291 N.C. App.—No. 3 Pages 312-403

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 4, 2024

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

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OF
NORTH CAROLINA

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COURT OF APPEALS

CASES REPORTED

FILED 21 NOVEMBER 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory order—custody action—motion to intervene allowed—substantial right—In a child custody matter, the trial court's interlocutory order allowing a grandparent's motion to intervene affected the natural parents' constitutional right to the care, custody, and control of their child and was therefore immediately appealable as affecting a substantial right. **Linker v. Linker, 343.**

Interlocutory order—substantial right test—more than mere assertion required—In an action to enforce a non-compete clause filed by a roofing contractor (plaintiff) against a former employee, the appellate court lacked jurisdiction to review the trial court's interlocutory order denying plaintiff's motion for a preliminary injunction where plaintiff failed to include in its statement of the grounds for appellate review any factual support—particular to this case—for its conclusory assertions that the order affected a substantial right, or a specific explanation of how the order would work injury absent appellate review. **Mecklenburg Roofing, Inc. v. Antall, 351.**

Preservation of issues—double jeopardy—multiple assault convictions—separate and distinct offenses—In an appeal from various charges arising from a domestic violence incident, the Court of Appeals declined to invoke Appellate Rule 2

to address defendant's unpreserved argument that his multiple assault convictions were based on one continuous assault and therefore violated the constitutional prohibition against double jeopardy. The evidence showed that, throughout the time that defendant attacked his romantic partner in their shared home, there were "interruptions in the momentum" of the attack—where he would pause to do something else, including hitting the victim's mother or momentarily changing location—such that the record supported a finding of several, separate assaults. Thus, defendant failed to show the requisite manifest injustice or merit to justify applying Rule 2 to his appeal. **State v. Tucker, 379.**

ASSAULT

Inflicting serious bodily injury—by strangulation—distinct interruption between two assaults—separate convictions upheld—In an appeal from multiple convictions arising from a domestic violence incident, during which defendant attacked his romantic partner in the home that she shared with him and with her mother, defendant's separate convictions for assault inflicting serious bodily injury and assault by strangulation were upheld where the record showed a distinct interruption in the momentum of the attack, which supported a finding of two separate assaults of the victim rather than one continuous assault. Specifically, defendant inflicted serious bodily injury on the victim by head-butting, punching, and then kicking her in the bedroom; then, he left the bedroom to hit the victim's mother, busting her lip, before returning to the bedroom to choke the victim to the point of blackout. **State v. Tucker, 379.**

With deadly weapon inflicting serious injury—knife as deadly weapon per se—manner of use—In defendant's trial for assault with a deadly weapon inflicting serious injury arising from an altercation over macaroni and cheese at a neighborhood cookout—during which the victim sustained numerous stab wounds to her head, face, chest, arm, and hand—the trial court did not err by instructing the jury that the knife used by defendant to attack the victim was a deadly weapon per se. Although the folding knife that was allegedly used in the attack was never found, the trial court's determination that it was a deadly weapon as a matter of law was supported by the circumstances and manner of defendant's use of the weapon, which caused the victim great bodily harm. Further, where the State presented evidence of each element of the offense and there was no conflicting evidence about any element, the trial court was not required to instruct the jury on any lesser-included offenses. **State v. Webster, 392.**

BAIL AND PRETRIAL RELEASE

Kidnapping—connected to domestic violence—no pretrial release hearing—no flagrant constitutional violation—no prejudice shown—After defendant was incarcerated for multiple charges arising from a domestic violence incident, the trial court did not err in denying defendant's motion to dismiss a kidnapping charge even though the State had failed to hold a pretrial release hearing relating to that charge as required under N.C.G.S. § 15A-534.1 (requiring pretrial release hearings for domestic violence crimes). The State's violation of defendant's constitutional rights was not a flagrant violation, since the record suggested that the State's mistake was inadvertent rather than intentional where the State did hold pretrial release hearings for all of defendant's other charges and quickly arranged for a hearing for defendant's kidnapping charge after defendant filed his motion to dismiss. Moreover,

defendant failed to show irreparable prejudice to the preparation of his case, where defendant did not post bond for any of his other charges and, therefore, would have remained incarcerated even if the State had complied with the statutory mandate in section 15A-534.1. **State v. Tucker, 379.**

CHILD CUSTODY AND SUPPORT

Custody—awarded to grandparents—factual findings—evidentiary support —The trial court did not err in awarding custody of plaintiff-mother's minor daughter to the child's paternal grandparents where clear and convincing evidence supported the court's findings of fact, including that: the mother failed to ensure that her child regularly attended school, which caused the child's academic performance to suffer; the conditions of the mother's home were unsafe and unsuitable for the child; the mother once took her daughter to play in the park at night despite the dangers of doing so; and the child had expressed to others that she did not want to be with her mother. Furthermore, these findings supported the court's conclusion that the mother had acted inconsistently with her constitutionally protected status as a parent. **Evans v. Myers, 312.**

Standing—grandparent—motion to intervene—filed prior to death of party—ongoing case—In a child custody matter between the child's parents, where the child's paternal grandmother filed a motion to intervene after the father filed a motion to modify custody and before the father died, the trial court properly concluded that the grandmother had standing to seek visitation because, although the court did not grant the motion to intervene until after the father's death, the underlying custody action was ongoing at the time the motion was filed. Therefore, the trial court properly denied the mother's motion to dismiss pursuant to Civil Procedure Rule 12(b)(1) (lack of subject matter jurisdiction). **Linker v. Linker, 343.**

CHILD VISITATION

Parent's visitation—limited to twice a year—required finding—unfitness or best interests of the child—In a child custody matter, where the trial court awarded primary custody of a mother's minor daughter to the paternal grandparents, the court erred by denying the mother her right to reasonable visitation—limiting her to only two visits per year—without entering a finding that the mother was an unfit person to visit the child or that visitation with the mother was not in the child's best interests. **Evans v. Myers, 312.**

CRIMINAL LAW

Cross-examination of defendant—irrelevant and improper impeachment—plain error analysis—In a prosecution for two counts of robbery with a dangerous weapon, the trial court did not commit plain error when it failed to intervene ex mero motu during the State's cross-examination of defendant. The State's questions regarding defendant's use of curse words in his interactions with the court were irrelevant to the case and constituted improper impeachment. However, the court's failure to intervene did not rise to the level of plain error where there was ample evidence that defendant committed the robberies he was charged with, and therefore it was unlikely that the court's error impacted the jury's finding that defendant was guilty. **State v. Hamilton, 368.**

Motion for new counsel—insufficient basis—blindness—In a prosecution for two counts of robbery with a dangerous weapon, the trial court did not abuse its discretion in denying defendant's motion for new counsel, where the sole basis for defendant's motion was that his counsel was blind. Defendant did not offer a valid reason explaining why his counsel was not "reasonably competent" to present his case, nor did defendant assert that a conflict existed between them that would have rendered his appointed counsel "incompetent or ineffective." **State v. Hamilton, 368.**

JUVENILES

Delinquency—disposition—statutory factors—insufficient findings—In a juvenile delinquency matter in which a minor admitted to simple affray and unauthorized use of a motor vehicle, the trial court's disposition order was vacated for failure to make written findings addressing each of the five factors in N.C.G.S. § 7B-2501(c). The deficiency of the findings were not overcome by the court's incorporation of the predisposition report, risk assessment, and needs assessment, or by the inclusion of "other findings," which provided details of the juvenile's difficulties with her living situation but did not relate to the offenses or the juvenile's degree of culpability. **In re A.G.J., 322.**

KIDNAPPING

First-degree—distinct from underlying felony—sufficiency of evidence—double jeopardy—domestic violence incident—In a prosecution for multiple convictions arising from a domestic violence incident, during which defendant attacked his romantic partner in the home that she shared with him and with her mother, the trial court did not violate the constitutional prohibition against double jeopardy by convicting defendant of both kidnapping and of the underlying assault. The evidence showed that defendant dragged the victim by the hair into the bedroom, ripping her hair out, and then choked her; because the act of dragging her into the bedroom was separate from the act of choking her, and because this and other acts of confining the victim to the bedroom were not necessary to defendant's assault of the victim (he could have assaulted her anywhere in the home), there was sufficient evidence to support separate convictions for kidnapping and assault. **State v. Tucker, 379.**

PROBATION AND PAROLE

Probation revocation—new criminal offense—sufficiency of evidence—admission to viewing pornography—The trial court did not abuse its discretion by revoking defendant's probation where the State's evidence that defendant had admitted to downloading and viewing child pornography was sufficient to reasonably satisfy the court that defendant had violated a condition of his probation by committing a new offense. Although the court did not specify which new crime defendant had committed, defendant's actions fulfilled the elements of third-degree exploitation of a minor, which was also the underlying crime for which defendant had been placed on probation. **State v. Bowman, 359.**

Probation revocation—notice—allegations of behavior—sufficiency—The trial court had jurisdiction to revoke defendant's probation where the allegations in the probation violation report provided sufficient notice of the probation hearing and its purpose. Although the report did not explicitly allege that defendant had committed a criminal offense, the report's description of defendant's behavior—that

N.C. COURT OF APPEALS
2024 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	8 and 22
February	5 and 19
March	4 and 18
April	1, 15, and 29
May	13 and 27
June	10
August	12 and 26
September	9 and 23
October	7 and 21
November	4 and 18
December	2

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

EVANS v. MYERS

[291 N.C. App. 312 (2023)]

MELANIE ANN EVANS, PLAINTIFF
v.
RAY ALLEN MYERS, DEFENDANT
v.
ALLEN AND CHRISTINE MYERS, INTERVENORS

No. COA22-952

Filed 21 November 2023

1. Child Custody and Support—custody—awarded to grandparents—factual findings—evidentiary support

The trial court did not err in awarding custody of plaintiff-mother's minor daughter to the child's paternal grandparents where clear and convincing evidence supported the court's findings of fact, including that: the mother failed to ensure that her child regularly attended school, which caused the child's academic performance to suffer; the conditions of the mother's home were unsafe and unsuitable for the child; the mother once took her daughter to play in the park at night despite the dangers of doing so; and the child had expressed to others that she did not want to be with her mother. Furthermore, these findings supported the court's conclusion that the mother had acted inconsistently with her constitutionally protected status as a parent.

2. Child Visitation—parent's visitation—limited to twice a year—required finding—unfitness or best interests of the child

In a child custody matter, where the trial court awarded primary custody of a mother's minor daughter to the paternal grandparents, the court erred by denying the mother her right to reasonable visitation—limiting her to only two visits per year—without entering a finding that the mother was an unfit person to visit the child or that visitation with the mother was not in the child's best interests.

Appeal by Plaintiff from order entered 19 May 2022 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 18 October 2023.

Barton & Doomy Law Firm, PLLC, by Matthew J. Barton, for Plaintiff-Appellant.

No brief for Defendant.

Connell & Gelb PLLC, by Michelle D. Connell, for Intervenors-Appellees.

COLLINS, Judge.

Plaintiff Melanie Evans appeals from the trial court's order granting Christine and Allen Myers legal and physical custody of her minor child and awarding her extremely limited visitation. Plaintiff argues that the trial court erred by awarding Intervenors custody of the minor child and by restricting Plaintiff's visitation to two days a year. The trial court did not err by awarding Intervenors custody of the minor child because the findings of fact are supported by clear and convincing evidence and the findings of fact support the conclusions of law. However, the trial court erred by denying Plaintiff reasonable visitation absent a finding that Plaintiff is an unfit person to visit the child or that visitation with Plaintiff is not in the best interest of the child. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. Background

Plaintiff Melanie Evans and Defendant Ray Myers were in a relationship from June 2009 until March 2017 but were never married.[1] The parties share one minor child, Callie,[2] who was born on 18 April 2013.

Plaintiff filed a complaint for child custody in January 2017. The trial court entered a consent order on 14 September 2017, which stated that "the parties are hereby granted joint legal and physical custody of the minor child . . . with the parties exercising week on, week off visitation," and that "[t]he parties shall enroll the minor child into Rowan-Salisbury Schools in the school closest to Plaintiff's home, unless otherwise agreed upon by the parties." Plaintiff filed a motion for a show cause order on 28 December 2018, alleging that Defendant failed to abide by the consent order because "the child is suppose to go to a Rowan school closest to Plaintiff but Plaintiff resides in Cabarrus County now & request the child be in that school district."

Christine and Allen Myers ("Intervenors"), who are the paternal grandparents of Callie, filed a motion to intervene and modify custody, alleging that there had been a substantial change of circumstances since the entry of the consent order, and that "it would be in the best interest of the minor child to award both temporary and permanent sole legal custody and primary physical custody of the minor child to the Intervenors and secondary physical custody, with appropriate visitation to the Plaintiff & Defendant." Intervenors specifically alleged that

1. Defendant is not a party to this appeal.

2. We use a pseudonym to protect the identity of the minor child.

"[w]hen the Plaintiff-mother has custody of the minor child, the child is not transported to school in Rowan County and thereby misses school every other week"; that "Plaintiff and Defendant have been served with truancy papers related to the child's repeated and extended absences from school"; and that "[t]he minor child has expressed fear and 'hate' for her mother, and has exhibited symptoms consistent with emotional distress, including screaming 'don't hit me' in the middle of the night, wetting her pants, and worrying about not getting enough to eat at her mothers."

After a bench trial on 21 May 2019, the trial court entered a custody order on 13 June 2019, ordering that:

> 1. Intervenors, Allen and Christine Myers, shall have legal and physical custody of the minor child . . . .
>
> 2. Defendant shall have visitation with the minor child as mutually agreed and as follows:
>
> a. Up to two consecutive weeks at the close of school for the summer with thirty days prior written notice to Intervenors of the two weeks Defendant wants to exercise his visitation; and
>
> b. After the child has spent two consecutive weeks during the summer with Intervenors following Defendant's first two consecutive week period, Defendant shall have the child for up to fourteen days (two weeks) after Intervenors two weeks in the summer as long as it does not conflict with the resumption of school for the minor child.
>
> 3. Plaintiff shall have visitation with the minor child the first weekend of Defendant's first two-week period of visitation during the summer. Plaintiff's weekend shall be from Friday at 6:00 p.m. until Sunday at 6:00 p.m.

Plaintiff and Defendant appealed. On appeal, this Court held that "the grandparents alleged sufficient facts to confer standing to seek custody[,]" but that "the trial court's findings of fact are insufficient to support the court's conclusion that the parents forfeited their constitutionally protected status as parents." *Evans v. Myers*, 281 N.C. App. 627, 867 S.E.2d 424 (2022) (unpublished). Accordingly, this Court vacated the trial court's order and remanded to the trial court to "enter a new order on the existing record or conduct any further proceedings the court deems necessary in the interests of justice." *Id.* The trial court on remand entered a new order on the existing record with additional

findings of fact but left the custody award and visitation schedule unchanged. Plaintiff appealed.

II. Discussion

A. Custody Award

[1] Plaintiff argues that the trial court erred by awarding Intervenors legal and physical custody of Callie because the findings of fact are not supported by clear and convincing evidence, and the findings of fact do not support the conclusions of law.

"A parent has an interest in the companionship, custody, care, and control of his or her children that is protected by the United States Constitution." *Best v. Gallup*, 215 N.C. App. 483, 485, 715 S.E.2d 597, 599 (2011). "A parent loses this paramount interest if he or she is found to be unfit or acts inconsistently with his or her constitutionally protected status." *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010) (quotation marks and citation omitted). "[T]here is no bright line beyond which a parent's conduct meets this standard." *Id.* (citation omitted). The analysis of whether a biological parent's conduct is inconsistent with the parent's protected status is a "fact-sensitive inquiry" and such a determination must be made on a case-by-case basis. *Id.* at 550, 704 S.E.2d at 503.

"[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). "In a custody proceeding, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003) (citations omitted). Unchallenged findings of fact are binding on appeal. *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011). We review the trial court's conclusions of law de novo. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

1. Findings of Fact

Plaintiff specifically challenges findings of fact 18, 23, 24, 26, 37, 39, 40, 46, 47, 58, 60, 63, 64, 84, and 85. We address each finding in turn.

a. Findings of Fact 18, 23, 24, 26, 37, 39, 40

> 18. On or about October 26, 2018, Defendant-Father informed Plaintiff-Mother of the child's enrollment [at Morgan Elementary School in Rowan County].

. . . .

23. Plaintiff-Mother had access to another vehicle during the relevant time period that the child was absent and tardy while in her care.

24. Plaintiff-Mother continued to travel to and from her work at Amazon during the relevant time period that the child was absent and tardy while in her care. In particular, Plaintiff-Mother generally began work at 7:00 a.m. and would have lost two hours of work to transport the child to and from school.

. . . .

26. Plaintiff-Mother had the ability and means to take the child to school during the relevant time period that the child was absent and tardy while in her care but willfully elected not to do so.

. . . .

37. Defendant-Father's election to take no action on the large number of absences and tardies was a substantial factor to the decline of the child's academic performance.

. . . .

39. Plaintiff-Mother and Defendant-Father each failed to exercise reasonable and appropriate measures to ensure the child's regular attendance in school.

40. The large number of absences and tardies was a substantial factor in the decline of the child's academic performance. In particular, the child was required to play catch-up in her studies due to the same.

Finding of fact 18 is supported by Defendant's testimony that he informed Plaintiff "the day of" that he enrolled Callie in school, which was 26 October 2018. Furthermore, finding of fact 23 is supported by Defendant's testimony that "[Plaintiff] had access to a vehicle[,]" and by Plaintiff's testimony that she has had a vehicle "since February." Finding of fact 24 is supported by Defendant's testimony that "[Plaintiff] had access to a vehicle[,]" and by Plaintiff's testimony that she has had a vehicle "since February" and that "[she] ha[s] to be at work by 7:00, and it's really difficult to change [her] schedule at Amazon, and -- so [she] lose[s] two hours of work to accommodate for [Callie] to get there

on time." Finding of fact 26 is supported by the same testimony and is further supported by the following testimony:

> [DEFENSE COUNSEL]: And since you discovered she was enrolled in school in November, do you know how many absences she's had from that date until the present?
>
> [PLAINTIFF]: Well, we do it every other week. Oh, boy. At least 20 days.
>
> [DEFENSE COUNSEL]: So it's -- it's fair to say that on the weeks that you have [Callie], you don't take her to school?
>
> [PLAINTIFF]: No, because he was in contempt of court.
>
> [DEFENSE COUNSEL]: That's --
>
> [PLAINTIFF]: Our papers --
>
> [DEFENSE COUNSEL] -- "no," you didn't take her to school?
>
> [PLAINTIFF]: I know.
>
> [DEFENSE COUNSEL]: -- is that the answer? Okay.
>
> [PLAINTIFF]: Because our papers that he signed said that our -- he was in contempt of court because she is supposed to be enrolled in a school closest to me, not him.

Finding of fact 37 is supported by Callie's paternal grandmother's testimony:

> [INTERVENORS' COUNSEL]: Are you concerned about the fact that [Defendant] did nothing to make sure that the child went to school even on [Plaintiff's] time? Are you concerned about that?
>
> [CHRISTINE MYERS]: Well I'm concerned that [Defendant] didn't step in and immediately -- I don't know what the legal recourse would be. File for full custody. I -- I said to him, time and again, "Ray, what are you waiting for? This can't go on, you know, please do something." And I don't know what the hesitation was, but I wish he had immediately acted upon that.

Finding of fact 39 is supported by Defendant's testimony that "[Plaintiff] had access to a vehicle"; by Plaintiff's testimony that she has had a vehicle "since February" and that she did not take Callie to school because

"[she] ha[s] to be at work by 7:00, and it's really difficult to change [her] schedule at Amazon, and -- so [she] lose[s] two hours of work to accommodate for [Callie] to get there on time"; and by Callie's paternal grandmother's testimony that "[Defendant] didn't step in" to make sure that Callie went to school when she was with Plaintiff. Finally, finding of fact 40 is supported by Callie's paternal grandmother's testimony that "[Callie's] missed so much school. I'm sure she's missing, you know, valuable teaching time; and it's broken up, so she's there for a week, and then she misses the next week, so she's behind and has to catch up."

Accordingly, findings of fact 18, 23, 24, 26, 37, 39, and 40 are supported by clear and convincing evidence.

b. Findings of Fact 46, 47, 58, 60

> 46. At the time of the hearing, Plaintiff-Mother willfully elected to not provide bedding for the child's bed or a pillow case for her pillow without justification.
>
> 47. The child asked Intervenor-Step-Grandmother what bedding was after seeing the same on the child's bed when staying with Intervenors. The home conditions of Plaintiff-Mother and Defendant-Father are unsafe and unsuitable for the child's age, amounting to unfitness and causing substantial harm to the child.
>
> . . . .
>
> 58. On October 1, 2018, Plaintiff-Mother willfully elected to transport the child to play at a park at night, a known risk for injury or other danger. Intervenors' Exhibit No. 17 is incorporated herein by reference as if fully set forth.
>
> . . . .
>
> 60. However, in December 2018, Plaintiff-Mother had access to snow boots for the child which had been gifted by Intervenors but willfully elected not to have her wear them.

Findings of fact 46 and 47 are supported by Plaintiff's Facebook post showing Callie lying in a bed without sheets or a pillowcase, and by Callie's paternal grandmother's testimony that "when [Callie] was with [her], and [she] pulled the top sheet over [Callie] and she was like, what's this. This is a sheet, honey." Furthermore, finding of fact 58 is supported by Plaintiff's Facebook post showing her, Callie, and another child sitting in a car at night with the caption, "[T]he kids wanted to go to park

at this time of night before bed so I took them we got there they started thinking how hard to play in the dark[.]" Finally, finding of fact 60 is supported by Plaintiff's Facebook post showing Callie playing in the snow with bags on her feet and Callie's paternal grandmother's testimony that Intervenors bought Callie winter boots.

Accordingly, findings of fact 46, 47, 58, and 60 are supported by clear and convincing evidence.

c. Findings of Fact 63, 64, 84, 85

> 63. The child has expressed to others that she hates and does not want to be with Plaintiff-Mother.
>
> 64. [Plaintiff]-Mother's actions and inactions described herein were contributing factors for the child's expression to others.
>
> . . . .
>
> 84. Cumulatively, the conduct of Plaintiff-Mother and Defendant-Father demonstrated that the child (1) did not receive proper care and support and (2) was exposed to substantial risks of harm.
>
> 85. Additionally, the actions and inactions of Plaintiff-Mother and Defendant-Father, viewed cumulatively, and their past misconduct detrimentally impacted the present (as of the original hearing) and could impact the future of the child. Among other considerations, the academic performance and substantial risk of harm of the child all detrimentally impacted the child and could do so in the future.

Findings of fact 63 and 64 are supported by Callie's paternal grandmother's testimony that "[Defendant] has said [Callie] hates her mother. And that way didn't want to -- and that she didn't want to go with her mother." Finally, findings of fact 84 and 85 are supported by the same clear and convincing evidence that supported the above findings of fact.

Accordingly, the trial court's findings of fact are supported by clear and convincing evidence.

2. Conclusions of Law

Plaintiff argues that the findings of fact do not support the trial court's conclusion of law that she acted inconsistently with her constitutionally protected parental status.

In addition to the supported findings detailed above, the trial court made the following relevant and unchallenged findings:

> 19. From on or about October 26, 2018, through May 21, 2019, the child was enrolled at Morgan Elementary School.
>
> 20. Since the child's enrollment, she has been absent thirty-six (36) days and received thirteen (13) tardies.
>
> 21. The majority of the child's absences occurred while the child was in Plaintiff-Mother's custody.
>
> . . . .
>
> 28. Plaintiff-Mother willfully elected to not take the child to school during the relevant time period because she believed Defendant-Father had violated the then-controlling Order.
>
> . . . .
>
> 30. At the time of the original hearing, Plaintiff-Mother [and] Defendant-Father had pending charges in Rowan County for School Attendance Law Violations relating to the child's large number of absences.
>
> . . . .
>
> 33. The child began school at Morgan Elementary in the second quarter of the 2018-2019 school year.
>
> 34. The child's grades continued to decline throughout that school year.
>
> . . . .
>
> 61. [Plaintiff]-Mother had a history of screaming [at] the child rather than utilizing appropriate punishment methods.

The findings of fact support the trial court's conclusions of law that:

> 6. By clear, cogent, and convincing evidence, Plaintiff-Mother and Defendant-Father are unfit to have care, custody, and control of the child.
>
> 7. By clear, cogent, and convincing evidence, Plaintiff-Mother and Defendant-Father have exhibited parental behavior inconsistent with the parental duties and responsibilities regarding the care of the child, waiving their constitutionally protected status and warranting placement of the child with Intervenors.

> 8. It is in the best interest and welfare of the child for her custody to be placed with Intervenors.

Accordingly, the trial court did not err by awarding Intervenors legal and physical custody of Callie.

B. Visitation Schedule

[2] Plaintiff argues that the trial court abused its discretion by "restrict[ing] [Plaintiff] to a conscience shocking two days a year of visitation."

"A noncustodial parent's right of visitation is a natural and legal right which should not be denied unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child." *Paynich v. Vestal*, 269 N.C. App. 275, 278, 837 S.E.2d 433, 436 (2020) (quotation marks and citations omitted). "In awarding visitation privileges[,] . . . the best interest and welfare of the child is the paramount consideration." *Id.* (quotation marks and citation omitted). In determining matters involving a parent's visitation rights, the trial court is granted "wide discretionary power." *Swicegood v. Swicegood*, 270 N.C. 278, 282, 154 S.E.2d 324, 327 (1967). "However, a trial court's discretionary authority is not unfettered." *Paynich*, 269 N.C. App. at 278, 837 S.E.2d at 436 (quotation marks and citation omitted). N.C. Gen. Stat. § 50-13.5(i) provides:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2021). "The statutory language is straightforward and unambiguous and requires that if a trial court does not grant reasonable visitation to a parent, its order must include a finding *either* that the parent is 'an unfit person to visit the child' *or* that visitation with the parent is 'not in the best interest of the child.' " *Respess v. Respess*, 232 N.C. App. 611, 616, 754 S.E.2d 691, 696 (2014). Where visitation is severely restricted, there must be some finding of fact, supported by competent evidence in the record, warranting such restriction. *Johnson v. Johnson*, 45 N.C. App. 644, 647, 263 S.E.2d 822, 824 (1980).

Here, the trial court's order provides, "Plaintiff-Mother shall have visitation with the child the first weekend of Defendant-Father's first two-week period of visitation during the summer. Plaintiff-Mother's

weekend shall be from Friday at 6:00 p.m. until Sunday at 6:00 p.m." The trial court denied Plaintiff the right of reasonable visitation by restricting her visitation to two days a year absent a finding that she was "an unfit person to visit the child or that such visitation rights are not in the best interest of the child." N.C. Gen. Stat. § 50-13.5(i). Accordingly, we reverse in part and remand to the trial court.

III. Conclusion

We affirm the portion of the trial court's order awarding Intervenors custody of Callie because the findings of fact are supported by clear and convincing evidence, and the findings of fact support the conclusions of law. However, the trial court erred by denying Plaintiff reasonable visitation absent a finding that Plaintiff is an unfit person to visit the child or that visitation with Plaintiff is not in the best interest of the child. We therefore reverse in part and remand to the trial court for further proceedings.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges GORE and FLOOD concur.

IN RE A.G.J.

No. COA23-323

Filed 21 November 2023

Juveniles—delinquency—disposition—statutory factors—insufficient findings

In a juvenile delinquency matter in which a minor admitted to simple affray and unauthorized use of a motor vehicle, the trial court's disposition order was vacated for failure to make written findings addressing each of the five factors in N.C.G.S. § 7B-2501(c). The deficiency of the findings were not overcome by the court's incorporation of the predisposition report, risk assessment, and needs assessment, or by the inclusion of "other findings," which provided details of the juvenile's difficulties with her living situation but did not relate to the offenses or the juvenile's degree of culpability.

Chief Judge STROUD dissenting.

IN RE A.G.J.

[291 N.C. App. 322 (2023)]

Appeal by juvenile-defendant from order entered 19 September 2022 by Judge Christopher Freeman in Rockingham County District Court. Heard in the Court of Appeals 19 September 2023.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for juvenile-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Bettina J. Roberts, for the State.

FLOOD, Judge.

Juvenile-Defendant, A.G.J. ("Annie"),[1] appeals from the trial court's 19 September 2022 disposition order, arguing the trial court erred by failing to include written findings demonstrating it considered the factors listed in N.C. Gen. Stat. § 7B-2501(c) (2021). For the reasons that follow, we agree.

I. Factual and Procedural Background

On 6 June 2020, juvenile petitions against Annie were approved for filing by the Chief Court Counselor for Rockingham County District Court for simple affray and unauthorized use of a motor vehicle. The petition alleging simple affray was based on an incident that occurred on 10 November 2021, where Annie and another schoolmate were in a physical altercation in the school cafeteria. During the altercation, Annie and her schoolmate both punched each other with closed fists. The petition alleging unauthorized use of a motor vehicle stemmed from an incident on 15 May 2022 where Annie took her adoptive mother's car without permission.

An adjudication hearing was held on 8 August 2022. At the adjudication hearing, Annie admitted fault to both charges and was adjudicated as a delinquent juvenile.

On 19 September 2022, a disposition hearing was held. Following the disposition hearing, Annie was sentenced to twelve months' probation and placed in the custody of Rockingham Department of Social Services. On 28 September 2022, Annie filed timely notice of appeal.

1. Pseudonym used to protect the identity of the juvenile and for ease of reading.

II. Jurisdiction

While Annie filed timely notice of appeal, her attorney failed to indicate the court to which she was appealing. Under the North Carolina Rules of Appellate Procedure, a notice of appeal is required to specify "the court to which appeal is taken[.]" N.C. R. App. P. 3(d). Rule 3(d) is a jurisdictional rule, and failure to comply is a jurisdictional default mandating dismissal. *See Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal.").

To cure this procedural defect, Annie has filed a Petition for Writ of Certiorari ("PWC") pursuant to North Carolina Rule of Appellate Procedure 21(a)(1). This Court "maintains broad jurisdiction to issue writs of certiorari[.]" *In re R.A.F.*, 384 N.C. 505, 507, 886 S.E.2d 159, 161 (2023). The issuance of a writ is generally supported where "the right of appeal has been lost through no fault of the petitioner[.]" *In re Z.T.W.*, 238 N.C. App. 365, 368, 767 S.E.2d 660, 663 (2014); *see also State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012) (issuing a writ where it was "readily apparent that [the] defendant has lost his appeal through no fault of his own, but rather as a result of sloppy drafting of counsel").

Here, Annie's counsel's failure to include a designation as to which court the appeal was being made was not Annie's fault. As such, this Court elects to allow Annie's PWC and review her claim on the merits. *See Hammonds*, 218 N.C. App. at 163, 720 S.E.2d at 823.

III. Analysis

This Court reviews a trial court's "alleged statutory errors *de novo*." *In re K.C.*, 226 N.C. App. 452, 462, 742 S.E.2d 239, 246 (2013). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation and internal quotation marks omitted).

"The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512(a) (2021). "Appropriate findings of fact" are those that consider the following:

> In choosing among statutorily permissible dispositions, the court shall select the most appropriate disposition in both terms of kind and duration for the delinquent

> juvenile. Within the guidelines set forth in [N.C. Gen. Stat. §] 7B-2508, the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile based upon:
>
> (1) The seriousness of the offense;
> (2) The need to hold the juvenile accountable;
> (3) The importance of protecting the public safety;
> (4) The degree of culpability indicated by the circumstances of the particular case; and
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2021).

At the outset, we note that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same [C]ourt is bound by that precedent, unless it has been overturned by a higher court." *State v. Davis*, 198 N.C. App. 443, 447, 680 S.E.2d 239, 243 (2009). This Court's precedents have made it clear that the trial court is required to make written findings in a disposition order entered in a juvenile delinquency matter, demonstrating it considered *all* the factors in Section 7B-2501(c). *See In re J.J.*, 216 N.C. App. 366, 375, 717 S.E.2d 59, 65 (2011) (finding error when the trial court did not make any written findings of fact); *see also In re V.M.*, 211 N.C. App. 389, 391–92, 712 S.E.2d 213, 215 (2011) (reversing the trial court's disposition order for failure to properly consider *all* of the factors required); *In re I.W.P.*, 259 N.C. App. 254, 261, 815 S.E.2d 696, 702 (2018) ("The plain language of Section 7B-2501(c) compels us to find that a trial court must consider each of the five factors in crafting an appropriate disposition."). "The purpose of the requirement that the [trial] court make findings of those specific facts which support its ultimate disposition . . . [is] to allow a reviewing court to determine . . . whether the judgment and the legal conclusions which underlie it represent a correct application of the law." *In re W.M.C.M.*, 277 N.C. App. 66, 77, 857 S.E.2d 875, 881 (2021) (first and third alteration added) (citation omitted).

We recently reaffirmed this proposition in *In re N.M.*, COA23-100, 2023 WL 6066497 (N.C. Ct. App. Sept. 19, 2023). In *In re N.M.*, the trial court used a pre-printed disposition order and checked the box noting it considered the predisposition report, risk assessment, and needs assessment. *Id.* at *2. The trial court did not make any other written findings of fact. *Id.* at *2. This Court concluded that, while the factors may be included in the reports, the trial court has the responsibility to make

written findings of fact showing it considered the factors in Section 7B-2501(c). *Id.* at *3 (holding the "[other findings] section must be filled with findings made by the trial court regarding the five factors required by the statute, otherwise it is reversible error").

In this case, Annie argues the trial court failed to consider all of the factors and make relevant findings of fact when entering the disposition order. We agree.

In the pre-printed disposition order filed by the trial court, it found Annie had been given a Class I disposition on 19 September 2022; checked the box noting Annie's juvenile delinquency history level was low; and checked the boxes noting it had received, considered, and incorporated the contents of the predisposition report, risk assessment, and needs assessment. Then, in the section of the pre-printed dispositional order labeled "other findings," the trial court added the following:

> Based on the evidence, the [trial court] make [sic] the following findings of fact: [Annie] appeared in court late. Her counsel and adoptive mother were present. The [trial court] had to withdraw a secure custody order after [Annie] appeared in court late. The adoptive mother stated that she had no contact with [Annie] for an extended period of time and there were allegations of [Annie] being involved in drug activity. The adoptive mother has other juveniles in her home and refuses for [Annie] to return to her home until she is enrolled in some type of drug counseling. It is impossible to do this instantaneously, therefore, [Annie] is left without a place to go. Additionally, counsel for [Annie] indicated that [Annie] is unwilling to return to the adoptive mother's home. Pursuant to statute, the [trial c]ourt changes custody of [Annie[from [her] adoptive mother to Rockingham County Department of Social Services.

As in *In re N.M.*, incorporating the reports by reference is insufficient to meet the statutory requirements set forth in Section 7B-2501(c). *See In re N.M.* at *2. Further, we fail to see how the "other findings" detailed above show the trial court considered the five factors in Section 7B-2501(c). The written findings the trial court made do not relate to the offenses detailed in the petitions, but seem to solely relate to Annie's difficulties with her living situation. We also fail to see, as the dissent posits, how the "other findings" detailed above show Annie's culpability. The Record shows Annie and another female schoolmate were in

a physical altercation in the school cafeteria where they both punched each other with closed fists. Even though Annie admitted fault at the adjudication hearing, the trial court did not indicate that it took into account the other girl's role in the altercation, to demonstrate to this Court that it considered Annie's culpability when sentencing her to twelve months' probation. *See* N.C. Gen. Stat. § 7B-2501(c)(4).

We note this Court has given a more deferential reading of disposition orders in the past. *See In re I.W.P.*, 259 N.C. App. at 264, 815 S.E.2d at 704 (concluding the trial court addressed in the disposition order (1) the need to hold the juvenile accountable by imposing a twelve-month probationary sentence; and (2) the importance of protecting public safety and the rehabilitative needs of the juvenile by imposing probationary conditions). Given our more recent decision in *In re N.M.*, however, we decline to give the disposition order in the instant case such a deferential interpretation, as doing so would render the requirement that a trial court make written findings meaningless. *See In re N.M.* at *3.

For this same reason, we also decline to conclude, as the State argues we should, that the designation of the offense as a "Class 1 misdemeanor" shows the trial court considered "the seriousness of the offense." This alone does not show this Court that the trial court considered the seriousness of the offense; it merely shows the trial court knew the classification of the offense.

Without written findings addressing the factors in Section 7B-2501(c), the disposition order is deficient and constitutes "reversible error." *See In re N.M.* at *3.

IV. Conclusion

We conclude the trial court failed to make written findings of fact showing it considered the factors set forth in N.C. Gen. Stat. § 7B-2501(c). Accordingly, we vacate the disposition order and remand for a new disposition hearing and entry of an order that includes findings of fact addressing all of the required factors.

VACATED AND REMANDED.

Judge MURPHY concurs.

Chief Judge STROUD dissents in separate writing.

STROUD, Chief Judge, dissenting.

Because the trial court's disposition order demonstrates the trial court considered and made findings addressing each of the factors as required by North Carolina General Statute Section 7B-2501(c), and the order is fully sufficient to allow for proper appellate review, I dissent. We review orders based upon their substance, not technical form. *See In re A.U.D.*, 373 N.C. 3, 11, 832 S.E.2d 698, 703 (2019) (noting a remand for findings on uncontested issues would elevate "form over substance and would serve only to delay the final resolution of this matter for the children"). Trial courts are not required by North Carolina General Statute Section 7B-2501(c) to follow a specific format or wording for their findings of fact. *See generally* N.C. Gen. Stat. § 7B-2501(c); *see generally also In re D.E.P.*, 251 N.C. App. 752, 758, 796 S.E.2d 509, 513 (2017) ("*Ferrell* did *not* address the degree to which a court's findings must specifically reflect consideration of the factors listed in N.C. Gen. Stat. § 7B-2501(c), and did *not* set out any rule regarding this issue." (emphasis in original)).

Here, the trial court's disposition order demonstrates full consideration of each factor in North Carolina General Statute section 7B-2501(c). Therefore, while I agree with the facts as laid out by the majority, I write separately to address the majority's misplaced reliance on *In re: N.M.*, 290 N.C. App. 482, 892 S.E.2d 643 (2023). Because I conclude the trial court made sufficient findings of fact to satisfy North Carolina General Statute Section 7B-2501(c), I would affirm.

I. North Carolina General Statute Section 7B-2501(c)

The issue of what is required to satisfy North Carolina General Statute Section 7B-2501(c) has been addressed in many prior published cases, including *In re I.W.P.*, which noted:

> In fact, this Court has previously held the trial court must consider each of the factors in Section 7B-2501(c). *See In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895 (2004); *In re V.M.*, 211 N.C. App. 389, 391-92, 712 S.E.2d 213, 215 (2011); *K.C.*, 226 N.C. App. 452, 462, 742 S.E.2d 239, 246; and *In re G.C.*, 230 N.C. App. 511, 519, 750 S.E.2d 548, 553 (2013). However, this Court recently held, contrary to precedent, that the trial court does not need to consider all of the Section 7B-2501(c) factors when entering a dispositional order. *In re D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 514 (2017). This

> inconsistency has created a direct conflict in this Court's prior jurisprudence and must be reconciled.

In re I.W.P., 259 N.C. App. 254, 261–62, 815 S.E.2d 696, 703 (2018). The main question in the cases cited in *I.W.P.* is generally how much detail the trial court must include in the findings of fact and the extent of the trial court's reliance on incorporation by reference of reports and other documents into the order. *See id.* Prior cases addressing Section 7B-2501(c) tend to fall into three groups, based upon the characteristics of the order on appeal.

A. Orders with No Additional Findings

In the first category of cases, this Court has generally remanded for further findings of fact because the trial court made no additional findings of fact, whether by incorporation of documents or not. *See*, *e.g.*, *In re J.J.*, *Jr.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (vacating and remanding in part, without mention of incorporation, due to the trial court's failure "to state any written findings of fact"); *In re V.M.*, 211 N.C. App. 389, 392, 712 S.E.2d 213, 215-16 (2011) (reversing and remanding because documents were incorporated by reference but "no additional findings of fact" were made). *J.J.*, *Jr.* and *V.M.* indicate that while incorporation by reference of additional documents is allowed, the trial court must make some additional findings of fact which indicate the trial court exercised its own discretion and reasoning upon the case. *See J.J.*, *Jr.*, 216 N.C. App. at 376, 717 S.E.2d at 66; *V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 215-16.

B. Orders with Some Findings of Fact

In the second category of cases, this Court has again generally remanded the case when the trial court made some additional findings, but those findings were either (1) not sufficient to address all of the factors or (2) not supported by the evidence. *See*, *e.g.*, *In re K.C.*, 226 N.C. App. 452, 461, 742 S.E.2d 239, 245 (2013) (remanding a disposition order, without mention of incorporation, because though additional findings were made, they were not sufficient); *In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895-96 (2004) (remanding, without mention of incorporation, because the evidence did not support a finding of fact). *K.C.* and *Ferrell* indicate that while incorporation by reference of additional documents into the order is appropriate, the trial court must still make sufficient additional findings of fact to satisfy the requirements of North Carolina General Statute Section 7B-2501(c). *See K.C.*, 226 N.C. App. at 461, 742 S.E.2d at 245; *Ferrell*, 162 N.C. App. at 177, 589 S.E.2d at 895-96.

C. Orders with Sufficient Findings of Fact

In the third category of cases, where the orders are often affirmed, the trial court made additional findings of fact with or without incorporation by reference of other documents. *See*, *e.g.*, *D.E.P.*, 251 N.C. App. at 759, 796 S.E.2d at 514 (affirming, without mention of incorporation, because there were sufficient findings of fact); *In re G.C.*, 230 N.C. App. 511, 521, 750 S.E.2d 548, 555 (2013) (affirming, without mention of incorporation, in part because there were sufficient written findings of fact). *D.E.P.* and *G.C.* indicate that incorporation by reference along with additional findings of fact, may be sufficient to satisfy the requirements of North Carolina General Statute Section 7B-2501(c). *See D.E.P.*, 251 N.C. App. at 759, 796 S.E.2d at 514; *G.C.*, 230 N.C. App. at 521, 750 S.E.2d at 555.

D. *In re N.M.*

Turning to the majority's primary analysis, in *N.M.*, the trial court incorporated documents by reference but failed to make *any* additional findings of fact. *See N.M.*, 290 N.C. App. 482, 892 S.E.2d 643. Thus, *N.M.* would properly fall within the first category of cases. Since the trial court made no additional findings to address the factors, but only incorporated additional documents, the trial court did not demonstrate it had exercised independent reasoning upon the case. *See*, *e.g.*, *J.J., Jr.*, 216 N.C. App. at 376, 717 S.E.2d at 66; *V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 215.

But this case falls into the third category of cases. *See D.E.P.*, 251 N.C. App. at 759, 796 S.E.2d at 514; *G.C.*, 230 N.C. App. at 521, 750 S.E.2d at 555. Here, the trial court not only incorporated other documents by reference but also made at least seven additional findings of fact, as quoted in the majority opinion. While the findings of fact could be worded more artfully, and they are in paragraph form rather than a neatly delineated list tracking the subsections of Section 7B-2501(c), the trial court did make additional findings addressing the factors.

In my references to past cases I have noted the trial court's use of "incorporation by reference" of other documents into the order because I am concerned that the majority's interpretation of the trial court's order elevates form over substance. The majority states, "As in *In re N.M.*, incorporating the reports by reference is insufficient to meet the statutory requirements set forth in Section 7B-2501(c)." *N.M.* stands for the proposition that incorporation of additional documents by reference, *alone*, is insufficient, but in this case, the trial court made additional findings. *See generally N.M.*, 290 N.C. App. 482, 892 S.E.2d 643. In

addition, although the majority noted the trial court's additional findings of fact, the majority failed to address the incorporated documents *at all*; the opinion reads as if *only* the additional findings may be considered.

According to Black's Law Dictionary, "incorporation by reference" is "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." Black's Law Dictionary 916 (11th ed. 2019). In other words, because the trial court did not merely *refer* to "the predisposition report, risk assessment, and needs assessment" but explicitly "incorporat[ed them] by reference" those documents "should be treated as if [they] were contained with the primary one" along with the seven additional findings of fact. *N.M.*, 290 N.C. App. 482, 484-85, 892 S.E.2d 643, 645.

A clear example of review of an order with documents incorporated by reference is *In re J.A.D.*, wherein this Court stated, "The record on appeal includes [the juvenile's] predisposition report, risks assessment, and needs assessment that were incorporated by reference into the trial court's written disposition order, but these documents also do not sufficiently address each of the N.C. Gen. Stat. § 7B-2501(c) factors." *In re J.A.D.*, 283 N.C. App. 8, 24, 872 S.E.2d 374, 387 (2022) (citation omitted). In other words, the incorporated documents in *J.A.D.* case did not satisfy the factors in North Carolina General Statute Section 7B-2501(c), but the incorporated documents were considered as part of the primary document in determining whether the factors were addressed. *See id.*

Last, while again I conclude *N.M.* does not control this case because here the trial court made additional findings of fact, while the order in *N.M.* had no additional findings, *see generally N.M.*, 290 N.C. App. 482, 892 S.E.2d 643. I also disagree with the majority's analysis regarding application of precedent. Even if we assume there have been inconsistencies in this Court's interpretations of North Carolina General Statute Section 7B-2501(c), *see I.W.P.*, 259 N.C. App. at 261-62, 815 S.E.2d at 703, "we are bound to follow the 'earliest relevant opinion' to resolve the conflict[:]"

> Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. The dilemma of *In Re Civil Penalty* arises when panels of this Court have decided the same issue two different ways, since we are theoretically bound by two opposing precedents or lines of precedent.

And the Court may have a double dilemma where a prior panel of this Court has addressed not only the underlying issue but also the effect of *In Re Civil Penalty* on the same issue in different ways. *See Routten*, ___N.C. App. at ___, 822 S.E.2d at 449 (Berger, J., concurring) ("*As the case before us here demonstrates, this Court can be trapped in a chaotic loop as different panels disagree, not only on the interpretation of the law, but also on what law appropriately controls the issue.*"). We have that double dilemma here, since this Court addressed the same issue *and* application of *In re Civil Penalty* in *Respess*, *see Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014), coming to one conclusion in 2014, and in *Routten*, coming to the opposite conclusion, in 2018. *See Routten*, ___ N.C. App. ___, 822 S.E.2d 436.

Yet we must resolve this double dilemma, and we conclude *Respess* is the precedent which must be followed. Where there is a conflict in cases issued by this Court addressing an issue, ***we are bound to follow the 'earliest relevant opinion' to resolve the conflict***:

> Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court. Further, our Supreme Court has clarified that, ***where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines***. With that in mind, we find *Skipper* and *Vaughn* are irreconcilable on this point of law and, as such, constitute a conflicting line of cases. Because *Vaughn* is the older of those two cases, we employ its reasoning here.

State v. Gardner, 225 N.C. App. 161, 169, 736 S.E.2d 826, 832 (2013) (citations and quotation marks omitted). Thus, we turn to *Respess*. *See Respess*, 232 N.C. App. 611, 754 S.E.2d 691.

Huml v. Huml, 264 N.C. App. 376, 394–95, 826 S.E.2d 532, 545 (2019) (formatting altered). I rely on "the older" case of *J.A.D.* instead of the more recent case of *In re N.M. Huml*, 264 N.C. App. at 394-95, 826 S.E.2d at 545; *see also N.M.*, 290 N.C. App. 482, 892 S.E.2d 643 (noting filing in 2023); 283 N.C. App. 8, 24, 872 S.E.2d 374 (noting filing in 2022).

As the dissenting judge, I will not attempt to reconcile years of arguably inconsistent case law and remain "trapped in a chaotic loop as different panels disagree[.]" *Huml*, 264 N.C. App. at. 395, 826 S.E.2d at 545 (citation omitted). I simply note that here, by *incorporating* the pertinent documents into its order *along with* its additional findings of fact, the trial court satisfied North Carolina General Statute Section 7B-2501(c) as these documents and the trial court's findings address:

> (1) The seriousness of the offense;
> (2) The need to hold the juvenile accountable;
> (3) The importance of protecting the public safety;
> (4) The degree of culpability indicated by the circumstances of the particular case; and
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2021). I would affirm the trial court's order.

Accordingly, I dissent.

IN RE A.N.R.

No. COA23-479

Filed 21 November 2023

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings of fact—evidentiary support

The termination of a mother's parental rights in her daughter was affirmed where clear, cogent, and convincing evidence supported the trial court's findings of fact (including all except one of the findings that were challenged on appeal), which supported a conclusion that the mother willfully left the child in placement outside of the home for more than twelve months without making reasonable progress in correcting the conditions that led to the child's removal. Specifically, the evidence showed that the mother failed to: consistently visit her child, follow the department of social services' (DSS) recommendations for addressing her substance abuse problems, complete parenting classes, maintain stable and appropriate housing, and provide verification of income demonstrating

her ability to care for the child. Although the mother was repeatedly incarcerated throughout the relevant twelve-month period, she did spend at least five months out of jail during which she could have taken steps to address the issues that led to the child's placement with DSS, but did not.

Appeal by Respondent from order entered 7 February 2023 by Judge Sarah N. Lanier in Randolph County District Court. Heard in the Court of Appeals 1 November 2023.

Chrystal Kay for Petitioner-Appellee Randolph County Department of Social Services.

Stephen M. Schoeberle for Appellee Guardian ad Litem.

Mercedes O. Chut for Respondent-Appellant Mother.

COLLINS, Judge.

Respondent-Mother ("Mother") appeals from an order terminating her parental rights to her daughter, Amy.[1] Mother argues that the trial court erred by concluding that she (1) neglected Amy and (2) willfully left Amy in placement outside of the home for more than 12 months and failed to show that reasonable progress had been made in correcting the conditions which led to Amy's removal. Because the trial court's findings are supported by the record evidence, and those findings support the trial court's conclusion that Mother willfully left Amy in placement outside of the home for more than 12 months without making reasonable progress, we affirm.

I. Background

Amy was born in July 2008. In March 2011, Mother and Amy's biological father[2] entered a voluntary "Custody Consent Order," granting temporary custody of Amy to Amy's maternal grandfather, Jeff, and maternal step-grandmother, Connie.[3] The custody order gave Mother and Amy's biological father "liberal visitation as the parties can agree."

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1. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

2. Amy's biological father is not a party to this appeal.

3. We use pseudonyms for Amy's maternal grandfather and maternal step-grandmother to protect Amy's identity.

Jeff and Connie retained custody of Amy for more than 10 years, during which time Mother visited Amy sporadically. On 3 September 2021, Randolph County Department of Social Services ("DSS") filed a petition alleging that Amy was a dependent juvenile because: Jeff was unable to care for Amy; Connie was "unable to care for" Amy or "have [Amy] in her home" because of Connie's substance abuse issues; and Amy's mental health problems were not being successfully managed. The petition further alleged that Mother was incarcerated for possession of methamphetamine and drug paraphernalia as of the time of the filing and that Mother had inappropriate contact with Amy. The trial court placed Amy in the nonsecure custody of DSS that same day. Sometime after that 3 September hearing, Mother was released from incarceration and attended a hearing in September 2021 to address visitation with Amy; the trial court awarded Mother DSS-supervised visits with Amy for one hour, every other week.

The matter came on for hearing on 18 November 2021, and Mother, Jeff, and Connie stipulated to the trial court that: Jeff and Connie were no longer willing to be Amy's caregivers; "Mother was incarcerated and did not have safe and stable housing or income sufficient to support [Amy]"; and Mother "has a history of substance abuse issues[.]" The trial court adjudicated Amy dependent because her "parents, custodians, and caretaker are unable to provide for her placement and care and lack an appropriate, alternative childcare arrangement[.]" The trial court then moved to the dispositional phase of the hearing, concluding that Amy should remain in the secure custody of DSS and ordering Mother to complete a series of services and activities in order to reunify with Amy. The trial court ordered Mother to: (1) complete a substance abuse assessment and follow any and all recommendations from DSS; (2) complete random drug screens at the request of DSS, on the day and time requested by DSS; (3) complete parenting classes and demonstrate skills learned; (4) obtain and maintain stable and appropriate housing; (5) obtain and maintain legal, verifiable income sufficient to meet Amy's needs; (6) participate in Amy's therapy if or when deemed appropriate by Amy's therapist; (7) sign release forms; and (8) contact DSS within two days of any change to Mother's phone number, mailing address, or place where Mother stayed. The trial court maintained Mother's DSS-supervised visitations with Amy. Mother was incarcerated on 28 December 2021 and remained in jail through March 2022.

From April 2022 through 27 September 2022, during which time Mother was not incarcerated, Mother had approximately eight in-person visits with Amy that were not supervised by DSS. Mother failed to appear for any in-person visits supervised by DSS and located at the

agency. Instead, Mother would meet Amy and Amy's foster mother at a shopping center or at a restaurant. During this same time period, Mother also failed to: obtain a substance abuse assessment and engage in substance abuse treatment; obtain and maintain stable housing; and obtain and maintain legal, verifiable income. Mother was incarcerated again on 28 September 2022 and remained in jail until 8 January 2023.

DSS filed a motion to terminate Mother's parental rights on 17 October 2022. The matter came on for hearing on 4 January 2023 and, by order entered 7 February 2023, the trial court terminated Mother's parental rights to Amy under N.C. Gen. Stat. § 7B-1111(a)(1), neglect, and N.C. Gen. Stat. § 7B-1111(a)(2), willfully leaving the juvenile in placement outside of the home for more than 12 months and failing to show that reasonable progress had been made in correcting the conditions which led to removal of the juvenile.

The trial court found and concluded that it was in Amy's best interests to terminate Mother's parental rights. Mother gave timely notice of appeal on 6 March 2023.

II. Discussion

Mother argues that the trial court erred in terminating her parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), neglect, and N.C. Gen. Stat. § 7B-1111(a)(2), willfully leaving the juvenile in placement outside of the home for more than 12 months and failing to show that reasonable progress had been made in correcting the conditions which led to removal of the juvenile, because certain findings of fact are unsupported by clear, cogent, and convincing evidence.

A. Standard of Review

A termination-of-parental-rights proceeding is a two-step process. *In re D.A.H.-C.*, 227 N.C. App. 489, 493, 742 S.E.2d 836, 839 (2013). "At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019) (quotation marks and citation omitted). If the petitioner meets its evidentiary burden with respect to a statutory ground and the trial court concludes that the parent's rights may be terminated, then the matter proceeds to the disposition phase, at which the trial court determines whether termination is in the best interests of the child. *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736-37 (2004). If, in its discretion, the trial court determines that it is in the child's best interests, the trial court may then terminate

the parent's rights. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 161 (2003).

Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. When reviewing the trial court's adjudication of grounds for termination, we examine whether the trial court's findings of fact "are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citations omitted). Any unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

B. Adjudication

1. N.C. Gen. Stat. § 7B-1111(a)(2) – Lack of Progress

When a trial court terminates parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must determine that, as of the time of the hearing, the juvenile has been willfully left in placement outside of the home for more than 12 months and that the parent has not made "reasonable progress under the circumstances to correct the conditions which led to removal of the child." *In re O.C.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (2005). The trial court may consider evidence of reasonable progress made by a parent "until the date of the termination hearing." *In re J.G.B.*, 177 N.C. App. 375, 385, 628 S.E.2d 450, 457 (2006) (citation omitted). A parent's "prolonged inability to improve [their] situation, despite some efforts in that direction, will support a finding of willfulness regardless of [their] good intentions[.]" *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004) (quotation marks and citation omitted). Our Courts consider the circumstance of a parent's incarceration in determining whether a parent has made reasonable progress and have made it clear that "incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights" proceeding. *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (brackets and citations omitted).

Here, the trial court's unchallenged findings of fact show that Amy was placed into DSS custody on 3 September 2021 and DSS filed a motion to terminate Mother's parental rights on 17 October 2022. This satisfies the first prong of N.C. Gen. Stat. § 7B-1111(a)(2), that Amy was willfully left in a placement outside of the home for more than 12 months before DSS filed its motion to terminate Mother's parental rights.

Relevant to the second prong of N.C. Gen. Stat. § 7B-1111(a)(2), Mother challenges the following findings as being unsupported by clear, cogent, and convincing evidence:

a. Finding 23

Finding 23 states, "Since the minor child has not been in the Mother's custody, the Mother has not consistently visited the minor child." The record evidence shows that Mother "has had sporadic contact as far as visitation" with Amy; that Mother did not appear for any DSS-supervised visits with Amy at the agency; and that Mother attended, at most, eight unsupervised visits with Amy for the entire time that Amy was in DSS custody. This clear, cogent, and convincing record evidence supports Finding 23.

b. Finding 24

Finding 24 states, "The Mother has a history of substance abuse issues that has prevented her from being able to provide proper care to the minor child." Here, Mother stipulated at the adjudication hearing that she "has a history of substance abuse issue[s]" and "at the filing of the petition she was incarcerated for pending charges of possession of methamphetamines and possession of drug paraphernalia." Mother further stipulated that Amy needed placement or assistance because Mother was "unable to provide for [Amy's] placement and care and lack[ed] an appropriate, alternative arrangement[.]" Moreover, the record contains a certified criminal record for Mother, showing that Mother has had multiple convictions for possession of drugs and drug paraphernalia from 2016 through 2021. The record further shows that Mother had sporadic contact with Amy for the 10-year period from 2011 until the filing of the petition in September 2021. Finding 24 is supported by clear, cogent, and convincing record evidence.

c. Finding 25

Finding 25 states, "At the time of the filing of the petition by [DSS] the Mother did not have safe and stable housing." Mother admits that she was in jail at the time of the filing of the petition and concedes that jail is not suitable, appropriate housing for a child. The clear, cogent, and convincing record evidence shows that Mother was incarcerated on the date that DSS filed its petition and supports Finding 25. Mother argues that "[t]his finding is misleading" because "the record contains no evidence of [Mother's] housing prior to that incarceration." We disagree that the finding is misleading and instead understand the finding as clearly stating Mother's housing situation "[a]t the time of the filing of the petition"

when she was incarcerated. Furthermore, unchallenged Finding 39 states in relevant part, "When the Mother was not incarcerated, she never provided verification through a lease and allowing [DSS] to assess[] her home to verify that she has safe and stable housing." Finding 25 is supported by clear, cogent, and convincing record evidence.

d. Finding 30

Finding 30 states, "The Mother was incarcerated from December 28, 2021 through March 2022 and again from October 10, 2022 through January 8, 2023." Mother argues that the evidence does not support that she was incarcerated "through March 2022" and "from October 10, 2022." Mother testified that she was released from jail in April 2022, which supports that Mother was incarcerated "through March 2022." Mother also testified that she was in jail on 10 October 2022 and visited with a DSS social worker while incarcerated on that date; this testimony supports that Mother was incarcerated from at least 10 October 2022. There is clear, cogent, and convincing record evidence to support Finding 30.

e. Finding 31

Finding 31 states, "The Mother's certified criminal records indicates [sic] her current charges are Possession of Schedule I Controlled Substance, Possession with Intent to Distribute Schedule I, and Possession of Schedule II Controlled Substance." Mother argues, and we agree, that her certified criminal record shows that Mother's only pending charges at the time of the hearing were for driving while license revoked, not impaired; expired registration; and "expired/no inspection." While Mother's criminal record shows past convictions for other drug-related offenses, there is no evidence to support the pending charges listed in Finding 31. We strike and omit Finding 31 from consideration.

f. Findings 33, 34, 35

Finding 33 states, "[DSS] requested a drug screen from the Mother on June 9, 2021; she failed to show." Finding 34 states, "[DSS] requested a drug screen from the Mother on October 21, 2021; she failed to show." Mother admits that DSS requested drug screens on those dates and that Mother "did not take them." Mother does not argue on appeal that this finding is unsupported by record evidence, but instead sets forth an explanation for her failure to show for the drug screens. However, the clear, cogent, and convincing record evidence shows that DSS requested, and Mother failed to show for, two drug screens. Finding 35 states, "The Mother has not demonstrated she can be a sober caregiver." This finding is supported by record evidence that shows that DSS requested two drug

screens and Mother failed to take either drug screen, which could have demonstrated her commitment to sobriety. Finding 35 is also supported by record evidence showing that Mother failed to obtain a substance abuse assessment or engage in approved substance abuse treatment, which further could have demonstrated her commitment to sobriety.

g. Finding 36

Finding 36 states, "The Mother was ordered to complete parenting classes. The Mother participated in parenting modules offered while incarcerated, but the Mother never participated in a [DSS] approved parenting class to demonstrate her parenting skills." Two social workers with DSS testified that Mother completed parenting classes on a tablet while she was incarcerated and that Mother presented to DSS a transcript showing her completion of the parenting classes. However, Mother also testified and admitted on cross-examination that she had other people complete some of the parenting classes on her tablet.

Mother testified that there were four people in her cell, they did "some of the courses," and all of the course credits were listed under her name despite others taking the classes. One of the DSS social workers testified that Mother never disclosed that other people had completed the parenting classes under Mother's name and that Mother did not mention this when she presented the transcript to DSS for credit. As it is the responsibility of the trial court to weigh testimony, pass upon the credibility of witnesses, and draw reasonable inferences from the evidence, *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167-68 (2016), we determine that clear, cogent, and convincing evidence supports the finding that Mother "never participated in a [DSS] approved parenting class to demonstrate her parenting skills."

Aside from Finding 31, clear, cogent, and convincing evidence supports the challenged findings of fact. In addition to the challenged findings, the trial court also made the following unchallenged, and thus binding, findings of fact:

> 32. The Mother indicated she completed substance abuse classes while incarcerated but there were no means to have her progress monitored. The Mother failed to complete a substance abuse assessment.
>
> . . . .
>
> 37. The Mother reported she was living at Holder Inman Road, Randleman, North Carolina. A home visit was scheduled on June 20, 2022. The Mother contacted [DSS]

that morning stating she was running a fever and she was going to the emergency room. The Mother stated she would reach out to [DSS] to reschedule a home visit.

38. On July 25, 2022, [DSS] contacted the Mother to get an update. The Mother failed to provide a time for a home visit.

39. Throughout the time the minor child has been in [DSS] custody the Mother has been in and out of incarceration. The Mother is currently incarcerated. When the Mother was not incarcerated she never provided verification through a lease and allowing [DSS] to assess[] her home to verify that she has safe and stable housing.

40. The Mother reported she would begin working for Hendrix Batting April 28, 2022, but she failed to provide proof of income.

41. The Mother reported she began working at Everhart Enterprises in August 2022, but the Mother failed to notify or provide proof of income to [DSS].

42. The Mother is currently incarcerated and does not have a source of income.

43. Since the minor child has come into [DSS] custody, the Mother has failed to provide any proof of income.

44. The Mother failed to provide verification of income demonstrating her ability to support the minor child.

The supported findings of fact show that Mother: failed to obtain a substance abuse assessment or any treatment; failed to show for at least two required drug screens ordered by DSS; failed to complete parenting classes and demonstrate skills learned; failed to obtain and maintain stable and appropriate housing; and failed to obtain and maintain legal, verifiable income.

While Mother could not do some of these things while incarcerated, Mother was not incarcerated for the entirety of this matter. Mother was out of jail for a period of at least five months, spanning April 2022 through September 2022; during that time, Mother was going back and forth between two residences in Randolph County. At the time of the termination hearing in January 2023, Mother testified that she planned to move in with her employer, which would have been her third residence in a span of less than nine months. This evidence further supports that

Mother failed to obtain and maintain stable and appropriate housing, even when she was not incarcerated. The record evidence shows that Mother failed to correct the conditions which led to Amy's placement in custody with DSS.

The trial court thus properly found that Amy was willfully left in placement outside of the home for more than 12 months and concluded that grounds existed to terminate Mother's rights under N.C. Gen. Stat. § 7B-1111(a)(2). "Because a finding of only one ground is necessary to support a termination of parental rights," we need not address Mother's remaining argument regarding the remaining ground of neglect. *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019) (citation omitted).

III. Conclusion

Clear, cogent, and convincing evidence supports the relevant challenged findings of fact except for Finding 31, and the findings of fact support the trial court's conclusion of law to terminate Mother's parental rights to Amy. Mother willfully leaving Amy in placement outside of the home for more than 12 months without showing that reasonable progress had been made in correcting the conditions which led to the removal of the juvenile supports this conclusion of law. Accordingly, the trial court's order terminating Mother's parental rights is affirmed.

AFFIRMED.

Judges TYSON and MURPHY concur.

LINKER v. LINKER

[291 N.C. App. 343 (2023)]

LAURA LEIGH LINKER, PLAINTIFF
v.
TIMOTHY LYON LINKER, DEFENDANT
v.
NANCY LYON BOLING, INTERVENOR

No. COA23-328

Filed 21 November 2023

1. Appeal and Error—interlocutory order—custody action—motion to intervene allowed—substantial right

In a child custody matter, the trial court's interlocutory order allowing a grandparent's motion to intervene affected the natural parents' constitutional right to the care, custody, and control of their child and was therefore immediately appealable as affecting a substantial right.

2. Child Custody and Support—standing—grandparent—motion to intervene—filed prior to death of party—ongoing case

In a child custody matter between the child's parents, where the child's paternal grandmother filed a motion to intervene after the father filed a motion to modify custody and before the father died, the trial court properly concluded that the grandmother had standing to seek visitation because, although the court did not grant the motion to intervene until after the father's death, the underlying custody action was ongoing at the time the motion was filed. Therefore, the trial court properly denied the mother's motion to dismiss pursuant to Civil Procedure Rule 12(b)(1) (lack of subject matter jurisdiction).

Appeal by plaintiff from an order entered on 3 November 2022 by Judge Tabatha P. Holliday in Guilford County District Court. Heard in the Court of Appeals 18 October 2023.

Scott Law Group, PLLC, by Harvey W. Barbee, Jr., for plaintiff-appellant.

Law Offices of Lee M. Cecil, by Lee M. Cecil, for intervenor-appellee.

FLOOD, Judge.

Laura Linker ("Plaintiff") appeals from the trial court's order allowing Nancy Boling ("Intervenor") to intervene in the underlying custody action. For the reasons discussed below, we affirm.

I. Facts and Procedural Background

On 23 January 2009, a child (the "minor child") was born to Plaintiff and Timothy Linker ("Defendant"). The family unit lived together for five years until Plaintiff and Defendant separated on 6 February 2014. On 10 March 2014, Plaintiff filed the first of what would be numerous complaints and motions in the underlying action, seeking sole custody of the minor child. On 6 June 2014, Plaintiff and Defendant entered into a temporary consent order which granted Plaintiff primary physical custody and Defendant secondary custody. This temporary consent order stipulated that Defendant's overnight visits with the minor child would be supervised by paternal grandmother, Intervenor. On 19 August 2014, the 6 June temporary order was formalized, mirroring the terms of the temporary order with Plaintiff having primary custody and Defendant having secondary custody.

At some point following entry of the 19 August Order, a report was made to Guilford County Department of Social Services ("DSS") that Defendant had struck the minor child during a supervised visit. DSS investigated the allegation and found no credible evidence to support Defendant's alleged abuse of the minor child but *did* find Plaintiff had "severely emotionally abused" the minor child. Due to the "degree of alienation caused by" Plaintiff, "the parties agreed to a safety plan whereby the minor child was placed with [Intervenor]." Per the safety plan, Plaintiff and Defendant were given supervised visits with the minor child at a therapist's office.

On 7 January 2015, Defendant filed a motion for emergency custody, which included an affidavit from social worker Rosa Holland in which Ms. Holland stated it was DSS's opinion that Plaintiff "presents an immediate and serious threat to the safety of [the minor child] as evidenced by her continued emotional abuse[.]" The trial court entered an order for emergency custody granting sole physical and legal custody to Defendant, "contingent on him agreeing to and following the DSS safety plan[.]" A return hearing was set for 16 January 2015.

Following the return hearing, the trial court entered a permanent custody order (the "April Order"), which made the following findings of fact:

> 3. From December 18, 2014 until February 23, 2015 (the day on which this [c]ourt orally made this Order), the minor

> child lived primarily with his paternal grandmother [Intervenor], and had visitation with both parents, more fully described below.
>
> . . . .
>
> 48. The parties agreed that the minor child would reside primarily with [Intervenor], and that the minor child would have supervised joint therapeutic visits with each parent at Lisa Partin's office. The parties signed a safety assessment implementing that plan.
>
> 49. Following the December 18, 2014 meeting, the minor child began residing with the paternal grandmother, [Intervenor].
>
> . . . .
>
> 58. The [Intervenor] has taken good care of the minor child.

Ultimately, the trial court granted Defendant sole legal custody and primary physical custody of the minor child, with Plaintiff being allowed two supervised, one-hour visits per week. After a few years, Plaintiff filed a motion to modify, and ultimately, the trial court increased Plaintiff's visitation pursuant to a permanent custody order entered on 1 August 2019 (the "August Order").

At some point between August 2019 and March 2022, Defendant was diagnosed with colon cancer. Given the circumstances, Plaintiff and Defendant orally agreed they would begin a "week on, week off" custody arrangement because it would be beneficial for the minor child. On 25 August 2022, Defendant filed a motion to modify the August Order. On 29 August 2022, Intervenor filed a motion to intervene in the pending custody action between Plaintiff and Defendant for the purpose of seeking visitation with the minor child. On 30 August 2022, Defendant died.

On 3 November 2022, Intervenor's motion to intervene was heard before the trial court, during which the court granted Intervenor's motion and found the following as fact:

> 4. On August 25, 2022, prior to his death, Defendant filed a Motion for Attorney's Fee and Motion to Modify Custody. These Motions . . . remained pending at the time of Defendant's death on August 30, 2022.
>
> 5. On August 29, 2022, also prior to the death of Defendant, Proposed Intervenor filed a Motion to Intervene, seeking

> visitation with [the minor child] based on N.C. Gen. Stat. §§ 50-13.2(b1) and 50-13.2(a).
>
> . . . .
>
> 7. Proposed Intervenor's Motion alleges that she has standing to seek visitation, in that she has a close bond with the minor child, which is in nature of a parent-child relationship, and that she exercised primary care of the minor child, with consent of the parties, [DSS], and the [c]ourt for several months as reflected by [c]ourt orders and DSS Safety Plans in this case.

The trial court concluded that there were "unresolved issues regarding child custody" pending at the time of Defendant's death, and Intervenor had standing as a "*de facto* party due to her prior involvement with the minor child as reflected by prior orders" of the trial court. Plaintiff appealed.

II. Jurisdiction

[1] The trial court's 3 November order is not a final judgment; accordingly, we note this appeal is interlocutory. Plaintiff requests this Court review the trial court's order allowing Intervenor to intervene on the basis that such a grant affects Plaintiff's substantial right pursuant to N.C. Gen. Stat. § 7(a)-27(b)(3)(a) (2021). In the alternative, Plaintiff petitions this Court for writ of certiorari in the event we determine she has not met her burden for immediate review of her interlocutory appeal. For the reasons discussed below, we allow Plaintiff's interlocutory appeal, dismiss Plaintiff's petition for writ of certiorari as moot, and deny Defendant's motion to dismiss.

"[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (2005) (citation omitted).

> Admittedly, the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Qualified Pers., Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

This Court tends to view matters involving third party custody claims against natural parents as affecting the natural parents' substantial rights. *See In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004) (allowing an interlocutory appeal on the basis that the trial court's order denying father's motion to dismiss a petition for adoption effectively eliminated his constitutional rights). Further, a natural parent's rights to the care, custody, and control of their children are among the oldest recognized fundamental rights and are protected by the Due Process Clause of the Fourteenth Amendment. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49, 57 (2000).

Here, Plaintiff appeals from the trial court's grant of Intervenor's petition to intervene, a ruling that is not a final judgment but does allow for Intervenor to make a claim for third party custody or visitation with the minor child. Such a ruling would directly impact Plaintiff's substantial rights in the care, custody, and control of her minor child. *See Troxel*, 530 U.S. at 66, 120 S. Ct. at 2060, 147 L. Ed. 2d at 57. For that reason, we elect to review Plaintiff's interlocutory appeal on the merits.

III. Analysis

[2] Plaintiff makes two arguments on appeal. Plaintiff argues the trial court erred when it (A) denied her motion to dismiss and (B) concluded as a matter of law that Intervenor had previously been made a *de facto* party to the underlying custody action.

A. Motion to Dismiss

1. Standard of Review

This Court reviews a motion to dismiss for lack of standing *de novo*, viewing "the allegations as true and the supporting record in the light most favorable to the non-moving party." *Breedlove v. Warren*, 249 N.C. App. 472, 475, 790 S.E.2d 893, 895 (2016) (quoting *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)). The trial court's conclusions of law are reviewed *de novo* on appeal. *In re Clark*, 76 N.C. App. 83, 86, 332 S.E.2d 196, 199 (1985); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.").

2. Analysis

Plaintiff begins by contending the trial court erred when it denied her motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina

Rules of Civil Procedure. Plaintiff's motion to dismiss asserts the trial court lacked subject matter jurisdiction over the action because the underlying custody action abated upon the death of Defendant, leaving Intervenor with no action in which to intervene.

This Court has long held that actions between parents involving custody claims abate upon the death of one of the parties. *See*, *e.g.*, *McDuffie v. Mitchell*, 155 N.C. App. 587, 590, 573 S.E.2d 606, 608 (2002) ("Upon the death of the mother in the instant case, the ongoing case between the mother and father ended."). Typically, only the parents of a minor child may initiate actions for custody; however, a trial court may, in its discretion, grant visitation to a third party where it would promote the "interest and welfare" of the child, or to a grandparent with whom the minor child has a "substantial relationship." N.C. Gen. Stat. §§ 50-13.2(a), (b1) (2021).

Following the seminal case *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995), a case in which the North Carolina Supreme Court considered whether grandparents had standing to sue for visitation with their grandchildren, "our Court has repeatedly held that grandparents only have statutory standing to sue for visitation . . . when the custody of a child [is] 'in issue' or 'being litigated' by the parents." *Alexander v. Alexander*, 276 N.C. App. 148, 151, 856 S.E.2d 136, 139 (2021) (quoting *Adams v. Langdon*, 264 N.C. App. 251, 257, 826 S.E.2d 236, 240 (2019)).

This Court considered facts similar to the case currently before us in *Alexander v. Alexander*, a case in which the mother of a minor child argued the trial court had no statutory authority to award the child's paternal grandparents visitation rights after the death of the minor child's father. *Alexander*, 276 N.C. App. at 149, 856 S.E.2d at 138. In *Alexander*, the father, upon learning of his cancer diagnosis, moved in with his parents, meaning the minor child lived with both the father and paternal grandparents during the father's custodial periods. Eventually, the father made a motion to modify the existing custody order. *Id.* at 149, 856 S.E.2d at 138. Shortly thereafter, the paternal grandparents motioned to intervene, which the trial court granted. *Id.*, 856 S.E.2d at 138. After the death of the father, the trial court dismissed his motion to modify due to mootness. *Id.*, 856 S.E.2d at 138. Subsequently, the trial court awarded the mother physical and sole legal custody of the minor child but granted the paternal grandparents "permanent, extensive visitation rights." *Id.*, 856 S.E.2d at 138.

Upon review, this Court concluded the "[g]randparents had statutory standing to seek permanent visitation rights, notwithstanding that

[the] [f]ather had died, as they had been allowed to intervene during a time when custody between Father and Mother was in dispute." *Id.* at 152, 856 S.E.2d at 140.

Conversely, this Court in *McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002), considered a maternal grandmother's motion to intervene in an underlying custody action that was filed *subsequent* to the death of the minor children's natural mother. This Court reasoned that a "[g]randparents' right to visitation is dependent on there [] being an ongoing case where custody is an issue between the parents" and therefore "[u]pon the death of the mother in this instant case, the ongoing case between the mother and father ended." *McDuffie*, 155 N.C. App. at 590, 573 S.E.2d at 608.

While this Court's analysis in both *Alexander* and *McDuffie* provide valuable insight into a grandparent's right to seek custody and visitation under our statutes, neither provide an answer to the question that is paramount to our current case. In the case before us, we must determine what becomes of a motion to intervene that was timely filed prior to the death of a party, if at the time of the party's death, a trial court had yet to rule on the motion. Here, unlike the maternal grandmother's circumstances in *McDuffie*, Intervenor's motion to intervene was filed *prior* to Defendant's death. Additionally, unlike the paternal grandparents' circumstances in *Alexander*, Intervenor's motion was not granted until *after* the death of Defendant. It is this precise legal limbo we seek to clarify.

To answer this question, we consider the binding precedent set forth in *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750 (grandparents have standing to initiate suit only when custody is being litigated); *McDuffie*, 155 N.C. App. at 590, 573 S.E.2d at 608 (ongoing custody disputes abate upon the death of a parent); and *Alexander*, 276 N.C. App. at 152, 856 S.E.2d at 140 (grandparent standing as an intervenor continues past the death of a parent if the trial court's grant of the motion for intervention was made prior to the death).

On 25 August 2022, Defendant filed a motion to modify custody, which effectively re-opened the case; four days later, Intervenor filed a motion to intervene in the on-going case. The following day, on 30 August 2022, Defendant died. While the timeline may appear "dubious," as Plaintiff contends, Intervenor's motion falls within the scope of acceptable timing per our statutes and case law. *See* N.C. Gen. Stat. § 50-13.2(b1); *see also McDuffie*, 155 N.C. App. at 590, 573 S.E.2d at 608. Because Intervenor's motion was filed prior to Defendant's death and

while the underlying action was ongoing, we hold the trial court's determination that Intervenor had standing was proper; accordingly, so too was the trial court's dismissal of Plaintiff's 12(b)(1) motion.

B. De Facto Party

Next, Plaintiff argues the trial court erred in finding and concluding as a matter of law that Intervenor had previously been made a *de facto* party to the underlying custody action.

Due to the interlocutory nature of Plaintiff's appeal, and because we have concluded that Intervenor has standing under both our statutes and case law, we need not reach the issue of whether the trial court improperly determined that Intervenor was a *de facto* party to the underlying case. *See Alexander*, 276 N.C. App. at 151, 856 S.E.2d at 140 ("[W]here grandparents *have intervened* or at least have been made de facto parties while the parents are disputing custody of a child, a resolution or abatement of the parents' custody dispute does not cut off the grandparents' statutory right to have their claim for visitation rights heard." (emphasis added)).

IV. Conclusion

Because custody of the minor child was being litigated at the time of Intervenor's motion to intervene, the trial court correctly denied Plaintiff's motion to dismiss for lack of standing.

AFFIRMED.

Judges COLLINS and GORE concur.

MECKLENBURG ROOFING, INC., PLAINTIFF
v.
JEREMY ANTALL & JOHNSON'S ROOFING SERVICE, INC., DEFENDANTS

No. COA23-255

Filed 21 November 2023

Appeal and Error—interlocutory order—substantial right test—more than mere assertion required

In an action to enforce a non-compete clause filed by a roofing contractor (plaintiff) against a former employee, the appellate court lacked jurisdiction to review the trial court's interlocutory order denying plaintiff's motion for a preliminary injunction where plaintiff failed to include in its statement of the grounds for appellate review any factual support—particular to this case—for its conclusory assertions that the order affected a substantial right, or a specific explanation of how the order would work injury absent appellate review.

Appeal by plaintiff from order entered 17 November 2022 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 August 2023.

Safran Law Offices, by Brian J. Schoolman, and Hendrick, Phillips, Salzman & Siegel, P.C., by Philip J. Siegel, for plaintiff-appellant.

Smith, Currie & Hancock LLP, by Matthew E. Cox, for defendants-appellees.

ZACHARY, Judge.

Plaintiff Mecklenburg Roofing, Inc., ("MRI") appeals from the trial court's order denying its motion for a preliminary injunction. After careful review, we dismiss the interlocutory appeal for lack of jurisdiction.

I. Background

In May 2019, MRI hired Defendant Jeremy Antall. MRI is a roofing contractor, and Mr. Antall first worked in the MRI service department as a superintendent and then was promoted to project manager. Mr. Antall described his responsibilities as "ensur[ing] that job materials were delivered to job sites, that safety was being adhered to, and that the job was completed per the plans and specifications."

In July 2021, MRI promoted Mr. Antall to the position of estimator. According to Alexander Ray, MRI's Vice President, Mr. Antall "estimated over $64,000,000 worth of roofing projects for MRI across most of the states" that MRI served. Mr. Ray averred that "Mr. Antall worked closely with MRI's customers and potential customers" and "was given increased access to MRI's confidential information and trade secrets, and estimated projects with the benefit of MRI's pricing strategies, gross profit percentage targets, man-hour targets, overhead allocation targets, and net profit percentage targets."

As part of this promotion, Mr. Antall and MRI entered into an "Employment Covenants Agreement" ("the Agreement"), which included the following non-compete clause:

> [F]or so long as [Mr. Antall] is employed by [MRI] and for a period of two (2) years thereafter, [Mr. Antall] will not, individually or on behalf of any person, firm, partnership, association, business organization, corporation or other entity engaged in the "Business" (as defined above), engage or participate in the actual Estimating or Selling of commercial roofing services, including but not limited to roof removal, roof retrofit, roof replacement, and roof maintenance and repair, the retrofit, renovation or repair of the exterior building envelope and waterproofing including above and below grade, of commercial or public buildings and other operations incidental to the roofing and construction services described herein and provided by [MRI]; provided that the restrictions set forth in this section shall only apply within the one hundred (100) mile radius from [MRI]'s office . . . .

In August 2022, Mr. Antall terminated his employment with MRI and accepted a position as an estimator with Defendant Johnson's Roofing Service, Inc. ("JRS") in Fort Mill, South Carolina, located within ten miles of MRI's office.

On 5 October 2022, MRI filed a verified complaint against Defendants alleging claims for misappropriation of trade secrets, tortious interference with contract, and tortious interference with existing and prospective relations. MRI also sought injunctive relief to enforce the non-compete clause and other provisions of the Agreement, and moved for the issuance of a preliminary injunction. Along with its complaint, MRI filed an affidavit from Mr. Ray. Before filing their responsive pleadings, on 10 November 2022, Defendants submitted affidavits from Mr.

Antall and Drew Brashear, the owner of JRS. The parties also submitted memoranda of law opposing MRI's motion for a preliminary injunction.

On 15 November 2022, MRI's motion for a preliminary injunction came on for hearing in Mecklenburg County Superior Court. After hearing the arguments of counsel and reviewing the pleadings, affidavits, and memoranda submitted, the trial court denied MRI's motion by order entered on 17 November 2022. MRI timely filed notice of appeal from the trial court's order denying its motion for a preliminary injunction.

II. Appellate Jurisdiction

MRI acknowledges the interlocutory nature of the order from which it appeals, but asserts that this Court may properly exercise jurisdiction because the trial court's order affects a substantial right of MRI. We disagree.

Ordinarily, this Court only hears appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2) (2021). "A preliminary injunction is interlocutory in nature." *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990). "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." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation omitted). "An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment." *Id.* (cleaned up); *see* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a).

Our Supreme Court has consistently defined a "substantial right" as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right." *Hanesbrands*, 369 N.C. at 219, 794 S.E.2d at 499–500 (cleaned up). Granted, this nebulous test is admittedly "more easily stated than applied"; thus, "it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Id.* at 219, 794 S.E.2d at 500 (cleaned up); *see also Radiator Specialty Co. v. Arrowood Indem. Co.*, 253 N.C. App. 508, 520, 800 S.E.2d 452, 460 (2017) ("Generally, each interlocutory order must be analyzed to determine whether a substantial right is jeopardized by delaying the appeal." (cleaned up)).

"To confer appellate jurisdiction based on a substantial right, the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020) (cleaned up); 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."). "[I]f the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019).

> Although this rule seems straightforward in the abstract, it is complicated by different rules concerning *how* a litigant must show that a substantial right is affected. Some rulings by the trial court affect a substantial right essentially as a matter of law. Sovereign immunity is an example. A litigant appealing the denial of a sovereign immunity defense need only show that they raised the issue below and the trial court rejected it—there is no need to explain why, on the facts of that particular case, the ruling affects a substantial right.
>
> By contrast, most interlocutory issues require more than a categorical assertion that the issue is immediately appealable. In these (more common) situations, the appellant must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right.

Id. at 17–18, 824 S.E.2d at 438 (citation omitted).

Here, in its statement of the grounds for appellate review, MRI fails to offer the requisite explanation. Instead of explaining why the facts of this case demonstrate that the trial court's order affects a substantial right, MRI simply parrots the oft-repeated proposition that "[i]n cases involving an alleged breach of a non-competition agreement and an agreement prohibiting disclosure of confidential information, North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions, holding that substantial rights have been affected." *Kennedy v. Kennedy*, 160 N.C. App. 1, 5–6, 584 S.E.2d 328, 331 (citation omitted), *appeal dismissed*, 357 N.C. 658, 590 S.E.2d 267 (2003). However, MRI's simple reliance on such bare statements of law—absent a clear and articulable

demonstration of the factual basis underlying MRI's asserted substantial right—is insufficient.

Our appellate courts have consistently reiterated that mere citation to precedent is generally insufficient to invoke this Court's interlocutory jurisdiction. Indeed, a "fixation on . . . published case[s] that [the appellant] believe[s] to be controlling" is "a mistake our Court has warned against for years." *Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10. Rather, "[w]hether a particular ruling affects a substantial right must be determined on a case-by-case basis." *Id.* (cleaned up). "Consequently, . . . the appellant cannot rely on citation to precedent to show that an order affects a substantial right. Instead, the appellant must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right." *Id.* (cleaned up).

And as explained below, here, MRI's misguided fixation on existing caselaw—at the expense of any context that might aid in our consideration of its interlocutory appeal—is compounded by another fatal shortcoming: MRI's failure to demonstrate that the order "will work injury to [MRI] if not corrected before appeal from final judgment." *Hanesbrands*, 369 N.C. at 218, 794 S.E.2d at 499 (citation omitted). "The appellant[ ] must present more than a bare assertion that the order affects a substantial right; [the appellant] must demonstrate *why* the order affects a substantial right." *Id.* at 219, 794 S.E.2d at 499 (citation omitted).

In its statement of the grounds for appellate review, MRI asserts that "interlocutory review is appropriate because MRI will lose the benefit of the noncompetition covenant in the absence of prompt review." MRI baldly asserts—without any supporting argument—that it "has a valid employment agreement structured to be no broader than necessary to protect its legitimate business interests" and that the trial court's denial of its motion for a preliminary injunction "permits [Mr.] Antall to violate the [A]greement while working for a competitor within the narrow geographic limits proscribed in the [A]greement."

Relying solely on these unsupported, conclusory assertions and scattered citation to a few, select opinions—ascribing great weight to an unpublished decision of this Court[1]—MRI maintains that "because the

1. Although not determinative of our central analysis and ultimate disposition, we nevertheless caution that the case upon which MRI most relies in this section of its brief is an unpublished decision of this Court, which lacks precedential value. *See generally Pinehurst Surgical Clinic, P.A. v. Dimichele-Manes*, 227 N.C. App. 225, 741 S.E.2d 927, 2013 WL 1901710 (2013) (unpublished). *Cf. Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10

covenants have only a two-year period, the relief sought by MRI could be mooted if Mr. Antall is permitted to continue competing with MRI." Consequently, according to MRI, our "failure to hear [its] appeal would involve a substantial right that may be lost before trial on the merits." *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 24, 373 S.E.2d 449, 451 (1988), *aff'd*, 324 N.C. 327, 377 S.E.2d 750 (1989).

MRI's statement of the grounds for appellate review is wholly insufficient. Like so many of its predecessors on appeal, MRI improperly and disproportionately relies upon vague, conclusory statements and prior cases to demonstrate that the challenged order affects a substantial right. Such assertions are ineffective to invoke our appellate jurisdiction, absent the requisite factual or evidentiary support. "In effect, [MRI] ask[s] this Court to comb through the record to understand the facts, research the elements of [preliminary injunctions and non-compete clauses], and then come up with a legal theory" to support its claim of a substantial right. *Doe*, 273 N.C. App. at 21–22, 848 S.E.2d at 10. "That is not our role; we cannot construct arguments for or find support for [the] appellant's right to appeal from an interlocutory order. The burden is on the appellant to do so, and [MRI] d[oes] not carry that burden here." *Id.* at 22, 848 S.E.2d at 10 (cleaned up).

Again, "outside of a few exceptions such as sovereign immunity, [an] appellant cannot rely on citation to precedent to show that an order affects a substantial right." *Id.* If there is any reasonable inference to draw from the oft-repeated proposition (upon which MRI relies) that "North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions," *Kennedy*, 160 N.C. App. at 5, 584 S.E.2d at 331, it is *not* that appellants seeking interlocutory review of any such order may safely assume our jurisdiction.

Rather, ever cognizant of the general rules governing interlocutory appeals, the cautious reader will infer from so generalized a proposition *only* that the appellants in those "routine" cases appropriately invoked our interlocutory jurisdiction pursuant to the substantial-right test of appealability—i.e., that the appellants sufficiently demonstrated, based on the unique facts and procedural context presented, that the challenged orders affected substantial rights and would work injury to the appellants absent immediate review. *See Hanesbrands*, 369 N.C. at 219,

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(admonishing the plaintiff-appellants for "fixati[ng] on a *published* case that they believed to be controlling . . . . a mistake our Court has warned against for years" (emphasis added)).

794 S.E.2d at 500; *Doe*, 273 N.C. App. at 21–22, 848 S.E.2d at 10. We reiterate: the *appellant* bears the burden in *every* case to "include in the statement of the grounds for appellate review an explanation of how the challenged order would . . . affect a substantial right *based on the particular facts of that case*." *Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439 (emphasis added).

To be sure, MRI makes arguments in its appellate brief concerning the merits of its underlying claims and the reasonableness of the Agreement, particularly the non-compete clause. However, in its statement of the grounds for appellate review, MRI neglects to make the argument that it will prevail on the merits, or to show that it will suffer irreparable injury. Indeed, the facts belie this contention.

For example, although MRI relies in its merits argument on *Precision Walls, Inc. v. Servie*, MRI makes only general and hypothetical allegations as to the sort of trade secrets and information that Mr. Antall *might* disclose to JRS, and has made none as definite as the allegation in *Precision Walls* that "one of [the] plaintiff's subcontractors had been contacted by [the] defendant on . . . [the] defendant's first day working for [his new employer], about performing subcontract work for" his new employer. 152 N.C. App. 630, 638, 568 S.E.2d 267, 273 (2002). In fact, rather than confirming that his "position with [his new employer] was almost identical to his job with [the] plaintiff[,]" *id.*, Mr. Antall here averred that "[t]he things that [he is] doing at JRS are not the same as what [he] did at MRI, or for the same clientele." Further, Defendants' counsel argued to the trial court that Mr. Antall "doesn't have any trade secrets. He uses mathematics, which is, to my knowledge, not a trade secret." MRI makes no specific showing to the contrary in its statement of the grounds for appellate review.

Additionally, MRI asserts in its appellate brief that "MRI and JRS bid against each other constantly, aggressively, and are direct competitors in the same market." Yet Mr. Antall stated in his affidavit that he was "unaware of any jobs that [he] bid for MRI that JRS was also bidding at the same time." Although MRI provided a "non-exhaustive list of examples" of the two companies bidding against each other, Mr. Brashear explained in his affidavit that JRS only bid on one of the listed projects, and that Mr. Antall did not work on that bid. Mr. Brashear even provided documentation showing that MRI did not bid on that particular project. Ultimately, MRI has made many accusations about Defendants' conduct, both before the trial court and this Court on appeal, but has not supported those accusations with evidence other than the assertions made

in its verified complaint and by Mr. Ray in his affidavit, all of which are contradicted by Defendants.

Regardless, this Court lacks jurisdiction to review MRI's arguments when its statement of the grounds for appellate review is insufficient to invoke our interlocutory jurisdiction to reach those arguments. *See Hanesbrands*, 369 N.C. at 219–20, 794 S.E.2d at 500 (dismissing the interlocutory appeal where the appellant "appear[ed] to suggest that she may suffer some unspecified prejudice from th[e] case being tried in Business Court," but did "not explain[ ] how she would be prejudiced" or "identif[y] a specific material right that she would lose if the order [were] not reviewed before final judgment nor [did she] explain[ ] how the order in question would work injury to her if not immediately reviewed" (cleaned up)); *Doe*, 273 N.C. App. at 21, 848 S.E.2d at 10 (deeming insufficient a statement of the grounds for appellate review in an appeal claiming a substantial right based on the risk of inconsistent verdicts, where the appellants "asserted, categorically and in a single sentence, that all the claims in this case involve the 'same facts and legal questions' concerning probable cause, without explaining how or why a jury's consideration of those facts in the various state and federal claims in this case could lead to irreconcilable results"); *Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439 (dismissing for lack of jurisdiction where the crux of the appellant's arguments—that a res-judicata defense *always* creates a risk of inconsistent verdicts, obviating the need for case-by-case applications of the substantial-right test—was, "in effect, simply an assertion that [the appellant] should not be forced to endure the burden of a trial when [it] ha[s] asserted a defense on which [it] believe[s] [it] will prevail on appeal").

In essence, MRI asks us to assume—for the sake of our jurisdiction, no less—that the barebones assertions in its statement of the grounds for appellate review are self-evident and supported by the record; and yet, MRI only begins to expound upon those assertions in the merits section of its brief. This approach improperly assumes that the appellant's burden is met, and instead, places the burden upon this Court to divine the basis for the exercise of our interlocutory jurisdiction. But it is not the duty of an appellate court "to construct arguments for or find support for [an] appellant's right to appeal. Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Hanesbrands*, 369 N.C. at 218, 794 S.E.2d at 499 (cleaned up). Accordingly, MRI's appeal is properly dismissed.

III. Conclusion

For the foregoing reasons, we dismiss the interlocutory appeal for lack of jurisdiction.

DISMISSED.

Judges DILLON and WOOD concur.

STATE OF NORTH CAROLINA
v.
CORY WYATT BOWMAN, DEFENDANT

No. COA23-384

Filed 21 November 2023

1. Probation and Parole—probation revocation—notice—allegations of behavior—sufficiency

The trial court had jurisdiction to revoke defendant's probation where the allegations in the probation violation report provided sufficient notice of the probation hearing and its purpose. Although the report did not explicitly allege that defendant had committed a criminal offense, the report's description of defendant's behavior—that defendant admitted to downloading and viewing child pornography even though he was subject to a condition of probation that he not possess pornography—put defendant on notice of possible revocation.

2. Probation and Parole—probation revocation—new criminal offense—sufficiency of evidence—admission to viewing pornography

The trial court did not abuse its discretion by revoking defendant's probation where the State's evidence that defendant had admitted to downloading and viewing child pornography was sufficient to reasonably satisfy the court that defendant had violated a condition of his probation by committing a new offense. Although the court did not specify which new crime defendant had committed, defendant's actions fulfilled the elements of third-degree exploitation of a minor, which was also the underlying crime for which defendant had been placed on probation.

Judge COLLINS concurring in result only.

Appeal by defendant from an order entered by Judge Cynthia K. Sturges on 27 September 2022, in Forsyth County Superior Court, revoking his criminal probation and activating his suspended sentence. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Reginaldo E. Williams, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for defendant-appellant.

FLOOD, Judge.

Cory Wyatt Bowman ("Defendant") appeals from the trial court's revocation of his criminal probation for third-degree exploitation of a minor. Defendant argues the trial court erred in revoking his probation status, as (A) Defendant did not have notice that his probation would face revocation, and (B) the State failed to prove he committed a new criminal offense. As explained in further detail below, we find the trial court did not err.

I. Factual and Procedural Background

On 21 June 2021, Defendant was charged with fifteen counts of third-degree exploitation of a minor. On 26 October 2021, Defendant pled guilty as charged, and on the same day, the trial court consolidated the convictions into three judgments. The trial court sentenced Defendant to three consecutive terms of five to fifteen months' imprisonment, which was suspended for sixty months' supervised probation. Included as conditions for Defendant's probation were, *inter alia*, that Defendant commit no criminal offense in any jurisdiction; participate in sex offender treatment; submit to warrantless searches for adult and child pornography; and a special condition under N.C. Gen. Stat. § 15A-1343(b2) (2021), that Defendant not "have any pornography adult or child."

In March 2022, Defendant began participating in group therapy pursuant to his court-mandated sex offender treatment. On 20 April 2022, during a group therapy meeting, Defendant admitted to "looking at child abusive material" and therefore was deemed non-compliant with the therapy. A counselor from Counseling and Support Associates reported Defendant's admission to his probation officer.

Two days later, on 22 April 2022, Defendant's probation officer ("Officer Wallace") and another police officer visited Defendant's home and made contact with him and his girlfriend. The officers asked

Defendant if he knew why they were there, and he replied "[p]robably for porn." The officers asked Defendant about his cell phone, and he indicated that his phone was damaged and that he had instead been using his girlfriend's phone. The officers asked Defendant if he had "looked at any child pornography," and he admitted to "looking at it" on his girlfriend's phone, and also admitted that he had factory reset his girlfriend's phone.

Defendant's girlfriend permitted the officers to look at her phone. Upon investigation of Defendant's girlfriend's phone, the officers observed Google search results for "little girls in bikini videos; little girl model videos; little girl videos; little girl web cams; . . . and live sex cam." Officer Wallace then contacted the Forsyth County Sheriff's Office, and a police deputy and investigator were sent to Defendant's residence. The investigator searched Defendant's girlfriend's phone, confiscated the phone, and determined "they could not pull anything off the phone that would lead to a new charge."

Soon after, Defendant went to a meeting with Officer Wallace, admitted again to viewing child pornography, and was arrested for the violation of being non-compliant in a group therapy class.

On 29 April 2022, Officer Wallace filed a violation report (the "Report"), alleging Defendant willfully violated probation. The Report reads, in relevant part:

> 1. Sex Offender Special Condition Number
>
>   Per [D]efendant's judgment, he is "not to have any pornography adult or child." On [20 April 2022] [D]efendant admitted to his counselor with C.A.S.A. that he had downloaded child abuse material to his telephone. During a home contact on [22 April 2022], the offender admitted to this officer that he had viewed child pornography on his girlfriend's cellphone (estimated time frame was a month prior). This officer contacted the Forsyth County Sherriff's office about it. [D]efendant's girlfriend's cellphone was seized by Investigator Tufft due to [D]efendant's admitting to viewing child pornography on it.
>
> 2. Condition of Probation
>
>   "Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court" in that Defendant was enrolled

> in sex offender treatment with counseling and support associates (C.A.S.A.) on [15 March 2022]. On [25 April 2022] [D]efendant was non-complied from group for the following: on [20 April 2022] he admitted to the counselor that he had downloaded (to his telephone) and watched child abuse material within the past week prior to admission. This violates the group rules [D]efendant signed on [7 March 2022]. On [22 April 2022] [D]efendant admitted to this officer that he had viewed child pornography (estimated time frame was a month prior).

(cleaned up).

This matter came on for hearing on 27 September 2022. The State argued that Defendant's admission of downloading and watching child pornography constituted a new criminal offense. The trial court asked Officer Wallace whether he had viewed any images on Defendant's girlfriend's phone, and Officer Wallace said he had not. Following this inquiry, Officer Wallace testified as to the Google search results he observed on Defendant's girlfriend's phone. Defendant's attorney contended that the search terms did not indicate illegality in the material viewed by Defendant, but the trial court noted that "whether or not what he did was illegal versus whether or not he violated probation, which he was not allowed to do, those are two different [questions]." The State then requested the trial court revoke Defendant's probation.

The trial court found Defendant violated probation, and that "the evidence does reasonably satisfy [the trial court] in [its] discretion that [Defendant] has violated conditions upon which his sentence was suspended," and ordered "that his probation is revoked and the suspended sentence is now active." In its written order, the trial court made the same findings, checked the box indicating that Defendant's probation was revoked for willful violation of the condition that he not commit any criminal offense, and indicated that each violation was, in and of itself, a sufficient basis upon which the court could revoke probation and activate Defendant's sentence. Defendant orally appealed from the trial court's order.

II. Jurisdiction

Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, this Court has jurisdiction over Defendant's appeal as to his argument concerning the State's alleged failure to prove he committed any new criminal offense. *See* N.C. R. App. P. 4(a)(1). As to Defendant's

argument regarding notice, under Rule 10: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10. At trial, the following exchange occurred between the court and Defendant's counsel:

> THE COURT: To satisfy due process in a probation revocation hearing, probationer is entitled to written notice of the claimed violations.
>
> We have that. You said you have notice.
>
> MS. MARTIN: Yes, Your Honor.

Defendant's counsel admitted that Defendant had notice, and Defendant did not bring at trial a request, objection, or motion regarding notice. Proper notice is required for a trial court to have subject matter jurisdiction, however, and "the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal[.]" *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted); *see State v. Kelso*, 187 N.C. App. 718, 723, 654 S.E.2d 28, 32 (2007). Accordingly, we address Defendant's notice argument.

III. Standard of Review

Defendant asserts this Court reviews his appeal *de novo*. Defendant's assertion is erroneous as, "[w]hen reviewing the decision of a trial court to revoke probation, we review for abuse of discretion." *State v. Pettiford*, 282 N.C. App. 202, 206, 869 S.E.2d 772, 776 (2022) (citation omitted). A trial court abuses its discretion when its "ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 206, 869 S.E.2d at 776 (citation and internal quotation marks omitted). "Nonetheless, when a trial court's determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law." *State v. Johnson*, 246 N.C. App. 132, 134, 782 S.E.2d 549, 551–52 (2016) (citation and internal quotation marks omitted). Here, the trial court's conclusions of law in its written order did not concern statutory interpretation, and our review is therefore for abuse of discretion. *See id.* at 132, 782 S.E.2d at 551–52; *see also Pettiford*, 282 N.C. App. at 206, 869 S.E.2d at 776.

IV. Analysis

Defendant contends on appeal: (A) the trial court erred in revoking Defendant's probation as he did not receive effective notice that he

would face probation revocation, and (B) the trial court erred by revoking Defendant's probation because the State failed to prove he committed any new criminal offense.

A. Notice

[1] Defendant contends he was not given notice of the hearing and its purpose, as the State alleged in the Report that he had violated a sex offender special probation condition, which is not a revocable violation. We disagree.

Under statute, "[t]he State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e) (2021). "Just as with the notice provided by criminal indictments . . . the purpose of notice mandated by N.C. [Gen. Stat.] § 15A-1345(e) is to allow the defendant to prepare a defense[.]" *State v. Moore*, 370 N.C. 338, 342, 807 S.E.2d 550, 553 (2017) (cleaned up) (citations and internal quotation marks omitted). Our Supreme Court has provided:

> A statement of a defendant's alleged actions that constitute the alleged violation will give that defendant the chance to prepare a defense because he will know what he is accused of doing. He will also be able to determine the *possible effects* on his probation that those allegations could have, and he will be able to gather any evidence available to rebut the allegations.

Id. at 342, 807 S.E.2d at 553 (emphasis added). One possible effect a defendant's actions may have on his probation, if said actions constituted a crime or absconding, is the revocation of said probation. *See* N.C. Gen. Stat. §§ 15A-1343(b)(1), 1344(a).

Here, Defendant was convicted for fifteen counts of third-degree exploitation of a minor, a crime that "prohibits the mere possession of child pornography." *State v. Fletcher*, 370 N.C. 313, 320, 807 S.E.2d 528, 534 (2017). Defendant was then placed on probation with the condition that he "not have any pornography adult or child." *See* N.C. Gen. Stat. § 14-190.17A(a) (2021) ("A person commits the offense of third[-]degree sexual exploitation of a minor if, knowing the character or content of the material, he possess material that contains a visual representation of a minor engaging in sexual activity."). In the Report, after noting that Defendant's probation is subject to the condition he "not have pornography adult or child[,]" Officer Wallace described Defendant's alleged actions of downloading to his phone and viewing "child abusive material," and viewing child pornography on his girlfriend's phone.

The Report's description of Defendant's alleged behavior was sufficient to give Defendant notice of possible probation revocation. While the Report does not explicitly allege that Defendant violated his probation by committing a criminal offense, its allegation of Defendant downloading and viewing child pornography gave Defendant the chance to prepare a defense against the accusation of him possessing child pornography—conduct that may be criminal as third-degree exploitation of a minor, which is the very offense for which Defendant was convicted. *See Moore*, 370 N.C. at 342, 807 S.E.2d at 553; *see Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534. We conclude that, from the Report, Defendant was able to determine the "possible effects" his alleged actions may have on probation, i.e., revocation, and therefore hold the trial court did not err. *See Moore*, 370 N.C. at 342, 807 S.E.2d at 553.

B. New Criminal Offense

[2] Defendant argues that, even if the State gave him effective notice that his probation could be revoked for committing a new criminal offense, the State failed to meet its burden to show that a crime was committed. We disagree.

This Court has provided:

> A proceeding to revoke probation is often regarded as informal or summary, and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended.

Johnson, 246 N.C. App. at 134, 782 S.E.2d at 551; *see also State v. Monroe*, 83 N.C. App. 143, 145–46, 349 S.E.2d 315, 317 (1986). As articulated above, a condition upon which probation may be revoked is the commission of a new crime, and one commits the crime of third-degree exploitation of a minor when, "knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity." N.C. Gen. Stat. § 14-190.17A(a); *see* N.C. Gen. Stat. §§ 15A-1343(b)(1), 1344(a). A person possesses child pornography when he is "aware of its presence and has himself or together with others both the power and intent to control the disposition of the material." *State v. Dexter*, 186 N.C. App. 587, 595, 651 S.E.2d 900, 906 (2007); *see State v. Riffe*, 191 N.C. App. 86, 92, 661 S.E.2d 899, 904 (2008).

In *Monroe*, this Court heard a defendant's appeal of the lower tribunal's decision to revoke his probation, and the defendant argued, "the trial court erred in revoking his probation because the trial court's findings of fact in the revocation order do not support the conclusion of law that [the] defendant breached a condition of probation by committing a criminal offense." 83 N.C. App. at 144, 349 S.E.2d at 316. We disagreed with the defendant's contention and provided that, although the trial court did not specifically state whether the criminal offense was in violation of one of the two statutory crimes listed in the defendant's violation report, "the evidence presented amply support[ed] a finding that [the] defendant violated" one of the statutory crimes. *Id*. at 144, 349 S.E.2d at 316. As such, the trial court's revocation of the defendant's probation was proper. *Id*. at 145–46, 349 S.E.2d at 317.

Here, the State presented evidence that Defendant admitted twice to downloading and viewing child pornography and "child abusive material[,]" that Defendant had factory reset his girlfriend's phone at some point after viewing the material on her phone, and that Defendant had made several suggestive Google searches on his girlfriend's phone. Defendant's admissions certainly support a finding that he possessed child pornography as, by downloading and viewing the material on his and his girlfriend's phones, he was necessarily aware of the pornography's presence and had the power and intent to control the material's disposition. *See Dexter*, 186 N.C. App. at 595, 651 S.E.2d at 906. This evidence, together with the remaining evidence presented by the State, was therefore sufficient to reasonably satisfy the trial court, in its sound discretion, that Defendant knowingly possessed material containing a visual representation of a minor engaging in sexual activity and committed third-degree exploitation of a minor. *See Johnson*, 246 N.C. App. at 134, 782 S.E.2d at 551; *see* N.C. Gen. Stat. § 14-190.17A(a).

In its written order, the trial court concluded, *inter alia*:

> 4. A [c]ourt may find a probationer has committed a new criminal offense regardless of the State's decision to drop the new criminal charge or to not bring a charge at all. . . .
>
> 5. The evidence before the [c]ourt was such as to reasonably satisfy the [c]ourt, in its discretion, that Defendant has willfully violated a condition of his probation.

(cleaned up). From the trial court's Conclusion of Law 4—that a court "may find a probationer has committed a new criminal offense regardless of the State's decision to . . . not bring a charge at all"—we conclude that the court found, in Conclusion of Law 5, Defendant willfully

violated the probation condition of not having child pornography by committing a new criminal offense.

Although the trial court did not specify in its order the new crime Defendant had committed, third-degree exploitation of a minor was the underlying crime for which Defendant was placed on probation with the condition that he not have child pornography. The State presented evidence which "amply support[ed] a finding" that Defendant committed third-degree exploitation of a minor, and the evidence was such that the trial court was reasonably satisfied Defendant violated a term of his condition. *See Monroe*, 83 N.C. App. at 145–46, 349 S.E.2d at 317. As such, the trial court did not abuse its discretion in revoking Defendant's probation.

IV. Conclusion

Defendant has failed to demonstrate he did not receive notice that he would face probation revocation, and the trial court was reasonably satisfied Defendant violated a term of his condition such that revocation was proper. Accordingly, the trial court did not err in revoking Defendant's probation.

NO ERROR.

Judge GORE concurs.

Judge COLLINS concurs in result only.

STATE OF NORTH CAROLINA
v.
KAJUAN DYSHAWN HAMILTON, DEFENDANT

No. COA22-847

Filed 21 November 2023

1. Criminal Law—motion for new counsel—insufficient basis—blindness

In a prosecution for two counts of robbery with a dangerous weapon, the trial court did not abuse its discretion in denying defendant's motion for new counsel, where the sole basis for defendant's motion was that his counsel was blind. Defendant did not offer a valid reason explaining why his counsel was not "reasonably competent" to present his case, nor did defendant assert that a conflict existed between them that would have rendered his appointed counsel "incompetent or ineffective."

2. Criminal Law—cross-examination of defendant—irrelevant and improper impeachment—plain error analysis

In a prosecution for two counts of robbery with a dangerous weapon, the trial court did not commit plain error when it failed to intervene ex mero motu during the State's cross-examination of defendant. The State's questions regarding defendant's use of curse words in his interactions with the court were irrelevant to the case and constituted improper impeachment. However, the court's failure to intervene did not rise to the level of plain error where there was ample evidence that defendant committed the robberies he was charged with, and therefore it was unlikely that the court's error impacted the jury's finding that defendant was guilty.

3. Robbery—with a dangerous weapon—jury instruction—lesser included offense—common law robbery

After defendant and his accomplice robbed a gaming business together, the trial court in defendant's criminal prosecution committed plain error by failing to instruct the jury on the lesser included offense of common law robbery with respect to one of defendant's two counts of robbery with a dangerous weapon, which was based on defendant acting in concert with his accomplice to rob one of the business patrons. Although defendant did demand money from the business manager by pointing a firearm at the manager, which supported a conviction on the first count of robbery with a dangerous weapon, nothing in the record suggested that defendant or

his accomplice approached the business patron with a weapon. Therefore, a rational jury could have found defendant guilty of common law robbery on the second count.

Appeal by Defendant from judgment entered 4 May 2022 by Judge Joseph N. Crosswhite in Davidson County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Wyatt Early Harris Wheeler LLP, by Stanley F. Hammer, for Defendant-Appellant.

CARPENTER, Judge.

Kajuan Dyshawn Hamilton ("Defendant") appeals from judgment after a jury convicted him of two counts of robbery with a dangerous weapon. On appeal, Defendant argues the trial court erred by: (1) denying Defendant's motion for new counsel; (2) failing to intervene *ex mero motu* during Defendant's cross-examination; and (3) failing to instruct the jury on the lesser included offense of common-law robbery. After careful review, we conclude the trial court plainly erred by failing to instruct the jury on the lesser included offense. Accordingly, we vacate the trial court's judgment as to the second count of robbery with a dangerous weapon, and we remand for a new trial concerning that count.

I. Factual & Procedural Background

On 5 March 2018, a Davidson County grand jury indicted Defendant on two counts of robbery with a dangerous weapon. The State tried the case during the 3 May 2022 Criminal Session of Davidson County Superior Court before the Honorable Joseph Crosswhite. At the beginning of trial, Defendant orally moved for new appointed counsel. Defendant requested new counsel because his appointed counsel was blind. This was Defendant's third appointed counsel: his first withdrew, and his second discovered a conflict of interest. The trial court inquired into Defendant's position and heard from both Defendant's counsel and the State. The State asked the trial court to proceed with Defendant's counsel, and Defendant's counsel was willing to proceed. The trial court denied Defendant's motion for new counsel.

At trial, evidence tended to show the following. On 13 December 2016, Defendant and Willie Thomasson entered a gaming business

(the "Business") in Davidson County. Todd Bauguess was managing the Business at the time Defendant and Thomasson entered. Upon entering the Business, Defendant drew his firearm and pointed it at Bauguess. Defendant then demanded money from Bauguess, while Thomasson approached Business patrons, including Larry McClendon, and demanded money from them. Before leaving, Defendant and Thomasson took money from Bauguess, the Business, and McClendon, as well as Bauguess' gun and driver's license. Police arrived approximately ten minutes after Defendant and Thomasson left the Business.

After the robbery, police obtained images from the Business' surveillance videos and issued a press release asking for help identifying the suspects. Based on the surveillance images, a corrections officer identified Defendant as one of the suspected robbers. On this information, police asked Bauguess if he would review a lineup of potential suspects. Bauguess agreed, and he identified Defendant from the lineup as one of the robbers. In addition to the trial testimony, the jury viewed the Business' surveillance video from 3 December 2016.

Defendant failed to request an instruction on the lesser included offense of common-law robbery, and the jury found Defendant guilty of two counts of robbery with a dangerous weapon: one direct count regarding Bauguess and one count for acting in concert with Thomasson regarding McClendon. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the trial court erred by: (1) denying Defendant's motion for new counsel; (2) failing to intervene *ex mero motu* during Defendant's cross-examination; and (3) failing to instruct the jury on the lesser included offense of common-law robbery.

IV. Analysis

A. Motion for New Counsel

[1] In his first argument, Defendant asserts the trial court erred by failing to grant his motion for new counsel. We disagree.

Whether a trial court erred in denying a defendant's motion for new appointed counsel is reviewed for abuse of discretion. *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981) ("[T]he decision

of whether appointed counsel shall be replaced is a matter committed to the sound discretion of the trial court."). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

An indigent defendant does not have the right to choose his appointed counsel. *State v. McNeil*, 263 N.C. 260, 270, 139 S.E.2d 667, 674 (1965). When an indigent defendant requests new appointed counsel, however, "the obligation of the court [is] to inquire into defendant's reasons for wanting to discharge his attorneys and to determine whether those reasons were legally sufficient to require the discharge of counsel." *Hutchins*, 303 N.C. at 335, 279 S.E.2d at 797. There is a legally sufficient reason for new appointed counsel "whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). Concerning the "constitutional right to counsel," the *Thacker* Court said:

> when it appears to the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent that defendant, denial of defendant's request to appoint substitute counsel is entirely proper.

Id. at 352, 271 S.E.2d at 255. In other words, *Thacker* presents a two-part test for determining whether to grant a motion for new appointed counsel. *See id.* at 352, 271 S.E.2d at 255. To receive new appointed counsel, the defendant must either show: (1) his current counsel is not "reasonably competent" to present the defendant's case; or (2) there is a conflict between the defendant and his appointed counsel that renders counsel "incompetent or ineffective." *See id.* at 352, 271 S.E.2d at 255.

In *State v. Jones*, however, our Supreme Court took a different route to review a request for new counsel. 357 N.C. 409, 413, 584 S.E.2d 751, 754 (2003). Because *Jones* potentially clouds our standard of review in these cases, we will illustrate the Court's reasoning and reconcile it with the established standard. *See Hutchins*, 303 N.C. at 336, 279 S.E.2d at 798; *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. In *Jones*, the Court initially acknowledged the abuse-of-discretion standard. *Jones*, 357 N.C. at 413, 584 S.E.2d at 754. But directly after announcing the abuse-of-discretion standard, the Court stated that " 'a defendant must show that

he received ineffective assistance of counsel.' " *Id.* at 413, 584 S.E.2d at 754 (quoting *State v. Thomas*, 350 N.C. 315, 328–29, 514 S.E.2d 486, 495 (1999). From there, the Court discussed our Sixth Amendment standard for ineffective assistance of counsel. *See id.* at 413, 584 S.E.2d at 754.

The Sixth Amendment standard for ineffective assistance of counsel, however, is reviewed de novo. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). So, the *Jones* Court discerned whether there was an abuse of discretion by analyzing, de novo, whether there was prejudice via ineffective assistance of counsel. *See Jones*, 357 N.C. at 413, 584 S.E.2d at 754. In other words, if the Jones Court retrospectively found the appointed counsel effective, the trial court clearly did not err by denying the motion for new counsel because the counsel was indeed effective. *See id.* at 413, 584 S.E.2d at 754. Said another way: No prejudice, no abuse of discretion. *See id.* at 413, 584 S.E.2d at 754.

After its Sixth Amendment analysis, the Jones Court stated that the "hearing judges did not abuse their discretion in denying defendant's motions to dismiss [the appointed] counsel. Since defendant did not meet the two-pronged *Strickland* test, *it follows that the denials of defendant's motions were not 'manifestly unsupported by reason.*' " *Id.* at 416–17, 584 S.E.2d at 756 (quoting *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (emphasis added). The *Strickland* test is, of course, used to determine whether a defendant's Sixth Amendment right to effective assistance of counsel was violated. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Put differently, the *Jones* Court backed into its abuse-of-discretion analysis by discerning whether the defendant was prejudiced. *See Jones*, 357 N.C. at 416–17, 584 S.E.2d at 756. The *Jones* Court seemingly used this logic: (1) a Sixth Amendment ineffective-assistance-of-counsel violation turns on whether a defendant received effective assistance of counsel; (2) an erroneous denial of a motion for new counsel turns on whether a defendant *could have* received effective assistance of counsel; (3) an alleged Sixth Amendment violation is reviewed de novo; (4) a denial of a motion for new appointed counsel is reviewed for abuse of discretion; (5) de novo review is more exacting than abuse-of-discretion review; therefore, (6) if there is no Sixth Amendment violation under a de novo review, it follows that a trial court did not abuse its discretion by denying a defendant's motion for new appointed counsel. *See id.* at 416–17, 584 S.E.2d at 756. Although it reached the right destination, the *Jones* Court skipped the straightforward abuse-of-discretion review described in *Thacker* for the meandering, and avoidable, Sixth Amendment review.

We, however, will purely review the trial court's denial of Defendant's motion for new counsel for abuse of discretion. *See Hutchins*, 303 N.C. at 336, 279 S.E.2d at 798; *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. On a motion for new appointed counsel, a trial judge must decide—in the moment—whether appointed counsel can provide effective assistance of counsel. *See Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. A trial judge does not have the benefit of hindsight: When a defendant makes a motion for new counsel, the trial judge must decide whether (1) a defendant's current counsel is "reasonably competent" to present the case; or (2) there is a conflict between the defendant and his appointed counsel that renders counsel "incompetent or ineffective." *Id.* at 352, 271 S.E.2d at 255. This is a forward-looking decision, made in the moment. Such a decision is in the sound discretion of the trial judge, and it is reviewed for abuse of discretion. *See Hutchins*, 303 N.C. at 336, 279 S.E.2d at 798. If a defendant wants a retroactive, de novo review of whether he received effective assistance of counsel, he must make a Sixth Amendment argument. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Defendant made no such argument.

Here, Defendant asserts the trial court erred by denying his motion for new appointed counsel. Defendant asserts the trial court abused its discretion because his appointed counsel was blind. The parties do not dispute that Defendant's counsel was blind. We cannot conclude, however, that the trial court abused its discretion by allowing Defendant's counsel to proceed in this case.

We turn to the two-part *Thacker* test. First, Defendant does not allege a conflict between him and his counsel. Therefore, no conflict could have "render[ed] counsel incompetent or ineffective to represent" Defendant. *See Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. Second, Defendant's only complaint about his appointed counsel was his counsel's blindness. As Defendant's only complaint was about his counsel's blindness, if we hold that the trial court abused its discretion, we hold that it is impossible for a blind lawyer, as such, to have been "reasonably competent" to present Defendant's case. *See id.* at 352, 271 S.E.2d at 255. In other words, if we hold the trial court abused its discretion merely because Defendant's counsel was blind, we necessarily hold that it is "manifestly unsupported by reason" to allow blind lawyers to practice criminal law. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. That, however, is a question for the State Bar, not this Court. *See* N.C. Gen. Stat. §§ 84-15 to -38 (2021) (granting the State Bar authority to manage admission to practice law in North Carolina). Defendant's counsel is licensed to practice law in this state, and we cannot say the trial court abused its

discretion by failing to replace him because of an immutable physical condition—a physical condition that is not limited to this case.

Thus, the trial court's "denial of [D]efendant's request to appoint substitute counsel [was] entirely proper" because Defendant did not offer a valid reason why his counsel was not reasonably competent to present his case, nor did Defendant assert a conflict with his counsel. *See Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. The trial court satisfied its obligation by "inquir[ing] into [D]efendant's reasons for wanting to discharge his attorney[] and . . . determin[ing] whether those reasons were legally sufficient to require the discharge of counsel." *See Hutchins*, 303 N.C. at 335, 279 S.E.2d at 797. The trial court's determination aligned with our State Bar, finding Defendant's counsel competent to practice law, and we think the trial court's decision was reasonable. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Accordingly, the trial court did not abuse its discretion by allowing Defendant's appointed counsel to proceed in this case. *See id.* at 285, 372 S.E.2d at 527.

B. Cross-Examination of Defendant

[2] In his second argument, Defendant asserts the trial court erred by failing to intervene *ex mero motu* during the State's cross-examination of Defendant. Although we agree with Defendant to the extent he argues the State's cross-examination of him was inappropriate, we conclude the trial court did not plainly err.

This Court reviews "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). To find plain error, first, this Court must determine that an error occurred at trial. *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, the defendant must demonstrate the error was "fundamental," which means the error "had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (internal quotations and citations omitted). Notably, the "plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (citing *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

North Carolina "adheres to the 'wide-open' rule of cross-examination . . . ." *State v. Penley*, 277 N.C. 704, 708, 178 S.E.2d 490, 492 (1971). Thus, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2021). A matter is relevant if it has any tendency to make a consequential

fact more or less probable. *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000). Credibility is relevant and may be cross-examined through questions about specific instances of a witness's conduct, but only insofar as the questions examine the witness's character for truthfulness or untruthfulness. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2021); *State v. Morgan*, 315 N.C. 626, 633–34, 340 S.E.2d 84, 89 (1986).

Here, Defendant asserts the trial court erred by failing to intervene *ex mero motu* during the State's cross-examination of him. Defendant argues the State's cross-examination was irrelevant and an improper form of impeachment. The challenged exchange, in which the State questioned Defendant about his interactions with the court before his trial began, is as follows:

> **Q**. And what words did you use towards the people in this courtroom whenever you were angry about that?
>
> **A**. It's beyond that. We all know what was said. I know what was said. The jury wasn't there when it was said, so it's beyond that.
>
> **Q**. If you would answer the question.
>
> **A**. I did answer it, ma'am.
>
> **Q**. What words did you use whenever you were angry?
>
> **A**. Any words that a man or a person would use when they're angry.
>
> **Q**. Mr. Hamilton, if you would please answer the question.
>
> **A**. I did answer it for you, ma'am.
>
> **Q**. What words did you use?
>
> **A**. Words that would be used when a person's angry.
>
> **Q**. And what words were those?
>
> **A**. I'm not going to speak on them. And thank you. I'll continue on answering your questions. Thank you.
>
> **Q**. Mr. Hamilton, what words did you use?
>
> **A**. Words that anybody would use when they're angry.
>
> **Q**. What words did you use whenever you were angry in the courtroom?
>
> **A**. The same words that you would use when you're angry.
>
> **Q**. Mr. Hamilton, I'm asking you what words you used.
>
> **A**. I don't recall the words that I used.
>
> **Q**. Did you say that—did you use the word "mother fucker"?
>
> **A**. I don't know. Did I?

Q. Did you say that you were "getting fucked"?

A. To my knowledge and how I feel, yes, I do feel like that.

Q. Did you say that you were "getting raped"?

A. What's happening? I'm being took from my family.

Q. Is that a yes?

A. I didn't deny it.

Q. Did you say that I was a racist?

A. You act like it.

Q. Is that a yes?

A. No. Because you didn't hear that come out of my mouth and say you racist. I said Davidson County, period.

Q. You don't remember pointing at me and screaming that I was a racist from Jump Street?

A. Well, if I did, I did. I don't recall.

Defendant's counsel did not object to this portion of the cross-examination.

First, Defendant's exchange with the court, over five years after the crimes in question, has no tendency to make a consequential fact concerning those crimes more or less probable. *See Griffin*, 136 N.C. App. at 550, 525 S.E.2d at 806. Second, although Defendant's cross-examined conduct may have been probative concerning his general character, his examined conduct was irrelevant to his character for truthfulness. Therefore, the State's inquiry into these actions was an inappropriate form of impeachment. *See Morgan*, 315 N.C. at 633–34, 340 S.E.2d at 89; N.C. Gen. Stat. § 8C-1, Rule 608(b).

The trial court's failure to intervene, however, does not rise to "plain error." There was ample evidence of Defendant's guilt in this case, including video footage and eyewitness testimony. Through video footage, the jury could see for itself whether Defendant committed the charged crimes: The State's inappropriate cross-examination had no bearing on the jury's ability to consider the video evidence. Considering the evidence in the record, we cannot say the trial court's failure to intervene impacted "the jury's finding that the defendant was guilty" or "seriously affect[ed] the fairness" of the trial. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Accordingly, the trial court did not plainly err. *See Odom*, 307 N.C. at 661, 300 S.E.2d at 378.

C. Lesser Included Offense

[3] In his third argument, Defendant asserts the trial court erred by failing to instruct the jury on the lesser included offense of common-law

robbery as to Defendant's second count of robbery with a dangerous weapon. We agree with Defendant: The trial court plainly erred.

Again, this Court reviews unpreserved objections to jury instructions for plain error. *Gregory*, 342 N.C. at 584, 467 S.E.2d at 31. And to show plain error, Defendant must demonstrate the error was "fundamental," which means the error "had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Failing to properly instruct a jury on a lesser included offense is a fundamental error: It "constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense." *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000).

"An instruction on a lesser[ ]included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "The test is whether there 'is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.' " *Id.* at 562, 572 S.E.2d at 772 (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)).

A defendant commits robbery with a dangerous weapon when he: (1) unlawfully takes another's property; (2) by using a dangerous weapon; (3) that threatens another person's life. *State v. Bellamy*, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667 (2003). The difference between robbery with a dangerous weapon and common-law robbery is that "the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985).

Concerning his second count, Defendant claims he was entitled to a jury instruction on common-law robbery. Here, Defendant was convicted of the second count of robbery with a dangerous weapon because he acted in concert with Thomasson. Bauguess testified that Defendant pointed a gun at him and ordered him to get the money from behind the counter. At the same time, Thomasson approached McClendon and took his money, while McClendon pleaded: "Man, I've got kids." Thomasson, however, did not have a firearm when he approached McClendon; Thomasson did not have a firearm at any time during the robbery. McClendon's mention of his children is evidence McClendon feared for his life. But Thomasson's lack of a firearm is evidence that a dangerous

weapon was not used to take McClendon's money, and Thomasson's lack of a firearm is also evidence that McClendon did not fear for his life.

The record shows Defendant indeed used a firearm to threaten Bauguess, but as neither Defendant nor Thomasson approached McClendon with a firearm, a rational jury could have reasonably inferred that neither Defendant nor Thomasson used a dangerous weapon to threaten McClendon. *See Bellamy*, 159 N.C. App. at 147, 582 S.E.2d at 667. Therefore, concerning Defendant's second count, a rational jury could have convicted Defendant of common-law robbery, rather than robbery with a dangerous weapon, because the difference between the crimes is the use of a dangerous weapon to threaten a life. *See Peacock*, 313 N.C. at 562, 330 S.E.2d at 195; *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771.

Accordingly, because a rational jury could have viewed the evidence to support common-law robbery and not robbery with a dangerous weapon, the trial court erred by not instructing the jury on common-law robbery concerning Defendant's second count. *See Bellamy*, 159 N.C. App. at 147, 582 S.E.2d at 667; *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771; *Peacock*, 313 N.C. at 562, 330 S.E.2d at 195. Therefore, the trial court plainly erred in failing to instruct the jury on the lesser included offense. *See Lawrence*, 352 N.C. at 19, 530 S.E.2d at 819. Thus, we vacate and remand the trial court's judgment concerning Defendant's second count of robbery with a dangerous weapon.

V. Conclusion

In sum, the trial court did not abuse its discretion by failing to grant Defendant's motion for new counsel, and the trial court did not plainly err by failing to intervene *ex mero motu* during the State's cross-examination of Defendant. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *Odom*, 307 N.C. at 661, 300 S.E.2d at 378. The trial court did, however, plainly err in failing to instruct the jury on the lesser included offense concerning Defendant's second count of robbery with a dangerous weapon. Failing to instruct the jury on the lesser included charge is a plain, reversible error; therefore, we must vacate and remand the trial court's judgment concerning the second count of robbery with a dangerous weapon. *See Lawrence*, 352 N.C. at 19, 530 S.E.2d at 819; *Bellamy*, 159 N.C. App. at 147, 582 S.E.2d at 667; *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771.

NO PREJUDICIAL ERROR in part; VACATED and REMANDED in part.

Chief Judge STROUD and Judge DILLON concur.

STATE v. TUCKER

[291 N.C. App. 379 (2023)]

STATE OF NORTH CAROLINA
v.
DOMINIQUE BUCK TUCKER

No. COA22-865

Filed 21 November 2023

1. Bail and Pretrial Release—kidnapping—connected to domestic violence—no pretrial release hearing—no flagrant constitutional violation—no prejudice shown

After defendant was incarcerated for multiple charges arising from a domestic violence incident, the trial court did not err in denying defendant's motion to dismiss a kidnapping charge even though the State had failed to hold a pretrial release hearing relating to that charge as required under N.C.G.S. § 15A-534.1 (requiring pretrial release hearings for domestic violence crimes). The State's violation of defendant's constitutional rights was not a flagrant violation, since the record suggested that the State's mistake was inadvertent rather than intentional where the State did hold pretrial release hearings for all of defendant's other charges and quickly arranged for a hearing for defendant's kidnapping charge after defendant filed his motion to dismiss. Moreover, defendant failed to show irreparable prejudice to the preparation of his case, where defendant did not post bond for any of his other charges and, therefore, would have remained incarcerated even if the State had complied with the statutory mandate in section 15A-534.1.

2. Appeal and Error—preservation of issues—double jeopardy—multiple assault convictions—separate and distinct offenses

In an appeal from various charges arising from a domestic violence incident, the Court of Appeals declined to invoke Appellate Rule 2 to address defendant's unpreserved argument that his multiple assault convictions were based on one continuous assault and therefore violated the constitutional prohibition against double jeopardy. The evidence showed that, throughout the time that defendant attacked his romantic partner in their shared home, there were "interruptions in the momentum" of the attack—where he would pause to do something else, including hitting the victim's mother or momentarily changing location—such that the record supported a finding of several, separate assaults. Thus, defendant failed to show the requisite manifest injustice or merit to justify applying Rule 2 to his appeal.

3. Assault—inflicting serious bodily injury—by strangulation—distinct interruption between two assaults—separate convictions upheld

In an appeal from multiple convictions arising from a domestic violence incident, during which defendant attacked his romantic partner in the home that she shared with him and with her mother, defendant's separate convictions for assault inflicting serious bodily injury and assault by strangulation were upheld where the record showed a distinct interruption in the momentum of the attack, which supported a finding of two separate assaults of the victim rather than one continuous assault. Specifically, defendant inflicted serious bodily injury on the victim by head-butting, punching, and then kicking her in the bedroom; then, he left the bedroom to hit the victim's mother, busting her lip, before returning to the bedroom to choke the victim to the point of blackout.

4. Kidnapping—first-degree—distinct from underlying felony—sufficiency of evidence—double jeopardy—domestic violence incident

In a prosecution for multiple convictions arising from a domestic violence incident, during which defendant attacked his romantic partner in the home that she shared with him and with her mother, the trial court did not violate the constitutional prohibition against double jeopardy by convicting defendant of both kidnapping and of the underlying assault. The evidence showed that defendant dragged the victim by the hair into the bedroom, ripping her hair out, and then choked her; because the act of dragging her into the bedroom was separate from the act of choking her, and because this and other acts of confining the victim to the bedroom were not necessary to defendant's assault of the victim (he could have assaulted her anywhere in the home), there was sufficient evidence to support separate convictions for kidnapping and assault.

Appeal by Defendant from judgments entered 16 November 2021 by Judge David T. Lambeth, Jr., in Durham County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Assistant General Counsel South A. Moore and Solicitor General Fellow James W. Whalen, for the State.

Kimberly P. Hoppin, for defendant.

WOOD, Judge.

Dominique Tucker ("Defendant") appeals the trial court's entry of three consecutive terms of imprisonment for a total of 185-253 months for first-degree kidnapping, three counts of assault, and interfering with emergency communications. After careful review of the record and applicable law, we determine Defendant's preparation of his case was not irreparably prejudiced by his pretrial detention and Defendant received a fair trial, free from prejudicial error.

I. Factual and Procedural History

Enomwoyi Moser ("Enomwoyi") lived in her mother Cynthia Moser's ("Cynthia") apartment in Durham with Cynthia and her grandson, K.P. Enomwoyi met Dominique Tucker ("Defendant') at church. Enomwoyi knew Defendant was married, and initially they were just friends. Eventually their relationship became more serious, and they began a physical relationship. Defendant came to live with Enomwoyi and Cynthia at their apartment because he needed an address change. Enomwoyi told Defendant that they needed to start to do "what's right" and stop "sleeping with each other under" the same roof. Refraining from having sex became an issue in their relationship.

Their relationship began to disintegrate in January 2020. Enomwoyi discovered Defendant had been handling her gun, and she did not approve because she knew he was a felon. Enomwoyi also discovered she had trichomoniasis, a sexually transmitted disease, and was very angry. She confronted Defendant about it, but he told her he "didn't catch anything[.]" Their relationship continued to deteriorate.

During the last week of January, Enomwoyi saw Defendant put a gun into his coat pocket after checking to make sure the magazine was in the gun. She told him he needed to get the gun out of Cynthia's apartment. Defendant denied having a gun. After this incident, the couple had "no good days."

On 29 January 2020, Enomwoyi returned home from work after 8:30 p.m. K.P. was asleep in Enomwoyi's bedroom, and Defendant and Cynthia were watching television in Cynthia's room. As Enomwoyi feared would happen, she and Defendant started arguing. When Enomwoyi started to collect a blanket and pillow for Defendant to sleep in the living room, "chaos" erupted as Defendant began bringing up all the arguments they had been having.

While the couple were in the living room, Defendant head butted Enomwoyi by hitting his forehead to her forehead. Enomwoyi told

Defendant if he put his hands on her again, she would call the police. The strike was very painful and left her dizzy and confused.

Enomwoyi then walked into the bedroom where K.P. was sleeping to make sure he was still asleep. Defendant followed behind her, "ranting and raging." After Enomwoyi again threatened to call the police, Defendant told her he would give her a reason to call the police. As Defendant "was standing behind [Enomwoyi] in [her] room by the door," he head butted her again, and she "went down." While Enomwoyi was down on the ground, Defendant kept punching her and started kicking her. During this beating, Enomwoyi shouted for Cynthia to call the police.

Cynthia heard Enomwoyi calling for her to call the police. Cynthia entered the room, telling Defendant, "don't hit her no more, don't put your hands on her." Defendant turned around and hit Cynthia, busting her lip.

Defendant then "went [back] into the bedroom" and resumed beating Enomwoyi. Enomwoyi again called out for Cynthia to call the police, but Defendant took Cynthia's phone away and threw it. Cynthia retrieved her phone and called the police. She then went outside to try to get help.

Enomwoyi tried escaping the attack by crawling out of the room, but Defendant continued kicking her until he had kicked her back into the room. Enomwoyi wanted to get out of the apartment out of concern for K.P. and Cynthia, because she did not know if he might turn his attention to them, but Defendant blocked the door in front of her.

At some point, Enomwoyi was able to get up, but Defendant, who was behind her, snatched her back into the room by her hair. Enomwoyi had a hair weave in, and Defendant snatched it all off making her feel like she "was being skinned." He slung her by her ponytail back into the room, and she fell over the bed.

Defendant then began choking Enomwoyi, causing her not to be able to breathe. Defendant had a chokehold around Enomwoyi's neck, and she pleaded for her life. Enomwoyi seemingly blacked out at that point because she could not see or hear anything. When Enomwoyi regained consciousness, she noticed for the first time that K.P. had awakened and was watching what was happening. She did not know how long K.P. had been awake or watching. Enomwoyi grabbed K.P. and cradled him.

Defendant returned to the room and began punching Enomwoyi once again while she cradled K.P. Finally, Defendant left the room. When Enomwoyi saw he had left, she jumped up, closed the door, and locked it.

Defendant once more returned and started kicking the door. Enomwoyi hid K.P. in the closet to protect him, and felt she had to remove herself from the situation.

While Defendant continued kicking the door, Enomwoyi jumped out of the third floor bedroom window, landing on the ground on her right side back and hip. She believed she could not have escaped the room any other way that would not have caused her death. Enomwoyi then saw Defendant looking out of a window and was afraid of being attacked again. She managed to get up and hide. She then heard Defendant start his car and heard what she believed were two gunshots before seeing Defendant pull out of the parking lot and leave.

Enomwoyi suffered a range of injuries from Defendant's attack. She complained of "severe hip pain and pain all over her face" to an EMS responder. Her face was very swollen, and an eye was swollen shut. There was blood all over her face and a significant laceration under an eye. Enomwoyi was transported to the hospital in an ambulance. Enomwoyi suffered a fractured eye socket fracture and also suffered vision issues, such as a spray of light in her peripheral vision. Pressure in her eye socket prevented her from wearing her contacts. At the time of trial, Enomwoyi continued to experience stabbing pains in her eye with varying degrees of severity, memory loss, headaches, migraines, fatigue, weakness, and struggling to think and focus. She continues to have difficulty eating because of a throat injury due to the choking. As a result of jumping out the window, Enomwoyi has hip issues and will need a hip replacement.

Defendant was arrested the same night of the assault. An officer attempted to stop Defendant for speeding and driving with a missing headlight; however, Defendant did not pull over but instead sped away. After a high-speed pursuit involving multiple officers, Defendant pulled into a driveway, and the officers conducted a "high-risk" apprehension. The arresting officers were unaware that a "bolo" (be on the lookout) bulletin had been issued for Defendant for his assaults upon Enomwoyi and Cynthia.

On 30 January 2020, Defendant was arrested on the charges stemming from the assaults, and the magistrate set his bond at $200,000.00. Defendant did not post bond, remaining in custody. On 16 March 2020, a grand jury indicted him on the charges of possession of a firearm by a felon, first-degree kidnapping of Enomwoyi, assault by pointing a gun, assault by strangulation, assault inflicting serious bodily injury, assault in the presence of a minor, assault on a female, and interference with

emergency communication. On 17 March 2020, Defendant was served the indictments while in custody. A bond of $50,000.00 was set for the additional charge of possession of a firearm by a felon. Because the magistrate determined the kidnapping charge involved an act of domestic violence, the magistrate did not set bond on the kidnapping charge and held the matter over for a judge to set the conditions of pretrial release pursuant to N.C. Gen. Stat. § 15A-534.1. Specifically, the magistrate ordered the State to produce Defendant before the next session of court held in Durham County or, if no session were held in the next forty-eight hours, to produce him before a magistrate in forty-eight hours to determine the conditions of pretrial release. The State failed to comply with this order, and Defendant was not afforded the required pretrial detention hearing on the kidnapping charge. Defendant did not post bond on any of the charges and remained in custody.

On 14 September 2020, Defendant filed a motion to dismiss the kidnapping charge, arguing his "arrest" and detention since 17 March 2020 without a pretrial release hearing for the kidnapping charge violated N.C. Gen. Stat. § 15A-534.1 and required its dismissal. The following day, the trial court consolidated Defendant's charges into one set of pretrial release conditions, setting a combined bond of $250,000.00. Defendant did not post bond and remained in custody. On 12 October 2020, the trial court denied Defendant's motion to dismiss for failure to meet the requirements of N.C. Gen. Stat. § 15A-954(a)(4) (2022).

Defendant waived his right to a jury trial and a bench trial was held 8-16 November 2021. Defendant renewed his motion to dismiss the kidnapping charge at the start of the trial. The trial court denied the motion prior to the start of trial. The jury found Defendant not guilty of possession of a firearm by a felon, and guilty of first-degree kidnapping, assault by strangulation, assault inflicting serious bodily injury, assault on a female, and interfering with emergency communications. At the close of the State's evidence, at the close of all the evidence, and after the verdict, Defendant made motions to dismiss all the charges. The trial court denied each motion.

Following the verdict, the trial court imposed a total of three sentences to run consecutively. The trial court consolidated the charges of first-degree kidnapping and interference with emergency communication and sentenced Defendant to 130-168 months imprisonment. The trial court consolidated the charges of assault inflicting serious bodily injury, assault in the presence of a minor, and assault on a female and sentenced Defendant to a consecutive term of imprisonment of 36-53 months. The trial court sentenced Defendant to a third consecutive term

of imprisonment of 19-32 months for the assault by strangulation charge. Defendant received credit for time served prior to trial.

Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant raises four arguments on appeal: (1) his kidnapping charge should be dismissed because the State failed to hold a pretrial release hearing related to that charge in violation of N.C. Gen. Stat. § 15A-534.1; (2) the trial court improperly convicted him of multiple counts of assault in violation of the prohibition against double jeopardy; (3) N.C. Gen. Stat. § 14-32.4 permits his conviction of assault inflicting serious bodily injury but not conviction of assault by strangulation; and (4) Defendant's conviction for kidnapping was not based on sufficient evidence. We address each argument in turn.

A. Motion to Dismiss the Kidnapping Charge

[1] A criminal defendant's motion to dismiss is reviewed *de novo*. *State v. Golder*, 374 N.C. 238, 249-50, 839 S.E.2d 782, 790 (2020). Similarly, whether a "defendant has met the statutory requirements of N.C. Gen. Stat. § 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law" reviewed *de novo*. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008).

N.C. Gen. Stat. § 15A-954(a)(4) requires the trial court to dismiss a charge against a defendant if the trial court determines a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." A defendant may demonstrate prejudice by showing he would have been released earlier had he received a pretrial hearing. *See State v. Thompson*, 349 N.C. 483, 501, 508 S.E.2d 277, 288 (1998).

For domestic violence crimes, including felonies perpetrated upon a person with whom the defendant lived, N.C. Gen. Stat. § 15A-534.1 (2022) requires a judge to hold a pretrial release hearing for the defendant within the first forty-eight hours from the time of arrest, and if a judge does not do so, then a magistrate must do so at the end of the forty-eight hour period.

To determine whether a defendant's pretrial detention violates N.C. Gen. Stat. § 15A-534.1, "it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the

interim decision may have been mistaken." *Thompson*, 349 N.C. at 499, 508 S.E.2d at 286–87.

Here, Defendant had been detained since 17 March 2020 on the kidnapping charge without receiving a pretrial release hearing for this charge. Defendant did not file his motion to dismiss the charge until 14 September 2020, almost six months later. It was not until after Defendant filed his motion that he received a pretrial release hearing related to the kidnapping charge.

Defendant has a private interest in liberty, which is a fundamental right. *Id.* at 499, 508 S.E.2d at 287. However, the State's failure to hold a pretrial release hearing related to the kidnapping charge did not flagrantly violate that right due to the inadvertence of the State's mistake as well as the absence of prejudice, as explained below. N.C. Gen. Stat. § 15A-954(a)(4).

The State admits it failed to hold a pretrial release hearing related to the kidnapping charge; however, it tries to explain the failure as an inadvertent mishap due to the significant disruption to our Judicial Branch at the onset of Covid-19. Indeed, Covid-19 significantly disrupted the operations of the Judicial Branch at the onset of the pandemic; nevertheless, the failure to conduct a pretrial release hearing could be a violation of Defendant's statutory and constitutional rights. Assuming it is a violation here, we next examine whether the failure to provide a pretrial hearing was intentional and thus a flagrant violation of Defendant's constitutional rights. Here, the State complied with the statutory mandate for all of Defendant's other charges and immediately arranged for a pretrial hearing after being made aware of the need for one upon the filing of Defendant's motion. Thus, there is merit to the State's contention it unintentionally withheld a timely pretrial release hearing regarding one of Defendant's charges. The inadvertence does not excuse the State; rather, it is relevant to show the absence of a flagrant constitutional violation.

Most compellingly, Defendant cannot show irreparable prejudice to the preparation of his case such that the trial court would have been required to dismiss the kidnapping charge. On 17 March 2020, Defendant had not posted the $200,000.00 bond following his 30 January 2020 arrest, so he was still incarcerated when he was arrested pursuant to the indictments of felon in possession of a firearm and kidnapping. After he was served these indictments, bond was set at $50,000.00 for the felon in possession of a firearm charge, and Defendant never posted that bond either. Therefore, even if the State had held a timely pretrial release hearing on the kidnapping charge, Defendant would not

have been released. Even after the trial court consolidated Defendant's charges into a combined bond of $250,000.00 on 15 September 2020, Defendant did not post bond and remained in custody.

Defendant argues his preparation for his case was irreparably prejudiced due to the State's failure to comply with N.C. Gen. Stat. § 15A-534.1. Specifically, Defendant argues it is reasonable to infer the trial court would have found a mitigating factor that Defendant had a support system in the community, but it did not because of Defendant's confinement due to his detainment for the kidnapping charge. However, as noted, Defendant would have remained confined had the State complied with the statute because he never posted bond for any of his criminal charges. Accordingly, Defendant cannot demonstrate irreparable prejudice to the preparation for his case. N.C. Gen. Stat. § 15A-954(a)(4).

Finally, we consider the "likelihood that the interim decision may have been mistaken." *Thompson*, 349 N.C. at 499, 508 S.E.2d at 287. We conclude the likelihood of mistakenly detaining Defendant was low because he already was in custody for other charges arising out of his assault of Enomwoyi. The indictments on the felon in possession of a firearm and kidnapping also arose out of the assault on Enomwoyi and were obtained and served while he was incarcerated on the other charges. Defendant was ultimately tried, convicted, and sentenced to 185-253 months in prison, and the trial court gave him credit for the time he spent in custody before trial. Thus, the record demonstrates Defendant was not mistakenly detained.

B. Multiple Assault Convictions

[2] Defendant next argues there was insufficient evidence to convict him for multiple counts of assault because his actions constituted one continuous assault. Defendant further argues, "in addition or in the alternative," his multiple assault convictions are not supported by the evidence insofar as the prohibition against double jeopardy prevents multiple convictions for the same offense. *See State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003). Indeed, Defendant grounds his insufficiency of the evidence argument primarily on his double jeopardy argument. However, "constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (brackets omitted). Therefore, Defendant requests this Court to exercise its discretion under N.C. R. App. P. 2 to suspend the rules and reach the merits of this argument. A defendant must demonstrate manifest injustice as well as merit for this Court to exercise its discretion as Defendant requests. *State v. Ricks*, 378 N.C. 737, 738, 862 S.E.2d 835, 837 (2021). For the following

reasons, we conclude Defendant fails to demonstrate manifest injustice and merit, and therefore, we decline to apply N.C. R. App. P. 2 to address Defendant's double jeopardy argument.

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Golder*, 374 N.C. at 250, 839 S.E.2d at 790. "Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion." *Id.* at 249, 839 S.E.2d at 790. (Brackets and ellipsis omitted). We consider the evidence "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* at 250, 839 S.E.2d at 790.

"In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults." *State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604 (2003). "[T]o find [a] defendant guilty of two separate assaults . . . a distinct interruption" must have occurred between the assaults. *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000). For example, there must be "an intervening event, a lapse of time in which a reasonable person may calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *State v. Robinson*, 381 N.C. 207, 218, 872 S.E.2d 28, 36 (2022). Contrarily, "the fact that a victim has multiple, distinct injuries alone is not sufficient evidence of a distinct interruption such that a defendant can be charged with multiple counts of assault." *Id.* at 218, 872 S.E.2d at 36.

Here, Defendant's second head butting of Enomwoyi followed by his punching and kicking her constitutes substantial evidence to support the conviction for assault causing serious bodily injury. This occurred in the bedroom. Second, Defendant's hitting Cynthia in the face, leaving her with a busted lip, constitutes substantial evidence to support the conviction for assault on a female. Third, Defendant "went into the bedroom" once more to beat Enomwoyi again. Therefore, there was both an interruption in the momentum of Defendant's attack on Enomwoyi when he paused to hit Cynthia and a change in location when Defendant returned to the bedroom to beat Enomwoyi again. Enomwoyi managed to get up to try to escape, and Defendant flung her to the bed and strangled her. Accordingly, substantial evidence supports Defendant's conviction for assault by strangulation. Fourth, Enomwoyi blacked out, woke up, and noticed K.P. had woken up. Defendant "came back" into the bedroom and punched Enomwoyi more, which K.P. witnessed. Therefore,

there was both an interruption in the momentum of Defendant's attack during the time Enomwoyi was blacked out and a change of location when Defendant returned to the bedroom to punch her. Accordingly, these facts constitute substantial evidence for Defendant's conviction of assault in the presence of a minor.

Because sufficient evidence supported each of Defendant's convictions for assault, we hold each offense was separate and distinct, and therefore, the trial court did not err in convicting Defendant of each charge of assault.

We further hold Defendant has failed to show merit in his argument that he did not commit multiple assaults upon Enomwoyi. Therefore, we decline to apply N.C. R. App. P. 2 to address Defendant's argument based on double jeopardy and hold the trial court did not err in convicting Defendant of numerous assaults because sufficient evidence supported the multiple convictions.

C. Assault by Strangulation and Assault Inflicting Serious Bodily Injury

[3] Defendant argues under N.C. Gen. Stat. § 14-32.4 (2022), only his conviction for assault inflicting serious bodily injury may stand, while his conviction for assault by strangulation must be vacated. This Court has held that whether a defendant's convictions violate N.C. Gen. Stat. § 14-32.4 is an issue "of statutory construction" reviewed *de novo*. *State v. McPhaul*, 256 N.C. App. 303, 317, 808 S.E.2d 294, 305 (2017). The State contends this argument was not preserved for appellate review; however, when the "trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *Id.* at 317, 808 S.E.2d at 305. Thus, we consider Defendant's argument.

N.C. Gen. Stat. § 14-32.4 provides that a trial court may convict a defendant for assault inflicting serious bodily injury "[u]nless the conduct is covered under some other provision of law providing greater punishment[.]" N.C. Gen. Stat. § 14-32.4(a). Two convictions are error if they are based on the same conduct. *State v. Prince*, 271 N.C. App. 321, 323, 843 S.E.2d 700, 702 (2020). Therefore, our analysis in the section above provides the answer here. If "[t]he record does not reveal that there was a 'distinct interruption' between two assaults," only one of the convictions may stand. *Id.* at 324, 843 S.E.2d at 703 (quoting *Brooks*, 138 N.C. App. at 189, 530 S.E.2d at 852).

Here, the initial head butting followed by punching and kicking Enomwoyi constitute evidence supporting Defendant's conviction

for assault inflicting serious bodily injury. Before Defendant choked Enomwoyi, he had left the room, even if momentarily, to hit Cynthia, busting her lip, then returned to the bedroom to beat Enomwoyi more, pulled her back into the room by her hair, flinging her to her bed as she attempted to escape, and then choked her to the point of blackout. The evidence demonstrates an interruption in the momentum of the attack when Defendant paused to hit Cynthia, as well as a change in the locations of his assaults upon Enomwoyi when he left the bedroom to do so and then returned to beating and then choking Enomwoyi. Accordingly, we conclude there was a distinct interruption in the assault, and both of Defendant's convictions must stand. *Prince*, 271 N.C. App. at 323, 843 S.E.2d at 702; *Robinson*, 381 N.C. at 218, 872 S.E.2d at 36.

D. Sufficiency of the Evidence for Kidnapping

[4] Finally, Defendant argues the evidence was insufficient for the jury to convict him of first-degree kidnapping because the act was not independent of the underlying assault. "Kidnapping is a specific intent crime, and therefore the State must prove that defendant unlawfully confined, restrained, or removed the victim for one of the specified purposes outlined in the statute." *State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008). "[T]he act of kidnapping must be distinct from such a felony if the perpetrator is to be convicted of both kidnapping and the underlying felony." *State v. Cole*, 199 N.C. App. 151, 157, 681 S.E.2d 423, 428 (2009). N.C. Gen. Stat. § 14-39 "was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Notwithstanding, "it is well-established that two or more criminal offenses may arise from the same course of action." *State v. Muhammad*, 146 N.C. App. 292, 295, 552 S.E.2d 236, 237 (2001). Therefore, "a conviction for kidnapping does not violate the constitutional prohibition against double jeopardy where the restraint is used to facilitate the commission of another felony, provided the restraint is a separate, complete act, independent of and apart from the other felony." *Id.* at 295, 552 S.E.2d at 237.

For example, in *State v. Romero*, during the course of an altercation that occurred inside a home, the victim "fled from inside the home," the defendant caught up with her and grabbed her, and "dragged her back inside by her hair." 164 N.C. App. 169, 174, 595 S.E.2d 208, 212 (2004). After dragging the victim back inside, the defendant further assaulted her. *Id.* at 174–75, 595 S.E.2d 208, 212. The *Romero* court concluded: the "defendant chose to drag [the victim] back inside to prevent others

from witnessing him then beat [the victim] with his fists, gun, and belt. Therefore, . . . the restraint and removal of [the victim] was separate and apart from, and not an inherent incident of, the commission of the assault with a deadly weapon." *Id.* at 175, 595 S.E.2d at 212 (2004).

Similarly, in *State v. Gayton-Barbosa*, the defendant committed multiple assaults on the victim. He kept the victim from leaving her house by repeatedly striking her with a bat. After she escaped the house, he chased her, grabbed her, and then shot her. There, the Court found, "Detaining [the victim] in her home and then again outside was not necessary to effectuate the assaults charged. These acts were committed 'separate and apart' from that which is inherent in the commission of the other felony." 197 N.C. App. 129, 140, 676 S.E.2d 586, 593 (2009) (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351).

Here, as in *Romero*, Defendant chose to drag Enomwoyi back into the bedroom by her hair and then choked her. The act of pulling Enomwoyi back into the bedroom by her hair, ripping it out, was separate and apart from the act of choking her. Also, as in *Gayton-Barbosa*, Defendant's pulling Enomwoyi back in by her hair, thereby confining her to the bedroom, was not necessary to Defendant's assaults. Defendant could have assaulted or choked Enomwoyi anywhere in the apartment. Therefore, Defendant's confinement of Enomwoyi was separate and apart from his subsequent choking of her. Finally, when Enomwoyi woke up after passing out and locked the bedroom door, Defendant further confined her when he kicked at the bedroom door. Such was Enomwoyi's fear of Defendant that she felt there was no other way to escape, "[o]ther than dying," besides jumping out the window to leave the room. Therefore, Defendant's confinement of Enomwoyi by pulling her by the hair back into the bedroom, confining her in there by kicking at the locked door, and forcing her to escape by jumping from the third floor window, were separate, complete acts apart from Defendant's other assaults upon her. *Muhammad*, 146 N.C. App. at 295, 552 S.E.2d at 237. Accordingly, the trial court did not err by convicting Defendant of assault and first-degree kidnapping.

III. Conclusion

For the foregoing reasons, we hold Defendant's preparation of his case was not irreparably prejudiced by his pretrial detention. Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges GRIFFIN and STADING concur.

STATE OF NORTH CAROLINA
v.
JUDY WEBSTER

No. COA23-68

Filed 21 November 2023

Assault—with deadly weapon inflicting serious injury—knife as deadly weapon per se—manner of use

In defendant's trial for assault with a deadly weapon inflicting serious injury arising from an altercation over macaroni and cheese at a neighborhood cookout—during which the victim sustained numerous stab wounds to her head, face, chest, arm, and hand—the trial court did not err by instructing the jury that the knife used by defendant to attack the victim was a deadly weapon per se. Although the folding knife that was allegedly used in the attack was never found, the trial court's determination that it was a deadly weapon as a matter of law was supported by the circumstances and manner of defendant's use of the weapon, which caused the victim great bodily harm. Further, where the State presented evidence of each element of the offense and there was no conflicting evidence about any element, the trial court was not required to instruct the jury on any lesser-included offenses.

Appeal by defendant from judgment entered 12 July 2022 by Judge Nathaniel J. Poovey in Forsyth County Superior Court. Heard in the Court of Appeals 23 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Dorian Woolaston, for the State.

Phoebe W. Dee for defendant-appellant.

ZACHARY, Judge.

Defendant Judy Webster appeals from the judgment entered upon a jury's verdict finding her guilty of assault with a deadly weapon inflicting serious injury, in violation of N.C. Gen. Stat. § 14-32(b) (2021). After careful review, we conclude that Defendant received a fair trial, free from error.

I. Introduction

In the instant appeal, what began as a neighborly disagreement over macaroni and cheese quickly escalated into violence reminiscent of "th[e] movie Carrie" after one resident pulled a concealed knife from her walker and just started "swinging [and] cutting."

Beginning at approximately 7:30 p.m. on 20 June 2021, the residents of Crystal Towers apartments in Winston-Salem threw a cookout to celebrate Father's Day. As set forth herein, there is substantial disagreement about the underlying details that ultimately led to violence; however, it is undisputed that the evening in question included three distinct hostile interactions between Defendant and the victim, Ms. Charon Smith ("Ms. Smith"), which began with Ms. Smith's refusal to serve some macaroni and cheese to Defendant.

II. Background

On 25 October 2021, a Forsyth County grand jury returned an indictment charging Defendant with assault with a deadly weapon inflicting serious injury, pursuant to N.C. Gen. Stat. § 14-32(b). This matter came on for a jury trial on 11 July 2022 in Forsyth County Superior Court, the Honorable Nathaniel J. Poovey presiding. The evidence at trial tended to show the following:

The initial dispute occurred while Ms. Smith was serving macaroni and cheese to cookout attendees under the Crystal Towers gazebo. Defendant and another resident approached and requested some macaroni and cheese, but Defendant became "upset" when Ms. Smith explained that there was "not enough" left. According to Ms. Smith, she intended to ensure that both women "would have at least got a taste" of macaroni and cheese, despite the low rations. But upon Defendant's outburst, Ms. Smith folded up the pan of macaroni and cheese and threw it in the trash, further enraging Defendant. Defendant "started cussing" and name-calling and "talking about [Ms. Smith's] mama," among other insults.

Defendant, however, recalls this initial confrontation much differently. At trial, Defendant testified that on the evening in question, she was enjoying the Father's Day cookout with a few friends from Crystal Towers and celebrating a friend's birthday. Defendant and her friend decided to get some food; but when Defendant asked Ms. Smith for some of the macaroni and cheese that she was serving, Ms. Smith "just flipped out on [her]." Defendant contends that Ms. Smith responded, "This is my f*****' macaroni. I made this. I ain't got to give you s***."

Defendant claims that although she was confused and slightly bothered by Ms. Smith's reaction, she initially walked away and returned to her friends.

The second interaction occurred a few minutes after the women's initial argument, in the apartment's lobby, near the elevator. Ms. Smith testified that she was headed upstairs to change clothes and begin cleaning up after the cookout when she again crossed paths with Defendant, who was also waiting for the elevator. Ms. Smith testified that, upon seeing Ms. Smith, Defendant resumed her expletive-filled tirade and accused Ms. Smith of following her. Defendant then "pushed and shoved [Ms. Smith] off the elevator . . . but [Defendant] knocked over a drink or something, and [Defendant] slipped and fell." At that point, Ms. Smith alleges, "a young man" entered the lobby carrying "a cane [or] a walking stick"; Defendant promptly "snatched" the man's stick and "c[a]me at [Ms. Smith] again, swinging the stick." But Defendant did not "land any blows" during that incident, and Ms. Smith was able to back away toward the door, unscathed. Regarding the experience, however, Ms. Smith testified at trial that she "was standing there still, like, What in the world is wrong with you?"

As with the women's first altercation, at trial, Defendant presented a very different account of the elevator incident. According to Defendant, after entering the elevator, she turned around and "saw [Ms. Smith] coming[,]" so she attempted to exit. Although Defendant said, "Excuse me[,]" Ms. Smith would not allow Defendant to leave, but instead "kept pushing"; eventually, the women were "pulling and tugging with [Defendant's] walker." Then Ms. Smith "pulled [Defendant's] walker away from [her]," and Defendant "hit the ground[.]" Finding herself unable to get back up off the ground, Defendant "grabbed [a nearby man's] stick and . . . started swinging it."

The final altercation ensued outside of the apartment building. Approximately 10 to 15 minutes after the elevator incident, Ms. Smith was outside socializing with other residents when suddenly, Defendant "was coming at [her] swinging a blade." Initially, Ms. Smith, who was unarmed, did not realize that Defendant possessed a weapon, but she "went to swing back to start defending [her]self[.]" Ms. Smith quickly realized, however, that "every time [Defendant] swung, [Defendant] was cutting [her]." Upon that realization, Ms. Smith testified, she "hollered" and tried to extricate herself from the fight. Ms. Smith tried removing her shirt to escape Defendant's grip, to no avail. Ms. Smith testified that by that point, her hands had "stopped swinging[,]" a reaction she believed was likely due to "shock or something." Meanwhile, Defendant "just kept on swinging [and] cutting, kept on swinging [and] cutting."

But again, Defendant testified to a much different version of events. According to Defendant, after the elevator incident, she went upstairs to change her wet clothes. After returning outside, Defendant was telling a friend about how Ms. Smith "just beat [her] up on the elevator" when she suddenly experienced a sensation in her head that "felt like a man hit [her]." Defendant testified that "[t]hat's when [Ms. Smith] came up and busted [Defendant] in [her] head." In response, Defendant opened her walker and retrieved a "little pocket knife[.]" Defendant testified that she "was scared because the only place [Ms. Smith] kept hitting [her] was in [the] head"—a particular danger for Defendant, who has seizures. According to Defendant, at the time, she was unable to see straight, and she believed that she "was going to die"; therefore, "every time [Ms. Smith] hit [her], [Defendant] cut [Ms. Smith]."

Kathy Holland, another Crystal Towers resident, was present at the cookout and witnessed the final altercation between Ms. Smith and Defendant. Ms. Holland testified that just before the fight, she overheard Ms. Smith ask Defendant, "You really want to fight over this?", to which Defendant replied, "Yes." The next thing Ms. Holland witnessed was blood "spraying everywhere[.]"

Officer J.H. Prisk of the Winston-Salem Police Department testified that upon reviewing the security footage of the altercation, he observed Ms. Smith "back-pedaling in an attempt to create distance, but also striking out of self-defense."

Ms. Smith was transported to the hospital and treated for multiple injuries to her face, scalp, chest, arm, and right hand. Dr. Stacie Zelman, an emergency physician at Wake Forest Atrium Health, treated Ms. Smith and testified for the State at Defendant's trial. According to Dr. Zelman, Ms. Smith was classified as "a Level II trauma" patient—potentially a "very serious" or "critical" patient—a categorization she received, in large part, due to multiple stab wounds sustained to her face, head, and scalp. Ms. Smith also required six staples in order to stop "pretty significant bleeding" from "a deep laceration to her scalp[.]"

Although Ms. Smith would eventually undergo multiple corrective surgeries to her face and right hand, none of her injuries were life-threatening. However, Ms. Smith testified that as of trial, she still suffered lasting effects including memory loss, significant scarring, and nerve damage, among other complications.

In addition to her own trial testimony, Defendant also presented two witnesses who testified that Ms. Smith had a reputation as a bully and that she was the aggressor in the affray.

During the charge conference, defense counsel requested that the jury be instructed on lesser-included misdemeanor assault offenses, asserting, inter alia, that the knife did not constitute a deadly weapon as a matter of law. Noting that "[t]here's plenary evidence in this case that this knife was a deadly weapon," the trial court overruled Defendant's objection and declined her request for instructions on lesser-included offenses. The court, however, delivered Defendant's requested instructions on self-defense.

On 12 July 2022, the jury returned its verdict finding Defendant guilty of the charged offense, assault with a deadly weapon inflicting serious injury. The trial court sentenced Defendant, as a Prior Record Level III offender, to 26 to 44 months in the custody of the North Carolina Division of Adult Correction. Defendant entered oral notice of appeal in open court.

III. Analysis

On appeal, Defendant advances two related challenges to the jury instructions arising from the trial court's determination, over Defendant's objection, that the knife constituted a deadly weapon per se. Specifically, Defendant contends that because the knife was never located and there was little trial testimony regarding its nature and appearance, the issue of whether the knife constituted a "deadly weapon" in this case should have been a question of fact decided by the jury, not an issue of law preliminarily determined by the trial court. Therefore, Defendant argues, the trial court committed reversible error (1) by instructing the jury that the knife was a deadly weapon per se, and (2) by declining to instruct the jury on the lesser-included offense of misdemeanor assault inflicting serious injury. We disagree.

A. Standard of Review

"Where the defendant preserves h[er] challenge to jury instructions by objecting at trial, we review the trial court's decisions regarding jury instructions de novo." *State v. Hope*, 223 N.C. App. 468, 471, 737 S.E.2d 108, 111 (2012) (cleaned up), *disc. review denied*, 366 N.C. 438, 736 S.E.2d 493 (2013). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (cleaned up).

The trial court's jury charge must include instructions on a lesser-included offense where the evidence at trial "would permit a jury rationally to find [the] defendant guilty of the lesser offense and acquit h[er] of the greater." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767,

772 (2002) (cleaned up). However, no instruction on a lesser-included offense is required "when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime." *Id.* (cleaned up).

B. The trial court properly determined that the knife was likely to cause death or great bodily harm under the circumstances of this case—a question of law—and instructed the jury accordingly.

The offense of assault with a deadly weapon inflicting serious injury comprises the following essential elements: "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990); *see also* N.C. Gen. Stat. § 14-32(b).

On appeal, Defendant only disputes the second element of the offense—specifically, whether the knife constituted a deadly weapon as a matter of law.[1] The outcome of the instant appeal turns upon whether the trial court properly instructed the jury that the knife that Defendant used to assault Ms. Smith constituted a deadly weapon per se under the circumstances of its use in this case.

As our caselaw makes abundantly clear, whether a particular instrument or article constitutes a "deadly weapon" for the purposes of our assault statutes generally depends upon its likelihood, under the circumstances and evidence presented, to cause death or great bodily harm. *See*, *e.g.*, *State v. Palmer*, 293 N.C. 633, 642, 239 S.E.2d 406, 412 (1977); *State v. McCoy*, 174 N.C. App. 105, 112, 620 S.E.2d 863, 869 (2005) ("A deadly weapon is not one that *must* kill, but rather one that is likely to cause death or great bodily harm." (emphasis added)), *disc. review denied*, ___ N.C. ___, 628 S.E.2d 8 (2006).

The rationale for requiring such case-by-case determinations is manifest: while certain items are inherently lethal, others become so solely based upon the circumstances of their use (or misuse). Indeed, it is well established in North Carolina that the "deadly character" of a particular "weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself." *Palmer*, 293 N.C. at 642–43, 239 S.E.2d

1. Defendant concedes that there was sufficient evidence from which the jury could have found that the knife constituted a deadly weapon. Consequently, the success of Defendant's appeal turns on whether we are persuaded that this issue should have been submitted to the jury as a question of fact, rather than decided by the trial court as a matter of law.

at 412–13 (citation omitted). Thus, "[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether . . . it is deadly within the foregoing definition is one of law, and the [trial c]ourt must take the responsibility of so declaring." *Id.* at 643, 239 S.E.2d at 413 (citation omitted). But in cases where the alleged deadly weapon "may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury." *Id.* (citation omitted).

Reviewing the issue through this lens, our appellate courts have upheld trial courts' determinations in numerous cases finding myriad implements—including a wide variety of knives—to be deadly weapons per se under the circumstances presented. *E.g.*, *State v. Hefner*, 199 N.C. 778, 779, 155 S.E. 879, 881 (1930) ("blackjack"); *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (baseball bat); *State v. Walker*, 204 N.C. App. 431, 443–46, 694 S.E.2d 484, 493–94 (2010) (approximately three-inch knife); *State v. Wiggins*, 78 N.C. App. 405, 407, 337 S.E.2d 198, 199 (1985) (box cutter); *State v. Roper*, 39 N.C. App. 256, 257, 249 S.E.2d 870, 871 (1978) ("keen bladed pocketknife").

In a similar vein, our appellate courts have also consistently held that where the evidence *properly supported* a determination by the trial court that the weapon was deadly per se—but the court nevertheless submitted the question to the jury, which found as a matter of fact that the weapon was deadly—there could be no error in the trial court's failure to instruct on lesser-included offenses that lack proof of a deadly weapon as an essential element. *E.g.*, *State v. McKinnon*, 54 N.C. App. 475, 478, 283 S.E.2d 555, 557 (1981) ("We conclude the trial court *should have* held that the pocketknife as used by [the] defendant was a deadly weapon as a matter of law. There was, therefore, no error in the court's failure to submit the lesser offense of misdemeanor assault." (emphasis added)).

In the instant case, the alleged weapon—a small folding knife, which Defendant describes as "a little pocket knife"—was not introduced into evidence at trial. Moreover, as Defendant thoroughly argues in her appellate brief, little direct testimony was offered at trial regarding the knife's character and appearance.[2] Defendant contends that it was, therefore, improper for the trial court to instruct the jury that the

2. We note that this is likely due, in part, to the fact that the knife was already missing when Defendant was interviewed by law enforcement officers who responded to Crystal Towers on the night in question.

knife was a deadly weapon per se; instead, Defendant contends, whether the knife was a "deadly weapon" under the circumstances was properly an issue of fact for the jury's decision. And by erroneously removing this issue from the province of the jury, Defendant argues, the trial court necessarily further erred by denying her request for jury instructions on lesser-included offenses, including assault inflicting serious injury.

We disagree. Defendant's arguments belie a fundamental misunderstanding of both the State's evidentiary burden regarding this element and the trial court's ultimate responsibility in charging the jury.

First, although the State bears the burden of proving, *inter alia*, the *use* of a deadly weapon, the State is not required to *produce* the alleged weapon to obtain a conviction for an assault involving a deadly weapon. *See*, *e.g.*, N.C. Gen. Stat. § 14-32(b); *Walker*, 204 N.C. App. at 445, 694 S.E.2d at 494 ("[W]e know of no rule of law that requires the production of the alleged deadly weapon on the trial of a criminal prosecution for an assault with a deadly weapon; indeed this Court recognizes that the weapon may not be produced." (cleaned up)).

Furthermore, we disagree with Defendant's characterization of the strength and scope of the evidence presented as regards the knife itself. In addition to Defendant's trial testimony, the jury also viewed State's Exhibit 4, body-cam video footage of Defendant's interview with law enforcement officers at Crystal Towers recorded mere hours after the altercation. In the video, Defendant described the missing weapon as a "small knife," "like a pocketknife," with a "foldout" blade, which she typically stored in her walker. When asked to estimate the size of the knife, Defendant demonstrated by holding her index fingers a few inches apart, in accord with her description of a small, foldout blade.

Nor do we agree with Defendant that the trial court "misapplied" well-established law by "using the injuries sustained by Ms. Smith as [the court's] basis for determining the weapon's dangerousness" because "there was no serious bodily injury alleged or proven . . . and because the trial [court] seems to have considered facts not in evidence when he made his determination." To the contrary, "well-established principles of North Carolina law allow the extent to which a particular instrument is a deadly weapon to be inferred based on the effects resulting from the use made of that instrument." *Walker*, 204 N.C. App. at 446, 694 S.E.2d at 494.

Here, we hold, consistent with the trial court's conclusion, that the knife was a deadly weapon per se based upon the circumstances of its use. The evidence in this case amply supports the conclusion that Ms. Smith suffered great bodily harm as a result of Defendant's assault

upon her with the knife, even absent production of that knife at trial. Ms. Smith sustained multiple injuries to her face, head, chest, arm, and hand, including several that continued to cause her lingering issues as of the trial in this matter. Ms. Smith testified that she suffers ongoing damage to the tendons, nerves, and ligaments in her right hand, and that her "memory comes in and out sometimes because [she] was cut . . . in [her] temple[.]" Ms. Smith required surgeries to her face and right hand—her dominant hand—due to injuries sustained in the assault; however, as of trial, she continued to experience pain and ongoing nerve damage in her hand and had not yet regained its full use.

Moreover, Dr. Zelman testified that Ms. Smith was admitted to the hospital as "a Level II trauma" patient, which "could potentially be a very serious patient or critical patient[,]" due to "a deep laceration to her scalp and multiple other lacerations to her face and her hands." Ms. Smith ultimately required six staples to curtail the "pretty significant bleeding" caused by this wound. And Ms. Holland, another Crystal Towers resident who witnessed the assault, testified similarly regarding the amount of blood at the scene; she recalled seeing Ms. Smith "just standing there . . . blood just coming out," like something out of the horror movie, "Carrie."

Notwithstanding Defendant's arguments to the contrary, the circumstances and manner of Defendant's use of the knife in this case "are of such character as to admit of but one conclusion": the knife was a deadly weapon as a matter of law. *Palmer*, 293 N.C. at 643, 239 S.E.2d at 413 (citation omitted). We simply cannot agree with Defendant that the injuries described above—most notably, deep knife wounds to the scalp and temple, and blood loss so extensive as to invoke memories of a notoriously gory horror movie—"merely raise[ ] a factual issue about [the knife's] potential for producing death." *Walker*, 204 N.C. App. at 444, 694 S.E.2d at 493 (citation omitted).

Having concluded that the trial court properly instructed the jury that the knife constituted a deadly weapon per se under the circumstances of this case, we necessarily also hold that the trial court appropriately declined Defendant's request for jury instructions on lesser-included offenses.

As explained above, the trial court did not err by determining, as a matter of law, that the knife constituted a deadly weapon—an instrument that was "likely to produce death or great bodily harm, under the circumstances of its use[,]" *Palmer*, 293 N.C. at 642, 239 S.E.2d at 412 (citation omitted)—nor by instructing the jury accordingly. The State's evidence was "positive as to each and every element of the crime charged

and there [wa]s no conflicting evidence relating to any element of the charged crime." *Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772 (cleaned up). Accordingly, the trial court was not required to instruct the jury on assault inflicting serious injury or any other lesser-included offenses.

IV. Conclusion

Upon the evidence presented, the trial court did not err by instructing the jury that the knife was a deadly weapon as a matter of law, nor by denying Defendant's request for instructions on any lesser-included offenses omitting that element.

We thus conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 NOVEMBER 2023)

CATO CORP. v. ZURICH AM. INS. CO. No. 23-305	Mecklenburg (21CVS9525)	Affirmed
FOUST v. N.C. DEP'T OF ENV'T QUALITY No. 23-18	Caswell (22CVS116)	Dismissed
IN RE A.G.G. No. 22-949	Orange (21JA32)	Dismissed
IN RE A.K. No. 22-877	Johnston (18JA140) (18JA141) (18JA142)	Affirmed
IN RE C.C.K. No. 23-362	Davidson (20JT123)	Affirmed
IN RE C.H. No. 23-508	New Hanover (21JT40)	Affirmed.
IN RE C.L.K. No. 23-453	Randolph (20JT106) (20JT107)	Affirmed
IN RE G.M. No. 22-1011	Watauga (16JT32) (18JT69) (18JT70)	Reversed and Remanded
IN RE I.M.J. No. 23-33	Durham (21J155)	Affirmed
IN RE L.D.C. No. 23-524	Gaston (18JT173) (18JT174)	Vacated and Remanded
IN RE L.L. No. 22-1045	Onslow (20JA81)	Vacated and Remanded
IN RE S.D. No. 23-233	Wake (20JT123) (20JT124) (20JT125)	Affirmed
IN RE S.E.B. No. 23-490	Guilford (19JT85)	Affirmed

IN RE T.L.B. No. 23-565	Lincoln (23JB6)	Affirmed
IN RE T.P. No. 23-469	New Hanover (19JT182)	Affirmed
MILLER v. TOWN OF CHAPEL HILL No. 23-230	Johnston (21CVS2036)	Affirmed
RYAN v. RYAN No. 23-467	Guilford (14CVD10126)	Affirmed in Part, Vacated in Part, and Remanded
STATE v. ALVA No. 22-1062	Scotland (20CRS51716-20)	No Error
STATE v. JONES No. 23-254	Union (20CRS51964)	No Error
STATE v. KELLER No. 23-203	Davidson (19CRS53809-12)	No Error
STATE v. LAWRENCE No. 22-804	New Hanover (17CRS60189) (17CRS60191) (17CRS60193) (17CRS60195) (17CRS60290)	No error in part, Vacated in part, Remanded for resentencing
STATE v. MELTON No. 23-182	Madison (20CRS50060)	Other - No error; no prejudicial error
STATE v. NEILL No. 23-95	Henderson (12CRS657)	Vacated and Remanded
STATE v. PEACOCK No. 23-91	Henderson (20CRS700711)	Reversed
STATE v. SANDERS No. 23-55	Wilson (18CRS50149-50)	Vacated and Remanded
STATE v. WILKINS No. 23-243	Nash (21CRS51448) (21CRS801)	No Error
SULLIVAN v. KARLIN No. 22-1037	Iredell (22CVS858)	Reversed

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