287 N.C. App.—No. 3 Pages 396-521

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 15, 2023

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
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[1] Resigned 31 December 2022. [2] Term ended 31 December 2022. [3] Term ended 31 December 2022.
[4] Sworn in 1 January 2023. [5] Sworn in 1 January 2023. [6] Sworn in 1 January 2023. [7] Died 23 May 2023.

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COURT OF APPEALS

CASES REPORTED

FILED 17 JANUARY 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Abandonment of issues—dismissal of unjust enrichment claim—applicability of sovereign immunity—failure to brief—In an action in which plaintiffs (university students) asserted breach of contract and unjust enrichment claims against defendant (the state-wide university system) for shutting down campuses due to the COVID-19 pandemic and failing to adequately refund prepaid tuition and fees, plaintiffs abandoned the issue of whether sovereign immunity was a valid ground for dismissal of their unjust enrichment claims because plaintiffs did not argue this issue on appeal. Even if plaintiffs had raised the issue, the appellate court noted that contracts implied in law—which allow recovery based on quantum meruit, an equitable remedy, to prevent unjust enrichment—do not waive sovereign immunity. **Dieckhaus v. Bd. of Governors of Univ. of N.C., 396.**

Criminal judgment—oral notice of appeal in open court—sufficient to confer jurisdiction—Where defendant properly gave oral notice of appeal in open court immediately upon entry of the final judgment in his criminal prosecution but did not file a written notice of appeal, defendant's petition for writ of certiorari (in the event that his oral notice of appeal was deemed inadequate) was unnecessary and therefore dismissed. Appellate Procedure Rule 4 allows parties to take appeal by giving oral notice of appeal at trial. **State v. Graham, 477.**

Interlocutory order—no Rule 54(b) certification—no petition for certiorari—failure to argue substantial right in main brief—In a breach of contract action arising from the sale of a luxury car, defendants' appeal from an order dismissing their third-party claims was dismissed where: (1) the order was interlocutory, since it left all other claims in the action unresolved; (2) the trial court had declined to certify the order as a final judgment under Civil Procedure Rule 54(b); (3) defendants did not petition the appellate court for a writ of certiorari; and (4) in their main appellate brief, defendants failed to include any facts or argument in their

statement of grounds for appellate review asserting that the challenged order affected a substantial right. Although defendants did argue in a reply brief that the order deprived them of a substantial right to avoid inconsistent verdicts on the dismissed and remaining claims, they failed to show that separate proceedings on these claims would involve the same factual issues. **SR Auto Transp., Inc. v. Adam's Auto Grp., Inc., 449.**

Preservation of issues—waiver—conflicting arguments offered before trial, at trial, and on appeal—In a divorce case where, during the marriage, the wife loaned money to the husband so that he could purchase a rental home in Georgia but he never paid her back, the husband failed to preserve for appellate review his argument that the trial court erred in awarding equitable damages to the wife based on a finding that a quasi-contract existed between the parties in relation to the loan. Specifically, the husband could not argue for the first time on appeal that the parties had an implied-in-fact contract regarding the loan after having argued in his pretrial filings that no loan existed and then having argued at trial that the parties had in fact entered into a quasi-contract regarding the loan. **Pelc v. Pham, 427**

Record on appeal—missing portions of trial transcript—no prejudice shown —The appellant in a divorce case failed to show that he was prejudiced on appeal where portions of the trial transcript were missing from the record due to technological glitches. The existing record still allowed the husband to adequately present (and even prevail on some of) his arguments on appeal. **Pelc v. Pham, 427.**

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Divorce action—husband sponsoring immigrant wife—breach of contract—failure to provide financial support under Form I-864—In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife when she immigrated to the U.S., the trial court did not err in awarding attorney fees to the wife on her breach of contract claim (alleging that the husband breached his obligation to make support payments under the Form I-864 after they separated) because she was the prevailing party on that claim. Further, the applicable federal law (8 U.S.C. § 1183a(c)) lists "payment of legal fees" as one of the available remedies for enforcing a Form I-864, and the Form I-864 that the husband signed stated that he might be required to pay attorney fees if a person or agency successfully sued him in relation to his payment obligations. **Pelc v. Pham, 427.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Habitual breaking and entering status—statement to jury—trial court's opinion—In defendant's trial arising from a home break-in, the trial court did not err during the habitual offender status phase when it told the jury that "the State will present evidence relating to previous convictions of breaking and/or entering." The trial court's statement did not constitute an opinion as to whether defendant did in fact have previous convictions. Even assuming the statement was improper, the State offered ample evidence of defendant's prior felony convictions of breaking and entering from which a jury could reasonably find defendant guilty of the status offense charge. **State v. Graham, 477.**

testimony did not meet the reliability requirements of Evidence Rule 702. However, the error did not amount to plain error because the trial court properly admitted the opinion of a DNA expert who did explain how she reliably applied her processes to the facts in the case (even though she did not provide the error rate associated with her methods), and her testimony was sufficient evidence from which a jury could reasonably conclude that defendant was guilty of felonious breaking or entering and larceny after breaking or entering. **State v. Graham, 477.**

Prior bad acts—admissibility under Rules 401, 402, 403, and 404(b)—murder and attempted murder—In a prosecution for multiple counts of murder and attempted murder, where defendant set fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court properly admitted evidence regarding defendant's prior attempt to burn down his girlfriend's father's car, another incident where he successfully burned down a vehicle belonging to the mother of his former romantic partner, and various acts of violence toward both the girlfriend and former partner. The evidence was relevant under Evidence Rules 401 and 402 because it was probative of defendant's identity, common scheme or plan, motive, knowledge, and *modus operandi*; and it was admissible under Rule 404(b) as evidence tending to show defendant's intent, motive, malice, premeditation, and deliberation. Further, defendant's prior acts were not too temporally remote from the charged crimes to warrant exclusion under Rule 403. **State v. Davis, 456.**

Prior bad acts—text messages—identity of substance as marijuana—In a drug prosecution, the trial court did not err by admitting prior bad act evidence in the form of text messages from defendant's cell phone tending to show defendant's interest in purchasing and possessing marijuana, in order to prove motive, intent, and knowledge. The evidence was relevant because it corroborated the State's contention that the substance in defendant's possession was marijuana and not legal hemp. Furthermore, the trial court's decision to admit the evidence was supported by reason and was not an abuse of discretion. Finally, even assuming that photographic evidence from defendant's cell phone was erroneously admitted, the error was harmless because of the substantial amount of unchallenged evidence of defendant's guilt. **State v. Massey, 501.**

HOMICIDE

Attempted first-degree murder—specific intent to kill—transferred intent doctrine—In a criminal prosecution arising from a domestic dispute that culminated in defendant setting fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court properly denied defendant's motion to dismiss a charge of attempted first-degree murder pertaining to one of the family members, even though defendant did not know that this particular family member was inside the house when he burned it down. The State presented sufficient evidence of defendant's specific intent to kill his girlfriend, and this intent transferred to the family member under the doctrine of transferred intent. **State v. Davis, 456.**

IMMUNITY

Sovereign—waiver—breach of contract action—contract implied in fact—adequacy of pleadings—In an action in which plaintiffs (university students) sued

defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, where plaintiffs adequately pleaded offer, acceptance, and consideration for each of their four contract claims (with regard to tuition, student fees, on-campus housing, and meals), they sufficiently demonstrated the existence of valid implied-in-fact contracts; therefore, their claims were not barred by the doctrine of sovereign immunity. **Dieckhaus v. Bd. of Governors of Univ. of N.C., 396.**

Statutory—section 116-311—applicability to breach of contract action—In an action in which plaintiffs (university students) sued defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, defendant was immune from liability regarding plaintiffs' breach of contract and unjust enrichment claims pursuant to N.C.G.S. § 116-311 where all statutory requirements for immunity were met and where the statute did not limit immunity only as to tort claims. **Dieckhaus v. Bd. of Governors of Univ. of N.C., 396.**

INDICTMENT AND INFORMATION

Sufficiency—allegations of the crime's essential elements—attempted first-degree murder—malice—In a criminal prosecution arising from a domestic dispute that culminated in defendant setting fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court had subject matter jurisdiction over defendant's three charges of attempted first-degree murder, where each indictment alleged that defendant "unlawfully, willfully, and feloniously did attempt to kill and murder [each victim] by setting the residence occupied by the victim on fire." Because the indictments alleged specific facts from which malice aforethought—an essential element of the offense—could be shown, defendant's argument that the indictments failed to allege malice at all was meritless. **State v. Davis, 456.**

JUDGES

Discretion—conference held after close of evidence but before entry of final order—delay in entering final order—The trial judge in a divorce case had the discretion to hold a conference after the close of evidence and before entering its final order—to hear the parties' proposals on how to draft the order—but it erred in waiting eighteen months to enter the final order, as the delay impeded appellate review of the judge's holdings in the case. **Pelc v. Pham, 427.**

SEARCH AND SEIZURE

Probable cause—search incident to arrest—medically cancelled driver's license—misdemeanor versus infraction—In a prosecution of drug offenses, the trial court erred by granting defendant's motion to suppress evidence obtained during a search incident to arrest, which defendant was subjected to after law enforcement officers conducted a traffic stop of defendant's car on the basis that they ran a license plate number check and discovered that the driver's license of the registered vehicle's owner had been medically cancelled. The officers had probable cause to arrest defendant because, interpreting multiple statutory sections together, the offense of driving with a medically canceled license is comparable to the offense of driving without a license and, absent one of several statutory exceptions that

were inapplicable in this case, constituted a misdemeanor (pursuant to N.C.G.S. § 20-35(a)) and not a traffic infraction (for which the officers would not have had authority to make an arrest). **State v. Duncan, 467.**

Traffic stop—license plate check—reasonable expectation of privacy—In a prosecution of drug offenses, the trial court erred by granting defendant's motion to suppress on the basis that law enforcement officers lacked reasonable suspicion to stop defendant's car. The officers' discovery, upon conducting a license plate check while surveilling a location with suspected drug activity, that the driver's license of the vehicle's registered owner had been medically canceled, was sufficient information that, at the very least, a traffic infraction had occurred. A license plate check is not a search for Fourth Amendment purposes because there is no constitutionally protected reasonable expectation of privacy in a plainly visible license plate number. **State v. Duncan, 467.**

N.C. COURT OF APPEALS
2023 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	9 and 23
February	6 and 20
March	6 and 20
April	10 and 24
May	8 and 22
June	5
August	7 and 21
September	4 and 18
October	2, 16, and 30
November	13 and 27
December	11 (if needed)

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

DIECKHAUS v. BD. OF GOVERNORS OF UNIV. OF N.C.

[287 N.C. App. 396, 2023-NCCOA-1]

DEENA DIECKHAUS, GINA McALLISTER, BRADY WAYNE ALLEN, JACORIA STANLEY, NICHOLAS SPOONEY AND VIVIAN HOOD, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, DEFENDANT

No. COA21-797

Filed 17 January 2023

1. Appeal and Error—abandonment of issues—dismissal of unjust enrichment claim—applicability of sovereign immunity—failure to brief

In an action in which plaintiffs (university students) asserted breach of contract and unjust enrichment claims against defendant (the state-wide university system) for shutting down campuses due to the COVID-19 pandemic and failing to adequately refund prepaid tuition and fees, plaintiffs abandoned the issue of whether sovereign immunity was a valid ground for dismissal of their unjust enrichment claims because plaintiffs did not argue this issue on appeal. Even if plaintiffs had raised the issue, the appellate court noted that contracts implied in law—which allow recovery based on quantum meruit, an equitable remedy, to prevent unjust enrichment—do not waive sovereign immunity.

2. Immunity—sovereign—waiver—breach of contract action—contract implied in fact—adequacy of pleadings

In an action in which plaintiffs (university students) sued defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, where plaintiffs adequately pleaded offer, acceptance, and consideration for each of their four contract claims (with regard to tuition, student fees, on-campus housing, and meals), they sufficiently demonstrated the existence of valid implied-in-fact contracts; therefore, their claims were not barred by the doctrine of sovereign immunity.

3. Immunity—statutory—section 116-311—applicability to breach of contract action

In an action in which plaintiffs (university students) sued defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, defendant was immune from liability regarding plaintiffs' breach of contract and unjust enrichment

claims pursuant to N.C.G.S. § 116-311 where all statutory requirements for immunity were met and where the statute did not limit immunity only as to tort claims.

4. Constitutional Law—North Carolina—as-applied challenge—immunity statute—university campuses shut down during pandemic—claims specific to plaintiffs

In an action in which plaintiffs (university students) sued defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, where plaintiffs sought to recover money they had paid for tuition, fees, on-campus housing, and meals, they had not waived their constitutional challenges to N.C.G.S. § 116-311, under which defendant sought immunity, because they raised an as-applied rather than a facial challenge.

5. Constitutional Law—federal and North Carolina—as-applied challenge—immunity statute—claims barred

In an action in which plaintiffs (university students) sued defendant (the state-wide university system) for failing to adequately refund prepaid tuition and fees after campuses were shut down due to the COVID-19 pandemic, the appellate court concluded that plaintiffs' claims for breach of contract and unjust enrichment were barred by statutory immunity pursuant to N.C.G.S. § 116-311 after determining that the statute was constitutional and did not violate plaintiffs' rights under the federal and state constitutions regarding the impairment of contracts, equal protection, due process or Law of the Land considerations, the Takings Clause, and separation of powers. The statute, which was enacted to allow institutions of higher education to continue their missions during the pandemic, constituted a reasonable response to a public health emergency and there was a rational relationship between the statute's grant of immunity and its purpose of maintaining the quality of education.

Appeal by plaintiffs from order entered 17 June 2021 by Judge Edwin G. Wilson, Jr. in Superior Court, Orange County. Heard in the Court of Appeals 10 May 2022.

Anastopoulo Law Firm, LLC, by Blake G. Abbott, for plaintiffs-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr. and Jennifer K. Van Zant, and Attorney General

Joshua H. Stein, by Special Deputy Attorneys General Laura McHenry and Kari R. Johnson, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiffs Deena Dieckhaus, Gina McAllister, Brady Wayne Allen, Jacoria Stanley, Nicholas Spooney, and Vivian Hood appeal an order granting Defendant Board of Governors of the University of North Carolina's Motion to Dismiss Plaintiffs' Amended Complaint.The Amended Complaint included both contract and unjust enrichment claims. Because sovereign immunity bars the unjust enrichment claims and because statutory immunity bars both the unjust enrichment and contract claims, we affirm the trial court's order dismissing all claims.

I. Background

¶ 2 Since this case is at the pleading stage, we rely upon the facts as alleged in Plaintiffs' Amended Complaint.[1] Defendant is the Board of Governors for the University of North Carolina System, and that System includes 17 "constituent institutions throughout the State" (collectively "Universities"). "As a precondition for enrollment" for the Spring 2020 Term, Defendant required students planning to attend the Universities to pay tuition. When charging tuition, Defendant charged students different rates depending on which of two types of programs the students chose, an "in-person, hands-on program[]" and a "fully online distance-learning program[.]" In addition to the differential pricing, Defendant marketed the two programs differently through its and the Universities' "website[s], academic catalogues, student handbooks, marketing materials and other circulars, bulletins, and publications" that differentiate between "fully online" programs and "non-online" programs with "references to and promises about the on-campus experience[.]"

¶ 3 Plaintiffs here all paid tuition and enrolled in the in-person program for the Spring 2020 Term, with one exception. Plaintiffs Dieckhaus, McAllister, Allen, Stanley, and Spooney all enrolled as undergraduates in different Universities in the system. Plaintiff Hood paid tuition to enroll her daughter at one of the Universities' campuses for the Spring 2020 Term.

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1. We focus on the Amended Complaint because the order on appeal ruled on Defendant's Motion to Dismiss the Amended Complaint. On 22 May 2020, Plaintiffs filed their original Complaint. On 14 August 2020, Defendant filed a Motion to Dismiss the Complaint. Before that motion was heard, Plaintiffs filed their Amended Complaint on 30 December 2020, as discussed more below.

¶ 4 Beyond the tuition students paid to enroll, they paid additional fees. Defendant charged students, including Plaintiffs, "certain mandatory student fees." In Defendant and its Universities' "publications" including "catalogs" and "website[s]," Defendant "specifically describe[d] the nature and purpose of each fee." The student fees paid by students were then "intended by both the students and Defendant to cover the services, access, benefits and programs for which the fees were described and billed." Plaintiffs paid all applicable fees for the Spring 2020 Term. Finally, a certain subset of students, including Plaintiffs McAllister, Spooney, and Hood paid additional fees "for the right to reside in campus housing and for access to a meal plan providing for on campus dining opportunities."

¶ 5 Plaintiffs and other students started the Spring 2020 Term with on-campus, in-person education and with access to the services for which they paid student fees, housing fees, and on-campus meal fees. "On or about March 11, 2020, in response to the COVID-19 pandemic, Defendant issued a system-wide directive to all" the Universities "requiring that they transition from in-person to online instruction no later than March 23, 2020." As a result, starting on 23 March 2020 through the end of the Spring 2020 Term, "there were no in person classes at" the Universities, "and all instruction was delivered online." Another directive from Defendant to all the Universities "[o]n or about" 17 March 2020 "instruct[ed] students living in campus housing to remain at or return to their perme[n]ant residences." As a result of this directive, the Universities closed their on campus residences and prevented student access to dining facilities. The campus shutdowns also meant students "no longer ha[d] the benefit of the services for which" they paid student fees. Defendant "announced" it would be offering "pro-rated credits or refunds for students who pre-paid housing and meal costs for the Spring 2020" Term—and did offer some refunds—but it did not offer refunds for tuition or student fees.

¶ 6 Based on these alleged facts, Plaintiffs filed their Amended Complaint on 30 December 2020. The Amended Complaint includes both breach of contract claims and unjust enrichment claims seeking "refunds . . . on a pro-rata basis" for "tuition, housing, meals, [and student] fees . . . that Defendant failed to deliver for the second half of the Spring 2020" Term after shutting down the Universities' campuses in response to COVID-19. As to all these claims, the Amended Complaint alleges the General Assembly "has explicitly waived sovereign immunity in suits against Defendant" because Defendant "is a body politic" that is, *inter alia*, "capable in law to sue and be sued in all courts whatsoever." The Amended Complaint also asserts Plaintiffs "bring this action on

behalf of themselves and as a class action" on behalf of four classes for each of the four categories of payments: tuition, fees, on-campus housing, and on-campus meals. As a result, the Amended Complaint includes "Class Action Allegations[,]" (capitalization altered), but the class action component of the lawsuit is not at issue in this appeal.

¶ 7 As to the tuition breach of contract claim, the Amended Complaint alleges Defendant offered to Plaintiffs and the proposed class its on-campus "live, in-person education" for the Spring 2020 Term in contrast to its "separate and distinct" online-only educational program. In addition to the descriptions through online and written materials discussed above, Defendant and its Universities differentiated between the two programs with respect to the Spring 2020 Term specifically by differences in how students registered for on-campus versus online instruction and "the parties' prior course of conduct" in starting classes "for which students expected to receive in-person instruction" with such instruction and with class materials with in-person "schedules, locations, and . . . requirements." Plaintiffs and the proposed class then "accepted that offer by paying tuition and attending classes during the beginning of the Spring 2020" Term. The Amended Complaint alleges Defendant then breached the contract by shutting down its campuses and shifting "all classes" to online learning "without reducing or refunding tuition accordingly." Finally as to this claim, the Amended Complaint states "[t]his cause of action does not seek to allege 'educational malpractice' " but instead focuses on how "Defendant provided a materially different product," online learning, from the one Plaintiffs and the proposed class paid for, "live[,] in-person[,] on-campus education[.]" As a result of this breach, Plaintiffs allege they suffered damages "amounting to the difference in the fair market value of the services and access for which they contracted, and the services and access which they actually received."

¶ 8 The Amended Complaint also alleges a breach of contract claim for student fees. Defendant and its Universities offered "services, access, benefits and programs" by "specifically describ[ing] the nature and purpose of each fee" in "publications," in particular in "catalogs . . . and website[s.]" Plaintiffs and the proposed fees class then accepted the terms and paid the fees, thereby forming a contract. The Amended Complaint alleges Defendant then breached the contract by shutting down the Universities' campuses and "cancelling most student activities" halfway through the Spring 2020 Term—thereby not providing "recreational and intramural programs; fitness centers or gymnasiums; campus technology[,] infrastructure[,] or security measures; or Spring intercollegiate competitions"—without giving students any "discount or

refund" on "any fees" as Defendant does for "fully online students[.]" As a result of Defendant's breach, Plaintiffs and the rest of the proposed class suffered damages.

¶ 9 The Amended Complaint includes two final breach of contract claims for on-campus housing and meals. The Amended Complaint alleges Defendant offered the relevant Plaintiffs and proposed classes "on-campus housing" and "meals and on-campus dining options" in return for additional fees. The relevant Plaintiffs and proposed class members then accepted by paying those fees. When the Universities shut down their campuses, they "requir[ed] students to move out of on-campus housing facilities" and closed "most campus buildings and facilities, including dining facilities[,]" thereby breaching the contract. Defendant then "issued arbitrary and insufficient refunds" for on-campus housing and meals for most students because the campus shutdowns started earlier than the date applied to pro-rate the refunds. According to the Amended Complaint, the relevant Plaintiffs and proposed class members suffered damages for the additional amounts they should have been refunded.

¶ 10 In the alternative to each of the four breach of contract claims, the Amended Complaint alleges unjust enrichment claims. Each of the claims follows a similar pattern. The Amended Complaint alleges Plaintiffs and the proposed class "conferred a benefit" non-gratuitously on Defendant by paying the relevant tuition or fees, and Defendant "realized this benefit by accepting such payment." Plaintiffs and the class members did not receive "the full benefit of their bargain[,]" i.e. the services and benefits they paid for, but Defendant "retained this benefit" unjustly. The Amended Complaint then alleges "[e]quity and good conscience require" Defendant "return a *pro-rata* portion of the monies paid" as tuition or the relevant fees, especially considering the money Defendant and its Universities saved by operating online rather than in-person, their "billions of dollars in endowment funds," and the "significant aid from the federal government" Defendant received. Finally, the claims request Defendant "be required to disgorge this unjust enrichment[.]"

¶ 11 On 15 January 2021, Defendant filed a "Motion to Dismiss [the] Amended Complaint" under Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) based on five grounds. (Capitalization altered.) First, Defendant argued Plaintiffs' claims were barred by N.C. Gen. Stat. § 116-311, which is part of Article 37 entitled "An Act to Provide Immunity for Institutions of Higher Learning." Next, Defendant contended Plaintiffs' claims were "barred by sovereign immunity." According to Defendant, Plaintiffs also failed to state claims for relief for breach

of contract and unjust enrichment, including on the grounds that the Amended Complaint was "an attempt to assert a claim for educational malpractice which is not a cognizable claim under North Carolina state law." Then, Defendant argued the Amended Complaint failed to allege "damages were proximately caused by Defendant." Finally, Defendant contended Plaintiffs lacked standing because they "failed to allege a sufficient injury and they purport to allege claims against [U]niversities with whom they had no relationship."

¶ 12 The trial court held a hearing on Defendant's Motion to Dismiss on 19 May 2021. At the hearing, Defendant discussed each argument raised in its Motion to Dismiss. When discussing statutory immunity under North Carolina General Statute § 116-311, the parties argued about both the applicability and constitutionality of the statute. Plaintiffs argued the statute was unconstitutional on a number of grounds, including "the federal contracts clause."[2] In addition to arguing Plaintiffs had failed to show § 116-311 was unconstitutional on the merits, Defendant argued Plaintiffs were making a facial constitutional challenge to the statute but had not followed the correct procedure to make such a challenge so Plaintiffs had "waived their right to challenge the statute." Plaintiffs repeatedly argued they were not raising a facial challenge but instead were making an as-applied challenge to the constitutionality of § 116-311. The trial court ended the hearing without making a ruling on Defendant's Motion to Dismiss or any discussion of whether Plaintiffs were making an as-applied or facial challenge to §116-311.

¶ 13 On 17 June 2021, the trial court entered an order granting Defendant's Motion to Dismiss without specifying the grounds for that decision. On 15 July 2021, Plaintiffs filed a written notice of appeal from the order granting Defendant's Motion to Dismiss.

II. Analysis

¶ 14 On appeal, Plaintiffs argue, "The trial court erred in granting Defendant's Motion to Dismiss because Plaintiffs adequately plead claims for breach of a contract and unjust enrichment." (Capitalization

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2. Our record does not include information about all the grounds on which Plaintiffs argued § 116-311 was unconstitutional. The transcript only includes this reference to "the federal contracts clause[,]" an argument "this law was passed specifically because of this case[,]" and a couple other references to impairing contracts in violation of the federal Constitution. Based on the transcript, the parties filed briefing on Defendant's Motion to Dismiss, but we do not have those briefs in our record. As a result, we do not know the details of Plaintiffs' arguments before the trial court as to the unconstitutionality of § 116-311.

altered.) As part of this overarching argument, Plaintiffs make five contentions. First, Plaintiffs argue they "state[d] a claim for breach of contract." (Capitalization altered.) Plaintiffs also argue they "state[d] a claim for unjust enrichment." (Capitalization altered.) Third, Plaintiffs assert "Defendant is not entitled to sovereign immunity." (Capitalization altered.) Plaintiffs then contend "N.C. Gen. Stat. § 116-311 is unconstitutional and inapplicable to this action." (Capitalization altered.) That statute grants "institution[s] of higher education . . . immunity from claims" for "tuition or fees paid . . . for the spring academic semester of 2020" when the claims "allege[] losses or damages arising from an act or omission by the institution of higher education during or in response to COVID-19, the COVID-19 emergency declaration, or the COVID-19 essential business executive order."[3] N.C. Gen. Stat. § 116-311(a) (2021). Finally, Plaintiffs argue they "hav[e] standing on all claims." (Capitalization altered.)

¶ 15 We will address Plaintiffs' contentions as to why the trial court erred in granting Defendant's Motion to Dismiss in the following order. First, we will address the immunity issues—both sovereign immunity and the potential statutory immunity of N.C. Gen. Stat. § 116-311—because of the special nature of immunity as more than "just a mere defense in a lawsuit" in comparison to other defenses raised under Rule of Civil Procedure 12. *See Lannan v. Board of Governors of the University of North Carolina*, 2022-NCCOA-653, ¶¶ 23, 29 (citation and quotation marks omitted) (when considering the interlocutory nature of an appeal, recognizing this nature of sovereign immunity means its loss affects a substantial right but requiring a petition for writ of certiorari to address the Rule 12(b)(6) failure to state a claim issue); *see also Stahl v. Bowden*, 274 N.C. App. 26, 28, 850 S.E.2d 588, 590 (2020) (recognizing claims of immunity in general, including specifically statutory immunity, affect a substantial right when considering an interlocutory appeal). Within the two types of immunity, we will address sovereign immunity first because Plaintiffs raise constitutional issues around statutory immunity and "it is well settled that 'the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " *See Holdstock v. Duke University Health System, Inc.*, 270 N.C. App. 267, 277, 841 S.E.2d 307, 314 (2020) (quoting *Anderson v. Assimos*, 356 N.C. 415,

3. The statute has additional requirements we will discuss more below. *See* N.C. Gen. Stat. § 116-311(a) (including four subsections of requirements). We only include enough information here to demonstrate the relevance of Plaintiffs' argument about the statute.

416, 572 S.E.2d 101, 102 (2002)). Because we ultimately hold sovereign and/ or statutory immunity bar all of Plaintiffs' claims, we do not reach the remaining issues of stating claims for breach of contract and for unjust enrichment or the standing issue.

A. Sovereign Immunity

¶ 16 Focusing on sovereign immunity first, Plaintiffs argue "Defendant is not entitled to sovereign immunity." (Capitalization altered.) Sovereign immunity is at issue because "[s]overeign immunity protects the State and its agencies from suit absent waiver or consent" and "Defendant Board of Governors is an agency of the State" that "can claim the protection of sovereign immunity." *See Lannan*, ¶ 22 (citations and quotation marks omitted). As a result, if Defendant is entitled to sovereign immunity, Plaintiffs' claims are barred and the trial court did not err in dismissing them.

¶ 17 Turning to Plaintiffs' specific arguments against the application of sovereign immunity, Plaintiffs contend as to the contract claims the State, including Defendant as a state agency, waives sovereign immunity when entering into an implied-in-fact contract. Defendant responds only an express contract, not a contract implied-in-fact, waives sovereign immunity. Then, Defendant contends even if an implied-in-fact contract is sufficient to waive sovereign immunity, "the Amended Complaint is completely void of any factual allegations establishing the existence of even an implied contract." Plaintiffs do not include any argument on the waiver of sovereign immunity for their unjust enrichment claims, which Defendant highlights. After setting out the standard of review, we examine whether Defendant has sovereign immunity first as to the unjust enrichment claims and then as to the contract claims.

¶ 18 At the outset, we note many of these questions have been addressed by this Court's recent decision in *Lannan v. Board of Governors of the University of North Carolina*. That case also involved contract claims arising out of a "switch from in-person to online learning" during the COVID-19 pandemic, although it covered the Fall 2020 Term rather than the Spring 2020 Term at issue in this case. *See Lannan*, ¶¶ 5-6. And in *Lannan* this Court addressed identical issues surrounding the applicability of sovereign immunity to implied-in-fact contract claims. *See id.* ¶¶ 30-31 (involving issues of whether an implied-in-fact contract could waive sovereign immunity and whether the plaintiffs had "pled a valid implied-in-fact contract"). While we now have the benefit of *Lannan* in making our decision, *Lannan* had not come out when the parties originally briefed this case.

1. Standard of Review

¶ 19 In *Lannan*, this Court explained the standard of review on sovereign immunity issues as follows:

> Our Supreme Court recently explained an appellate court "reviews a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of sovereign immunity using a de novo standard of review." *State ex rel. Stein* [*v. Kinston Charter Academy*, 379 N.C. 560, 2021-NCSC-163], ¶ 23 (citing *White v. Trew*, 366 N.C. 360, 362–63, 736 S.E.2d 166 (2013)); *see also Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017) ("Questions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo." (quoting *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016))).
>
> To the extent the question of whether Plaintiffs[] pled a valid contract should be reviewed under the standard for orders on motions to dismiss under Rule 12(b)(6), the standard is the same, i.e. de novo. *See State ex rel. Stein*, ¶ 25 n.2 (explaining standard is the same because "the only factual materials presented for the trial court's consideration were those contained in the complaint"); *see also Wray*, 370 N.C. at 46-47, 802 S.E.2d at 898 (stating appellate courts "review appeals from dismissals under Rule 12(b)(6) de novo" immediately before stating same standard for sovereign immunity (quotations and citations omitted)). In conducting such a review of the complaint, appellate courts treat as true the complaint's allegations. *Deminski on behalf of C.E.D. v. State Board of Education*, 377 N.C. 406, 2021-NCSC-58, ¶ 12, 858 S.E.2d 788 ("When reviewing a motion to dismiss, an appellate court considers 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " (quoting *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006))); *see also State ex rel. Stein*, ¶ 25. An appellate court "is not, however, required to accept mere conclusory allegations, unwarranted deductions of

> fact, or unreasonable inferences as true." *Estate of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 493, 751 S.E.2d 227, 233 (2013).

See id. ¶¶ 32-33 (brackets from original omitted).

2. Unjust Enrichment Claims

¶ 20 **[1]** As Defendant identifies, Plaintiffs do not argue on appeal Defendant consented to suit or otherwise waived its sovereign immunity. Under our Appellate Rules, Plaintiffs have therefore abandoned the issue of whether sovereign immunity was a valid ground on which to dismiss their unjust enrichment claims. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

¶ 21 Even if Plaintiffs had argued sovereign immunity did not bar their unjust enrichment claims, we would reject that argument. As this Court recently reaffirmed in *Lannan*, "contracts implied in law, which are also called quasi contracts and which permit recovery based on *quantum meruit*, do not waive sovereign immunity." *See Lannan*, ¶ 37 (citing, *inter alia*, *Whitfield v. Gilchrist*, 348 N.C. 39, 41-42, 497 S.E.2d 412, 414 (1998)). As *Whitfield* in turn explains, "*Quantum meruit* is a measure of recovery for the reasonable value of services rendered *in order to prevent unjust enrichment*. It operates as an equitable remedy based upon a quasi contract or a contract implied in law." *Whitfield*, 348 N.C. at 42, 497 S.E.2d at 414-15 (emphasis added) (citations omitted). Thus, claims for unjust enrichment do not waive sovereign immunity because they involve contracts implied in law. *See M Series Rebuild, LLC v. Town of Mount Pleasant, Inc.*, 222 N.C. App. 59, 67, 730 S.E.2d 254, 260 (2012) ("[W]e decline to imply a contract in law in derogation of sovereign immunity to allow a party to recover under a theory of unjust enrichment." (citation and quotation marks omitted)). Since Plaintiffs have provided no other reason Defendant waived sovereign immunity, their unjust enrichment claims are barred by sovereign immunity. The trial court did not err in dismissing those claims.

3. Contract Claims

¶ 22 **[2]** Turning to Plaintiffs' remaining contract claims, the parties' arguments present two questions: (1) whether a valid implied-in-fact contract can waive sovereign immunity and (2) whether Plaintiffs pled valid implied-in-fact contracts.

¶ 23 *Lannan* answers the first question; "a contract implied in fact can waive sovereign immunity under the contractual waiver holding" in *Smith v. State*. *See Lannan*, ¶ 51 (referencing *Smith v. State*, 289

N.C. 303, 222 S.E.2d 412 (1976)); *see also Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24 ("[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract."). *Lannan* reached that conclusion after an extensive analysis of our caselaw on contracts waiving sovereign immunity. *Lannan*, ¶¶ 35-50. *Lannan* also explained the existence of N.C. Gen. Stat. § 116-311, i.e., the basis of the statutory immunity issue here, indicated the General Assembly did not believe the contract claims were already barred by sovereign immunity because otherwise "[t]here would be no need for this separate immunity statute[.]" *See Lannan*, ¶ 50.

¶ 24 In undertaking that analysis, this Court also rejected the same arguments Defendant now advances when arguing a valid implied-in-fact contract does not waive sovereign immunity. First, the *Lannan* Court rejected Defendant's argument *Whitfield* and *Eastway Wrecker Service, Inc. v. City of Charlotte*, 165 N.C. App. 639, 599 S.E.2d 410 (2004), require an express contract for a waiver of sovereign immunity because those two cases were limited to situations involving contracts implied in law even though they included "overly broad" statements at times. *See Lannan*, ¶¶ 38-41 (analyzing cases before concluding "*Whitfield* and *Eastway Wrecker Service* only allow the State to defend itself based on sovereign immunity against contracts implied in law, not contracts implied in fact").

¶ 25 *Lannan*'s rejection of Defendant's arguments also relied on "another line of cases holding the State waives its sovereign immunity when it enters into a contract implied in fact." *Id.* ¶ 41; *see also*, *id.* ¶¶ 41-43 (full analysis of that line of cases, namely *Archer v. Rockingham County*, 144 N.C. App. 550, 548 S.E.2d 788 (2001), *Sanders v. State Personnel Com'n*, 183 N.C. App. 15, 644 S.E.2d 10 (2007), and *Lake v. State Health Plan for Teachers and State Employees*, 234 N.C. App. 368, 760 S.E.2d 268 (2014)). Defendant here contends those cases were limited to "employment settings" rather than the "educational setting" present here, (emphasis omitted), but the *Lannan* court rejected a similar argument for several reasons. *See Lannan*, ¶¶ 44-48. First, the reasoning of that line of cases "extends beyond the employment context." *Id.* ¶ 45. Second, "the employment context and the educational context are not so different that we can disregard the cases addressing contracts implied in fact in the employment context." *Id.* ¶ 46. Finally, extending that line of cases "beyond the employment context is consistent with our treatment of implied in fact contracts in general" because "[o]ur Supreme Court has long held 'an implied in fact contract is valid and enforceable as if

it were express or written.' " *Id.* ¶ 47 (quoting *Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980)) (brackets omitted).

¶ 26 Since *Lannan* already determined a "contract implied in fact can waive sovereign immunity[,]" we turn to the remaining question, whether Plaintiffs pled a valid implied-in-fact contract. *See id.* ¶ 51. "[T]o plead a valid implied-in-fact contract, Plaintiffs needed to plead offer, acceptance, and consideration." *Id.* ¶ 54. We examine this issue as to each of the four contract claims: tuition, student fees, on-campus housing, and meals.

¶ 27 Plaintiffs adequately pled their tuition claim. Specifically, the Amended Complaint alleges "Defendant offered to provide, and members of the Tuition class expected to receive, instruction on a physical campus" rather than the "separate and distinct product[]" of "online distance education" based on: (1) Defendant and the Universities' "website[s], academic catalogues, student handbooks, marketing materials and other circulars, bulletins, and publications" that differentiate between "fully online" programs and "non-online" programs with "references to and promises about the on-campus experience," which Plaintiffs included examples of in the Amended Complaint; (2) differences in how students register for on-campus versus online instruction; and (3) "the parties' prior course of conduct" in starting classes "for which students expected to receive in-person instruction" with such instruction and with class materials with in-person "schedules, locations, and . . . requirements." Turning to acceptance, Plaintiffs allege they accepted the offer for "live, in-person education" by "paying tuition and attending classes during the beginning of the Spring 2020" Term. Finally, the Amended Complaint states Plaintiffs and the proposed class "paid valuable consideration in exchange" for in-person learning, which refers back to the tuition money they paid to accept the offer.

¶ 28 For the student fees contract claim, Plaintiffs allege Defendant "[i]n its publications and, particularly in its catalogs and website" described the "purpose of each fee" such that everyone understood "the monies Plaintiff[s] and other members of the [proposed class] paid towards these fees were intended . . . to cover the services, access, benefits and programs for which the fees were described and billed," thereby constituting an offer. The Amended Complaint includes various descriptions of these fees. Plaintiffs then allege they paid the fees to the Universities, which constituted acceptance and consideration and therefore formed a contract.

¶ 29 Similarly, as to the on-campus housing and meals claims, the Amended Complaint alleges the Universities offered "on-campus

housing" and "meals and on-campus dining options" to students who agreed to pay certain fees. As pled, the students then accepted those offers and gave consideration when they paid the required fees to receive on-campus housing or dining and meals. Thus, Plaintiffs adequately pled a valid implied-in-fact contract as to each of the four contract claims.

¶ 30 None of Defendant's arguments persuade us otherwise. While Defendant's section on sovereign immunity only includes a single sentence arguing "the Amended Complaint is completely void of any factual allegations establishing the existence of even an implied contract," Defendant later includes additional arguments about the ways in which "Plaintiffs' Amended Complaint fails to identify a contract" in its section on how Plaintiffs failed to state a claim for breach of contract. (Capitalization altered.) Specifically, Defendant first argues "every contract requires a promise" and Plaintiffs did not include any such allegations of promises or, specifically, promises to refunds. This argument is partially premised on two cases, *Ryan v. University of North Carolina Hospitals*, 128 N.C. App. 300, 494 S.E.2d 789 (1998) and *Montessori Children's House of Durham v. Blizzard*, 244 N.C. App. 633, 781 S.E.2d 511 (2016), that, according to Defendant, require allegations to be based on "identifiable contractual promises" such that "statements made in a university policy manual or other university publication are insufficient to support a breach of contract claim unless they are explicitly included or incorporated into a contract." (Emphasis omitted.)

¶ 31 Defendant's contention the Amended Complaint does not allege promises underlying a contract cannot be squared with the pleading. While the Amended Complaint does not include the specific term "promise" when describing what the Universities offered to students, the offers constitute promises to act nonetheless. As laid out above, the Universities offered in-person education, benefits as described in the student fee descriptions, and on-campus housing and meals according to the Amended Complaint. Those offers were promises to provide those services if Plaintiffs and other members of the proposed classes paid the fees. In other words, by their acceptance and payment of consideration, Plaintiffs converted Defendant's offer into promises. *See Wilkins v. Vass Cotton Mills*, 176 N.C. 72, 81, 97 S.E. 151, 155 (1918) ("An acceptance by promise or act, and communication thereof when necessary, while an offer of a promise is in force, changes the character of the offer. It supplies the elements of agreement and consideration, changing the offer into a binding promise, and the offer cannot afterwards be revoked without the acceptor's consent." (citation and quotation marks omitted)). Thus, by properly alleging the contract, Plaintiffs have pled a promise necessary to form a contract.

¶ 32 Defendant's reliance on *Ryan* and *Montessori Children's House* is also misplaced. As this Court explained in *Lannan*, *Ryan* and *Montessori Children's House* both involved pre-existing written contracts. *See Lannan*, ¶¶ 57-58. As such, they differ from the case here where Plaintiffs allege the statements made in university publications "are the contract." *See id.* ¶ 62. And thus their statements about requiring an "identifiable contractual promise" or incorporation of publications into a contract do not apply here to bar Plaintiffs' contract claims. *See id.* ¶¶ 57-58 (citation and quotation marks omitted).

¶ 33 Next, Defendant argues none of the described fees "support[] Plaintiffs' claim that a contract exists entitling them to a refund for fees in the event the format of instruction changed" because Plaintiffs did not plead they took advantage of services, services ceased with the shift to online learning, or the pre-existing refunds for meals and housing were insufficient. First, while these arguments are under a heading labeled "Plaintiffs' Amended Complaint fails to identify a contract and thus fails to state a contract claim[,]" they address breach because they all focus on the provision of services or remedy for lack of the allegedly contracted for services. This matters because the waiver of sovereign immunity only requires pleading a valid contract, not pleading breach; pleading breach is only relevant when looking at Rule of Civil Procedure 12(b)(6) and dismissal for failure to state a claim. *See Lannan*, ¶¶ 27-28 (explaining a valid contract is necessary to both waive sovereign immunity and survive a Rule 12(b)(6) motion to dismiss but breach is also necessary to state a breach of contract claim that survives such a motion) and ¶ 66 (addressing only breach to rule on 12(b)(6) motion to dismiss contract claims because this Court had "already determined above [the p]laintiffs pled a valid contract").

¶ 34 Even if Defendant's arguments on breach could impact whether Plaintiffs pled a valid contract sufficient to waive sovereign immunity, we would still reject its contentions. As to the contention Plaintiffs did not plead they took advantage of the services for which they paid student fees, the Amended Complaint alleges "as a result of being moved off campus," Plaintiffs and the proposed class "no longer have the benefit of the services for which these fees have been paid" and lists numerous services. The language "no longer" suggests the Plaintiffs had used the services in the past. Further, some of the services, such as "campus . . . security measures" are things Plaintiffs would passively benefit from rather than actively take advantage of in many circumstances. As to Defendant's argument Plaintiffs failed to plead services ceased when students shifted to online instruction, the Amended Complaint plainly

states that transition included "closing most campus buildings and facilities, and cancelling most student activities." That followed a more specific allegation that "as a result of being moved off campus" Plaintiffs "were unable to participate in recreational and intramural programs; no longer had access to campus fitness centers or gymnasiums; no longer benefit[t]ed from campus technology[,] infrastructure[,] or security measures; and no longer had the benefit of enjoying Spring intercollegiate competitions." The Amended Complaint also includes allegations detailing why the refunds for housing and meals failed to fully reimburse Plaintiffs for the services they could not access due to campus shutdowns by calculating the dates of the shutdowns versus the dates upon which the refunds were based.

¶ 35 Finally, Defendant argues "Plaintiffs' claims are veiled educational malpractice claims which are not allowed in North Carolina," again relying on *Ryan* as the only binding authority. (Capitalization altered.) While Defendant is correct North Carolina does not permit educational malpractice claims, *see Ryan*, 128 N.C. App. at 302-03, 494 S.E.2d at 791 (only permitting claim to go forward because it "would not involve an inquiry into the nuances of educational processes and theories" (quotation marks omitted)), Plaintiffs are not making such a claim. In *Ryan*, this Court clarified educational malpractice claims require "an inquiry into the nuances of educational processes and theories." *See id.* at 302, 494 S.E.2d at 791. The *Ryan* Court also relied heavily on a Seventh Circuit case that clarified an educational malpractice claim alleged "the school breached its agreement by failing to provide an effective education" or "simply . . . that the education was not good enough." *See id.* (quoting *Ross v. Creighton Univ.*, 957 F.2d 410, 416-17 (7th Cir. 1992)).

¶ 36 Reviewing Plaintiffs' contract claims does not require an investigation into educational processes or theories or a determination of whether the education was adequate. The student fees, housing, and meals claims do not involve education practices at all; they involve separate amenities Plaintiffs allege they paid to access as discussed above. And Plaintiffs' tuition claim alleges they paid for "live, in-person, on-campus education" but instead received instruction via "online distance learning platforms[.]" Defendants do not indicate any place where Plaintiffs' tuition claim turns on whether one of those types of education is better than the other in terms of educational quality. Defendant's best argument to the contrary is that calculating damages for Plaintiffs' tuition claim would require determining "the difference in value between in-person and distance learning." But the trial court would not need to do that in the future if this case reaches a damages stage because Defendant

has already set different tuitions for on-campus and distance learning programs according to the allegations in the Amended Complaint. At its heart, Plaintiffs' tuition claim alleges they contracted and paid for product A and received product B for part of the Spring 2020 Term. Products A and B can represent anything in that scenario, demonstrating that the claim does not rely on reviewing educational processes or even on the educational setting itself.

¶ 37 Having rejected all Defendant's arguments, we conclude after our *de novo* review sovereign immunity does not bar Plaintiffs' contract claims, although it does bar their unjust enrichment claims.

B. Statutory Immunity

¶ 38 As the contract claims survive sovereign immunity, we next turn to statutory immunity. As explained above, Plaintiffs argue N.C. Gen. Stat. § 116-311, which provides immunity to claims for tuition and fees for COVID-19 related university closures, "is unconstitutional and inapplicable to this action." (Capitalization altered.) *See* N.C. Gen. Stat. § 116-311(a). Following the doctrine of constitutional avoidance, *see Holdstock*, 270 N.C. App. at 277, 841 S.E.2d at 314 ("[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds."), we will first consider whether § 116-311 is applicable here and then address the constitutionality of the statute.

1. Applicability of North Carolina General Statute § 116-311

¶ 39 **[3]** Plaintiffs first argue § 116-311 is "inapplicable to this action." (Capitalization altered.) North Carolina General Statute § 116-311 provides, in relevant part:

> Notwithstanding any other provision of law and subject to G.S. 116-312, an institution of higher education shall have immunity from claims by an individual, if all of the following apply:
>
> > (1) The claim arises out of or is in connection with tuition or fees paid to the institution of higher education for the spring academic semester of 2020.
> >
> > (2) The claim alleges losses or damages arising from an act or omission by the institution of higher education during or in response to

> COVID-19, the COVID-19 emergency declaration, or the COVID-19 essential business executive order.
>
> (3) The alleged act or omission by the institution of higher education was reasonably related to protecting the public health, safety, or welfare in response to the COVID-19 emergency declaration, COVID-19 essential business executive order, or applicable guidance from the Centers for Disease Control and Prevention.
>
> (4) The institution of higher education offered remote learning options for enrolled students during the spring academic semester of 2020 that allowed students to complete the semester coursework.

N.C. Gen. Stat. § 116-311(a). Plaintiffs' first argument is that the "plain meaning of this statute is to provide immunity for tort claims" because it includes the language "act or omission." Plaintiffs also contend "Defendant's refusal to provide fair tuition and [fee] refunds" is not "reasonably related to protecting public health or safety."

¶ 40 As questions of statutory interpretation, we review Plaintiffs' arguments *de novo*. *See Winkler v. North Carolina State Board of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 207, 210 (2020) ("Thus, this case presents an issue of statutory interpretation, which we review de novo." (citing *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013))). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Id.* (quoting *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (brackets omitted)).

¶ 41 Section 116-311(a), by its plain language, provides "immunity from claims[.]" N.C. Gen. Stat. § 116-311(a). Plaintiffs argue the term claims should be limited to tort claims, and thus not cover their contract claims, because the claim must "allege[] losses or damages arising from an act or omission." N.C. Gen. Stat. § 116-311(a)(2). But this argument ignores the statutory definition of claims. N.C. Gen. Stat. § 116-310 defines "Claim" as, "A claim or cause of action seeking any legal or equitable remedy or relief" for the purpose of the article on "Covid-19 Immunity for Institutions of Higher Education," which includes § 116-311. N.C. Gen. Stat. § 116-310(1) (2021). That definition includes any claim or cause of action that could be brought, so it necessarily

includes Plaintiffs' contract claims, and, as an alternative basis for our decision, Plaintiffs' unjust enrichment claims. "If a statute 'contains a definition of a word used therein, that definition controls.' " *Lovin v. Cherokee County*, 248 N.C. App. 527, 529, 789 S.E.2d 869, 871 (2016) (quoting *In re Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974)). Therefore, we reject Plaintiffs' argument the statutory immunity provided by § 116-311 applies only to tort claims; it applies to all claims, including all of Plaintiffs' contract and unjust enrichment claims.

¶ 42 The remainder of § 116-311 provides five requirements for immunity to apply. First, the statute imports the limits provided in § 116-312, which limits the timeframe of the immunity to "alleged acts or omissions occurring on or after the issuance of the COVID-19 emergency declaration until June 1, 2020." *See* N.C. Gen. Stat. § 116-311 (making clear the immunity is "subject to G.S. 116-312"); N.C. Gen. Stat. § 116-312 (including quoted language on timeframe of immunity). Then, § 116-311 has the four individually numbered requirements listed above.

¶ 43 Of these five requirements, Plaintiffs only contest the requirement in § 116-311(a)(3) that the "alleged act or omission by the institution of higher education was reasonably related to protecting the public health, safety, or welfare in response to . . . COVID-19 . . . ." N.C. Gen. Stat. § 116-311(a)(3). Specifically, Plaintiffs contend "Defendant's refusal to provide fair tuition and [fee] refunds" is not "reasonably related to protecting public health or safety." In making that argument, Plaintiffs misunderstand the relevant "alleged act or omission." N.C. Gen. Stat. § 116-311(a)(3). The alleged act or omission that gave rise to Plaintiffs' claims was, at least in part, Defendant and its Universities shutting down their campuses and moving classes online according to Plaintiffs' own Amended Complaint. For example, the tuition contract claim explains: "However, the University breached the contract with Plaintiffs and other members of the Tuition Class by moving all classes for the Spring 2020 semester to online distance learning platforms, and restricting the on-campus experience without reducing or refunding tuition accordingly." Similarly, the tuition unjust enrichment claim states:

> Instead, Plaintiffs and other members of the Tuition Class conferred this benefit on Defendant in expectation of receiving one product, *i.e.*, live in-person instruction in a physical classroom along with the on-campus experience of campus life as described more fully above, but they were provided with a materially different product carrying a different fair market value, *i.e.*, online instruction devoid of the on-campus experience, access, and services.

And Plaintiffs' Amended Complaint also pleads the shift to online instruction was a result of the COVID-19 pandemic: "On or about March 11 , 2020, *in response to the COVID-19 pandemic*, Defendant issued a system-wide directive to all constituent institutions requiring that they transition from in-person to online instruction no later than March 23, 2020." (Emphasis added.) As part of that paragraph on the transition to online instruction, Plaintiffs include a footnote to a press release on Defendant's website about the directive, which clarifies the decision to transition to online classes was related to "the health and safety of [the Universities'] students, faculty, and staff . . . ." *UNC System Issues Update on Coronavirus Preparations*, The University of North Carolina System (Mar. 12, 2020).[4] Thus, contrary to Plaintiffs' argument, the alleged acts or omissions were "reasonably related to protecting the public health, safety, or welfare in response to . . . COVID-19 . . . ." N.C. Gen. Stat. § 116-311(a)(3).

¶ 44 The remaining four requirements for statutory immunity under § 116-311(a) are also met here. As to timing, the above allegation about the system-wide directive indicates the decision to shift to online learning was announced on 11 March 2020. Governor Roy Cooper had already entered "the first of many emergency orders . . . in response to the COVID-19 pandemic" on 10 March 2020, *Hall v. Wilmington Health, PLLC*, 282 N.C. App. 463, 2022-NCCOA-204, ¶ 6; *see also* E.O. 116, Cooper, 2020, § 1 (declaring a state of emergency based on "the public health emergency posed by COVID-19"), which started the period of immunity under § 116-312. *See* N.C. Gen. Stat. § 116-312 (applying immunity to "alleged acts or omissions occurring on or after the issuance of the COVID-19 emergency declaration until June 1, 2020"). The remaining actions related to the campus shutdowns all took place within this time period as well.

¶ 45 Turning to the next requirement, the claims all arose "out of or [are] in connection with tuition or fees . . . for the spring academic semester of 2020." *See* N.C. Gen. Stat. § 116-311(a)(1). The Amended Complaint's introduction explains the claims arise from "Defendant's decision not to issue appropriate refunds for the Spring 2020 semester" for "tuition, housing, meals, fees and other costs that Defendant failed to deliver for the second half of the Spring 2020 semester . . . ." Similarly, the four groups of claims (one each for breach of contract and unjust enrichment) are for: tuition, student fees, on-campus housing fees, and meal fees. Further, as we have already discussed, the actions by Defendant

4. Available at: https://www.northcarolina.edu/news/unc-system-issues-update-on-coronavirus-preparations/.

and the Universities were taken "in response to COVID-19[.]" *See* N.C. Gen. Stat. § 116-311(a)(2). Finally, Plaintiffs acknowledge "[f]rom March 23, 2020 through the end of the Spring 2020 semester, there were no in-person classes at Defendant's institutions, *and all instruction was delivered online*[,]" (emphasis added), thereby meeting the final requirement in § 116-311(a)(4). *See* N.C. Gen. Stat. § 116-311(a)(4).

¶ 46 Since all the statutory requirements are met here, § 116-311(a) applies to Plaintiffs' claims, both their contract claims and their unjust enrichment claims. Thus, after our *de novo* review and under the statute's plain language, Defendant has immunity from these claims. N.C. Gen. Stat. § 116-311(a).

2. Constitutionality of North Carolina General Statute § 116-311

¶ 47 Having decided § 116-311 applies to Plaintiffs' claims and grants Defendant immunity, we now address Plaintiffs' argument the statute is unconstitutional. Plaintiff argues the law is unconstitutional for five reasons: (1) "such a law squarely violates U.S. Con[s]t. art. I, § 10 cl. 1 which reads, in pertinent part, '[n]o State shall . . . pass any . . . law impairing the Obligation of Contracts[;]' " (2) "the statute would violate the equal protection clause of both the United States and North Carolina Constitutions[;]" (3) "the statute violates the due process clauses of the United States and North Carolina Constitutions[;]" (4) "the statute would violate U.S. Const. amend. V which prohibits the taking of private property without just compensation[;]" and (5) "the statute intrudes upon the separation of powers because it is a law that was passed in response to specific litigation already pending in the courts with the purposes of directing the courts on how to adjudicate the pending actions."

¶ 48 Before arguing § 116-311 "is not unconstitutional[,]" Defendant contends "Plaintiffs have waived any purported constitutional challenges to" the statute. After discussing the standard of review, we first review whether Plaintiffs have waived the issue and then the merits of Plaintiffs' argument the statute is unconstitutional.

a. Standard of Review

¶ 49 For challenges under both the federal and State Constitutions, we review the constitutionality of statutes *de novo*. *See North Carolina Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016) (stating, in a case where a party argued a statute was unconstitutional under Article I, § 10 of the United States Constitution, "we review de novo any challenges to a statute's constitutionality"); *Cooper*

v. Berger, 376 N.C. 22, 33, 36, 852 S.E.2d 46, 56, 58 (2020) (stating, in a case challenging the constitutionality of a statute under our State Constitution, "[a]ccording to well-established North Carolina law," appellate courts "review[] constitutional questions using a de novo standard of review"). "In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Cooper*, 376 N.C. at 33, 852 S.E.2d at 56 (citation and quotation marks omitted); *see also North Carolina Ass'n of Educators*, 368 N.C. at 786, 786 S.E.2d at 262 ("This Court presumes that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck unless found unconstitutional beyond a reasonable doubt[.]" (citations omitted)).

b. Waiver

¶ 50 **[4]** In its waiver argument, Defendant specifically asserts "[a] facial constitutional challenge to a state statute is governed by the procedure found in N.C. Gen. Stat. §§ 1-267.1, 1-81.1, and [1A-1,] N.C. R. Civ. P. 42(b)(4)." Defendant alleges "Plaintiffs failed to comply with the requirements of Rule 42(b)(4)[5] for raising a facial challenge to the constitutionality" of § 116-311 and thus "have waived their ability to do so."

¶ 51 Defendant's argument rests on a faulty premise because Plaintiffs only raised as-applied constitutional challenges below. During the hearing on Defendant's Motion to Dismiss the Amended Complaint, Plaintiffs' attorney emphasized four separate times they were making as-applied challenges:

- "The first thing I will say and that I want to make very clear is that we have not made a facial challenge to the statute. We are alleging as applied in this case, as they wish to apply it, it is unconstitutional particularly among a number of other sections against the federal contracts clause."
- "Again, I would posit that we are not making a facial challenge but an as-applied challenge."
- "We're making an as-applied challenge."

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5. The requirements of Rule 42(b)(4) control the application of the other two statutes Defendant previously mentioned, §§ 1-267.1 and 1-81.1. *See Holdstock*, 270 N.C. App. at 273, 276, 841 S.E.2d at 312, 314 (explaining how Rule 42(b)(4) "limits the application of N.C.G.S. § 1-267.1(a1)" and then discussing how § 1-81.1 also "restricts" its "requirement to only properly raised challenges as set forth in Rule 42(b)(4)" (emphasis from original omitted)).

- "That is not what we're trying to do is make a facial challenge to this."

¶ 52 The as-applied nature of the challenge matters because the statutes Defendant directs our attention towards "only apply to 'facial challenges to the validity of an act of the General Assembly, not as applied challenges.' " *See Cryan v. National Council of Young Men's Christian Associations of the United States*, 280 N.C. App. 309, 2021-NCCOA-612, ¶ 19 (quoting *Holdstock*, 270 N.C. App. at 271, 841 S.E.2d at 311). And Plaintiffs clarifying they were not making a facial challenge, combined with the lack of a trial court ruling that Plaintiffs were actually making a facial challenge, means no facial challenge was made to trigger the requirements set out by §§ 1-267.1, 1-81.1, and 1A-1, Rule 42. *See Cryan*, ¶ 21 ("As Defendant made clear they were only making an as applied challenge to the 2019 amendments, and the trial court did not make a determination itself that Defendant's constitutional challenges were in fact a facial challenge, no facial challenge was made in the time prescribed by Rule 42(b)(4) for a court to be able to transfer a facial challenge to a three-judge panel.").

¶ 53 Although Plaintiffs argued their constitutional challenge was only an as-applied claim, we recognize that Plaintiffs' own characterization of the claim is not necessarily the end of the analysis. Recently, this Court in *Kelly v. State* held "a court is not restricted *per se* by a party's categorization of its challenge as facial or as-applied and may conduct its own review to determine whether the party's challenge is facial or as-applied." *Kelly v. State*, 2022-NCCOA-675, ¶ 23. As Judge Hampson's dissent in *Kelly* indicates, *id.* ¶¶ 47-48 (Hampson, J. dissenting), this holding may conflict with *Cryan* because *Cryan* focused primarily on whether a party itself said they were making a facial or as-applied challenge. *Cryan*, ¶ 21 ("As [the d]efendant made clear they were only making an as applied challenge . . . no facial challenge was made . . . ."). If the tests from *Cryan* and *Kelly* were to lead to different outcomes, we would need to address this potential conflict in precedent. *See, e.g.*, *Huml v. Huml*, 264 N.C. App. 376, 395, 826 S.E.2d 532, 545 (2019) (explaining how to resolve "a conflict in cases issued by this Court addressing an issue").

¶ 54 But we do not need to address this potential conflict in precedent. Whether we apply the test announced in *Kelly* or we rely upon *Cryan*, the result is the same: Plaintiffs' challenge to § 116-311 here is an as-applied challenge. *See Kelly*, ¶¶ 24, 26 (setting out test for "determining whether a challenge is as-applied or facial"). The *Kelly* Court explained the test to differentiate between as-applied and facial challenges requires a

court to "look to the breadth of the remedy requested." *Kelly*, ¶ 24. The *Kelly* Court then differentiated between the two types of challenges:

> A claim is properly classified as a facial challenge if the relief that would accompany it "reach[es] beyond the particular circumstances of these plaintiffs." *Doe* [*v. Reed*], 561 U.S. [186,] 194, 130 S. Ct. [2811,] 2817, 177 L. Ed. 2d [493,] 501. A claim is properly classified as an as-applied challenge if the remedy "is limited to a plaintiff's particular case." *Libertarian Party v. Cuomo*, 300 F. Supp. 3d 424, 439 (W.D.N.Y. 2018), *overruled on other grounds by N.Y. State Rifle & Pistol Ass'n v. Bruen*, --- U.S. ----, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).

Id. (first brackets in original). In *Kelly*, this Court determined the plaintiffs made a facial challenge because (1) the relief requested "would, if successful, effectively preclude all enforcement of the statute[;]" and (2) the plaintiffs did not allege any facts from which an as-applied determination could be made because they had not sought to be part of the challenged program. *Id.* ¶¶ 27-31 (citations and quotation marks omitted).

¶ 55 Here, examining Plaintiffs' challenge with *Kelly*'s test, we again conclude Plaintiffs have made an as-applied challenge. First, looking at the relief requested, *see id.* ¶ 28, Plaintiffs made the constitutional challenge in the context of their specific case where they are seeking to recover money they and the proposed classes paid for tuition, fees, on-campus housing, and meals. This situation differs from *Kelly* where the plaintiffs sought a declaratory judgment the challenged program was unconstitutional and a permanent injunction against continued operation of that program. *See id.* ¶ 27. Here, we could find an as-applied constitutional violation that opens a limited pathway to allow Plaintiffs and the proposed class to recover the monies they seek without "effectively preclud[ing] all enforcement" of § 116-311 since Plaintiffs do not seek a declaratory judgment that the statute is unconstitutional or injunctive relief barring its enforcement. *See id.* ¶ 28. Plaintiffs merely seek a ruling § 116-311 cannot be used to grant Defendant immunity from *their* lawsuit. For example, they argued before the trial court: "That is not what we're trying to do is make a facial challenge to this. I don't care whether the state and Lenoir-Rhyne or Gardner-Webb try to enforce this immunity on any other students that might run this. I'm concerned about the case that I've brought."

¶ 56 Further, unlike the plaintiffs in *Kelly*, Plaintiffs here could and did allege facts on which an as-applied constitutionality determination could

be made because they were impacted by the challenged statute. *See id.* ¶ 30. For example, Plaintiffs' attorney argued below the challenge was partially based on "the federal contracts clause." As discussed above, Plaintiffs' Amended Complaint alleges they personally entered into contracts with the Universities, so they could challenge § 116-311 on the ground it impaired their contracts specifically. *See North Carolina Ass'n of Educators*, 368 N.C. at 786, 786 S.E.2d at 262 (explaining the Contract Clause of the United States Constitution bars a state from passing "any Law impairing the Obligation of Contracts" (quoting U.S. Const. art. I, § 10 (ellipses omitted))). Although we do not have in our record Plaintiffs' precise arguments before the trial court on this ground, *see* Fn. 2, *supra*, their separation of powers argument demonstrates the as-applied nature of their challenge to § 116-311 even more clearly. On appeal, Plaintiffs argue § 116-311 unconstitutionally "intrudes upon the separation of powers because it is a law that was passed in response to specific litigation already pending in the courts with the purposes of directing the courts on how to adjudicate the pending actions." This argument relies on when Plaintiffs filed their specific lawsuit, i.e., before the General Assembly passed the immunity statute, so it necessarily relies on facts "specific to" Plaintiffs "from which to determine whether the statute is unconstitutional as applied." *See Kelly*, ¶ 30 (requiring such facts for a challenge to be as-applied).

¶ 57 Under both of *Kelly*'s factors, *see id.* ¶¶ 27-31, Plaintiffs here make an as-applied challenge to the immunity statute. Thus, applying *Kelly*'s test, we reach the same conclusion as our previous analysis based on *Cryan*. Therefore, we reject Defendant's argument Plaintiffs have waived their constitutional challenges to § 116-311 and the statutory immunity it provides against Plaintiffs' claims.

c. Merits

¶ 58 **[5]** Turning to the merits, Plaintiffs argue § 116-311 is unconstitutional on five grounds: (1) the United States Constitution's clause barring states from impairing contracts; (2) the Equal Protection Clauses of the United States and North Carolina Constitutions; (3) the Due Process Clauses of the United States and North Carolina Constitutions; (4) the Takings Clause in the Fifth Amendment of the United States Constitution; and (5) the separation of powers doctrine. We address each of those five arguments in turn.

¶ 59 Under the Contract Clause of the United States Constitution, "no State shall pass any Law impairing the Obligation of Contracts." *North Carolina Ass'n of Educators*, 368 N.C. at 786, 786 S.E.2d at 262 (quoting

U.S. Const. art. I, § 10) (ellipses and brackets omitted). Our courts use a three-factor test to "determine whether a Contract Clause violation exists." *Id.* (citing *Bailey v. State*, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998)). That test, adopted from the Supreme Court of the United States's decision in *U.S. Trust Co. of N.Y. v. New Jersey*, "requires a court to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey*, 348 N.C. at 140-41, 500 S.E.2d at 60 (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 52 L.Ed.2d 92 (1977)). Here, we have already determined Plaintiffs pled a valid contractual obligation when we decided the contract claims survived sovereign immunity, thereby meeting the first prong of the test. Assuming *arguendo* the second prong, impairment of the contract, is met, Plaintiffs fail at the third prong.

¶ 60 The third prong, "whether the impairment was reasonable and necessary to serve an important public purpose[,]" recognizes "[n]ot every impairment of contractual obligations by a state violates the Contract Clause" because the state can still permissibly use its police power. *Bailey*, 348 N.C. at 151, 500 S.E.2d at 66 (citing *U.S. Trust Co.*, 431 U.S. at 21, 25-26, 52 L.Ed.2d at 109, 111-12). The third prong "involves a two-step process, first identifying the actual harm the state seeks to cure, then considering whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose." *North Carolina Ass'n of Educators*, 368 N.C. at 791, 786 S.E.2d at 265 (citing *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412, 74 L.Ed.2d 569, 581 (1983)); *see also Lake v. State Health Plan for Teachers and State Employees*, 380 N.C. 502, 2022-NCSC-22, ¶ 64 (quoting that portion of *North Carolina Ass'n of Educators*).

¶ 61 Here, the Article on immunity explains the purpose of the statute: "It is a matter of vital State concern affecting the public health, safety, and welfare that institutions of higher education continue to be able to fulfill their educational missions during the COVID-19 pandemic without civil liability for any acts or omissions for which immunity is provided in this Article." N.C. Gen. Stat. § 116-313 (2021). In *North Carolina Ass'n of Educators*, our Supreme Court explained "maintaining the quality of the public school system is an important purpose." *See North Carolina Ass'n of Educators*, 368 N.C. at 791, 786 S.E.2d at 266. While the case did so in the context of elementary and secondary school public education, *see id.* at 781, 786 S.E.2d at 259 (referencing history of N.C. Gen. Stat. § 115C-325 (2012)); N.C. Gen. Stat. Chapter 115C (covering elementary and secondary education), the quality of post-secondary education is

also an important purpose for the State, especially when it has decided to create a public university system to, *inter alia*, "improve the quality of education[.]" *See* N.C. Gen. Stat. § 116-1(a) (2021) ("In order to foster the development of a well-planned and coordinated system of higher education, to improve the quality of education, to extend its benefits and to encourage an economical use of the State's resources, the University of North Carolina is hereby redefined in accordance with the provisions of this Article.").

¶ 62 Turning to the second part of the third prong, we must determine "whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose." *See North Carolina Ass'n of Educators*, 368 N.C. at 791, 786 S.E.2d at 265. The immunity statute was a reasonable means of ensuring the quality of education because it allowed the Universities to focus on how to best deliver education online rather than trying to continue in person and expending resources on all the public health measures necessary to try to achieve that prospect safely. With the benefit of hindsight, there are many different opinions on the effectiveness or wisdom of closures of educational institutions as a response to the COVID-19 pandemic, but this Court need not attempt to resolve these questions as they are not presented by this case. The General Assembly limited the application of N.C. Gen. Stat. §116-311 to the spring semester of 2020 only, and this was the only semester during which the Universities had to deal with an immediate response to the COVID-19 pandemic for students who were already enrolled and on campus when the Governor's Emergency Directives were issued. *See* N.C. Gen. Stat. § 116-311(a)(1) ("The claim arises out of or is in connection with tuition or fees paid to the institution of higher education for the spring academic semester of 2020."); *see generally* E.O. 116, Cooper, 2020, § 1 (first COVID-19 Emergency Directive). The immunity statute was a reasonable response to the COVID-19 pandemic at the time it was adopted, in the context of the Governor's Emergency Directives. *See*, *e.g.* E.O. 116, Cooper, 2020, § 1 (declaring a state of emergency based on "the public health emergency posed by COVID-19"); E.O. 120, Cooper, 2020, § 4 (closing other educational institutions, namely public schools, from 16 March 2020 to 15 May 2020 pursuant to, *inter alia*, the state of emergency); E.O. 121, Cooper, 2020, § 1-2, 7 (imposing a 30-day stay-at-home order effective 30 March 2020 pursuant to, *inter alia*, the state of emergency with a limited exception for educational institutions, including public colleges and universities, only for "facilitating remote learning, performing critical research, or performing essential functions, provided" social distancing of at least six feet from other people was respected). The statute was also a necessary response

to the COVID-19 pandemic and the need to ensure educational quality during the early days of the pandemic. Removing the possibility of liability from the Universities ensured they could shift to online learning and focus on education without worrying about either public health measures to continue in person or the prospect of lawsuits arising from having to change the method of instruction mid-semester. Put another way, it is unclear what else the General Assembly could have done to achieve the same goal of ensuring the focus was on continuing the Universities' educational mission in light of the uncertainty caused by the early days of the COVID-19 pandemic. Because we find the immunity statute to be reasonable and necessary, we reject Plaintiffs' argument the statute violates the federal Constitution's Contract Clause.

¶ 63 Second, Plaintiffs argue § 116-311 violates the equal protection clauses of the federal and State Constitutions because it "aimed at protecting only one group of specific entities[,]" Defendant and its Universities "against the claims of another specific group" and did not extend to other industries that also "suffered financially from the pandemic" such as "[g]yms, restaurants, and countless other businesses . . . forced to close their physical locations." Since Plaintiffs' argument rests on differing classifications of universities versus other businesses affected by the COVID-19 pandemic, the tests under the federal and State Constitutions are identical. *See Liebes v. Guilford County Dept. of Public Health*, 213 N.C. App. 426, 428, 724 S.E.2d 70, 72 (2011) ("Our courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis." (quoting *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996))). This Court has described those tests as follows:

> Upon the challenge of a statute as violating equal protection, our courts must "first determine which of several tiers of scrutiny should be utilized" and then whether the statute "meets the relevant standard of review." *Department of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). Where "[t]he upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," we apply the lower tier or rational basis test if the statute neither classifies persons based on suspect characteristics nor impinges on the exercise of a fundamental

> right. *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983).

See Liebes, 213 N.C. App. at 428-29, 724 S.E.2d at 72-73. Here, Plaintiffs do not argue any suspect classification or fundamental right is involved, so we apply only rational basis. *See id.* at 428-29, 724 S.E.2d at 73.

¶ 64 "The pertinent inquiry under rational basis scrutiny is whether the 'distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest.' " *Id.* at 429, 724 S.E.2d at 73 (quoting *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980)). While we need not determine the actual purpose when conducting rational basis review, *see id.*, here the statutory explanation in § 116-313 we excerpted above provides the required rational basis. Not only are the educational missions of institutions of higher learning a legitimate government interest, but the importance of education is also enshrined in our State's Constitution. *See* N.C. Const. Art. IX, § 1 ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and *the means of education shall forever be encouraged*." (emphasis added)). And the immunity law helped further that purpose by allowing the Universities to focus on educational quality rather than worry about lawsuits or what public health measures would be needed to allow schools to continue in person during the early stages of the pandemic. Since there is a rational basis for treating institutions of higher learning different than gyms or restaurants, the immunity statute survives equal protection analysis.

¶ 65 Third, Plaintiffs argue § 116-311 "violates the due process clauses of the United States and North Carolina Constitutions" because they were "deprived of their property rights in the contract, and their property rights in the chose of action that they have acquired as a result of Defendant's breach of said contract." Plaintiffs provide no authority in support of this argument. As with the Equal Protection Clauses, the Due Process Clause of the Fourteenth Amendment to the United States Constitution is "synonymous" with the "term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina," *see, e.g.*, *In re Moore's Sterilization*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976), so our analysis is identical under both the federal and State Constitutions.

¶ 66 The Supreme Court of the United States has long made clear "the State remains free to create substantive defenses or immunities for use in adjudication . . . ." *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 71 L.E.2d 265, 276 (1982). In such a case, "the legislative

determination provides all the process that is due." *Id.* at 433, 71 L.E.2d at 276 (citing *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46, 60 L.Ed. 372 (1915)). For example, in *Martinez v. California*, 444 U.S. 277, 62 L.Ed.2d 481 (1980), the Supreme Court of the United States "upheld a California statute granting officials immunity from certain types of state tort claims." *See Logan*, 455 U.S. at 432, 71 L.E.2d at 276. While "the grant of immunity arguably did deprive the plaintiffs of a protected property interest . . . they were not thereby deprived of property without due process" because of the legislative determination. *Id.* at 432-33, 71 L.E.2d at 276. The only requirement was that the legislative action had "a rational relationship" to the legislature's "purposes." *Martinez*, 444 U.S. at 282, 62 L.Ed.2d at 487 (quotation marks omitted); *see also Martinez*, 444 U.S. at 282, 62 L.Ed.2d at 487 ("[E]ven if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.").

¶ 67 Here, faced with another immunity statute, we also only need to determine if there was a rational relationship between § 116-311 and its purpose. S*ee id.* As laid out above, the statute grants immunity to allow the Universities to fulfill their academic missions. *See* N.C. Gen. Stat. § 116-313. As noted above in our discussion of the reasonableness of the immunity statute when discussing the Contract Clause, there is a rational relationship between the grant of immunity and that goal because immunity freed up the Universities to focus on how to best deliver education online rather than trying to continue in person and take all the public health measures necessary to do that, which would have necessarily taken resources away from efforts to ensure educational quality. Therefore, we reject Plaintiffs' contention § 116-311 violates the Fourteenth Amendment's Due Process Clause or our Constitution's corresponding Law of the Land Clause.

¶ 68 Fourth, Plaintiffs argue the immunity statute violates the Takings Clause of the Fifth Amendment to the United States Constitution because their "chose in action" from Defendant's breach of contract is property that was taken without just compensation. The only authority Plaintiffs cite in support of this contention is *Frost v. Naylor*, 68 N.C. 325 (1873) and its statement "a chose in action is property." *See Frost*, 68 N.C. at 326. But *Frost* focused on "our Constitution," not the federal Constitution's Takings Clause. *See id.* Plaintiffs present no caselaw showing a chose in action, or a right to sue in general, *see Chose in*

Action, Black's Law Dictionary (11th ed. 2019) (defining a chose in action as "[t]he right to bring an action to recover a debt, money, or thing"), can be the basis of a Takings Clause violation under the United States Constitution. Therefore, we reject this argument.

¶ 69 Finally, Plaintiffs argue § 116-311 unconstitutionally "intrudes upon the separation of powers because it is a law that was passed in response to specific litigation already pending in the courts with the purposes of directing the courts on how to adjudicate the pending actions." Plaintiffs provide no other argument, law, or citations to support that argument; the entire argument is that sentence. As such, even assuming *arguendo* passing a law in response to specific litigation already pending would violate separation of powers, Plaintiffs have failed to provide any evidence this law was passed in such a manner. Therefore, we reject Plaintiffs' separation of powers argument.

¶ 70 Thus, after our *de novo* review we are not convinced beyond a reasonable doubt that § 116-311 is unconstitutional. Because we uphold the constitutionality of § 116-311 against all of Plaintiffs' arguments and have already decided it applies to this case, we now hold Plaintiffs' claims are barred by statutory immunity. This holding applies to bar Plaintiffs' contract claims that survive sovereign immunity, and it also represents an alternative bar to Plaintiffs' unjust enrichment claims. Therefore, the trial court did not err in dismissing Plaintiffs' claims.

III. Conclusion

¶ 71 We affirm the trial court's dismissal of Plaintiffs' claims. Sovereign immunity bars Plaintiffs' unjust enrichment claims, but it does not bar their contract claims because they have pled valid implied-in-fact contracts. Statutory immunity from N.C. Gen. Stat. § 116-311 bars Plaintiffs' contract claims and, in the alternative, their unjust enrichment claims, because the statute applies to their claims based on its plain language and meaning and is constitutional.

AFFIRMED.

Judges COLLINS and CARPENTER concur.

PELC v. PHAM

[287 N.C. App. 427, 2023-NCCOA-2]

JAMES HOWARD PELC, PLAINTIFF
v.
MONICA ELIZABETH PHAM, DEFENDANT

No. COA22-175

Filed 17 January 2023

1. Contracts—breach—husband sponsoring immigrant wife—failure to provide financial support under Form I-864—subject matter jurisdiction

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife when she immigrated to the U.S., the trial court had subject matter jurisdiction to hear the wife's breach of contract claim alleging that the husband failed to continue paying support under the Form I-864 for years after they separated. Although the support obligation under a Form I-864 is calculated on an annual basis, the wife was not required to renew her breach of contract claim every year after the date of separation where her complaint prayed for all monetary damages resulting from the alleged breach; therefore, the husband's argument—that the only year the court possessed jurisdiction over the wife's claim was the year that the parties separated—was meritless.

2. Divorce—breach of contract—husband sponsoring immigrant wife—failure to pay support under Form I-864—calculation of payments owed—household size

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife when she immigrated to the U.S., and where the trial court ruled in favor of the wife on her breach of contract claim alleging that the husband failed to make support payments under the Form I-864 after they separated, the court erred in calculating the damages owed to the wife using the Federal Poverty Level Guidelines for a two-person household rather than for a one-person household. Although the parties did have a son together, the child could not be considered part of the wife's household for Form I-864 purposes because the husband had promised in the Form to support only the wife and because the child was a U.S. citizen.

3. Divorce—breach of contract—husband sponsoring immigrant wife—failure to pay support under Form I-864—calculation of payments owed—sponsored immigrant's income

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife when she immigrated to the U.S., and where the trial court ruled in favor of the wife on her breach of contract claim alleging that the husband failed to make support payments under the Form I-864 after they separated, the court did not err by using the wife's adjusted gross income as listed on her federal tax returns when calculating the damages that the husband owed her (the support obligation under a Form I-864 is the difference between the sponsored immigrant's annual "income" and the amount equal to 125 percent of the federal poverty level).

4. Appeal and Error—preservation of issues—waiver—conflicting arguments offered before trial, at trial, and on appeal

In a divorce case where, during the marriage, the wife loaned money to the husband so that he could purchase a rental home in Georgia but he never paid her back, the husband failed to preserve for appellate review his argument that the trial court erred in awarding equitable damages to the wife based on a finding that a quasi-contract existed between the parties in relation to the loan. Specifically, the husband could not argue for the first time on appeal that the parties had an implied-in-fact contract regarding the loan after having argued in his pretrial filings that no loan existed and then having argued at trial that the parties had in fact entered into a quasi-contract regarding the loan.

5. Damages and Remedies—equitable remedy—breach of quasi-contract—loan to purchase rental home—no credit given for "sweat equity"

In a divorce case where, during the marriage, the wife loaned money to the husband so that he could purchase a rental home in Georgia but he never paid her back, the trial court did not abuse its discretion in awarding equitable relief to the wife—based on a finding that a quasi-contract existed with respect to the loan—without crediting the husband for his "sweat equity" in repairing some of the wife's properties in Australia. The quasi-contract between the parties concerned only the rental home, and therefore the court did not have to consider any of the parties' other properties when fashioning

an equitable remedy. Further, the court also declined to credit the wife with the "sweat equity" she purportedly put into repairing the parties' residential property in North Carolina.

6. Damages and Remedies—equitable remedy—breach of quasi-contract—loan to purchase rental home—North Carolina Foreign-Money Claims Act—currency for payment of damages

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife) where, during the marriage, the wife loaned money to the husband so that he could purchase a rental home in Georgia but he never paid her back, and where the trial court awarded equitable relief to the wife based on a finding that the parties had a quasi-contract with respect to the loan, the court erred by awarding damages in U.S. dollars. Under the North Carolina Foreign-Money Claims Act, relief should have been awarded in Australian dollars (AUD) because: (1) the wife loaned the money in AUD, and the husband regularly made interest payments on the loan in AUD; (2) the parties used AUD "at the time of the transaction"; and (3) the wife's loss was "ultimately felt" in AUD.

7. Judges—discretion—conference held after close of evidence but before entry of final order—delay in entering final order

The trial judge in a divorce case had the discretion to hold a conference after the close of evidence and before entering its final order—to hear the parties' proposals on how to draft the order—but it erred in waiting eighteen months to enter the final order, as the delay impeded appellate review of the judge's holdings in the case.

8. Appeal and Error—record on appeal—missing portions of trial transcript—no prejudice shown

The appellant in a divorce case failed to show that he was prejudiced on appeal where portions of the trial transcript were missing from the record due to technological glitches. The existing record still allowed the husband to adequately present (and even prevail on some of) his arguments on appeal.

9. Attorney Fees—divorce action—husband sponsoring immigrant wife—breach of contract—failure to provide financial support under Form I-864

In a divorce case between a U.S. citizen (husband) and an Australian citizen (wife), where the husband had signed a United States Citizenship and Immigration Services Form I-864 "Affidavit of Support" promising to sponsor and financially support the wife

when she immigrated to the U.S., the trial court did not err in awarding attorney fees to the wife on her breach of contract claim (alleging that the husband breached his obligation to make support payments under the Form I-864 after they separated) because she was the prevailing party on that claim. Further, the applicable federal law (8 U.S.C. § 1183a(c)) lists "payment of legal fees" as one of the available remedies for enforcing a Form I-864, and the Form I-864 that the husband signed stated that he might be required to pay attorney fees if a person or agency successfully sued him in relation to his payment obligations.

Appeal by defendant from judgment entered 7 June 2021 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 29 November 2022.

Arnold & Smith, PLLC, by Matthew R. Arnold and Ashley A. Crowder, for the plaintiff-appellant.

Miller Bowles Cushing, PLLC, by Brett Holladay, for the plaintiff-appellant.

Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell for the defendant-appellee.

TYSON, Judge.

¶ 1 James Howard Pelc ("Father") appeals from order entered on 7 June 2021, which awarded to Monica Elizabeth Pham ("Mother"): (1) monetary damages under an United States Citizenship and Immigration Services ("USCIS") Form I-864 Affidavit of Support; (2) equitable damages for Father's failure to repay a loan; and, (3) attorney's fees for Mother's Affidavit of Support claims. The order also denied attorney's fees for both Mother's and Father's child custody claims. We affirm in part, reverse in part, and remand.

I. Background

¶ 2 Father and Mother began a romantic relationship in Perth, Australia, and began cohabitating in 2007. The relationship evolved into a "*de facto* relationship" per Australian law, which is analogous to a common-law marriage. Mother and Father are parents of one minor son born on 26 June 2009. The parties resided in Australia until 2014, when they moved to the United States (U.S.).

¶ 3 Father holds dual citizenship in the U.S. and Australia. Mother holds dual citizenship in Australia and New Zealand. Their son is a U.S. and Australian citizen because Father is a U.S. citizen. At the time of trial, Father was 62 years old, and Mother was 50 years old.

¶ 4 Father desired to return to the U.S. in 2014 to be closer to his aging parents. Mother was reluctant, but she agreed to move "on a trial basis" to determine whether she would enjoy living in the U.S. Mother was required to obtain a Fiancée Visa prior to immigrating and entering the U.S. Mother and Father completed and signed a USCIS Form I-134, entitled "Intent to Marry," and confirmed their intent to marry within ninety days upon entry into the U.S. Mother and Father married on 21 July 2014 in the U.S.

¶ 5 For Mother to remain in the U.S., Father also signed and submitted a USCIS Form I-864, titled an "Affidavit of Support," on 7 August 2014. The Affidavit of Support allows the "intending immigrant [to] establish that he or she is not inadmissible to the United States as an alien likely to become a public charge" by requiring the future spouse to promise to financially support the alien.

¶ 6 The trial court found Father "represented that he was not working but had assets and income from his property from which to support [M]other" on the USCIS Form I-864. Father signed the USCIS Form I-864 Affidavit of Support, promising to maintain his alien wife, an Australian/New Zealand citizen, for her to lawfully remain in the United States for permanent residence.

¶ 7 The parties resided together in the U.S. with the minor son until they separated on 4 November 2016. Father failed to pay any support to Mother after the parties separated.

¶ 8 From November 2016 until April 2017, the parties "nested" with the minor son, meaning "Mother and Father would alternate weeks living in Father's residence with the minor child." The parties eventually stopped "nesting" with their son. The parties have maintained separate households since April 2017.

¶ 9 Neither Mother nor Father were employed for 2014 through 2017. Father has not maintained traditional employment since February 2014. Mother resigned from her job in Australia when she moved to the U.S., per Father's request. Mother, however, later secured a part-time employment during 2018 and a full-time position in 2019.

¶ 10 Prior to moving to the U.S., Father identified various properties located in different geographic areas. He intended to use one as the family

home, and another to be used as a rental property to generate income. In May 2013, Father purchased residential property located in Charlotte. He also purchased property located in Suwanee, Georgia, in August 2013, which he hoped to rent.

¶ 11 Prior to closing on the property in Suwanee, Mother offered funds to Father to avoid financing the property through a traditional loan and borrowing from a lender. Mother was to receive equity in the home for her investment, or alternatively, Father promised to re-pay Mother the interest she was obligated to pay on her separate line of credit. Mother provided $110,000 Australian dollars ("AUD") to Father in two transactions on 11 and 12 June 2013, which Father subsequently transferred to a U.S. bank account and, upon conversion, received currency proceeds of $104,099 U.S. Dollars ("USD"). Father used those funds to partially purchase the property in Suwanee.

¶ 12 The trial court found that Mother "trusted Father" because of their personal relationship, and Mother considered the transaction as a "loan to Father and not a gift." The trial court also found Mother had relied upon Father's promises to re-pay the funds loaned from her line of credit and her reliance was reasonable.

¶ 13 Father paid Mother $4,071 towards the loan proceeds in 2013 and part of 2014, which amount equaled the interest accruing on Mother's line of credit. Father subsequently stopped paying Mother in 2014. In one of Father's responses to a motion before the trial, he "admitted that Mother had loaned him the money, admitted that he had paid for a time on the loan, and admitted that it had not been paid in full." Father sold the Suwanee property for a profit in 2018. Father did not re-pay Mother any of the proceeds from the sale nor make any additional payments on the loan.

¶ 14 Following the dissolution of Mother's and Father's relationship in late 2016, Father initiated this litigation after Mother had threatened to take their minor son back to Australia. He sought permanent child custody, temporary emergency custody, and, in the alternative, a motion for temporary parenting arrangement. The litigation has sadly proceeded in a protracted, expensive, contentious, and a highly-conflicted manner since it began.

¶ 15 Mother counterclaimed for a decree of divorce, child custody, child support, attorney's fees, recovery of personal property, monetary damages resulting from breach of contract for support, specific performance of the contract for support, equitable distribution, interim allocation, postseparation support, alimony, unjust enrichment, constructive trust, and resulting trust.

¶ 16 Mother voluntarily dismissed her post-separation support, alimony, and temporary and permanent child support claims without prejudice when trial began. The remaining claims were tried between 9-11 December 2019. No written order was entered until eighteen months later on 7 June 2021.

¶ 17 The trial court found and concluded: (1) Father owed Mother damages for failing to meet his contractual obligation under the USCIS Form I-864 Affidavit of Support; (2) Mother's claim for *quantum meruit*/unjust enrichment should be granted for the funds Mother provided to finance the purchase of the Georgia rental home and awarded Mother $100,028 USD, the converted amount of the funds minus the payments Father made in 2013 and 2014, together with $33,697.10 USD in interest; (3) Mother's claim for attorney's fees arising out of the Affidavit of Support should be allowed in the amount of $20,000 USD; and, (4) both Mother and Father's claims for attorney's fees related to the child custody agreement should be denied. Father timely appealed on 6 July 2021.

II. Appellate Jurisdiction

¶ 18 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

¶ 19 Father presents extensive arguments regarding the trial court's order on appeal. Those arguments relate to the trial court's findings regarding: (1) the USCIS Form I-864 Affidavit of Support; (2) Mother's loan to Father to purchase the property located in Suwanee, Georgia; and, (3) the award of mother's attorney's fees for those fees related to the Affidavit of Support.

¶ 20 Father also argues he was prejudiced and should be granted a new trial because: (1) a hearing conducted after trial, but before entry of the final order, allowed Mother to make additional arguments; and, (2) certain portions of the trial transcript are missing due to technological glitches.

IV. Affidavit of Support

¶ 21 Father first argues the trial court lacked subject matter jurisdiction to adjudicate Mother's Affidavit of Support claim for 2017 and 2018. Father asserts he could only be in breach of the agreement at the end of each year, because the trial court uses the annual income of the sponsored alien immigrant to determine whether he breached his obligations

under the Affidavit of Support. He argues Mother should have brough forth new claims regarding Defendant's breach at the end of each year during the litigation.

¶ 22 Father also argues the trial court erred by considering the 125% of the Federal Poverty Level ("FPL") Guidelines values for a two-person household instead of a one-person household when determining whether Mother's annual income fell below the 125% FPL threshold. He similarly asserts the trial court erred by excluding certain tax-deductible depreciation expenses from mother's income when calculating damages. If those tax deductions were not excluded from Mother's income and the trial court applied the guidelines for a one-person household, Father argues he would not owe Mother damages for breaching his contractual obligations under the USCIS Form I-864 Affidavit of Support.

¶ 23 The following chart compares the 125% FPL Guidelines for both household sizes for the years the trial court awarded Mother damages arising from Father's obligations under the Affidavit of Support. Although Mother also sought damages for 2015, the trial court did not award damages for that year because her income exceeded the FPL Guidelines for a two-person household in 2015.

125% of the Federal Poverty Level Guidelines (in USD)		
Year	**One-Person Household**	**Two-Person Household**
2016	$ 14,850	$ 20,025
2017	$ 15,075	$ 20,300
2018	$ 15,175	$ 20,575

¶ 24 Mother's adjusted gross income on her federal tax returns for the requisite years is displayed in the table below, along with Mother's income without deducting her depreciation expenses:

Mother's Adjusted Gross Income		**Mother's Income Before Subtracting Depreciation Expenses**	
Year	**Amount in USD**	**Year**	**Amount in USD**
2016	$ 8,511	2016	$18,066
2017	$ 7,173	2017	$16,728
2018	$ 6,703	2018	$16,258

A. Subject Matter Jurisdiction

¶ 25 **[1]** Mother asserted a breach of contract claim in her First Amended Answer and Counterclaims, filed on 13 December 2016. Father argues the only possible year the trial court possessed subject matter jurisdiction over Mother's claim for damages arising from the Affidavit of Support was 2016, and he asserts the "threshold for determining liability under the Affidavit of Support is 125% of the [FPL], [which is] calculated on an annual level, rather than monthly [basis]." Mother renewed her claim in her Second Amended Answer and Counterclaims filed on 14 February 2017. Defendant asserts his potential liability for 2017 and 2018 was speculative, as 2017 had not ended when Mother renewed her claim and 2018 had not begun, making both claims premature and not "ripe."

1. Standard of Review

¶ 26 "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). "Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Id.* (citation and internal quotation marks omitted).

2. Suozzo v. Suozzo

¶ 27 The defendant in *Suozzo v. Suozzo* argued "the trial court erred by awarding damages for the monthly installments that became due only after Wife commenced th[e] action," because "[w]ife did not sue for claims which came due subsequent to the filing [of] the complaint." 285 N.C. App. 425, 2022-NCCOA-620, ¶ 10, 876 S.E.2d 915 (2022) (unpublished) (internal quotation marks and alterations omitted). This Court held the trial court did not err by awarding damages for monthly installments the defendant-husband had missed after wife had filed her complaint. *Id.* ¶ 13. Wife did not "limit her prayer for relief to the recovery of installments prior to the filing of her complaint" and she prayed for " 'all damages incurred as a result of Defendant's breach' and for 'such other and further relief as the Court may deem just and proper.' " *Id.* ¶ 12.

¶ 28 Here, Mother was not required to renew her breach of contract claim arising under the USCIS Affidavit of Support at the end of each new year the litigation proceeded into, as she had prayed for all monetary damages resulting from Father's breach and "such other and further relief [as] the Court may deem just and proper." *Id.* ¶ 13.

¶ 29 North Carolina courts have jurisdiction to adjudicate breach of contract claims deriving from a supporting spouse's failure to comply with an Affidavit of Support. *See Zhu v. Deng*, 250 N.C. App. 803, 794 S.E.2d 808 (2016). The trial court possessed subject-matter jurisdiction to hear and adjudicate Mother's claims under her prayer for relief for Father's breach as they accrued for the years 2017 and 2018. Father's argument is overruled.

B. USCIS Form I-864 Affidavit of Support

1. Standard of Review

¶ 30 The contents of a USCIS Form I-864 Affidavit of Support "are specified in 8 U.S.C. § 1183a, and . . . [are] [ ] an issue of statutory interpretation." *Id.* at 817, 794 S.E.2d at 817 (citation omitted). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *Martin v. N.C. Dep't. of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (citation and quotation marks omitted); *Anderson v. Anderson*, 840 F. App'x 92, 94 (9th Cir. 2020) (unpublished) (explaining that whether the court correctly instructed the jury they were allowed to consider TRICARE health insurance benefits and a judgment for attorney's fees as "income" should be reviewed *de novo*, not for an abuse of discretion, because the appellate court was determining "whether the challenged instruction correctly state[d] the law").

2. Analysis

¶ 31 Federal statutes in the U.S. Code mandate compliance with certain immigration requirements before an alien from another country or jurisdiction may lawfully enter sovereign borders of the United States. A potential immigrant or "alien who . . . is likely at any time to become a public charge is inadmissible," and cannot lawfully enter, although if properly filed, "the consular officer or the Attorney General may also consider any [A]ffidavit of [S]upport under section 1183a of this title" before reaching a decision about whether to allow entry. 8 U.S.C. § 1182(a)(4)(A)-(B)(ii) (2018).

¶ 32 A United States citizen, or a "lawfully admitted" alien, may "sponsor" an immigrant or alien petitioning for admission and lawful entry into the United States by signing an Affidavit of Support USCIS Form I-864A contract and promising "to maintain the sponsored alien at an annual income that is not less than 125 percent of the [FPL]." 8 U.S.C. § 1183a(a)(1)(B), (f)(1) (2018).

¶ 33 "Form I-864A is considered a legally enforceable contract between the sponsor and the sponsored immigrant." *Zhu*, 250 N.C. App. at 807, 794 S.E.2d at 812 (citation and internal quotation marks omitted). The sponsoring spouse is, nevertheless, only obligated to pay the sponsored immigrant if the immigrant's income is less than 125% of the FPL for the requisite household size. 8 U.S.C. § 1183a(a)(1)(A); *Zhu*, 250 N.C. App. at 807, 794 S.E.2d at 812 (citation omitted); *Barnett v. Barnett*, 238 P.3d 594, 598-99 (Alaska 2010) (explaining "[e]xisting case law supports the conclusion that a sponsor is required to pay only the difference between the sponsored non-citizen's income and the 125% of [FPL] threshold" and denying support for any amount above the 125% threshold because "the parties have referred us to no authority supporting the proposition that federal law requires a sponsor to pay spousal support when the sponsored non-citizen's earned income exceeds 125% of the [FPL]").

¶ 34 "The sponsor's obligation under the affidavit does not terminate in the event of divorce." *Id.* (citation and quotation marks omitted); *Erler v. Erler* (*Erler I*), 824 F.3d 1173, 1177 (9th Cir. 2016) ("[U]nder federal law, neither a divorce judgment nor a premarital agreement may terminate an obligation of support."); *Wenfang Liu v. Mund*, 686 F.3d 418, 419-20 (7th Cir. 2012) (explaining the "right of support conferred by federal law exists apart from whatever rights [a sponsored alien] might or might not have under [state] divorce law").

¶ 35 In addition, "child support is a financial obligation to one's non-custodial child, not a monetary benefit to the other parent. . . . [C]hild support payments do not offset the defendant's obligation under the affidavit." *Younis v. Farooqi*, 597 F. Supp. 2d 552, 555 (D. Md. 2009).

a. Household Size

¶ 36 **[2]** The federal regulation defining the terms used in the USCIS Form I-864 Affidavit of Support provides: "Income means an individual's total income (adjusted gross income for those who file IRS Form 1040EZ) for purposes of the individual's U.S. Federal income tax liability, including a joint income tax return[.]" 8 C.F.R. § 213a.1. This definition, however, only defines "income" for the supporting spouse, and not the dependent spouse intending to lawfully immigrate and enter. *See Flores v. Flores*, 590 F. Supp. 3d 1373, 1380 (W.D. Wash. 2022) (citation omitted) ("The Immigration and Nationality Act [ ] does not define income with respect to the sponsored immigrant.").

¶ 37 North Carolina's courts have never defined "income" for the purpose of determining what amount a supporting spouse is obligated to pay a dependent spouse, who they agreed to sponsor by signing an USCIS I-864

Affidavit of Support, and this issue is of first impression. The approaches other courts have taken, when resolving the issue of which household size may be considered to calculate damages, is persuasive guidance, although not binding. *N.C. Ins. Guar. Ass'n v. Weathersfield Mgmt.*, 268 N.C. App. 198, 203, 836 S.E.2d 754, 758 (2019) (citation omitted) ("When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance.").

¶ 38 In *Flores*, a couple were parents of three children: two children who "were born after Plaintiff immigrated to the United States and, therefore, are citizens of the United States," and one lawfully residing child who was a "citizen of the Philippines and Lawful Permanent Resident of the United States." *Flores*, 590 F. Supp. 3d at 1378 n.1. When the supporting spouse in *Flores* submitted the USCIS Form I-864 Affidavit of Support, only the first child, who was a citizen of the Philippines, was listed on the form along with the dependent spouse. *Id.* (citing *Erler I*, 824 F.3d at 1180).

¶ 39 The court in *Flores* held the supporting spouse only agreed to sponsor both the dependent spouse and their first child, per the terms of the contractual agreement in the Affidavit of Support. *Id.* The supporting spouse did not agree to sponsor the two children who were U.S. citizens. *Id.* The proper household size used to calculate the supporting spouse's obligation was two, not four. *Id.* (citing *Erler I*, 824 F.3d at 1180 ("If the sponsor agreed to support more than one immigrant, and those immigrants separate from the sponsor's household and continue to live together, then the sponsor must provide them with whatever support is necessary to maintain them at an annual income of at least 125% of the [FPL] guidelines for a household of a size that includes all the sponsored immigrants.")).

¶ 40 The reasoning in *Flores* is supported by two independent lines of reasoning. First, children who are U.S. citizens are not aliens capable of becoming a "public charge" under the immigration statutes. *See* 8 U.S.C. § 1182(a)(4) (explaining that an "alien who . . . is likely at any time to become a public charge is inadmissible") Second, given the contractual nature of the Affidavit of Support, the supporting spouse in *Flores* was only contractually obligated to support the dependent spouse and their first child because those two were the only dependent alien individuals listed on the Affidavit of Support. *Flores*, 590 F. Supp. 3d at 1378 n.1.

¶ 41 Defendant cannot be liable for contractual damages to support individuals not required to be listed, per federal immigration law, in the terms of the "contract." *See Erler I*, 824 F.3d at 1179 (explaining that a

"sponsor would not reasonably expect to have to support the immigrant *and* any others with whom she chooses to live," nor would "the U.S. Government, who is also a party to the contract created by the affidavit, . . . reasonably expect the sponsor to support any others with whom the immigrant might choose to live following [their] separation").

¶ 42 Here, Father only promised to support *Mother* in the Affidavit of Support, as she was the only *alien* intending to immigrate and enter the U.S. Their child was born before Father signed the Affidavit of Support. Father initially and knowingly omitted the child as an *immigrant* he intended to sponsor on the USCIS Form I-864, as his son is a U.S. citizen, to whom the Affidavit of Support *does not apply*. The trial court erred by calculating the damages Defendant owed to Plaintiff using the FPL Guidelines for a two-person household. *Flores*, 590 F. Supp. 3d at 1378 n.1.

¶ 43 Whether Father owes Mother child support for their son is a separate issue governed by *state* law. Mother is not barred from bringing her action for temporary and permanent child support, as she had voluntarily dismissed those claims *without prejudice*. *Wenfang Liu*, 686 F.3d at 419-20 ("The right of support conferred by *federal law exists apart from whatever rights* Liu might or might not have under *[state] divorce law*.") (emphasis supplied). The trial court's order is affected by error on this issue and is reversed.

b. Sponsored Immigrant's Income

¶ 44 **[3]** Father also argues the trial court erred by using Mother's Adjusted Gross Income when determining whether Father owed Mother damages arising from breaching the Affidavit of Support. He asserts the trial court should have considered Mother's gross income, prior to deduction of certain depreciation expenses, instead of the adjusted gross income listed on her federal tax returns.

¶ 45 Federal law does not define how to calculate a sponsored immigrant's income. *Erler I*, 824 F.3d at 1177 ("[A]lthough several provisions of the statutes and the regulations contain instructions for calculating the sponsor's income and household size for purposes of determining whether the sponsor has the means to support the intending immigrant, *see* 11 U.S.C. § 1183a(f)(6)(A)(iii); 8 C.F.R. § 213a.1 (defining 'household income,' 'household size,' and 'income'); 8 C.F.R. § 213a.2(c)(2), there are no similar provisions for calculating the sponsored immigrant's income and household size for purposes of determining whether the sponsor has breached his or her duty to support the immigrant.").

¶ 46 Other courts, which have addressed whether the inclusion or exclusion of certain benefits, awards, grants, supplements, gifts, or agreements should be considered as part of the sponsored immigrant's "income," provide guiding principles. One court held educational grants should be treated as income because they offset the living expenses of a sponsored immigrant. *Anderson*, 840 F. App'x at 95 ("The [ ] inclusion of 'educational grants received by plaintiff' [as income] was not erroneous. To the extent [immigrant]'s educational grant covered her tuition and did not require repayment, it was income because it allowed her to put money she would otherwise use for tuition to other uses.").

¶ 47 Other courts have not considered public benefits for U. S. citizens, such as food stamps, as income, reasoning: (1) "[f]ood stamps contribute to keeping an individual above 125% of the [FPL] Guidelines, and the Affidavit's stated goal is to keep people from being public charges"; and, (2) the only reason the Internal Revenue Service (IRS) fails to tax food stamps is because "it makes little sense for the government to award a public benefit to an individual and then tax the individual on it." *Erler v. Erler* (*Erler II*), 2017 WL 5478560, *6 (N.D. Cal. Nov. 15, 2017), *aff'd*, 798 F. App'x 150 (9th Cir. 2020) (unpublished).

¶ 48 Apart from the treatment of food stamps and educational grants, most courts have not considered other gifts, supplements, agreements, judgments, and benefits as part of a sponsored immigrant's income. For example, an informal agreement of board for work between a mother and son, where the mother agreed to perform certain housekeeping duties in exchange for living with her son, was not counted in a sponsored immigrant's income. *Id.* at *6 ("[Mother] never contracted with her son to provide domestic housework in exchange for rent coverage. The rent she is allegedly responsible for covering is not income under 8 U.S.C. § 1183a.") (citation omitted). Without a formal contract or agreement, it is difficult to "appraise[ ] [an immigrant's] domestic work," nor does such an agreement increase an immigrant's cash flow. *Id.* (citation omitted).

¶ 49 The court in *Erler II* also held a divorce judgment, which is owed to the sponsoring spouse and never collected, does not constitute income for two reasons. *Id.* at *5. First, a divorce judgment "relates to the division of the couple's assets," is "not relevant," and "does not qualify as income." *Id.* (citation omitted). Second, if a sponsoring spouse "desires to collect his [or her] [ ] judgment against [sponsored immigrant], he [or she] can take this matter up with [the respective] Family Court." *Id.*

¶ 50 The U. S. Court of Appeals in *Anderson* explained the district court erred by "defining income as 'constructively-received income,' " and

thus "permit[ing] the inclusion of TRICARE benefits as part of [sponsored immigrant's] income." *Anderson*, 840 F. App'x at 95 ("The health insurance benefits [sponsored immigrant] received through [sponsoring spouse's] TRICARE coverage were not income because [sponsoring spouse] did not pay an enrollment fee[,] and he should not receive a windfall at [sponsored immigrant]'s expense.") (citing *Erler I*, 824 F.3d at 1179). Health insurance coverage extended via marriage is different than other means-tested benefits, such as food stamps, "because the state providing the benefits could seek reimbursement from the sponsor." *Id.* at 95 n.3.

¶ 51 The Alaska Supreme Court simplified the analysis by using the income reported on a sponsored immigrant's tax form in *Villars v. Villars*:

> [A]n EITC, [Earned Income Tax Credit], is not income for federal income tax purposes. The Internal Revenue Code defines "taxable income" as "gross income minus deductions." *See* 26 U.S.C. § 63(a) (2018) Gross income is defined as "all income from whatever source derived," *see id.* § 61(a), but the Code specifically excludes certain items from the definition, *see id.* §§ 101–40 ("Items Specifically Excluded from Gross Income"), including tax credits. *See Id.* § 111. Therefore, an EITC, which is by definition a tax credit, is not "income for purposes of the individual's U.S. Federal income tax liability" and cannot be used to offset [supporting spouse]'s I–864 obligations. The superior court did not err in concluding that any EITC [sponsored immigrant] received was not income.

336 P.3d 701, 712-13 (Alaska 2014) (alterations omitted).

¶ 52 Here, Mother entered evidence demonstrating the costs and expenses she had incurred to repair one of the properties she owned. Those costs were then deducted from her gross income on her U.S. federal tax returns. The trial court did not err as a matter of law by deducting these expenses when calculating Mother's income. *See id.*; *Erler II* at *5-6; *Anderson*, 840 F. App'x at 95.

V. Mother's Loan to Father to Finance the Property in Suwanee, Georgia

¶ 53 Father asserts the trial court erred by finding a quasi-contract existed and awarding Mother equitable damages resulting from his failure to repay Mother for a loan. Father argues the trial court should have found

an implied-in-fact contract existed and, as a result, fashioned a remedy stemming from a breach of contract.

¶ 54 If this Court were to hold the trial court properly found a quasi-contract existed, Father argues the trial court abused its discretion in fashioning an equitable remedy by failing to credit Father for his "sweat equity" in repairing some of Mother's other properties in Australia.

A. Quasi-Contract

¶ 55 **[4]** An appellate court must have jurisdiction to consider an argument on appeal. *See Tohato, Inc. v. Pinewild Mgmt.*, 128 N.C. App. 386, 390, 496 S.E.2d 800, 803 (1998) (citation omitted) (explaining an appellate court may not reach a conclusion on issues that were not raised at trial); *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (explaining that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount") (citations and internal quotation marks omitted).

¶ 56 In Father's response to Mother's Second Amended Answer and Counterclaims in August 2017, Father twice denied a loan existed. He first "explicitly denie[d]" Mother's assertion that "any note or other writing evidencing a loan from Mother to Father" existed. Later, he asserted "Mother never explicitly requested that [he] repay the money."

¶ 57 At trial in 2019, Father's counsel stated in closing arguments: "[T]he problem here is the [c]ourt is going to enter a judgment. And I think, analytically, these facts as they have come out, I think it's a quasi-contract." On appeal, Father now asserts the "evidence presented at trial[ ] tended to show the existence of a *contract* between the parties for the loan of $110,000 AUD," not a quasi-contract.

¶ 58 Father's argument on appeal about whether a quasi-contract or implied-in-fact contract existed is not properly preserved for this Court on appeal. Father cannot "swap horses" on appeal, and his argument is waived. *Tohato*, 128 N.C. App. at 390, 496 S.E.2d at 803; *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5; *accord Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order get a better mount[.]").

B. Award of Equitable Damages

1. Standard of Review

¶ 59 This Court reviews unjust enrichment awards under an abuse of discretion standard "[b]ecause the fashioning of equitable remedies is a

discretionary matter for the trial court." *Kinlaw v. Harris*, 364 N.C. 528, 533, 702 S.E.2d 294, 297 (2010) (citation omitted).

2. Unjust Enrichment

¶ 60 **[5]** "Unjust enrichment is an equitable doctrine[,]" and "[t]rial courts have the discretionary power to grant, deny, limit, or shape equitable relief as they deem just." *Bartlett Milling Co. v. Walnut Grove Auction & Realty*, 192 N.C. App. 74, 80, 665 S.E.2d 478, 485 (2008) (citations and internal quotation marks omitted).

¶ 61 The equitable relief the trial court awarded to Mother related to the trial court's finding and conclusion that a quasi-contract existed to finance an income-producing property located in Suwanee, Georgia, not any of Mother's or Father's other properties located elsewhere. The trial court did not abuse its discretion by not crediting Father with any purported "sweat equity" he put into repairing some of Mother's other properties located in Australia. *Bartlett Milling Co.*, 192 N.C. App. at 80, 665 S.E.2d at 485. The trial court similarly declined to credit Mother with the "sweat equity" she purportedly put into repairing their residential property in Charlotte. Father's argument is without merit.

C. Currency for Payment of Damages

¶ 62 **[6]** Father also argues the trial court erred by awarding Mother repayment of the loan in USD instead of AUD. Mother argues Father wishes to pay Mother back in Australian funds on today's exchange rate because the exchange rate is currently lower than when Father originally converted the money to USD.

1. Standard of Review

¶ 63 "The determination of the proper money of the claim pursuant to G.S. 1C-1823 is a question of law." N.C. Gen. Stat. § 1C-1825(d) (2021). This Court reviews questions of law *de novo*. *Martin*, 194 N.C. App. at 719, 670 S.E.2d at 632 (citation omitted).

2. Foreign-Money Claims Act

¶ 64 The North Carolina Foreign-Money Claims Act provides "rules to fill gaps in the agreement of the parties with rules as to the allocation of risks of fluctuations in exchange rates." N.C. Gen. Stat. § 1C-1823(b), cmt. 2 (2021). Those rules are as follows:

> (b) If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is *the money*:

> (1) Regularly *used between the parties* as a matter of usage or course of dealing;
>
> (2) Used *at the time of a transaction* in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or
>
> (3) In which the loss was ultimately felt or will be incurred by the party claimant.

Id. § 1C-1823(b) (emphasis supplied). The three rules in subpart b "will normally apply in the order stated," but the "[a]ppropriateness of a rule is to be determined by the judge from the facts of the case." *Id.* § 1C-1823(b) cmt. 2.

¶ 65 The evidence at trial indicated Father "[r]egularly used" AUD to pay Mother for the interest accruing on her Australian line of credit. § 1C-1823(b)(1). Second, AUD were "[u]sed at the time of the transaction." § 1C-1823(b)(2). Finally, Mother's loss was "ultimately felt" or "incurred" in AUD. N.C. Gen. Stat. § 1C-1823(b)(3) (2021).

¶ 66 "If [ ] the contract fails to provide a decisive interpretation, the damage should be calculated in the currency in which the loss was felt by the plaintiff or which most truly expresses his loss." *M.V. Eleftherotria v. Owner of M.V. Despina R*, [1979] App. Cas. 685, 701 (internal quotation marks omitted) (cited favorably by N.C. Gen. Stat. § 1C-1823(b), cmt. 2).

¶ 67 Applying the rules in the "order stated," all three prongs of § 1C-1823(b) dictate Mother's equitable relief should have been awarded and paid in AUD, not USD. The trial court erred as a matter of law by awarding Mother equitable relief payable in USD and its order on this issue is reversed in part. On remand, the trial court is to correct and convert Mother's equitable award and any interest thereon as re-payable in AUD for any outstanding balance.

VI. Additional Hearing Before Entry of the Order

¶ 68 **[7]** After the hearing in December 2019, Mother's attorney initially drafted a proposed order in this case. Father's attorney revised Mother's initial draft, and the two subsequently exchanged various versions of the proposed judgment. Mother and Father did not reach an agreement concerning the final version to present to the trial court to sign, file, and enter. As a result, the trial court held an additional conference on 9 February 2021. Father argues Mother "improperly reargued the

merits of the case and submitted additional evidentiary information" at this conference.

¶ 69 Father asserts Mother's proposed judgment, circulated after the conference, "improperly altered the Order such that the substantive rights of the parties were changed." Father and Mother again submitted additional drafts and exchanged several electronic communications regarding remaining issues before the court entered a final order on 7 June 2021, over *eighteen months after* the hearing and oral rendition in December 2019. Father argues Mother "improperly attempted and succeeded at a back-door Rule 60 [of the North Carolina Rules of Civil Procedure] argument."

¶ 70 This over *eighteen months* delay in entry of the order following hearing and rendition is unexplained in the order, and this delay also impeded the appeal and appellate review of the trial judge's holdings and conclusions. The mission of the North Carolina Judicial Branch is "to protect and preserve the rights and liberties of all the people, as guaranteed by the Constitution and laws of the United States and North Carolina, by providing a fair, independent, and accessible forum for the *just, timely, and economical resolution of their disputes*." *About North Carolina Courts*, North Carolina Judicial Branch, http://www.nccourts.gov/about/about-the-north-carolina-judicial-branch (last visited Jan. 4, 2022) (emphasis supplied); *see also* Cannon 3 of the North Carolina Code of Judicial Conduct ("A judge should perform the duties of the judge's office impartially and *diligently*. The judicial duties of a judge take *precedence* over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the *performance of these duties*, the following standards apply. . . . (5) A judge should *dispose promptly* of the business of the court.") (emphasis supplied).

¶ 71 Father cites *Buncombe County ex rel Andres v. Newburn*, which explains "Rule 60(a) allows the correction of clerical errors, but it does not permit the correction of serious or substantial errors." 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993) (citation omitted) (explaining the purpose of N.C. Gen. Stat. § 1A–1, Rule 60(a) (2021)). Father also acknowledges: "The general rule is that it is in the discretion of the trial judge whether to allow additional evidence by a party after that party has rested or whether to allow additional evidence after the close of the evidence." *Gay v. Walter*, 58 N.C. App. 360, 363, 283 S.E.2d 797, 799 (1981) (citations omitted).

¶ 72 The additional conference held regarding the final form of the order to be entered occurred *before* the trial judge had entered the final order.

Rule 60(a) only applies to changes made to a final order. Trial judges may exercise discretion about whether to hold a conference after the close of the evidence and before the final order is filed and entered. *Id.* While Father has failed to show the trial court violated N.C. R. Civ. P. 60(a), the long year and one-half delay in entry and, consequently appellate review, did not further nor promote "the *just, timely, and economical resolution of their disputes*."

VII. Unavailability of Portions of the Trial Transcript

¶ 73 **[8]** "The unavailability of a verbatim transcript does not automatically constitute error. To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006) (citations omitted). "Overall, a record must have the evidence necessary for an understanding of all errors assigned." *Madar v. Madar*, 275 N.C. App. 600, 608, 853 S.E.2d 916, 922 (2020) (quotation marks omitted) (quoting *Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918).

¶ 74 Father does not show how the missing portions of the transcript prejudiced him on appeal. *Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918. Sufficient portions of the transcript exist for this Court to understand the errors Father argued and assigned to the trial court and the order eventually entered. The existing record allowed Father to adequately present and argue this appeal. He has successfully argued several issues and errors before this Court. Father has failed to show any prejudice by the missing portions of the trial transcript.

VIII. Attorney's Fees

¶ 75 **[9]** "Remedies available to enforce an affidavit of support under this section include . . . an order for specific performance and payment of legal fees and other costs of collection[.]" 8 U.S.C. § 1183a(c). The USCIS Form I-864 Affidavit of Support, which Father signed, also provides notice to sponsoring spouses: "If you are sued, and the court enters a judgment against you, the person or agency who sued you may use any legally permitted procedures for enforcing or collecting the judgment. You may also be required to pay the costs of collection, including attorney fees."

¶ 76 While the trial court should have calculated Mother's damages using a household size of one, and is ordered to do so upon remand, Father still breached his obligations to support Mother under the Affidavit of Support for 2016, 2017, and 2018. Mother was a prevailing party on her claim, and she may recover reasonable attorney's fees. *Iannuzzelli*

v. Lovett, 981 So.2d 557, 560-61 (Fla. Dist. Ct. App. 2008) ("In order to recover attorney's fees and costs under 8 U.S.C. § 1183a(c), the claimant must obtain a judgment for actual damages based upon the opposing party's liability under the Affidavit."). The trial court did not err by awarding Mother's attorney's fees. In light of the errors Father successfully argued and prevailed in, regarding the reduction of the amounts owed under the USCIS Form I-864 herein, the trial court may in its discretion re-consider the amount previously awarded upon remand using the elements and guidance stated in N.C. Rev. R. Prof. Conduct 1.5.

IX. Conclusion

¶ 77 The trial court possessed subject matter jurisdiction to hear Mother's claims for Father's breach under the USCIS Form I-864 Affidavit of Support. The trial court erred by calculating the damages Defendant owed to Plaintiff using the 125% of FPL Guidelines for a two-person household. *See Flores*, 590 F. Supp. 3d at 1378 n.1. The amounts entered at trial on this issue are vacated. On remand, the trial court should calculate Mother's damages arising from the Affidavit of Support as follows:

Year	125% FPL Guidelines for a One-Person Household (USD)	Mother's Adjusted Gross Income (USD)	Mother's Damages (USD)
2016	$ 14,850	$ 8,511	$14,850 - $8,511 = $6,339
2017	$ 15,075	$ 7,173	$15,075 - $7,173 = $7,902
2018	$ 15,175	$ 6,703	$15,175 - $6,703 = $8,472

¶ 78 The trial court did not err as a matter of law by failing to add depreciation expenses Mother lawfully deducted from her adjusted gross income on her federal tax returns back into her "income" when calculating damages under the Affidavit of Support. *See Villars*, 336 P.3d at 712-13; *Erler II* at *5-6; *Anderson*, 840 F. App'x at 95.

¶ 79 Father failed to preserve his argument about whether an express, quasi-contract, or implied-in-fact contract for debt repayment existed on appeal, because he offered contradictory arguments at trial. *See Tohato*, 128 N.C. App. at 390, 496 S.E.2d at 803; *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5; *Weil*, 207 N.C. at 10, 175 S.E. at 838.

¶ 80 The trial court did not abuse its discretion when fashioning an equitable remedy by failing to credit Mother or Father with any purported "sweat equity" either may have exerted into repairing other properties. The loan proceeds from Mother were used to purchase the income-producing property located in Suwanee, Georgia, which was sold by Father without repayment of Mother's loan from the proceeds. *Bartlett Milling Co.*, 192 N.C. App. at 80, 665 S.E.2d at 485.

¶ 81 Mother loaned and paid Father in AUD, and Father re-paid the interest in AUD. Mother's loss occurred in AUD, and her re-payment and interest to her bank's line of credit is payable in AUD. Father received loan proceeds in AUD and took the risk of conversion rate to USD after receipt.

¶ 82 The trial court erred as a matter of law by awarding mother equitable relief payable in USD instead of AUD. *See* N.C. Gen. Stat. § 1C-1823(b); *The Despina R*, [1979] App. Cas. 685, 701 (internal quotation marks omitted). On remand, the trial court is to correct and convert Mother's equitable award from the loan amount and any interest due from USD into AUD, with credit for payments Father made.

¶ 83 Trial judges are granted discretion about whether to hold a conference after the close of the evidence. *Gay*, 58 N.C. App. at 363, 283 S.E.2d at 799. The missing portions of the transcript were not shown to have prejudiced Father, as Father successfully argued several issues of error on appeal. *Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918.

¶ 84 The trial court did not err by awarding Mother reasonable attorney's fees arising from her claims for breach of the USCIS I-864 Form Affidavit of Support, because Mother prevailed on her claim, subject to any adjustments noted above upon remand. *Iannuzzelli*, 981 So.2d at 560-61. The order appealed from is affirmed in part, reversed in part, and is remanded for further proceedings not inconsistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges CARPENTER and GRIFFIN concur.

SR AUTO TRANSP., INC. v. ADAM'S AUTO GRP., INC.

[287 N.C. App. 449, 2023-NCCOA-3]

SR AUTO TRANSPORT, INC., Plaintiff
v.
ADAM'S AUTO GROUP, INC. AND ALI DARWICH, Defendants/Third-Party Plaintiffs
v.
ALFIDA ANTONIA RODRIGUEZ, DARIANA SAMALOT, SORANA RUIZ, LUIS GUILLERMO MARTINEZ, JORGE LUIS MARTINEZ, LUIS HERMINIO MARTINEZ, and SAGA AUTO SALES, INC., Third-Party Defendants

No. COA22-463

Filed 17 January 2023

Appeal and Error—interlocutory order—no Rule 54(b) certification—no petition for certiorari—failure to argue substantial right in main brief

In a breach of contract action arising from the sale of a luxury car, defendants' appeal from an order dismissing their third-party claims was dismissed where: (1) the order was interlocutory, since it left all other claims in the action unresolved; (2) the trial court had declined to certify the order as a final judgment under Civil Procedure Rule 54(b); (3) defendants did not petition the appellate court for a writ of certiorari; and (4) in their main appellate brief, defendants failed to include any facts or argument in their statement of grounds for appellate review asserting that the challenged order affected a substantial right. Although defendants did argue in a reply brief that the order deprived them of a substantial right to avoid inconsistent verdicts on the dismissed and remaining claims, they failed to show that separate proceedings on these claims would involve the same factual issues.

Appeal by Defendants from Order entered 29 November 2021 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 2022.

James, McElroy, & Diehl, P.A. by Preston O. Odom, III, J. Alexander Heroy, and Alexandra B. Bachman, for plaintiff-appellee SR Auto Transport, Inc. and third-party defendants-appellees Dariana Samalot, Sorana Ruiz, Luis Guillermo Martinez, Jorge Luis Martinez, and Saga Auto Sales, Inc.

Alexander Ricks PLLC, by Nathan A. White and John (Jack) Spencer, for defendants-appellants Adam's Auto, Inc. and Ali Darwich.

DeVore, Acton, & Stafford, P.A., by Derek P. Adler, for third-party defendants-appellees Alfida Antonia Rodriguez and Luis Herminio Martinez.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Adam's Auto Group, Inc. and Ali Darwich (collectively, Defendants) appeal from an Order entered 29 November 2021 dismissing Defendants' third-party claims against Dariana Samalot, Sorana Ruiz, Luis Guillermo Martinez, Jorge Luis Martinez, Saga Auto Sales, Inc., Alfida Antonia Rodriguez, and Luis Herminio Martinez (collectively, Third-Party Defendants) pursuant to Rules 12(b)(6) and 14(a) of the North Carolina Rules of Civil Procedure. SR Auto Transport, Inc. (Plaintiff) along with Third-Party Defendants have filed Motions to Dismiss Defendants' Appeal in this Court arguing the trial court's Order dismissing the third-party claims is interlocutory and Defendants have not shown a right to an immediate appeal. The Motions to Dismiss Appeal were referred to this panel for decision. For the reasons that follow, we allow the Motions to Dismiss Appeal. The Record before us tends to reflect the following:

¶ 2 On 11 August 2020, Plaintiff filed a Complaint and Motion for Injunctive Relief alleging, among numerous claims, Defendants had breached an agreement with Plaintiff regarding the purchase of a Ferrari Spider. The Record does not include Defendants' initial responsive pleading; however, it appears Defendants filed an Answer which included third-party claims and named the Third-Party Defendants. The Record does reflect Third-Party Defendants filed Motions to Dismiss a Third-Party Complaint. It further appears Defendants then filed a Motion for Leave to Amend their initial responsive pleading and third-party complaint. On 12 July 2021, the parties filed what they termed a "Consent Stipulation Regarding Defendants' Motion to Amend and Third-Party Defendants' Motions to Dismiss." In this filing, the parties stipulated that Defendants would be permitted to amend their responsive pleading and that the Third-Party Defendants' previously filed Motions to Dismiss would constitute valid responsive pleadings to the Amended Answer, Counterclaims, and Third-Party Complaint.

¶ 3 The same day, 12 July 2021, Defendants filed their Amended Answer, Counterclaims, and Third-Party Complaint. The Amended Answer, Counterclaims, and Third-Party Complaint asserted counterclaims against Plaintiff and third-party claims against Third-Party

Defendants for fraud and civil conspiracy to commit fraud. Additionally, the amended pleading also asserted additional third-party claims for conversion, as well as seeking punitive damages against Third-Party Defendants. The counterclaims and third-party claims related to several transactions not alleged in Plaintiff's Complaint and included allegations Third-Party Defendants had provided over $200,000 in worthless checks to Defendants and owed Defendants other debts related to a Lamborghini and a Land Rover.

¶ 4 On 2 August 2021, the trial court heard and orally granted the Third-Party Defendants' Motions to Dismiss. On 14 September 2021—before the trial court's written Order was entered—Defendants filed a Motion Requesting Certification that the Court's Order Dismissing Defendants' Claims Against Third-Party Defendants is Final pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

¶ 5 On 22 November 2021, the trial court heard the Motion to Certify its Order dismissing the claims against Third-Party Defendants for immediate appeal. The trial court declined to certify the yet-to-be filed Order dismissing the third-party claims for immediate appeal pursuant to Rule 54(b). On 24 November 2021, the trial court entered an Order granting Third-Party Defendants' Motions to Dismiss, dismissing all claims against Third-Party Defendants pursuant to Rules 12(b)(6) and 14(a) of the North Carolina Rules of Civil Procedure on the basis the third-party claims constituted improper third-party practice. Specifically, the trial court dismissed the third-party claims without prejudice to Defendants filing a separate action against any or all Third-Party Defendants, asserting the same claims. The Order did not address the status of Defendants' counterclaims against Plaintiff. On 22 December 2021, Defendants filed written Notice of Appeal from the Order dismissing the third-party claims.

Appellate Jurisdiction

¶ 6 On 14 June 2022, Plaintiff and Third-Party Defendants filed Motions to Dismiss the Appeal for lack of appellate jurisdiction, contending the trial court's Order was not a final order or judgment, but rather an interlocutory order and not subject to immediate appeal. On 24 June 2022, Defendants responded to these Motions, arguing the Order is final as to Third-Party Defendants and the "Order impairs [Defendants'] substantial right to have this common issue of fact heard in the same forum." Thus, Defendants submit the Order is subject to immediate appellate review.

¶ 7 As a general matter, with certain exceptions not applicable here: "appeal lies of right directly to the Court of Appeals . . . [f]rom any final

judgment of a superior court." N.C. Gen. Stat. § 7A-27(b)(1) (2021). An appeal may also be taken to this Court from "any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [a]ffects a substantial right." N.C. Gen. Stat. § 7A-27(b)(2) (2021). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 354, 361-62, 57 S.E.2d 377, 381 (1950). On the other hand, "an interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.*

¶ 8 Here, Defendants seek an immediate appeal of the Order granting Third-Party Defendants' Motions to Dismiss. "An order granting a motion to dismiss certain claims in an action, leaving other claims to go forward, is an interlocutory order." *Mills Pointe Homeowner's Ass'n v. Whitmire*, 146 N.C. App. 297, 298, 551 S.E.2d 924, 926 (2001). In the case *sub judice*, the trial court's Order left Plaintiff's claims against Defendants, as well as Defendants' counterclaims against Plaintiff, to go forward. As such, the trial court's Order is interlocutory.

¶ 9 Generally, there is no right to appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "However, immediate appeal of interlocutory orders and judgments is available in at least two instances: when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1)." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558 681 S.E.2d 770, 773 (2009) (citation and quotation marks omitted). "It is appellant's burden to present appropriate grounds for . . . acceptance of an interlocutory appeal . . . ." *Hanesbrands, Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation and quotation marks omitted).

¶ 10 Here, the trial court declined to certify the Order pursuant to Rule 54(b). Defendants contend this decision was error. This Court has, however, previously observed:

> Although a trial court's decision to grant a Rule 54(b) certification is not binding on our Court and is fully reviewable on appeal, *Giles v. First Virginia Credit Services, Inc.*, 149 N.C. App. 89, 94-95, 560 S.E.2d 557, 561 (2002), a trial court's *denial* of a motion for a Rule 54(b) certification has not previously been

> directly reviewed by our Court in that our rules do not provide an appellant with relief from the denial of a motion for a Rule 54(b) certification. Rather, the proper methods for appealing an underlying interlocutory order are to argue the interlocutory order affects a substantial right, or to petition our Court for a writ of certiorari pursuant to N.C. R. App. P. 21(b).

Van Engen v. Que Scientific, Inc., 151 N.C. App. 683, 686-87, 567 S.E.2d 179, 182 (2002) (emphasis added). Defendants did not petition our Court for a Writ of Certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure.[1]

¶ 11 In the absence of a valid Rule 54(b) certification or Petition for Writ of Certiorari, Defendants must, therefore, demonstrate the trial court's Order affects a substantial right in order to establish a right of immediate appeal. Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure expressly requires an appellant to include a statement of grounds for appellate review. N.C. R. App. P. 28(b)(4). "When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Id.* Here, Defendants' principal brief contains no facts or argument to support appellate review on the ground the challenged order affects a substantial right. Instead, Defendants contend in conclusory fashion that the Order was final as to their third-party claims or was otherwise appealable as an interlocutory order. It is true, "[o]ur Supreme Court has held that noncompliance with 'nonjurisdictional' rules such as Rule 28(b) 'normally should not lead to dismissal of the appeal.' " *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77-78, 772 S.E.2d 93, 95-96 (2015) (quoting *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008)).

¶ 12 "However, when an appeal is interlocutory, Rule 28(b)(4) is not a 'nonjurisdictional' rule. Rather, the *only way* an appellant may establish appellate jurisdiction in an interlocutory case, absent Rule 54(b) certification, is by showing grounds for appellate review based on the order affecting a substantial right." *Id.* As such, Defendants' failure to comply with Rule 28(b)(4) in this case subjects their appeal to dismissal.

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1. At oral argument, Defendants requested we treat this appeal as a Petition for Writ of Certiorari. Defendants have not filed a Petition for Writ of Certiorari with this Court, and we decline to invoke N.C. R. App. P. 2 and waive the requirements of N.C. R. App. P. 21.

¶ 13 Having failed to establish any right to an immediate appeal in their principal brief, Defendants did file a reply brief in which they summarily contend the trial court's Order affects a substantial right. Defendants' reply brief purports to incorporate their arguments advanced in their response to the Motions to Dismiss Appeal. It is well-established in this Court, however, that "[w]e will not allow Defendants to use their reply brief to independently establish grounds for appellate review." *Id.* at 78, 772 S.E.2d at 96.

¶ 14 Nevertheless, presuming without deciding, Defendants properly raised the allegation of a substantial right deprivation in their response to Plaintiff's and Third-Party Defendants' Motions to Dismiss the Appeal, Defendants have not met their burden of demonstrating the Order deprives them of a substantial right.[2] "Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002) (citation omitted).

¶ 15 "In order to determine whether a particular interlocutory order is appealable pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1), we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011). "A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation and quotation marks omitted).

¶ 16 Defendants contend the trial court's Order affects a substantial right because the trial court's dismissal without prejudice of the third-party claims may lead to inconsistent verdicts. Indeed, "[a] party has a substantial right to avoid two trials on the same facts in different forums where the results would conflict." *Clements v. Clements*, 219 N.C. App. 581, 585, 725 S.E.2d 373, 376 (2012) (citing *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 639, 652 S.E.2d 231, 237 (2007)). "Where a party is appealing an interlocutory order to avoid two trials, the party must 'show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.' "

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2. We observe that both the Motions to Dismiss Appeal and Defendants' Responses were filed before Defendants' principal brief was filed with this Court.

Id. (quoting *N.C. Dep't. of Transp. v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995)).

¶ 17 In the case *sub judice*, Defendants have not demonstrated the same factual issues in the various claims alleged by Plaintiff against Defendants would be present in a separate trial litigating the Defendants' fraud, civil conspiracy to commit fraud, and conversion claims against Third-Party Defendants, which arise from different factual allegations than those made by Plaintiff. Further, Defendants have also not demonstrated the possibility of inconsistent verdicts arising from the factual allegations made in their third-party claims involving a completely different set of transactions and different parties than the transaction alleged in Plaintiff's Complaint.

¶ 18 Moreover, to the extent Defendants are entitled to any set-off or recovery arising from their pending counterclaims against Plaintiff, that too may be litigated in the underlying case and would not necessarily be inconsistent with any verdict in a separate action against Third-Party Defendants. At this preliminary stage of litigation, we simply conclude Defendants have not adequately demonstrated the possibility that inconsistent verdicts exist for these separate issues against different parties justifying immediate review. Thus, Defendants' appeal in this case is interlocutory, and Defendant has not demonstrated any substantial right would be lost absent immediate appeal. Therefore, we are without jurisdiction to review this matter on immediate appeal. Consequently, we must dismiss Defendants' appeal.

Conclusion

¶ 19 Accordingly, for the foregoing reasons, we allow Plaintiff's and Third-Party Defendants' Motions to Dismiss this appeal as interlocutory.

APPEAL DISMISSED.

Judges TYSON and ZACHARY concur.

STATE v. DAVIS

[287 N.C. App. 456, 2023-NCCOA-4]

STATE OF NORTH CAROLINA
v.
HARRY LEVERT DAVIS

No. COA22-222

Filed 17 January 2023

1. Indictment and Information—sufficiency—allegations of the crime's essential elements—attempted first-degree murder—malice

In a criminal prosecution arising from a domestic dispute that culminated in defendant setting fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court had subject matter jurisdiction over defendant's three charges of attempted first-degree murder, where each indictment alleged that defendant "unlawfully, willfully, and feloniously did attempt to kill and murder [each victim] by setting the residence occupied by the victim on fire." Because the indictments alleged specific facts from which malice aforethought—an essential element of the offense—could be shown, defendant's argument that the indictments failed to allege malice at all was meritless.

2. Homicide—attempted first-degree murder—specific intent to kill—transferred intent doctrine

In a criminal prosecution arising from a domestic dispute that culminated in defendant setting fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court properly denied defendant's motion to dismiss a charge of attempted first-degree murder pertaining to one of the family members, even though defendant did not know that this particular family member was inside the house when he burned it down. The State presented sufficient evidence of defendant's specific intent to kill his girlfriend, and this intent transferred to the family member under the doctrine of transferred intent.

3. Evidence—prior bad acts—admissibility under Rules 401, 402, 403, and 404(b)—murder and attempted murder

In a prosecution for multiple counts of murder and attempted murder, where defendant set fire to the house where his girlfriend had been staying—believing that his girlfriend was inside the house when, in fact, her friend's family was inside—the trial court properly

admitted evidence regarding defendant's prior attempt to burn down his girlfriend's father's car, another incident where he successfully burned down a vehicle belonging to the mother of his former romantic partner, and various acts of violence toward both the girlfriend and former partner. The evidence was relevant under Evidence Rules 401 and 402 because it was probative of defendant's identity, common scheme or plan, motive, knowledge, and modus operandi; and it was admissible under Rule 404(b) as evidence tending to show defendant's intent, motive, malice, premeditation, and deliberation. Further, defendant's prior acts were not too temporally remote from the charged crimes to warrant exclusion under Rule 403.

Appeal by defendant from judgments entered 26 March 2021 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 29 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa M. Postell, for the State.

Widenhouse Law, by M. Gordon Widenhouse, Jr., for defendant-appellant.

TYSON, Judge.

¶ 1 Harry Levert Davis ("Defendant") appeals from judgments entered upon a jury's verdicts finding him guilty of two first-degree murders and of three attempted first-degree murders. Our review of Defendant's arguments shows no error.

I. Background

¶ 2 Pamela Pickett, Beverly Pickett, Makayla Pickett, Jasmine Sumpter, Shatara Pickett, and William Pickett lived in a house located at 1901 Lingo Street in Wilmington ("House"). Makayla and Sumpter were sisters. After their mother passed away in 2012, both moved into the House with their aunt, Pamela. Beverly, Pamela's mother and Makayla and Sumpter's grandmother, moved into the House as well. Makayla and Sumpter's other sister, Deseree, moved in with their other aunt, Tina Pickett, in Raleigh. Deseree spent holidays with her sisters at the House in Wilmington.

¶ 3 Shatara, who is another niece of Pamela, also moved into the House. Shatara's boyfriend, Lamarcus Davis, also occasionally stayed at the House. In 2013, William, Pamela's brother and Makayla and Sumpter's

uncle, also moved into the House. William worked a twelve-hour overnight shift from 7:00 p.m. to 7:00 a.m.

¶ 4 In 2014, Pamela was fifty-one years old, suffered from an abnormal heartbeat, and required an oxygen tank to provide supplemental oxygen. Makayla was fourteen years old, diagnosed with autism, and completely blind. Beverly, the mother and grandmother, had been confined to a bed or wheelchair for thirty years due to multiple sclerosis.

¶ 5 Nicole Thrower, a certified nursing assistant, came to the House to assist Beverly several times every day. Thrower and Shatara were friends from high school and had renewed their friendship when Thrower began assisting Beverly. Thrower had also dated Defendant since high school. Thrower would stay and visit with Shatara when she was not working. Shatara's boyfriend, Lamarcus, was also friends with Defendant. Defendant came to the House to visit Lamarcus and Thrower.

¶ 6 On 7 August 2014 at 7:24 p.m., Defendant broke into the home of Doris Saadeh at 622 Jennings Drive in Wilmington. Doris is the mother of Linda Saadeh, a romantic partner of Defendant. Defendant caused property damage and assaulted Linda. A short time later Defendant was arrested, taken into custody, and transported to the New Hanover County Jail. Defendant's mother posted bond at 11:35 p.m. on 7 August 2014, and Defendant was released.

¶ 7 Early the next morning at 1:06 a.m., Doris called 911 to report her car, parked in front of her home, was on fire. Police officers determined the fire had been intentionally set. Police recovered several items from the scene: a butane disposable lighter, a can of aerosol spray, and balled-up tin foil. Wilmington Police officers located Defendant at a Scotchman convenience store at 1:13 a.m. The drive from 627 Jennings Drive to the Scotchman convenience store located at Third Street and Dawson Street is approximately nine minutes. Doris sought and was granted a protective order against Defendant on behalf of her minor daughter, Linda, on 11 August 2014.

¶ 8 On 30 August 2014, Defendant also assaulted Thrower and was charged. On 8 December 2014, Thrower sought and was granted a protective order against Defendant. She alleged Defendant had been released from jail the night before and was making threats against her.

¶ 9 Defendant attempted to reconcile with Thrower on 22 December 2014. Thrower rebuffed Defendant's advances and asked to stay with Shatara for her own protection. While Shatara and Thrower were driving, Defendant spotted the women and followed the vehicle until Shatara

drove to the Wilmington Police Department. Upon arrival, Defendant quit following their vehicle and drove away.

¶ 10 Defendant called Robert Hale at 3:51 a.m. on 23 December 2014 and asked him for a gun. Hale told Defendant he did not have a gun, hung up the phone, and went back to sleep. Defendant purchased a gas container at the Wilmington Scotchman convenience store and filled it with gas at 4:12 a.m. on 23 December 2014. A security video camera recorded Defendant driving away from the Wilmington Scotchman, holding the gas container outside of the driver's window of the vehicle. At 5:04 a.m. that same morning, a 911 call was made reporting the House was on fire.

¶ 11 Wilmington Police Corporal Brandon McInerney was the first to arrive upon the scene at 5:06 a.m. Corporal McInerney was familiar with the residents of the House and had previously responded to medical issues reported at the House. Corporal McInerney observed power lines were down in the front of the House and laying across the road. After exiting his vehicle, Corporal McInerney saw two women attempting to climb out of a window. He rushed to assist them and identified them as Deseree and Jasmine.

¶ 12 Tina, the aunt from Raleigh, had driven and dropped Deseree off at the House to spend the upcoming Christmas holiday with her sisters, Makayla and Sumpter. After sending Deseree and Jasmine across the road to safety, he turned the corner to the east side of the House and saw a female screaming and unable to get out. He later identified that person as Pamela, hanging halfway out of a side window. Corporal McInerney and Officer Clark helped get Pamela out through the window. Pamela said two more individuals remained inside the House, including one person laying by that window, who had begun to crawl away from the window. Corporal McInerney and Officer Clark leaned inside the window, found Beverly's leg, and pulled her out of the window and passed her to other first responders to get her to safety and receive medical attention.

¶ 13 Pamela struggled to breathe and became unresponsive. First responders began cardiopulmonary resuscitation. Emergency Medical Services officials attempted additional, but unsuccessful, lifesaving procedures. Pamela was pronounced dead at the scene.

¶ 14 Corporal McInerney, who also served as a volunteer firefighter, attempted to look for Makayla inside the House. He reported seeing "heavy smoke, again, coming from every crack. There was a back door, but again with the amount of smoke coming out, I didn't think it was advisable to try to get in through the door."

¶ 15 Wilmington Fire Department had dispatched two firetrucks to the House, but with the live power lines down in the front yard and street, the firemen had to enter the House without water to locate Makayla. The first vent entry into the House was unsuccessful. Wilmington Fire Department Captain Michael Browning ordered every firefighter to perform another vent entry into the House into all four bedrooms and in the kitchen to find Makayla.

¶ 16 Captain Shannon Provencher used a thermal imaging camera and located Makayla unconscious, wedged between a living room wall and bags of adult diapers. Captain Provencher carried Makayla out to EMS personnel, who were unable to revive her. Makayla was also pronounced dead from smoke inhalation on the scene.

¶ 17 Fire investigators determined two separate fires had been intentionally set at the House. One fire had been set on the front porch, the site of one entrance, and another at the rear entrance. Outside of the House, investigators located a blue butane disposable lighter and a gas can spout. Investigators also located the presence of gasoline in the fire debris.

¶ 18 Defendant was indicted for one count of first-degree arson, two counts of first-degree murder, and three counts of attempted first-degree murder on 30 March 2015. The jury found Defendant guilty of all charges, including both first-degree murders on two bases of malice, premeditation, and deliberation, and also under the felony-murder rule.

¶ 19 Defendant was sentenced to life imprisonment without the possibility of parole for the first-degree murder convictions and 207 to 261 months for each of the attempted first-degree murders, all sentences to run concurrently. The trial court arrested judgment on the first-degree arson conviction. Defendant appeals.

II. Jurisdiction

¶ 20 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2021).

III. Issues

¶ 21 Defendant argues the trial court: (1) lacked subject matter jurisdiction over the charges of attempted first-degree murder because the indictments did not allege an essential element of the offense; (2) erred by refusing to dismiss the charge of attempted first-degree murder of Deseree Pickett; and, (3) erred by admitting evidence of prior incidents of violence and abuse.

IV. Sufficiency of Indictments of Attempted First-Degree Murder

¶ 22 **[1]** Defendant argues the trial court lacked jurisdiction to enter judgment because his indictments for attempted first-degree murder failed to allege an essential element of the crime. He asserts the indictment failed to include "with malice aforethought."

¶ 23 Defendant failed to challenge the sufficiency of the indictment at trial. It is well established that "when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2008) (citation omitted). This jurisdictional challenge is properly before us.

A. Standard of Review

¶ 24 This Court reviews the jurisdictional sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (citation omitted).

B. Analysis

¶ 25 The purpose of an indictment is "to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Creason*, 313 N.C. 122, 130, 326 S.E.2d 24, 29 (1985) (citations omitted).

¶ 26 Under the North Carolina Constitution, an indictment is sufficient to confer jurisdiction if it alleges every element of the offense. *See State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). "An indictment need not conform to any technical rules of pleading, but instead, must satisfy both the statutory strictures of N.C.G.S. § 15A-924 and the constitutional purposes which indictments are designed to satisfy[.]" *State v. Oldroyd*, 380 N.C. 613, 617, 2022-NCSC-27, ¶8, 869 S.E.2d 193, 196-97 (2022) (internal citation omitted). "[I]ndictments need only allege the ultimate facts constituting each element of the criminal offense." *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995) (citation omitted).

¶ 27 Our Supreme Court has recently held: "[A]n indictment is sufficient if it asserts facts plainly, concisely, and in a non-evidentiary manner which supports each of the elements of the charged crime with the exactitude necessary to allow the defendant to prepare a defense and

to protect the defendant from double jeopardy." *Oldroyd*, 380 N.C. at 617-18, 2022-NCSC-27, ¶8, 869 S.E.2d at 197.

¶ 28 Defendant's purported reliance on this Court's decisions in *State v. Wilson*, 236 N.C. App. 472, 474-75, 762 S.E.2d 894, 895-96 (2014); *State v. Bullock*, 154 N.C. App. 234, 243-44, 574 S.E.2d 17, 23 (2002); and *State v. Wilson*, 128 N.C App. 688, 691-92, 497 S.E.2d 416, 419 (1998) is both misplaced and unavailing. Defendant maintains the indictment on its face failed to include the essential element of "malice aforethought," and the judgment must be arrested. *Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 24.

¶ 29 Defendant's indictments for attempted first-degree murder alleged "the defendant named above unlawfully, willfully, and feloniously did ATTEMPT TO KILL AND MURDER [NAMED VICTIM] BY SETTING THE RESIDENCE OCCUPIED BY THE VICTIM ON FIRE." In *Bullock*, the indictment for attempted first-degree murder stated: "[t]he jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above unlawfully, willfully, and feloniously did attempt to kill and murder [victim's name]." *Id.* at 244, 574 S.E.2d at 23. This Court arrested judgment in *Bullock*. This Court also arrested judgment in the separate cases of *Wilson* and *Wilson*, which excluded "malice aforethought." *Wilson*, 236 N.C. App. at 474-75, 762 S.E.2d 895-96; *Wilson*, 128 N.C. App. at 691-92, 497 S.E.2d at 419.

¶ 30 The indictments that Defendant challenges include the specific facts from which malice is shown, by "unlawfully, willfully, and feloniously . . . setting the residence occupied by the victim(s) on fire." The indictments allege "the ultimate facts constituting each element of the criminal offense." *Rambert*, 341 N.C. at 176, 459 S.E.2d at 512 (citation omitted). Defendant's argument is overruled.

V. Attempted First-Degree Murder – Transferred Intent

¶ 31 **[2]** Defendant argues the trial court erred by denying his motion to dismiss the attempted first-degree murder charge of Deseree Pickett.

A. Standard of Review

¶ 32 Our Supreme Court has held: "Upon 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 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 (2000) (citation omitted).

¶ 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) (citation omitted). "The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted).

B. Analysis

¶ 34 Defendant asserts the trial court erred by denying his motion to dismiss the attempted first-degree murder charge of Deseree Pickett. He argues insufficient evidence tends to show a specific intent to kill her because he did not know she would be inside the House.

¶ 35 The elements of attempted first-degree murder are: (1) specific intent to kill another person unlawfully, (2) an overt act calculated to carry out that intent, going beyond mere preparation, (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing. *See State v. Gartlan*, 132 N.C. App. 272, 275, 512 S.E.2d 74, 77 (1999). Defendant argues he was unaware Deseree was present inside the House at the time he set the fires, and he could and did not form the specific intent to attempt to kill her. Defendant's argument is misplaced and ignores longstanding precedents.

¶ 36 The doctrine of transferred intent applies where one engages in an action against another and unintentionally attempts to or kills a third person. *See State v. Locklear*, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992). The actor's conduct toward the victim is "interpreted with reference to his intent and conduct towards his adversary[,]" and criminal liability for the third party's death is determined "as [if] the fatal act had caused the death of [the intended victim]." *Id.* (citation and quotation marks omitted).

¶ 37 "[I]t is immaterial whether the defendant intended injury to the person actually harmed; if he in fact acted with the required or elemental intent toward someone[,] that intent suffices as the intent element of the crime charged as a matter of substantive law." *State v. Andrews*, 154 N.C. App. 553, 559, 572 S.E.2d 798, 802 (2002) (citation omitted).

¶ 38 Here, the State's evidence tended to establish Defendant was involved in a domestic dispute with Thrower. Defendant set two fires at both points of natural entry, ingress, and egress in a house, which he

believed contained Thrower, his intended victim. Defendant acted with the requisite intent to injure or kill towards a specific person, which intent transferred to another. The true identity of that individual is immaterial. The evidence tends to show and is sufficient for the jury to find Defendant in fact acted, and with the necessary transferred intent to attempt to kill, Deseree. Defendant's argument is without merit and overruled.

VI. Prior Acts

¶ 39 **[3]** Defendant argues the admission of various prior acts of violence and abuse against Linda and Thrower, his setting Linda's mother's vehicle on fire, and attempting to burn Thrower's father's car were improperly admitted over his objections.

A. Rules 401 and 402

1. Standard of Review

¶ 40 "Although a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (citation omitted), *disc. rev. denied*, 361 N.C. 223, 642 S.E.2d 712 (2007).

2. Analysis

¶ 41 Defendant argues the admission of this evidence was irrelevant under North Carolina Rules of Evidence 401 and 402. N.C. Gen. Stat. § 8C-1, Rules 401, 402 (2021).

¶ 42 Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Irrelevant evidence is evidence "having no tendency to prove a fact at issue in the case." *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368 (1992). Under Rule of Evidence 402, relevant evidence is generally admissible at trial, while irrelevant evidence is not admissible. *See* N.C. Gen. Stat. § 8C-1, Rule 402.

¶ 43 The challenged testimony was clearly relevant under Rules 401 and 402. This evidence was probative to issues of Defendant's identity, Defendant's common scheme or plan, Defendant's intent, Defendant's motive, Defendant's knowledge, and Defendant's *modus operandi*. The testimony at issue is relevant and admissible under Rules 401 and 402. N.C. Gen. Stat. § 8C-1, Rules 401, 402. Defendant's argument is without merit.

B. Rule 404(b)

¶ 44 Defendant also challenges the admission of prior bad acts under Rules of Evidence 404(b) and 403.

1. Standard of Review

¶ 45 "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

2. Analysis

¶ 46 Under North Carolina Rules of Evidence 404(b), evidence may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). Evidence of prior criminal activity must be: (1) relevant to the crime charged; and, (2) sufficiently similar and temporally proximate to the crime charged. *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007).

¶ 47 Our Supreme Court has held:

> Rule 404(b) state[s] a clear general rule of *inclusion* of relevant evidence of 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).

¶ 48 The State argues the relevant evidence of Defendant's prior actions is properly admitted under Rule 404(b) and tends to show his intent, motive, malice, premeditation, and deliberation. We agree. Defendant's argument is overruled.

C. Rule 403

1. Standard of Review

¶ 49 "Rulings under North Carolina Rule of Evidence 403 are discretionary, and a trial court's decisions on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion." *State v. Chapman*, 359 N.C. 328, 348, 611 S.E.2d 794, 811 (2005) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a

reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

2. Analysis

¶ 50 Even relevant evidence, under Rule 403 "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2021). Defendant argues the probative value of admitting this evidence is outweighed by the danger of unfair prejudice, because the prior acts are too remote to have probative value and are a needless presentation of cumulative evidence.

¶ 51 "When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). "[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (citation omitted).

¶ 52 The alleged incident where Defendant set Doris Saadeh's car on fire with gasoline occurred approximately five months prior to the incidents on 24 December. The incident where Defendant had threatened to damage Thrower's father's vehicle occurred the same day of the murders and events charged. Defendant's physical assaults of Thrower and Linda also occurred not too temporally remote from the crimes to warrant exclusion under Rule 403. Defendant has failed to show these incidents are so cumulative or likely to mislead the jury for their admission to constitute an abuse of discretion. *See State v. Stevenson*, 169 N.C. App. 797, 801-02, 611 S.E.2d 206, 210 (2005). Defendant has failed to show the trial court abused its discretion in allowing the admission of testimony regarding Defendant's prior bad actions under Rules 404(b) and 403. His arguments are overruled.

VII. Conclusion

¶ 53 Defendant's jurisdictional challenges to the sufficiency of his indictments for attempted first-degree murder are without merit. The trial court did not err in refusing to dismiss the charge of attempted first-degree murder of Deseree. Defendant's prior acts were properly admitted under North Carolina Rules of Evidence 401, 402, 403, and 404(b).

¶ 54 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.
JOSHUA JEZRELL DUNCAN

No. COA21-794

Filed 17 January 2023

1. Search and Seizure—traffic stop—license plate check—reasonable expectation of privacy

In a prosecution of drug offenses, the trial court erred by granting defendant's motion to suppress on the basis that law enforcement officers lacked reasonable suspicion to stop defendant's car. The officers' discovery, upon conducting a license plate check while surveilling a location with suspected drug activity, that the driver's license of the vehicle's registered owner had been medically canceled, was sufficient information that, at the very least, a traffic infraction had occurred. A license plate check is not a search for Fourth Amendment purposes because there is no constitutionally protected reasonable expectation of privacy in a plainly visible license plate number.

2. Search and Seizure—probable cause—search incident to arrest—medically cancelled driver's license—misdemeanor versus infraction

In a prosecution of drug offenses, the trial court erred by granting defendant's motion to suppress evidence obtained during a search incident to arrest, which defendant was subjected to after law enforcement officers conducted a traffic stop of defendant's car on the basis that they ran a license plate number check and discovered that the driver's license of the registered vehicle's owner had been medically cancelled. The officers had probable cause to arrest defendant because, interpreting multiple statutory sections together, the offense of driving with a medically canceled license is

comparable to the offense of driving without a license and, absent one of several statutory exceptions that were inapplicable in this case, constituted a misdemeanor (pursuant to N.C.G.S. § 20-35(a)) and not a traffic infraction (for which the officers would not have had authority to make an arrest).

Appeal by the State from order entered 22 June 2021 by Judge Donnie Hoover in Catawba County Superior Court. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

The Law Offices of J. Edgar Halstead, III, PLLC, by J. Edgar Halstead, III, for defendant-appellee.

ZACHARY, Judge.

¶ 1 The State appeals from the trial court's order granting Defendant Joshua Jezrell Duncan's motion to suppress. After careful review, we reverse and remand to the trial court for further proceedings.

I. Background

¶ 2 On 31 August 2018, Sergeant Derek Slaughter and another Newton Police Department officer were surveilling a residence and the adjacent parking lot in Newton. The officers had received information that "drug activity" was occurring at that location, and that a "black male with dreadlock-type hair" who had numerous outstanding indictments for trafficking marijuana was "at the residence on a frequent basis."

¶ 3 As the officers watched from an unmarked vehicle, they saw a Cadillac pull into the driveway, drop off a passenger, and depart. While the officers could not positively identify the driver, they observed that he was "a black male with similar hairstyle of the subject in question[.]" They also noted the Cadillac's license plate number, which they pulled up in the CJLEADS database.[1] From CJLEADS, the officers determined that the driver's license of the vehicle's registered owner was "medically canceled," and they called for a marked unit to conduct a traffic stop of the Cadillac.

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1. CJLEADS is "a database which details a person's history of contacts with law enforcement in the form of a list of criminal charges filed against the individual[.]" *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 4.

¶ 4 Patrol Sergeant Brian Bixby of the Newton Police Department responded to the call and conducted the traffic stop of the Cadillac. Officer Bixby approached the vehicle and asked Defendant, the driver, for his driver's license and registration. Through CJLEADS, Officer Bixby confirmed Sergeant Slaughter's report that Defendant's driver's license was medically canceled.

¶ 5 Later, at the hearing on Defendant's motion to suppress, Officer Bixby testified that the officers had discussed the implications of a medically canceled license. Officer Bixby testified that initially, he "was confused[,]" because "medically canceled" "means no operator's license or suspended." Then, however, Officer Bixby "looked at the details of the cancellation, [and] saw it was suspended, which would have corroborated . . . Sergeant Slaughter's statement that it was revoked."

¶ 6 As Officer Bixby spoke with Sergeant Slaughter over the radio, he checked Defendant's criminal record, which included past convictions for violent crimes that "raised [Officer Bixby's] alert level." He called for backup because he had "decided to arrest [Defendant] for driving while license revoked." Once additional officers arrived, Officer Bixby arrested Defendant. During the search of Defendant incident to his arrest, Officer Bixby discovered baggies of a substance that he believed to be crystal methamphetamine hidden in Defendant's hair. Later, while Defendant was being processed at the police station, Officer Bixby discovered a ball of "wadded up aluminum foil" on the ground at Defendant's feet. Defendant explained that it had fallen out of his hair and admitted that it contained more methamphetamine.

¶ 7 On 24 June 2019, a Catawba County grand jury returned indictments charging Defendant with (1) possession with intent to manufacture, sell, or deliver methamphetamine, (2) maintaining a vehicle for keeping and selling methamphetamine or any mixture containing methamphetamine, and (3) attaining the status of habitual felon. On 27 October 2020, the State filed notice of its intent to introduce evidence at trial that law enforcement officers obtained by virtue of a search without a search warrant. On 18 June 2021, Defendant filed a motion to suppress.

¶ 8 On 22 June 2021, Defendant's motion to suppress came on for hearing in Catawba County Superior Court. After considering the testimony of Sergeant Slaughter and Officer Bixby, together with the arguments of counsel, the trial court granted Defendant's motion to suppress. In its order entered the same day, the trial court made the following relevant findings and conclusions:

> THE ORIGINAL TIP TO OFFICER[S] TO BE ON THE LOOK OUT FOR A BLACK/MALE WITH DREADS WAS INSUFFICIENT TO CONSTITUTE REASONABLE SUSPICION TO PURSUE DEFENDANT FURTHER, INCLUDING THE DISCOVERY OF THE-ISSUES WITH DEFENDANT'S DRIVER'S LICEN[S]E; THEREAFTER, THE DRIVING OFFENSE WAS TO BE TREATED AS A NO OPERATOR'S LICENSE PURSUANT TO N.C.G.S. 20-29.1 AND THEREFORE DID NOT CONSTITUTE PROBABLE CAUSE FOR ARREST.

¶ 9 The State gave oral notice of appeal at the conclusion of hearing and also timely filed written notice of appeal.

II. Discussion

¶ 10 On appeal, the State argues that the trial court erred by granting Defendant's motion to suppress based on its erroneous conclusions that law enforcement officers lacked (1) reasonable suspicion to stop the Cadillac, and (2) probable cause to arrest Defendant.

A. Standard of Review

¶ 11 Our appellate courts review a trial court's order granting "a defendant's suppression motion by determining 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. Parisi*, 372 N.C. 639, 649, 831 S.E.2d 236, 243 (2019) (citation and internal quotation marks omitted). Under this standard of review, "the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id.* (citation and internal quotation marks omitted). However, the trial court's "conclusions of law are reviewed de novo and are subject to full review, with an appellate court being allowed to consider the matter anew and freely substitute its own judgment for that of the lower tribunal." *Id.* (citations and internal quotation marks omitted).

B. Analysis

¶ 12 The State contends that the trial court erred by determining that Officer Bixby lacked both reasonable suspicion to stop the Cadillac and probable cause to arrest Defendant, and therefore, by granting Defendant's motion to suppress the evidence seized during the search incident to Defendant's arrest. For the reasons that follow, we conclude that the trial court erred in reaching both conclusions, and in granting

Defendant's motion to suppress. Accordingly, we reverse and remand for further proceedings.

1. Reasonable Suspicion to Stop Defendant

¶ 13 **[1]** The trial court found that Officer Bixby did not have "REASONABLE SUSPICION TO PURSUE DEFENDANT FURTHER, INCLUDING THE DISCOVERY OF THE ISSUES WITH DEFENDANT'S DRIVER'S LICEN[S]E[.]" However, as explained below, a law enforcement officer does not need reasonable suspicion to investigate a plainly visible license plate number, because a license plate check does not implicate a defendant's Fourth Amendment rights. And as the State correctly contends, "[t]he 'original tip' referenced by the trial court is irrelevant because Officer Bixby had reasonable suspicion at the time of the seizure based on the traffic violation."

¶ 14 "Both the Fourth Amendment to the Constitution of the United States and article I, section 20 of the North Carolina Constitution protect private citizens against unreasonable searches and seizures." *Johnson*, ¶ 16. The Supreme Court of the United States has recognized that "the State's intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a constitutionally protected reasonable expectation of privacy." *New York v. Class*, 475 U.S. 106, 112, 89 L. Ed. 2d 81, 89 (1986) (citation and internal quotation marks omitted). In North Carolina, a license plate must be affixed to the exterior of a car and be "plainly readable from a distance of 100 feet during daylight." N.C. Gen. Stat. § 20-63(c)–(d) (2021). "[I]t is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile." *Class*, 475 U.S. at 114, 89 L. Ed. 2d at 90. And "[t]he exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.' " *Id.*

¶ 15 Pursuant to *Class*, it is evident that a license plate check is not a "search" under the Fourth Amendment. Although the State recognizes that our appellate courts have not explicitly ruled on whether a license plate check constitutes a search, the State notes that previous opinions of this Court have hinted at this conclusion. *See State v. Murray*, 192 N.C. App. 684, 688–89, 666 S.E.2d 205, 208–09 (2008) (analyzing the constitutionality of a traffic stop, notwithstanding the fact that the law enforcement officer had already conducted a "check of the license plate" of the defendant's vehicle prior to the stop); *cf. State v. White*, 82 N.C. App. 358, 362, 346 S.E.2d 243, 246 (1986) (concluding that a law enforcement officer's investigation of a driver's license number marked on

stereo equipment in plain view through window of a car was not "sufficiently intrusive as to amount to a constitutionally impermissible search of [the] defendant's automobile"), *cert. denied*, 323 N.C. 179, 373 S.E.2d 124 (1988). Our conclusion is in line with these precedents.

¶ 16 Further, our conclusion is consistent with the analysis of the federal appellate courts that have ruled on this issue. *See*, *e.g.*, *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1152 (9th Cir.) ("[W]hen police officers see a license plate in plain view, and then use that plate to access additional non-private information about the car and its owner, they do not conduct a Fourth Amendment search."), *cert. denied*, 552 U.S. 1031, 169 L. Ed. 2d 410 (2007); *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir.) ("A motorist has no privacy interest in her license plate number. Like the area outside the curtilage of a dwelling, a car's license plate number is constantly open to the plain view of passersby." (citations omitted)), *reh'g denied*, No. 98-20027, 1999 U.S. App. LEXIS 26265 (5th Cir. 1999). Accordingly, the investigation of the Cadillac's license plate was not a Fourth Amendment search requiring any degree of suspicion. To the extent that the trial court implicitly concluded that Defendant had a reasonable expectation of privacy in the Cadillac's license plate number sufficient to implicate his Fourth Amendment rights, this was in error.

¶ 17 This leaves for resolution the issue of whether Officer Bixby had reasonable suspicion to stop the Cadillac based on the investigation of its license plate. "Law enforcement officers may initiate a traffic stop if the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Johnson*, ¶ 16 (citation and internal quotation marks omitted). In this case, the officers learned from their license plate checks that Defendant's "driver's license status was medically canceled[.]"

¶ 18 A law enforcement officer may stop a motorist when the officer "reasonably believes that a driver has violated the law." *State v. Walton*, 277 N.C. App. 154, 2021-NCCOA-149, ¶ 19. Therefore, a law enforcement officer with reasonable suspicion to believe that the driver of a vehicle is driving with a medically canceled license may conduct a lawful traffic stop of that vehicle without running afoul of the Fourth Amendment.

¶ 19 The officer here had sufficient information to believe that Defendant had, at the very least, committed a traffic infraction—if not a misdemeanor, as discussed below—and lawfully conducted a traffic stop of Defendant's vehicle. *Id.* Thus, the trial court erred by concluding otherwise.

2. Probable Cause to Arrest Defendant

¶ 20 **[2]** We next address whether Officer Bixby had probable cause to arrest Defendant, and therefore, to search him incident to that arrest. While "[i]t is a well-established principle that an officer may make a warrantless arrest for a misdemeanor committed in his or her presence[,]" *State v. Brooks*, 337 N.C. 132, 145, 446 S.E.2d 579, 588 (1994); N.C. Gen. Stat. § 15A-401(b)(1), a law enforcement officer has "no authority to arrest [an individual] for the commission of an infraction[,]" *State v. Braxton*, 90 N.C. App. 204, 208, 368 S.E.2d 56, 59 (1988). Accordingly, this issue turns on whether Defendant's alleged act of driving with a medically canceled license was a misdemeanor, or as Defendant argues and the trial court concluded, an infraction. We conclude that the offense of driving with a medically canceled license is a misdemeanor, justifying the warrantless arrest and search incident to the arrest.

¶ 21 Defendant claims that the official notice of his license's medical cancellation provides "in plain language the punishment for noncompliance shall be deemed the equivalent of operating a motor vehicle without any driver's license." However, the four identical notices that DMV sent to Defendant during the period between 28 July 2018 and 1 February 2019 include no such pronouncements.

¶ 22 The notices cite N.C. Gen. Stat. §§ 20-9(g)(2) and 20-29.1 for the statutory authority to cancel Defendant's license. Section 20-9(g) describes the DMV's authority to issue restricted or unrestricted licenses, and subsection (g)(2) provides, in pertinent part, that the DMV "may request a signed certificate from a health care provider duly licensed to practice medicine in the United States that the applicant or licensee has submitted to a physical examination by the health care provider." N.C. Gen. Stat. § 20-9(g)(2). Section 20-29.1 describes the Commissioner of Motor Vehicles' authority to require a driver to submit to a reexamination upon "good and sufficient cause to believe that a licensed operator is incompetent or otherwise not qualified to be licensed[.]" *Id.* § 20-29.1. In appropriate circumstances, the Commissioner "may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions or upon failure of such reexamination may cancel the license of such person until he passes a reexamination." *Id.* Notably, this section also provides that "[r]efusal or neglect of the licensee to submit to such reexamination *shall be grounds for the cancellation of the license of the person failing to be reexamined*, and the license so canceled shall remain canceled until such person satisfactorily complies with the reexamination requirements of the Commissioner." *Id.* (emphasis added).

¶ 23 Section 20-29.1 further describes the Commissioner's discretionary authority to issue restricted or limited driver's licenses, and adds:

> Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and *the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any driver's license.*

Id. (emphasis added).

¶ 24 Defendant argues that § 20-29.1 "is clear and unambiguous. It clearly states that an infraction shall be deemed the equivalent of operating a motor vehicle without any driver's license." We find no such clear statement in the plain text of § 20-29.1. Section 20-29.1 describes the various circumstances under which a driver's license may be suspended, revoked, restricted, or canceled pursuant to the Commissioner of Motor Vehicles' authority to require a driver to submit to medical examination, and it more specifically provides that a *restricted* licensee's operation of a motor vehicle not specified by the license "shall be deemed the equivalent of operating a motor vehicle without any driver's license." *Id.* But this neither applies to a medically canceled license nor does it provide that the offense is an infraction.

¶ 25 First, we address the nature of a medically canceled license. Section 20-15(a) describes the DMV's authority to cancel a license and provides, in pertinent part, that the DMV "shall have authority to cancel any driver's license upon determining" that "[t]he licensee has failed to submit the certificate required under" N.C. Gen. Stat. § 20-9(g). *Id.* § 20-15(a)(5). Section 20-4.01(2) defines "canceled" for purposes of Chapter 20: "As applied to drivers' licenses and permits, a declaration that a license or permit which was issued through error or fraud, *or to which* [*N.C. Gen. Stat.* §] *20-15(a) applies, is void and terminated.*" *Id.* § 20-4.01(2) (emphasis added). Reading these provisions together, we conclude that a driver's license that is medically canceled pursuant to § 20-29.1 for failure to submit a required medical certificate pursuant to § 20-9(g), thus subjecting the license to cancellation pursuant to § 20-15(a)(5), is "void and terminated" pursuant to § 20-4.01(2).

¶ 26 One argument advanced by the State is that the offense of driving with a medically canceled license is the functional equivalent of the

misdemeanor offense of driving while license revoked, *see id.* § 20-28(a), because Chapter 20 treats the terms "revocation" and "suspension" synonymously and defines them both as the "[t]ermination of a licensee's . . . privilege to drive . . . for a period of time stated in an order of revocation or suspension[,]" *id.* § 20-4.01(36). However, the record does not contain such an order of revocation or suspension for the period in which Defendant's license was medically canceled. We therefore disagree with the State that the offense of driving with a medically canceled license is necessarily akin to the offense of driving while license revoked. Rather, we agree with another of the State's arguments: because a medically canceled license is "void and terminated" under § 20-4.01(2), the offense of driving with a medically canceled license is comparable to the offense of driving without a license.

¶ 27 Yet we do not accept Defendant's blanket assertion that "a person operating a motor vehicle without a license is responsible for an infraction." Section 20-35(a) states generally that "[e]xcept as otherwise provided in subsection (a1) or (a2) of this section, a violation of this Article is a Class 2 misdemeanor unless a statute in the Article sets a different punishment for the violation." *Id.* § 20-35(a).

¶ 28 Subsections (a1) and (a2) enumerate six exceptions to the general Class 2 misdemeanor classification:

> (a1) The following offenses are Class 3 misdemeanors:
>
> > (1) Failure to obtain a license before driving a motor vehicle, in violation of [N.C. Gen. Stat. §] 20-7(a).
> >
> > (2) Failure to comply with license restrictions, in violation of [N.C. Gen. Stat. §] 20-7(e).
> >
> > (3) Permitting a motor vehicle owned by the person to be operated by an unlicensed person, in violation of [N.C. Gen. Stat. §] 20-34.
>
> (a2) A person who does any of the following is responsible for an infraction:
>
> > (1) Fails to carry a valid license while driving a motor vehicle, in violation of [N.C. Gen. Stat. §] 20-7(a).
> >
> > (2) Operates a motor vehicle with an expired license, in violation of [N.C. Gen. Stat. §] 20-7(f).

> (3) Fails to notify the Division of an address change for a drivers license within 60 days after the change occurs, in violation of [N.C. Gen. Stat. §] 20-7.1.

Id. § 20-35(a1)–(a2).

¶ 29 Defendant specifically cites § 20-35(a2)(3) (failure to report address change) to support his assertion that driving with a medically canceled license is an infraction, but we fail to see how that provision supports his claim. Instead, the provision that most plausibly supports Defendant's argument is subsection (a2)(1) (failure to carry a valid license while driving).

¶ 30 However, the State argues that § 20-35(a2)(1) "applies only when a driver has a valid license in the first instance but fails to abide by the requirement set forth in [N.C. Gen. Stat.] § 20-7(a) that he or she 'must carry the license while driving the vehicle.' " Further, the State notes that "[t]he offense of no operator's license encompasses a range of potential punishments" and is classified as a misdemeanor unless the conduct specifically falls within one of the enumerated exceptions to § 20-35(a2), or another statute provides otherwise. For example, each of the Class 3 misdemeanors listed in § 20-35(a1) could also be described as driving without a license. *See* N.C. Gen. Stat. § 20-35(a1). We thus reject the sweeping assertion that the offense of driving with a medically canceled license is necessarily an infraction, absent a showing of specific facts placing the offense within one of the enumerated exceptions to § 20-35(a2), which are not present in the case at bar. We conclude that the offense that Defendant was alleged to have committed does not fall within the enumerated exceptions of § 20-35(a1)–(a2) or another statute, and thus is a Class 2 misdemeanor. *Id.* § 20-35(a).

¶ 31 In that the offense that Defendant allegedly committed was a misdemeanor, the trial court erred by concluding that "[t]he medical cancellation on [Defendant's] license was not an arrestable offense[.]" "[A]n officer may make a warrantless arrest for a misdemeanor committed in his or her presence[,]" *Brooks*, 337 N.C. at 145, 446 S.E.2d at 588, and "[a]n officer may conduct a warrantless search incident to a lawful arrest[,]" *State v. Robinson*, 221 N.C. App. 266, 276, 727 S.E.2d 712, 719 (citation omitted), *appeal withdrawn*, 366 N.C. 247, 731 S.E.2d 161 (2012). The law enforcement officers had probable cause to arrest Defendant and to search Defendant incident to his arrest. Accordingly, the officers lawfully seized the evidence discovered during the search of Defendant incident to his arrest.

III. Conclusion

¶ 32 For the foregoing reasons, the trial court's order granting Defendant's motion to suppress is reversed, and the matter is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

Chief Judge STROUD and Judge MURPHY concur.

STATE OF NORTH CAROLINA
v.
JORDAN MONTEZ GRAHAM

No. COA22-48

Filed 17 January 2023

1. Appeal and Error—criminal judgment—oral notice of appeal in open court—sufficient to confer jurisdiction

Where defendant properly gave oral notice of appeal in open court immediately upon entry of the final judgment in his criminal prosecution but did not file a written notice of appeal, defendant's petition for writ of certiorari (in the event that his oral notice of appeal was deemed inadequate) was unnecessary and therefore dismissed. Appellate Procedure Rule 4 allows parties to take appeal by giving oral notice of appeal at trial.

2. Burglary and Unlawful Breaking or Entering—habitual breaking and entering status—statement to jury—trial court's opinion

In defendant's trial arising from a home break-in, the trial court did not err during the habitual offender status phase when it told the jury that "the State will present evidence relating to previous convictions of breaking and/or entering." The trial court's statement did not constitute an opinion as to whether defendant did in fact have previous convictions. Even assuming the statement was improper, the State offered ample evidence of defendant's prior felony convictions of breaking and entering from which a jury could reasonably find defendant guilty of the status offense charge.

3. Evidence—expert witness testimony—reliability—plain error analysis

In defendant's trial for charges arising from a home break-in, the trial court erred by admitting a fingerprint expert's opinion where the expert's testimony did not clearly indicate that the expert reliably applied his processes to the facts in the case, and therefore the testimony did not meet the reliability requirements of Evidence Rule 702. However, the error did not amount to plain error because the trial court properly admitted the opinion of a DNA expert who did explain how she reliably applied her processes to the facts in the case (even though she did not provide the error rate associated with her methods), and her testimony was sufficient evidence from which a jury could reasonably conclude that defendant was guilty of felonious breaking or entering and larceny after breaking or entering.

4. Burglary and Unlawful Breaking or Entering—habitual breaking and entering—judgment—Class E status offense—no clerical error

The trial court did not make a clerical error by identifying habitual breaking and entering as a Class E status offense, as compared to a Class E substantive offense. The written judgment clearly indicated the offenses for which defendant was found guilty, the offense classes and punishment classes, the criminal statute governing each offense, and defendant's sentence.

Appeal by defendant from judgment entered 21 May 2021 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 2022.

Attorney General Joshua H. Stein, by Special Attorney General Tamara M. Van Pala Skrobacki, for the State.

Daniel J. Dolan and Appellate Defender Glenn G. Gerding for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Defendant appeals from judgment after a jury convicted him of felonious breaking or entering, larceny after breaking or entering, and attaining the status of habitual breaking and entering offender. On appeal, Defendant argues: (1) the trial court prejudicially erred when it instructed the jury "[t]he State will present evidence relating to

previous convictions" during the habitual status offender phase of trial; (2) the trial court committed plain error by admitting expert testimonies without establishing the necessary foundation for reliability under Rule 702; and (3) the case should be remanded for correction of a clerical error on the written judgment relating to the felony class of the habitual breaking and entering status offense. After careful review, we find no prejudicial error.

I. Factual & Procedural Background

¶ 2 The State's evidence at trial tends to show the following: On 16 June 2016 at approximately 5:30 p.m., Marie Broz ("Broz") left her Charlotte home to take three of her children to track practice, leaving her oldest daughter, A.B., alone in the house. Broz received two phone calls from A.B. while Broz was gone. In her first call, A.B. told Broz that she thought she heard footsteps in the home. Broz confirmed to A.B. that Broz and the other children were not inside the house. Before calling Broz again, A.B. stepped out of her bedroom and noticed a window was broken, and the back door was open. In her second call, A.B. told Broz that she believed the home had been broken into. Broz instructed A.B. to call the police. Blood was found on the shattered glass, blinds, and floor. Additionally, fingerprints were left on the window frame. A PlayStation and other gaming equipment belonging to Broz's son were found to be missing from the home.

¶ 3 Shortly after 10:00 p.m. that evening, James Pease ("Pease"), a crime scene investigator for the Charlotte-Mecklenburg Police Department ("CMPD"), responded to Broz's home to investigate the residential breaking and entering and larceny. Pease testified that he gathered photographs of the residence and collected latent evidence, including fingerprints; suspected biological evidence, including blood; and physical evidence, including a shovel and hair from a bucket, which was used to prop open the rear screen door. Pease dusted for and found fingerprints on the frame of the broken window—the suspected point of entry.

¶ 4 Aaron Partridge ("Partridge"), a detective for CMPD, was assigned to investigate the case. Defendant became a suspect in the investigation after Partridge received "a DNA comparison result back [from the crime lab] that identified [Defendant] . . . ." Partridge then obtained a search warrant for a DNA sample from Defendant and took the sample by rubbing a buccal swab in Defendant's mouth. Partridge submitted a lab request to have the swabs of suspected blood be tested for a DNA profile. Partridge submitted another lab request to compare the swab from Defendant with the swabs of suspected blood that were collected

from the crime scene. Partridge also requested that the fingerprints collected from the crime scene be compared with Defendant's.

¶ 5 Todd Roberts ("Roberts"), a fingerprint examiner at the CMPD crime lab, was admitted as a fingerprint expert without objection by Defendant. Roberts testified he analyzed the fingerprints collected from the window frame and compared them with an ink print card containing Defendant's prints. Roberts opined a print on Defendant's ink print card was consistent with the latent fingerprint obtained from the window frame.

¶ 6 Shannon Guy ("Guy"), a DNA criminalist at the CMPD crime lab, analyzed the blood left at the crime scene. Guy was tendered as an expert in DNA analysis and identification without objection by Defendant. Guy testified she generated a DNA profile from the suspected blood swab collected from the blinds and compared it with the full "single-source DNA profile" obtained in Defendant's buccal swab. Guy formed the opinion the sample collected from the blinds matched the DNA collected from Defendant and testified "there were no inconsistencies across all 24 areas" of the DNA samples she analyzed.

¶ 7 On 5 March 2018, a Mecklenburg County grand jury indicted Defendant on the charges of felonious breaking or entering, in violation of N.C. Gen. Stat. § 14-54(a); larceny after breaking or entering, in violation of N.C. Gen. Stat. § 14-72(b)(2); and attaining habitual breaking and entering offender status, in violation of N.C. Gen. Stat. § 14-7.26.

¶ 8 On 13 April 2021, a jury trial began before the Honorable Hugh B. Lewis, judge presiding. The trial was bifurcated, and the jury addressed the issue of Defendant's guilt in relation to the two substantive offenses in the first phase of the trial. In the second phase of the trial, the jury addressed the issue of enhancement as a habitual offender. Defendant was not present for the last day of his trial, 15 April 2021. On 15 April 2021, the jury returned its verdicts, finding Defendant guilty, *in absentia*, of felonious breaking or entering and larceny after breaking or entering.

¶ 9 Following the jury rendering its verdicts in the first phase, the trial court began the second phase of the proceeding for the jury to consider the habitual breaking and entering status. The trial judge announced to the jury: "The State will present evidence relating to previous convictions of breaking and/or entering at this time." The State tendered into evidence a certified copy of Defendant's judgment from a prior conviction for breaking and/or entering. Counsel for Defendant moved to dismiss at the close of the State's evidence and after the close of all

evidence, and the motions were denied. Defendant did not object to the jury instruction regarding habitual breaking and entering. At the conclusion of the second phase of trial, the jury returned a verdict finding Defendant guilty, *in absentia*, of attaining habitual breaking and entering offender status.

¶ 10 Due to Defendant's absence at the last day of trial, Defendant's sentencing hearing took place on 21 May 2022 before the Honorable W. Robert Bell. Defendant was sentenced to a minimum of thirty months and a maximum of forty-eight months in the custody of the North Carolina Department of Corrections. Defendant gave oral notice of appeal in open court after the trial court entered judgment.

II. Jurisdiction

¶ 11 **[1]** As an initial matter, we consider Defendant's petition for writ of *certiorari*. On 13 May 2022, Defendant filed with this Court a petition for writ of *certiorari* contemporaneously with his brief, in the event his oral notice of appeal was deemed inadequate.

¶ 12 Rule 4 of the North Carolina Rules of Appellate Procedure permits a "party entitled by law to appeal from a judgment" to "take appeal by . . . giving oral notice of appeal at trial . . . ." N.C. R. App. P. 4(a)(1).

¶ 13 Here, counsel for Defendant gave oral notice of appeal while the trial court was in open session, and immediately after the trial court entered its judgment against Defendant. Defendant did not file written notice of appeal. The State does not challenge the sufficiency of Defendant's oral notice of appeal.

¶ 14 Because Defendant gave oral notice of appeal in open court immediately upon entry of the final judgment, Defendant properly gave "notice of appeal *at trial*," as required by Rule 4. *See State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019) (explaining oral notice of appeal given before the entry of final judgment is premature, and consequently, inadequate notice); *see also* N.C. R. App. P. 4(a)(1). Thus, we deem Defendant's petition for writ of *certiorari* unnecessary and dismiss the petition. *See State v. Howard*, 247 N.C. App. 193, 205, 783 S.E.2d 786, 794–95 (2016) (dismissing the State's petition for writ of *certiorari* where our Court deemed the petition was not needed to confer the Court's jurisdiction).

¶ 15 Therefore, this Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issues

¶ 16 The issues before this Court are: (1) whether the trial court violated N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 when it communicated to the jury that the State would be "present[ing] evidence relating to previous convictions of breaking and/or entering"; (2) whether the trial court plainly erred when it admitted the expert opinions of Roberts and Guy on the grounds their testimonies lacked the necessary foundation for admissibility under Rule 702; and (3) whether the trial court's designation of the habitual breaking and entering status offense as a Class E felony on the written judgment constitutes a clerical error.

IV. Jury Instructions in Second Phase of Trial

¶ 17 **[2]** In his first argument, Defendant contends the trial court prejudicially erred by communicating to the jury that the "State will present evidence relating to [Defendant's] previous convictions of breaking and/or entering" because proof of such prior conviction "was an essential element of the charge that the jury was required to determine." The State argues the trial court did not err in these instructions to the jury because "[t]he trial court was simply informing the jury of what the State was planning to do, not expressing an opinion that would sway the jury." After careful review, we agree with the State and find no error.

A. Standard of Review

¶ 18 This Court reviews a trial court's comments for a violation of N.C. Gen. Stat §§ 15A-1222 or 15A-1232 using a "totality of the circumstances" test. *State v. Gell*, 351 N.C. 192, 207, 524 S.E.2d 332, 342, *writ denied*, 531 U.S. 867, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000). "Whenever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of [N.C. Gen. Stat.] §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions." *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005) (citation omitted), *writ denied*, 549 U.S. 855, 127 S. Ct. 130, 166 L. Ed. 2d 96 (2006); *see also In re E.D.*, 372 N.C. 111, 119, 827 S.E.2d 450, 456–57 (2019) (explaining a statutory mandate may be automatically preserved when it either: (1) requires the trial judge to take a specific action, or (2) clearly leaves the responsibility to the presiding judge at trial).

¶ 19 "[A] defendant claiming that he was deprived of a fair trial by the judge's remarks has the burden of showing prejudice in order to receive a new trial." *Gell*, 351 N.C. at 207, 524 S.E.2d at 342; *see also State v. Sidbury*, 64 N.C. App. 177, 179, 306 S.E.2d 844, 845 (1983) ("While

not every improper remark will require a new trial, a new trial may be awarded if the remarks go to the heart of the case."). "Unless it is apparent that [the statutory violation] might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citation omitted).

B. Analysis

¶ 20 Defendant argues the trial court stated to the jury that Defendant "had prior breaking and entering offenses," which was a "grossly improper and erroneous" remark. We disagree with Defendant as to the substance of the trial court's comment and conclude the trial court's statement did not amount to error, let alone plain error. In addition, the trial court instructed the jury that it was the jury's role to make factual findings and to not draw inferences regarding the evidence from what the trial court did or said.

¶ 21 "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2021). Further, "the judge shall not express an opinion as to whether or not a fact has been proved[,]" while instructing the jury. N.C. Gen. Stat. § 15A-1232 (2021). This is because "[j]urors entertain great respect for [the trial judge's] opinion, and are easily influenced by any suggestion coming from [the trial judge]." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951).

¶ 22 To convict a person of the status offense of habitual breaking and entering, the State must prove the individual "has been convicted of or pled guilty to one or more prior felony offenses of breaking and entering . . . ." N.C. Gen. Stat. § 14-7.26 (2021). "In all cases in which a person is charged [as a habitual breaking and entering] status offender, the record of prior conviction of the felony offense of breaking and entering shall be admissible in evidence, but only for the purpose of proving that the person had been convicted of a former felony offense of breaking and entering." N.C. Gen. Stat. § 14-7.29 (2021).

¶ 23 Defendant cites *State v. Guffey*, 39 N.C. App. 359, 250 S.E.2d 96 (1979), *State v. Whitted*, 38 N.C. App. 603, 248 S.E.2d 442 (1978), and *State v. McEachern*, 283 N.C. 57, 194 S.E.2d 787 (1973) to argue the trial court's remark "goes to the heart of the case." These cases, where the trial courts' comments warranted new trials, are readily distinguishable from the instant case, where the trial court's statement was a forecast of the proceeding—not an expression of opinion.

¶ 24 In *Guffey*, the trial court stated the defendant "was pretty busy that day," in explaining why the indictment charged the defendant with two crimes. 39 N.C. App. at 361, 250 S.E.2d at 97 (emphasis removed). In *Whitted*, the trial court advised the jury what the court believed the evidence tended to show. 38 N.C. App. at 605, 248 S.E.2d at 443. In *McEachern*, the trial court asked a prosecuting witness whether she was raped in the car, where the witness had not testified she had been raped. 283 N.C. at 59, 194 S.E.2d at 789. As discussed in greater detail below, the trial court's comments, unlike the courts' remarks in *Guffey*, *Whitted*, and *McEachern*, were neither an expression of an opinion as to Defendant's guilt nor the evidence in this case.

¶ 25 Here, the trial court informed the jury: "Now at this time, the State has brought against [D]efendant the charge of habitual breaking and/or entering. The State *will present evidence relating to* previous convictions of breaking and/or entering at this time." (Emphasis added). After the presentation of all evidence, the trial court explained to the jury the habitual status offender charge as well as the elements the State must prove: "For you to find [D]efendant guilty of this offense, the State must prove beyond a reasonable doubt that on October 30th of 2015, [D]efendant, in Superior Court of Mecklenburg County, was convicted of the offense of felonious breaking or entering, which was committed on or about May 28th, 2015."

¶ 26 In examining the trial transcript, we conclude the trial court did not offer to the jury the court's opinion as to whether Defendant did in fact have previous convictions. *See Gell*, 351 N.C. at 207, 524 S.E.2d at 342; *see also* N.C. Gen. Stat. § 15A-1222; N.C. Gen. Stat. § 15A-1232. Rather, the trial court notified the jury and the parties of its plan for the outset of the second phase of trial: to allow the State to offer evidence in support of the habitual breaking and entering status offender charge.

¶ 27 After the trial court made its comment, the State admitted into evidence a certified copy of Defendant's prior felony breaking or entering conviction. The State also offered testimony from Partridge, who investigated Defendant's breaking and/or entering case, which resulted in this previous conviction. After the State presented its evidence, the trial court asked Defendant if he would "be putting on any evidence relating to [the charge]?" Defendant did not offer evidence. Presuming, *arguendo*, the trial court's comment was improper, the State offered ample evidence of Defendant's "prior felony offense[ ] of breaking and entering," from which a jury could reasonably find Defendant guilty of the status offense charge. *See* N.C. Gen. Stat. § 14-7.26; *see also State v. Austin*, 378 N.C. 272, 2021-NCSC-87, ¶¶ 26-27 (holding the trial court

did not commit prejudicial error where the State satisfied all elements of the crime charged, and the trial court instructed the jury that it must determine the facts). Defendant has failed to show the jury would have reached a different verdict without the trial court's comment; therefore, we find no prejudicial error. *See Gell*, 351 N.C. at 207, 524 S.E.2d at 342; *see also* N.C. Gen. Stat. § 15A-1443(a) (2021) (defining prejudicial error and explaining the burden of showing prejudice in criminal cases is upon the defendant).

¶ 28 Defendant further argues the trial court's alleged error was "exacerbated" because the trial court did not give the parties the opportunity to make opening and closing statements regarding the habitual breaking and entering charge; Defendant was absent for the habitual breaking and entering phase; and the trial court "did not re-instruct the jury on fundamental principles, including presumption of innocence, burden of proof, reasonable doubt, [D]efendant's right to testify, and the requirement for a unanimous verdict."

¶ 29 The North Carolina Criminal Procedure Act governs the parties' opening and closing statements to the jury. "Each party must be given the opportunity to make a brief opening statement . . . ." N.C. Gen. Stat. § 15A-1221(a)(4) (2021). "At the conclusion of the evidence, the parties may make [closing] arguments to the jury in accordance with the provisions of [N.C. Gen. Stat. §] 15A-1230." N.C. Gen. Stat. § 1221(a)(8) (2021). In order for a defendant "to assert a constitutional or statutory right on appeal, the right must have been asserted and the issued raised before the trial court." *State v. McDowell*, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980) (citation omitted), *writ denied*, 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 220.

¶ 30 In *State v. McDowell*, our Supreme Court considered whether the trial court's failure to give the defendant the opportunity to present an opening statement, pursuant to N.C. Gen. Stat. § 15A-1221(a)(4), amounted to prejudicial error. 301 N.C. at 290–91, 271 S.E.2d at 294. The Court held the defendant waived his statutory right to make an opening statement by failing to request the opportunity to do so, and by therefore "engag[ing] in conduct inconsistent with a purpose to insist upon the exercise of a statutory right." *Id*. at 291, 271 S.E.2d at 294.

¶ 31 Here, the trial court properly instructed the jury on the elements of the substantive offenses in the initial phase of trial. The trial court then explained the relevant rules of law, including, *inter alia*: direct and circumstantial evidence, the State's burden of proving Defendant's guilt beyond a reasonable doubt, the presumption of Defendant's innocence,

the jury's duty of determining witness credibility and the weight of the evidence, Defendant's right to not testify, and the presiding judge's duty to be impartial. Finally, the trial court instructed the jury that "[D]efendant's absence is not to create any presumption against him[,] and is not to influence your decision in any way."

¶ 32 Before the jury was brought back in from deliberations on the substantive charges, the trial court advised the State and Defendant's counsel that the court would not be re-instructing on the preliminary instructions. It further advised it would be reading *verbatim*, North Carolina Pattern Jury Instruction 214.20 on habitual breaking and entering, *see* N.C.P.I. – Crim. 214.20, if and when the jury returned with a guilty verdict on the felony breaking or entering charge. Counsel for Defendant did not object to the trial court's plan for the second phase of the trial.

¶ 33 After the jury returned and announced its guilty verdicts as to the felonious breaking or entering, and larceny after breaking or entering, the trial court advised the jury the State would be presenting evidence as to the charge of habitual breaking and entering. The State presented its evidence, and the trial court then proceeded to instruct the jury as follows: "Please recall all the previous jury instructions that I have read to you[,] and now I will instruct you on the substance of this charge and how you are to make your decision in this charge." The trial court then read the pattern jury instruction for the charge of habitual breaking and entering.

¶ 34 Like the defendant in *McDowell*, Defendant did not object to the trial court's failure to provide the parties with an opportunity to present a brief opening statement or a closing argument, nor did Defendant request opening or closing statements. Thus, Defendant waived his statutory right to make such statements in the habitual status offender phase of his trial. *See McDowell*, 301 N.C. at 291, 271 S.E.2d at 294. Furthermore, Defendant has not provided support for his argument that the trial court erred by proceeding in the second phase of trial in Defendant's absence; therefore, we deem this apparent argument abandoned. *See* N.C. App. P. 28(b)(6).

¶ 35 Similarly, we conclude Defendant waived review of his argument as to jury re-instruction. North Carolina General Statute Section 15A-1231 governs the trial court's instructions to the jury. N.C. Gen. Stat. § 15A-1231 (2021). It is well established in North Carolina that courts will not find prejudicial error in jury instructions where, taken as a whole, they "present[ ] the law fairly and clearly to the jury . . . ." *State v. Chandler*, 342

N.C. 742, 752, 467 S.E.2d 636, 641, *writ denied*, 519 U.S. 875, 117 S. Ct. 196, 136 L. Ed. 2d 133 (1996). "[I]solated expressions [of the trial court], standing alone," will not warrant reversal "when the charge as a whole is correct." *Id.* at 751–52, 467 S.E.2d at 641. When a defendant does not object to jury instructions, we review for arguments relating to instructions under the plain error standard. *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020). In order for our Court to review "an alleged error under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error" in his brief. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (quoting N.C. R. App. P. 10(a)(4)).

¶ 36 Here, counsel for Defendant did not request the trial court to re-instruct on the pertinent rules of law, despite the trial court advising the parties that it did not intend to re-state its earlier instructions. Hence, Defendant would only be entitled to plain error review on appeal. Because Defendant did not "specifically and distinctly" allege in his brief this alleged error amounts to plain error, he has waived review of the issue. *See Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333*; see also* N.C. R. App. P. 10(a)(4).

¶ 37 After examining the totality of the circumstances, including the trial court's instructions to the jury as a whole, and the State's evidence presented at trial, we conclude the trial court did not commit prejudicial error in communicating to the jury that the State would be presenting evidence relating to Defendant's prior convictions. *See Gell*, 351 N.C. at 207, 524 S.E.2d at 342.

V. Admission of Expert Witness Testimony

¶ 38 **[3]** In his second argument, Defendant contends the trial court plainly erred when it admitted the expert opinions of Roberts and Guy because each testimony lacks the necessary foundation for admissibility under Rule 702. The State argues that the trial court did not err by admitting the expert opinions of Roberts and Guy because both testimonies were relevant and reliable, and meet the requirements of Rule 702. After careful review of the expert testimonies, we discern no prejudicial error.

A. Standard of Review

¶ 39 Generally, this Court reviews the admissibility of expert testimony under Rule 702 for an abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). However, where a defendant does not preserve his or her objection as "to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal

trial," we review the alleged error under the plain error standard. *State v. Hunt*, 250 N.C. App. 238, 246, 792 S.E.2d 552, 559 (2016); *see also* N.C. R. App. P. 10(a)(4) (specifying plain error review may be used in some circumstances when an issue is not preserved, and the defendant "specifically and distinctly" alleges plain error on appeal).

¶ 40 Defendant concedes he did not challenge the trial court's admission of the expert testimony, and therefore, asserts plain error review is the proper standard for our review. We agree and note Defendant "specifically and distinctly" contends on appeal that the trial court's admission of the expert testimony at issue constitutes plain error; thus, we proceed in reviewing these arguments for plain error. *See Hunt*, 250 N.C. App. at 246, 792 S.E.2d at 559; *see also* N.C. R. App. P. 10(a)(4).

B. Analysis

¶ 41 Rule 702 of the North Carolina Rules of Evidence governs the trial court's admission of expert testimony. Rule 702 provides in pertinent part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(1)-(3) (2021). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (explaining the United States Supreme Court's *Daubert* factors, including a technique's known or potential rate of error, "are part of a 'flexible' inquiry" and do not create "a definitive checklist or test"). In any event, "[t]he primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate." *Id.* at 890, 787 S.E.2d at 9 (citations and quotation marks omitted).

1. Roberts' Latent Fingerprint Testimony

¶ 42 Defendant argues that the trial court committed plain error in admitting Roberts' expert testimony because Roberts did not testify that the process he used was scientifically accepted in the community, how he applied that process in this case, or the rate of error associated with the process that he uses.

¶ 43 Defendant relies on *State v. McPhaul* in arguing the trial court abused its discretion by permitting Roberts to provide his expert testimony. 256 N.C. App. 303, 808 S.E.2d 294 (2017). As explained above, the issue before this Court is not whether the trial court abused its discretion in admitting Roberts' testimony, but rather, whether it *plainly erred*. In *McPhaul*, our Court concluded the fingerprint expert's testimony was insufficient to meet the requirement of Rule 702(a)(3) because the witness did not testify *how* she "applied the principles and methods reliably to the facts of th[at] case." *Id.* at 316, 808 S.E.2d at 305; *see also* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(3). Nevertheless, we held that although the trial court abused its discretion, the error did not prejudice the defendant because "[t]he State presented abundant additional evidence," which tended to demonstrate the defendant's guilt. *Id.* at 316–17, 808 S.E.2d at 305.

¶ 44 Defendant cites *State v. Koiyan*, 270 N.C. App. 792, 841 S.E.2d 351 (2020) in his reply brief as further support for his assertion the trial court plainly erred. In *Koiyan*, our Court reviewed the testimony from fingerprint examiner Todd Roberts—the same fingerprint examiner in this case—under the plain error standard. *Id.* at 794, 841 S.E.2d at 353. There, Roberts provided sufficient testimony to demonstrate his "qualifications, training, and expertise, and showed that [he] uses reliable principles and methods." *Id.* at 797, 841 S.E.2d at 354. Yet Roberts "never explained what—if any—characteristics from the latent fingerprints matched with [the d]efendant's fingerprints"; therefore, his conclusions failed to meet the statutory requirement of Rule 702(a)(3). *Id.* at 798, 841 S.E.2d at 355. Despite this deficient expert testimony, we declined to conclude the trial court committed plain error due to "the otherwise overwhelming evidence that [the defendant] was the perpetrator of the robbery." *Id.* at 798, 841 S.E.2d at 355.

¶ 45 Here, Roberts was admitted as a fingerprint expert without objection by Defendant after Roberts testified as to his training, experience, and education, as well the basics of fingerprint analysis. He worked for the CMPD for over twenty-two years and earned a Bachelor of Science in criminal justice and an associate's degree in correctional and juvenile

services. Apart from in-house training, Roberts also received "formal training in fingerprint comparisons, latent fingerprint photography, forensic ridgeology, advance palm print comparison techniques, logical latent analysis, analysis of distortion in latent prints, and . . . advanced latent analysis[.]"

¶ 46 Roberts described the basics of fingerprint analysis, including friction ridge skin and inked prints. "Friction ridge skin is the raised and lowered areas of your skin that's located on your fingers, palms, and also on the soles of your feet." "An inked print is the intentional reproduction of . . . friction ridge skin[.]" Roberts explained that fingerprints can be used for human identification because they are unique to every individual, and no two people have the same fingerprints.

¶ 47 Roberts explained how and when a latent print is transferred onto a surface. Roberts then testified to the unique characteristics of fingerprints and the level of detail fingerprints possess:

> The fingerprints themselves have three levels of detail. One is simply ridge flow, which allows us to easily exclude a potential donor to a fingerprint. There's level II detail, which is made up of bifurcations and ending ridges, which I will—do you have a pencil or pen? When I talk about level I detail, it's simply the ridge flow. This print here has the ridge flow coming in from the right side of the print looping around what I refer to as a core, and then right back out the right side, so this is referred [to] as a right slant loop. The distance between the core, here, and the delta is also a level I detail in which we could use to help narrow down an identification.
>
> But the important part are all of these ending ridges and bifurcations throughout this print, and their spatial relationship to each other. That's what makes that print unique, and unique to everyone. And not only is it unique to everyone, it's unique to that finger, so none of the 10 figures are the same. Even though this is a right slant loop, you can see this one has more of a circular pattern, but still coming in from the right and going out to the right, and this is a left slant loop.
>
> But ultimately[,] it's those ending ridges and bifurcations, their relationship to each other, and I can't zoom in any further but there is a third type of detail

> which includes the pores. Where the pores actually lay in the ridge[s] themselves also bears weight to our identification process when [they] need to[.] Very rarely used, just because that amount of detail usually doesn't exist within the latent print collected from a crime scene, but sometimes.

¶ 48 Roberts further explained basic fingerprint types, the different levels of detail found in a print, and the tool he uses to examine fingerprints:

> [Roberts]: There are loops, whorls, and arches.
>
> [Prosecutor]: And can you describe what each looks like for the jury?
>
> [Roberts]: Sure. A loop is like I described on the screen. It comes in one side of the screen, goes around what we refer to as a core, and right back out the same side. A whorl-type pattern would be more of a circular, in some way, shape or form, it is a circular pattern or bullseye pattern in the fingerprint. The third is the arch, which means that it pretty much comes in one side of the finger, kind of elevates, and then goes right back out the other side.
>
> [Prosecutor]: So when you were explaining just the different characteristics of fingerprints, you mentioned bifurcations. What other—and you called them level II details. What are other level II details that you look at?
>
> [Roberts]: [T]here are bifurcations and ending ridges. [T]wo opposing bifurcations make, like, an island, or an enclosure, which makes them both unique. Two ending ridges fairly close together could be a short ridge, but ultimately[,] it's all bifurcations. It's all ending ridges, and it all boils down to their relationship to each other.
>
> [Prosecutor]: Now, what type of instrument do you use, if any, back at the lab to examine fingerprints?
>
> [Roberts]: We use a type of magnifier, a magnifying glass, not microscopic, but we do magnify the image.

¶ 49 Roberts described the process of analyzing and comparing a latent print obtained from a crime scene with an ink print:

[Roberts]: "Physically, I take the latent fingerprint card collected from the crime scene. I fold it so that I can sit it right next to the print that I want to compare it to. They are both placed under magnification, and I am looking mainly at that level I and level II detail for both similarities and dissimilarities.

[Prosecutor]: So when you look at a latent . . . and an ink print, . . . are you trying to find areas where there is disagreement?

[Roberts]: Yes.

[Prosecutor]: So basically[,] you're trying to prove that the latent and the ink print are not a match. Is that correct?

[Roberts]: Well, both. I'm looking for areas of agreement along with areas of disagreement.

[Prosecutor]: If you find one area of disagreement, do you continue with your analysis?

[Roberts]: No, ma'am.

[Prosecutor]: Does it matter, if you have 10 areas of agreement, if there is one area of disagreement?

[Roberts]: No, ma'am.

[Prosecutor]: And so, what happens if you're looking—you're examining the print and you don't see any areas of disagreement?

[Roberts]: Then that would steer me toward an identification.

[Prosecutor]: So if you don't see any disagreement, would you consider those fingerprints consistent with each other?

[Roberts]: If there is enough information present within both, yes.

[Prosecutor]: What if there's not enough information?

[Roberts]: Then that may result in what we refer to as an inconclusive.

> [Prosecutor]: So, if you do have enough, and you're able to come to a conclusion, what's the next step in your process?
>
> [Roberts]: The next step would be a verification process with my supervisor.
>
> [Prosecutor]: And what does a verification process with your supervisor mean?
>
> [Roberts]: He is given the case along with the 10-print card, and he is asked to agree or disagree with my conclusions.
>
> [Prosecutor]: So does he do the same analysis that you did?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: And do you guys do this in every case?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: So you testified that you've conducted fingerprint analysis quite a few times. Do you find prints that are consistent with one another every single time you do a fingerprint analysis?
>
> [Roberts]: No, ma'am.
>
> [Prosecutor]: Do you find fingerprints that are consistent with one another in the majority of the fingerprint analysis that you do?
>
> [Roberts]: No, ma'am.

¶ 50 Under plain error review, Defendant fails to provide support for his argument that Roberts' expert testimony was erroneously admitted into evidence on the grounds Roberts did not testify his process was scientifically accepted in the community, and he did not disclose error rates related to his processes. Therefore, we consider these arguments abandoned. *See* N.C. R. App. P. 28(b)(6). Our Supreme Court has "recognized that fingerprinting is an established and scientifically reliable method of identification." *State v. Parks*, 147 N.C. App. 485, 490, 556 S.E.2d 20, 24 (2001); *see State v. Rogers*, 233 N.C. 390, 398, 64 S.E.2d 572, 578 (1951). Additionally, neither factor proffered by Defendant is required by statute or caselaw in this state. *See* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a); *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9.

¶ 51 We next consider whether Roberts "applied [his fingerprint analysis] principles and methods reliably to the facts of th[is] case." *See* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(3). Here, Roberts testified he compared the latent fingerprint card collected at the crime scene with a card containing Defendant's ten ink fingerprints retrieved from the Automated Fingerprint Identification System (the "AFIS"), "a state maintained database for fingerprints." The prosecutor asked Roberts to describe the comparison and analysis process he used in this case:

> [Prosecutor]: After you received this latent print for examination, did you then do a comparison, as you previously described you do in your work, to the known 10-inkprint card that belongs to [D]efendant?
>
> [Roberts]: Not initially. I was not—I did not compare the prints to [D]efendant until I was requested to by the detective.
>
> [Prosecutor]: And once you were requested, did you then compare it to [D]efendant's known ink prints?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: Were you able to find a print on [D]efendant's ink print card that was consistent with this latent print that was found at the crime scene?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: And when you say consistent, does that mean that you found no dissimilarities between the two prints?
>
> [Roberts]: That is correct.
>
> [Prosecutor]: Had you found one dissimilarity, would your analysis have stopped right there?
>
> [Roberts]: A dissimilarity, yes, it would have stopped.
>
> [Prosecutor]: Was your conclusion submitted to your supervisor for peer review?
>
> [Roberts]: Yes, ma'am.
>
> [Prosecutor]: And did they agree with your findings?
>
> [Roberts]: Yes, ma'am.

> [Prosecutor]: And this latent print that I've marked as State's Exhibit 18, do you recall to which of [D]efendant's finger it was consistent with?
>
> [Roberts]: It's the number one finger, and just to clarify, there are two prints on that card. Both were identified to the number one finger of Jordan Montez Graham, number one being the right thumb.

¶ 52 In this case, Roberts' testimony does not clearly indicate that Roberts used the comparison process he described in his earlier testimony when he compared Defendant's ink print card to the latent fingerprints recovered at the crime scene. Like the testimonies in *McPhaul* and *Koiyan*, Roberts' testimony lacks detail concerning the methodology he used in comparing the prints and the fingerprint characteristics he considered in reaching his conclusions. Instead, Roberts' testimony, which is strikingly similar to the testimony he gave in *Koiyan*, demonstrates he compared the two sets of prints, found the prints to be consistent, identified no dissimilarities, and his supervisor reached the same result. Thus, Roberts did not "establish that [he] reliably applied [his] procedure to the facts" in the instant case. *See McPhaul*, 256 N.C. App. at 315, 808 S.E.2d at 304; *see also* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(3). Therefore, we conclude again Roberts' testimony is insufficient to meet the reliability requirements of Rule 702, and the trial court erred in admitting it. *See Koiyan*, 270 N.C. App. at 798, 841 S.E.2d at 355; *see also* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a).

2. Guy's DNA Analysis Testimony

¶ 53 Defendant argues that the trial court committed plain error in admitting Guy's expert testimony because Guy, like Roberts, failed to explain how she applied her processes to this case and did not indicate the error rate associated with her methods.

¶ 54 In *State v. Coffey*, our Court considered whether the trial court established a sufficient foundation under Rule 702(a)(3) to qualify a North Carolina State Crime Lab employee as an expert in DNA analysis. 275 N.C. App. 199, 853 S.E.2d 469 (2020). The expert witness testified as to the four-step process she uses to extract DNA from a defendant's buccal sample. *Id.* at 211–12, 853 S.E.2d at 479. The witness confirmed her procedures in analyzing DNA evidence were widely accepted as valid in the scientific community. *Id.* at 212, 853 S.E.2d at 479. Next, the witness testified she compared the defendant's buccal sample with a DNA profile extracted from a semen sample taken from the victim's clothing using her four-step process. *Id.* at 203, 853 S.E.2d at 473. She concluded

the DNA profile obtained from the clothing matched the DNA profile obtained from the defendant. *Id.* at 213, 853 S.E.2d at 480. In concluding the testimony met the requirements of Rule 702(a)(3), our Court reasoned the witness "thoroughly explained the methods and procedures of performing autosomal testing and analyzed [the] defendant's DNA sample following those procedures." *Id.* at 213, 853 S.E.2d at 480. We also acknowledged this "particular method of testing has been accepted as valid within the scientific community and is a standard practice within the state crime lab." *Id.* at 213, 853 S.E.2d at 480.

¶ 55 Defendant contends *Coffey* is distinguishable because "Guy did not provide a sufficiently detailed description of the process used and how it applied to this case." We disagree and find no meaningful difference between the expert witness testimony in *Coffey* and Guy's testimony.

¶ 56 Before Guy was tendered as an expert in DNA analysis and identification, Guy testified as to her training, education, duties as a DNA criminalist, and professional background working in the field. She earned a Bachelor of Science degree in forensic chemistry from Ohio University and a master's degree from the University of Florida with specialization in forensic DNA and serology. As of the date of trial, she had analyzed tens of thousands of DNA samples over her twenty-one-year career in forensics. Guy further testified the CMPD crime lab is accredited and explained the standards that must be met for the lab to comply with the accreditation, as well as the measures taken by the lab for quality assurance. Guy met the crime lab's accreditation requirements for annual continuing education. She also described the peer review process and how that process ensures the reported results are correct.

¶ 57 After the trial court qualified Guy as an expert, Guy described what DNA is and explained that DNA is present in the cells of every person. DNA samples fall into two categories: (1) "forensic unknowns," which are collected from crime scenes, and (2) "reference samples," which are taken from a known individual. A buccal swab is an example of a reference sample.

¶ 58 Guy testified as to the process she and her lab use to analyze DNA samples, which is "widely accepted and used in the scientific community." Guy explained the DNA from a crime scene can be matched with an individual after referencing buccal samples taken from swabs inside the cheek of an individual. Once the swabs are collected, DNA is available for extraction, and a DNA criminalist can estimate the amount of DNA found in the sample, which is referred to as "quantitation." The DNA would then be copied through "amplification," a process that turns

DNA into a representation that allows for comparison of the DNA sample to known DNA standards from an individual.

¶ 59 Guy explained a full DNA profile means the "results were obtained at every single area of the DNA," and allows for the determination on whether the profile was male or female. A full DNA profile enables a DNA criminalist to analyze twenty-four areas of the DNA. A partial profile is one in which some areas of the DNA are missing. Moreover, a single source sample contains information from only one individual, rather than multiple individuals.

¶ 60 Lastly, Guy testified that she generated a DNA profile from the suspected blood swab collected from the blinds and compared it with the full "single-source DNA profile" obtained in Defendant's buccal swab. In reviewing the profiles, Guy found "no inconsistencies across all 24 areas" of the DNA she analyzed. From this data, Guy opined the sample collected from the blinds matched the DNA collected from Defendant because she estimated there was a 1 in 130 octillion "probability of selecting a person at random that had the DNA profile obtained from the blinds . . . ."

¶ 61 Like the expert witness in *Coffey*, Guy thoroughly explained her credentials, education, and expertise, as well as the methods and procedures she uses to analyze DNA profiles. Guy confirmed the process is widely accepted in the scientific community. Guy testified she applied those methods and procedures in her analysis and comparison of Defendant's DNA profile with the suspected blood sample. Guy explained she arrived at her conclusion that the sample matched Defendant's DNA profile after reviewing all twenty-four areas of his full DNA profile. Although Guy did not provide a rate of error, this omission was not fatal to her testimony. *See McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. Guy's DNA testimony sufficiently detailed how she "applied the principles and methods reliably to the facts of the case"; therefore, the testimony meets the requirement of Rule 702(a)(3). *See Coffey*, 275 N.C. at 213, 853 S.E.2d at 480; *see also* N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a)(3).

3. Prejudicial Error

¶ 62 Based on our conclusion the trial court erred in admitting Roberts' testimony, we now determine whether this error constitutes plain error, warranting a new trial. For error to amount to plain error, "a defendant must demonstrate that a fundamental error occurred at trial" and that "the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted). As our Supreme Court has emphasized,

> the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is . . . something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

¶ 63 As discussed above, Guy's testimony regarding DNA analysis and identification was properly admitted at trial. This testimony is sufficient evidence from which a jury could reasonably conclude Defendant was guilty of the offenses charged. After examining the entire record, we conclude Defendant cannot show that the trial court's admission of Roberts' testimony had a probable impact on the jury finding that Defendant was guilty. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Therefore, we find no prejudicial error in the trial court's admission of Roberts' testimony. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; *see also* N.C. Gen. Stat. § 15A-1443(a).

VI. Clerical Error in Written Judgment

¶ 64 **[4]** In his third and final argument, Defendant asserts the trial court made a clerical error in its "written judgment [by] erroneously indicat[ing] that [he] was convicted of a [C]lass E felony" for the habitual breaking and entering status offense." The State contends the written judgment correctly reflects the trial court's judgment because it properly indicates that the habitual breaking and entering status offense enhanced the substantive offense of felony breaking and/or entering from a Class H felony to a Class E felony. After careful review, we agree with the State.

¶ 65 A clerical error is "[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determining." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (citation omitted).

¶ 66 Here, trial court entered its judgment and commitment on Administrative Office of the Courts form AOC-CR-601. The judgment lists three offenses: (1) felony breaking and/or entering, (2) larceny after breaking and/or entering, and (3) habitual breaking and entering. Habitual breaking and entering is identified as a Class E felony. The felony breaking and entering offense is identified as a Class H felony with a Punishment Class E, which the form notes "represents a status or enhancement." The written judgment also indicates, by a checked box, that the trial court "adjudge[d] the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon."

¶ 67 Relying on *State v. Eaton*, Defendant asserts remand is necessary to correct the alleged error on the judgment listing the status offense of habitual breaking and entering as a Class E felony. 210 N.C. App. 142, 707 S.E.2d 642 (2011). In *Eaton*, our Court *sua sponte* remanded the case for correction of a clerical error in the judgment because a substantive offense was incorrectly identified as a Class H felony where it should have been identified as a Class I felony. *Id.* at 155–56, 707 S.E.2d at 651. There, the defendant was found guilty of attaining the status of habitual felon and was properly sentenced for his felony substantive offenses as a Class C felon. *Id.* at 144, 156, 707 S.E.2d at 644, 651. Although this Court's opinion in *Eaton* does not mention in which class the habitual felon status offense was identified on the judgment, our review of the record in that case reveals the judgment designated the status offense as a Class C felony. The statute governing sentencing of habitual felons in effect at the time, provided an habitual felon "must . . . be *sentenced as a Class C felon*" for any felony he or she commits under North Carolina law. N.C. Stat. Gen. § 14-7.6 (2009) (emphasis added); *see also Eaton*, 210 N.C. App. at 150, 707 S.E.2d at 648.

¶ 68 The statute governing sentencing of habitual breaking and entering status offenders provides a status offender "must . . . be *sentenced as a Class E felon*" for any felony offense of breaking and entering the offender commits under North Carolina law. N.C. Gen. Stat. § 14-7.31(a) (2021) (emphasis added).

¶ 69 Thus, the judgment in *Eaton* categorized habitual felon status as Class C, the felony class for which Defendant was to be sentenced for the pertinent substantive offense. Similarly, in this case, the judgment categorized the habitual breaking and entering status offense as a Class E felony, the felony class for which Defendant was to be sentenced for the underlying felony breaking and entering offense. Therefore, Defendant's reliance on *Eaton* for remanding this case is misplaced.

¶ 70 In this case, Defendant is not arguing that he was improperly sentenced or that a substantive offense was incorrectly classified. Rather, Defendant maintains he was not convicted of a Class E felony, and the judgment erroneously indicates that he was. Defendant was in fact convicted of the status offense of habitual breaking and entering; hence, we next consider whether the trial court improperly identified the offense as a Class E felony.

¶ 71 The reason for establishing that an offender has attained habitual breaking and entering status "is to enhance the punishment which would otherwise be appropriate for the substantive [breaking and entering]

felony which [the defendant] has allegedly committed while in such a status." *State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 721 (1988) (citation omitted). Our case law clearly indicates status offenses are not substantive offenses and therefore do "not support a criminal sentence," standing alone. *State v. Taylor*, 156 N.C. App. 172, 175, 576 S.E.2d 114, 116 (2003). Nevertheless, our Legislature did not specify the felony classes for which status offenses should be classified.

¶ 72 We note the North Carolina Judicial Branch publishes on its website a guideline document entitled "N.C. Courts Offense Codes and Classes." N.C. Judicial Branch, *N.C. Courts Offense Codes and Classes* (July 27, 2022), https://www.nccourts.gov/documents/publications/nc-courts-offense-codes-and-classes (last visited Dec. 16, 2022). This document classifies the status offense of habitual breaking and entering as a Class E felony, and habitual felon status as a Class C felony. *Id.* Defendant provides no other authority to support his contention that the written judgment contains a clerical error, and we conclude trial court's identification of habitual breaking and entering as a Class E *status offense*, as compared to a Class E *substantive offense*, was not error.

¶ 73 Because the written judgment clearly indicates the offenses for which Defendant was found guilty as well as the offense classes and punishment classes, properly notates the criminal statute governing each offense, and correctly indicates Defendant's sentence, we discern no clerical error from the trial court's classification of the status offense as a Class E felony.

VII. Conclusion

¶ 74 We dismiss Defendant's petition for writ of *certiorari* as superfluous because Defendant's oral notice of appeal properly conferred jurisdiction to this Court. We hold that the trial court did not err when it communicated to the jury that the State would be presenting evidence relating to Defendant's prior conviction of breaking or entering. Further, we hold the trial court did not plainly err by admitting the expert opinions of Roberts and Guy because their testimonies satisfy foundation requirements for admissibility under Rule 702. Finally, we conclude the written judgment did not contain a clerical error. In sum, our examination of the record reveals Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
ROBERT LINWOOD MASSEY, JR.

No. COA22-414

Filed 17 January 2023

1. Evidence—prior bad acts—text messages—identity of substance as marijuana

In a drug prosecution, the trial court did not err by admitting prior bad act evidence in the form of text messages from defendant's cell phone tending to show defendant's interest in purchasing and possessing marijuana, in order to prove motive, intent, and knowledge. The evidence was relevant because it corroborated the State's contention that the substance in defendant's possession was marijuana and not legal hemp. Furthermore, the trial court's decision to admit the evidence was supported by reason and was not an abuse of discretion. Finally, even assuming that photographic evidence from defendant's cell phone was erroneously admitted, the error was harmless because of the substantial amount of unchallenged evidence of defendant's guilt.

2. Drugs—possession of marijuana and paraphernalia—sufficiency of evidence—identity of substance

The State presented sufficient evidence to submit the charges of simple possession of marijuana and possession of marijuana paraphernalia to the jury where the evidence tended to show that defendant used colloquial terms for marijuana in his text messages, that the substance was found along with methamphetamine, that the substance was found in single plastic bags, and that the arresting officer initially identified the substance as marijuana. The evidence was sufficient to allow the jury to determine whether the substance was marijuana or hemp, and the State was not required to provide a chemical analysis of the substance.

3. Drugs—maintaining a dwelling resorted to by persons using methamphetamine—sufficiency of the evidence—no evidence

The trial court erred by denying defendant's motion to dismiss the charge of maintaining a dwelling resorted to by persons using methamphetamine where the State failed to present any, much less substantial, evidence of the crime. There was no evidence that anyone besides defendant used methamphetamine at his home.

Appeal by defendant from judgments entered 21 July 2021 by Judge James F. Ammons, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 15 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan R. Marx, for the State.

Patterson Harkavy LLP, by Christopher A. Brook, for defendant.

ARROWOOD, Judge.

¶ 1 Robert Linwood Massey, Jr., ("defendant") appeals from judgments following jury verdicts of guilty for possession of marijuana paraphernalia, simple possession of marijuana, assault on a government official, possession with intent to sell or deliver methamphetamine,[1] intentionally maintaining a dwelling which is resorted to by persons using controlled substances, and for attaining the status of habitual felon. Defendant argues the trial court erred by improperly admitting prior bad act evidence, denying his motion to dismiss the charges of marijuana possession, possession of marijuana paraphernalia, and maintaining a dwelling which is resorted to by persons using controlled substances. Defendant also argues the trial court committed plain error by giving conflicting jury instructions. For the following reasons, we find no error in part and arrest judgment in part.

I. Background

¶ 2 On 29 March 2019, after receiving information from a confidential informant that defendant possessed methamphetamines, Johnston County Sheriff's Office ("JCSO") executed a search warrant on defendant's home. Based on the recovered evidence, defendant was indicted by a Johnston County Grand Jury for possession of marijuana and marijuana paraphernalia, assault on a government official, resisting a public officer, possession of methamphetamine with the intent to sell or deliver, maintaining a dwelling resorted to by persons using methamphetamine, and for being a habitual felon on 6 May 2019. The matters came on for trial on 19 July 2021, Judge Ammons presiding. The evidence at trial tended to show the following:

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1. We note that although defendant's indictment alleged he "unlawfully . . . possess[ed] with intent to sell and deliver a controlled substance, namely [m]ethamphetamine," we defer to the statutory definition set forth in N.C. Gen. Stat. § 90-95(a)(1), which states it is a felony to "sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[,]" throughout this opinion.

¶ 3 In the morning of 29 March 2019, defendant was outside working on his vehicle when he saw officers from JCSO arrive. Upon seeing the law enforcement vehicles, defendant ran inside his residence. Officers entered and found defendant sitting in a recliner "reaching" his left hand "between the seat cushion and arm rest[.]" Defendant was "noncompliant" and refusing "to show his hands clearly." Defendant was "combative[,]" "kicking[,]" "flailing[,]" and "really hard to control[.]" After this brief physical altercation, defendant was subsequently arrested and taken outside, where he, again, attempted to flee.

¶ 4 During the search of defendant's person, officers recovered a cellphone and what they identified as a bag of marijuana. Forensic scientist Lauren Adcox of the North Carolina State Crime Laboratory ("NCSCL") testified that she did not quantify the percentage of tetrahydrocannabinol ("THC") in the substance, thus unable to determine if the substance was marijuana as opposed to legal hemp. On direct examination, JCSO officer testimony initially identified the substance as marijuana, however, during cross-examination the officer equivocated whether the substance was marijuana or hemp.

¶ 5 During search of the residence, officers found a "Hide-A-Key" device inside the recliner defendant was sitting in, which contained "five baggies" of a "crystal substance." Subsequent testing indicated one bag contained 2.81 grams of methamphetamine; consistent with NCSCL policy, the remaining bags were not tested. Two digital scales were also seized, one containing a "white powder residue[.]" Officer testimony indicated that the division of the substance into five baggies, along with the presence of the scales were consistent with selling drugs. On defendant's coffee table, officers recovered: suspected marijuana, "rolling papers," "a one-hitter[,]" which is "a little device that they smoke marijuana out of[,]" and "some clear plastic baggies[.]"

¶ 6 As an individual "suspected of dealing drugs," certain items from defendant's cellphone were also admitted into evidence via a "Cellebrite extraction [report][,]" ("the extraction report"). Officers were able to recover a series of text messages and photographs the State argued were "relevant information" to show knowledge, motive, and intent to commit the charged offenses. The text messages ranged from 20 October 2018 to 25 February 2019. Each photo was undated, except for one picture of a crystalline substance taken 25 December 2018. Defendant filed a motion to exclude the evidence from the extraction report as violative of Rule 404(b) of the North Carolina Rules of Evidence, which the trial court denied.

¶ 7 On 21 July 2021, the jury found defendant guilty of possession with intent to sell or deliver methamphetamine, intentionally maintaining

a dwelling resorted to by persons using controlled substances, simple possession of marijuana, possession of marijuana paraphernalia, and assault on a government official. Thereafter, defendant pled guilty to being a habitual felon. The court consolidated all of the charges for sentencing purposes. Defendant was sentenced to 58 to 82 months, which is the lowest possible sentence in the mitigated range for these charges. Defendant filed a notice of appeal on 27 July 2021.

II. Discussion

¶ 8 On appeal, defendant argues the trial court erred by (1) admitting text messages and photographs from the extraction report in contravention of Rule 404(b), (2) denying his motion to dismiss the charges of marijuana possession, possession of marijuana paraphernalia, and maintaining a dwelling resorted to by persons using methamphetamine, and (3) providing the jury with inconsistent jury instructions. Defendant does not raise any issues on appeal with respect to his conviction of assault on a governmental official. We address each argument in turn.

A. Rule 404(b) Prior Act Evidence

¶ 9 **[1]** Defendant contends the trial court committed prejudicial error by admitting prior bad act evidence in violation of Rule 404(b). Specifically, defendant argues the extraction report should have been excluded as the challenged text messages and photographs are too temporally attenuated and lack sufficient similarity to the current controversy and that their admission was inherently prejudicial under Rule 403. Thus, defendant asserts the challenged evidence was admitted in error as it tended to show defendant's general propensity to deal in controlled substances. We disagree.

¶ 10 This Court reviews whether prior bad act evidence is admissible under Rule 404(b) *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). If admissible, we then "determine whether the trial court abused its discretion in balancing the probative value of the evidence under Rule 403." *State v. Martin*, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474 (2008).

¶ 11 Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation,

> plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). Rule 404(b) is a "general rule of *inclusion* of relevant evidence[,]" but it operates to exclude evidence 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).

¶ 12 When evidence is introduced pursuant to Rule 404(b), there is a "natural and inevitable tendency" for the judge or jury "to give excessive weight [to the challenged evidence]" and "allow it to bear too strongly on the present charge[s][,] . . . justifying a condemnation [of the accused], irrespective of the accused's guilt of the present charge[s]." *State v. Carpenter*, 361 N.C. 382, 387-88, 646 S.E.2d 105, 109-10 (2007) (citation and internal quotation marks omitted). In order to protect a party from such "perils inherent in introducing" evidence under Rule 404(b), the admissibility of the evidence is constrained by the requirements of "similarity and temporal proximity." *Id.* at 388, 646 S.E.2d at 110 (quoting *State v. Al–Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002)). "Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them, but the similarities need not rise to the level of the unique and bizarre." *State v. Pierce*, 238 N.C. App. 537, 545, 767 S.E.2d 860, 866 (2014) (citation and internal quotation marks omitted).

¶ 13 Although Rule 404(b) has a temporal limitation, our Supreme Court has established "remoteness in time is less significant when the prior conduct is used to show intent, motive, [or] knowledge . . . [;] remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (citation omitted). "[W]hile a . . . lapse in time between the prior and present acts generally indicate a weaker case for admissibility under Rule 404(b) . . . remoteness . . . must be considered in light of the specific facts of each case[.]" *State v. Pabon*, 380 N.C. 241, 2022-NCSC-16, ¶ 63 (citations and internal quotation marks omitted).

¶ 14 The proffered evidence "must also be relevant to a material issue in the case." *State v. Thomas*, 268 N.C. App 121, 134, 834 S.E.2d 654, 664 (2019) (citation omitted), *disc. review denied*, 374 N.C. 434, 841 S.E.2d 531 (2020). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2021).

¶ 15 In the instant case, the challenged evidence includes a series of text messages ranging from October 2018 to February 2019. Defendant concedes that these text messages, generally speaking, illustrate defendant's interest in 1) purchasing marijuana from an unidentified source; or 2) possessing marijuana. The challenged photos include 1) defendant's face; 2) money; and 3) a photo of a crystalline substance dated 25 December 2018.

¶ 16 The State introduced the challenged evidence to prove motive, intent, and knowledge. The State argued the messages using colloquial terms for marijuana (i.e. "bud") and marijuana smoking devices (i.e. "blunt" and "bowl") illustrated that defendant was in possession of marijuana, not hemp, on the day of the offense. The State also argued the messages referencing giving some type of controlled substance to a woman, indicated defendant's intent to sell or deliver methamphetamine. With respect to the foregoing reasons, the trial judge gave the following limiting instruction:

> Now, ladies and gentlemen, evidence has been received which might show some possible criminal conduct on the part of the defendant. The phone–the phone records is what I'm talking about. This evidence was received solely for the following purposes: To show that the defendant had a motive for the commission of the crime which is charged in this case and/or to show that the defendant had the intent, which is a necessary element of some of the crimes charged in this case, and/or that the defendant had the knowledge, which is a necessary element of some of the crimes charged in this case. If you believe this evidence, the cell phone evidence, you may consider it, but only for the limited purposes for which I have just stated which it was received. You may not consider it for any other purpose. You may not convict the defendant in this case solely because of something he may have done in the past.

¶ 17 Initially, we note that the challenged text message evidence is relevant as it reflects defendant's guilty knowledge, an element of the charged crimes, of the substances he possessed on 29 March 2019. *See State v. Weldon*, 314 N.C. 401, 406, 333 S.E.2d 701, 704 (1985) (" '[W]here

guilty knowledge is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, *even though* the evidence reveals the commission of another offense by the accused.' ") (emphasis in original) (citation omitted). Because knowledge was at issue during trial, the challenged evidence is relevant as it corroborated the State's contention that the substance defendant possessed was indeed marijuana and not legal hemp. Therefore, admission of the text message portion of the extraction report was permissible with respect to knowledge.

¶ 18 Having determined the evidence was relevant, the next part of our Rule 404(b) analysis involves determining whether the trial court abused its discretion in admitting the evidence under Rule 403. Pursuant to Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2021). "An abuse of discretion occurs when a trial judge's ruling is manifestly unsupported by reason." *State v. Golden*, 224 N.C. App. 136, 145, 735 S.E.2d 425, 432 (citation and internal quotation marks omitted).

¶ 19 Here, the admission of the text message portion of the extraction report survives a Rule 403 determination. Prior to admitting the evidence, the trial court considered defendant's motion to exclude the challenged evidence and heard arguments from the State as well as defense counsel outside the presence of the jury. The trial judge asked clarifying questions and also considered the interval of time the digital data stemmed from. Defense counsel argued that since all, with the exception of one photo was undated, and there were no text messages in the immediate days preceding the offense, that the admission of the extraction report was simply indicative of someone using drugs, not selling them. The trial court was not persuaded by defendant's arguments, stating "weight [of the evidence] rather than credibility" was impacted by the lack of messages surrounding the date of the offense. Accordingly, the trial court's decision was supported by reason and does not reflect an abuse of discretion.

¶ 20 Although we find the challenged text message evidence is admissible, we reject the State's arguments on appeal that similarity and temporal connection are not necessary requirements to admit evidence under Rule 404(b). Our case law is clear that similarity and temporal proximity are the "twin north stars" to guide the evidentiary considerations inherent to a Rule 404(b) analysis. *Pabon*, ¶ 63.

¶ 21 With respect to the photographs that are also a portion of the extraction report, assuming *arguendo*, that the photographic evidence fails the Rule 404(b) analysis and was admitted in error, we find such error harmless because of the substantial amount of unchallenged evidence introduced, including: two scales, 2.81 grams of methamphetamine, five separate bags of methamphetamine, and items of marijuana paraphernalia.

¶ 22 Because we find that the trial court did not err in admitting the text messages and the admission of the photographic evidence was at most harmless error, defendant's argument is overruled.

B. Motion to Dismiss

¶ 23 Defendant also argues that the trial court erred in denying his motion to dismiss the charges of simple possession of marijuana, possession of marijuana paraphernalia, and maintaining a dwelling resorted to by persons using methamphetamine because there was insufficient evidence from which a reasonable jury could reach a conviction. For the following reasons, we agree in part, and vacate defendant's conviction for maintaining a dwelling resorted to by persons using methamphetamine.

¶ 24 We review 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) (citation omitted). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citations omitted). Substantial evidence is defined as " '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 (citation omitted). "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) (citation omitted). "The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss." *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997).

¶ 25 On appeal, the question for this 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 defendant's being the perpetrator of the offense. If so, the motion is properly denied." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

1. Possession of Marijuana and Marijuana Paraphernalia

¶ 26 **[2]** Our statutes state that a person who possesses marijuana, a Schedule VI controlled substance, shall be guilty of a Class 3 misdemeanor. N.C. Gen. Stat. § 90-95(d)(4) (2021). Thus, in order to convict a defendant of marijuana possession, the State has the burden of proving "(1) that the defendant knowingly possessed a controlled substance and (2) that the substance was marijuana." *State v. Johnson*, 225 N.C. App. 440, 454-55, 737 S.E.2d 442, 451, *mandamus denied*, 366 N.C. 566, 738 S.E.2d 395 (2013) (citation omitted). It is also a separate Class 3 misdemeanor for a person "to possess with the intent to use, [marijuana] drug paraphernalia[.]" N.C. Gen. Stat. § 90-113.22(a) (2021).

¶ 27 At the time of defendant's alleged offenses, marijuana was defined as "all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin[.] . . . The term does not include industrial hemp as defined in [N.C. Gen. Stat. §] 106-568.51[.]" N.C. Gen. Stat. § 90-87(16) (2019). N.C. Gen. Stat. § 106-568.51 is no longer in effect and has since been replaced by Session Law 2022-32, which states the distinction between marijuana and hemp rests on the percentage of THC; hemp contains "no[] more than three-tenths of one percent (0.3%) [of THC] on a dry weight basis."

¶ 28 Here, defendant argues that by failing to introduce evidence of the chemical composition of the seized substance, the State is unable to provide substantial evidence that the substance found was marijuana, as opposed to legal hemp. Defendant is correct that the evidence at trial did not establish the chemical composition of the seized substance and thus did not definitively establish that the substance was marijuana. However, our analysis on appeal is limited to analyzing the sufficiency of the evidence in order to submit the case to the jury.

> In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed before the trial court contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Osborne, 372 N.C. 619, 626, 831 S.E.2d 328, 333 (2019) (citations and quotation marks omitted).

¶ 29 Thus, the distinction between the admissibility of the evidence and the sufficiency of the evidence is imperative. *See id.* at 630-31, 831 S.E.2d at 334-35. "[I]t simply does not matter whether some or all of the evidence contained in the record should not have been admitted[,] . . . all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction[.]" *Id.* at 630, 831 S.E.2d at 335 (citation omitted).

> For that reason, a reviewing court errs to the extent that it determines whether the evidence suffices to support a defendant's criminal conviction by ascertaining whether the evidence relevant to the issue of the defendant's guilt should or should not have been admitted and then evaluating whether the admissible evidence, examined without reference to the allegedly inadmissible evidence that the trial court allowed the jury to hear, sufficed to support the defendant's conviction.

Id. at 630, 831 S.E.2d at 336.

¶ 30 In *State v. Duncan*, 2022-NCCOA-699 (2022) (unpublished), this Court reiterated the principal established in *State v. Osborne*. There, as defendant in this case argues, the defendant alleged the trial court erred in denying her motion to dismiss marijuana possession and marijuana paraphernalia charges. *Duncan*, ¶ 12. In *Duncan*, the defendant contended an officer's opinion identifying a substance as marijuana, as opposed to hemp, was insufficient to raise more than "a suspicion or conjecture of [her] guilt[,]" due to a lay person's inability to distinguish between marijuana and hemp. *Id.* ¶ 14. In that case, the officer's lay opinion was the only evidence identifying the substance found as marijuana. *Id.* ¶ 23. Because our review focused on the sufficiency of evidence to support a criminal conviction, we declared, "[the officer's] lay opinion identification of marijuana must be considered when evaluating all of the evidence in the light most favorable to the State." *Id.* ¶ 26. Based on the officer's testimony, we found the State presented sufficient evidence that the defendant possessed marijuana and marijuana paraphernalia. *Id.* We find the reasoning of *Duncan* instructive.

¶ 31 In the case *sub judice*, we are persuaded based upon our review of all the evidence introduced under the *Osborne* and *Duncan* analysis that when viewed in the light most favorable to the State, the State

produced sufficient evidence establishing the substance was marijuana and the trial court did not err in denying defendant's motion to dismiss. "The trial court's function is to determine whether the evidence allows a '*reasonable inference*' to be drawn as to the defendant's guilt of the crimes charged." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citation omitted) (emphasis in original). The trial court need only determine "whether the evidence presented constitutes substantial evidence" and thus "is a question of law for the court." *Id.* at 66, 296 S.E.2d at 652 (citation omitted). It is for the jury to "weigh evidence, assess witness credibility, [and] assign probative value to the evidence . . . and determine what the evidence proves or fails to prove." *State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012) (citation omitted). Our established precedent illustrates

> the great deference which our courts, whether at trial or appellate level, must give to the vital role of the citizens of our state's local communities who are selected to serve as jurors. Once the trial court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then *it is for the jury to decide* whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

State v. Taylor, 379 N.C. 589, 2021-NCSC-164, ¶ 51 (citation omitted) (quotation marks and brackets omitted) (emphasis in original).

¶ 32 Here, the State's evidence included digital data indicating that the seized substance was marijuana; defendant referred to it as "bud," and he attempted to procure "bud" from someone he was messaging. The substance was also found with methamphetamine, an illegal substance, and found within single plastic bags, commonly associated with drugs. Additionally, the arresting officer initially identified the seized substance as marijuana. That the officer later equivocated as to identity of the substance goes to the weight the jury should give the evidence, not to whether it is sufficient to take the case to the jury. This evidence is sufficient to allow the jury to determine whether the substance was marijuana or hemp. With respect to defendant's argument regarding the necessity of a chemical analysis of the substance to exclude hemp as a potential substance, our courts have never held this is necessary and we decline to establish a new requirement in this case. Because our review is limited to the sufficiency of the evidence to support a criminal conviction, the trial court did not err in denying defendant's motion to dismiss the marijuana-related charges.

2. Maintaining a Dwelling Resorted to by Persons Using Methamphetamine

¶ 33 **[3]** Defendant also contends it was error for the trial court to deny his motion to dismiss maintaining a dwelling resorted to by persons using methamphetamine for insufficient evidence. We agree.

¶ 34 Our statutes declare "it shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . dwelling house . . . which is resorted to by persons using controlled substances[.]" N.C. Gen. Stat. § 90-108(a)(7) (2021). Thus, in order to survive a motion to dismiss, the State has the burden of providing substantial evidence that defendant intentionally allowed others *to resort to* his house to use controlled substances. *State v. Simpson*, 230 N.C. App. 119, 121, 748 S.E.2d 756, 759 (2013) (emphasis added).

¶ 35 Here, the State failed to establish that anyone outside of defendant, used defendant's home to consume controlled substances. Defendant cannot "resort to" his own residence. *Id.* at 122, 748 S.E.2d at 759. In an effort to prove defendant committed the offense charged, the State attempts to rely solely on ambiguous text messages that do not explicitly refer to methamphetamine nor prove defendant *knowingly allowed others* to use his home in such manner. This argument is not convincing as these text messages fail to rise above the level of creating a mere suspicion of methamphetamine use. As this Court has established previously, "we do not believe the General Assembly intended 'resorted to,' as used in N.C. Gen. Stat. § 90-108(a)(7), to include persons who own the [dwelling] at issue." *Id.*

¶ 36 Because we find that the State failed to provide any, much less substantial evidence, we vacate defendant's conviction of maintaining a dwelling resorted to by persons using methamphetamine. As defendant's third issue on appeal related to the jury instruction given for this offense, we do not reach that issue as we have vacated that conviction.

¶ 37 Remanding defendant's case for resentencing on the vacated conviction is not necessary, however, since all of the offenses for which defendant was convicted was consolidated into a single judgment and defendant received the lowest possible sentence in the mitigated range. "[W]e do not remand for resentencing where [d]efendant has already received the lowest possible sentence[.]" *State v. Cromartie*, 257 N.C. App. 790, 797, 810 S.E.2d 766, 772 (2018) (citation omitted). Remanding is necessary after arresting judgment only if we are "unable to determine what weight, if any, the trial court gave to each of the separate convictions[.]" *Id.* (quoting *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124,

127-28 (1990)). However, we arrest judgment "so as to avoid any collateral consequences." *Cromartie*, at 797, 810 S.E.2d at 772.

¶ 38 Accordingly, we arrest judgment on defendant's maintaining a dwelling resorted to by persons using controlled substances conviction.

III. Conclusion

¶ 39 For the reasons set forth above, we conclude the trial court erred in denying defendant's motion to dismiss maintaining a dwelling resorted to by persons using methamphetamine, in all other respects we find no error.

NO ERROR IN PART, VACATED AND ARRESTED IN PART.

Judges MURPHY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
COREY LEE OWENS

No. COA22-517

Filed 17 January 2023

1. Criminal Law—prosecutor's opening statement—forecast of evidence not introduced—not grossly improper

In a trial for taking indecent liberties with a child, the trial court was not required to intervene ex mero motu during the State's opening statement (to which defendant did not object) or to instruct the jury to disregard that opening statement, in which the State forecast evidence from a witness who the State said would corroborate location details that had been described by the victim but who did not testify at trial. The prosecutor's statements were not so grossly improper or prejudicial as to warrant a new trial; further, the trial court properly instructed the jury that opening statements did not constitute evidence and the State's failure to introduce forecast evidence could have been addressed by defense counsel at closing.

2. Evidence—expert testimony—indecent liberties trial—consistency of victim's statements—credibility vouching

In a trial for taking indecent liberties with a child, there was no plain error in the trial court's allowing a sheriff's office investigator

to testify regarding her opinion as to how consistent the child victim was when recounting defendant's conduct. The investigator's testimony did not constitute impermissible vouching of the victim's credibility because she did not substantiate or corroborate defendant as the perpetrator, and she did not testify regarding the victim's propensity for truthfulness.

Appeal by defendant from judgment entered 6 October 2021 by Judge Lisa C. Bell in Rutherford County Superior Court. Heard in the Court of Appeals 29 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

William D. Spence for defendant-appellant.

TYSON, Judge.

¶ 1 Corey Lee Owens ("Defendant") appeals from a jury's verdict finding him guilty of indecent liberties with a child and attaining the status of a habitual felon. Our review shows no error.

I. Background

¶ 2 Defendant engaged in a romantic relationship with Tina Williams between 2009 and 2012. Defendant lived in a single-wide mobile home with Patrick Harrison in 2011. Williams' daughter, "Sue," was between four and seven years old during the period Defendant and Williams dated. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of minor). Defendant would babysit Sue, while Williams was working on the weekends or when Sue was not in school or at home.

¶ 3 In 2011, Williams left Sue with Defendant. Sue fell asleep on Defendant's couch. Defendant woke Sue, brought her into the bedroom of the trailer, and told her to remove her clothes. Defendant removed his clothes. Defendant grabbed a bottle of lubricant and squirted liquid onto Sue's hands. Defendant told Sue to rub his penis. Sue testified Defendant's penis became hard.

¶ 4 Sue testified Defendant told her to lay down, turn on her side, and laid on his side up against her. Defendant placed his penis between the crack of her buttocks and began pumping her. When Defendant had finished, he told Sue to get dressed. He got down on his knees and asked Sue if she wanted to play a game called "Secrets," which Defendant said

he had played with Williams, and also told Sue not to tell the "secret" to anybody. Sue testified Defendant did not threaten her nor insert his penis inside of either her vagina or anus.

¶ 5 Sue testified the shaft of Defendant's penis had "two bumps." Sue's Mother, Williams, testified Defendant he had two "ball bearing" implants inserted near the top of the shaft of his penis during the entirety of their relationship.

¶ 6 Sue later became friends with Defendant's biological daughter in the sixth grade. Sue testified she told Defendant's daughter and another friend the details of this incident, which had occurred five years earlier. Sue did not remember whether she had identified Defendant as the person who committed these acts to his daughter. Defendant's daughter told Sue to tell an adult about the acts.

¶ 7 Sue testified her grandparents had asked her on multiple times in the two preceding years whether Defendant had "done anything" to her, but she always denied it. The summer after completing the sixth grade, Sue told her mother, Williams, about the incident. Williams did not force Sue to report the incident and she left the decision to Sue. While in the seventh grade, Sue asked Williams to report the incident to law enforcement, which she did.

¶ 8 Rutherford County Sheriff's Investigator Julie Greene arranged an interview for Sue at the Children's Advocacy Center in March 2018. Greene viewed Sue's interview through a live video feed in a monitoring room.

¶ 9 Greene spoke with Defendant. Greene asked Defendant how Sue would have been able to describe the appearance of his penis. Defendant told Greene there was no reason for Sue to be able to describe his penis. Greene asked how Sue could have known about the "bumps" on Defendant's penis and whether those "bumps" existed before his relationship began with Williams. Defendant confirmed he had two "bumps" or "ball bearings" implanted in his penis prior to his relationship with Williams. Defendant also told Greene he had given Williams graphic drawings, letters, and photographs of his body during their relationship. Defendant denied doing anything sexually inappropriate with Sue.

¶ 10 Defendant was indicted for one count of indecent liberties with a child and for attaining habitual felon status on 5 June 2019. While Defendant was awaiting trial, he sent his own daughter a letter. In the letter Defendant sought her assistance in a plan to discredit Sue's credibility. He urged his daughter to report Sue had made up the allegations

against him to protect Williams. Defendant specifically asked for his daughter's involvement to "betray" Sue and instructed her to burn the letter after she had read it. A redacted version of the letter was read into evidence during Defendant's trial without objection.

¶ 11 Defendant was convicted of one count of taking indecent liberties with a child, a class F felony, on 6 October 2021. Defendant pleaded guilty to attaining the status of being a habitual felon, which raised his taking indecent liberties with a child conviction from a class F felony offense class level punishment to a class C felony offense class level punishment.

¶ 12 Defendant was sentenced as a prior record level IV offender to an active term of 96 to 125 months. The trial court also entered a permanent no contact order and ordered Defendant to register as a sex offender for life, upon his release from prison. Defendant appeals.

II. Jurisdiction

¶ 13 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021).

III. Issues

¶ 14 Defendant argues the trial court erred by failing to intervene *ex mero motu* during the State's opening statement and argues the trial court plainly erred by allowing a witness to vouch and bolster the victim's testimony.

IV. State's Opening Statement

¶ 15 **[1]** Defendant argues the trial court erred by failing to declare a mistrial *ex mero motu*, or it alternatively erred by not instructing the jury to disregard the State's opening statement. Defendant failed to object to the challenged statement at trial.

A. Standard of Review

¶ 16 When a defendant fails to object to portions of an opening statement, our review is limited to an examination of whether the trial court was required to intervene *ex mero motu*. *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685 (1986). "Under this standard, [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. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (citation and quotation marks omitted).

B. Analysis

¶ 17 In her opening statement, the prosecutor stated:

> You are going to hear from Patrick Harrison. He was the defendant's roommate in 2011 at their trailer in Ellenboro when this happened. You are going to hear from Patrick some details. Now, he wasn't around a lot. He wasn't there when this happened to [Sue], but you're going to hear details from him about their trailer and the set up in the room that this happened to show that it is consistent with [Sue's] testimony, specifically that this happened on a mattress on the floor in the back room. And he will corroborate that and say that there was a room like that back in 2011.

Harrison never testified at trial. Defendant contends and argues these statements were facts and matters outside of the record.

¶ 18 To determine whether a prosecutor's statement was grossly improper, this Court must examine the context in which the remarks were made and the factual circumstances to which they refer. *See State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998); *State v. Mills*, 248 N.C. App. 285, 291, 788 S.E.2d 640, 645 (2016).

¶ 19 Our Supreme Court has applied a two-step analysis on prosecutor's statements: "(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial. *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (citation omitted). In order to demonstrate prejudicial error, a defendant must show: "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. The burden of showing such prejudice . . . is upon the defendant." N.C. Gen. Stat. § 15A-1443(a) (2021).

¶ 20 The purpose of the opening statement is to forecast the evidence likely to be admitted in the case. *Gadden*, 315 N.C. at 417, 340 S.E.2d at 685. "[T]rial counsel [is] granted wide latitude in the scope of jury argument[.]" *State v. Thomas*, 350 N.C. 315, 360, 514 S.E.2d 486, 513 (1999) (citation omitted).

¶ 21 Here, the trial court properly instructed the jury that the party's opening statements are not evidence. While opening statements are merely a "forecast [of] the evidence," failure to deliver evidence as

promised in the opening is fair game for the opposing party to argue in the closing. S*ee Gadden*, 315 N.C. at 417, 340 S.E.2d at 685.

¶ 22 Defendant further asserts the trial court erred by allowing the corroboration Harrison might have offered. However, the State did not assert Harrison would corroborate the alleged abuse had occurred, only to potentially state Defendant's room in the mobile home contained a mattress on the floor in the back room in 2011 as Sue had described.

¶ 23 Defendant failed to object and did not move to strike. The State did not make improper statements to the jury in its opening argument. Defendant has failed establish the State's opening statement was "grossly improper" and prejudicial to warrant a new trial. *Huey*, 370 N.C. at 179, 804 S.E.2d at 468. Defendant failed to show the State's comments "so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted). Presuming, without deciding, improper statements were made by the State, the trial court did not commit reversible error by failing to intervene *ex mero motu*. The statements were not so "grossly improper" and prejudicial to Defendant as to require the trial court's intervention on its own motion. *Huey*, 370 N.C. at 179, 804 S.E.2d at 468. *Waring*, 364 N.C. at 499, 701 S.E.2d at 650.

V. Alleged Bolstering

¶ 24 **[2]** Defendant argues the trial court committed plain error by allowing Greene to improperly vouch for or bolster Sue's credibility. Defendant concedes his trial counsel also failed to object to the testimony he now challenges and the issue is not preserved at trial and on appeal. Unpreserved evidentiary issues are reviewed for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

A. Standard of Review

¶ 25 "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action 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." N.C. R. App. P. 10(a)(4).

¶ 26 This Court's review under plain error is to be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" to overcome dismissal for a defendant's failure to preserve. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted). To constitute plain error, Defendant carries and maintains the

burden to show "not only that there was error, but that absent the error, the jury probably would have reached a different result to demonstrate prejudice" and for this Court to reverse the judgment. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

B. Analysis

¶ 27 Defendant argues the following two lines of questioning during the State's direct examination of Greene constitutes impermissible bolstering:

> [The State]: Was her disclosure on that day consistent with what you heard her testify to today?
>
> [Greene]: It was.
>
> . . .
>
> [The State]: Each time that you have heard [Sue] disclose what happened, has she been consistent in her disclosure?
>
> [Greene]: Yes, ma'am.

¶ 28 The Supreme Court of North Carolina has held "[t]he jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial–determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) (citation omitted). "It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citation omitted).

¶ 29 This Court and our Supreme Court have repeatedly admonished: "a witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010). In *Giddens*, this Court has held reversible error occurs when a DSS child protective services investigator testified the defendant "was substantiated as the perpetrator." *Id*. at 118, 681 S.E.2d at 506.

¶ 30 "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Chandler*, 364 N.C. 313, 318, 697 S.E.2d 327, 331 (2010) (citations omitted).

¶ 31 Unlike in *Giddens*, the testimony of Greene did not substantiate or corroborate Defendant as the perpetrator. The State asked if Sue's

"disclosure" was consistent. Our Supreme Court has expressed concern and has warned the State of its gross use of "disclosure" in a context to vouch or bolster a prosecuting witness upon proper objection. *See State v. Betts*, 377 N.C. 519, 524, 2021-NCSC-68, ¶19, 858 S.E.2d 604-05 (2021) ("Even if it were error for the trial court to admit testimony of the State's witness who used the term 'disclose,' defendant has not shown plain error . . . . Defendant has not shown that the use of the word 'disclose' had a probable impact on the jury's finding that he was guilty." (citation omitted)). Given the context of the testimony and the limited questions asked by the State, Greene's testimony did not vouch for Sue's credibility to demonstrate error and prejudice under plain error review. *Id.* at 525, 2021-NCSC-68, ¶21, 858 S.E.2d at 605.

¶ 32 Greene did not testify that Sue "was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988). Greene testified Sue's statements and accusations remained consistent. Defendant's argument under plain error review is overruled. *Betts*, 377 N.C. at 523, 858 S.E.2d at 605.

VI. Conclusion

¶ 33 The trial court did not err when it failed to intervene *ex mero motu* in the State's opening argument or by failing to instruct the jury to disregard the State's opening statement in the absence of an objection and motion to strike.

¶ 34 The trial court did not err in admitting Greene's testimony about consistency in Sue's accusations without objection. Under plain error review, this testimony did not improperly bolster or vouch for the victim's credibility.

¶ 35 Defendant received a fair trial, free of plain or prejudicial error he preserved and argued. We find no error in the jury's verdict, Defendant's plea, or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 JANUARY 2023)

GILLELAND v. ADAMS 2023-NCCOA-9 No. 21-691	Lincoln (19CVD821)	Affirmed
HWANG v. CAIRNS 2023-NCCOA-10 No. 22-31	Durham (18CVS2942)	Affirmed; Cross-Appeal Dismissed.
IN RE M.W. 2023-NCCOA-11 No. 22-21	Cumberland (20JA252) (20JA253)	Affirmed In Part, Reversed In Part, Vacated In Part And Remanded.
STATE v. ABRAMS 2023-NCCOA-12 No. 22-347	Rutherford (19CRS50950) (20CRS92-93)	Affirmed
STATE v. ANDERSON 2023-NCCOA-13 No. 22-379	Cabarrus (21CRS52152)	No Error.
STATE v. BOYKIN 2023-NCCOA-14 No. 22-542	Sampson (15CRS51148)	Affirmed.
STATE v. BRYAN 2023-NCCOA-15 No. 22-184	New Hanover (19CRS57521) (19CRS58143) (20CRS52616)	Vacated and Remanded
STATE v. COX 2023-NCCOA-16 No. 22-628	Wake (19CRS201042) (19CRS203119) (19CRS703266)	No Error
STATE v. MESSER 2023-NCCOA-17 No. 22-551	McDowell (20CRS280)	No Error
STATE v. THOMAS 2023-NCCOA-18 No. 22-513	Pitt (16CRS57635-38)	Dismissed.
YOUNG v. CITY OF DURHAM 2023-NCCOA-19 No. 22-578	Durham (21CVS2194)	Affirmed

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