . [I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citation omitted).

3. Analysis

¶ 25 The trial court's proposed jury instruction for the charge of intimidating a witness was essentially the same as the pattern instruction N.C.P.I.—Crim. 230.65. In pertinent part, N.C.P.I.—Crim. 230.65 provides the following:

> The defendant has been charged with [intimidating] [interfering] with a witness.
>
> For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt:
>
> . . .
>
> that the defendant [[intimidated] [attempted to intimidate] [interfered with] [attempted to interfere with] [deterred] [attempted to deter] [prevented] [attempted to prevent]] any person who was [summoned] [acting] as a witness in the defendant's case. Intimidate means to make timid or fearful; inspire or affect with fear; frighten.

N.C. Pattern Jury Instructions, N.C.P.I.—Crim. 230.65.

¶ 26 The trial court did not deviate from the proposed or pattern instruction. Defendant takes issue with the fact that the trial court used the pattern phrase "attempted to deter", which Defendant argues corresponds to a charge of "interfering with" rather than "intimidating" a witness. However, the trial court specified in its proposal that it would use the phrase "attempting to deter", and "attempted to deter" is one of the phrases provided in N.C.P.I.—Crim. 230.65. There was no deviation from the agreed-upon instruction.

¶ 27 Although Defendant argues that "intimidating" versus "interfering with" a witness are two different theories of liability with distinct elements, Defendant cites no case law that construes N.C. Gen. Stat. § 14-226 in this way. On the contrary, *State v. Neely*, 4 N.C. App. 475, 166 S.E.2d 878 (1969), which Defendant cites in support of his argument, considers "attempting to intimidate" a witness, "attempting to . . . threaten" a witness, and "attempting to . . . prevent [a witness from] testifying" as undistinguished parts of a single offense under N.C. Gen. Stat. § 14-226. 4 N.C. App. at 476, 166 S.E.2d at 879 (stating that "the defendant was attempting to intimidate and threaten this witness and to prevent him from testifying"). Similarly, *State v. Blevins*, 223 N.C. App. 521, 735 S.E.2d 451 (2012), an unpublished opinion which Defendant likewise cites in support of his argument, states that

> The *crime of intimidating a witness* exists when "any person . . . threat[ens], menaces or in any other manner intimidate[s] or attempt[s] to intimidate any person who is summoned or acting as a witness in any of the courts of this State, *or prevent[s] or deter[s], or attempt[s] to prevent or deter* any person . . . acting as such witness from attendance upon such court[.]"

Id. at ___, 735 S.E.2d at ___ (emphasis added) (quoting N.C. Gen. Stat. § 14-226 (2011)).

¶ 28 Presuming, *arguendo*, the trial court's use of the phrase "attempted to deter" was an erroneous deviation, Defendant has failed to show that this was likely, in light of the entire charge, to mislead the jury. The jury was informed that "the defendant has been charged with intimidating a witness[,]" and was told that "[i]ntimidating means to make timid or fearful, inspire or affect with fear or frighten[.]" In light of the entire charge, we perceive no reasonable likelihood that the use of the phrase "attempted to deter" (rather than the word "intimidated" or the phrase "attempted to intimidate") misled the jury. It was already informed

that the charge involved intimidation and was provided a definition of "intimidating".

C. The Restitution Order

¶ 29 **[3]** Defendant argues that the State did not present any evidence to support the amount of the trial court's restitution order. We agree.

1. Preservation

¶ 30 Although Defendant did not object to the restitution award at sentencing, an invalid or incorrect sentence may be appealed as a matter of law. *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (applying N.C. Gen § 15A-1446(d)(18)).

2. Standard of Review

¶ 31 We review *de novo* whether competent evidence supports the trial court's restitution award. *State v. Lucas*, 234 N.C. App. 247, 258, 758 S.E.2d 672, 680 (2014).

3. Analysis

¶ 32 The trial court ordered Defendant to pay restitution in the amount of $23,189.22 to the victim. However, the State failed to present in court any documentation or testimony supporting or detailing the amount of the victim's medical expenses. The State concedes this point on appeal.

¶ 33 When a restitution award lacks a sufficient evidentiary basis, "the proper remedy is to vacate the trial court's restitution order and remand for rehearing on the issue." *State v. Thomas*, 259 N.C. App. 198, 211, 814 S.E.2d 835, 843 (2018) (citation and quotation marks omitted), *disc. review denied*, 371 N.C. 475, 818 S.E.2d 288 (2018). We vacate the restitution order and remand for a rehearing on the issue.

III. Conclusion

¶ 34 For the foregoing reasons, we discern no error in the denial of the motion to dismiss and in the jury instruction. We vacate the trial court's restitution order and remand for a rehearing on that issue alone.

NO ERROR IN PART; VACATED IN PART, AND REMANDED.

Judges TYSON and CARPENTER concur.

STATE v. FRANCE

[279 N.C. App. 436, 2021-NCCOA-498]

STATE OF NORTH CAROLINA
v.
WILLIAM ANTHONY FRANCE, Defendant

No. COA20-487

Filed 21 September 2021

1. Search and Seizure—traffic stop—duration—officer safety measures—reasonable suspicion of other crimes

Defendant's motion to suppress drugs and paraphernalia was properly denied where, although his vehicle was initially stopped for a broken taillight, the stop was not unconstitutionally prolonged because the officers diligently pursued investigation into the reason for the stop, conducted ordinary inquiries including license and warrant checks, and took necessary safety precautions after one passenger who was found to have active warrants stated he had a gun on his person. Moreover, there was reasonable suspicion of criminal activity where one officer had observed the same vehicle earlier in the night involved with a hand-to-hand transaction, which justified a canine sniff for narcotics. Challenged findings were either irrelevant to the ultimate question of whether the stop was unreasonably prolonged or supported by evidence.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

The trial court's order requiring defendant to pay attorney fees after he pleaded guilty to multiple drug offenses was vacated and the matter remanded for further proceedings where the court did not personally ask defendant if he wanted to be heard on the issue of attorney fees.

Appeal by Defendant from judgments entered 8 October 2019 by Judge William A. Wood II in Forsyth County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

Ellis & Winters LLP, by Michelle A. Liguori, for Defendant-Appellant.

GRIFFIN, Judge.

¶ 1 Defendant William Anthony France appeals from judgments entered upon his pleas of guilty to various drug-related offenses, driving while license revoked, and attaining the status of a habitual felon. Defendant argues that the trial court erred by (1) denying his motion to suppress evidence; and (2) entering a civil judgment ordering Defendant to pay attorney's fees without providing Defendant notice and an opportunity to be heard. After careful review, we conclude that the trial court did not err in denying Defendant's motion to suppress evidence. We vacate the civil judgment as to attorney's fees and remand for further proceedings.

I. Factual and Procedural Background

¶ 2 On the night of 15 February 2017, Detective L.A. Veal and Officer LaValley of the Winston-Salem Police Department were patrolling the streets of Winston-Salem in an unmarked vehicle as part of the "street crimes unit" when they noticed a vehicle with "a white light emitting from the taillight[.]" Detective Veal turned on her vehicle's emergency lights and initiated a traffic stop because of the broken taillight.

¶ 3 After stopping the vehicle, Detective Veal and Officer LaValley approached the vehicle. Defendant was in the driver's seat of the vehicle. His brother, Harvey France, was in the passenger's seat. Defendant's cousin, Antoine Bishop, was in the back seat. Officer LaValley then informed Defendant and the passengers of the purpose of the traffic stop and requested identification from the occupants, while Detective Veal called in the vehicle's license plate number and peered into the front and back seats of the vehicle with a flashlight. Defendant informed Officer LaValley that he did not have his driver's license. After Officer LaValley collected Harvey's identification, Harvey stated, "I can walk home. . . . I'm just saying I can walk." Officer LaValley then returned to the patrol car with the occupants' identification to conduct warrant checks. Detective Veal briefly discussed the white taillight with Defendant before joining Officer LaValley in the patrol car.

¶ 4 Detective Veal returned to the patrol car and requested that a canine unit respond to her location. Immediately thereafter, Officers Ferguson and Wagoner arrived at the scene. Detective Veal briefly greeted the officers before returning to the patrol car with Officer LaValley. Officers Ferguson and Wagoner then stood by the stopped vehicle to watch over the occupants.

¶ 5 Shortly after Detective Veal returned to the patrol car, Officer LaValley discovered that the backseat passenger, Mr. Bishop, had active warrants for his arrest. Officer LaValley exited the patrol car and, with assistance from Officer Wagoner, asked Mr. Bishop to step out of the

vehicle. Mr. Bishop complied and informed Officer LaValley that he was carrying a gun. Officer LaValley then removed the gun from Mr. Bishop's possession and placed it on the trunk of the vehicle while Officer Ferguson watched Mr. Bishop from the opposite side of the car with his weapon drawn.

¶ 6 Meanwhile, Detective Veal approached the driver's side of the vehicle and asked Defendant and Harvey to place their hands on the dashboard while Officers LaValley, Wagoner, and Ferguson dealt with Mr. Bishop. After Officer LaValley placed Mr. Bishop's gun on the trunk, Officer Ferguson informed Detective Veal that he was going to step away to "render [Mr. Bishop's weapon] safe." While Officer Ferguson was securing Mr. Bishop's weapon and Officers LaValley and Wagoner were placing Defendant under arrest, Detective Veal stood watch over Defendant and Harvey.

¶ 7 Officer Ferguson unloaded Mr. Bishop's weapon and stored it in the trunk of the patrol car. He then returned to the vehicle and told Detective Veal that he would watch Defendant and Harvey so that Detective Veal could go and "do what [she needed] to do." Detective Veal immediately returned to her patrol car, pulled out her laptop, and continued to conduct warrant checks on Defendant and/or Harvey. After conducting the warrant checks, Detective Veal began "the process of issuing a citation" to Defendant for the broken taillight and "driving with a license revoked[.]"

¶ 8 While Detective Veal was drafting the citation, the canine unit that she requested earlier responded to the scene, at which point the other officers requested that Defendant and Harvey step out of the vehicle. Defendant and Harvey complied with the officers' requests. While the other officers dealt with Defendant and Harvey, Detective Veal walked over to greet the officer with the canine and informed the officer that she had previously encountered the vehicle that evening and witnessed "a hand-to-hand transaction." The officer with the canine then walked the canine around the vehicle, and the canine "indicated a positive alert." The officers then searched the vehicle and found "multiple burnt marijuana cigarettes were located in a portable ashtray in the center console" along with "an open container of beer[.]" Officer Ferguson also searched Defendant's person and "located a digital scale in [Defendant's] pants pocket."

¶ 9 Detective Veal arrested Defendant for possession of drug paraphernalia. Detective Veal and Officer Ferguson both reported smelling "unburnt marijuana" emanating from Defendant's person. Officers Ferguson

and Wagoner later conducted a strip search of Defendant at the police station and "located an individually wrapped bag of unburnt marijuana and an individually wrapped bag of a white rock-like substance," which later "tested positive for cocaine."

¶ 10 A Forsyth County grand jury issued true bills of indictment charging Defendant with several drug-related offenses, driving while license revoked, and attaining the status of a habitual felon. Defendant then filed a motion to suppress evidence obtained during the traffic stop. A hearing was held on Defendant's motion to suppress, during which Defendant argued, *inter alia*, that the length of the traffic stop was "outside the reasonable amount of time . . . allowed for a traffic stop" under the Fourth Amendment of the U.S. Constitution as interpreted in *United States v. Rodriguez*, 575 U.S. 348 (2015).

¶ 11 The trial court entered a written order denying Defendant's motion to suppress and concluded the following as a matter of law:

> The officers in this case diligently pursued their investigation into the original [traffic] violation for which [] Defendant's vehicle was stopped and the related safety concerns. The seizure of [] Defendant in this case was reasonable in every way and in compliance with the law in *Rodriguez* and other cases. . . . To the extent, if any, that the seizure of [] Defendant went beyond the scope of the investigation that resulted from the original traffic violation, that seizure was supported by reasonable suspicion or safety concerns independent of the traffic violation, i.e., dealing with the safety concerns which arose when Officer LaValley, not lead traffic violation investigator Det. Veal, took the back seat passenger of the [vehicle] into custody for outstanding warrants and dealing with safety concerns that arose when a loaded handgun was located by Officer LaValley on that individual. Both of these situations required Det. Veal to deviate, if only briefly, from her mission of conducting the traffic stop as it related to [] Defendant's traffic and license violations.

The trial court further concluded that the body camera footage "introduced and published during th[e] hearing corroborate[d] the fact that Det. Veal diligently pursued her investigation into the original traffic violation for which the vehicle was stopped and subsequent discovery of [] Defendant's revoked license."

¶ 12 Pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), Defendant pled guilty to possession of a controlled substance on jail premises, possession with intent to sell or deliver cocaine, two counts of possession of cocaine, possession of drug paraphernalia, possession of less than one-half ounce of marijuana, and attaining the status of a habitual felon. The trial court entered two judgments upon Defendant's convictions and sentenced him to 26 to 44 months' imprisonment for possession of cocaine and possession of drug paraphernalia and 67 to 93 months' imprisonment for the other offenses. The court also entered a civil judgment ordering Defendant to pay attorney's fees.

¶ 13 Defendant expressly reserved his right to appeal the trial court's order denying his motion to suppress and provided oral notice of appeal in open court. Defendant did not provide notice of appeal from the civil judgment ordering him to pay attorney's fees but has filed a petition for writ of certiorari seeking discretionary review of the judgment.

II. Appellate Jurisdiction

¶ 14 We must first address our jurisdiction to hear Defendant's appeal on the issue of attorney's fees. Defendant concedes that he did not timely file notice of appeal from the civil judgment ordering him to pay attorney's fees. In acknowledgment of this error, Defendant filed a petition for certiorari with this Court seeking discretionary review of his appeal.

¶ 15 N.C. R. App. P. 21(a) provides that this Court may issue a writ of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action. . . ." N.C. R. App. P. 21(a)(1). "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). This Court has previously allowed petitions for writ of certiorari in cases where the trial court entered a civil judgment ordering the defendant to pay attorney's fees without providing the defendant notice and an opportunity to be heard. *See, e.g.*, *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018); *State v. Baker*, 260 N.C. App. 237, 240–41, 817 S.E.2d 907, 909–10 (2018). We therefore grant Defendant's petition seeking our discretionary review on the issue of attorney's fees.

III. Analysis

¶ 16 Defendant argues that the trial court erred by (1) denying his motion to suppress evidence; and (2) entering a civil judgment ordering Defendant to pay attorney's fees without providing Defendant notice and an opportunity to be heard. We affirm the trial court's order denying

Defendant's motion to suppress evidence. We vacate the civil judgment as to attorney's fees and remand for further proceedings.

A. Motion to Suppress

¶ 17 **[1]** Defendant argues that the trial court erred in denying Defendant's motion to suppress, because the officers prolonged the duration of the traffic stop to conduct a search for drugs in violation of Defendant's rights under the Fourth Amendment of the United States Constitution as interpreted in *United States v. Rodriguez*, 575 U.S. 348 (2015). Specifically, Defendant contends that the trial court "erroneously concluded that Detective Veal diligently conducted the traffic stop, that reasonable suspicion existed to prolong the stop, and that Mr. Bishop's outstanding warrants and firearm provided a reasonable basis for delay." We disagree.

¶ 18 Our review of a trial court order denying a motion to suppress evidence "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

¶ 19 The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "A traffic stop is a seizure" within the meaning of the Fourth Amendment "even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

¶ 20 While "[a] seizure for a traffic violation justifies a police investigation of that violation," *Rodriguez*, 575 U.S. at 354, "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless reasonable suspicion of another crime arose before that mission was completed," *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (citing *Rodriguez*, 575 U.S. at 349, 353–55). "Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to [the traffic] stop." *Rodriguez*, 575 U.S. at 355 (alteration in original) (citation and internal quotation marks omitted). Such inquiries may "involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* (citation omitted).

¶ 21 In addition, "[t]he Fourth Amendment permits an officer to conduct an investigation *unrelated* to the reasons for the traffic stop as long as it '[does] not lengthen the roadside detention.' " *United States v. Bowman*, 884 F.3d 200, 210 (4th Cir. 2018) (quoting Rodriguez, 575 U.S. at 354) (alteration in original); *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." (citation omitted)). "For example, an officer may question the occupants of a car on unrelated topics without impermissibly expanding the scope of a traffic stop" or "engage a K-9 unit to conduct a 'dog sniff' around a vehicle during a lawful traffic stop in an attempt to identify potential narcotics." *United States v. Hill*, 852 F.3d 377, 382 (4th Cir. 2017) (citing *Johnson*, 555 U.S. at 333; *United States v. Caballes*, 543 U.S. 405, 407–09 (2005)).

¶ 22 "Traffic stops are especially fraught with danger to police officers, so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Rodriguez*, 575 U.S. at 356 (citation and internal quotation marks omitted). "[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission." *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676. As a safety precaution, "a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle," along with any passengers. *Maryland v. Wilson*, 519 U.S. 408, 410, 414–15 (1997) (stating that "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car"). "Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop." *Bullock*, 370 N.C. at 258, 805 S.E.2d at 674 (citation omitted). "But investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop." *Id.* (citation omitted).

¶ 23 In the instant case, Detective Veal initiated a traffic stop of Defendant's vehicle because of the vehicle's broken taillight—a "traffic violation justif[ying] a police investigation of that violation." *Rodriguez*, 575 U.S. at 354. At that point, Detective Veal was legally authorized to detain Defendant for "the length of time . . . reasonably necessary to accomplish the mission of the stop," which was to address the broken taillight. *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (citation omitted).

Upon approaching the vehicle, Officer LaValley requested identification from the occupants and informed them of the reason for the stop, while Detective Veal shined her flashlight into the vehicle and called in the vehicle's license plate number. Officer LaValley then returned to the patrol car with the occupants' identification to conduct warrant checks. After briefly engaging with Defendant regarding his taillight, Detective Veal joined Officer LaValley in the patrol car. Such inquiries being "ordinary inquiries incident to [a traffic] stop," *Rodriguez*, 575 U.S. at 355 (alteration in original) (citation omitted), the officers' actions were well-within the scope of the mission of the stop.

¶ 24 After joining Officer LaValley in the patrol car, Detective Veal requested that a canine unit respond to her location, while Officer LaValley conducted warrant checks on the occupants. Although unrelated to the traffic mission of the stop, Detective Veal's request to "engage a K-9 unit to conduct a 'dog sniff' around [the] vehicle[,]" *Hill*, 852 F.3d at 382 (citation omitted), did "not measurably extend the duration of the stop" and "convert the encounter into something other than a lawful seizure," *Johnson*, 555 U.S. at 333; *see also Bullock*, 370 N.C. at 258, 805 S.E.2d at 674 ("[I]nvestigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop." (citation omitted)).

¶ 25 Immediately after Officer Veal requested the canine unit, Officers Ferguson and Wagoner arrived at the scene. Detective Veal briefly greeted the officers before rejoining Officer LaValley in the patrol car. Officer LaValley then discovered that Mr. Bishop had active warrants for his arrest and proceeded to place Mr. Bishop under arrest with assistance from Officer Wagoner. Mr. Bishop complied and informed Officer LaValley that he had a gun on his person. At this point, the situation required the officers to take certain safety "precautions in order to complete [the] mission safely." *Rodriguez*, 575 U.S. at 356 (citation omitted).

¶ 26 After Mr. Bishop informed Officer LaValley that he had a gun, Officer LaValley removed the weapon from Mr. Bishop's possession and placed it on the trunk of the vehicle. Meanwhile, Officer Wagoner stood watch on the passenger's side of the car while Officer Ferguson watched Mr. Bishop from the opposite side of the car with his weapon drawn. While the three other officers were occupied with disarming and arresting Mr. Bishop, Detective Veal ordered Defendant and Harvey to place their hands on the dashboard and stood watch over them. After Officer LaValley placed Mr. Bishop's weapon on the trunk, Officer Ferguson informed Detective Veal that he was going to step away to "render [Mr.

Bishop's weapon] safe." Officer Ferguson then unloaded Mr. Bishop's weapon and stored it in the trunk of the patrol car.

¶ 27 "[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission." *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676. The officers moved diligently and responsibly upon discovery of the loaded pistol. The presence of multiple officers only increased the safety and efficiency of the traffic stop. *See Wilson*, 519 U.S. at 414–15 (stating that "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car"). Accordingly, all of the officers were taking legitimate and permissible steps necessary to ensure their safety. *See Rodriguez*, 575 U.S. at 356.

¶ 28 After securing Mr. Bishop's weapon, Officer Ferguson returned to the vehicle and told Detective Veal that he would watch Defendant and Harvey so that Detective Veal could go and "do what [she needed] to do." Detective Veal immediately returned to her patrol car to conduct warrant checks on Defendant and/or Harvey and began "the process of issuing a citation" to Defendant for the broken taillight and "driving with a license revoked[.]"

¶ 29 While Detective Veal was drafting citations, the canine unit that she requested earlier responded to the scene. The other officers then requested that Defendant and Harvey step out of the vehicle. While the other officers dealt with Defendant and Harvey, Detective Veal walked over to greet the officer with the canine. The officer with the canine then walked the canine around the vehicle, and the canine "indicated a positive alert."

¶ 30 At no point during the preceding course of events did the officers' actions "convert the encounter into something other than a lawful seizure." *Johnson*, 555 U.S. at 333. The facts in the Record indicate that at each point during the traffic stop Detective Veal was either "diligently pursu[ing] [the] investigation[,]" conducting "ordinary inquiries incident to [the traffic] stop[,]" or taking necessary "precautions in order to complete h[er] mission safely." *Rodriguez*, 575 U.S. at 354–56 (citations omitted). Although the request for a canine sniff was "unrelated to the reasons for the traffic stop[,]" *Bowman*, 884 F.3d at 210 (citing *Rodriguez*, 575 U.S. at 354) (alteration omitted), the request did "not measurably extend the duration of the stop" and was therefore permissible, *Johnson*, 555 U.S. at 333.

¶ 31 Assuming *arguendo* that any of the officers' actions did unreasonably extend the duration of the stop, we agree with the trial court that the

actions were justified by reasonable suspicion of criminal activity. The trial court's findings of fact state that "[t]he traffic stop was recorded on Body Worn Camera . . . and the footage was admitted as State's Exhibit 1." A review of that footage shows that when Detective Veal walked over to greet the officer with the canine, she informed the officer that she had previously encountered Defendant's vehicle that evening and witnessed "a hand-to-hand transaction." The traffic stop also occurred late in the evening and in a high crime area. Mr. Bishop had multiple active warrants for his arrest and a loaded gun on his person. Moreover, after Officer LaValley collected Harvey's identification, Harvey stated, "I can walk home. . . . I'm just saying I can walk." Although each of these factors standing alone might not provide officers with reasonable suspicion, the totality of the circumstances indicate that reasonable suspicion justified prolonging the stop. *See State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012) ("The only requirement [for reasonable suspicion] is a minimal level of objective justification, something more than an unparticularized suspicion or hunch." (citations and internal marks omitted)).

¶ 32 Lastly, Defendant takes issue with several findings of fact made by the trial court. Defendant contends that the trial court mistakenly determined that (1) "after Detective Veal approached the stopped car, she asked [Defendant] for his license;" (2) Detective Veal requested the canine unit after running warrant checks on the occupants; (3) "it takes approximately five minutes to conduct a single warrant check;" (4) "Detective Veal stood outside the driver's side window with [Defendant] as a safety precaution and she intended to return to her patrol vehicle to write [Defendant] citations once another officer relieved her and could assume security watch over [Defendant] and his brother;" and (5) [Defendant] freely volunteered his consent for the officers to search the car" and conduct a "canine sniff."

¶ 33 Even assuming that contentions (1)-(3) have merit, none of the facts Defendant challenges alter the legal analysis in this case. It is irrelevant whether Detective Veal asked for Defendant's license or not, whether Detective Veal requested the canine unit before or after conducting the warrant checks, or whether it takes five minutes or less, on average, to conduct a warrant check.

¶ 34 We also disagree that the trial court erroneously determined that Detective Veal watched over Defendant and Harvey until another officer could relieve her. The body camera evidence clearly shows that while the other three officers were arresting Mr. Bishop and securing his weapon, Detective Veal was the only officer available to watch over Defendant and Harvey. Officer safety thus required Detective Veal to

watch over Defendant and Harvey while the other officers dealt with Mr. Bishop. "[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission." *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676.

¶ 35 Lastly, it is irrelevant whether Defendant consented to a search or canine sniff of his vehicle. At the time the canine officer arrived and conducted the canine sniff, Detective Veal was still in the process of issuing a citation to Defendant. Although the officers requested that Defendant and Harvey step out of the vehicle before the canine sniff, "a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle," along with any passengers. *Wilson*, 519 U.S. at 410. When the canine officer conducted the drug sniff around Defendant's vehicle, the canine "indicated a positive alert." At that point, the officers were authorized to conduct a search of Defendant's vehicle for narcotics, regardless of whether Defendant consented to the search or not.

¶ 36 We therefore affirm the trial court's denial of Defendant's motion to suppress.

B. Attorney's Fees

¶ 37 **[2]** Defendant argues that the trial court erred by entering a civil judgment ordering Defendant to pay attorney's fees without providing Defendant notice and an opportunity to be heard. We agree, vacate the civil judgment as to attorney's fees, and remand for further proceedings.

¶ 38 N.C. Gen. Stat. § 7A-455(b) provides that a court may enter a civil judgment against a convicted indigent defendant "for the money value of services rendered by assigned counsel, . . . plus any sums allowed for other necessary expenses of representing the indigent person[.]" N.C. Gen. Stat. § 7A-455(b) (2019). However, "[b]efore imposing a judgment for . . . attorney's fees, the trial court must afford the defendant notice and an opportunity to be heard." *Friend*, 257 N.C. App. at 522, 809 S.E.2d at 906 (citations omitted). To that end, "before entering money judgments against indigent defendants for fees . . . under N.C. Gen. Stat. § 7A-455, trial courts should ask [the] defendants—personally, not through counsel—whether they wish to be heard on the issue." *Id.* at 523, 809 S.E.2d at 907. "Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.*

¶ 39 After the plea hearing concluded, the following colloquy took place between the trial court and Defendant's counsel:

> THE COURT: All right. Thank you, [defense counsel]. How much time?
>
> [COUNSEL]: Your Honor, at this—at the conclusion of this hearing, I'll have approximately 40 hours. I would say 40 hours. . . .
>
> THE COURT: That's the D rate? That's –
>
> [COUNSEL]: Seventy-five times 40, is [$]3000.
>
> THE COURT: Yes, sir. All right. [Defendant], sir if you'll stand up.

The trial court then proceeded to sentence Defendant and, with respect to attorney's fees, stated, "All of the costs associated with this court action will be [included in] a civil judgment. That would include the court costs, attorney's fee of $3000 and a lab fee of $1800."

¶ 40 At no point did the trial court ask Defendant "personally, not through counsel[,] whether [he] wish[ed] to be heard on the issue" of attorney's fees. *Id.* Moreover, there is no "evidence in the record demonstrating that . . . [D]efendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.* We therefore vacate the civil judgment ordering Defendant to pay attorney's fees and remand for further proceedings.

IV. Conclusion

¶ 41 We affirm the trial court's denial of Defendant's motion to suppress. We vacate the civil judgment as to attorney's fees and remand for further proceedings.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges MURPHY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
BRANDON SCOTT GOINS, Defendant

No. COA19-288-2

Filed 21 September 2021

Appeal and Error—remand from Supreme Court—higher court's interpretation of evidence—same or less taxing standard

On remand from the Supreme Court to consider the remaining issues in defendant's appeal—whether the trial court committed plain error in allowing certain testimony and in its jury instructions—the Court of Appeals held that, assuming arguendo the trial court erred, the alleged errors did not amount to plain error because the Supreme Court, in its opinion considering a different argument raised by defendant, evaluated the strength of the evidence in the case while applying a less taxing standard of review and concluded that, in light of the virtually uncontested evidence of defendant's guilt (not relying upon the evidence that defendant challenged in the case before the Court of Appeals), defendant could not meet his burden.

Appeal by Defendant from judgments entered 21 September 2018 by Judge Christopher W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 5 December 2019, and opinion filed 4 February 2020. Remanded to this Court by the North Carolina Supreme Court on 11 June 2021 by 2021-NCSC-65 for consideration of Defendant's remaining arguments on appeal.

Attorney General Joshua H. Stein, by Assistant Attorney General Catherine F. Jordan, for the State.

Joseph P. Lattimore for defendant-appellant.

MURPHY, Judge.

¶ 1 This case returns to this Court after our Supreme Court reversed the opinion in *State v. Goins*, 269 N.C. App. 618, 839 S.E.2d 858 (2020), and remanded the matter to our Court "to address the remaining issues raised by [D]efendant on appeal." *State v. Goins*, 2021-NCSC-65, ¶ 20.

¶ 2 The remaining issues presented by Defendant's appeal are as follows: (1) "Did the trial court commit plain error in permitting Lieutenant

Smith to interpret video footage of the incident to 'corroborate' witness testimony and comment on [Defendant's] guilt?"; and (2)

> Did the trial court commit plain error by failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter where the video evidence created a conflict about who fired first and thereby produced the requisite evidence to show [Defendant] fired his gun in the heat of blood upon adequate provocation?

¶ 3 Assuming, *arguendo*, that the trial court's alleged failures to act were in error, Defendant cannot demonstrate any alleged error rose to the level of plain error. Our Supreme Court has established what a defendant must demonstrate in order for a trial court's error to rise to the level of plain error:

> [T]o demonstrate that a trial court committed plain error, the defendant must show that a fundamental error occurred at trial. To show fundamental error, 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. Further, . . . because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Maddux, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (marks and citations omitted) (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)).

¶ 4 In *State v. Lawrence*, our Supreme Court had reaffirmed the legal principles applicable to plain error review and concluded that the defendant failed to meet his burden of demonstrating such error. *State v. Lawrence*, 365 N.C. 506, 518-19, 723 S.E.2d 326, 334-35 (2012).

> Specifically, [in *Lawrence*, our Supreme Court] held that the trial court's instruction on conspiracy to commit robbery with a dangerous weapon was erroneous; however, [it] determined that the error was not plain error, because in light of the overwhelming and uncontroverted evidence, [the] defendant cannot show that, absent the error, the jury probably would have returned a different verdict.

Maddux, 371 N.C. at 564-65, 819 S.E.2d at 371 (marks omitted). In accordance with *Lawrence*, for us to find prejudice to a defendant under plain error review "[the] [d]efendant must demonstrate that absent the error, the jury probably would have reached a different result." *Id.* at 565, 819 S.E.2d at 371-72 (marks omitted).

¶ 5 Our Supreme Court has already examined and evaluated the strength of the evidence in this case:

> We also examine the evidence presented to the jury. The State presented evidence that [D]efendant was violating his probation and would rather kill himself or be killed by the police than go back to jail. Several witnesses testified that [D]efendant's gun was loaded with bullets designed to cause more serious injuries, which are colloquially referred to as "cop-killers." The State's witnesses also testified that when [D]efendant was eventually located by police, he pointed his gun directly at a police officer in the midst of the pursuit. Furthermore, after Detective Hinton clearly identified himself as a police officer, [D]efendant turned around, drew his weapon, and fired at the officer. Multiple witnesses testified that [D]efendant shot first and that Detective Hinton only returned fire after [D]efendant's first shot. In addition, the hotel surveillance video which was played for the jury at trial showed the shootout between [D]efendant and Detective Hinton. *Between the video and the testimony of eyewitnesses who corroborated the State's account of events, "virtually uncontested" evidence of [D]efendant's guilt was submitted to the jury for its consideration.*
>
> . . . .
>
> Therefore, we cannot conclude that [D]efendant has met his burden of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C.G.S. § 15A-1443 (2019).

Goins, 2021-NCSC-65 at ¶¶ 15, 19 (emphasis added).

¶ 6 In making this determination, our Supreme Court did not rely upon the contested evidence Defendant mentions in the first remaining issue,

namely the testimony from Lieutenant Smith interpreting video footage of the incident in order to "corroborate" witness testimony. Furthermore, our Supreme Court arrived at this view of the evidence and its impact on the verdict while applying a less taxing standard of "reasonable *possibility*" compared to the "reasonable *probability*" of a different result that must be shown to amount to plain error. *Id.* at ¶ 19.

¶ 7 In light of our Supreme Court's interpretation of the evidence presented at trial, any alleged error does not rise to the level of plain error in the face of " 'virtually uncontested' evidence of [D]efendant's guilt[.]" *Id.* at ¶ 15. To arrive at a different result and view of the evidence presented would create a paradox in which we could collaterally undermine the analysis of our Supreme Court. It is axiomatic that when our Supreme Court, applying the same or a less taxing standard of review, has already determined and relied upon the impact of unchallenged evidence, we cannot take a different view of the evidence presented or the impact thereof. Defendant has failed to show that any alleged error rose to the level of plain error.

NO PLAIN ERROR.

Judges TYSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
IVAN GERREN HOOPER

No. COA20-200

Filed 21 September 2021

Appeal and Error—criminal case—request for jury instruction—self-defense—invited error—waiver of appellate review

In a prosecution for assault on a female and other charges arising from an altercation between defendant and his child's mother, the trial court did not err by denying defendant's request for a jury instruction on self-defense—which he made right before the court was about to instruct the jury—where defendant failed to file a pre-trial notice to assert self-defense (as required under N.C.G.S. § 15A-905(c)(1)) and expressly agreed to the court's instructions both before and after they were given. Rather, defendant's failure to object to the tendered instructions constituted invited error that

waived his right to appellate review, including plain error review. Furthermore, given the overwhelming evidence of his guilt, defendant could not show that his denied request had prejudiced him.

Judge MURPHY dissenting.

Appeal by defendant from judgment entered 7 March 2018 by Judge Stanley L. Allen in Rockingham County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jasmine C. McGhee, for the State.

Carella Legal Services, PLLC, by John F. Carella, for defendant-appellant.

TYSON, Judge.

¶ 1 Ivan Gerren Hooper ("Defendant") appeals from a judgment entered upon a jury's verdicts finding him guilty of assault by strangulation, communicating threats, assault on a female, interfering with emergency communication, and attaining habitual felon status. We find no error.

I. Background

¶ 2 On 5 March 2017, Reidsville Police Officer Scott Brown responded to a call placed by Ashley Thomas concerning an alleged assault, which had occurred at a Quality Inn Hotel the previous evening. Officer Brown met Thomas at her residence located on Wolf Island Road. Thomas stated she had an altercation with Defendant, the father of her child. Evidence tended to show Thomas arrived with their son, Trent, at Defendant's hotel room at the Quality Inn on 4 March 2017. Following the altercation in the hotel room, Defendant had been shot. Thomas was visibly bruised and swollen across the bridge of her nose and eyes and displayed redness around her neck. Thomas also showed an open wound on her cheek, and scratches down her chest.

¶ 3 Defendant was indicted for assault by strangulation, possession of a firearm by felon, communicating threats, assault on a female, interfering with an emergency communication, and subsequently, with attaining the status of a habitual felon. Defendant failed to file a pre-trial notice to assert self-defense. *See* N.C. Gen. Stat. § 15A-905(c)(1) (2019).

¶ 4 Thomas testified to her version of the events that unfolded at Defendant's hotel room. Thomas testified when she arrived at Defendant's hotel room with their son for visitation, Defendant began questioning Thomas regarding her personal relationship status. Defendant became agitated, punched, kneed, and threatened Thomas' life. Thomas then kneed Defendant, which allowed Thomas to get up and retrieve her phone just before Defendant shattered it. Thomas turned to the TV stand, picked up [Defendant's] gun, and discharged the gun towards the floor.

¶ 5 Defendant did not testify at trial. Reidsville Police Officer Jason Joyce, a witness for the State, testified about what Defendant had told him on 5 March 2017. Defendant told Officer Joyce he had advanced toward Thomas after he saw her with the firearm.

¶ 6 Defendant's mother, Felicia Donnell, testified for Defendant regarding a phone call she had with Thomas shortly after the events had occurred in the hotel room. Donnell testified she was told no physical altercation had occurred until after the first shot was fired. Further testimony by other defense witnesses showed Thomas had acquired a gun prior to her visit to Defendant's hotel room.

¶ 7 At the close of the State's case and again at the close of all evidence, Defendant moved to dismiss for insufficiency of the evidence. Defense counsel argued Thomas had "provoked this particular action" and that it was a "defense mechanism" and that "he had to try to protect himself." Both motions were denied. During the initial charge conference, the trial court presented and laid out the proposed jury instructions. Defendant did not request additional instructions or raise objections to the instructions the court intended to give. Counsel expressly agreed to the court's tendered instructions.

¶ 8 The following day, immediately before the jury instructions were to be delivered, Defendant requested, for the first time, the jury be instructed on self-defense using the pattern jury instruction, entitled "Self-Defense-Assaults Not Involving Deadly Force." N.C.P.I. -- Crim. 308.40 (2017). The State objected.

¶ 9 The trial court denied Defendant's request, stating "there was no notice given of [an] affirmative defense." The court further pointed out there was no evidence of what Defendant thought or believed about the need to defend himself and "there [was] no other evidence that . . . anything was done in self-defense." After instructing the jury, the trial court again asked both the State and Defendant if there were any objections to the jury instructions. Both parties replied they had no objections to the instructions as given.

¶ 10 The jury found Defendant not guilty of possession of a firearm by a felon, but guilty of assault by strangulation, communicating threats, assault on a female, interfering with emergency communication, and having attained habitual felon status. Defendant's convictions were consolidated, and he was sentenced to an active prison term of 65 to 90 months.

II. Jurisdiction

¶ 11 Defendant failed to give timely notice of appeal. Defendant's petition for writ of certiorari was allowed by this Court 27 August 2019 to review the judgment entered 7 March 2018. This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-1444(g) (2019) and N.C. R. App. P. 21(a)(1).

III. Issue

¶ 12 Defendant argues the trial court erred by denying his request for an instruction on self-defense.

IV. Self-Defense Instruction

¶ 13 Defendant failed to file the statutorily required notice of intention to offer a defense of self-defense at trial. *See* N.C. Gen. Stat. § 15A-905(cv)(1) ("Give notice to the State of the intent to offer at trial a defense of . . . self-defense"). Defendant asserts sufficient evidence was presented to justify the trial court instructing the jury on self-defense.

¶ 14 During the jury charge conference, the trial court stated it was going to give:

> the usual [instructions]: function of the jury, burden of proof, and reasonable doubt, credibility of witnesses, weight of the evidence, effect of the Defendant's decision not to testify.
>
> I had to pull it in from a civil volume, but it's 101.41, that's stipulations; 104.05, circumstantial evidence; 104.41, actual versus constructive possession; 104.50, be the photographs and the other things as illustrative evidence; 105.20, impeachment or corroboration by a prior statement; 105.35, impeachment of a witness, other than the Defendant by proof of a crime; 120.10, definition of intent.
>
> And then, the substantive offenses, 208.61, assault inflicting physical injury by strangulation; 254A.11, possession of a firearm, it wouldn't be a weapon of mass destruction by a felon; 208.70, assault on a

> female by a male person; 235.18, communicating threats; and 222.32, interfering with emergency communications; and then the final mandate.

The trial court then asked of both the State and Defendant's trial counsel: "Are there any requests for additional instructions or any objections to the instructions the Court is intending to give[?]" Defendant's counsel responded, "Your Honor, I believe that the information that's been articulate (sic) is accurate."

¶ 15 During the jury charge conference, Defendant's counsel never made additional requests, nor voiced any objection regarding the jury instructions proposed after he was specifically asked by the trial court. Defendant was provided the opportunity to object or correct these instructions and expressly agreed to the instructions to be given.

¶ 16 The day after the jury charge conference, just before jury deliberations, Defendant's counsel mentioned self-defense for the first time and made the request for a self-defense instruction. The trial court recalled Defendant's express agreement to the proffered instructions from the day prior, stating: "Well, you said yesterday you were satisfied with the instructions as the Court had outlined is going (sic) to give."

¶ 17 After delivering the instructions to the jury, the trial court held the following colloquy:

> THE COURT: Now outside the presence of the jury, are there any requests for additional instructions or for corrections or any objections to the instructions given to the jury by– from the State?
>
> [THE STATE]: No, Your Honor.
>
> THE COURT: Or from the Defendant?
>
> [DEFENDANT'S COUNSEL]: No, Your Honor.

¶ 18 Defendant's failure to object during the charge conference or after the instructions were given to the jury, along with his express agreement during the charge conference and after the instructions were given to the jury, constitutes invited error. His invited error waives any right to appellate review concerning the invited error, "*including plain error review*." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (emphasis supplied).

¶ 19 Our Supreme Court in *State v. White* examined a defendant's counsel's involvement in jury instructions in a death penalty case. *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998). The Court held:

> Counsel . . .did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Id. at 570, 508 S.E.2d at 275 (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 396 (1996)). The tardiness of Defendant's purported request followed by his counsel's express agreement following the jury instructions as given waives appellate review. Defendant's argument is overruled.

V. Prejudice

¶ 20 North Carolina's statutes provide: "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2019). Even if we agreed the trial court erred in denying Defendant's requests regarding the self-defense, Defendant cannot carry his burden to show the court's refusal of his requested instruction "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 333 (2012) (citation omitted).

¶ 21 In *State v. Chavez*, our Supreme Court held:

> Where there is highly conflicting evidence in a case, an error in the jury instructions may tilt the scales and cause the jury to convict a defendant. In situations where the instructional error had a probable impact on the jury's finding that the defendant was guilty, a defendant can show plain error. In contrast, where the evidence against a defendant is overwhelming and uncontroverted[, a] defendant cannot show that, absent the error, the jury probably would have returned a different verdict.

State v. Chavez, 278 N.C. 265, 270, 2021-NCSC-86, ¶13, 2021 WL 355039 at *4 (2021) (citations and quotation marks omitted). Defendant cannot show prejudice because the evidence against him was both "overwhelming and uncontroverted." *Id.*

VI. Conclusion

¶ 22 Defendant's trial counsel's active participation in the formulation and express agreement on the instructions forecloses appellate review

on this issue, "including plain error review." *Barber*, 147 N.C. App. at 74, 554 S.E.2d at 416. Defendant's counsel's express agreement to the instructions before and after they were given constitutes invited error and waives any right to appellate review concerning the invited error. *White*, 349 N.C. at 570, 508 S.E.2d at 275.

¶ 23 Presuming Defendant's mother's hearsay testimony of his phone call could be considered unasserted "self-defense," in the face of "overwhelming and uncontroverted [evidence of guilt, a] defendant cannot show that, absent the error, the jury probably would have returned a different verdict." *Chavez*, 278 N.C. at 270, 2021-NCSC-86, ¶13, 2021 WL 355039 at *4.

¶ 24 Defendant received a fair trial, free from prejudicial errors he preserved or argued. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge GORE concurs.

Judge MURPHY dissents with separate opinion.

MURPHY, Judge, dissenting.

¶ 25 The Majority incorrectly concludes "Defendant's failure to object during the charge conference or after the instructions were given to the jury, along with his express agreement during the charge conference and after the instructions were given to the jury, constitutes invited error." *Supra* at ¶ 18. In light of errors in the analysis to reach this conclusion, I respectfully dissent.

¶ 26 Additionally, while the Majority does not reach the merits of Defendant's arguments, this dissent also encompasses the merits in the following sections. *See* N.C. R. App. P. 16(b) (2021) ("When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent[.]").

BACKGROUND

¶ 27 On 10 April 2017, Defendant, Ivan Gerren Hooper, was indicted for assault by strangulation, possession of firearm by felon, communicating threats, assault on a female, and interfering with an emergency

communication. On 5 February 2018, Defendant was indicted for attaining the status of a habitual felon. Defendant's trial began on 5 March 2018.

¶ 28 At trial, the evidence showed that on 4 March 2017, the mother of Defendant's child, Ashley Thomas, arrived with their son, Trent, at Defendant's hotel room at a Quality Inn. Subsequent events in the hotel room are disputed. However, following the disputed events in the hotel room, Defendant had been shot, and Thomas had "apparent bruising and swelling across the bridge of her nose and eyes[,]" "bruising and red marks around both sides of her neck" and open wound scratches down her cheek and chest.

¶ 29 Thomas testified for the State. Thomas's testimony at trial indicated that the following events occurred:

> [THOMAS:] When I first get into the hotel room, I sit my son down, and I sit down in the chair near the door. And [Defendant] says, "No, let me sit right here," and I said–
>
> . . . .
>
> [THE STATE:] Okay. And– so what does [Defendant] say to you at that point?
>
> [THOMAS:] He asked me to let him sit right there at the chair by the door, and I said, "Why does it matter where I sit? I'm fine sitting right here." "No, let me sit right here." So I don't move and he pulls up a chair directly in front of me in my face, and then he begins to question me about a guy that he assumed I had a relationship with.
>
> He saw his cousin at the store before he met me at the hotel room and his cousin was telling him, "Yeah, she been dealing with him," blah, blah, blah, all this stuff like that. So then, he begins to question me about were we dealing and all this stuff, and I told him no. And so–
>
> . . . .
>
> [THOMAS:] I said, "Is this really why you called me here?" And then, he said, "Well honestly, I don't care. I don't want you anyway, so you can really dismiss yourself." So I said, "Okay," and as I proceed to stand

up and grab for my child, that's when he gets in my face, and pushes me, and starts punching me.

[THE STATE:] And where does he punch you?

[THOMAS:] He punches me in my face, in my stomach.

[THE STATE:] And what does he punch you with?

[THOMAS:] A closed fist.

[THE STATE:] Okay. And after you're standing there and he's punching you in the face with his closed fist, what transpires after that?

[THOMAS:] Then he takes me and slings me on the bed, climbs on top of me, and starts continuously hitting me in my face as I'm screaming, "Please don't do this in front of Trent," like–

. . . .

[THOMAS:] He's punching me in the face, I'm trying to shield my face. I put my knee up to kind of try to push him off, and I'm screaming "Help," you know, and "Oh, my God," and everything like that and he just continues.

. . . .

[THE STATE:] Does [Defendant] say anything to you at this point?

[THOMAS:] He says, "Nobody is going to be able to save you, but Trent, and even he is not going to be able to save you today. I'm going to kill you, [b—-]."

. . . .

[THE STATE:] And what else does, if anything, does he do to you?

[THOMAS:] Then somehow we get up off the bed. I think when I nudged him, we stood up, and that's when he threw me on the floor, climbed on top of me, and started choking me.

[THE STATE:] And what is going on with you while he's choking you?

[THOMAS:] I feel myself about to lose consciousness like my vision's blurring, I can't breathe, I can't even scream.

[THE STATE:] And what is he choking you with?

[THOMAS:] His hands.

[THE STATE:] What happens after that?

[THOMAS:] After that, I think that's when I kneed him in his genital area and he finally got up. And I go directly over to the mirror and look at my face, and I'm like, "Oh, my God. I can't believe you actually did this." And then he tells me, "Get back up on the bed and you gonna call this [n----]."

And so, I grabbed for my phone and I looked and see my uncle's calling me as all of this is going on, and so, I try to call him back. And then, he smacks my phone out of my hand up against the wall and it shatters.

. . . .

[THOMAS:] After he throws my phone, then that's when my attention is directed to the TV stand, and I see a firearm sitting there. And the first thing that goes through my head is "you've got to get this before he gets his hands on it." So I picked the gun up, and by this time I'm standing facing the door. So my back is to the mirror, and the bathroom, and all that.

And he grabs my son and puts my son in front of him like, "Shoot me. You not gonna shoot me." So then, I say, "Trent, come here, baby," and Trent runs over to me. And I say, "[Defendant], if you do not let me go, you leave me no choice but to shoot this gun."

And so, he act like he's going to lunge at me, so I pull the trigger, and the gun is pointed down towards the floor. And he said, "I've been shot, (*inaudible*) I've been shot." And I didn't know that he'd been shot because I didn't aim towards his head, his arms, nothing. I pointed directly to the floor.

So then, he jumps over and he grabs my hand because my hand is on the gun, and he's like, "Let the gun go.

> Let the gun go." I said, "No, I'm not going to let the gun go, so you can do what you already planned to do." And he says, "Well, we'll let it go at the same time." And I said, "No, I'm not letting it go." And he says, "Well, if I let it go, can I leave with you?"
>
> I said, "Sure," anything so he would get off of me, so I could have my chance to get out. So when he lets go, I grab my son, I still have the gun in my hand, and I run out and get in my car.

¶ 30 Defendant did not testify at trial. However, Officer Jason Joyce, a witness for the State, testified about what Defendant told him on 5 March 2017:

> [OFFICER JOYCE:] . . . . Myself and my lieutenant, Lieutenant Osborne, we spoke to [Defendant] in Room 101. He advised that on [4 March 2017] at about 6:00 PM, his– the mother of his child, Ashley Thomas, and their child, Trenton Thomas, came to the Quality Inn, I'm sorry, came to the Quality Inn, Room 101 at the Quality Inn.
>
> [THE STATE:] And what did he tell you about that incident?
>
> [OFFICER JOYCE:] [Defendant] stated the conversation turned into an argument with [] Thomas, and [] Thomas pulled a gun out on him and shot him in the leg.
>
> [THE STATE:] Did he say anything else?
>
> [OFFICER JOYCE:] Stated that when he saw the firearm, he advanced towards her and tried to get the firearm from her, and that they struggled with each other. Said it all happened in front of their son, Trenton, and that once he was shot, both of them left the scene.
>
> [THE STATE:] And did he tell you anything about what this argument was about or anything?
>
> [OFFICER JOYCE:] No, he did not.
>
> [THE STATE:] Did he tell you anything else that led up to him being shot?

> [OFFICER JOYCE:] He stated that he was staying at the hotel to get away from people because of a death in the family. I asked him why he waited so long to report the shooting, and he stated he went to a friend of his house (*sic*), who was in the medical field, and they treated him. And he passed out because he had never been shot before.

¶ 31 Defendant's mother, Felicia Donnell, testified for Defendant. According to Donnell, Thomas called her after 4 p.m. on 4 March 2017 and recounted what happened in the hotel room:

> [DONNELL:] When [Thomas] called me, I could tell that she was very upset, so I asked her what was going on. And she just told me, "I shot him. I shot your son."
>
> [DEFENSE COUNSEL:] And–
>
> [DONNELL:] Then I asked her to please tell me what went on, what took place, you know, for her to shoot him. So she went on to explain briefly that she went to where he was staying at that time. And honestly until this time, I didn't know it was a Days Inn, or a friend's home, or where he was that particular day.
>
> But anyway, she let me know that she was fearing for her life and that she had a gun, and she and [Defendant] were standing in front of one another. And at that point, she said she had it pointed at him, and she asked him, "[Defendant], are you going to kill me?" And [Defendant] said– (*inaudible*) [Defendant] said to me (*sic*), "Give me the gun." And she said, "[Defendant], are you going to kill me?" He said, "[Thomas], give me the gun."
>
> And then, a shot was fired, a scuffle happened, and then a fire, you know, a bullet happened again, and he looked down at his leg, is what she told me. I said, "You shot him in his leg?" And she said, "Yes." And she said that he looked down at his leg because they could see some blood and he said, "You shot me. You shot me."
>
> So after that, I'm honest, I don't know what went down after that, but my main question was to [Thomas], "You left [your son] at your mom's home, right, when

> you went to see [Defendant]?" And she said, "No, he was there." And I said, "He could have been hurt," because I had told her on [3 March] while I was at the airport, "do not go over to see [Defendant] under any circumstances. Just stay away from him." So I was shocked to get that phone call that she– when she called me on Saturday[.]
>
> . . . .
>
> [DEFENSE COUNSEL:] And– so, [] Donnell, from what was conveyed to you, was it the fact that there was a scuffle after the weapon was fired?
>
> [DONNELL:] A shot was fired, and then a scuffle happened. She told me exactly what happened. I said, "What did he do to you?" And she let me know that he did strangle her and that he punched her, but then a second fire happened at some point and that's when, I think, both of– and I'm saying "think," but she told me that they were standing because both of them looked down at his leg. She didn't tell me which leg it was and they saw the blood–
>
> . . . .
>
> [DEFENSE COUNSEL:] Okay. And so, you said based on that component is that there was no physical altercation until after the first shot was fired?
>
> [DONNELL:] After a shot was fired.
>
> . . . .
>
> [THE STATE:] And [] Thomas told you that she was strangled?
>
> [DONNELL:] Uh-huh, after she fired the first shot, they got into that altercation.

¶ 32 At the close of the State's evidence, and again at the close of all evidence, Defendant made motions to dismiss for insufficiency of the evidence, arguing the evidence showed Defendant was acting to defend himself. Both motions were denied.

¶ 33 During the initial charge conference, Defendant indicated he was satisfied with the jury instructions. The following day, immediately before the jury instructions were delivered, Defendant requested, for the

first time, the jury be instructed on self-defense using a pattern jury instruction entitled "Self-Defense—Assaults Not Involving Deadly Force." N.C.P.I.—Crim. 308.40 (2017). The State objected, noting "there was no notice provided that he intended to seek . . . any sort of defense, which he's required to do." The trial court denied Defendant's request, stating "there was no notice given of [an] affirmative defense," and "there [was] no other evidence that . . . anything was done in self-defense."

¶ 34 The jury found Defendant not guilty of possession of a firearm by a felon and guilty of assault by strangulation, communicating threats, assault on a female, and interfering with an emergency communication. The jury also found Defendant guilty of having attained habitual felon status. A judgment was entered on 7 March 2018, sentencing Defendant to an active sentence of 65 to 90 months. Defendant did not give an oral notice of appeal in open court. However, on 30 August 2019, we allowed his *Petition for Writ of Certiorari* for the purpose of reviewing the judgment entered on 7 March 2018.

ANALYSIS

A. Preservation

¶ 35 Our Rules of Appellate Procedure provide as a general rule that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the [trial] court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2021). Regarding the preservation of jury instructions, the rules state:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2) (2021). "For the purposes of Rule 10(a)(2), a request for instructions constitutes an objection." *State v. Rowe*, 231 N.C. App. 462, 469, 752 S.E.2d 223, 227 (2013).

¶ 36 Here, the following colloquy occurred following the charge conference and before the jury was charged:

THE COURT: All right, Sheriff, bring the jury in, please.

[DEFENSE COUNSEL]: Your Honor, may I have just one moment?

THE COURT: Yes.

. . . .

[DEFENSE COUNSEL]: Your Honor, I think it's reasonable based on information that has been presented that the– that self-defense component in this particular jury instruction would be appropriate, as well, [as] the 308.40 to be elicited here in this particular matter.

Also secondly with that, Your Honor, I do have a case to hand up. I think that would be reflective of that, as well, based on the evidence that has been presented at this time.

THE COURT: Okay. Well, you said yesterday you were satisfied with the instructions as the [c]ourt had outlined [it] is going to give.

[DEFENSE COUNSEL]: And Your Honor, (*inaudible*) back where we started in that component, so I wanted to make sure that (*inaudible*) would be appropriate, Your Honor.

THE COURT: And you want to be heard further?

[DEFENSE COUNSEL]: Yes, Your Honor. Simply as we look at this particular matter, the State v. Jennings, this is 276 NC 157. This particular matter, as it reflects to a slightly more serious– it's a murder allegation, but still when it reflects what takes place with a self-defense proposition, that should be provided to the jurors. The piece here, I think, that falls in line with this particular matter is that obviously whatever has been charged, whatever was done, the fact still remains that this particular matter that's in front of the [trial court] today, it is most appropriate that this particular test here for self-defense should be appropriated– is appropriate and should be provided to the jurors.

> With that, the actions that were done, the timeliness of the actions, all of those components are supported and would be prudent to make sure that the jurors are aware of this particular action that will be most beneficial, I think, in this matter.
>
> . . . .
>
> THE COURT: Well, I have to agree with the State. The notice– there was no notice given of affirmative defense, and because that– and because we don't know what was in [] Defendant's mind because he exercised his constitutional right not to testify, we don't know what he was thinking or what he believed. And there's been no other evidence that this was a– anything was done in self-defense. The request for a self-defense instruction is denied.
>
> Bring the jury in, please, Sheriff.

¶ 37 "As Defendant specifically requested the trial court to include a jury instruction on [self-defense] and argued that point before the [trial] court, . . . he properly preserved this issue for appellate review." *Id.* at 469-70, 752 S.E.2d at 228.

¶ 38 The Majority relies on *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999), to conclude "[t]he tardiness of Defendant's purported request followed by his counsel's express agreement following the jury instructions as given waives appellate review." *Supra* at ¶ 19. In *White*, the defense counsel requested that the trial court give peremptory instructions to the jury regarding nonstatutory mitigating circumstances. *White*, 349 N.C. at 568, 508 S.E.2d at 274. However, the defense counsel cited the pattern instruction for the peremptory instruction only for statutory mitigating circumstances, not for nonstatutory mitigating circumstances. *Id.* at 569, 508 S.E.2d at 274. When the trial court clarified the language it would use in the jury instruction, the defense counsel agreed. *Id.* Our Supreme Court observed:

> [The] [d]efense counsel thus agreed with this proposed language, made no objection to it, and neither suggested nor provided any other language either orally or in writing. Thereafter, the trial court instructed the jury exactly as it had indicated. [The]

> [d]efense counsel did not object at this point either, though given the opportunity.
>
> . . . .
>
> [The] defense counsel did not submit any proposed instructions in writing. Counsel also did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, [the] defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Id. at 569-70, 508 S.E.2d at 274-75.

¶ 39 *White* is distinguishable from the facts of the present case because here, while Defendant did not say the words "I object" after the charge had been given, his "request for instructions constitutes an objection." *Rowe*, 231 N.C. App. at 469, 752 S.E.2d at 227. Further, Defendant's request for a self-defense jury instruction was denied, whereas in *White*, the trial court instructed the jury based on the instruction the defense counsel requested and the proposed language they agreed to.[1] *White*, 349 N.C. at 568-70, 508 S.E.2d at 274-75. Under our precedent in *Rowe*, Defendant did not waive appellate review. "The fact that [Defense] [C]ounsel did not say the words 'I object' is not reason to deny appellate review . . . ." *Id.* at 470, 752 S.E.2d at 228.

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1. Although the defendant in *White* also requested an instruction, the request for an instruction there could not constitute an objection. Where a request for instructions is granted and the defendant approves the language used in the instruction, like in *White*, a request for instructions cannot constitute an objection, as there is no longer anything for a defendant to object to. *See State v. Roache*, 358 N.C. 243, 296, 595 S.E.2d 381, 415 (2004) (citations omitted) ("The trial court sustained [the] defendant's objections to the questions specifically addressed by [the] defendant in his brief to this Court. This Court will not review the propriety of questions for which the trial court sustained a defendant's objection absent a further request being denied by the [trial] court. No prejudice exists, for when the trial court sustains an objection to a question the jury is put on notice that it is not to consider that question. Accordingly, any error alleged by [the] defendant to result from these questions is not properly before the Court, and regardless would not have resulted in prejudice."). In order for a request for an instruction to constitute an objection in this context, there would need to be a subsequent request for the instruction or a formal objection to the instructions. *See id.*; *but see State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) ("[A] request for an instruction at the charge conference is sufficient compliance with [Rule 10] to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.").

B. Merits of Defendant's Argument

¶ 40 Defendant argues the trial court erred in denying his request for an instruction on self-defense because there is "conflicting evidence regarding what happened at the Quality Inn, [and] when viewed in the light most favorable to [Defendant], [the evidence] supported an instruction on self-defense." The State argues the trial court did not err in denying Defendant an instruction on self-defense because (1) Defendant "did not present competent evidence of self-defense" and (2) "Defendant did not provide required notice." Defendant also argues that, to the extent the trial court's denial of his requested self-defense instruction was a sanction for failure to comply with the discovery statutes, "the trial court did not make the 'specific findings' that would be required for it to bar a jury instruction as a discovery sanction."

¶ 41 It would only have been proper for the trial court to refuse the self-defense instruction here if there was not sufficient evidence, when viewed in the light most favorable to Defendant, to support the instruction, and/or if the trial court used the refusal of the instruction as a sanction for Defendant's discovery violation.

1. Sufficient Evidence of Self-Defense

¶ 42 Defendant argues "[t]he evidence that [] Thomas possessed a gun and initiated the struggle by aiming the gun at [Defendant] was sufficient to entitle [him] to the requested self-defense instruction, and there was a reasonable possibility the outcome would have been different had the jury been fully instructed." We review a trial court's decision regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

¶ 43 "[W]here competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case[.]" *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (emphasis omitted). "In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to [the] defendant." *State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989). "Where there is evidence that [the] defendant acted in self-defense, the [trial] court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in [the] defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974); *see State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) ("[I]f the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State's evidence is contradictory.").

¶ 44 "[A]n error in jury instructions is prejudicial and requires a new trial only if 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." *State v. Locklear*, 259 N.C. App. 374, 377, 816 S.E.2d 197, 201 (2018) (marks omitted); *see also* N.C.G.S. § 15A-1443(a) (2019). "The burden of showing such prejudice . . . is upon the defendant." N.C.G.S. § 15A-1443(a) (2019).

¶ 45 N.C.G.S. § 14-51.3 provides a defendant who uses non-deadly force to defend himself will be immune from criminal liability:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. . . .
>
> (b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . .

N.C.G.S. § 14-51.3 (2019).

¶ 46 Here, the evidence presented at trial, when interpreted in the light most favorable to Defendant, is sufficient to entitle him to a jury instruction on self-defense. Specifically, Donnell testified Thomas told her the timeline of events was that Thomas first fired the gun, then Defendant became physical with Thomas, then Thomas fired another shot:

> [DEFENSE COUNSEL:] Okay. And so, you said based on that component is that there was no physical altercation until after the first shot was fired?
>
> [DONNELL:] After a shot was fired.
>
> . . . .
>
> [THE STATE:] And [] Thomas told you that she was strangled?
>
> [DONNELL:] Uh-huh, after she fired the first shot, they got into that altercation.

Officer Joyce's testimony corroborates Donnell's testimony:

> [OFFICER JOYCE:] [Defendant] stated the conversation turned into an argument with [] Thomas, and

> [] Thomas pulled a gun out on him and shot him in the leg.
>
> [THE STATE:] Did he say anything else?
>
> [OFFICER JOYCE:] Stated that when he saw the firearm, he advanced towards her and tried to get the firearm from her, and that they struggled with each other. Said it all happened in front of their son, Trenton, and that once he was shot, both of them left the scene.

¶ 47 Taken as true and in the light most favorable to Defendant, this testimony is sufficient to support Defendant's request for a self-defense instruction as it shows Thomas pointing a gun at Defendant gave rise to his reasonable belief "that the conduct [was] necessary to defend himself . . . against [Thomas's] imminent use of unlawful force." N.C.G.S. § 14-51.3(a) (2019). Even though Thomas's testimony indicates Defendant became physical *before* she pointed the gun at him, the trial court was still obligated to instruct on self-defense. *See Moore*, 363 N.C. at 796, 688 S.E.2d at 449 (emphasis added) ("[I]f the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given *even though the State's evidence is contradictory.*"). "With conflicting evidence, it was for the jury to determine which individual was the initial aggressor." *State v. Parks*, 264 N.C. App. 112, 117, 824 S.E.2d 881, 885 (2019). The trial court erred by failing to include an instruction on self-defense in its final mandate to the jury. Defendant is entitled to a new trial if this error was prejudicial to him, such that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (2019).

¶ 48 Defendant relies on *State v. Gomola* to argue "the trial court's error in denying the requested instruction deprived the jury of the ability to assess whether [Defendant] acted lawfully." *See State v. Gomola*, 257 N.C. App. 816, 810 S.E.2d 797 (2018). In *Gomola*, we held the defendant was entitled to a new trial because "the lack of a self-defense/defense of others instruction deprived the jury of the ability to decide the issue of whether [the defendant's] participation in the altercation was lawful." *Id.* at 823, 810 S.E.2d at 803.

¶ 49 The lack of a self-defense instruction here similarly deprived the jury of the ability to decide the issue of whether Defendant's participation in the altercation was lawful. A determination by the jury that Defendant's participation was lawful could have compelled the jury to return a verdict of "not guilty," especially in light of the jury finding Defendant was

not guilty of possession of a firearm. Defendant was prejudiced by the trial court's refusal to submit a self-defense instruction to the jury.

¶ 50 The evidence was sufficient to require the trial court to instruct the jury on self-defense, and the trial court erred by failing to do so based on a lack of evidence. This error prejudiced Defendant. Having concluded the trial court erred in failing to instruct the jury on self-defense, "[t]he question remains whether the trial court's denial of [D]efendant's request for a[] [self-defense] instruction may be upheld as a sanction for [D]efendant's failure to provide adequate notice of his defense." *State v. Foster*, 235 N.C. App. 365, 376, 761 S.E.2d 208, 216 (2014).

2. Refusal as a Sanction for a Discovery Violation

¶ 51 In light of the determination that the evidence, when viewed in the light most favorable to Defendant, supports a jury instruction on self-defense, it must be addressed whether the trial court properly refused the instruction as a sanction for a discovery violation. The State argues "the trial court did not err by denying Defendant an instruction on self-defense because Defendant did not provide required notice" pursuant to N.C.G.S. § 15A-905.

¶ 52 If a defendant voluntarily provides discovery under N.C.G.S. § 15A-902(a), the defendant is required to comply with N.C.G.S. § 15A-905(c), and he must "[g]ive notice to the State of the intent to offer at trial a defense of . . . self-defense[.]" N.C.G.S. § 15A-905(c)(1) (2019); *see* N.C.G.S. § 15A-905(d) (2019). Here, Defendant agreed to voluntarily provide reciprocal discovery in compliance with N.C.G.S. § 15A-905. As a result, N.C.G.S. § 15A-905(c)(1) required Defendant to provide the State with notice of his intent to offer the defense of self-defense at trial "within 20 working days after the date the case is set for trial." N.C.G.S. § 15A-905(c)(1) (2019). In this case, the trial court implicitly found Defendant violated N.C.G.S. § 15A-905(c)(1) because "there was no notice given of [an] affirmative defense[.]" It appears the trial court used this violation as part of its basis for its refusal to submit the issue of self-defense to the jury.

¶ 53 If a trial court determines that a defendant has violated N.C.G.S. § 15A-905(c)(1) by failing to provide advance notice of a defense, it may impose any of the following sanctions on a defendant:

> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C.G.S. § 15A-910(a) (2019). We have previously treated a trial court's denial of a defendant's request for jury instructions as a sanction under N.C.G.S. § 15A-910(a)(3) when the defendant failed to provide notice, even when the trial court did not explicitly refer to the denial as a sanction. *See State v. Pender*, 218 N.C. App. 233, 243-44, 720 S.E.2d 836, 843, *disc. rev. denied*, *appeal dismissed*, 366 N.C. 233, 731 S.E.2d 414 (2012), *cert. dismissed*, 374 N.C. 264, 839 S.E.2d 845 (2020); *see also State v. Jones*, 260 N.C. App. 104, 107, 816 S.E.2d 921, 924 (2018) ("The sanction for failure to give notice of a defense of self-defense is normally exclusion of evidence upon the State's objection or refusal to give a jury instruction on self-defense."), *disc. rev. denied*, *cert. dismissed*, *appeal dismissed*, 372 N.C. 710, 831 S.E.2d 90 (2019). Just as in *Pender*, here, the trial court's denial of Defendant's request for a self-defense instruction is treated as a sanction for a discovery violation under N.C.G.S. § 15A-910(a)(3).

¶ 54 "Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article." N.C.G.S. § 15A-910(b) (2019). "If the court imposes any sanction, it must make specific findings justifying the imposed sanction." N.C.G.S. § 15A-910(d) (2019). "[T]he determination of whether to impose sanctions [is] solely within the discretion of the trial court." *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002), *disc. rev. denied*, *appeal dismissed*, 356 N.C. 687, 578 S.E.2d 320, *cert. denied*, 540 U.S. 842, 157 L. Ed. 2d 76 (2003). "[T]he trial court's decision will only be reversed for an abuse of discretion upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (marks omitted).

> As explained by our Supreme Court, the rules of discovery contained in the Criminal Procedure Act were enacted by the General Assembly to ensure, insofar as possible, that defendants receive a fair trial and not be taken by surprise. They were not enacted to serve as mandatory rules of exclusion for trivial defects in the State's mode of compliance. Despite the General Assembly's emphasis on protecting defendants from

> the State's noncompliance, such legislative intent does not give defendants *carte blanche* to violate discovery orders, but rather, defendants and defense counsel both must act in good faith, just as is required of their counterparts representing the State. Thus, the rules of discovery have been applied with equal force to both defendants and the State to ensure a fair trial and avoid unfair surprise for both parties.

Foster, 235 N.C. App. at 377, 761 S.E.2d at 217 (citations and marks omitted).

¶ 55 Presuming the trial court purported to deny Defendant's request for an instruction on self-defense as a sanction for Defendant's failure to provide the State with prior notice, it must be determined whether the trial court abused its discretion in imposing this sanction.

> [I]n considering the totality of the circumstances prior to imposing sanctions on a defendant, relevant factors for the trial court to consider include without limitation: (1) the defendant's explanation for the discovery violation including whether the discovery violation constituted willful misconduct on the part of the defendant or whether the defendant sought to gain a tactical advantage by committing the discovery violation, (2) the State's role, if any, in bringing about the violation, (3) the prejudice to the State resulting from the defendant's discovery violation, (4) the prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any fundamental rights of the defendant, and (5) the possibility of imposing a less severe sanction on the defendant.

Id. at 380-81, 761 S.E.2d at 219.

¶ 56 In this case, the trial court implicitly found that Defendant violated N.C.G.S. § 905(c)(1) because "there was no notice given of [an] affirmative defense" and, contrary to Defendant's position in his reply brief, our review of the Record indicates Defendant failed to give notice when required to do so. The trial court then used this violation as an additional basis for its refusal to submit the issue of self-defense to the jury. Presuming the trial court intended to deny the self-defense instruction as a sanction on the basis of a discovery violation, it made no specific findings "justifying the imposed sanction" to deny Defendant's requested

instruction on self-defense in accordance with N.C.G.S. § 15A-910(d). N.C.G.S. § 15A-910(d) (2019). "The [trial] court simply found that [D]efendant failed to fully comply with the notice statute[,]" and "the [R]ecord suggests that the trial court [referred to the notice requirement] simply as an afterthought to bolster its decision not to instruct the jury on [self-defense]." *Foster*, 235 N.C. App. at 381, 761 S.E.2d at 219-220.

¶ 57 The lack of findings justifying the trial court's decision on Defendant's request for a jury instruction on self-defense was not the result of a reasoned decision. *See id.* at 381, 761 S.E.2d at 219 ("The procedure followed by the trial court, the failure to find prejudice, and the lack of findings are inconsistent with the [trial] court's ruling being a reasoned decision to further the purposes of the rules of discovery."); *see also State v. Barnett*, COA18-1183, 266 N.C. App. 140, 828 S.E.2d 754, 2019 WL 2505384 *8 (2019) (unpublished) ("Presuming *arguendo*, [the] [d]efendant's failure to provide the State with prior notice of [the] defense of [self-defense] could justify denying a jury instruction on the defense of [self-defense,] [i]t does not follow that the trial court could deny [the] [d]efendant's requested instruction on [self-defense] when the instruction is supported by the evidence viewed in the light most favorable to [the] [d]efendant."). The trial court abused its discretion in refusing to instruct the jury on self-defense when it failed to properly make findings and consider the appropriateness of the sanction for the failure of Defendant to provide notice of his intent to assert the defense of self-defense. Defendant is entitled to a new trial.

CONCLUSION

¶ 58 Defendant preserved his arguments for appellate review by requesting that the trial court instruct the jury on self-defense before the jury was charged. Defendant presented sufficient evidence to warrant submission of the self-defense affirmative defense to the jury. Further, the trial court abused its discretion when precluding the self-defense jury instruction as a sanction for Defendant failing to provide notice of his intent to rely upon the self-defense affirmative defense. I would hold Defendant is entitled to a new trial based on these prejudicial errors. For these reasons, I respectfully dissent.

[279 N.C. App. 475, 2021-NCCOA-501]

STATE OF NORTH CAROLINA
v.
KEVIN LEE JOHNSON

No. COA20-564

Filed 21 September 2021

1. Appeal and Error—preservation of issues—traffic stop—drug seizure—meritorious argument

The Court of Appeals invoked Appellate Rule 2 to review defendant's constitutional challenge to the seizure of drugs from his pants pocket after he was pulled over for a seatbelt violation because, in the event he did not properly preserve the issue for appeal, he presented a meritorious argument that required review in order to prevent manifest injustice.

2. Search and Seizure—traffic stop—seatbelt violation—request for consent to search person—voluntariness

During a traffic stop for a seatbelt violation, an officer's request for consent to search defendant's person without reasonable articulable suspicion of unrelated criminal activity resulted in an unconstitutional extension of the traffic stop. In light of the unlawful detention, defendant's consent to the search of his person was not voluntary, and his motion to suppress drugs found in his pants pocket should have been granted.

Judge CARPENTER concurring in a separate opinion.

Judge GRIFFIN concurring in a separate opinion.

Appeal by Defendant from Judgment entered 25 February 2020 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Associate Attorneys General Jarrett McGowan and Robert Pickett, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Kevin Lee Johnson (Defendant) appeals a Judgment entered upon his guilty pleas to Felony Possession of Cocaine and to having attained Habitual-Felon Status. The Record tends to reflect the following:

¶ 2 On the afternoon of 22 December 2017, Lieutenant Chris Stone (Lieutenant Stone) of the Iredell County Sheriff's Office was on duty and "sitting in the parking lot of a convenience store" on Taylorsville Highway. Lieutenant Stone saw Defendant get in a vehicle in the convenience store parking lot. According to Lieutenant Stone, he did not see Defendant put on his seatbelt upon entering the vehicle. Lieutenant Stone observed Defendant as Defendant drove past Lieutenant Stone's patrol car and, according to Lieutenant Stone, Defendant had still not put on his seatbelt. Lieutenant Stone initiated a traffic stop of Defendant's vehicle moments after Defendant drove out of the convenience store parking lot. When Lieutenant Stone approached the driver's window of Defendant's vehicle, he noticed Defendant still did not have his seatbelt on. Lieutenant Stone informed Defendant he stopped him for a seatbelt infraction but that Lieutenant Stone "was not going to write him a citation. If that's all that was wrong, then [Lieutenant Stone] was going to give him a warning."

¶ 3 Almost immediately, Lieutenant Stone asked Defendant to get out of Defendant's vehicle and "come back to [Lieutenant Stone's] vehicle." As Defendant walked back towards Lieutenant Stone's vehicle, Lieutenant Stone asked Defendant if "[Defendant] had anything illegal in his possession." Defendant said "no." Lieutenant Stone then asked if he "could search [Defendant]." Video from Lieutenant Stone's patrol car shows Defendant stop, as he is still walking back towards Lieutenant Stone's patrol car, and raise his hands above his waist. Lieutenant Stone proceeded to reach into Defendant's sweatshirt pockets, then into Defendant's trouser pockets. Eventually, Lieutenant Stone reached into Defendant's right trouser pocket and found "a plastic wrapper with some type of soft material inside, which [Lieutenant Stone] believed was possibly powder cocaine[.]" Video evidence reflects Lieutenant Stone never conducted an external pat down of Defendant's person before instructing Defendant to get in the front passenger seat of the patrol vehicle.

¶ 4 Lieutenant Stone placed Defendant in the front seat of his patrol vehicle and ran Defendant's license to make sure it was valid. Lieutenant Stone "advised [Defendant] that if he was interested in working with one of our narcotics detectives, he could possibly avoid being charged." Lieutenant Stone gave Defendant a "name and phone number to call."

Lieutenant Stone did not charge Defendant for possession of cocaine that day; Lieutenant Stone allowed Defendant to return to his vehicle and leave. However, Lieutenant Stone "followed up with [his] supervisor . . . a short time later" and learned Defendant had not contacted the Sheriff's Office.

¶ 5 On 5 March 2018, an Iredell County Grand Jury indicted Defendant on charges of Felony Possession of Cocaine and Felony Possession of Drug Paraphernalia as well as having attained Habitual-Felon Status. On 6 March 2019, Defendant filed a Motion to Suppress "the cocaine found in his pocket." In his Motion, Defendant argued Lieutenant Stone did not have reasonable suspicion to stop Defendant for the seatbelt infraction and, even if the stop was lawful, Lieutenant Stone's "going through the Defendant's pockets for a violation of a seatbelt was excessive, unconstitutional, and unlawful." Defendant argued he did not give Lieutenant Stone consent to search his pockets—Defendant supported the Motion with a signed affidavit stating Defendant consented "to be patted down for weapons" but not for a search of his pockets.

¶ 6 Defendant's Motion came on for hearing on 8 November 2019. During the hearing, Lieutenant Stone testified: "I asked him if he had anything illegal in his possession. That's what I always ask people. . . . I asked him if I could search him. I did not ask if I could pat him down. . . . I teach new deputies . . . [a]lways ask to search [people]." When asked why he always asks to search people during traffic stops, Lieutenant Stone replied: "For safety reasons, you know. If somebody has a weapon on them, then I definitely want to know that. . . . I want to know that before they sit in the front seat of my car."

¶ 7 Defendant also testified at the hearing. Defendant claimed that he had, in fact, been wearing his seatbelt when Lieutenant Stone pulled him over. Defendant also testified Lieutenant Stone asked if he could "pat [Defendant] down for weapons[.]" Defense counsel argued the evidence did not support a finding Lieutenant Stone had reasonable suspicion to stop Defendant for not wearing a seatbelt. Defense counsel also argued, in the alternative, that Defendant did not give knowing consent for Lieutenant Stone to search Defendant's pockets. Thus, according to Defendant, although Lieutenant Stone could have frisked Defendant as part of the traffic stop with Defendant's consent, because Lieutenant Stone lacked reasonable suspicion of criminal activity beyond the seatbelt infraction, Defendant's consent could not knowingly extend past a frisk allowed for officer safety.

¶ 8 The trial court made the following oral Findings and Conclusions:

> The officer stopped the defendant, told him he stopped him for a seatbelt violation, but was just giving him a warning. The court finds at that point, that the officer had reasonable suspicion to stop the vehicle because of his observations about the seatbelt. At that point, after asking -- after telling the defendant that he was just giving him a warning, the officer asked the defendant if there was anything illegal on his person. The defendant responded there was not. The officer asked, "can I search you?" The defendant gave consent to search. The officer conducted a search and found a package that he believed to be powder cocaine. The court finds that the officer asked for the defendant's consent to search, and the defendant gave consent to search. However, the defendant indicates that the officer asked if he could pat him down. The court finds that if that were the situation, then when the officer did pat him down and felt an object in his pocket that was -- that was a knotted bag, that that would come under the plain [feel] exception, and he would have had -- the officer would have had probable cause to be able to retrieve that item. And so, either way the court does find that the officer's actions were justified in this matter. So, therefore the motion to suppress is denied.

¶ 9 Subsequently, upon the denial of his Motion to Suppress, Defendant entered guilty pleas to Felony Possession of Cocaine and having attained Habitual-Felon-Status as evidenced by the Transcript of Plea. Defendant's Transcript of Plea expressly reserved Defendant's right to appeal the trial court's denial of his Motion to Suppress. Defendant gave oral Notice of Appeal at the plea hearing and filed written Notice of Appeal on 25 February 2020.

Issues

¶ 10 The issues on appeal are whether: (I) Defendant has preserved his argument his consent was involuntary on the basis Lieutenant Stone strayed from the traffic stop's mission and measurably prolonged the stop; and, if so, (II) the trial court erred in denying Defendant's Motion to Suppress evidence of the cocaine found on Defendant because Defendant's consent for the search was involuntary as a matter of law.[1]

1. On appeal, Defendant also argues: Lieutenant Stone exceeded the scope of the consent Defendant gave because Defendant only consented to an external frisk; the trial

Analysis

I. Preservation

¶ 11 **[1]** As a threshold matter, the State contends that because Defendant did not specifically argue before the trial court that the search was unrelated to the mission of the traffic stop and added undue delay to the stop, Defendant has not preserved this theory for appeal under Rule 10(a)(1) of our Rules of Appellate Procedure. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure requires:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired . . . if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's . . . motion.

N.C. R. App. P. 10(a)(1) (2021). "The theory upon which the case is tried in the lower court must control in construing the record and determining the validity of the exceptions. Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal[.]" *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (citation omitted). Moreover, "a defendant may not assert on appeal a new theory for suppression which was not asserted at trial." *State v. Smarr*, 146 N.C. App. 44, 56, 551 S.E.2d 881, 88 (2001) (concluding the defendant's "fruit of the poisonous tree" argument on appeal, based on a lack of Miranda warnings, should not be considered where the defendant argued his admission was inadmissible because it was not knowing and voluntary or that the testimony regarding the admission was not the best evidence at trial).

¶ 12 Where a defendant does not argue a constitutional theory at trial and later argues a constitutional theory on appeal, or a defendant argues one constitutional theory at trial and a different constitutional theory on appeal, the defendant may be deemed to have failed to preserve their appellate arguments under Rule 10(a)(1). *See Benson*, 323 N.C. at 322, 372 S.E.2d at 519; *State v. Bursell*, 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019) ("The transcript from the sentencing hearing reveals that

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court erred by failing to make Findings regarding the voluntariness of Defendant's consent; and, even if the search did not violate the Fourth Amendment to the United States Constitution, it violated Art. I § 20 of the North Carolina Constitution. However, because we conclude Lieutenant Stone's request for consent to search and subsequent search of Defendant's pockets constituted an unreasonable search and seizure, we do not reach these arguments.

defendant did not clearly raise the constitutional issue of whether the lifetime SBM imposed on him constituted a reasonable search under the Fourth Amendment. Though defense counsel specifically objected to imposition of lifetime SBM, this objection questioned the sufficiency of the evidence supporting the SBM order."); *State v. McPhail*, 329 N.C. 636, 640-41, 406 S.E.2d 591, 595 (1991) ("[T]he defendant objected on the ground that allowing his own expert to testify for the State would violate his due process rights under the fourteenth amendment. The trial court overruled that objection. On appeal, the defendant now contends for the first time that allowing his expert to be called and to testify as a witness for the State violated his sixth amendment right to effective assistance of counsel. Having failed to challenge the admission of the evidence in question on this ground during the trial, the defendant will not be allowed to do so for the first time on his appeal to this Court.").

¶ 13 In this case, Defendant argued in his Motion to Suppress:

> 10. The officer did not have the ability to clearly see whether or not the Defendant was wearing his seatbelt. Defendant maintains that he was wearing his seatbelt. The stop of the vehicle was without reasonable suspicion and was therefore unconstitutional.
>
> 11. Even if the Court determines that the stopping of the Defendant's vehicle was lawful, the search of going through the Defendant's pockets for a violation of a seatbelt was excessive, unconstitutional, and unlawful. . . .
>
> . . . .
>
> 13. That the defendant's person was unlawfully searched and property was seized by Officer Stone in violation of the Fourth Amendment to the United States Constitution and in violation of the North Carolina Constitution and that the recovery of items from the defendant's person by an officer acting without a search warrant was as a result of an unconstitutional search and seizure.

¶ 14 Here, unlike in the cases cited above, Defendant did not argue the evidence was inadmissible based on one constitutional provision at trial and another provision on appeal. Defendant argued Lieutenant Stone did not have reasonable suspicion for the stop generally and that Defendant's "person was unlawfully searched and property was seized by Officer

Stone in violation of the Fourth Amendment[.]" Thus, Defendant argued Lieutenant Stone's search violated Defendant's right to be free from unreasonable search and seizure as protected by the Fourth Amendment. On appeal, Defendant continues to argue Lieutenant Stone's search violated Defendant's rights as protected by the Fourth Amendment, albeit on slightly different factual bases than Defendant argued to the trial court. Although Defendant now argues Lieutenant Stone strayed from the traffic stop's mission and added measurable delay to the stop, thus rendering the search unlawful, Defendant has not changed his underlying constitutional basis for suppression. *See Smarr*, 146 N.C. App. at 56, 551 S.E.2d at 88. Consequently, Defendant preserved this issue for appeal.

¶ 15 Moreover, even if Defendant did not preserve this issue for appeal under Rule 10(a)(1), Rule 2 of our Rules of Appellate Procedure affords this Court the discretion to waive Rule 10(a)(1)'s requirements to reach the merits of Defendant's arguments. Rule 2 provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules . . . upon application of a party or upon its own initiative[.]

N.C. R. App. P. 2 (2021). In fact, recognizing he may have not preserved this issue on appeal, Defendant asks this Court, in the alternative, to exercise its discretion under Rule 2 to reach the merits of his argument.

¶ 16 " 'Rule 2 must be applied cautiously,' and it may only be invoked 'in exceptional circumstances.' " *Bursell*, 372 N.C. at 200, 827 S.E.2d at 305 (quoting *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007)). "A court should consider whether invoking Rule 2 is appropriate 'in light of the specific circumstances of individual cases and parties, such as whether 'substantial rights of an appellant are affected.' " *Id.* (quoting *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (citation and quotation marks omitted)). "As a result, a decision to invoke Rule 2 and suspend the appellate rules is always a discretionary determination." *Id.* at 201, 827 S.E.2d at 306 (citation and quotation marks omitted).

¶ 17 In this case, if Defendant failed to satisfy Rule 10(a)(1) to preserve his Fourth Amendment argument based on the facts argued on appeal, Defendant did raise directly related issues in his Motion to Suppress, which are necessarily intertwined with any analysis of the traffic stop under the Fourth Amendment. Unlike in other cases—including cases where this Court has chosen to exercise its discretion under Rule 2

and reach the merits of appellants' unpreserved arguments—here, Defendant's Motion did argue similar constitutional theories in the trial court. *See State v. Hall*, 134 N.C. App. 417, 424, 517 S.E.2d 907, 912 (1999) (reviewing the defendant's in-court identification argument based on a theory not raised in the trial court); *see also State v. Adams*, 250 N.C. App. 664, 674, 794 S.E.2d 357, 364 (2016) (exercising discretion under Rule 2 to review the trial court's denial of the defendant's motion to suppress when the defendant did not object to the evidence at trial).

¶ 18 Moreover, our courts have "tended to invoke Rule 2 for the prevention of 'manifest injustice' in circumstances in which substantial rights of an appellant are affected." *Hart*, 361 N.C. at 316, 644 S.E.2d at 205 (citation omitted). But, where "the result would be no different if we chose to invoke Rule 2 to suspend the rules[,]" there is likely no manifest injustice. *State v. Patterson*, 185 N.C. App. 67, 73, 648 S.E.2d 250, 254 (2007) (declining to exercise Rule 2 discretion where the defendant's argument had no merit and reviewing the argument would not change the outcome of the case). Here, however, Defendant raises a meritorious argument on appeal—thus, declining to exercise our discretion to review Defendant's argument would constitute manifest injustice where the State could not prove its case against Defendant without the challenged evidence. *See State v. Mullinax*, 180 N.C. App. 439, 443, 637 S.E.2d 294, 297 (2006) (reviewing defendant's assignment of error under Rule 2, in part, "[b]ecause of the potential impact on defendant's sentence from an incorrect prior record level calculation"). Therefore, assuming Defendant has failed to preserve his argument under N.C.R. App. P. 10(a)(1), we exercise our Rule 2 discretion to address the merits of Defendant's argument.

II. Consent

¶ 19 **[2]** Defendant argues, even if he consented to Lieutenant Stone's request for a full search, that consent was involuntary because the request and search was outside the traffic stop's scope, added time to the stop, and was not supported by reasonable suspicion of any criminal activity beyond the seatbelt infraction.

¶ 20 "When reviewing a ruling on a motion to suppress, we analyze whether the trial court's 'underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law.' " *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)) (alterations in original). Here, the trial court found and concluded:

> The officer stopped the defendant, told him he stopped him for a seatbelt violation, but was just giving him a warning. The court finds at that point, that the officer had reasonable suspicion to stop the vehicle because of his observations about the seatbelt. At that point, after asking -- after telling the defendant that he was just giving him a warning, the officer asked the defendant if there was anything illegal on his person. The defendant responded there was not. The officer asked, "can I search you?" The defendant gave consent to search. The officer conducted a search and found a package that he believed to be powder cocaine. The court finds that the officer asked for the defendant's consent to search, and the defendant gave consent to search. However, the defendant indicates that the officer asked if he could pat him down. The court finds that if that were the situation, then when the officer did pat him down and felt an object in his pocket that was -- that was a knotted bag, that that would come under the plain [feel] exception, and he would have had -- the officer would have had probable cause to be able to retrieve that item. And so, either way the court does find that the officer's actions were justified in this matter. So, therefore the motion to suppress is denied.

¶ 21 Even if Defendant had consented to a full search in this context[2], such a Finding would not have supported the legal conclusion Defendant's consent was voluntary as a matter of law. "The Fourth Amendment to the United States Constitution states that '[t]he right of the people to be secure . . . , against unreasonable searches and seizures, shall not be violated.' " *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (citing U.S. Const. amend. IV) (alterations in original). " 'A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.' " *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166 (2012) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407, 160 L. Ed. 2d 842, 846 (2005)). "[T]o detain a driver beyond the scope of the traffic stop, the officer must have the driver's consent or reasonable

2. The trial court's findings do not resolve the dispute over the scope of Defendant's consent to be searched—that is, whether Defendant was consenting to be frisked for weapons or consenting to the full search of the interior of his pockets for contraband.

articulable suspicion that illegal activity is afoot. *Id.* (holding consent to search *after* the mission of the traffic stop was complete was voluntary) (citing *Florida v. Royer*, 460 U.S. 491, 497-98, 75 L. Ed. 2d 229, 236 (1983)). However, where "consent to search . . . was the product of an unconstitutional seizure," it is involuntary. *State v. Cottrell*, 234 N.C. App. 736, 752, 760 S.E.2d 274, 285 (2014). Moreover, "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity." *State v. Parker*, 183 N.C. App. 1, 9, 644 S.E.2d 235, 241-42 (2007) (citation omitted).

¶ 22 " 'Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to [the traffic] stop.' " *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (quoting *Rodriguez v. United States*, 575 U.S. 348, 355, 191 L. Ed. 2d 492, 499 (2015) (citation and quotation marks omitted))(alterations in original). "These inquiries include checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* (citation and quotation marks omitted). "In addition, 'an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely[,]' " including conducting criminal history checks. *Id.* at 258, 805 S.E.2d at 673-74 (citations omitted). Officer safety "stems from the mission of the traffic stop[;]" thus, "time devoted to officer safety is time that is reasonably required to complete that mission." *Id.* at 262, 805 S.E.2d at 676. "On-scene investigation into other crimes, however, detours from that mission." *Rodriguez*, 575 U.S. at 356, 191 L. Ed. 2d at 500. Moreover, "traffic stops remain[ ] lawful only so long as [unrelated] inquiries do not *measurably* extend the duration of the stop." *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676 (alterations and emphasis in original) (citation and quotation marks omitted) (holding an officer's frisk of the defendant, for safety reasons, lasting eight or nine seconds did not measurably extend the stop).

¶ 23 Here, Lieutenant Stone did not articulate any reasonable suspicion of other criminal activity to support his asking for Defendant's consent to search. In fact, Lieutenant Stone stated he routinely asked for consent to a full search during traffic stops and taught other law enforcement officers to do the same. Thus, the pertinent inquiry is whether Lieutenant Stone's asking Defendant for consent to search and the subsequent search measurably extended the stop's duration rendering any consent Defendant gave involuntary as a matter of law. This inquiry, in turn, depends on whether the search deviated from the traffic stop's mission. Certainly, a full search of Defendant's person for any illegal contra-

band was not related to the traffic stop based on a seatbelt infraction. However, officer safety is a part of every traffic stop's mission. *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676.

¶ 24 An officer is permitted to detain and individual when the officer has a reasonable suspicion criminal activity is afoot and may conduct an external frisk of the detained person if the officer has reason to believe the detainee is armed and potentially dangerous. *See State v. Duncan*, 272 N.C. App. 341, 347, 846 S.E.2d 315, 320-21 (2020) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 372-73 124 L. Ed. 2d 334, 343-44 (1993)). Thus, it may have been reasonable for Lieutenant Stone to conduct an external frisk of Defendant for officer safety as a part of the traffic stop's mission. Moreover, this traffic stop's mission could have included a check for outstanding warrants and of Defendant's license and registration. However, the length and scope of a full search, before any of those permissible checks were completed, measurably—and impermissibly—extended the traffic stop in this case.

¶ 25 Here, the video evidence shows approximately twenty-six seconds elapsed from the time Defendant appears to raise his arms and complies with the search and when Lieutenant Stone finished reaching into all Defendant's pockets. Moreover, the video reflects Lieutenant Stone never conducted an external frisk and possibly missed locations where Defendant could have concealed weapons instead focusing on the content of Defendant's pockets. Lieutenant Stone not conducting such a frisk belies his stated concern for his safety. Thus, although "a frisk that lasts just a few seconds[,]" and is conducted to enhance officer safety may not measurably extend a traffic stop, *Bullock*, 370 N.C. at 262-63, 805 S.E.2d at 677, the full search in this case lasting almost thirty seconds, and arguably not related to officer safety, did measurably extend the stop in this case. *See Duncan*, 272 N.C. App. at 353-54, 846 S.E.2d at 325 (a thirty-four-second "search into Defendant's jacket pockets had nothing to do with the 'mission' of the traffic stop" and measurably prolonged the stop).

¶ 26 Indeed, the State makes no argument that—absent Defendant's alleged consent—the search in this case would have been permissible under the Fourth Amendment. Rather, the State contends Lieutenant Stone's act of *requesting* consent to search did not measurably extend the traffic stop. However, as stated above, "[w]ithout additional reasonable articulable suspicion of additional criminal activity, the officer's request for consent exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment." *Parker*, 183 N.C. App. at 9, 644 S.E.2d at 242 (citation omitted).

¶ 27 Nevertheless, the State argues our decision in *State v. Jacobs* supports the State's position law enforcement officers need no additional, reasonable suspicion to request consent to search defendants during a valid traffic stop.[3] 162 N.C. App. 251, 590 S.E.2d 437 (2004). In *Jacobs*, the defendant pled guilty to drug charges after the trial court denied the defendant's motion to suppress evidence of drug possession law enforcement found after stopping the defendant's car and asking defendant for consent to search the car. *Id.* at 252, 590 S.E.2d 439. An officer with the Burlington Police Department stopped the defendant's car at approximately 1:43 a.m. because the officer saw the defendant's car "continuously weaving back and forth in its lane[.]" *Id.* Beyond the defendant's "weaving," the defendant's car also had a Tennessee license plate; the officer had recently been alerted that a murder suspect from Tennessee was in Burlington. *Id.*

¶ 28 After the officer stopped the defendant's car, the officer "ordered [the] defendant out of the car and conducted a pat-down search to ensure [the] defendant was not armed." *Id.* The defendant's car was registered to a man with a different last name than the defendant, and the defendant stated the car was the defendant's brother's car, although he could not explain why the two had different last names. *Id.* at 252-53, 590 S.E.2d at 439. According to the officer, the defendant "appeared to be nervous[.]" *Id.* at 253, 590 S.E.2d at 439. The officer then told the defendant the officer "had information regarding the transport of drugs" between Tennessee and Burlington. *Id.* The officer asked the defendant if the defendant had any drugs in his car; the defendant replied he did not. *Id.* The officer asked the defendant for consent to search the car, and the defendant consented and told the officer there was a large amount of cash in the car "from the sale of a motorcycle." *Id.* As the officer searched the car, he smelled marijuana; the defendant admitted someone had smoked marijuana in the vehicle earlier. *Id.* at 253, 590 S.E.2d at 440. The officer found "a bundle of bills in a rubber band" and loose tobacco the officer believed came from hollowed-out cigars used to smoke marijuana. *Id.* The officer searched the defendant's person, including the defendant's "crotch," where the officer found plastic bags containing what the officer believed were methylenedioxymethamphetamine (MDMA) and marijuana. *Id.* at 253-54, 590 S.E.2d at 440.

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3. The State makes this argument in opposing Defendant's argument the request for consent violated Art. I § 20 of the North Carolina Constitution. We address whether *State v. Jacobs* supports the State's position on Fourth Amendment grounds and do not address whether the request for consent in this case violated the North Carolina Constitution.

¶ 29 On appeal, the defendant argued the trial court erred in denying his motion to suppress where, according to the defendant, the officer did not have reasonable suspicion for the stop, and the search of his car was unlawful, despite his consent, because "the length of the investigatory detention was unreasonable." *Id.* at 254-56, 590 S.E.2d 440-41. First, we held the trial court did not err in concluding the officer had reasonable suspicion to stop the defendant because the officer observed the defendant "weaving" in his lane giving rise to reasonable suspicion of impaired driving. *Id.* at 255-56, 590 S.E.2d at 440-41. Further, we held the officer had reason to detain the defendant and ask him questions in order to dispel or confirm his suspicions about the Tennessee murder suspect and that the defendant's inability to answer the officer's questions and the defendant's nervousness gave rise to additional suspicion. *Id.* at 256-57, 590 S.E.2d at 441-42.

¶ 30 In the alternative, the defendant argued the State "failed to establish that [the officer] had sufficient reasonable suspicion to request defendant's consent for the search." *Id.* at 258, 590 S.E.2d at 442. We concluded "[n]o such showing is required." *Id.* We reasoned: "[w]hen a defendant's detention is lawful, the State need only show 'that defendant's consent to the search was freely given, and was not the product of coercion' . . . ." *Id.* (quoting *State v. Sanchez*, 147 N.C. App. 619, 626, 556 S.E.2d 602, 608 (2001) *disc. rev. denied*, 355 N.C. 220, 560 S.E.2d 358 (2002) (citation omitted)). Thus, we held the search of the defendant's car was lawful "[s]ince the search of defendant's car was admittedly consensual *and* was not tainted by an unlawful detention." *Id.* at 258, 590 S.E.2d at 443 (emphasis added).

¶ 31 However, *Jacobs* is inapposite here. In *Jacobs*, we held the defendant was already lawfully detained on suspicion of impaired driving. Thus, the officer in *Jacobs* already had reasonable suspicion to support a search for intoxicants in the defendant's vehicle. Therefore, the request for consent to search did not constitute further, unlawful detention because the officer had reason to believe evidence of impairment could be present, and the defendant's nervousness and inability to answer questions added to the officer's suspicions. Here, unlike the officer in *Jacobs*, Lieutenant Stone had no reasonable suspicion of criminal activity unrelated to the initial reason for the traffic stop. Without any additional reasonable suspicion of unrelated criminal activity, Lieutenant Stone's request for consent for a full search unreasonably delayed the stop and tainted the consent Defendant gave. *See id.*; *see also Parker*, 183 N.C. App. at 9, 644 S.E.2d at 242. Therefore, Lieutenant Stone had not lawfully detained Defendant such that the State only had to show Defendant's

consent was freely given and not the product of coercion. *See Jacobs*, 162 N.C. App. at 258, 590 S.E.2d at 442.

¶ 32 The State further argues our decision in *Parker*—restating the general proposition that a request for consent unrelated to the reason for the initial stop must be supported by reasonable suspicion of additional, criminal activity—"does not survive" our Supreme Court's decision in *Bullock*. In *Parker*, however, we in fact held law enforcement's request for consent to search was supported by probable cause where, during a valid "weapons frisk" of the vehicle just prior to the request for consent to search the defendant's purse, law enforcement found other drugs and drug paraphernalia creating at least reasonable suspicion of further criminal activity unrelated to defendant's speeding that caused law enforcement to stop the defendant's vehicle in the first instance. *Parker*, 183 N.C. App. at 11-13, 644 S.E.2d at 243-44. In this case, based on Lieutenant Stone's own testimony, he had no reasonable, articulable suspicion of any further criminal activity that would support his request for consent for a full search of Defendant's person.

¶ 33 Moreover, our decision in *Parker* was left undisturbed by *Bullock* as *Bullock* was focused on how a frisk was related to the mission of the traffic stop generally. *See generally Bullock*, 370 N.C. 256, 805 S.E.2d 671. Indeed, the *Bullock* Court acknowledged: "Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop." *Id.* at 258, 805 S.E.2d at 674. Here, the request to search and the full search of Defendant in this case was not related to the mission of the stop and wholly unsupported by any reasonable, articulable suspicion of other criminal activity afoot beyond the seatbelt infraction for which Lieutenant Stone initially stopped Defendant. Thus, because Lieutenant Stone's request for consent and his subsequent search of Defendant measurably prolonged the traffic stop for reasons unrelated to the stop's mission without reasonable suspicion, any consent Defendant gave for this full search was involuntary as a matter of law. Therefore, the trial court erred in denying Defendant's Motion to Suppress the cocaine found as a result of this unreasonable search.[4] Consequently, we reverse the trial court's denial of Defendant's

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4. Alternatively, the trial court found Lieutenant Stone's "actions were justified" under the "plain feel exception." The trial court's Finding/Conclusion the evidence in this case would have been admitted under the plain feel exception is not supported by the Record. The plain feel exception applies "to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search." *Minnesota v. Dickerson*, 508 U.S. 366, 375; 124 L. Ed. 2d 334, 345 (1993). However, as explained above, the search in this case was not a lawful search. Moreover, even if the trial court assumed Lieutenant Stone

Motion to Suppress. Moreover, we vacate the Judgment entered against Defendant based on his guilty pleas—entered subject to this appeal—to the charges of Felony Possession of Cocaine and the concomitant charge of attaining Habitual-Felon Status. We remand this matter to the trial court for further proceedings, including a determination of whether there is evidence to support the charges against Defendant or if these matters should be dismissed.

Conclusion

¶ 34 Accordingly, for the foregoing reasons, we reverse the trial court's denial of Defendant's Motion to Suppress, vacate the Judgment, and remand this matter for further proceedings.

VACATED AND REMANDED.

Judge CARPENTER concurs in a separate opinion.

Judge GRIFFIN concurs in a separate opinion.

CARPENTER, Judge, concurring.

¶ 35 I concur with the reasoning and the outcome that the application of the Constitutional protections to this case requires. I join the narrow analysis of the dispositive constitutional issue in this case set forth by Judge Griffin in his concurrence. I write separately to highlight that the legality of the stop of Appellant's vehicle was not challenged on appeal and there is no indication in the record in this case that racially disparate treatment was at issue.

¶ 36 Choosing to inject arguments of disparate treatment due to race into matters before the Court where such treatment is not at issue and does not further the goal of the equal application of the law to everyone. Rather, such a discussion functions to overshadow the other important constitutional issues of this case, and is not helpful to maintaining public confidence in the judiciary or the practice of law generally.

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would have immediately recognized the contraband during an external frisk, nothing in the Record supports such an assumption. Lieutenant Stone did not know there was anything in Defendant's pockets until he reached inside them. As such, the plain feel exception does not apply in this case. *See State v. Beveridge*, 112 N.C. App. 688, 696, 436 S.E.2d 912, 916 (1993), *aff'd per curiam*, 336 N.C. 601, 444 S.E.2d 223 (1994) (declining to apply the plain feel exception where the officer conducted an external frisk and then exceeded the scope of that permissible frisk by asking the defendant to empty the contents of his pockets and where the officer's testimony did not establish the object was immediately recognizable as contraband during the frisk).

GRIFFIN, Judge, concurring.

¶ 37 I concur with the reasoning in the majority opinion. I write separately to indicate exactly where Lieutenant Stone violated the Fourth Amendment to the U.S. Constitution. The Defendant's brief also raises a question of impartiality in traffic stops, and our justice system generally, based on the color of a person's skin and their gender. This appeal to an emotion, and to nothing before us in the Record, must be addressed, as the law applies equally to everyone. This case presents a very specific set of facts to guide our analysis. The stop of Defendant's vehicle was supported by reasonable suspicion. "[R]easonable suspicion is the necessary standard for traffic stops[.]" *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (citation omitted). Lieutenant Stone plainly articulated that he observed Defendant driving the vehicle without wearing a seatbelt. Defendant does not challenge on appeal the validity of the initial traffic stop.

¶ 38 Lieutenant Stone could and did lawfully ask Defendant to get out of the vehicle for safety reasons.

> [A] police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle. . . . Asking a stopped driver to step out of his or her car improves an officer's ability to observe the driver's movements and is justified by officer safety, which is a legitimate and weighty concern.

State v. Bullock, 370 N.C. 256, 261-62, 805 S.E.2d 671, 676 (2017) (citations and internal quotation marks omitted). A traffic stop is anything but routine and can present any number of challenges to an officer and the individual stopped. An officer is authorized to take many investigatory and safety-related measures. Additionally, Lieutenant Stone could have checked for outstanding warrants, checked Defendant's driver's license, and inspected the vehicle registration. *Id.* at 257, 805 S.E.2d at 673. An officer can, and should, take officer safety into account during a traffic stop. *Id.* at 258, 805 S.E.2d at 674.

¶ 39 The issue in this case arises when Lieutenant Stone asks to search Defendant with no additional reasonable suspicion of other criminal activity. The only violation evident from the Record is the seatbelt violation. Here, Lieutenant Stone's testimony was clear that his intent was to search Defendant. The evidence in the Record supports this. The video of the interaction between Lieutenant Stone and Defendant cuts against an assertion that the search was for officer safety. Further, the trial court

made no findings regarding officer safety concerns. The search was administered only in the pockets of Defendant. There was no pat down frisk. Lieutenant Stone reached directly into Defendant's pockets and did not search other areas of Defendant's person where weapons could be hidden. The evidence here does not indicate that the search was motivated by a concern for officer safety. Lieutenant Stone even stated that he asked to search "every single person that I stop" and that for years he had been training new deputies to "ask to search" people that they stop. An officer can certainly ask for consent to search an individual after a lawful detention. However, under this specific set of facts, this search prolonged the mission of the stop in violation of the Fourth Amendment. *See Rodriguez v. United States*, 575 U.S. 348, 355 (2015) (holding a traffic stop "remains lawful only so long as [unrelated] inquiries do not measurably extend the duration of the stop" (alteration in original) (citation and internal quotation marks omitted)). Lieutenant Stone articulated no additional reasonable suspicion of criminal activity for asking to search Defendant, thereby illegally delaying the stop. *See id.* (stating an officer "may not [conduct unrelated checks] in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual" (citation omitted)).

¶ 40 The analysis here does not limit or question the officer's ability to take safety precautions as articulated in *Bullock*. It also does nothing to limit a search pursuant to consent. If Lieutenant Stone had reasonable articulable suspicion of other criminal activity or had received valid consent for an additional search, the additional search would not have violated the Fourth Amendment by extending the encounter. *See State v. Reed*, 373 N.C. 498, 510, 838 S.E.2d 414, 423 (2020) (stating that "prolong[ing] a detention beyond the scope of a routine traffic stop requires . . . either the driver's consent or a reasonable suspicion that illegal activity is afoot" (citation and internal quotation marks omitted)).

¶ 41 Defendant's brief implies that U.S. citizens are treated differently under our laws based on the color of their skin. I reject this argument. The law is color blind and applies equally to every citizen in the United States of America. This argument in Defendant's brief is inflammatory and unnecessary.

¶ 42 It is hard to blame Defendant for raising this argument. The brief quoted former North Carolina Chief Justice Beasley, who also implied in a speech on 2 June 2020 that our justice system does not treat people equally in the courtroom based on the color of their skin:

> These protests highlight the disparities and injustice that continue to plague black communities. Disparities

that exist as the result of policies and institutions; racism and prejudice have remained stubbornly fixed and resistant to change. These protests are a resounding, national chorus of voices whose lived experiences reinforce the notion that Black people are ostracized, cast out, and dehumanized. Communities are crying out for justice and demanding real, meaningful change.

. . .

As the mother of twin sons who are young black men, I know that the calls for change absolutely must be heeded. And while we rely on our political leaders to institute those necessary changes, we must also acknowledge the distinct role that our courts play. As Chief Justice, it is my responsibility to take ownership of the way our courts administer justice, and acknowledge that we must do better, we must be better.

When Chief Justice Martin convened a commission to study the justice system in 2015, that commission found that a majority of North Carolinians lack trust and confidence in our court system. Too many people believe that there are two kinds of justice. They believe it because that is their lived experience – they have seen and felt the difference in their own lives.

The data also overwhelmingly bears out the truth of those lived experiences. In our courts, African-Americans are more harshly treated, more severely punished and more likely to be presumed guilty. There are many ways to create change in the world, but one thing is apparent: the young people who are protesting everyday have made clear that they do not intend to live in a world in which they are denied justice and equality like the generations before them.

We must develop a plan for accountability in our courts. Judges work hard and are committed to serving the public. But even the best judges must be trained to recognize our own biases. We have to be experts not just in the law, but in equity, equity that recognizes the difficult truths about our shared

> past. We must openly acknowledge the disparities that exist and are too often perpetuated by our justice system.
>
> . . .
>
> Our pilot projects in eight North Carolina counties are already showing promising results that can be implemented statewide to truly bring change to a system that all too frequently punishes people disparately.

Cheri Beasley, *Chief Justice Beasley Addresses the Intersection of Justice and Protests around the State*, North Carolina Judicial Branch (June 2, 2020), https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-addresses-the-intersection-of-justice-and-protests-around-the-state.

¶ 43 This statement from the former Chief Justice has motivated Defendant in this case to assert that "[o]ur Constitution gives this Court the legal authority to carry out our Chief Justice's pledge." Defendant's statement highlights the problem with the judiciary becoming involved in public policy. The speech by the former Chief Justice states our justice system does not treat people equally based on the color of their skin. It also encourages and charges the courts to become an active body by involving our judicial branch in policy decisions. The judiciary should at all times practice judicial restraint. Here, this Court reaches the correct legal outcome regardless of the color of Defendant.

¶ 44 We are fortunate to live in the United States of America where the law is applied the same to all citizens.

[279 N.C. App. 494, 2021-NCCOA-502]

STATE OF NORTH CAROLINA
v.
JENNIFER LYNN PIERCE, Defendant

No. COA20-494

Filed 21 September 2021

1. False Pretense—"person within this State"—corporate victim—sufficiency of evidence

In a prosecution for obtaining property by false pretenses, assuming without deciding that "person within this State" (pursuant to N.C.G.S. § 14-100, referring to a victim) is an essential element of the offense, the State nevertheless met this requirement by presenting evidence that the large quantity of cell phones defendant ordered from a corporation at a discount, on the pretense that the phones were for a non-existent charity, were shipped to one of the corporation's retail stores located in North Carolina and that one of the corporation's agents met with defendant's collaborator in various North Carolina locations.

2. False Pretense—valuation of property—to elevate felony—fair market value—sufficiency of evidence

In a prosecution for obtaining property by false pretenses in which defendant obtained a large quantity of cell phones at a discount on behalf of a non-existent charity with plans to resell the phones at the full retail value, the State presented substantial evidence, including actual fraud loss values, from which a jury could conclude that the value of the property obtained—meaning fair market value—was $100,000.00 or more, elevating each of four counts to a Class C felony pursuant to N.C.G.S. § 14-100(a), regardless of any amount defendant may have paid when obtaining the phones.

Appeal by Defendant from judgment entered 16 September 2019 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

Mark L. Hayes for defendant-appellant.

MURPHY, Judge.

¶ 1 A trial court does not err in denying a defendant's motion to dismiss where the State presented substantial evidence, when viewed in the light most favorable to the State, of each essential element of the crime charged. Here, presuming, without deciding, the phrase "person within this State" is an essential element of obtaining property by false pretenses under N.C.G.S. § 14-100(a), the State presented substantial evidence that the victim was a person within this State. The State also met its burden to show the gross value of the property obtained under false pretenses was $100,000.00 or more in each timeframe supporting the four separate convictions. We discern no error.

BACKGROUND

¶ 2 In 2006, Defendant Jennifer Lynn Pierce employed Brian Knight[1] at her telemarketing business. In 2008, Knight left Defendant's company and went back to school to become a police officer. Around 2010 or 2011, Knight acquired two convenience stores, including one that was attached to a Marathon gas station. In 2015, the North Carolina Department of Revenue seized both convenience stores due to Knight falling behind on paying the stores' taxes. At that time, Knight and Defendant reconnected with each other.

¶ 3 After Knight explained his financial struggles to Defendant, she offered to help. Defendant told Knight she could use his name and his convenience store businesses to purchase phones at a discount from AT&T[2] and resell them at full retail value, a scheme that ultimately came to be known as the Merry Marathon project. Using Knight's personal and business information, Defendant represented to AT&T that Merry Marathon was a charity associated with Knight's convenience store attached to the Marathon gas station and the charity needed a large quantity of Apple iPhones[3] for telemarketing purposes.

¶ 4 Knight testified the iPhones were sent to his business, and he brought them to Defendant, after which he was "not quite sure" what happened to them. However, Knight knew the iPhones would leave Defendant's possession and he would get money in return. AT&T's fraud team began to suspect illegal behavior and gathered information regarding the billing and transaction records for the Merry Marathon account.

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1. Knight was also charged for his roles in the alleged criminal activities.

2. For ease of reading, and which is made more clear in note 8, *infra*, we refer to "AT&T" generically, as it appears in the indictments, throughout this opinion.

3. Defendant also ordered a small number of tablets, but the majority of the items she ordered and obtained were iPhones.

This information was passed along to the United States Secret Service, as well as the North Carolina Secretary of State's Office.

¶ 5 Defendant was indicted on five counts[4] of obtaining property by false pretenses valued at $100,000.00 or more and two charges of accessing government computers to defraud.[5] The obtaining property by false pretenses valued at $100,000.00 or more charges were identified by shipping date, and the gross value of the goods falsely obtained for count one was $110,547.99 from 28 July 2014 to 29 August 2014; $162,797.04 from 16 September 2014 to 17 September 2014 for count two; $116,047.93 on 22 September 2014 for count three; and $131,597.74 from 23 September 2014 to 22 October 2014 for count four. The indictments each alleged:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or between [the alleged dates], in Wake County, [Defendant] unlawfully, willfully, and feloniously did knowing and designedly with the intent to cheat and defraud, obtain Apple iPhones from AT&T by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: [Defendant] pretended to operate a charity when in fact the charity was non-existent. [Defendant] entered into an agreement with AT&T to purchase Apple iPhones for the fraudulent charity and make payments. [Defendant] then failed to make payments on the agreement and sold the devices for cash. At the time [Defendant] knew that the charity did not exist. The value of the iPhones was greater than $100,000.00.[6] This act was done in violation of [N.C.G.S.] § 14-100 and against the peace and dignity of the State.

¶ 6 At trial, the State presented testimony from AT&T's senior fraud case manager, Pam Tyler. Tyler's testimony explained and discussed State's

4. At the close of the State's evidence, the State dismissed one count of obtaining property by false pretenses valued at $100,000.00 or more, leaving the remaining four counts to go to the jury.

5. The two accessing government computers to defraud charges are not part of this appeal.

6. We note the indictments, in alleging the Class C felony as opposed to the Class H felony, improperly reference the value of the falsely obtained goods as "greater than $100,000.00" when the statute only requires the "value is one hundred thousand dollars ($100,000[.00]) or more[.]" N.C.G.S. § 14-100(a) (2019). This defect in the indictment was not fatal and did not deprive the trial court of subject matter jurisdiction.

Exhibit #1, which was a spreadsheet with information about the Merry Marathon project, including what type of iPhones were purchased, the dates the iPhones were purchased, the addresses the iPhones were shipped to, and the dollar figures for the "sale price" and the "actual fraud loss." Tyler testified the "sale price" column represented "what [AT&T] would charge the customer." She further clarified that, in this case, "[b]ecause of [the] large sale, they -- it looks like [Defendant] worked out a deal with [AT&T] where they got [] what we call a subsidized price on the phones, but there's an *actual retail value* of the phone that AT&T or any carrier actually pays" to buy the iPhones from the supplier. (Emphasis added). Tyler testified the dollar figure in the "actual fraud loss" column represented "the actual value of each [iPhone,] . . . the actual price." Tyler also testified some payments had been made, but she "[did not] have that figure." She stated "there were [] some [] payment reversals[,]" meaning "[t]he check didn't clear or was reversed by the financial institution."

¶ 7 A jury found Defendant guilty of all four counts of obtaining property by false pretenses valued at $100,000.00 or more and guilty of the two charges of accessing government computers to defraud. Defendant received a consolidated active sentence of 100 to 132 months on the obtaining property by false pretenses valued at $100,000.00 or more convictions and a consecutive consolidated active sentence of 20 to 33 months on the accessing government computers with the intent to defraud convictions. Defendant verbally gave notice of appeal.

ANALYSIS

¶ 8 Defendant argues the trial court erred when it denied her motion to dismiss because there was not substantial evidence of each essential element of obtaining property by false pretenses under N.C.G.S. § 14-100. Specifically, Defendant argues (A) "[t]he State presented no evidence that [the victim of the crime] was a 'person within this State,' " and (B) "[t]he State presented no evidence upon which a jury could conclude that the property [obtained under false pretenses] was worth more than $100,000[.00]."

¶ 9 N.C.G.S. § 14-100 defines the crime of obtaining property by false pretenses:

> (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State

> any money, goods, property, services, chose in action or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action, or other thing of value, such person shall be guilty of a felony[.] . . . If the value of the money, goods, property, services, chose in action, or other thing of value is one hundred thousand dollars ($100,000[.00]) or more, a violation of this section is a Class C felony. If the value of the money, goods, property, services, chose in action, or other thing of value is less than one hundred thousand dollars ($100,000[.00]), a violation of this section is a Class H felony.
>
> . . . .
>
> (c) For purposes of this section, "person" means person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization.

N.C.G.S. § 14-100 (2019).

¶ 10 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

> Upon [the] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33. "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

A. "Person Within this State"

¶ 11 **[1]** Defendant argues "[b]y the plain language of [N.C.G.S.] § 14-100, it is an essential element of the crime that the victim is a 'person within this

State' " and the State failed to meet its burden in proving this element of the crime. Our research reveals that this is an argument that has not been addressed by our appellate courts and initially we note that our caselaw has consistently observed the essential elements to the offense of obtaining property by false pretenses under N.C.G.S. § 14-100 are: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002); *see also State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); *State v. Hallum*, 246 N.C. App. 658, 664, 783 S.E.2d 294, 299, *disc. rev. denied*, 368 N.C. 919, 787 S.E.2d 24 (2016).

¶ 12 This is an issue of first impression;[7] however, we need not address whether "person within this State" is an essential element of obtaining property by false pretenses because, even if it is, the element has been satisfied here. Knight testified the iPhones were shipped to an AT&T store that operated out of Greenville, and AT&T's agent also relinquished possession of iPhones in Wilson and Goldsboro[8]:

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7. The law covering the King of England's realm in 1757 did not include a geographical restriction. The first time a law was enacted in North Carolina which included any potential geographical restriction was when the General Assembly included "within this state" in the statute codified as Potter's Revisal of 1819, laws of 1821, Ch. 814 § 2. *Compare* 30 Geo. II, ch. 24, § 1 (emphasis added) ("That from and after the twenty ninth day of September one thousand seven hundred and fifty seven, all persons who knowingly and designedly, by false pretence or pretences, *shall obtain from any person or persons*, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same . . . .") *with* 1811, c. 814, § 2, P.R. (emphasis added) ("That from and after the passing of this act, if any person or persons shall knowingly and designedly, by means of any forged or counterfeit paper, in writing or in print, or by any false token or other false pretence or pretences whatsoever, *obtain from any person or persons, or corporation within this state*, any money, goods, property or other thing of value, or any bank note, check, or order for the payment of money issued by or drawn on any bank or other society . . . .").

8. On appeal, for the first time, Defendant posits that AT&T is made up of various different subsidiaries, including AT&T, Inc., AT&T Operations, Inc., AT&T Wireless Services, Inc., AT&T Corp., and AT&T Mobility, LLC, and argues "even if a corporation becomes 'a person within this State' by the presence of any of its stores, the State presented no evidence that this AT&T store was owned or operated by the AT&T corporation which was the victim in this case. . . . One cannot automatically assume that one AT&T entity is 'within this State' just because another AT&T entity is 'within this State[.]'" We interpret Defendant's argument to be a fatal variance argument regarding which entity is the actual victim of the crime. *See State v. Fink*, 252 N.C. App. 379, 386-87, 798 S.E.2d 537, 542 (2017) (finding no fatal variance where the indictment referred to the corporation as "Precision Auto Care, Inc." and the evidence at trial tended to show the corporation's name was "Precision Franchising, Inc."). As Defendant's motion to dismiss was based solely on the

[THE STATE:] Okay. The phones that were being sent and shipped by AT&T as part of this Merry Marathon project, where were they being sent to? Where were you receiving them?

[KNIGHT:] Different -- some -- some were sent to this -- my location in Wilson, which was a Marathon store, just like the account was -- was addressed under and some were given to me, brought to me by Tracy who was my account manager from AT&T. She would bring them to me sometimes. So just, you know, if she brought them -- she brought them to me sometimes, sometimes they were shipped to the store in boxes.

[THE STATE:] Okay. That Tracy, is that Tracy Fryer Williams?

[KNIGHT:] That's correct.

[THE STATE:] And she was an AT&T employee in Greenville?

[KNIGHT:] Right. She was like a business specialist which she didn't particularly work inside in one location. Sometimes I would meet her in Wilson, she would meet at that location. And sometimes it was Greenville and also Goldsboro, so . . .

[THE STATE:] Okay. And some times when you met she would actually deliver you some of these phones as part of the Merry Marathon project?

[KNIGHT:] That's correct.

[THE STATE:] Okay. And then you said a bunch or many of them came to your actual Marathon store in Wilson.

[KNIGHT:] Right.

---

grounds of insufficient evidence and not on the grounds of a fatal variance, it was not properly preserved for appellate review. *See State v. Everette*, 237 N.C. App. 35, 40, 764 S.E.2d 634, 638 (2014) (citations omitted) ("To preserve a fatal variance argument for appellate review, a defendant must state at trial that an allegedly fatal variance is the basis for his motion to dismiss. At trial, [the] [d]efendant based his motion to dismiss solely on the grounds of insufficient evidence. Therefore, [the] [d]efendant did not properly preserve for appellate review his argument that there was a fatal variance . . . ."). Therefore, we do not consider this portion of Defendant's argument in our resolution of this appeal.

> [THE STATE:] Each time that you received phones either from Tracy or that were shipped to your store, what did you do with them?
>
> [KNIGHT:] I would take them straight to Raleigh.
>
> [THE STATE:] Where would you go in Raleigh with them?
>
> [KNIGHT:] I would go to [Defendant's] house on San Gabriel in Raleigh. I would leave them with her. And after that I'm not sure where they went.

¶ 13 Presuming, without deciding, that "person within this State" is an essential element to the offense of obtaining property by false pretenses, a reasonable mind could conclude AT&T was operating as a "person within this State" from the above-quoted testimony; the falsely obtained iPhones came from a store operated by the victim, AT&T, located in North Carolina. The State presented substantial evidence from which a reasonable mind could conclude that AT&T is a "person within this State." N.C.G.S. § 14-100(a) (2019) ("If any person shall . . . obtain or attempt to obtain from any person within this State . . ."). The trial court properly denied Defendant's motion to dismiss on this basis.

B. Valuation of the Property Obtained by False Pretenses

¶ 14 **[2]** Defendant also argues the trial court erred in denying her motion to dismiss because the State did not meet its burden to present evidence that the value of the iPhones falsely obtained by Defendant in each time period was at least $100,000.00. Accordingly, Defendant argues she should have only been convicted of four Class H felonies, as opposed to four Class C felonies. *See* N.C.G.S. § 14-100(a) (2019) ("If the value of the [goods falsely obtained] is one hundred thousand dollars [] or more, a violation of this section is a Class C felony. If the value of the [goods falsely obtained] is less than one hundred thousand dollars [], a violation of this section is a Class H felony.").

¶ 15 Our caselaw has not defined the term "value" in the context of N.C.G.S. § 14-100(a). However, our caselaw has defined the term "value" in the context of property crimes to be synonymous with "fair market value." *See State v. Shaw*, 26 N.C. App. 154, 157, 215 S.E.2d 390, 392-93 (1975) (citations omitted) ("As used in [N.C.G.S. §] 14-72(a) for determining whether the crime is a felony or a misdemeanor, the word 'value' means the fair market value of the stolen item at the time of the theft. In the case of common articles having a market value, the courts . . . have declared the proper criterion to be the price which the subject of the

larceny would bring in open market–its ‘market value’ or its ‘reasonable selling price’, at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny[.]”); *State v. Cook*, 263 N.C. 730, 736, 140 S.E.2d 305, 310 (1965) (“The word ‘value,’ as used in the [grand larceny] statute, does not mean the price at which the owner would sell, but means . . . fair market value.”). We hold that this reasoning is persuasive and that the term “value,” as used in N.C.G.S. § 14-100, means fair market value of the item at the time it was falsely obtained.

¶ 16 To this end, Defendant also argues “[t]he State’s evidence concerning the original purchase prices and subsidized retail prices of the phones is insufficient to establish the fair market value of the phones.” We disagree.

¶ 17 “A verdict or finding as to value may be based on evidence of the price which the owner had paid for [the] property shortly before its theft . . . .” *Shaw*, 26 N.C. App. at 158, 215 S.E.2d at 393. The jury was provided with State’s Exhibit #1, a spreadsheet containing dollar figures in a column labeled “actual fraud loss.” Tyler testified the actual fraud loss value represents the actual retail value of the iPhone, not the price AT&T charges the customer. The jury was free to either consider these values or not consider them in determining the iPhones’ fair market value, and whether it considered them does not affect the outcome of our analysis. *See State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975) (“What the evidence proves or fails to prove is a question of fact for the jury.”); *State v. Blagg*, 2021-NCSC-66, ¶ 11 (marks omitted) (“Courts considering a motion to dismiss for insufficiency of the evidence should not be concerned with the weight of the evidence.”). Based on Tyler’s testimony, a reasonable mind could have interpreted State’s Exhibit #1 as representing the prices which AT&T had paid to its supplier for the iPhones before Defendant falsely obtained them. There was sufficient evidence presented to the jury to allow it to conclude the fair market value of the iPhones was equivalent to the “actual fraud loss” figures in State’s Exhibit #1.

¶ 18 Defendant also argues even if the actual fraud loss figure could be construed as the fair market value of the iPhones, “[t]he jury could not calculate the value of the falsely-obtained property without knowing the value of the payments [made by Defendant] for that property.”

¶ 19 At trial, Tyler testified to the following on cross-examination:

> [DEFENSE COUNSEL:] Okay. And how much payment did [AT&T] actually receive on [the Merry Marathon] accounts?

> [TYLER:] I don't know. There [were] some deposits, payments made, and I don't have that figure.
>
> [DEFENSE COUNSEL:] You understand -- maybe you don't -- do you understand that part of this offense deals with how much -- one of the elements is the amount that [AT&T is] out of pocket?
>
> [TYLER:] We have that document -- what we put as a loss is what we lost.
>
> [DEFENSE COUNSEL:] Okay. How much was paid, because the phones that you get for free, correct, I mean, something was paid to get them?
>
> [TYLER:] They paid deposits on some of the accounts. And there were also some reversals, payment reversals.
>
> [DEFENSE COUNSEL:] What does that mean?
>
> [TYLER:] The check didn't clear or was reversed by the financial institution.

¶ 20 Defendant relies on *State v. Kornegay* to assert that "[b]ecause large payments for the phones were paid, the obtained property consists of only a portion of the devices' overall fair market values." *See State v. Kornegay*, 313 N.C. 1, 326 S.E.2d 881 (1985). Defendant misconstrues our Supreme Court's recitation of an exercise of prosecutorial discretion in its preliminary statement for *Kornegay* as substantive law. *Id.* at 6, 326 S.E.2d at 887; *see Henderson v. Wilmington*, 191 N.C. 269, 278, 132 S.E. 25, 30 (1926) ("Upon this question the appeal was prosecuted; not upon that of levying a tax or pledging the credit of the city. The reference in the reported case to municipal wharves as 'public necessities' appears incidentally in the preliminary statement. It is not a part of the opinion; so it cannot be accepted as a precedent or as the expression of the Court.").

¶ 21 In *Kornegay*, the defendant, an attorney, obtained a settlement for his client in which she had to pay $104,000.00. *Kornegay*, 313 N.C. at 8, 326 S.E.2d at 889. The defendant falsely represented to his client that he settled the suit for $125,000.00 and instructed his client to bring him a check in the amount of $125,000.00. *Id.* at 28, 326 S.E.2d at 901. The defendant's client delivered him a check in the amount of $125,000.00, the defendant tendered a check for the settlement in the amount of $104,000.00, and the defendant kept the remaining $21,000.00

for himself. *Id*. The defendant was indicted and charged with obtaining $21,000.00 from his client by false pretense. *Id*. The information from *Kornegay* that Defendant relies on is merely a recitation of what the defendant was charged with, and not even dicta, much less a holding from our Supreme Court.

¶ 22 Despite Defendant's reliance on a premise not found in our substantive body of law, her argument and other hypotheticals are not without logic or reason. In her brief, Defendant argues:

> This Court has not previously addressed how to calculate the value of falsely obtained "money, goods, property, services, chose in action, or other thing of value" when that item of value is part of a greater asset. For example, if a perpetrator purchased a $100,000[.00] bar of gold using one valid cashier's check for $95,000[.00] and a second forged cashier's check for $5,000[.00], then the victim has only been swindled out of $5,000[.00]. The falsely-obtained property is the $5,000[.00] interest in the gold bar, not the entire $100,000[.00] gold bar. On those facts, the perpetrator would be guilty of a Class H felony, not a Class C felony.

However, we hold that *State v. Hines* is more applicable to the facts of this case. *State v. Hines*, 36 N.C. App. 33, 243 S.E.2d 782, *appeal dismissed and disc. rev. denied*, 295 N.C. 262, 245 S.E.2d 779 (1978).

¶ 23 In *Hines*, we discussed the purpose of N.C.G.S. § 14-100:

> A careful examination of [N.C.G.S. §] 14-100 reveals that the essence of the crime is the intentional false pretense – not the resulting economic harm to the victim. A civil action for damages would be the proper vehicle for remedying any pecuniary loss. The gravamen of the criminal offense, however, is making the false pretense and, thereby, obtaining another person's property or services. *The simple purpose of [N.C.G.S. §] 14-100 is to prevent persons from using false pretenses to obtain property. The ultimate loss to the victim, therefore, is an issue which is irrelevant to the purpose of the criminal statute and is an issue properly within the province of the civil courts.*
>
> . . . . The criminal law cannot and should not rush to the aid of every citizen who strikes a bad bargain.

> The criminal law, however, is the proper mechanism to ensure that goods and services are freely surrendered and not taken away, irrespective of the economic realities. Thus, theft is punished even if the property stolen is worthless on the open market. . . . .
>
> Therefore, we hold that a defendant can be convicted of obtaining goods by false pretenses in violation of [N.C.G.S. §] 14-100 even though some compensation is paid . . . .

Id. at 42, 243 S.E.2d at 787-88 (emphasis added) (citation omitted).

¶ 24 Under the reasoning of *Hines*, the intent of N.C.G.S. § 14-100 is to focus on the act of the false pretense and the perpetrator's intent to deceive, not on any particular economic damage to the victim. Any payment that may or may not have been made toward the iPhones that were falsely obtained is irrelevant for resolution of this issue.

¶ 25 While *Kornegay* could have presented an opportunity for our Supreme Court to overturn our reasoning in *Hines*, it did not do so. *Kornegay* did not deal with the issue of net valuation or setoffs; rather, it only recognized the defendant's procedural posture.[9] *Hines* establishes that we are only concerned with the gross fair market valuation of the property obtained, not the net gain in value to the criminal.[10]

¶ 26 The State presented substantial evidence from which the jury could conclude the gross fair market value of the property falsely obtained was $100,000.00 or more. The trial court did not err in denying Defendant's motion to dismiss on this basis.

CONCLUSION

¶ 27 Presuming, without deciding, that the phrase "person within this State" is an essential element of N.C.G.S. § 14-100, the State presented

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9. We further note Defendant makes no other arguments related to the theory of the case pursued by the State at trial to undercut the applicability of *Hines* and "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

10. This interpretation of *Hines* is further supported by the potential setoff being otherwise considered by the General Assembly. N.C.G.S. § 15A-1340.16 lays out a number of mitigating factors to be considered in *sentencing*, including "[t]he defendant has made substantial or full restitution to the victim." N.C.G.S. § 15A-1340.16(e)(5) (2019). N.C.G.S. § 15A-1340.16(e)(5) recognizes potential payments as a mitigating factor, but not as part of the substantive crime.

sufficient proof regarding the element. In addition, the State presented sufficient evidence for the jury to conclude the value of the goods that were falsely obtained was $100,000.00 or more to support each of the four indictments. The trial court did not err in denying Defendant's motion to dismiss the Class C felonies.

NO ERROR.

Judges TYSON and JACKSON concur.

BRUCE TAYLOR and SUSAN TAYLOR, Plaintiffs-Appellants
v.
THOMAS HIATT, THOMAS R. HIATT and JEWEL HOLLARS, Defendants-Appellees

No. COA20-322

Filed 21 September 2021

Easements—gates erected—gravel road across neighboring property—unreasonable interference

In a dispute between neighboring landowners, where plaintiffs erected gates across a portion of a gravel road on their property through which defendants had an easement, the trial court properly ordered plaintiffs to remove the gates because, although the gates were necessary to the plaintiffs' reasonable enjoyment of their agricultural land (by helping to contain plaintiffs' horses), they unreasonably interfered with defendants' easement rights (defendants had to open the gates by typing a code on a temperamental, inconveniently located keypad that sometimes locked defendants out, the gates malfunctioned in cold weather, and plaintiffs' horses sometimes blocked the gates). However, the portion of the court's judgment declaring that plaintiffs had no right at all to erect gates across the easement was modified to allow plaintiffs to erect gates provided that they did not unreasonably interfere with defendants' easement rights.

Appeal by Plaintiffs from judgment entered 24 October 2019 by Judge D. Thomas Lambeth, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 12 May 2021.

Geoffrey K. Oertel for the Plaintiffs-Appellants.

Timothy W. Gray for the Defendants-Appellees.

DILLON, Judge.

I. Background

¶ 1 Plaintiffs, Bruce and Susan Taylor, own a tract of land in Alamance County. Defendants, Thomas Hiatt, his son Thomas R. Hiatt, and his son's partner Jewel Hollars, own a tract of land adjacent to Plaintiffs' tract.

¶ 2 Defendants have easement rights to a gravel road that extends across Plaintiffs' tract from Defendants' tract to a public road. A dispute arose between the parties regarding the rights of the parties to the gravel road after Plaintiffs erected gates across the gravel road.

¶ 3 The present appeal is the second appeal of this matter to our Court.

¶ 4 Prior to the first appeal, the trial court granted Defendants' summary judgment, concluding that Plaintiffs were prohibited "from having any gates, bars, fences and the like upon [the easement]." Plaintiffs appealed that judgment. Our opinion in the first appeal is reported at *Taylor v. Hiatt*, 265 N.C. App. 665, 829 S.E.2d 670 (2019). There, we recognized that a portion of the easement was created in 1986 and that another portion of the easement was created in 2000. We further recognized that, based on the language used in the instruments granting the easement rights:

> (1) Plaintiffs have no right to erect any gate over the portion created in 1986, as that grant contained language that the easement was to stay open; and
>
> (2) Plaintiffs have the right to erect gates across the portion of the easement created in 2000, as that grant contained no language requiring that the easement remain "open." However, Plaintiffs' right is limited to erect gates on this portion "when necessary to the reasonable enjoyment of" their tract *and* provided that said gates "are not of such nature as to materially impair or unreasonably interfere" with the purpose of Defendants' easement rights. *Chesson v. Jordan*, 244 N.C. 289, 293, 29 S.E.2d 906, 909 (1944).

We held that summary judgment was not appropriate, as there was no evidence before the trial court showing *where* along the gravel road Plaintiffs had erected their gates. That is, there was no evidence showing

whether the gates were erected on the portion created in 1986 or whether they were erected on the portion created in 2000. We remanded for further proceedings.

¶ 5 On remand, the trial court conducted a bench trial. At the trial's conclusion, the trial court entered its judgment, ordering Plaintiffs to remove the gates, declaring that "Plaintiffs are prohibited from installing gates across the road used by the Defendants[.]" Plaintiffs appeal from that judgment.

II. Analysis

¶ 6 When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law are supported by those findings. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 583, 347 S.E.2d 25, 28 (1986).

¶ 7 The trial court found that the gates were erected on the portion of the easement that was created in 2000, where the instruments creating those easements do *not* contain a requirement that the easements remain "open." This finding is not challenged on appeal. Notwithstanding, the trial court ordered Plaintiffs to remove the gates, concluding that Plaintiffs did not have the right to erect gates on any part of the easement. We address each part of the trial court's order.

A. Removal of Existing Gates

¶ 8 We affirm the portion of the trial court's order directing Plaintiffs to remove the existing gates. The seminal case upon which we rely is *Chesson v. Jordan*, 224 N.C. 289, 29 S.E.2d 906 (1944). In that case, our Supreme Court explained that a private easement "carries with it no implication of a right to deprive the owner of the servient estate of the full enjoyment of his property" and "it is subject only to the right of passage." *Id.* at 293, 29 S.E.2d at 909. Accordingly, the estate owner "may erect gates across the way when [1] necessary to the reasonable enjoyment of his estate, [2] provided they are not of such nature as to materially impair or unreasonably interfere with the use of the lane as a private way for the purposes for which it has theretofore been used." *Id.* at 293, 29 S.E.2d at 909.

¶ 9 In its judgment, the trial court determined that Plaintiffs did not satisfy either of the two prongs necessary to establish a servient tract owner's right to erect gates on an easement created for the benefit of another. We address each prong below.

1. Reasonable Use and Enjoyment

¶ 10 As to the first prong, the trial court determined that "the gates erected by the Plaintiffs are not necessary to the Plaintiffs' reasonable enjoyment of their estate." Plaintiffs argue that the gates are an integral component of their fencing system necessary to contain horses on their agricultural land. We agree with Plaintiffs.

¶ 11 The undisputed facts in this case include that Plaintiffs use their tract for agricultural purposes (for keeping horses) that the Plaintiffs have fenced in their tract, and that the Plaintiffs have erected the gates to prevent their horses from escaping. Our Supreme Court has recognized that this type of use is reasonable:

> Plaintiff uses his land for agricultural purposes which requires fencing. To prohibit the erection of gates would deprive him of the reasonable use of his land.

Id. at 293, 29 S.E.2d at 909. Other jurisdictions have likewise determined that a reasonable use of property includes the installation of gates on an easement by the owners of the servient estate for the purpose of containing their grazing animals.[1]

¶ 12 It may be, as Defendants argue, that Plaintiffs could reasonably contain their horses without fencing in the easement portion of their land. However, this argument misses the point that Plaintiffs are the fee simple owners of the easement land, and as such, have the right to make reasonable use of that land so long as said use does not unreasonably interfere with Defendants' easement rights. Accordingly, we hold that the trial court erred in determining that Plaintiffs' erection of gates would not deprive Plaintiffs of the reasonable use of their tract.

2. Material Impairment or Unreasonable Interference

¶ 13 As to the second prong, the trial court determined that "[t]he gates erected by Plaintiffs are of a nature to materially impair and unreasonably interfere with the Defendants' right of egress and ingress over the

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1. *Ford v. Rice*, 195 Ky. 185, 241 S.W. 835 (1922) (finding two gates across an easement erected by servient estate to be reasonable and necessary to contain grazing animals); *Wille v. Bartz*, 88 Wis. 424, 60 N.W. 789 (1894) (allowing a servient estate owner's gate that prevented the dominant estate owner's livestock from encroaching); *Board of Trustees v. Gotten*, 119 Miss. 246, 80 So. 522 (1919) (ruling that that the trivial labor and trouble incident to the opening and closing of the gate did not in any way interfere with the full enjoyment of the easement); *Watson v. Hoke*, 73 S.C. 361, 364, 53 S.E. 537, 538 (1906) ("To require the defendant to throw his pasture lands open would deprive him of their use[.]").

road." Plaintiffs argue that competent evidence does not support this determination. We disagree and conclude that the trial court's findings as to this prong are supported by the evidence and, in turn, support this determination.

¶ 14 Our Supreme Court has instructed that when "the question of unreasonable obstruction is at issue[, it] should be determined by the jury." *Chesson*, 224 N.C. at 293, 29 S.E.2d at 909.

¶ 15 Here, the trial court, as the fact-finder, found that there were many issues with the gates erected by Plaintiffs, some of which are as follows: The key boxes, where a code had to be entered to open the gate, were located well off the road, requiring Defendants to get out of their car to enter the code. Plaintiffs refused to provide Defendants a remote control. The keypads were temperamental in that a single mistype of the code sometimes locked Defendants out from trying again. The gates would sometimes not function in the cold weather. Plaintiffs' horses sometimes congregated around the gates, making it difficult for Defendants to open the gates while keeping the horses from escaping.

¶ 16 These and the other findings of the trial court, sitting as the fact-finder, support the trial court's determination that the gates, as constructed by Plaintiffs, constituted an unreasonable obstruction. As such, the trial court did not err in ordering Plaintiffs to remove the gates.

B. Plaintiffs' Right to Erect Gates

¶ 17 In addition to ordering Plaintiffs to remove the existing gates, the trial court declared, "Plaintiffs are prohibited from installing gates across the road used by the Defendants to access their property as shown in [the 2000 map]." In other words, the trial court declared that Plaintiffs have no right to erect gates *at all* on the section of the easement created in 2000, notwithstanding that nothing in the documents creating that section of the easement requires the easement to remain "open." This portion of the trial court order is error. Plaintiffs may erect gates, provided that the gates do not unreasonably interfere with Defendants' use of the easement.

¶ 18 The trial court did not err in determining that Plaintiffs' current gates interfere with Defendants' use of the easement. However, this determination does not prevent Plaintiffs from erecting different gates in the future, so long as those gates do not unreasonably interfere with Defendants' use of the easement. In other terms, as there is no express requirement that the easement remain "open," and as the erection of gates is consistent with Plaintiffs' reasonable enjoyment of their fee

simple interest in the easement, Plaintiffs have the right to erect gates across the easement. The only limitation is that the gates cannot be erected in a way that interferes with Defendants' easement rights.

III. Conclusion

¶ 19 The portion of the trial court's judgment directing Plaintiffs to remove the existing gates is affirmed. The trial court's finding that the current gates unreasonably interfere with Defendants' use of the easement is supported by the evidence.

¶ 20 The portion of the trial court's judgment declaring that Plaintiffs have no right *at all* to erect gates across the portion of the easement created in 2000 is modified to allow the erection of gates by Plaintiffs, *provided that* the gates would not unreasonably interfere with Defendants' easement rights.

AFFIRMED, AS MODIFIED.

Judges GRIFFIN and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 21 September 2021)

Case	County	Disposition
CAROLINA CHIROCARE & REHAB, INC. v. NATIONWIDE PROP. & CAS. INS. CO. 2021-NCCOA-504 No. 20-511	Wake (19CVS5875)	Affirmed
HAHN v. HAHN 2021-NCCOA-505 No. 20-856	Macon (20CVD478)	Reversed
IN RE A.D.G.C. 2021-NCCOA-506 No. 21-172	New Hanover (20JA121) (20JA122)	Vacated in part, reversed in part, and remanded
IN RE J.H. 2021-NCCOA-507 No. 21-189	Robeson (19JA308)	AFFIRMED IN PART; VACATED IN PART; REMANDED.
IN RE T.T. 2021-NCCOA-508 No. 21-181	Scotland (17JA33-36) (17JA69)	Affirmed
SLOK, LLC v. COURTSIDE CONDO. OWNERS ASS'N, INC. 2021-NCCOA-509 No. 20-606	Mecklenburg (17CVS8935)	Reversed and remanded in part; vacated and remanded in part.
STATE v. CAPPS 2021-NCCOA-510 No. 19-748	Orange (18CRS50730)	No Error
STATE v. CRANFORD 2021-NCCOA-511 No. 20-781	Lincoln (17CRS53484-85)	Affirmed
STATE v. FLEMING 2021-NCCOA-512 No. 20-391	Mecklenburg (17CRS202720) (17CRS26201)	APPEAL DISMISSED.
STATE v. KWIAGAYE 2021-NCCOA-513 No. 20-383	Mecklenburg (18CRS206824-26)	Remanded.
STATE v. MAY 2021-NCCOA-514 No. 20-703	Haywood (18CRS53893) (19CRS226)	No Error

STATE v. McNEILL 2021-NCCOA-515 No. 20-557	Cumberland (16CRS58298)	No Error
STATE v. MYERS 2021-NCCOA-516 No. 20-720	Rutherford (18CRS51344)	Dismissed
STATE v. ROBERTS 2021-NCCOA-517 No. 20-686	Davidson (18CRS56920) (18CRS56922) (19CRS303)	Vacated and Remanded
STATE v. SANDERS 2021-NCCOA-518 No. 20-460	New Hanover (18CRS52035)	No Error
STATE v. SUGGS 2021-NCCOA-519 No. 20-596	Pitt (18CRS51811)	No Error
STATE v. WOOLARD 2021-NCCOA-520 No. 21-14	Beaufort (16CRS51737) (16CRS51742) (16CRS51744) (16CRS51747) (16CRS51750)	Affirmed; Remanded for Correction of Clerical Error

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