291 N.C. App.—No. 4 Pages 404-521

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 26, 2024

MAILING ADDRESS: The Judicial Department
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OF
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COURT OF APPEALS

CASES REPORTED

FILED 5 DECEMBER 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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authorization, and another requiring defendant to send plaintiff any distributions he was to receive from several LLCs he had an interest in. Although both orders were interlocutory, their purpose was to enforce the underlying federal judgment, which was a final judgment in the case. Furthermore, both interlocutory orders had the effect of determining the action given that, absent immediate appeal, defendant would have to either comply with the potentially invalid orders or be held in contempt for noncompliance in order to appeal. **Universal Life Ins. Co. v. Lindberg, 506.**

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CRIMINAL LAW

Defenses—voluntary intoxication—jury instructions—sufficiency of evidence—In a prosecution for charges arising from a pharmacy break-in, the trial court did not err by denying defendant's request for a jury instruction on voluntary intoxication. According to the evidence, defendant and an accomplice successfully broke into the pharmacy by prying open and sliding under a roll-up door leading to the stock room, after which they stole items from the pharmacy, ran out the front door through a parking lot into a field across the street, and then attempted to climb over a fence. Although some evidence indicated that defendant was very sleepy during police interviews, had a hard time standing up, and had consumed cocaine over the previous few days, defendant failed to show that he was so intoxicated on the day of the break-in that he could not form the specific intent to commit the charged offenses. **State v. Mitchell, 490.**

requiring defendant to send plaintiff any distributions he was entitled to receive from several LLCs, the court erred by including a significant number of LLCs in the charging order of which defendant was neither a member nor an assignee of an economic interest. Further, the charging order violated the North Carolina Limited Liability Company Act by requiring defendant to produce all governing company documents and compelling the LLCs to freeze distributions to defendant, which went beyond the "exclusive remedy" established under the Act (providing that entry of a charging order is the "exclusive remedy" by which a judgment creditor of an interest owner may satisfy the judgment). **Universal Life Ins. Co. v. Lindberg, 506.**

State court enforcement—federal money judgment—jurisdiction to issue injunction—unsatisfied writ of execution required—In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, the state court lacked jurisdiction to enter an order enjoining defendant from encumbering or withdrawing from any entity he owned or controlled without prior authorization. Although Chapter 1, Article 31 of the General Statutes allows a court to forbid transfers or other dispositions of a judgment debtor's property (under section 1-358) and permits a court to order that a judgment debtor's non-exempt property be applied toward the judgment (under section 1-362), both sections 1-358 and 1-362 required plaintiff to return an unsatisfied writ of execution in order for the court to have had jurisdiction; here, plaintiff returned an unsatisfied writ, but the record showed that plaintiff never attempted to execute it. **Universal Life Ins. Co. v. Lindberg, 506.**

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Testimonial evidence—Confrontation Clause—hearsay—exceptions—phone records—statutory rape case—Defendant was entitled to a new trial on charges of statutory rape of a child and related sexual offenses arising from his interactions with a thirteen-year-old girl, where the trial court erroneously admitted into evidence defendant's cell phone records along with a derivative record showing communications between his phone and the girl's phone. The records' admission violated defendant's rights under the Confrontation Clause of the Sixth Amendment, since the records constituted direct testimonial evidence and defendant was not given any prior or in-court opportunity to confront the records' source or assertions. Although the court properly determined that the records were inadmissible under the business records exception to the hearsay rule—because the State failed to authenticate defendant's phone records, and the derivative record was expressly made for litigation purposes rather than in the regular course of the phone company's business—the court erred in admitting the records under the "catch-all" exception to the hearsay rule. Further, because the records were the only evidence that corroborated the girl's testimony at trial, the State failed to show that the court's error was harmless beyond a reasonable doubt. **State v. Lester, 480.**

FIREARMS AND OTHER WEAPONS

Possession of a firearm by a felon—jury instructions—type of firearm not specified—plain error analysis—In a prosecution for charges arising from a pharmacy break-in, where law enforcement saw defendant drop what looked like a gun while fleeing the scene through the pharmacy parking lot, the trial court did not commit plain error when it instructed the jury on the charge of possession of a firearm by a felon without identifying the specific firearm listed in defendant's indictment:

traffic stop where, although the trial court's order contained a factual error (regarding the contents of an anonymous tip about possible drug activity) and an erroneous conclusion of law (that Fourth Amendment scrutiny was not triggered during the stop even though an officer assisted defendant out of the vehicle, at which point no reasonable person would have felt free to leave), those errors did not amount to fundamental error seriously affecting the fairness of the proceedings. Defendant's constitutional rights were not violated during the stop because officers' initial interactions with the vehicle's occupants were consensual, and the occupants were not seized until after officers had reasonable suspicion that illegal drug activity was taking place based on smelling an odor of marijuana coming from the car, seeing marijuana crumbs in plain view, and soliciting an explanation from one of the occupants that he possessed no marijuana but that he "was just making a blunt." **State v. Williams, 497.**

SEXUAL OFFENDERS

Registration—older federal conviction—substantial similarity test—newer version of statute insufficient—The trial court's order requiring defendant to register as a sexual offender was vacated and the matter was remanded for a new hearing because the State failed to show that defendant's prior conviction in 2003 of a federal offense was substantially similar to a sexually violent offense under North Carolina law. Instead of presenting the trial court with the 2003 version of the federal statute, the State instead presented the 2021 version, and did not provide any evidence that the statute had remained unchanged from 2003 to 2021. **In re Alcantara, 430.**

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.

SASHA ROSE ELLIOTT AND JEREMY LEE OACHS, PLAINTIFFS
v.
DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA23-390

Filed 5 December 2023

Eminent Domain—inverse condemnation—access to main road from property—collapsed driveway

After the gravel driveway connecting plaintiffs' property to the main road collapsed due to a three-day continuous rain event, the trial court properly dismissed plaintiffs' complaint alleging that the Department of Transportation (DOT)—which had performed some work near plaintiffs' driveway after acquiring a right-of-way to convert the main road into a two-lane paved highway—had taken a compensable interest in plaintiffs' property through inverse condemnation. Plaintiffs failed to show that DOT's actions contributed to the driveway's collapse or otherwise denied plaintiffs of their physical and lawful access to the main road. Further, competent evidence supported the trial court's findings and conclusions about the credibility of the parties' respective witnesses, which could not be reweighed on appeal.

Appeal by plaintiffs from order entered 9 January 2022 by Judge Jacqueline D. Grant in Caldwell County Superior Court. Heard in the Court of Appeals 1 November 2023.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Andrew J. Howell, for the plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the defendant-appellee.

TYSON, Judge.

Sasha Rose Elliott and Jeremy Lee Oachs (collectively "Plaintiffs") appeal from an order entered concluding: *inter alia*, (1) the Department of Transportation ("DOT") had not taken a compensable interest in Plaintiffs' property through inverse condemnation; (2) Plaintiffs were not entitled to any compensation from DOT; and (3) dismissing Plaintiffs' claims. We affirm.

I. Background

Plaintiffs acquired a parcel of real property located at 6149 Laytown Road in Lenoir in July 2018. The parcel measures approximately 38.96 acres and contains Plaintiffs' single-family dwelling. Plaintiffs have lived on the property with their children since acquiring the parcel. The parcel is accessed through a gravel driveway, which rises and runs up a slope with a stream running along the base of the slope.

DOT acquired a new right-of-way to convert Laytown Road from a dirt road into a two-lane paved highway. This right-of-way extends into and through where Plaintiffs' driveway connects to Laytown Road. DOT's agreement with Plaintiffs' predecessors-in-title released DOT from all claims of damages by reason of acquiring and improving said right-of-way.

Sometime before 2017, a prior landowner, without involvement or help from DOT, installed eight concrete blocks directly on top of a slope on the driveway. Each of these blocks weighed an average of 3,600 lbs. Between 2017 and 2018, at the request of a prior owner, DOT installed gabion baskets filled with earth or rocks to support the abutment between Laytown Road and the driveway. The baskets were not located on the slope that later failed.

Plaintiffs noticed cracking and an opening in the ground at the connection of the driveway with Laytown Road. DOT performed maintenance work on a culvert near the driveway and placed large stone riprap on the fill side of the embankment beside the driveway in March 2019.

A three-day continuous rain event ("rain event") caused the slope of the driveway to collapse in June 2019 and rendered Plaintiffs' driveway unusable. Several other slides occurred on Laytown Road during the rain event. A significant portion of Plaintiffs' driveway collapsed down the fill side of the embankment on 8 June 2019.

Plaintiffs filed a complaint demanding a jury trial and alleged inverse condemnation by DOT on 26 November 2019. DOT filed an answer, a motion to dismiss, and a motion for a hearing pursuant to N.C. Gen. Stat. § 136-108 (2021) to determine all issues other than damages.

Following hearings on 12 July 2022 and 30 September 2022 without a jury, the trial court entered an order concluding DOT had not taken a compensable interest in Plaintiffs' property and Plaintiffs were not entitled to any compensation. The court dismissed Plaintiffs' complaint. Plaintiffs appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

Plaintiffs argue the trial court erred by: (1) concluding Plaintiffs' expert testimony was not supported by sufficient facts or data; (2) giving weight to DOT's witnesses, who did not offer credible evidence; and (3) eliminating their access to Laytown Road. Plaintiffs do not assert or argue any error from the trial court conducting the hearings and making findings without submitting disputed facts and evidence to resolution by a jury.

IV. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether . . . competent evidence support[s] the trial court's findings of fact and whether the conclusions of law were proper in light of such facts." *Anthony Marano Co. v. Jones*, 165 N.C. App. 266, 267-68, 598 S.E.2d 393, 395 (2004) (citation omitted). Unchallenged findings of fact are binding upon appeal. *Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 567, 712 S.E.2d 696, 699 (2011). "The trial court's conclusions of law are reviewed *de novo*[.]" *Strikeleather Realty & Invs. Co. v. Broadway*, 241 N.C. App. 152, 160, 772 S.E.2d 107, 113 (2015) (citation and quotation marks omitted).

V. Inverse Condemnation

Inverse condemnation actions are governed by N.C. Gen. Stat. § 136-111. "Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may . . . file a complaint in the superior court[.]" N.C. Gen. Stat. § 136-111 (2021).

A taking under the power of eminent domain may be defined generally as an "entering upon private property for more than a momentary period and, under the warrant . . . of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Ledford v. Highway Comm.*, 279 N.C. 188, 190–91, 181 S.E.2d 466, 468 (1971). North Carolina courts and precedents recognize "[d]amage to land which inevitably or necessarily flows from a public construction project results in an appropriation of

land for public use." *Robinson v. N.C. Dept. of Transportation*, 89 N.C. App. 572, 574, 366 S.E.2d 492, 493 (1988) (citing *City of Winston–Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986)).

Our Supreme Court has held: "[p]arties to a condemnation proceeding must resolve all issues other than damages at a hearing pursuant to N.C.[Gen. Stat.] § 136-108." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999). N.C. Gen. Stat. § 136-108 provides:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 136-108 (2021). N.C. Gen. Stat. § 136-108 applies to both inverse and traditional condemnations. *DeHart v. N.C. Dep't of Transp.*, 195 N.C. App. 417, 419, 672 S.E.2d 721, 722 (2008) ("DOT then moved for a hearing pursuant to N.C. Gen. Stat. § 136-108 (2007) to determine 'whether the Plaintiffs have had any interest or area of their property taken by the Defendant and/or whether the Plaintiffs have an inverse condemnation claim against the Defendant.' ").

VI. Plaintiffs' Expert Testimony

Plaintiffs argue the trial court erred in finding their expert, Jeffrey Brown's, testimony was not credible. Plaintiffs seek for this Court to re-weigh the evidence presented before the trial court. "The trial court must determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) (citations omitted). Competent evidence supports the trial court's unchallenged and binding findings and conclusions about credibility and weight accorded to the competing experts. Plaintiffs' argument is overruled.

VII. DOT Witnesses

Plaintiffs argue the trial court improperly credited DOT's witness testimony. As established above, the "trial court must determine what pertinent facts are actually established by the evidence before it," and it is not our role as an appellate court to reweigh the evidence. *Id.* at 712, 268 S.E.2d at 189.

It is the injured party's burden at trial to establish their injury was sustained by the action of the opposing party. *See Board of Education v. McMillan*, 250 N.C. 485, 489, 108 S.E.2d 895, 898 (1959) (holding that the injured party has the burden of the issue on damages and must convince the jury by a greater weight of evidence that he has been damaged.).

This burden applies to cases dealing with an overflow of water damaging a landowner's property. *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 614, 304 S.E.2d 164, 172 (1983) (holding that in order to recover for damages, the plaintiff had to show how the increased overflow of water was "such as was reasonably to have been anticipated by the State to be the direct result of the structures it built and maintained" (citation omitted)). Plaintiffs must show it was reasonably foreseeable for the State to anticipate the change in water movement at the time it undertook to erect a structure. *Id.* Plaintiffs' argument is overruled.

VIII. Plaintiffs Access to Laytown Road

Plaintiffs argue the trial court erred by denying their access to Laytown Road without just compensation. Our statutes and precedents have long established "[a]n owner of land abutting a highway or street has the right of direct access from his property to the traffic lanes of the highway." *Dept. of Transportation v. Harkey*, 308 N.C. 148, 151, 301 S.E.2d 64, 67 (1983); *see* N.C. Gen. Stat. § 136-89.53 (2021) ("When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easements of access."). The State may not diminish, deprive, or take away this right away without just compensation to the property owner. *Harkey*, 308 N.C. at 151, 301 S.E.2d at 67.

Governmental action eliminating all direct access to an abutting road is a taking and compensable as a matter of law. *Id.* at 158, 301 S.E.2d at 71. Even if the State's actions do not eliminate all direct access, a landowner may be entitled to compensation if his common law and statutory rights of access are substantially interfered with by the State. *Highway Comm. v. Yarborough*, 6 N.C. App. 294, 302, 170 S.E.2d 159, 165 (1969).

Competent evidence supports the trial court's findings and conclusion the collapse of Plaintiffs' slope and driveway was not caused by or a result of DOT actions. Plaintiffs' failed to show DOT's actions denied Plaintiffs of their physical and lawful access to Laytown Road. Plaintiffs' argument is overruled.

IX. Conclusion

Plaintiffs do not appeal nor argue the hearings were conducted and expert testimony and factual disputes on damages incurred were presented before the trial court without a jury as was demanded in their complaint. The evidence, taken as a whole, is competent to support the trial court's findings of fact that the DOT's experts' testimonies were more persuasive than Plaintiffs' expert witness. These findings support the trial court's conclusions of law. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges MURPHY and COLLINS concur.

JENNIFER GROSECLOSE, Plaintiff/Mother
v.
ALAN GROSECLOSE, Defendant/Father

No. COA22-950

Filed 5 December 2023

1. Divorce—modification—child support—alimony—no change in circumstances—calculation of income—additional findings needed

A trial court's order denying defendant father's motion for modification of child support and alimony was affirmed in part where: the court properly determined that defendant's decrease in employment income was insufficient on its own to show a substantial change of circumstances warranting a modification of his support or alimony obligations; competent evidence supported the court's finding that certain "loans" the father received from friends and his girlfriend were actually gifts to be included in the calculation of his actual gross income; and the court did not err in declining to make detailed findings regarding the father's health. However, because the court did not enter sufficient findings explaining precisely how it calculated the father's actual gross income, the case was remanded for additional findings regarding that issue.

2. Contempt—civil—failure to pay alimony—ability to pay—purge conditions—additional findings needed

In an action between divorced parents, the trial court properly held defendant father in civil contempt for failure to pay alimony, a distributive award to plaintiff mother, and attorney fees, where competent evidence supported the court's conclusion that defendant had the ability to pay each of those court-ordered obligations. Notably, the evidence showed that, despite a pattern of fluctuating income, defendant had maintained a relatively high standard of living, often spending significant amounts of money on alcohol and shopping at high end grocery stores. However, because the court's civil contempt order lacked sufficient findings of fact establishing that defendant had the present ability to satisfy the purge conditions detailed in the order, the case was remanded for additional findings of fact addressing that issue.

3. Appeal and Error—abandonment of issues—Rule 28(b)(6)—no argument or legal authority—attorney fees in divorce action

In defendant father's appeal from an order denying his motion to modify his child support and alimony obligations, defendant challenged the trial court's award of attorney fees without citing any legal authority or making any substantive arguments, relying instead upon arguments he laid out in other parts of his appellate brief relating to other issues. Consequently, any argument he had regarding the attorney fees award was deemed abandoned pursuant to Appellate Rule 28(b)(6).

Appeal by defendant from order entered 16 December 2021 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 5 September 2023.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Haley E. White, and Kristin J. Rempe, for plaintiff-appellee.

Wofford Burt, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for defendant-appellant.

ZACHARY, Judge.

Defendant Alan Groseclose ("Father") appeals from the trial court's order denying his motion for modification of permanent child support and permanent alimony, and granting Plaintiff Jennifer Groseclose's ("Mother") motion for contempt. After careful review, we affirm in part and remand for additional findings of fact and conclusions of law.

I. Background

Mother and Father were married in 2000, separated in 2014, and divorced thereafter. One child was born of the marriage. On 3 December 2015, the trial court entered a temporary support order addressing post-separation support and child support (together, "temporary support"). The court ordered Father to pay:

> $726.37 per month in ongoing temporary child support; . . . $11,848.52 in child support arrears at the rate of $300.00 per month; . . . $400.00 per month in ongoing postseparation support; . . . $800.00 in postseparation support arrears at the rate of $100.00 per month; and . . . $7,444.50 in attorney's fees to [Mother]'s counsel at the rate of $200 per month.

Father filed his first motion to modify 20 days later, alleging that he suffered a substantial decrease in income and seeking a reduction in his temporary support obligations. Father was then late in paying his temporary support and attorney's fees for several months of 2016, and failed to make any payments in October, November, or December of that year. Mother filed her first motion for contempt. On 3 January 2017, the trial court entered a permanent support order, denying Father's motion to modify, granting Mother's motion for contempt, and ordering Father to pay

> $2,579 in temporary support arrears and $600 in attorney's fees obligations; . . . $803.61 per month in permanent child support; . . . $1,000 per month in alimony until December 30, 2020; and . . . $18,000 in attorney's fees at the rate of $225 per month until paid in full.

Father filed two more motions to modify his support obligations in 2017, while the parties' equitable distribution action reached its conclusion. On 19 September 2017, the trial court entered its equitable distribution order, awarding Mother "a distributive award of $158,141.00 [payable by Father] at a rate of $1,000 per month until paid in full in order to achieve an equal distribution of the marital estate." The trial court made a finding of fact that Father "had the ability to pay such a distributive award."

On 3 December 2018, Father filed his fourth motion to modify, again alleging a substantial decrease in his income and requesting that the trial court reduce his child support and alimony obligations. On 18 June 2020, Mother filed another motion for contempt, alleging that Father had failed to pay his child support, alimony, attorney's fees, and distributive award payments.

On 12 February and 3 March 2021, the parties' motions came on for hearing in Mecklenburg County District Court. On 16 December 2021, the trial court entered an order denying Father's motion to modify and granting Mother's motion for contempt. The trial court also ordered Father to pay Mother an additional sum in reimbursement for her attorney's fees. On 14 January 2022, Father timely filed notice of appeal.

II. Discussion

Father argues that the trial court erred by denying his motion to modify his child support and alimony obligations and by granting Mother's motion for contempt.

A. Modification of Child Support and Alimony

[1] Father first contends that the trial court abused its discretion by denying his motion for modification "where the findings of fact supported changed circumstances[,]" namely, "an involuntary decrease in [Father's] income" and Father's persistent health concerns. We do not find Father's arguments as to this issue to be persuasive. Father also argues that the trial court's "findings of fact lacked detail to support the finding" of his actual monthly income. On this issue, we agree and remand for additional findings of fact.

1. Standard of Review and Applicable Legal Principles

Generally, the amount of child support and alimony is "left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Shirey v. Shirey*, 267 N.C. App. 554, 559, 833 S.E.2d 820, 824 (2019) (citation omitted), *disc. review denied*, 376 N.C. 675, 853 S.E.2d 159 (2021). "A trial court abuses its discretion when it renders a decision that is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 560, 833 S.E.2d at 825 (cleaned up).

"When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Id.* at 559–60, 833 S.E.2d at 824–25 (citation omitted). "When the trial judge is authorized to find the facts, [its] findings, if supported by competent evidence, will not be disturbed on appeal despite the existence of evidence which would sustain contrary findings." *Kelly v. Kelly*, 228 N.C. App. 600, 605, 747 S.E.2d 268, 275 (2013) (citation omitted). While "the trial court need not recite all of the evidentiary facts[,]" it still "must find those material and ultimate facts from

which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Id.* at 606–07, 747 S.E.2d at 276 (citation omitted). We review de novo the trial court's conclusions of law. *Shirey*, 267 N.C. App. at 560, 833 S.E.2d at 825.

An order for child support or alimony may be modified "upon motion in the cause and a showing of changed circumstances by either party[.]" N.C. Gen. Stat. §§ 50-13.7(a), -16.9(a) (2021). The movant bears the burden of showing a change of circumstances in order to modify either child support or alimony. *Thomas v. Thomas*, 134 N.C. App. 591, 592, 518 S.E.2d 513, 514 (1999) (child support); *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980) (alimony).

In both contexts, the change of circumstances must be *substantial*. For example, for the purposes of modifying alimony, this Court has made clear that

> not *any* change of circumstances will be sufficient to order modification of an alimony award; rather, the phrase is used as a term of art to mean a *substantial* change in conditions, upon which the moving party bears the burden of proving that the present award is either inadequate or unduly burdensome.

Britt, 49 N.C. App. at 470, 271 S.E.2d at 926. Meanwhile, the "modification of a child support order involves a two-step process. The court must first determine a *substantial* change of circumstances has taken place; only then does it proceed to apply the [Child Support] Guidelines to calculate the applicable amount of support." *McGee v. McGee*, 118 N.C. App. 19, 26–27, 453 S.E.2d 531, 536 (emphasis added), *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).

2. The Trial Court's Findings of Fact

In its order, the trial court made the following pertinent findings of fact regarding the lack of a substantial change of circumstances for the purposes of modifying child support and/or alimony:

> 23. The Court does *not* find that there has been a substantial change in circumstances such that permanent child support or alimony should be modified.
>
> 24. In the January 3, 2017 Permanent Support Order, the Court found as follows:

a. [Mother]'s income from her full-time job at Calvary Church is $2,594.73 gross per month and $1,974.45 net per month.

b. Two-thirds (2/3) of [Mother]'s shared family expenses should be attributed to [Mother]. Thus, [Mother]'s portion of the shared family expenses is $1,699.90 per month.

c. [Mother]'s monthly individual expenses are $1,493.83.

d. [Mother]'s total monthly needs and expenses are $3,193.73, plus her child support obligation of $305.89 pursuant to the North Carolina Child Support Guidelines.

e. [Mother] has a monthly shortfall in excess of $2,300.

f. [Father]'s testimony regarding his income was not credible.

g. [Father]'s income from employment is $6,067.90 gross per month.

h. [Father] received money from friends to help him pay his living expenses and attorney's fees in the average amount of $750 per month. [Father] testified that this monetary support from friends was a "loan" or series of "loans." However, [Father] failed to present any evidence to support his contention that the additional monetary support were loans.

i. [Father]'s portion of the shared family expenses is $1,740.95 per month. [Father]'s individual expenses are $583.00 per month. [Father]'s total monthly needs and expenses are $2,323.95, plus his child support obligation of $803.61.

j. After mandatory deductions listed on his pay-stub, [Father]'s total monthly net income is $6,273.26. After subtracting his total monthly needs and expenses and his child support obligation, [Father] has a monthly surplus of $3,145.70.

25. The Permanent Support Order awarded [Mother] monthly alimony of $1,000 per month for a period of five (5) years or sixty (60) months.

26. [Father]'s current Fourth Motion to Modify was filed on December 3, 2018 after he became unemployed due to his employer in Virginia Beach, Virginia changing management or otherwise reorganizing such that the "last in was the first out" and [Father] was the "last in." The Court does not find that [Father]'s income changed substantially at that time as he received unemployment benefits, severance pay, and his living expenses were paid by his sister. Additionally, [Father] began receiving financial assistance from his girlfriend . . . in 2018. The Court acknowledges and finds as fact that when [Father] was employed in Virginia Beach, he paid his court-ordered obligations.

27. In April 2019, [Father] moved in with [his girlfriend] and continued living a lifestyle with no substantial economic difference, except the majority of his income came from [his girlfriend] by way of her payment of his living expenses and alleged "loans," which this Court finds were actually regular, recurring gifts and not loans.

28. The Court does not find that either of the "loans" evidenced by promissory notes signed by [Father] and [his girlfriend] are truly loans for the following reasons:

    a. Though the terms call for payments to begin, no payments have ever been made, despite the fact that [Father] had voluntary deductions totaling $1,093.31 from his Lowe's pay which would have covered either or both of the "loan" payments cited in the promissory notes.

    b. [Father] has experience with the courts such that he knew that he would need to have evidence that money given to him is to be paid back (*i.e.*, a loan) and therefore, he attempted to create evidence of such.

    c. Despite his experience with the courts, [Father] never disclosed any other gifts paid on his behalf,

nor that he lived with [his girlfriend], and had access to her bank account via his own debit card attached to that account, despite being asked in discovery.

d. During his testimony, [Father] cited his advanced age (64 years old), his poor health (which he also cited 4 years ago at the equitable distribution trial), his inability to secure a better paying job, no savings, no property, no investments, and little credit available. Accordingly, the Court finds that [Father] and [his girlfriend] could not, in good faith, have signed the promissory notes setting forth 5 and 10 year terms for repayment and intended that [Father] would repay the loans according to the terms in the promissory notes.

e. The loans are unsecured with no penalty for non-payment or late payment.

f. The loan documents and promissory notes were prepared just prior to the deadline for the filing of Financial Affidavits, wherein the parties are required to disclose debts and provide documentation evidencing such debts.

g. *See Lowe v. Lowe*, 2005 N.C. App. LEXIS 1025 (2005), which provides that loans from close family members should be closely scrutinized for legitimacy and failure to make payments on loans for several years when funds are available to do so is evidence that the loans are illusory. The alleged "loans" from [Father's girlfriend] to [Father] do not pass such scrutiny and the evidence shows that the "loans" are illusory.

29. In addition to the purported "loans" from [Father's girlfriend] (which the Court finds were not loans at all, but were gifts which should be included in [Father]'s income) almost all of [Father]'s living expenses were either paid directly by [his girlfriend] or by the authorized use of her bank account and debit card.

. . . .

32. [Father] has a cavalier and entitled attitude toward money that became apparent though his testimony and actions, including, but not limited to:

    a. When questioned about his failure to pay support to [Mother], [Father] responded: "If I pay her, I can't pay something else."

    b. [Father]'s Financial Affidavit listed voluntary deductions from his paycheck totaling approximately $1,093.31 per month. [Father] listed a monthly garnishment of $568.90 on his Financial Affidavit, and he testified that the garnishment had been satisfied in January 2021, prior to the filing of his verified Financial Affidavit.

    c. [Father] spent significant amounts of money on alcohol and shopping at higher end grocery stores and gourmet shops.

    d. The last entry in [Father]'s job search log was May 6, 2019. [Father] has not continued to search for higher paying employment in line with his skills and abilities.

    e. [Father]'s Financial Affidavit states that his average monthly net income is $640.38 and his monthly needs and expenses are $1,921.31. [Father]'s statement that "no one can live on $640.38 per month" further demonstrates his attitude of entitlement to a certain lifestyle.

    f. [Father] took a 6 week leave of absence from his job at Lowe's because he "thought" he had COVID. Notably, this was right around the same time that [Father] received a tax refund.

    g. The Court previously found that [Father] incorporated and ran several coin businesses, and that fact has not changed. In fact, [Father]'s most recent well-paid employment was in the coin business.

    h. [Father] earned his real estate license, which is a difficult undertaking. This demonstrates to the Court that even if [Father] was unable to sell

houses and subsequently let his real estate license lapse, that he has the ability to earn more than he is earning at his current job.

i. The history of this case shows that [Father] did not make any support payments to [Mother] until he was court ordered to do so.

j. [Father] has filed multiple motions to modify support and there have been multiple motions for contempt filed against him. [Mother] has prevailed on her motions for contempt. [Father]'s motions to modify support have either been voluntarily dismissed by [Father] or denied by the Court.

k. Prior Court Orders have found as a fact that [Father] is not entirely credible.

l. [Father]'s actions show a pattern of fluctuating income but a consistent relatively high standard of living.

33. At present, the Court finds [Father]'s gross monthly income to be $6,526.18 per month. This is comprised of (a) $2,355.43 from Lowe's; (b) $2,758.75 from monetary "loans" from [his girlfriend], which the Court finds to be gift income; (c) $1,412 from additional regular, recurring gifts by way of [his girlfriend] paying [Father]'s living expenses, directly and through [Father]'s use of her bank account. After mandatory deductions set forth on [Father]'s paystub, [Father]'s net monthly income is $5,904.44. This income is [Father]'s actual income from all sources. The Court does not find bad faith such that it will impute income to [Father].

34. At present, the Court finds that [Father]'s shared monthly expenses are $500 per month that he pays to [his girlfriend]. [Father]'s individual expenses are $71.00 per month. Additionally, his court ordered obligations including a monthly child support obligation of $803.61, the Equitable Distributive award of $1,000 per month, and attorney's fees payment of $225.00 per month. [Father]'s monthly expenses total $2,599.61, leaving him a monthly surplus of $3,304.83. [Father]

therefore has the ability to pay $1,000 each month in alimony.

. . . .

37. [Mother] has a monthly shortfall of $1,027.52. Her current monthly shortfall is lower than what the Court found in the January 3, 2017 Permanent Support Order and approximately 2.8% more than the amount of alimony that was originally ordered in the Permanent Support Order.

38. The Court finds that [Mother] had no choice but to reduce her personal expenses in November 2018 when [Father] unilaterally began paying only $50 per month toward his alimony obligation, which is only 5% of the court-ordered amount. After [Father] reduced his support payments, [Mother] took on a temporary part-time job as a delivery driver for Uber Eats for a few months to help make ends meet. The Court does not consider [Mother]'s temporary income for these calculations.

. . . .

Alimony

41. This Court considered two possible calculations for alimony, neither of which the Court finds to be a substantial change in circumstances such that alimony should be modified.

42. For both calculations, the Court used [Father]'s income as set forth above.

    a. The first calculation is based on [Mother] receiving the entire distributive award payment of $1,000 per month from [Father]. [Mother]'s monthly income is $3,744.27 when she receives the entire $1,000 distributive award payment. [Mother]'s reasonable monthly expenses of $2,861.89, plus her monthly child support obligation of $442.60, equals $3,304.49. In this scenario, there is no shortfall, but only a slim $347 per month left over after her expenses. This Court finds that alimony of $1,000 per month would still

be awarded and appropriate. This Court is constrained from reconsidering dependency that was already established by the Permanent Support Order. *See Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997). The Court considers the following:

i. [Father]'s marital misconduct, *i.e.*, abandonment, under N.C.G.S. § 50-16.3A according to the Permanent Support Order, Finding of Fact No. 19, "[Father] moved to Hawaii without informing [Mother] or the minor child of his intentions or whereabouts," which left [Mother] without any financial support ([Father] did, however, leave her with debt) or even knowledge as to where [Father] was living;

ii. The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of the minor child; and

iii. That the standard of living during the marriage was significantly higher than the modest $2,861.89 cited in [Mother]'s Financial Affidavit, which is the result of [Mother] being forced to reduce her expenses from the standard of living she enjoyed during her marriage.

b. The second calculation is based on [Father] only paying a fraction of the distributive award payment. Since November 1, 2018, [Father] has only been paying $50 (or 5%) of the distributive award payment such that [Mother]'s income for alimony purposes would only be increased by $50 per month, which results in a shortfall of $997.52, which is approximately 3% less than what is currently ordered in the Permanent Support Order.

43. [Father] has failed to show a substantial change in circumstances such that his alimony obligation should be modified.

Child Support

44. The Court considered [Mother]'s income including the $1,000 per month alimony payment and the $1,000 distributive award payment (even though she has not been receiving the court-ordered amounts of those payments since November 2018) and determined that the calculation does not result in a 15% or more decrease to [Father]'s child support obligation.

    a. [Father]'s gross monthly income is $6,526.18. If the $1,000 monthly alimony payment is added to [Mother]'s gross income for child support purposes, the North Carolina Child Support Guidelines have her child support obligation at $442.60. [Father]'s child support obligation would be $771.44 which is approximately only 4.2% lower than the current ordered amount of $803.61.

    b. If the Court adds both the $1,000 monthly alimony payment and the $1,000 distributive award payment to [Mother]'s gross income, her child support obligation would be $552.30. [Father]'s child support obligation would be $759.74 which is approximately 5.8% lower than the current ordered amount of $803.81.

    c. If the Court considers what [Mother] has actually received since November 1, 2018 (*i.e.*, $50 in monthly alimony and $50 in monthly distributive award payments), her gross income would be $2,844.27, which results in a child support obligation of $453.38. [Father]'s child support obligation would be $818.22, which is approximately 2% higher than the court ordered amount of $803.81.

45. [Father] failed to present evidence of a substantial change in circumstances sufficient to justify a downward modification of his alimony obligation and permanent child support obligation and his Motion to Modify should be denied.

3. Substantial Change of Circumstances

Father first argues that the trial court erred by failing to find a substantial change of circumstances where he met his burden of showing such a

change "based on an involuntary decrease in his income." As Father notes, it is undisputed that he "lost his job in October 2018, and then remained unemployed until he found a new job paying significantly less than he earned prior to his unemployment." Father contends that he suffered "a decrease of more than 60% from his income from employment when the Support Order was entered. Such a decrease in income is clearly substantial and should have been sufficient for the trial court to find a substantial change in circumstances and to modify [his] support obligation."

However, this Court has repeatedly recognized that "[t]he fact that a husband's salary or income has been reduced substantially does not automatically entitle him to a reduction" of either child support or alimony. *Wolf v. Wolf*, 151 N.C. App. 523, 526, 566 S.E.2d 516, 518 (2002); *see also Britt*, 49 N.C. App. at 470, 271 S.E.2d at 926 ("[A] conclusion of law that there has been a substantial change of circumstances based only on income is inadequate and in error."). "There cannot be a conclusion of substantial change in circumstances based solely on change in income. The overall circumstances of the parties must be compared with those at the time of the award." *Patton v. Patton*, 88 N.C. App. 715, 719, 364 S.E.2d 700, 703 (1988) (citation omitted). In the instant case, the trial court made that comparison and determined that Father failed to show a substantial change of circumstances.

Father primarily contends that "[t]he trial court improperly made findings of fact under a capacity to earn analysis and then made an inconsistent ultimate finding of fact that [its] analysis was based on" his "actual income[.]" This assertion is misplaced.

"The trial court may refuse to modify support and/or alimony on the basis of an individual's earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations . . . ." *Wolf*, 151 N.C. App. at 526, 566 S.E.2d at 518. "When the evidence shows that a party has acted in 'bad faith,' the trial court may refuse to modify the support awards. If a husband has acted in 'good faith' that resulted in the reduction of his income, application of the earnings capacity rule is improper." *Id.* at 527, 566 S.E.2d at 519 (citation omitted).

Father specifically highlights those portions of the trial court's finding of fact 32 that seem to address his "intent with regard to income and spending money" to argue that the trial court improperly conducted an earning-capacity analysis, despite its seemingly contradictory finding that Father had not acted in bad faith. "[H]owever, the trial court never reached the step of calculating [Father]'s child support [or alimony]

obligation, since the trial court found no change of circumstances warranting a modification of [his] current obligation. Therefore, [Father]'s discussion of the earning capacity rule is incorrect." *Armstrong v. Droessler*, 177 N.C. App. 673, 677–78, 630 S.E.2d 19, 22 (2006).

Rather than conducting an earning-capacity analysis, the trial court's extensive findings concerning Father's "cavalier and entitled attitude toward money" provide an illustrative context for the trial court's finding that Father "continued living a lifestyle with no substantial economic difference, except the majority of his income came from" his girlfriend. Indeed, the final two paragraphs of finding of fact 32, which Father does not specifically challenge in his appellate brief, state that Father "is not entirely credible" and that his "actions show a pattern of fluctuating income but a consistent relatively high standard of living."

We conclude that "[i]n the present case, the trial court did not impute income to [Father] as a result of voluntary unemployment or underemployment, but rather was merely attempting to determine what [Father] actually earned in [2021]. Consequently, the law of imputation is inapplicable." *Diehl v. Diehl*, 177 N.C. App. 642, 650, 630 S.E.2d 25, 30 (2006).

4. Calculation of Father's Income

Father next complains that the trial court "did not use [his] actual income as a basis for the calculation of his income." First, the North Carolina Child Support Guidelines explicitly state that a parent's income includes "gifts . . . or maintenance received from persons other than the parties to the instant action." N.C. Child Support Guidelines, at 3 (2019).

> When income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

Id. Additionally, this Court has observed that "[t]here appears to be no good reason to employ a different definition of income for the purposes of a child support award than for an alimony award." *Glass v. Glass*, 131 N.C. App. 784, 788, 509 S.E.2d 236, 239 (1998).

Mother submits in her brief on appeal that the facts of this case resemble those of *Onslow County v. Willingham*, in which the defendant-father testified that a female "friend" with whom he shared a joint bank account "contributed about $800.00 per month into the joint [bank] account and that she had been giving him this financial

assistance in the form of a loan for about three months." 199 N.C. App. 755, 687 S.E.2d 541, 2009 WL 2929305, at *5 (2009) (unpublished).[1] The trial court, however, did not find the defendant-father's "assertion that said deposits were loans to be credible[,]" and this Court recognized that the trial court "was not bound to accept [the defendant-father's] assertion that any of the recurring, financial assistance provided to him was in the form of loans." *Id.* Indeed, the defendant-father "did not produce any documentation or other evidence to show that these deposits were loans." *Id.*, at *6. Therefore, we concluded that "[i]n accordance with the Guidelines, these deposits could be classified as 'gifts' or 'maintenance received from persons other than the parties to the instant action.' " *Id.*

Although an unpublished decision of this Court, and therefore not binding authority, we find our previous decision in *Willingham* to be persuasive in guiding our analysis of the trial court's findings in the case at bar. As quoted above, the trial court found that the "alleged 'loans' . . . were actually regular, recurring gifts and not loans[,]" and made extensive findings of fact as to why it did "not find that either of the 'loans' evidenced by promissory notes signed by [Father] and [his girlfriend] [we]re truly loans." Just as in *Willingham*, the trial court's findings support its conclusion that these "alleged 'loans' " were properly classified as income to Father. Moreover, as in *Willingham*, the trial court here concluded that Father's testimony was not credible, a determination by which this Court is bound. *See Asare v. Asare*, 281 N.C. App. 217, 243, 869 S.E.2d 6, 25 (2022) ("The trial court is the sole judge of the credibility and weight of the evidence.").

5. Father's Health

Father also argues that "[t]he trial court failed to consider [his] health" in denying his motion to modify. Father cites this Court's opinion in *Kelly* in support of his contention that "[w]orsening health, although not automatically a changed circumstance, must be considered in a modification proceeding as it may affect the obligor's ability to earn income or be reason for a decline in income." However, as Father acknowledges, "the relevance of [the *Kelly*] defendant's medical condition was his claim that it was contributing to his reduction in income" and yet, in *Kelly*, "the trial court found that his income was not substantially reduced." 228 N.C. App. at 611, 747 S.E.2d at 278. The trial court

1. Although unpublished opinions do not have precedential value, "an unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point." *Zurosky v. Shaffer*, 236 N.C. App. 219, 234, 763 S.E.2d 755, 764 (2014).

in this case similarly did not find that Father's income was substantially reduced, "and thus the trial court did not err in not making detailed findings as to [Father]'s health." *Id.*

In sum, the trial court did not err by determining that Father's decrease in income from employment alone was not sufficient to show a substantial change of circumstances; finding that Father's actual income included the gift income from his girlfriend; or declining to make detailed findings as to Father's health.

6. Sufficiency of the Findings of Fact

Nonetheless, while "the trial court need not recite all of the evidentiary facts[,]" it still "must find those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Id.* at 606–07, 747 S.E.2d at 276 (citation omitted).

"There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982) (citation omitted), *superseded in part on other grounds*, N.C. Gen. Stat. § 50-13.4(f)(9) (1983).

> [W]hile Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Id. at 452, 290 S.E.2d at 658. Our Supreme Court has explained that this requirement is not a formality, but rather is essential to the process of appellate review:

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the

> appellate courts to perform their proper function in the judicial system.

Id. (cleaned up).

Father contends that the trial court's "findings of fact lacked detail to support the finding" that Father's actual gross income was $6,526.18 per month. For example, Father argues that "the trial court did not make findings that would allow this [C]ourt to see how the trial [court] calculated the ultimate monthly amount of $1,412.00" in "regular, recurring gifts[.]" Although we have concluded that the trial court did not err in determining that Father's actual gross income included this gift income, and the record amply supports the trial court's determinations as to what to include or not to include in calculating Father's actual gross income, we agree with Father that the trial court's findings of fact leave us unable to determine precisely *how* it calculated Father's actual gross income.

"The findings of fact should address . . . how [the trial court] calculated [Father's actual] gross income based upon its consideration of the evidence presented." *Craven Cty. ex rel. Wooten v. Hageb*, 277 N.C. App. 586, 590, 861 S.E.2d 571, 574–75 (2021). Accordingly, because we cannot determine how the trial court used the evidence presented to calculate Father's actual gross income, we remand for additional findings of fact concerning this issue.

B. Contempt

[2] Father further argues that "[t]he trial court erred in holding [him] in contempt of court based on an ultimate conclusion that he has at all times had the ability to comply, but not making findings of fact supported by the evidence that he had the ability to comply during the specific time periods at issue."

The trial court found as fact that Father was in substantial compliance with his child support obligation, but that he "has willfully failed to pay his court ordered financial obligations as to alimony, equitable distribution distributive award, and attorney's fee award, and is therefore in civil contempt." The trial court also found that Father "has, at all times, been fully aware of the Permanent Support [and Equitable Distribution] Order[s], has had full knowledge and understanding of the requirements of the Order[s], and has had the ability to comply with the Order[s]." The court determined that Father's failure to comply with those orders "is willful, wanton, deliberate, without justification, and constitutes a civil contempt of Court[,]" and set the following purge conditions:

a. In addition to his ongoing obligations to pay prospective alimony, attorney's fee award payments, and distributive award payments, [Father] shall pay arrears to [Mother] as follows:

   i. $5,000 within thirty (30) days of the entry of this Order;

   ii. $5,000 within sixty (60) days of the entry of this Order;

   iii. $5,000 within ninety (90) days of the entry of this Order;

   iv. $5,000 within one hundred and twenty (120) days of the entry of this Order.

b. After payment of $20,000 as set forth above, [Father] will owe $43,184.50 in arrears as of September 30, 2021. Beginning on the first (1st) day of the first (1st) month after the last $5,000 payment is due as set forth above, [Father] shall continue paying $2,500 per month towards his arrears until paid in full.

c. [Father] shall pay to [Mother] the sum of $17,919.15 as attorney's fees. The Court will hold a hearing at a later date to determine a payment schedule for [Father]'s payment of attorney's fees once he has satisfied his arrearages as set forth above.

1. Standard of Review

Appellate review of "contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573, *appeal dismissed in part and disc. review denied in part*, 327 N.C. 482, 397 S.E.2d 218 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

2. Ability to Pay

It is well established that "the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support

a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt." *Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 22, 821 S.E.2d 840, 846 (2018) (citation omitted), *aff'd per curiam*, 372 N.C. 64, 824 S.E.2d 397 (2019). Father compares this case to *Burnette*, in which the defendant "presented substantial evidence regarding his medical condition, his minimal living expenses, and his lack of income[,]" but the plaintiff "presented no evidence other than the amount of arrears owed, including any evidence regarding [the] defendant's ability to work, income, potential income, or assets." *Id.* at 23, 821 S.E.2d at 846. Father asserts that he similarly "presented evidence of his inability to pay and it was not refuted by" Mother; according to Father, "[t]he trial court's finding are, in essence, that she did not believe what he was saying to be true, but this is insufficient."

Indeed, it is axiomatic that "the trial court is the sole judge of credibility and weight of the evidence[.]" *Id.* Nonetheless, "although the trial court could find [the] defendant's evidence not to be credible, this does not create evidence for [the] plaintiff. The absence of evidence is not evidence." *Id.* (emphasis omitted). Therefore, the *Burnette* Court concluded that "even if the trial court determined not one word of [the defendant's evidence] to be true, we are then left with no evidence from [the] plaintiff other than the amount owed." *Id.*

However, Father's reliance on *Burnette* is misplaced. Unlike the facts presented in *Burnette*, Father's own evidence in the case at bar evinces his ability to pay. Here, the trial court found as fact that Father's "Financial Affidavit listed voluntary deductions from his paycheck totaling approximately $1,093.31" and that despite a "pattern of fluctuating income" Father has maintained "a consistent relatively high standard of living." Further, the trial court noted that Father "spent significant amounts of money on alcohol and shopping at higher end grocery stores and gourmet shops," evidencing his "cavalier and entitled attitude toward money[.]" These findings are supported by competent evidence in the record, and in turn support the trial court's conclusion that Father had the ability to pay for the purposes of civil contempt. *Adkins*, 82 N.C. App. at 292, 346 S.E.2d at 222.

"Given the extensive evidence presented and findings made regarding [Father]'s income and expenses, we hold that the trial court's finding on present ability to pay is adequate." *Gordon v. Gordon*, 233 N.C. App. 477, 483, 757 S.E.2d 351, 355 (2014). Accordingly, the trial court's conclusion that Father is in contempt is affirmed.

3. Purge Conditions

Finally, Father argues that the trial court's "findings of fact are insufficient to warrant the purge conditions" because there was no showing that he had the present ability to satisfy the purge conditions. We agree, and remand for the trial court to consider this issue.

"To justify conditioning [a] defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that [the] defendant has the present ability to pay those arrearages." *Tigani v. Tigani*, 256 N.C. App. 154, 160, 805 S.E.2d 546, 551 (2017) (citation omitted); *see also Burnette*, 262 N.C. App. at 38–39, 821 S.E.2d at 856 (remanding for additional findings of fact and conclusions of law, including conclusion as to the defendant's "present ability to pay the full amount of any purge payments ordered"); *Bishop v. Bishop*, 90 N.C. App. 499, 502, 369 S.E.2d 106, 108 (1988) ("Since the instant order allows [the] defendant to purge his contempt by paying the entire $2,230 arrearage, the trial court would . . . be required to conclude [that the] defendant had the [present] ability . . . to pay the entire $2,230 arrearage in order to hold him in civil contempt.").

In the present case, although the trial court made sufficient findings of fact regarding Father's ability to pay his court-ordered support obligations, it failed to make a conclusion of law that he had the present ability to satisfy the purge conditions that it imposed. Accordingly, we must remand for the entry of a new order "including the required findings of fact . . . and conclusions of law for [Father's] present ability to pay the full amount of any purge payments ordered. The trial court may, in its discretion, receive evidence on remand." *Burnette*, 262 N.C. App. at 38–39, 821 S.E.2d at 856. "On remand, if the trial court holds [Father] in civil contempt, new evidence will be necessary to determine if [Father] has the *present* ability to pay any purge payments ordered." *Id.* at 39 n.11, 821 S.E.2d at 856 n.11.

C. Attorney's Fees

[3] Lastly, Father concludes his appellate brief with the following paragraph: "The trial court entered an award of attorney fees [sic] in its order. Her consideration of an award of such fees was based in significant part on her prior erroneous rulings as set forth herein. The attorney fees [sic] award should, therefore, be vacated." Father cites no authority nor makes any substantive argument other than summarily relying upon his previous arguments, already discussed in this opinion.

"Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6). "An appellant avoids abandonment when it complies with the rule's mandate that '[t]he body of the argument . . . shall contain citations of the authorities upon which the appellant relies.' " *K2HN Constr. NC, LLC v. Five D Contr'rs, Inc.*, 267 N.C. App. 207, 213, 832 S.E.2d 559, 564 (2019) (alterations in original) (quoting N.C. R. App. P. 28(b)(6)). "This Court has routinely held an argument to be abandoned where an appellant presents argument without such authority and in contravention of the rule." *Id.* Father cites no legal authority in his argument concerning the trial court's award of attorney's fees; accordingly, this issue is "taken as abandoned." N.C. R. App. P. 28(b)(6).

III. Conclusion

For the foregoing reasons, we affirm the trial court's order in part and remand for additional findings of fact and conclusions of law (1) detailing the court's calculation of Father's actual income, and (2) stating whether Father has the ability to satisfy the purge conditions. The court may hear additional evidence on either issue, in its discretion.

AFFIRMED IN PART; REMANDED.

Judges HAMPSON and FLOOD concur.

IN THE MATTER OF ENOC ALCANTARA

No. COA22-795

Filed 5 December 2023

Sexual Offenders—registration—older federal conviction—substantial similarity test—newer version of statute insufficient

The trial court's order requiring defendant to register as a sexual offender was vacated and the matter was remanded for a new hearing because the State failed to show that defendant's prior conviction in 2003 of a federal offense was substantially similar to a sexually violent offense under North Carolina law. Instead of presenting the trial court with the 2003 version of the federal statute, the State instead presented the 2021 version, and did not provide any evidence that the statute had remained unchanged from 2003 to 2021.

IN RE ALCANTARA

[291 N.C. App. 430 (2023)]

Appeal by Defendant from order entered 16 June 2022 by Judge Mark E. Klass in Guilford County Superior Court. Heard in the Court of Appeals 11 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Bryan G. Nichols, for the State.

Jason Christopher Yoder for defendant-appellant.

MURPHY, Judge.

To require a person to register for a federal conviction under N.C.G.S. §§ 14-208.6(4)(c) and 14-208.7, the State has the burden to prove by a preponderance of the evidence that a person's federal conviction is for an offense that, if committed in North Carolina, was substantially similar to a sexually violent offense. When the State only offers an out-of-date version of the statute to the trial court, the State does not meet this burden. Here, where the State presented the 2021 version of the statute for a 2003 federal conviction, we vacate the trial court's order requiring Defendant to register as a sex offender and remand for a new registration hearing.

BACKGROUND

On 22 April 2003, Defendant Enoc Alcantara pled guilty to violating 18 U.S.C. § 2252(a)(4)(a) in the United States District Court for the District of Puerto Rico. He received a 40-month active sentence followed by three years of supervised release. On 20 October 2021, the Guilford County Sheriff's Office notified Defendant of his requirement to register as a sex offender based on his federal conviction pursuant to N.C.G.S. § 14-208.7(a). On 3 November 2021, Defendant filed a petition in Guilford County Superior Court for Judicial Determination of Sex Offender Registration Requirement and was appointed counsel.

On 16 June 2022, the trial court held a hearing on the matter, and Mr. Floyd, Defendant's appointed counsel, requested to withdraw as counsel. The trial court denied Mr. Floyd's request and proceeded with the hearing. At the 16 June hearing, the State presented a copy of Defendant's 2003 federal conviction for sexual exploitation of a minor, a copy of the 2021 version of the charging federal statute, 18 U.S.C. § 2252(a)(4)(a), and a copy of N.C.G.S. § 14-190.17A. The State argued that the federal statute and the North Carolina statute are substantially similar and "almost identical in language," requesting that the trial court order Defendant to register as a sex offender in North Carolina.

After the State presented its evidence and arguments, defense counsel asked the trial court to be heard about his request to withdraw as Defendant's attorney. Defense counsel described the conflict between himself and Defendant, which was followed with a brief exchange between the two:

> [COUNSEL]: [Defendant] has given me a couple written motions which I've reviewed and have absolutely no merit in the law . . . It is my opinion that he should have to register as a sex offender.
>
> . . . .
>
> Then he went into wanting me to file other frivolous motions, which I will not do, on his behalf . . . [H]e asked me to withdraw which I'll gladly do . . . But I'm just telling the court . . . he's trying to avoid registering and delaying the court process which I will not do under any circumstance.
>
> . . . .
>
> If [Defendant] thinks he's such a copious student of the law, then, I'd ask the court to find that he forfeited his right to counsel and he can represent himself in this matter. And if he wants to address the court, he's more than welcome.
>
> . . . .
>
> [DEFENDANT]: I wish my attorney to give the court . . . the handwritten motions . . . that I gave him so that we can all be on the same page . . . I want everything transcribed and that the court will be able to see the precise language that I use to raise my points.
>
> . . . .
>
> [COUNSEL]: Judge, I'll be glad to let you review these frivolous motions he's prepared, but . . . it's not my obligation to adopt whatever he writes . . . if he wants to file them on his own behalf, that's fine, but I'm not going to do it.

After hearing from both Defendant and his counsel, the trial court did not acknowledge defense counsel's renewed request to withdraw. The trial court found the statutes, as submitted by the State, to be substantially similar and that Defendant's "conviction from Puerto Rico fits the requirements of registration . . .." Defendant asked the trial court

about raising a federal question on the matter, and defense counsel interjected, saying "[n]ot in state court." After the trial court denied Defendant's request, the following exchange took place:

> [DEFENDANT]: I want to appeal the court decision.
>
> [COURT]: I don't know – I don't even –
>
> [STATE]: Do a little research, Your honor?
>
> [COUNSEL:] I'm not giving notice of appeal. If . . . he wants to give notice of appeal he can do it on his own.
>
> [COURT]: I'll let him do that.
>
> [COUNSEL]: He can do it. I don't have to do it, Your Honor? Your Honor?
>
> [COURT]: No, you don't.
>
> [COUNSEL]: All right. I'm going to withdraw. You . . . want to file a notice of appeal, you can do that on your own behalf. Good luck. We're done.
>
> [DEFENDANT]: Thank you, sir.

The trial court acknowledged defense counsel's motion to withdraw, but only after rendering its order requiring Defendant to register as a sex offender. The trial court entered its order on 16 June 2022. Defendant timely filed a written notice of appeal on 13 July 2022.

ANALYSIS

On appeal, Defendant challenges the trial court's finding that N.C.G.S. § 14-190.17A(a) is substantially similar to the 2021 version of 18 U.S.C. § 2252(a)(4)(A). Specifically, Defendant argues that the trial court erred when it failed to compare the 2021 version of N.C.G.S. § 14-190.17A with the 2003 version of 18 U.S.C. § 2252(a)(4)(A)—the federal statute under which Defendant was initially convicted.

In the context of criminal sentencing, we have held that "the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law[,]" which we review *de novo*. *State v. Fortney*, 201 N.C. App. 662, 669 (2010). While it is not required "that the statutory wording [of a Federal Statute] precisely match, . . . the offense [must] be 'substantially similar' " to a statute of a particular felony in North Carolina. *State v. Graham*, 379 N.C. 75, 80 (2021) (citation and marks omitted).

However, as recognized by our Supreme Court, we have "consistently held that when evidence of the applicable law is not presented to the trial court, the party seeking a determination of substantial similarity has failed to meet its burden of establishing substantial similarity by a preponderance of the evidence." *State v. Sanders*, 367 N.C. 716, 718 (2014); *see* N.C.G.S. § 14-208.12B(c) (2022) ("At the hearing, the [State] has the burden to prove by a preponderance of the evidence, that the person's out-of-state or federal conviction is for an offense, which if committed in North Carolina, was substantially similar to a sexually violent offense[.]"). In *State v. Burgess*, we held that the State failed to present sufficient evidence of out-of-state convictions' similarity to North Carolina offenses when, *inter alia*, the State provided copies of the 2008 version of the applicable out-of-state statutes but did not present evidence that the statutes were unchanged from the 1993 and 1994 versions under which the defendant had been convicted. *State v. Burgess*, 216 N.C. App. 54, 57–58 (2011). In *State v. Morgan*, we held that the State failed to meet its burden of proving that the defendant's prior conviction was substantially similar to a North Carolina offense when it offered the 2002 version of the applicable New Jersey statute governing the defendant's 1987 New Jersey conviction, but failed to present any evidence that the statute was unchanged from 1987 to 2002. *State v. Morgan*, 164 N.C. App. 298, 309 (2004). As both the criminal statutes and this civil statute require the State to meet the same burden of proof related to the same type of evidence, we are bound by the reasoning in these opinions.

By failing to present the trial court with the 2003 version of 18 U.S.C. § 2252(a)(4)(A) or evidence that there had not been any changes in the intervening 18 years, the State failed to meet its burden to present sufficient evidence of the applicable statute. The State failed to provide to the trial court such evidence as to allow it to determine that 18 U.S.C. § 2252(a)(4)(A) remained unchanged from 2003 to 2021 and that the federal statute is substantially similar to the North Carolina statute. Accordingly, under *Burgess* and its progeny, we vacate the trial court's order and remand this issue for a new hearing. "The State and [D]efendant may offer additional evidence at the resentencing hearing." *Burgess*, 216 N.C. App. at 58.[1]

1. Since we vacate the trial court's order that Defendant register as a sex offender and remand this case for a new hearing, we need not address defendant's argument that his trial counsel's actions amounted to ineffective assistance of counsel. *See Burgess*, 216 N.C. App. at 58, n.4.

CONCLUSION

We vacate the trial court's order that Defendant be required to register as a sex offender pursuant to N.C.G.S. §§ 14-208.6(4)(c) and 14-208.7. Further, we remand for a new hearing because the State did not meet its burden of proof regarding substantial similarity between the prior federal conviction and the North Carolina statute.

VACATED AND REMANDED.

Judges ZACHARY and CARPENTER concur.

SHILPA SHAHEEN SINCLAIR, PLAINTIFF
v.
GREGORY SCOTT SINCLAIR, DEFENDANT

No. COA22-390

Filed 5 December 2023

Child Custody and Support—subject matter jurisdiction—modification of out-of-state child support order—registration required

In an action to modify the child support provisions of a Virginia order (which contained both child custody and child support provisions), the trial court's order modifying the mother's child support obligation from $0.00 to $777.00 per month was vacated for lack of subject matter jurisdiction because, although the mother registered the Virginia order in North Carolina pursuant to N.C.G.S. § 50A-305 regarding the custody provisions, neither party registered the foreign order in this state pursuant to the Uniform Interstate Family Support Act (UIFSA) (Chapter 52C) for purposes of enforcement or modification of the Virginia Order's child support provisions.

Appeal by plaintiff-appellant from order entered 12 October 2021 by Judge Nathaniel M. Knust in District Court, Cabarrus County. Heard in the Court of Appeals 7 February 2023.

Arnold & Smith, PLLC, by Ashley A. Crowder, for plaintiff-appellant.

Gregory S. Sinclair, pro-se, defendant-appellee.

STROUD, Chief Judge.

Plaintiff-appellant appeals from the trial court's child support order modifying her child support obligation. Plaintiff-appellant's primary argument is the trial court erred in concluding a substantial change in circumstances had occurred. However, since the trial court did not have subject matter jurisdiction to modify a Virginia child support order, we vacate the child support modification order for lack of subject matter jurisdiction.

I. Background

Plaintiff-appellant ("Mother") and defendant-appellee ("Father") were married in 2006 in Virginia. The parties had two children, born in 2010 and 2012. On 25 August 2018, the parties began living separate and apart. In August of 2018, Mother was in Okinawa, Japan working for the United States military, and the children were living with Father in Fairfax, Virginia. On or about 22 October 2019, the parties entered into a Property Settlement Agreement ("2019 Agreement"), including terms for visitation, custody, and child support.

On or about 25 November 2019, a final order of divorce was entered in Fairfax County, Virginia ("Virginia Order"). The Virginia Order lists Mother's residential and work address as Okinawa, Japan and Father's residential address as Fairfax, Virginia. The 2019 Agreement was incorporated into the Virginia Order. Relevant terms from the 2019 Agreement incorporated into the Virginia Order include:

> 2. Incorporation of Property Settlement Agreement: The parties executed a Property Settlement Agreement (the "Agreement") on October 22, 2019 (attached hereto as Exhibit A) and the same hereby is affirmed, ratified, and incorporated, but not merged, into this Order as if the same were set forth herein verbatim, pursuant to Virginia Code § 20-109.1 (1950 as amended) and the parties are hereby ordered to comply with all provisions thereof.
>
> 3. Child Support: Pursuant to Paragraph 5 of the Agreement, the parties agree that no direct child support shall be paid by either one, as follows:
>
> > (a) The parties acknowledge their mutual duty to provide support and maintenance for the minor children but agree that there shall be $0.00 in monthly child support payable from one party to the other. Each

> party shall pay the living and activity expenses of the children when the children are in their care and custody without contribution from the other parent.

The parties also agreed to provisions regarding custody and visitation, Section 6, in the 2019 Agreement and the Virginia Order also incorporated these provisions, including the following:

> 6. CUSTODY AND VISITATION
>
> A. Custody: Father shall have sole physical and legal custody of the minor children with the children's primary residence being with Father.
>
> B. Visitation: [Mother] shall have visitation pursuant to the holiday and summer schedule below, as well as when the parties agree based on [Mother]'s travel schedule.

On 11 January 2021, Mother filed a notice of registration of foreign child custody order under North Carolina General Statute Section 50A-305, regarding child custody, in Cabarrus County, North Carolina. Father did not object to the registration, and on 31 March 2021, the order confirming registration of the foreign child custody order was entered. The parties did not raise any issue either before the trial court or on appeal regarding the fact that the order was not registered under North Carolina General Statute Chapter 52C, Uniform Interstate Family Support Act ("UIFSA"), for purposes of modification of child support.

Father filed a motion for modification of child support on 6 May 2021 in Cabarrus County, North Carolina, and served Mother at her mailing address in Japan. Father alleged that "[d]uring [Mother's] residency abroad, [he] and the minor children relocated from Fairfax County, Virginia to Cabarrus County, North Carolina." The motion also alleged Mother "returned to Fairfax, Virginia in July of 2020." Father testified he moved from Fairfax, Virginia to Harrisburg, North Carolina on 15 August 2020.

Father's motion for modification asserts there has been a substantial change in circumstances warranting modification of child support due to Mother's return from Japan and her subsequent acceptance of another position overseas. Father's evidence tended to show that in 2018 the parties did not anticipate that Mother's work in Japan would be a permanent condition and both parties expected Mother would return to the United States after completion of her contract. But Father contended that upon Mother's most recent acceptance of employment in Japan, her relocation had become permanent.

The trial court rendered its ruling at the close of the hearing, finding there was a substantial change in circumstances since "[Father] now provides full-time care for the minor children on a permanent basis" and "[Father] now incurs work related childcare expenses that he is solely responsible for." On 12 October 2021, the trial court entered a new child support order ("2021 Order") calculating child support based upon Worksheet A of the North Carolina Child Support Guidelines. The 2021 Order modified Mother's child support obligation from $0.00 per month, as set in the Virginia Order, to $777.00 per month. Mother appealed.

II. Jurisdiction

We must first address the issue of subject matter jurisdiction of the trial court to modify the Virginia Order. Although neither party has raised any question regarding subject matter jurisdiction, we raise this issue *sua sponte*. *See Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009) ("As this Court recently emphasized, subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." (citation omitted)). Further, the parties cannot create subject matter jurisdiction "by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial." *Halterman v. Halterman*, 276 N.C. App. 66, 74, 855 S.E.2d 812, 817 (2021) (formatting altered) (quoting *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006)).

A. Jurisdictional Background

On 11 January 2021, Mother filed a Petition for Registration of Foreign Child Custody Order, (capitalization altered), under North Carolina General Statute Section 50A-305 in Cabarrus County, North Carolina. *See* N.C. Gen. Stat. § 50A-305 (2021). Father did not object to the registration, and on 31 March 2021, the District Court, Cabarrus County entered an Order Confirming Registration of Foreign Child Custody Order. (Capitalization altered.) But here, the issue is modification of a *child support* order, not child custody, and the Order Confirming Registration of Foreign Child Custody Order did not address child support. (Capitalization altered.)

B. Registration Requirements for Child Support Orders

The registration requirements for child custody orders and child support orders issued out-of-state are different. *Compare* N.C. Gen. Stat. § 50A-305 (2021) ("Registration of child-custody determination.") *with* N.C. Gen. Stat. § 52C-6-602 (2021) ("Procedure to register order for

enforcement.") *and* N.C. Gen. Stat. § 52C-6-609 ("Procedure to register child support order of another state for modification."). This Court has recognized the differences in registration and modification jurisdiction for out-of-state child support orders, as governed by UIFSA, and the registration and modification of child custody orders, as governed by the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *See*, *e.g.*, *Halterman*, 276 N.C. App. at 76, 855 S.E.2d at 818. ("For purposes of child custody, the focus is on the residence of the children, and personal jurisdiction over a parent is not required. For purposes of child support modification and enforcement, the focus is on the residence of the obligor . . . ." (citations omitted)). For example, in *Halterman*, this Court ultimately determined the mother did not properly register an out-of-state child support order since the registration was "in substance and in form a petition to register a foreign custody order . . . not a petition to register" an out-of-state support order. *Id.* at 77-78, 855 S.E.2d at 819. Additionally, our Administrative Office of the Courts has a separate form for registering child support orders as opposed to child custody orders, reflecting the different statutory requirements for registration of each type of order. *See* Form AOC-CV-505, Rev. 5/16 ("Notice of Registration of Foreign Support Order(s)" (capitalization altered)).

Child support orders issued in another state are registered under North Carolina General Statute Section 52C-6-602, UIFSA. *See* N.C. Gen. Stat. § 52C-6-602 (2021).

> Under UIFSA, a child support order is first entered by the "issuing tribunal" in the "issuing state." N.C. Gen.Stat. § 52C–6–609 (2009) establishes that if an obligee wants to modify an order against an obligor who resides in a different state, the obligee must "register" the order in the state in which the obligor resides. *See* N.C. Gen.Stat. § 52C–6–609 cmt. ("A petitioner wishing to register a support order of another state for purposes of modification must . . . follow the procedure for registration set forth in [N.C. Gen. Stat. § 52C–6–602 (2009),]" which requires registration in "the tribunal for the county in which the obligor resides in this State[.]").

Crenshaw v. Williams, 211 N.C. App. 136, 140, 710 S.E.2d 227, 230 (2011) (citing to the 2009 version of Chapter 52C) (citations omitted). North Carolina General Statute Section 52C-6-609 addresses the registration of a child support order issued in another state. Section 52C-6-609 provides,

> A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another state shall register that order in this State in the same manner provided in G.S. 52C-6-601 through G.S. 52C-6-608 if the order has not been registered.

N.C. Gen. Stat. § 52C-6-609. North Carolina General Statute Section 52C-6-602 sets out the requirements for registration of a child support order:

> (a) Except as otherwise provided in G.S. 52C-7-706, a support order or income-withholding order of another state or a foreign support order may be registered in this State by sending the following records to the appropriate tribunal in this State:
>
> (1) A letter of transmittal to the tribunal requesting registration and enforcement;
>
> (2) Two copies, including one certified copy, of the order to be registered, including any modification of the order;
>
> (3) A sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
>
> (4) The name of the obligor and, if known:
>
> a. The obligor's address and social security number;
>
> b. The name and address of the obligor's employer and any other source of income of the obligor; and
>
> c. A description and the location of property of the obligor in this State not exempt from execution; and
>
> (5) Except as otherwise provided in G.S. 52C-3-311, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.

N.C. Gen. Stat. § 52C-6-602.

Here, neither party has registered the Virginia Order in North Carolina as an out-of-state child support order; Mother merely filed a "Petition for Registration of Foreign *Child Custody Order*[,]" (emphasis added) (capitalization altered), and the trial court entered an "Order Confirming Registration or Denying Confirmation or Registration of

Foreign *Child Custody Order*[.]" (Emphasis added.) (Capitalization altered.) Thus, the Virginia Order, as to child support, was not properly registered in North Carolina for enforcement or modification purposes.

C. Jurisdiction for Modification of Out-of-State Child Support Orders

Subject matter jurisdiction for modification of an out-of-state child support order may be established under either North Carolina General Statute Section 52C-6-611 or 52C-6-613. North Carolina does not have jurisdiction to modify the Virginia Order under North Carolina General Statute Section 52C-6-613 because, in part, this applies only if *both* parents reside in North Carolina; however, Mother resides in Japan. *See* N.C. Gen. Stat. § 52C-6-613 ("(a) If all of the parties who are individuals *reside in this State* . . . ." (emphasis added)).

North Carolina General Statute Section 52C-6-611 provides for jurisdiction to modify an out-of-state child support order if Section 52C-6-613 does not apply:

> (a) If G.S. 52C-6-613 does not apply, upon petition, a tribunal of this State may modify a child support order issued in another state which is registered in this State if, after notice and hearing, the tribunal finds that:
>
> (1) The following requirements are met:
>
> a. Neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;
>
> b. A petitioner who is a nonresident of this State seeks modification; and
>
> c. The respondent is subject to the personal jurisdiction of the tribunal of this State; or
>
> (2) This State is the residence of the child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this State and *all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this State to modify the support order and assume continuing, exclusive jurisdiction.*

N.C. Gen. Stat. § 52C-6-611 (2021) (emphasis added).

Here, the trial court's findings would not support subject matter jurisdiction to modify under North Carolina General Statute Section

52C-6-611(a) subsection (1) because the party seeking modification – Father – is a resident of North Carolina. In addition, the record does not reveal if the trial court could have jurisdiction under Section 52C-6-611(a)(2). While the trial court found that North Carolina is the residence of the children and Father, there is no indication that "all of the parties who are individuals" – Mother and Father – "have filed consents in a record in the issuing tribunal[,]" Virginia, "for a tribunal of this State to modify the support order and assume continuing, exclusive jurisdiction." *See* N.C. Gen. Stat. § 52C-6-611(a)(2). Therefore, even if the Virginia Order could be considered as registered in North Carolina, the trial court would still not have jurisdiction to modify the child support provisions under North Carolina General Statute Sections 52C-6-611 or 613.

As noted in *Crenshaw*,

> In the overwhelming majority of cases, the party seeking modification must seek that relief in a new forum, almost invariably the State of residence of the other party. This rule applies to either obligor or obligee, depending on which of those parties seeks to modify.
>
> This restriction attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local tribunal to the marked disadvantage of the other party. In short, the obligee is required to register the existing order and seek modification of that order in a State which has personal jurisdiction over the obligor other than the State of the obligee's residence. Most typically this will be the State of residence of the obligor.

N.C. Gen. Stat. § 52C-6-611 cmt (2009). As North Carolina is not the proper forum for modifying the Michigan support order, the trial court lacked the authority to modify that order. *See Lacarrubba v. Lacarrubba*, 202 N.C. App. 532, ___, 688 S.E.2d 769, 773 (2010) (concluding North Carolina court "lacked authority to modify New York child support order or reduce arrearages" where obligee, who resided in Florida, registered foreign order in North Carolina for enforcement only and obligee did not consent to personal jurisdiction in North Carolina).

Crenshaw, 211 N.C. App. at 140–41, 710 S.E.2d at 231 (ellipses omitted) (citation omitted); *see also Lacarrubba v. Lacarrubba*, 202 N.C. App. 532, 538, 688 S.E.2d 769, 773 (2010) (noting the strict compliance required by UIFSA, and though the order was registered here, it was for "enforcement only[;]" thus, modification was not allowed).

Accordingly, prior cases from this Court address the different requirements for registration and modification jurisdiction for child custody orders under the UCCJEA and child support orders under UIFSA. *See*, *e.g.*, *Halterman*, 276 N.C. App. at 76, 855 S.E.2d at 818. Because the Virginia Order was not registered under UIFSA, the trial court did not have subject matter jurisdiction to modify child support. *See Crenshaw*, 211 N.C. App. at 140, 710 S.E.2d at 230 ("*See* N.C. Gen. Stat. § 52C–6–609 cmt. ('A petitioner wishing to register a support order of another state for purposes of modification must . . . follow the procedure for registration set forth in [N.C. Gen. Stat. § 52C–6–602 (2009),]' which requires registration in 'the tribunal for the county in which the obligor resides in this State[.]' ") (alterations in original)).

III. Conclusion

Because the Virginia Order was not properly registered in North Carolina under UIFSA for purposes of modification of the child support obligation, the trial court did not have subject matter jurisdiction to modify the child support provisions of the Virginia Order.

VACATED.

Judges CARPENTER and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
NATHANIEL E. DIXON, DEFENDANT

No. COA21-471

Filed 5 December 2023

1. Jury—selection—Batson challenge—third step—clear error analysis

In a first-degree murder trial, the trial court did not clearly err by denying defendant's *Batson* challenge to the State's use of a peremptory strike against an African American potential juror—the only one of two in the jury pool to be peremptorily struck after others were excused for cause—where the trial court accepted the State's race-neutral reason that the potential juror had expressed reservations about the death penalty, and where there was no evidence of racially discriminatory intent.

2. Criminal Law—motion for mistrial—first-degree murder prosecution—juror knowledge of witness killed during trial—abuse of discretion analysis

In a first-degree murder trial, the trial court did not abuse its discretion by denying defendant's two motions for a mistrial concerning jurors who learned about the murder of one of the State's witnesses during trial. At the time of the hearing on the first motion, which led to one juror being excused for cause, there was no evidence that any other impaneled jurors knew of the witness's death. With regard to the second motion, which defendant filed after another juror belatedly disclosed—after the verdict was reached—that he had inadvertently learned about the death of the witness by seeing a headline on his cell phone, the trial court was in the best position to gauge the juror's truthfulness regarding the lack of impact the knowledge had on his ability to be fair and impartial.

3. Judges—motion to recuse—first-degree murder trial—hearing on motion for mistrial

In a first-degree murder trial, the trial judge did not err by refusing to recuse himself from hearing defendant's motion for mistrial concerning a juror who failed to report that he had learned about the murder of a State's witness during trial. Defendant failed to show that the trial judge was a witness for or against one of the parties in

the case and there was no indication that the judge exhibited such a bias or prejudice as to be unable to rule impartially.

Chief Judge STROUD and Judge ZACHARY concurring in the result only.

Appeal by Defendant from judgments entered 16 July 2019 by Judge R. Gregory Horne in Buncombe County Superior Court. Originally heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

MURPHY, Judge.

Where a Defendant cannot demonstrate at the third step of *Batson* that the State acted on a discriminatory purpose with respect to race and that the trial court clearly erred in its ruling, we will not overturn the denial of a *Batson* ruling on appeal. Here, taking into account the whole Record as it existed before the trial court at the time of Defendant's *Batson* objection, we are not persuaded that the State's peremptory strike of one of only two African American prospective jurors in the jury pool was motivated by discriminatory intent, even where the State made a greater effort to rehabilitate other jurors who expressed reservations about the death penalty, because we cannot be confident the trial court was mistaken in its conclusion that reservations about the death penalty still explained the exercise of the strike.

Furthermore, given the high degree of discretion with which a trial court is entrusted in ruling on a motion for mistrial, we cannot say the trial court abused that discretion in denying Defendant's. The trial court also permissibly ruled on all motions for mistrial, as the trial judge was not a witness in any associated hearing.

BACKGROUND

This case arises out of Defendant Nathaniel E. Dixon's appeal of his criminal convictions for first-degree murder, attempted first-degree murder, and malicious maiming on 26 June 2019, following a high-profile jury trial that lasted several weeks and garnered significant media attention.

During voir dire, the State struck an African American[1] potential juror, R.D.[2], who expressed reservations about the death penalty:

> [R.D.]: Personally I have reservations about the death penalty. Simply because [it's] disproportionate. Most people who know anything about the death penalty know[] that the statistics show that African American[s] receive it more than others. You know, this is weighed on me like quite a bit. Just back and forth. And . . . I wish I wasn't here, honestly. I wish the reason that I'm here never occurred. And . . . that's not a presumption of guilt or innocence for anyone. I just wish that what happened, that we know for sure never happened, so I was never in this courtroom. But what I . . . struggle with is, I'd rather my life not be interrupted. I'd rather be only thinking about what I have to do at work today and the plans that I have at the end of June. But then there's another side of me that understands [] something tragic really did happen. And if this is the course for justice to be served, a part of me just wants to see that happen.
>
> So the law is the law, and whatever is decided, I would hope that the punishment fits the crime. I would hope that the Defense would be confident in doing their job, that they can present their case to where they believe what they're doing is going to help their Defendant, and I would hope that the Prosecution is confident in that they can present their case, that justice would be served one way or another. And then whomever has to decide, decides the right thing. But it weighs heavily on me when just thinking that we might be part of this process. So the short answer is neither one of those penalties do I object to.
>
> [THE STATE]: Okay. Well, I guess are your -- I believe the terms you used [were] you have reservations about the death penalty. And would your feelings about that be

1. For consistency with the Record, we use the term "African American" in this opinion, though we use it interchangeably with the term "black" referenced in our caselaw. Furthermore, as this case involves an appeal from a *Batson* objection, we note that Defendant is African American.

2. To limit the use of juror and potential juror names and in consideration of concerns regarding juror safety raised during and after the trial, we use pseudonyms for the jurors and potential jurors in this case.

such -- are your feelings such that you could not under any circumstance vote for a death sentence?

[R.D.]: Well, it's not that I couldn't. I hoped to never put myself in a position where I'm on the other side of one of those tables. But my point is, if that's what the law requires, then that's what the law requires.

[THE STATE]: I guess --

[R.D.]: My reservation is, I don't want to see anybody die. That's my reservation.

[THE STATE]: I understand. Well, basically the trial would be divided into two parts. The first part would be one determining guilt or innocence on the charge -- particularly on the charge of first degree murder. There are other charges the jury would also consider. But as far as the penalty goes, the only one that potentially would go to a second phase would be the charge of first degree murder. So the first stage in any of this would be the jury would have to consider that. And do your -- again, you have some clearly heart-felt personal feelings about the death penalty. And because of those, would those affect your -- or prevent you from making an impartial decision based on the evidence about the Defendant's guilt in the first part of the trial?

[R.D.]: No.

[THE STATE]: So you think you could sit through that part?

[R.D.]: Certainly.

[THE STATE]: Okay. And if the Defendant is guilty -- found guilty of first degree murder, we would then move into a second or a sentencing phase of the trial. And that phase as well as the first phase, the burden is on the State and that's always proof beyond a reasonable doubt. But in the second phase, the first part of that is the State would produce -- present evidence of what are called aggravating circumstances. And that would be things that would tend to suggest that the appropriate penalty is a death sentence.

[R.D.]: Sure.

[THE STATE]: And again, the jury would have to consider those and find them -- any one of them exists beyond a reasonable doubt. The second part of that, the Defense then would have the ability to present evidence of what are called mitigating circumstances. And again, that would be evidence that would tend to show that the appropriate sentence is one of life in prison. And there the burden is different on the Defense. It's not beyond a reasonable doubt. It's the lower burden of preponderance of the evidence. And in that -- also for the mitigating circumstances there doesn't have to be unanimity. Any juror who felt like -- particular mitigating circumstance applied, had been proven to themselves could consider that. Whether or not everyone else agreed on that. So the mitigating is more of an individual juror decision.

[R.D.]: Yes, sir.

[THE STATE]: And again, if aggravating circumstances have been found, the next step the jury would be asked to weigh those. And the standard there is -- and the question the jury would have to ask is, are the mitigating circumstances insufficient to outweigh the aggravating circumstances. Which is kind of a backwards question --

[R.D.]: I understand.

[THE STATE]: -- the way it's asked; but basically weighing. And again, that's beyond a reasonable doubt and mitigating insufficient to outweigh the aggravating. And if the jury finds that, then the final question is, are the aggravating circumstances when taken into account the mitigating, are they sufficiently substantial to call for the imposition of a death sentence. And again, that's a beyond a reasonable doubt question as well. And given that -- and that's the framework the jury would have to do that. And in your case -- and again, you're the only one -- and again, you've clearly given a lot of thought to this. There's no question. But if the Defendant was found guilty of first degree murder, would your feelings about the death penalty substantially impair your ability to vote at the sentencing hearing to impose a death sentence no matter what the evidence or aggravating circumstances that were proved?

[R.D.]: No.

> [THE STATE]: So you think if the -- if you felt like it was appropriate, you would be able to vote for a death sentence?
>
> [R.D.]: If that's what the law required, yes.
>
> [THE STATE]: Again --
>
> [R.D.]: I get it.
>
> [THE STATE]: The laws requires --
>
> [R.D.]: I understand nuances. I'm a [p]astor. I understand backwards questions, too. I use them all the time, but I understand what you're saying.
>
> [THE STATE]: And again --
>
> [R.D.]: I understand the framework.
>
> [THE STATE]: The law requires you to consider --
>
> [R.D.]: Yes.
>
> [THE STATE]: The law doesn't require a vote one way or the other. That's a juror's decision about how to vote.
>
> [R.D.]: I would not --
>
> [THE STATE]: You would not --
>
> [R.D.]: I would not have any reservations.
>
> [THE STATE]: Okay. Likewise, if you felt like the evidence called for it, would you be able to vote for a sentence of life in prison?
>
> [R.D.]: Certainly.

Defendant raised an objection to the State's peremptory strike of R.D. under *Batson v. Kentucky*, which the trial court overruled during the following exchange in open court:

> [DEFENDANT]: [] [Y]our Honor, at the appropriate time, we do enter a *Batson* challenge as to Alternate Number One, [R.D.].
>
> . . . .
>
> Your Honor, in regards to [R.D.], and I tried to be very careful . . . to write down everything that he said. Certainly there was nothing indicated on his questionnaire . . . that

indicated that he could not follow the law, that he was not available, that he could not make the time. He certainly hadn't formed any opinions. He understood clearly the presumption of innocence and the reasonable doubt theories that we all deal with. And I was especially struck[ ] when he was asked questions about his views on the death penalty. . . . [O]ne of the reasons why we feel like the District Attorney's peremptory strike against him, that there are some racial undertones to it, because what he said was he didn't want to be here. He didn't want to be in this position. He would do it. And he made the statement that if anybody is familiar with personal statistics, they do show that there are more African Americans that receive the death penalty. But then he went on to say that it was weighing on him. He's a minister. He said he has struggled with his decisions in this. Prefers that his life not be interrupted, but then he said the law is the law and what is decided. The punishment[] fits the crime. And he was confident. . . . . He made that statement. And he also said if the State is confident and can convince him beyond a reasonable doubt, whoever has to decide will make the right decision. He made it very clear that he . . . wasn't predisposed to either penalty. That he could consider each one. That there wasn't either penalty that he objected to. He didn't want to see anyone die but that he could do it. He's, in our opinion, the perfect juror. Not only is he rational and intelligent and thoughtful in his answers[,] . . . [b]ut he is what we would call the perfect juror for a death-qualified jury, and that is somebody who has made it very clear that he can consider both sides[.] . . . [W]ith everybody else that they have accepted, we can find the only reason that they would want to kick [R.D.] off is because he is an African American man and because he did happen to make that statement which is a true statement. That the death penalty is more often than not applied to African Americans if you look to see who is on our death row.

. . . .

I think obvious to all of us as we have received the past three jury pools that these pools are woefully lacking in diversity. I counted in this particular pool that we got today . . . [and] we had a total of 89 people . . . in this pool. And five of them were African American and then two of

them were released for cause. In the other two pools, it has been similar to that, and that is . . . not a cross section of this community. I don't know why that is. . . . I haven't done statistical studies. I don't know why that is that our jury pools in Buncombe County are so obviously lacking in diversity.

But I think given that, the fact that we have had the opportunity to speak to one African American juror and that gentleman is on our jury now, we haven't had any opportunity to question any other African Americans until [R.D.] came in. And I think that is something to be considered as well. The fact that our client has[] . . a Sixth Amendment right to a fair trial. He has a right under . . . the Sixth and the Eighth Amendment and due process to be judged by . . . a cross section of the community. And although I think we . . . worked hard to do that, and we certainly have been able to obtain one African American juror who is appropriate for death-qualified jury, we have not had the opportunity to question anybody else until [R.D.]. And I think that also needs to be considered in whether or not the State should be allowed to strike what may well be the only other African American potential juror that we'll have a chance to talk to in this case. I don't . . . know that we have any more. I think we might have one somewhere. So we would ask that you take that into consideration as well.

THE COURT: Okay. Thank you. The issue for the Court to determine under *Batson* . . . is, first, whether or not the party making the *Batson* claim has made a sufficient showing that the other party exercised appropriate challenge on the basis of race or sex. I'm looking at *State v. Smith*, 351 [N.C.] 251 [2000]. The Court will take the following matters into consideration to determine whether or not the prima facie showing has been taken by the Defendant.

First, []my recollection is that . . . the State has exercised no peremptory challenges as to any previous African American juror. There was a previous African American juror that was excused by cause but that was with the consent of [] Defendant. . . . [T]he Court did not observe any racially motivated questions by the State. . . . [R.D.] did make the statement about the death penalty . . . [being]

disproportionately given to African Americans. . . . . So it is a low standard. Lower than a preponderance as shown by our evidence for the initial threshold showing.

Based upon that statement, the Court is going to find a prima facie showing and then turn to the State for any neutral justification. So . . . I'll recognize the State at this point.

[THE STATE]: Well, first of all, I would – I think I would object to [the] finding of a prima facie case, your Honor. I don't think there has been a showing of that. I particularly think the part about the jury pool, given that Buncombe County is only six or seven percent African American, the numbers that they cited regarding the jury pool would not be particularly out of order given Buncombe County's overall population.

However, as far as a reason for the strike of [R.D.] is he did express reservations about the death penalty. He was very clear about that. He had thought about it and had reservations about it and its application. Just like the juror next to him, [M.K.]. She also expressed rather [] different reservations about the death penalty, but she expressed them as well. And that would be the State's reason for striking him are the reservations he expressed about the death penalty, your Honor.

. . . .

And . . . I don't think the reasoning behind is reservations, your Honor, is relevant. The fac[t] is he expressed reservations about the death penalty.

THE COURT: All right. Thank you. [Defendant]?

[DEFENDANT]: Well, your Honor, I . . . was very careful to write down what [R.D.] was saying, because what I recall happening is he made it very clear when he said the punishment should fit the crime. That . . . he wasn't predisposed to either sentence; and, in fact, I think what the record would show is that it was at that point that [the State] asked him the questions that you would normally ask of somebody that says, I don't think I can consider the death penalty. And, in fact, I think those questions were an attempt to lead [R.D.] to some different conclusion other

> than that which he had already given in a very sincere and genuine way, and that is that it would be very difficult for him. The law is the law. Whatever is decided, punishment fits the crime. He'd listen [to] what the Defendant presents. He[] . . . hopes that the State is confident in their case. And whomever has to decide it will make the right decision. Then he clearly said, neither penalty do I object to. I don't want to see anyone die he said. There's nothing about that that suggests that he had any reservations about the death penalty. If that's the reason that the State is giving.
>
> THE COURT: All right. Thank you. . . . [F]or purposes of the *Batson* hearing, the Court would find that . . . under the low threshold, the Court found a prima facie showing. [The] State has now provided the justification indicating that he expressed reservations about the death penalty. I wrote down, quote, I have reservations. It is correct[,] as [Defendant] indicated[,] that he did indicate that he could consider both punishments. [The] Court does consider, again, as I indicated earlier[,] that the State has exercised no peremptory challenges as to any previous African American juror. The one . . . African American juror that was called to the panel and excused was excused by cause and that was consented to by the Defense and that was a situation in which she was related to some of the parties involved. So that was not a peremptory challenge. That was a challenge for cause.
>
> Again, no racially-motivated questions were asked. [The] State has used at this point what would be . . . 16 previous peremptory challenges. . . . 15 of which . . . involved white jurors. And again, he did express reservations about the death penalty.
>
> The Court would find based upon the evidence presented that there has not been a sufficient showing that the juror's race was a significant or motivating factor in striking [R.D.]. And so the *Batson* challenge is respectfully denied.

No further *Batson* issues were raised during jury selection.

While trial was ongoing, one of the State's witnesses was killed, and the Buncombe County District Attorney issued a press release identifying the victim by her involvement in the case. The release stated, in

pertinent part, that the trial court had "issued appropriate orders to protect individuals who are involved with the trial to ensure proceedings may safely continue." One of the jurors learned of the press release and was excused for cause. Defendant moved for a mistrial, and the trial court denied the motion.

Two days after the jury reached its verdict, Defendant became aware that another juror had learned of the murder of the State's witness, and Defendant moved once again for a mistrial. The trial court conducted a hearing on the matter and ruled that, in light of the juror having communicated to the bailiff that learning of the news did not personally concern him, the juror's failure to report his having obtained the information to the court had "not resulted in substantial or irreparable prejudice to [Defendant's] case[.]" The trial court also denied this motion for mistrial.

ANALYSIS

On appeal, Defendant argues (A) the trial court erred in overruling his *Batson* challenge; (B) the trial court abused its discretion in not granting his motions for mistrial; and (C) the trial court erred in not recusing from Defendant's final motion for mistrial, allegedly because the resolution of the motion "hinged on [the trial judge's] own testimony."[3] For the reasons stated below, we hold the trial court did not err.

A. *Batson*

[1] First, Defendant argues the trial court erred in denying his *Batson* objection. Under *Batson v. Kentucky*,

> a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show . . . that the prosecutor has exercised peremptory challenges to remove [members] from the venire [on the basis of] race. Second, the

3. Defendant has also sought an *in camera* review of the sealed personnel records of an officer testifying in the case. *See State v. Hardy*, 293 N.C. 105, 128 (1977) ("[I]f the [trial] judge, after the *in camera* examination [of allegedly exculpatory evidence], rules against [a] defendant on his motion, the judge should order the sealed statement placed in the record for appellate review."). However, we have reviewed the personnel records in question and have identified nothing that would be both material and favorable to Defendant. *See State v. Sheffield*, 282 N.C. App. 667, 684-85, *disc. rev. denied*, 382 N.C. 328 (2022) (separately analyzing materiality and favorability). The trial court, therefore, did not err in its *in camera* review of the sealed personnel records.

> defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.
>
> . . . .
>
> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging [jurors of the excluded class].

Batson v. Kentucky, 476 U.S. 79, 96, 97 (1986) (marks and citations omitted). Thus, a *Batson* analysis consists of three steps: "First, the defendant must make a prima facie showing that the [S]tate exercised a race-based peremptory challenge." *State v. Taylor*, 362 N.C. 514, 527 (2008). Second, "[i]f the defendant makes the requisite showing, the burden shifts to the [S]tate to offer a facially valid, race-neutral explanation for the peremptory challenge." *Id.* "Finally, the trial court must decide whether the defendant has proved purposeful discrimination." *Id.*

In *State v. Hobbs*, our Supreme Court clarified the procedural requirements applicable to a *Batson* analysis. It emphasized that, "when a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge." *State v. Hobbs*, 374 N.C. 345, 356 (2020). It then reiterated the U.S. Supreme Court's holding that

> [a] criminal defendant may rely on a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race. This evidence includes, but is not limited to:
>
> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;

- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Id. (marks and citation omitted) (citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019)).

Here, Defendant argues on appeal that the trial court erred in its *Batson* ruling because the State's reason for striking R.D.—reservations about the death penalty—was pretextual. In support of this argument, Defendant argues that two similarly situated white jurors gave similar answers to Defendant and were not stricken by the State; that the State, in addition to striking R.D., struck prospective jurors who expressed concerns relating to race; that the State's strike rate was suspect, especially in light of historic statistical trends in North Carolina strike rates by race in capital trials; and that the racial makeup of the jury pool rendered this case susceptible to racial discrimination.

As the trial court explicitly issued its ruling at the third step of *Batson*, we review its determination for clear error. *Foster v. Chatman*, 578 U.S. 488, 500 (2016) (marks omitted) ("*Batson*'s third step[] . . . turns on factual determinations, and, in the absence of exceptional circumstances, we defer to [trial] court factual findings unless we conclude that they are clearly erroneous."). However, before conducting our ultimate analysis, we must address two threshold issues.

1. Scope of Defendant's Argument on Appeal

First, several of Defendant's arguments on appeal were not actually before the trial court during the *Batson* hearing. The whole of Defendant's argument before the trial court, reproduced in relevant part above, concerned R.D.'s willingness to impose the death penalty if legally warranted, the fact that R.D.'s misgivings about the death penalty arose from his concerns about its racially disparate rate of application, the overall lack of diversity in Buncombe County's jury pools, the fact that R.D. was one of only two African American prospective jurors at the time the State struck him, and the State's inappropriately

having pursued a line of inquiry with R.D. that is typically pursued only with jurors who have expressed an inability to impose the death penalty. Beyond these arguments, the trial court also considered, on its own initiative, whether the State asked R.D. "racially motivated" questions. At no point during trial did Defendant raise arguments concerning any comparable answers by white jurors, nor did Defendant discuss the striking of jurors of other races who voiced concerns pertaining to race, as he does now on appeal.

Defendant and the State disagree as to the proper scope of appellate review, and sources conflict as to whether and to what extent a defendant may make additional *Batson* arguments on appeal. At face value, the traditional emphasis on the Defendant's burden at step three of *Batson* should operate to limit the scope of available arguments on appeal to what was actually argued at trial. *Batson*, 476 U.S. at 93 (marks omitted) ("[T]he burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination."); *see also State v. Bennett*, 282 N.C. App. 585, 601 (citing N.C. R. App. P. 10(a)(1)) (remarking, with respect to a *Batson* argument, that "a defendant must (1) raise the issue below and (2) argue the same theory below."), *appeal dismissed*, *review denied*, 383 N.C. 694 (2022). Moreover, even in *State v. Hobbs*, which emphasized that "a trial court, and a reviewing appellate court, must consider [all of a defendant's] evidence in determining whether the defendant has proved purposeful discrimination[,]" the scope of the requirement was limited to instances "when a defendant presents evidence raising an inference of discrimination[.]" *Hobbs*, 374 N.C. at 356; *see also State v. Clegg*, 380 N.C. 127, 149-50 (describing step three of *Batson* as the trial court "weigh[ing] all of the reasoning from both sides").

Nonetheless, both our Supreme Court and the U.S. Supreme Court have cautioned that, " 'in reviewing a ruling claimed to be *Batson* error, *all* of the circumstances that bear upon the issue of racial animosity must be consulted.' " *State v. Waring*, 364 N.C. 443, 475 (2010) (emphasis added) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)), *cert. denied*, 565 U.S. 832 (2011); *see also Flowers*, 139 S. Ct. at 2243 (emphasis added) ("The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, *and* in light of the arguments of the parties."). Thus, while the holding in *Hobbs* creates an affirmative duty to weigh *at least* the evidence put forth by Defendant during the *Batson* hearing at trial, *see Hobbs*, 374 N.C. at 356, we understand the proper scope of our review on appeal to include all relevant information in the Record at the time, regardless of

whether Defendant's arguments at trial specifically invoked that information.[4] This approach comports with that used by the U.S. Supreme Court. *Miller-El v. Dretke*, 545 U.S. 231, 240-44 (2005) (conducting a comparative juror analysis on appeal not used before the trial court).

This analysis also mirrors the scope of review applied to clear error in our First Amendment jurisprudence. "In cases raising First Amendment issues[,] an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *State v. Taylor*, 379 N.C. 589, 608 (2021) (marks omitted) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)). This whole record review "does not empower an appellate court to ignore a trial court's factual determinations[,]" *id.*; rather, the underlying "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses[.]" *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 43 (2020) (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 689 (1989)). This whole record review does not necessarily require a detailed written exploration of all salient features of a record, only that such a review have actually occurred.[5] *E.g.*, *Mitchell v. Univ. of N.C. Bd. of Governors*, 288 N.C. App. 232, 242-43 (2023). Our *Batson* analysis, therefore, is not only consistent with the existing *Batson* caselaw, but also mirrored elsewhere in our State's constitutional clear error jurisprudence.

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4. This further highlights an emergent distinction in our caselaw between substantively correct *Batson* analyses—analyses that correctly answer whether the State purposefully discriminated based on race—and procedurally correct *Batson* analyses—analyses that adequately addresses a defendant's *Batson* arguments at step one and three. A *Batson* proceeding, even if substantively correct, may be procedurally deficient if either we or the trial court fail to adequately address a defendant's arguments. *Compare Hobbs*, 374 N.C. at 360 (reversing and remanding to the trial court at *Batson*'s third step, in part, for "failing to engage in a comparative juror analysis of the prospective juror's voir dire responses and failing to consider the historical evidence of discrimination that [the defendant] raised") *with State v. Hobbs*, 384 N.C. 144, 156-57 (2023) (holding, in the same case, that the trial court did not clearly err in its substantive *Batson* ruling). Thus, under *Hobbs*, a *Batson* ruling may be overturned on appeal on substantive grounds for any reason clear from the Record at the time of the ruling; however, *Batson* analyses are only *procedurally* deficient if they fail to respond to a defendant's arguments.

5. This scope of review also, we think, best suits both the practical and substantive needs of our justice system, balancing the paramount importance of ensuring that racial discrimination not occur in North Carolina's jury pools with the need to avoid the systemic inefficiency that would result from a written analysis spanning the entire Record in every case on appeal. *Batson v. Kentucky*, 476 U.S. at 99 (1986) ("[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

For these reasons, we base our analysis on a review of the whole record, engaging in a full, written analysis of all arguments raised by Defendant at trial, as required by *Hobbs*. *Hobbs*, 374 N.C. at 356. We also, for methodological clarity, address in writing most[6] arguments Defendant raises for the first time on appeal; those arguments, while not encompassed under the procedural command of *Hobbs*, still factor into our review of the whole record.

2. Race and Views About Race

Defendant has made two arguments pertaining to stricken jurors "who expressed concern about racial disparities"—one as to R.D. and another as to three white prospective jurors. Thus, as a second threshold issue, we devote this section of the opinion to clarifying whether and to what extent these arguments factor into our analysis.

Our Supreme Court has made clear that, at step three of *Batson*,

> "[t]he ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2244 (cleaned up). Thus, "[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race." *Hernandez* [*v. New York*, 500 U.S. 352, 375 (1991)] (O'Connor, J., concurring).

State v. Campbell, 384 N.C. 126, 135 (2023). In other words, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 134-35 (citing *Hernandez*, 500 U.S. at 360).

Race, for all the discussion devoted to it in the legal field and beyond, naturally generates a variety of viewpoints as to the nature and extent of its significance, as well as what norms and policies ought to be adopted surrounding it. *Cf. Mitchell*, 288 N.C. App. at 246 (Murphy, J., concurring in part and dissenting in part) (citing Kevin Laland, *Racism in academia, and why the 'little things' matter*, Nature (Aug. 25, 2020), https://www.nature.com/articles/d41586-020-02471-6; John McWhorter, *Words Have Lost Their Common Meaning*, The Atlantic (Mar. 31, 2021), https://www.theatlantic.com/ideas/archive/2021/03/nation-divided-language/618461/; Yuvraj Joshi, *Racial Transition*, 98 Wash. U. L. Rev. 1181,

6. We do not include Defendant's evidence and arguments pertaining to death penalty statistics by race in North Carolina in our analysis because, as Defendant concedes, this evidence was not in the record before the trial court at the time of the *Batson* hearing.

1203-1208 (2021)) ("Copious amounts of ink have been spilled over what the significance of race in academia should be, what constitutes racism, and how to solve the myriad of problems it poses."). Just as naturally, we would not expect—nor is it in fact the case—that all members of a given racial group subscribe to the same views about race or that a particular view about race canonically expresses the interests of any given group. For this reason, a peremptory strike employed on the basis of a stricken juror's views about race, standing alone, will not itself establish a violation of *Batson*, "[n]o matter how closely tied . . . to race th[at] explanation for a peremptory strike may be," topically speaking. *Campbell*, 384 N.C. at 135 (citing *Hernandez*, 500 U.S. at 375).

Nonetheless, just as views about race are not identical with race, they are also not fully separable from an inquiry—taking "all of the circumstances that bear upon the issue of racial animosity" into account—as to whether a strike had been used with discriminatory intent. *Waring*, 364 N.C. at 475. After all, if the State were of a mind to strike a juror based on his or her race, the same discriminatory animus that motivated a strike based on race would also tend to motivate strikes of jurors espousing a special sympathy for that racial group, especially in a case where the race of the stricken juror and the race of the defendant align. Put differently, while it is not, in fact, the case that discrimination based on race and discrimination based on views about race are the same for *Batson* analysis purposes, the two would run closely enough together in the mind of the discriminator that a racial-views-based strike can operate as a "plus factor" with respect to an allegedly race-based strike.

Accordingly, to the extent Defendant alleges the strike of juror R.D. having been based on his views about race would amount to a strike based on race, we reject that argument. However, to the extent Defendant offers R.D.'s views about race and the views of the three stricken white jurors as context to support an allegation that the strike of R.D. was pretextual, we consider his argument for that limited purpose.

3. ***Batson*** **Analysis**

Turning to the merits, Defendant argues that the State's proffered race-neutral reasons for its strike—reservations about the death penalty—was pretextual for the following reasons: first, juror R.D. did not actually express an inability to impose the death penalty, yet he was asked questions similar to those asked of jurors who expressed an inability to do so; second, the State accepted similarly situated white jurors, J.C. and C.D., who also expressed reservations about the death penalty; third, the State used peremptory strikes on jurors X.I., D.F., and B.M., "who expressed race-based concerns"; and, finally, the jury

pool being almost entirely white rendered this case more susceptible to racial discrimination. Meanwhile, in addition to disputing Defendant's arguments, the State points us to the fact that both Defendant and the alleged victims were African American and directs our attention to another white juror it struck, M.K., who was allegedly similar to R.D.

The voir dire responses of J.C., which Defendant alleges demonstrated similar reservations about the death penalty to R.D., were as follows:

> [THE STATE]: As you're aware the one we're trying is charged with first degree murder, and the two possible penalties for first degree murder are life in prison or a death sentence. And with that in mind, do you have any moral, philosophical, or religious beliefs or opinions against the death penalty?
>
> [J.C.]: No, sir.
>
> [THE STATE]: So no particularly strong belief one way or the other?
>
> [J.C.]: No, sir.
>
> [THE STATE]: Okay. So if -- in light of that, under the evidence that was produced, if you thought that a death sentence was the appropriate punishment you would be able to vote for that?
>
> [J.C.]: Yes.
>
> [THE STATE]: And likewise, if you thought a sentence of life in prison was appropriate, you would be able to vote for that?
>
> [J.C.]: Yes, sir.
>
> . . . .
>
> [THE STATE:] [I]f the Defendant was found guilty of first degree murder, would your feelings about the death penalty substantially impair your ability at the sentencing hearing to impose a death sentence no matter what the evidence was?
>
> [J.C.]: Yes.
>
> [THE STATE]: So you think that your feelings about the death penalty might cause a problem?

> [J.C.]: Yes.
>
> [THE STATE]: All right. And what are those feelings you have about –
>
> [J.C.]: Just the way we was brought up as a family, you do not take a life.
>
> [THE STATE]: Okay. So the way you were brought up, do not take a life, think that would affect your ability to sit and consider whether or not to impose a death sentence?
>
> [J.C.]: It could.
>
> [THE STATE]: And are those feelings so strong that you don't think under any circumstance you could vote for a death sentence?
>
> [J.C.]: No, not that I can -- I don't think so. I'd have to know what the circumstances were.
>
> [THE STATE]: Okay. So then what you're telling me is there might be circumstances that you felt were sufficient to call for a death sentence but you would -- that wouldn't be your first inclination?
>
> [J.C.]: Right.
>
> [THE STATE]: And would you be able to keep an open and fair and impartial mind about those issues until you've heard all the evidence and Judge Horne has instructed you about the law?
>
> [J.C.]: I hope I could.
>
> [THE STATE]: I guess the bottomline question then is, and again, not sort of an academic one. In this it's a very direct question. If you thought the evidence called for it, could you walk in here and tell the Court that you voted for death?
>
> [J.C.]: Yes, sir.

The responses of C.D., which Defendant offers for the same purpose, were as follows:

> [THE STATE]: Do you have any moral or religious objections to or opinions against the death penalty?

[C.D.]: I don't really like the death penalty, but I would be willing to give my vote whether or not the evidence provided that the person was guilty or not.

. . . .

[THE STATE]: And is that belief that you have, that opinion that you don't like the death penalty, is that strong enough that it would keep you under any circumstances from voting for a sentence of death?

[C.D.]: No, it wouldn't impede my decision.

. . . .

[THE STATE]: So you -- despite not really, as you put it, not really liking the death penalty, you think under some circumstances at least you would be able to vote in favor of a sentence of death?

[C.D.]: If he was guilty, yes.

[THE STATE]: Well, if he's guilty, then you also realize that you would be obligated to weigh both the sentence of life in prison and the death sentence.

[C.D.]: Yes.

[THE STATE]: You could consider both?

[C.D.]: Yes.

[THE STATE]: And would you be able to go through that process of hearing about aggravating circumstances and mitigating circumstances and weigh those?

[C.D.]: Yes.

[THE STATE]: And if you felt like that the appropriate sentence was one of -- was a death sentence, would you be able to vote for that?

[C.D.]: Yes.

[THE STATE]: Would you be able to walk back into court and announce that that was your verdict?

[C.D.]: Yes.

> [THE STATE]: Similarly, if you felt like the appropriate sentence was one of life in prison, would you be able to vote that?
>
> [C.D.]: Yes.
>
> [THE STATE]: And would you be able to walk back here in court and announce that that was your verdict?
>
> [C.D.]: Yes.

When asked whether she could render a verdict free of racial bias, X.I. affirmatively brought up the scarcity of African Americans on the jury, and D.F. agreed:

> [X.I.:] I thought it was odd that so far it looked like all the people you had to choose from were Caucasians, so I thought that was odd.
>
> [D.F.]: I thought that, too.
>
> [X.I.]: I was concerned you wouldn't end up having any African Americans on your jury.
>
> [THE STATE]: Well, obviously, that is an issue in today's world.
>
> [X.I.]: You can only have what you call in, so I was concerned.
>
> [THE STATE]: And again, that's why it's important to get these issues out.

The State eventually exercised peremptory strikes against both D.F. and X.I., though D.F.'s strike occurred only after she reported that Defendant waved at her.

Later during voir dire, B.M., in response to a similar question about rendering a verdict free of racial bias, made the following remark:

> [B.M.:] I [] think it's going to be challenging because he's African American; and basically everybody in here except for those sitting out in the gallery are not; and so I can't presume to understand his background at all. And so yes -- so that adheres to it. I'm not one who has this color blind mind set. I fully am aware of my status and my privilege and who I am as far as my race.

The State exercised a peremptory strike against B.M.

Finally, the State argues another allegedly similar white prospective juror that it struck during voir dire, M.K., was similar to R.D.:

> [THE STATE:] [M.K.], do you have any moral, philosophical, religious beliefs or opinions against the death penalty?
>
> [M.K.]: I'm a homeschooling mother, and I raised my children -- we did Government. Don't ask me anything about it now. But I raised them to understand that our laws are placed here by God and that we honor them and also that everyone of you are in here appointed by God.
>
> [THE STATE]: I'm sorry, I didn't hear what you said.
>
> [M.K.]: That everybody in here is appointed in authority by God, and my children are to do the right thing, whatever it is. I don't -- I don't like -- I don't think about the death penalty. I just have to be honest. But I do read a lot in scripture and different things. I know how God set up things. I know he has grace and mercy. But I also know he has justice before he can even extend mercy. I can't say that I have a problem with the death penalty. We're all under a death penalty eventually anyway. But for me to play that part, I would have to know in my heart beyond a shadow of a doubt that that really is what the answer should be. I have to know from what you-all are saying that's something that should be put in place or not put in place. I can't make a decision. I'm not quite sure -- I don't have a problem -- I do have a problem. Like I can't imagine somebody not having a problem with it. But I just have to hear everything, you know.
>
> [THE STATE]: Okay. Well, obviously this is a very -- it's a very serious question, and I think no one would do any of this lightly.
>
> [M.K.]: Yeah. If I had to, I would. If I really, really felt strong, but I would have to really feel strong about it.
>
> [THE STATE]: Okay?
>
> [M.K.]: I can't -- I can't imagine.
>
> [THE STATE]: Okay.
>
> [M.K.]: Have to think about this issue.

[THE STATE]: So are your feelings -- let's see. Are your beliefs such that you think under some circumstances you could vote in favor of a death sentence?

[M.K.]: It would have to be a very extreme one.

[THE STATE]: Okay. But under a very extreme case, you think you would be able to -- your beliefs aren't so strong that under no circumstance then would you be able to vote in favor of a death sentence?

[M.K.]: No, my belief -- no.

[THE STATE]: You would under -- I believe as you put it, extreme circumstances, you would be able to vote for such a thing -- for a death sentence?

[M.K.]: Yeah, it would have to be proven extreme for me.

[THE STATE]: Okay. And do you think because of these strong personal feelings you have you would already be predisposed to vote for a sentence of life in prison?

[M.K.]: I have no -- no.

[THE STATE]: So you would come in -- again, be able to --

[M.K.]: I don't know what is going on with any of this stuff, and I have no agenda in my mind.

[THE STATE]: Okay. Would your attitude toward the death penalty prevent you from making an impartial decision based on the evidence about the Defendant's guilt in the first part of the trial?

[M.K.]: My attitude -- you know, I just really would be seeking the Lord the whole time. I mean I have to -- I don't -- I don't think so.

[THE STATE]: Okay. So you think as far as that first part where it's not about the sentencing, it's just about whether the Defendant is guilty or innocent of first degree murder.

[M.K.]: Yeah, that's --

[THE STATE]: I mean that's still obviously a very serious decision.

[M.K.]: Yes, it is.

[THE STATE]: Do you think you would be able to -- as a juror be able to do that part, carry forward that part of your duties?

[M.K.]: I think I -- you know, if I can get out of this, I will. You know that. But I think I could make a decision.

[THE STATE]: Okay. When I was going through with [R.D.] the process then if the Defendant is found guilty of first degree murder, the process of the aggravating circumstances and the mitigating and the weighing. Were you able to listen to that?

[M.K.]: Yeah.

[THE STATE]: And again, I know this isn't stuff you normally sit around thinking about.

[M.K.]: No, I don't.

[THE STATE]: These are very difficult questions. And if the Defendant was found guilty of first degree murder, would your feelings about the death penalty substantially impair your ability to vote at the sentencing hearing to impose a death sentence no matter what the evidence or aggravating circumstances that were proved?

[M.K.]: Okay. Say that one more time, because it's heavy.

[THE STATE]: Yes. If the Defendant was found guilty of first degree murder, would your feelings about the death penalty substantially impair your ability to vote in the sentencing hearing to impose a death sentence no matter what the evidence or aggravating circumstances that were proved?

[M.K.]: I'm trying to understand the last part of what you're saying. I don't -- simply put --

[THE STATE]: Simply put, are your feelings about the death penalty so strong that they would impair your ability no matter what the State proved as far as -- what made this aggravating. No matter what we proved, would your feelings --

[M.K.]: About the death penalty?

[THE STATE]: About the death penalty --

[M.K.]: Override what --

[THE STATE]: Substantially impair your ability to vote for a death sentence no matter what the evidence was?

[M.K.]: I don't -- you know what, I think I'm not your person, but I don't think -- I've never been in that position. I just don't think I'm your person. I don't believe that I would be impartial or partial. I just want to know the truth, if I'm responsible for something. I don't think about the death penalty like I don't think about life imprisonment. I don't think about that stuff. I will just -- when things are presented, that's when I'll look at it and decide what goes on in my -- you know, from what I'm seeing, from what you're proving. I don't know if that helps you or not, but I don't know all your legal jargon. But I don't think I would object be -- in my own words, I don't feel like I would be impartial. I just think I would do whatever I really felt was the right thing to do.

[THE STATE]: Okay. Well --

[M.K.]: But if you don't want me, that's okay.

[THE STATE]: I understand. Kind of strip it down as -- the question down as much as I can.

[M.K.]: Okay.

[THE STATE]: If you thought the evidence called for it --

[M.K.]: Yes.

[THE STATE]: -- could you walk in here and tell the Court that you had voted for death?

[M.K.]: If I thought the evidence called for death, would I say that? Is that what you're saying?

[THE STATE]: Could you vote for it --

[M.K.]: Yes.

[THE STATE]: -- and walk in and say you voted for it?

[M.K.]: Yes, if I felt that that called for that, yes.

[THE STATE]: Likewise, if you felt like the evidence called for a sentence of life in prison, could you --

[M.K.]: If I felt that, yes.

The State exercised a peremptory strike against M.K., doing so at the same time as it struck R.D.

On this Record, we cannot say the trial court clearly erred in denying Defendant's objection at the third step of *Batson*, though the case is close. *See Foster*, 578 U.S. at 500. At the outset, the percentage-based strike rate analysis proffered by Defendant is completely indeterminate, with only two African American jurors having remained in the jury pool after removals for cause; a fifty-percent strike rate means almost nothing when that fifty percent represents only a single person. Similarly, the relative scarcity of African Americans in the jury pool, while perhaps a problematic phenomenon for racial equity in the justice system in general, is the product of circumstances outside the State's control in its prosecutorial capacity. This factor therefore plays no role in our determination of whether Defendant has demonstrated "purposeful discrimination" on the part of the State. *Taylor*, 362 N.C. at 527.

As often happens in *Batson* inquiries, the more compelling evidence in this case is the relative treatment of prospective juror R.D. and white jurors who expressed reservations about the death penalty. *See Miller-El*, 545 U.S. at 241 ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."). Comparing the responses of J.C., C.D., and M.K. to those of R.D., we note that R.D. shares the most relevant features with M.K. In expressing their respective initial thoughts about the death penalty, R.D. and M.K. both wavered in their feelings about its application, albeit under different rationales—R.D. was concerned primarily about racial disparities in application, while M.K. couched her thoughts in terms of religious introspection. R.D. and M.K. were also questioned sequentially, minimizing the likelihood that simple variables like the passage of time or differences in levels of fatigue on the part of the State affected the comparability of the outcomes. Finally, R.D. and M.K. both suffered some degree of miscommunication with the State during questioning that may have undermined the State's confidence in the juror's answers, with R.D. interrupting the State during its explanation of forthcoming procedures and M.K. indicating she did not understand what the State was saying.

Despite these similarities, there was more reason for the State to doubt M.K.'s ability to serve as a death-qualified juror than R.D. As stated above, though both jurors suffered a degree of miscommunication with the State, only M.K. suffered that miscommunication as a result of failure

to comprehend the State. R.D., by contrast, expressed a confidence and straightforwardness in his responses more comparable to J.C. and C.D.—whom the State did *not* strike—than M.K. Notwithstanding that difference in demeanor, the State took pains to attempt to rehabilitate M.K. that it did not with R.D., continuing to clarify and reframe its questions concerning her ability to serve on the jury even after she directly stated "I'm not your person[.]" And a similar interaction occurred with J.C., whom the State rehabilitated and accepted even after he expressed plainly that he could not vote for the death penalty. R.D. made no comparable remarks.

However, despite this possible contrast in the State's treatment of the venire members, we still cannot say that the trial court clearly erred in its determination that the State permissibly struck R.D. First, as stated previously, the sample size of African Americans in the jury pool was so small that it would have been impossible to extrapolate a meaningful pattern from the State's treatment of African American jurors as opposed to jurors of other races. R.D. was the only African American juror against whom the State exercised a peremptory strike, and the only other African American venireman questioned at the time of the *Batson* hearing was accepted without issue and subject to no irregular questioning patterns. Second, despite the potentially unfavorable treatment of R.D. by the State relative to other jurors who expressed reservations about the death penalty, the fact remains that the manner and reasoning with which R.D. expressed those reservations were unique, with no other allegedly similar juror expressing substantively comparable thoughts. On this Record, considering whether the State's explanation was pretextual, we are not "left with the definite and firm conviction that a mistake ha[d] been committed" by the trial court in overruling Defendant's objection. *Clegg*, 380 N.C. at 141.

Finally, applying the clearly erroneous standard, we are no less confident in this conclusion in light of the State's pattern of striking jurors who expressed concerns relating to race. If anything, without evidence of racially discriminatory intent elsewhere in the State's striking or questioning patterns, the consistency with which the State struck potential jurors who volunteered their views about issues of race—three out of four of whom were white—suggests that the State exercised a peremptory strike against R.D. because it was uniquely averse to the reason he gave for his reservations about the death penalty, not because R.D. is African American. We cannot be confident the trial court was mistaken in its conclusion that reservations about the death penalty explained the exercise of the State's strike of R.D., *see id.*, and we therefore hold the trial court did not err with respect to Defendant's *Batson* challenge.

B. Motions for Mistrial

[2] Defendant next argues the trial court abused its discretion by denying his motions for mistrial. "This Court reviews a trial court's denial of a motion for mistrial under an abuse of discretion standard." *State v. McDougald*, 2021-NCCOA-424, ¶ 7, 279 N.C. App. 25, 27 (2021). "The decision of the trial judge is entitled to great deference since he is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *State v. Williamson*, 333 N.C. 128, 138 (1992).

Here, the trial court did not abuse its discretion in denying Defendant's mistrial motions. The trial court found there was "not evidence before [it] at [that] time . . . that there [had] been and [was] substantial and irreparable prejudice to [Defendant's] case in that [there was] no evidence before [it] that the 12 jurors or the alternate ha[d] any knowledge at th[at] point." Moreover, the transcript demonstrates that, when the Buncombe County District Attorney's press release concerning the death of the State's witness was brought to the trial court's attention, "no impaneled juror indicated they had knowledge of [the] death"; that, "[a]t that point, the [R]ecord d[id] not indicate that any other jurors said they were aware of [the] death or had viewed any media reports related to it or this case"; that the juror who became aware of the press release "stated no other jurors had said anything to him about having any concerns about their safety or being afraid"; and that the trial court issued a curative instruction regarding the use of cell phones after another juror sent a text message to the clerk during trial about information he inadvertently learned.

Based on this Record, we cannot conclude that the trial court abused its discretion in denying these mistrial motions. Defendant has not offered any evidence or arguments that overcome the fact, as found by the trial court, that none of the impaneled jurors knew about the District Attorney's press release when the court considered Defendant's first mistrial motion. When the second mistrial motion was heard—occurring only after deliberations finished and the verdict was announced—the trial court was in the best position to gauge the veracity of the juror who used his cell phone and only inadvertently saw a headline, not the full details of an independent news broadcast, and unequivocally denied that the information regarding the death of the State's witness impaired his ability to be fair and impartial. These facts do not rise to the level of an abuse of discretion.

C. Recusal

[3] Finally, Defendant argues the trial court erred by conducting a hearing on his final motion for mistrial itself. N.C.G.S. § 15A-1223(e) provides that "[a] judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case." N.C.G.S. § 15A-1223(e) (2021). A defendant must prove "objectively that grounds for disqualification actually exist" and "show substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *State v. Fie*, 320 N.C. 626, 627 (1987). "Our task on appeal is not to determine whether the trial court's decisions throughout the proceedings leading up to the [underlying motion] were appropriate, but whether, in light of [his] previous involvement with this case, 'the circumstances are such that a reasonable person would question whether the judge could rule impartially' . . . ." *In re: E.D.-A.*, __ N.C. App. __, __ (2023) (quoting *Harrington v. Wall*, 212 N.C. App. 25, 34 (2011)). We review a trial court's ruling on a judicial recusal motion de novo. *Dalenko v. Peden Gen. Contractors, Inc.*, 197 N.C. App. 115, 123 (2009), *disc. rev. denied*, 363 N.C. 854 (2010).

Here, despite his assertion that "the resolution of [the final motion for mistrial] hinged on [the trial judge's] own testimony[,]" Defendant has not shown that the trial judge was a witness for or against one of the parties in the case. Rather, the trial judge only became a witness as it relates to the recusal motion itself, which does not inherently constitute legal error. *See State v. Kennedy*, 110 N.C. App. 302, 306 (1993) ("[T]here was no error in the trial judge's failure to recuse himself. Having established that there were no facts presented to cause a reasonable person to doubt the trial judge's impartiality; there is also no error in the trial judge's failure to refer the motion to recuse to another judge."). Defendant's assertions that the trial judge acted as a "witness" obfuscate the fact that the substantive issue alleged with respect to Defendant's final motion for mistrial was the extrinsic factual knowledge of a juror, not the acts or omissions of the trial judge. And while the Record does reveal that a miscommunication between the bailiff and the trial judge may have occurred with respect to the underlying juror knowledge, we have no reason to believe "there exist[ed] such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially[,]" especially given the secondary importance of the miscommunication to the actual subject of the mistrial motion. *Fie*, 320 N.C. at 627. The trial court therefore did not err in denying Defendant's motion for recusal.

CONCLUSION

The trial court correctly overruled Defendant's *Batson* objection at step three, and it did not err in denying his motions for mistrial or failing to recuse.

NO ERROR.

Chief Judge STROUD and Judge ZACHARY concur in the result only.

STATE OF NORTH CAROLINA
v.
DELVIN HARVEY, DEFENDANT

No. COA23-542

Filed 5 December 2023

Jurisdiction—trial court—Rule 60(b) motion for relief—from lifetime satellite-based monitoring—appeal already perfected—exception to general rule

The trial court's order denying a criminal defendant's motion filed pursuant to Civil Procedure Rule 60(b)(6), which sought relief from the court's prior order imposing lifetime satellite-based monitoring (SBM) upon defendant, was reversed and the matter remanded because the court incorrectly concluded that it lacked jurisdiction over defendant's motion. As a general matter, a perfected appeal divests a trial court of jurisdiction over the matter appealed from, and defendant's pending appeal from the SBM order had already been perfected before the court heard defendant's Rule 60(b) motion. However, under an exception to the general rule, the court still had jurisdiction to consider the motion for the limited purpose of indicating how it would be inclined to rule on it were the appeal not pending. The court's exercise of jurisdiction would have been especially fitting considering defendant's novel contention that the General Assembly's revision of the SBM laws weeks after he was ordered to submit to lifetime SBM necessitated extraordinary relief.

Appeal by defendant from order entered on 3 November 2022 by Judge Robert C. Roupe in Columbus County Superior Court. Heard in the Court of Appeals 1 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya M. Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Ben Mayes, for defendant-appellant.

FLOOD, Judge.

Delvin Harvey ("Defendant") appeals from the trial court's order denying his Rule 60(b) motion. For the reasons discussed below, we reverse and remand.

I. Facts and Procedural Background

On 17 November 2008, Defendant pled guilty to second-degree rape in Guilford County Superior Court and was sentenced to 93–121 months' imprisonment. Sometime in December 2020, Defendant was released after completing his sentence. On 15 June 2021, a hearing occurred on whether Defendant should be subject to satellite-based monitoring ("SBM"). On 10 August 2021, the trial court entered an order (the "SBM Order") compelling Defendant to submit to a lifetime of SBM. On 20 August 2021, Defendant appealed.

Two weeks later, on 2 September 2021, the North Carolina General Assembly changed the law related to when the imposition of a lifetime of SBM was appropriate. Under the revised statute, a trial court must find that a defendant needs the highest level of supervision before imposing any length of SBM. N.C. Gen. Stat. § 14-208.40A(c1) (2021). Further, the revised statute provides that "[a]n offender who was ordered prior to December 1, 2021, to enroll in [SBM] for a period longer than [ten] years may file a petition for termination or modification of the monitoring requirement[.]" N.C. Gen. Stat. § 14-208.46(a) (2021).

On 31 March 2022, Defendant filed a motion for relief from the trial court's SBM Order pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure, arguing the change to the SBM law mere weeks after he was ordered to submit to a lifetime of SBM constituted an extraordinary circumstance warranting relief. On 4 November 2022, Defendant's Rule 60(b)(6) motion was heard before the trial court. During the hearing, the following colloquy occurred between Defendant's counsel and the trial judge:

> THE COURT: First and foremost, I believe that pendency of an appeal in this case divests me of jurisdiction to rule on this motion at this time . . . . And I believe the case

> law clearly indicates that my reviewing the matter presently, while its on appeal to the Court of Appeals, divests – divests me of that jurisdiction.
>
> [DEFENSE COUNSEL]: Your Honor if I may?
>
> THE COURT: Go ahead.
>
> [DEFENSE COUNSEL]: I do have – I did bring with me notices of withdrawal of appeal. And now I – obviously, that can be risky, depending on, you know, where the [trial c]ourt might go. And if – if [Defendant] needs to find that before getting any indication as to where the [trial c]ourt is going to rule then, you know, I would probably not do that.
>
> However, with – with an indication of maybe how the [trial c]ourt was going to rule and then [Defendant] and I could sit down, explain it in more detail th[a]n I already have to him; sign the notice; and serve it and file it with the clerk. That should remove the impediment of jurisdiction.
>
> THE COURT: And I appreciate you making me aware that, []. Thank you, sir.
>
> At this point, I'm not going to accept a withdrawal of appeal in that I frankly believe the matter needs to be addressed by the appellate court to protect your client's interests.
>
> . . . .
>
> Having found that Rule 60(b) does not apply to this case, I believe that it would be improper for the [trial c]ourt to move further to do any sort of constitutional analysis of this case at this time, which is what I believe [Defendant] through counsel is asking me to do.

Following the hearing, the trial court entered an order (the "Rule 60 Order") denying Defendant's Rule 60(b)(6) motion for relief from the SBM Order. The Rule 60 Order included the following conclusions of law:

> 1. That the pendency of the appeal in this case divests the [trial c]ourt[']s ruling of this motion.
>
> . . . .
>
> 3. That [N.C. Gen Stat.] § 14-208.46 provides a method for [] Defendant to ask for relief based on the modification in law by the General Assembly.

. . . .

5. That respectfully, Rule 60(b)(6) does not apply because extraordinary circumstances do not exist.

. . . .

7. Justice does not require the [trial c]ourt to act in this case because [] Defendant has a statutory method of relief.

On 2 December 2022, Defendant timely filed a notice of appeal from the Rule 60 Order; prior to that, however, Defendant's initial appeal from the SBM Order was docketed at this Court on 10 November 2022. On 30 January 2023, Defendant formally withdrew his initial appeal from the SBM Order, while maintaining his appeal from the trial court's Rule 60 Order.

II. Jurisdiction

This Court has jurisdiction to review the final judgment of a superior court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Analysis

On appeal, Defendant argues (1) the trial court erred when it determined it did not have jurisdiction over the Rule 60(b)(6) motion; and (2) by denying Defendant's Rule 60(b)(6) motion, the trial court's application of N.C. Gen. Stat. § 14-208.46 denied Defendant equal protection of the law. After careful review, we determine the trial court erred in its conclusion that it lacked jurisdiction; accordingly, we reverse and remand the trial court's denial of Defendant's Rule 60(b)(6) motion and do not reach Defendant's equal protection argument.

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). " '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) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

On our *de novo* review of the matter before us, we broadly consider whether the trial court had jurisdiction to hear Defendant's Rule 60(b)(6) motion—either because Defendant's appeal from the SBM Order was not yet perfected, or through operation of Rule 60. Because the case before us presents the Court with an opportunity to apply our Rule 60

precedent to a novel request for extraordinary relief from a criminal SBM order, our analysis will review each rule in turn.

B. Perfection of Appeal

To begin, we first examine whether Defendant's appeal from the SBM Order was perfected, and if so, what effect that perfection had on the trial court's jurisdiction to enter the Rule 60 Order.

This Court recognizes "our long-standing general rule that an appeal removes a case from the jurisdiction of the trial court, and, pending the appeal, the trial court is functus officio." *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977). "An appeal is not 'perfected' until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal[.]" *Ponder v. Ponder*, 247 N.C. App. 301, 305, 786 S.E.2d 44, 47 (2016) (citation omitted). Upon perfecting an appeal, therefore, any order rendered by "the trial court after the notice of appeal [is given,] [is] void for lack of jurisdiction." *Id.* at 305, 786 S.E.2d at 47 (citation omitted).

Here, the chronology of this case shows that Defendant's appeal from the SBM Order was not docketed until one week *after* the trial court entered its Rule 60 Order. Regardless, once Defendant's appeal from the SBM Order was docketed and thus perfected, that perfection related back to the date he originally filed his notice of appeal—20 August 2021. *See id.* at 305, 786 S.E.2d at 47. Therefore, Defendant's appeal was perfected as of 20 August 2021, and any orders entered after that date would be considered void for lack of jurisdiction. Our analysis does not end there, however, because in this case, the trial court had the authority to exercise jurisdiction pursuant to Rule 60 of the North Carolina Rules of Civil Procedure.

C. Rule 60 Exception

Defendant contends that, pursuant to *Sink v. Easter*, the trial court had jurisdiction to rule on the extraordinary relief sought in his Rule 60(b)(6) motion, despite Defendant's appeal from the SBM order being pending at the time his Rule 60(b)(6) motion was made. 288 N.C. 183, 217 S.E.2d 532 (1975). We agree.

As stated above, the general rule is that an appeal divests the trial court of jurisdiction over a case. *See Bowen*, 292 N.C. at 635, 234 S.E.2d at 749. There is, however, an exception made for consideration of Rule 60 motions. *See Sink*, 288 N.C. at 199, 217 S.E.2d at 542; *see also Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on*

other grounds, 299 N.C. 715, 264 S.E.2d 101 (1980). This exception was specifically applied in this Court's 1979 opinion in *Bell*.

In *Bell*, this Court determined the best practice "is to allow the trial court to consider the Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending." 43 N.C. App. at 142, 258 S.E.2d at 409. At that point, should the trial court indicate it would be in favor of granting the motion, the appellant would "be in position to move the appellate court to remand to the trial court for judgment on the motion." *Id.* at 142, 258 S.E.2d at 409. If, on the other hand, the trial court indicated it would deny the motion, that indication "would be considered binding on that court and [the] appellant could then request appellate court review of the lower court's action." *Id.* at 142, 258 S.E.2d at 409. The *Bell* Court reasoned that this method was preferable because "initial consideration of Rule 60(b) motions at the appellate level does not provide the essential ingredient of trial court review[.]" *Id.* at 142, 258 S.E.2d at 409. "As is recognized in many cases, a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink*, 288 N.C. at 198, 217 S.E.2d at 541.

The principle that a trial court retains limited jurisdiction for the purposes of a Rule 60(b) motion has been most often applied in the context of cases arising from civil law. *See*, *e.g.*, *Talbert v. Mauney*, 80 N.C. App. 477, 478–79, 343 S.E.2d 5, 7 (1986) (applying Rule 60 in a case where the defendant was sued for slander and unfair and deceptive trade practices); *In re Baby Boy Scearce*, 81 N.C. App. 662, 345 S.E.2d 411 (1986) (applying the Rule 60 exception to a case in which the district court made an oversight in not assessing the costs of bringing the action in its order).

Here, we apply the procedure outlined in *Bell* while considering Defendant's novel contention that the change in our SBM laws one month after he was ordered to submit to a lifetime of SBM necessitates extraordinary relief under Rule 60(b)(6). Defendant's appeal was perfected on 20 August 2021, which would typically divest the trial court of jurisdiction; however, Defendant's Rule 60(b)(6) motion for extraordinary relief vested the trial court with the authority to indicate how it would rule if an appeal were not pending. *See Bell*, 43 N.C. App. at 142, 258 S.E.2d at 409; *see also Morgan v. Nash Cnty.*, 224 N.C. App. 60, 74–75, 735 S.E.2d 615, 625 (2012) (upholding an advisory opinion issued by the trial court during the pendency of an appeal).

Upon our *de novo* review, it appears that statements made in the transcript and conclusions made in the Rule 60 Order are at odds with each other. On the one hand, the transcript reveals the trial court stated: "I believe the case law clearly indicates that my reviewing the matter presently, while its [sic] on appeal to the Court of Appeals, [] divests me of [] jurisdiction." On the other hand, the trial court concludes in its Rule 60 Order that "Rule 60(b)(6) does not apply because extraordinary circumstances do not exist." The trial court's error in concluding it lacked jurisdiction to enter an order on the Rule 60(b)(6) motion would necessarily negate its secondary conclusion that "respectfully, Rule 60(b)(6) does not apply because extraordinary circumstances do not exist." In order to conclude that extraordinary circumstances did not exist, the trial court would first have to determine it had jurisdiction—which it had pursuant to our caselaw—yet did not recognize.

In this particular instance, where our review of statements made in the transcript and conclusions made in the Rule 60 Order do not align, we elect to allow the conclusions made in the Rule 60 Order to guide this Court's ultimate disposition. Because the trial court had jurisdiction to enter an order on Defendant's Rule 60(b)(6) motion, we reverse and remand for a new hearing consistent with this opinion. *See Bell*, 43 N.C. App. at 143, 142, 258 S.E.2d at 409 (reversing and remanding after concluding the trial court "should have considered appellant's Rule 60(b) motion for the limited purpose of indicating how it would have been inclined to rule on the motion and the trial court erred in dismissing the Rule 60(b) motion").

IV. Conclusion

The pendency of Defendant's appeal from the SBM Order did not divest the trial court of jurisdiction to enter an order on Defendant's Rule 60(b)(6) motion. Accordingly, we reverse and remand.

REVERSED AND REMANDED.

Judges ARROWOOD and CARPENTER concur.

STATE v. LESTER

[291 N.C. App. 480 (2023)]

STATE OF NORTH CAROLINA
v.
ANDRE EUGENE LESTER

No. COA23-115

Filed 5 December 2023

Evidence—testimonial evidence—Confrontation Clause—hearsay—exceptions—phone records—statutory rape case

Defendant was entitled to a new trial on charges of statutory rape of a child and related sexual offenses arising from his interactions with a thirteen-year-old girl, where the trial court erroneously admitted into evidence defendant's cell phone records along with a derivative record showing communications between his phone and the girl's phone. The records' admission violated defendant's rights under the Confrontation Clause of the Sixth Amendment, since the records constituted direct testimonial evidence and defendant was not given any prior or in-court opportunity to confront the records' source or assertions. Although the court properly determined that the records were inadmissible under the business records exception to the hearsay rule—because the State failed to authenticate defendant's phone records, and the derivative record was expressly made for litigation purposes rather than in the regular course of the phone company's business—the court erred in admitting the records under the "catch-all" exception to the hearsay rule. Further, because the records were the only evidence that corroborated the girl's testimony at trial, the State failed to show that the court's error was harmless beyond a reasonable doubt.

Appeal by defendant from judgment entered 21 July 2022 by Judge Thomas H. Lock in Wake County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Deputy General Counsel Tiffany Y. Lucas, and General Counsel Fellow Zachary R. Kaplan, for the State.

Mark L. Hayes, for the defendant-appellant.

TYSON, Judge.

Andre Eugene Lester ("Defendant") appeals from judgments entered upon the jury's verdicts of guilty of statutory rape of a child, statutory sex offense with a child, and indecent liberties with a child. The State has failed to show the Constitutional confrontation error was harmless beyond a reasonable doubt. Defendant is entitled to a new trial.

I. Background

Thirteen-year-old Riley lived in an apartment in Cary with her father and her fifteen-year-old brother. (Pseudonym is used to protect the identity of minors. N.C. R. App. P. 42(b). Riley's father worked during the day and left his children at home alone after school. Riley's mental health diagnoses included major depressive disorder without psychosis, which had previously required "several inpatient psychiatric hospitalizations." Riley also exhibited signs of cutting herself.

Riley's father took her to a Duke Hospital Clinic ("Duke") in the summer of 2019. Riley privately met with Kristen Russell ('Russell"), a social worker. Russell inquired of Riley about her sexual health and experiences. Riley asserted she had previous sexual experiences with a man around thirty years old. Riley told Russell she did not believe this experience was wrong and did not want to tell an adult. Duke is a mandatory reporter of alleged sexual assaults and reported her allegations to Riley's father and to law enforcement officers. Riley was referred to and interviewed at the SAFEchild Advocacy Center.

Cary Police Corporal Armando Bake received Russell's report on 12 September 2019 at the Juvenile Crimes Unit. Corporal Bake spoke with Riley, her father, and her brother. Riley's brother identified the alleged perpetrator as "Ray-Ray," and he informed Corporal Bake "Ray-Ray" was currently in jail for an alleged robbery.

Riley told Corporal Bake that she and "Ray-Ray" had communicated via text messages and cellular phone calls. Riley also gave Corporal Bake her and "Ray-Ray's" cell phone numbers. Corporal Bake contacted Cary Police Detective Jim Young, who was investigating the alleged robbery. Detective Young identified "Ray-Ray" as Defendant and also confirmed his date of birth and his cell phone number.

Corporal Bake and Detective John Schneider obtained a court order requesting Defendant's cell phone records from Verizon from May 2019 until July 2019. The officers used PenLink, a computer program, to create a derivative record showing communications between Defendant's and Riley's cellular phones. PenLink derived "over 100 communications . . . between the two phones" within the May to July 2019 time period.

Riley testified she and her brother used their apartment as a "crack house," bringing people over for "drugs and sex," while their father was away working. Riley initially met then thirty-two-year-old Defendant at a hotel through her brother. Riley later encountered Defendant outside near the family's apartment, while she was walking her dog during the summer of 2019. After "small talk," Defendant told Riley that he was waiting to meet her brother. Riley "offered to let [Defendant] wait in the house because it was hot outside."

Riley and Defendant talked, which "led to [Riley] doing a tarot card reading" for Defendant. Riley displayed a tarot card, which "had a naked lady on it," and which steered the conversation towards the topic of sex. Riley produced and showed Defendant her "pleasure toys." Riley asked Defendant if he wanted to have sex. Defendant agreed, and the two went into Riley's brother's bedroom and allegedly engaged in multiple acts of fellatio and intercourse.

Riley allegedly told her brother what had occurred when he arrived home a short time later. Neither Riley nor her brother told their father or any other adult about the allegations until her visit at Duke, because she was "scared." Defendant received Riley's cell phone number from her brother and began to communicate with her.

Defendant was indicted for statutory rape of a person fifteen years or younger, statutory sexual offense with a child fifteen years or younger, and indecent liberties with a child.

During pre-trial proceedings on the day trial was scheduled to begin, Defendant's attorney stated: "Your honor, the defendant requests that I move to withdraw, so I move to withdraw." Defendant's attorney stated he had been representing Defendant for several years in multiple different cases. Defendant's attorney asserted this representation had begun cordially, but their relationship had become difficult after Defendant had "refused to talk to him." Defendant's attorney stated he had received all discovery materials and an offer of a plea agreement from the State, which he had forwarded to Defendant. Defendant's attorney stated he was familiar with the case and was fully prepared to try the case.

Defendant stated his counsel had not come to see him much and had "yelled" at him during a visit. Defendant disagreed with his counsel's trial strategy, specifically his counsel's refusal to challenge the indictment and to file a motion for discovery. Defendant acknowledged receipt of all materials provided by the State, including a plea offer and agreement.

The trial court denied Defendant's counsel's motion to withdraw, trial proceeded, and a jury convicted Defendant of all three charges. The trial court consolidated his convictions for statutory rape of a person fifteen years or younger and statutory sexual offense with a child fifteen years or younger and sentenced Defendant to an active sentence of 317 to 441 months imprisonment. Defendant was also sentenced to 21 to 35 months active imprisonment for the indecent liberties with a child conviction, the sentences to run consecutively. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

Defendant argues the trial court erred by: (1) admitting phone records, which were hearsay and violated his rights under the Confrontation Clause, (2) admitting hearsay evidence to link him to a phone number; (3) allowing an in-court identification based on an impermissibly suggestive pretrial procedure; (4) denying his motion to have his attorney withdraw as counsel; and, (5) denying his motion for a new attorney.

IV. Confrontation Clause

Defendant asserts the admission of State's Exhibit #2 of the Verizon records showing calls made to and from cell number (984)-328-XXXX from 1 May 2019 to 13 July 2019 and State's Exhibit #3 showing calls to Defendant's purported cell number ending in 1545 and (984)-328-XXXX were inadmissible hearsay and violated his Sixth Amendment right to confront and cross-examine witnesses and challenge the evidence admitted against him.

A. Standard of Review

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless [the State proves] . . . it was harmless beyond a reasonable doubt." *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 830 (2007) (citing N.C. Gen. Stat. § 15A-1443(b) (2005)). Whether a defendant's right to confrontation has been violated is reviewed *de novo*. *State v. Jackson*, 216 N.C. App. 238, 241, 717 S.E.2d 35, 38 (2011) (citation omitted).

"When the State fails to prove the error was harmless beyond a reasonable doubt, 'the violation is deemed prejudicial[,] and a new trial is

required.' " *State v. Glenn*, 220 N.C. App. 23, 25, 725 S.E.2d 58, 61 (2012) (citation omitted).

B. Analysis

1. Sixth Amendment Confrontation Clause

Defendant argues he suffered Constitutional and prejudicial error when the trial court admitted the hearsay cellular phone data records as direct evidence without any prior or in-court opportunity for him to confront and cross-examine the source and assertions. U. S. Const. amend VI.

The Supreme Court of the United States held: "The Sixth Amendment's Confrontation Clause provides that, [i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. We have held that this bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42, 158 L. Ed. 2d 177, 187 (2004) (citations and quotation marks omitted).

Justice Scalia cited a very early decision from the Court in North Carolina in support of the original meaning and understanding of the right of confrontation:

> Early state decisions shed light upon the original understanding of the common-law right. *State v. Webb*, 2 N.C. 103 (1794) (per curiam), decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.*, at 104.

Crawford, 541 U.S. at 49, 158 L. Ed. 2d at 191,

Justice Scalia also reasoned:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability. . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.

Id. at 42, 158 L. Ed. 2d at 187 (internal quotation marks omitted).

Our Supreme Court more recently held the Sixth Amendment Confrontation Clause within the Constitution of the United States, and applicable to the states, bars admission of direct testimonial evidence, "unless the declarant is unavailable to testify and the accused had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009).

Courts employ a three-step inquiry to determine whether a defendant's right to confront a witness has been violated: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and, (3) whether defendant had an opportunity to cross-examine the declarant. *See State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004); *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

The trial court made oral findings to support its ruling to admit State's Exhibit #2:

> The court does not find that it is admissible under the express terms of Rule 801 - - I'm sorry, 803(6). However, the court will accept the document under Rule 803(6) read in conjunction with Rule 803(24), the so-called catch-all exception to the hearsay rule under Rule 803, in that the document is not specifically covered by any of the foregoing exceptions under the rule, but does have equivalent circumstantial guarantees of trustworthiness, in that *the statement is offered as evidence of a material fact; it is more probative on the point for which it is offered than any other evidence which the proponent could procure through reasonable efforts;* and the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
>
> The court, moreover, does find, and I believe there is no dispute as to this, that the proponent did give written notice stating its intention to offer this statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (emphasis supplied).

The trial court's findings answered the first and second factors and steps above in the affirmative and the third factor in the negative and these statements are testimonial. *Clark*, 165 N.C. App. at 283, 598 S.E.2d at 217; *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

These findings contravene *Crawford*'s admonition, "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability. . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Crawford*, 541 U.S. at 42, 158 L. Ed. 2d at 187. *Crawford* forbids testimonial evidence not subject to confrontation, and the evidence should have been excluded. *Id.*

2. Rule of Evidence 803(6)

The trial court erroneously admitted this evidence under a combination of hearsay rules, "under Rule 803(6) read in conjunction with Rule 803(24)." Hearsay is a "statement *other than one made by the declarant while testifying at the trial* or hearing, offered in evidence *to prove the truth of the matter asserted*." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2021) (emphasis supplied).

The State initially attempted to admit State's Exhibits #2 and #3 solely as business records pursuant to Rule 803(6). No official or agent from Verizon appeared in court to authenticate them, and the cover letter purporting to authenticate the records were not sworn, under seal nor notarized, to qualify them as an affidavit, nor were any of these record subject to prior confrontation by Defendant. *Id.*

While Verizon's hearsay records, which are produced and kept in the ordinary course of business, may have been qualified a custodian and sought admission as non-testimonial ordinary course of business records, the State failed to authenticate them to justify admission under that specific exception. *Id.*; *State v. Smith*, 315 N.C. 76, 93, 337 S.E.2d 833, 844 (1985). The trial court correctly concluded, "[t]he court does not find that it is admissible under the express terms of Rule 801 - - I'm sorry, 803(6)." N.C. Gen. Stat. § 8C-1, Rule 803(6) (2021),

State's Exhibit # 3 was also inadmissible as a business record after Detective Schneider testified the document was expressly made for the purpose of litigation and not produced or retained in the regular course of Verizon's business. *Id.* The documents were compiled, derived, and presented for the upcoming litigation, and the Exhibits were not compiled nor maintained in the regular course of Verizon's business nor presented by a qualified custodian. N.C. Gen. Stat. § 8C-1, Rule 803(6).

No one was present at trial with knowledge or authority to validate or testify to and to be subject to cross-examination concerning their maintenance, retention, compilation, chain of custody, or authenticity. *Id.* The trial court, after objection, correctly denied their admission as

business records, given as the trial court properly found, "the statement is offered as evidence of a material fact." *Id.*

3. Rule of Evidence 803(24) Catch all

The trial court then erroneously admitted both the challenged documents and exhibits over objection "under rule 803(6) read in conjunction with Rule 803(24), the so-called catch-all exception." Rule 803(24) governs the admission of a hearsay statement, as a "catch all", which is not covered by another exception, but the evidence carries sufficient *indicia* of reliability. The residual or "catch all" exception to the rule against the admission of hearsay statements is codified by N.C. Gen. Stat. § 8C-1, Rule 803(24) (2021).

The residual hearsay exception allows the admission of:

> [a] *statement not specifically covered by any of the foregoing exceptions* but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. *However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.*

Id. (emphasis supplied).

In order for hearsay statements to be admissible under Rule 803(24), our Supreme Court, in a pre-*Crawford* opinion, held the trial court must also determine and conjunctively find:

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent

> can procure through reasonable efforts, *and* (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003) (citations omitted) (emphasis supplied). *See Crawford*, 541 U.S. at 42, 158 L. Ed. 2d at 187.

The trial court is also mandated to "make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court [erred] in making its ruling." *State v. Sargeant*, 365 N.C. 58, 65, 707 S.E.2d 192, 196 (2011) (citation omitted). "If the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception." *Id.* (citation omitted).

As noted, the trial court made findings purporting to support its ruling to admit State's Exhibit #2:

> The court does not find that it is admissible under the express terms of Rule 801 - - I'm sorry, 803(6). However, the court will accept the document under Rule 803(6) read in conjunction with Rule 803(24), the so-called catch-all exception to the hearsay rule under Rule 803, in that the document is not specifically covered by any of the foregoing exceptions under the rule, but does have equivalent circumstantial guarantees of trustworthiness, in that the statement is offered as evidence of a material fact; it is more probative on the point for which it is offered than any other evidence which the proponent could procure through reasonable efforts; and the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
>
> The court, moreover, does find, and I believe there is no dispute as to this, that the proponent did give written notice stating its intention to offer this statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

When the State sought to introduce their Exhibit #3 at trial, Defendant renewed and objected on the same grounds as previously asserted, and the trial court again overruled Defendant's objection.

The primary purpose of the court-ordered production of and preparation of the data records retained and provided by Verizon was to prepare direct testimonial evidence for Defendant's trial. The trial court specifically found "the statement is offered as evidence of a material fact." Exhibits #2 and #3 were offered and admitted for consideration by the jury as substantive and testimonial evidence. Defendant was not given the prior opportunity or at trial to challenge or cross-examine officials from Verizon, who had purportedly accumulated this evidence, and their admission as such violated Defendant's rights under the Confrontation Clause. U. S. Const. amend VI. *Crawford*, 541 U.S. at 42, 158 L. Ed. 2d at 187; *State v. Webb*, 2 N.C. 103, 104 (1794) (per curiam) ("no man shall be prejudiced by evidence which he had not the liberty to cross-examine").

4. Harmless Error

The State recognizes the potential Confrontation error and argues their erroneous admission was "harmless beyond a reasonable doubt." *Lewis*, 361 N.C. at 549, 648 S.E.2d at 830 (citation omitted). The trial court found the phone records were direct evidence of the State's case and submitted them to the jury. Without these records, and in the absence of other physical or corroborative evidence, the State's case relies solely upon Riley's allegations and testimony. Without these records, the jury was left to adjudicate Defendant's guilt solely upon Riley's credibility.

The State has failed to carry its burden to prove the erroneous admission of the hearsay phone records in violation of the Confrontation Clause was "harmless beyond a reasonable doubt." *Id.* (citation omitted). The purported cellular phone contacts between Defendant and Riley after the alleged assaults gave corroboration and credibility to her testimony. No other physical or direct evidence was admitted to support the State's case.

The State cannot demonstrate, absent the cellular phone data hearsay or without other physical or direct evidence, the jury would have found Riley's allegations as credible to reach its verdicts to meet and carry its burdens to demonstrate the Constitutional error was "harmless beyond a reasonable doubt." *Id.*

V. Conclusion

This challenged evidence was testimonial, and the trial court correctly ruled they did not qualify to be admitted as business records. The State failed to carry its burden to demonstrate the error in the admission of the admittedly hearsay cell phone records in State's Exhibits #2 and #3 was "harmless beyond a reasonable doubt." *Id.*

We reverse the trial court's rulings on Defendant's motions, vacate the trial court's judgment entered on Defendant's convictions for statutory rape of a person fifteen years or younger, statutory sexual offense with a child fifteen years or younger, and indecent liberties with a child, and remand for a new trial.

In light of our disposition on these issues, we need not address Defendant's remaining arguments. *It is so ordered.*

NEW TRIAL.

Judges COLLINS and WOOD concur.

STATE OF NORTH CAROLINA
v.
JORDAN NATHANIEL MITCHELL

No. COA23-270

Filed 5 December 2023

1. Criminal Law—defenses—voluntary intoxication—jury instructions—sufficiency of evidence

In a prosecution for charges arising from a pharmacy break-in, the trial court did not err by denying defendant's request for a jury instruction on voluntary intoxication. According to the evidence, defendant and an accomplice successfully broke into the pharmacy by prying open and sliding under a roll-up door leading to the stock room, after which they stole items from the pharmacy, ran out the front door through a parking lot into a field across the street, and then attempted to climb over a fence. Although some evidence indicated that defendant was very sleepy during police interviews, had a hard time standing up, and had consumed cocaine over the previous few days, defendant failed to show that he was so intoxicated on the day of the break-in that he could not form the specific intent to commit the charged offenses.

2. Firearms and Other Weapons—possession of a firearm by a felon—jury instructions—type of firearm not specified—plain error analysis

In a prosecution for charges arising from a pharmacy break-in, where law enforcement saw defendant drop what looked like a gun while fleeing the scene through the pharmacy parking lot, the

trial court did not commit plain error when it instructed the jury on the charge of possession of a firearm by a felon without identifying the specific firearm listed in defendant's indictment: a revolver found in the parking lot. The court properly instructed the jury on the requirement that defendant have actual possession of a firearm in order to be convicted of the crime. Although law enforcement found two other guns (in addition to the revolver) inside a vehicle that was parked outside the pharmacy during the break-in, defendant was never seen near that vehicle; therefore, because defendant could not have had actual possession of the other two guns, the court did not plainly err in failing to single out the revolver in its jury instructions.

Judge MURPHY concurring in the result only as to Part II-A.

Appeal by Defendant from judgments entered 9 August 2022 by Judge Patrick Thomas Nadolski in Guilford County Superior Court. Heard in the Court of Appeals 1 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State-Appellee.

Mary McCullers Reece for Defendant-Appellant.

COLLINS, Judge.

Defendant, Jordan Nathaniel Mitchell, appeals from judgments entered upon guilty verdicts of breaking and entering, two counts of larceny after breaking and entering, possession of a firearm by a felon, and resisting a public officer. Defendant argues that the trial court erred by denying his request for a jury instruction on voluntary intoxication, and that the trial court plainly erred by not identifying the specific firearm in its jury instructions for possession of a firearm by a felon. We find no error or plain error.

I. Background

The evidence at trial tended to show the following: Greensboro Police Officer Taylor Brame received a call around 5:00 a.m. on 10 May 2021, reporting two males wearing black hoodies and blue jeans had broken into a Walgreens pharmacy through a roll-up door behind the pharmacy. When Brame arrived on the scene, she observed a white Jeep Cherokee parked near the roll-up door behind the pharmacy. The

vehicle was unlocked, and the keys were in the ignition. Brame removed the keys from the ignition and "proceeded to do a perimeter around the store [and] check for broken windows, while [she] waited for additional units to respond."

Two males, later identified as Defendant and Lloyd Harper, briefly stepped out of the rear door on the right side of the pharmacy. Brame "barely could give commands [before] they shut the door again[.]" Defendant and Harper then exited the pharmacy through the front door and ran through the parking lot. While Defendant and Harper were running through the parking lot, Defendant dropped what "looked to be a gun[.]" Defendant and Harper crossed through the bushes at the front of the parking lot and ran into a field across the street. Defendant was apprehended, while trying to climb over a fence, and Harper was later apprehended after climbing over the fence and running into the woods.

Upon searching the parking lot, officers discovered "a .22 Ruger caliber [revolver] in a holster . . . along with a tire iron that [Defendant and Harper had] discarded." The "revolver was damaged, so th[e] barrel fell out of that." Two bottles of Oxybutynin, a prescription bladder medication, were found in the field where Defendant was apprehended. The shelves inside the pharmacy "[l]ooked like stuff had been knocked over. . . . [either] purposely knocked over or knocked over as [Defendant and Harper] came out[.]" Three boxes of Newport cigarettes, two boxes of compression socks, and another bottle of prescription medication were found on the floor near the pharmacy exit.

Officers searched the Jeep that was parked behind the pharmacy and discovered the following: two HP laptop computers, an HP PC charger, a Samsung TV, Razer headphones, an HP all-in-one printer, and a Byrna PepperBall pistol. These items, along with the Ruger .22 caliber revolver, had been stolen earlier that night from Wilson & Lysiak, an architectural business approximately a half-mile away from the Walgreens. Officers also discovered a nine-millimeter Beretta on the passenger side dashboard.

Defendant was indicted for two counts of breaking and entering, breaking and entering a pharmacy, two counts of larceny after breaking and entering, possession of a firearm by a felon, and resisting a public officer. Defendant filed a notice of defense, asserting that "[D]efendant was so intoxicated that he was unable to form the requisite specific intent" for the charged offenses.

The matter came on for trial on 11 July 2022. Defendant moved to dismiss at the close of the State's evidence, and the trial court denied the

motion.[1] The trial court denied Defendant's request for a jury instruction on voluntary intoxication during the jury charge conference. The jury returned guilty verdicts of breaking and entering, breaking and entering with intent to commit larceny, two counts of larceny after breaking and entering, possession of a firearm by a felon, and resisting a public officer.

The trial court sentenced Defendant to 19 to 32 months of imprisonment for possession of a firearm by a felon. Furthermore, the trial court sentenced Defendant to three consecutive terms of 11 to 23 months of imprisonment for breaking and entering, two counts of larceny after breaking and entering, and resisting a public officer. Finally, the trial court arrested judgment on Defendant's conviction for breaking and entering with intent to commit larceny. Defendant appealed.

II. Discussion

A. Voluntary Intoxication

[1] Defendant first argues that the trial court erred by denying his request for a jury instruction on voluntary intoxication.

"To determine whether a defendant is entitled to a requested instruction on voluntary intoxication, this Court reviews de novo whether each element of the defense is supported by substantial evidence when taken in the light most favorable to the defendant." *State v. Meader*, 377 N.C. 157, 162, 856 S.E.2d 533, 537 (2021) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quotation marks and citation omitted).

"The doctrine of voluntary intoxication should be applied with great caution." *Id.* (quotation marks, brackets, and citation omitted). "A defendant is not entitled to an instruction on voluntary intoxication in every case in which a defendant consumes intoxicating beverages or controlled substances." *Id.* (quotation marks, brackets, ellipses, and citation omitted). To obtain a voluntary intoxication instruction, a defendant "must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form" the specific intent to commit the underlying offenses. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). "Evidence of mere intoxication, however, is not enough to meet defendant's burden of production." *Id.* "There must be some evidence tending to show that the defendant's

1. Defendant was also indicted for breaking and entering a private residence. The indictment does not appear in the record before us; however, it appears from the record and transcripts that the trial court dismissed this charge at the close of the State's evidence and denied the motion to dismiss with respect to the relevant charges.

mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan." *Meader*, 377 N.C. at 162, 856 S.E.2d at 537 (quotation marks, brackets, and citation omitted).

Here, surveillance footage from the Walgreens showed that Defendant and Harper "pried [the exterior roll-up door] up enough to where they . . . were actually able to slide under the door and into the stock room." Defendant and Harper "went upstairs to see what was in the upstairs stock room" and then came back downstairs, "jimmied the door, [and] got into the pharmacy." When Brame arrived at the Walgreens, she observed the white Jeep parked near the roll-up door behind the pharmacy. At that time, Defendant and Lloyd Harper briefly stepped out of the rear door on the right side of the pharmacy, and Brame "barely could give commands [before] they shut the door again[.]" Defendant and Harper then exited the pharmacy through the front door, ran through the parking lot into a field across the street, and attempted to climb over a fence. Brame testified that Defendant was "very sweaty" and "breathing heavily," and that "we all were, as you could hear in the [bodycam footage]."

Greensboro Police Detective Martin attempted to interview Defendant after he was apprehended and observed that Defendant "was pretty sleepy . . . [and] hadn't slept in a couple days." Defendant "would talk to himself, kind of not complete any thoughts or sentences. He had a hard time standing up, which I think would relate to him being sleepy at that time, and he said that he was tired."

Defendant testified that he had used "probably like 3.5 grams" of cocaine over the span of two or three days and that he "kind of lost control of [him]self at the time somewhat." He recalled meeting up with Harper, driving around in the white Jeep, and going to the Walgreens because he was "probably [looking for] money[.]"

Defendant felt "[p]anicked" as he was leaving the Walgreens and running through the parking lot, and remembered "[t]he road, a fence, and being tackled[.]" Defendant recalled being interviewed at the police station, and that he "didn't really have much to say." Defendant further testified, "I was nodding off. I was really tired, and they was just dragging me through the processing. I just wanted to go to sleep, talk about it - wake up later. Didn't really -- but they drug me through that process. I was really exhausted."

When viewed in the light most favorable to Defendant, he has failed to produce substantial evidence which would support a conclusion by

the judge that he was so intoxicated that he could not form the specific intent to commit the underlying offenses. *See Mash*, 323 N.C. at 346, 372 S.E.2d at 536.

Accordingly, the trial court did not err by denying Defendant's request for a jury instruction on voluntary intoxication.

B. Possession of a Firearm by a Felon

[2] Defendant next argues that the trial court plainly erred by not identifying the specific firearm listed in the indictment in its jury instructions for possession of a firearm by a felon.

"If at trial, a defendant fails to object to a jury instruction, that instruction is reviewable on a plain error standard on appeal." *State v. Raynor*, 128 N.C. App. 244, 247, 495 S.E.2d 176, 178 (1998) (citation omitted). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citation omitted). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (quotation marks, brackets, and citations omitted).

Here, the indictment alleged that Defendant "unlawfully, willfully and feloniously did possess a Ruger 22 caliber revolver, which is a firearm." The trial court gave the following jury instruction for possession of a firearm by a felon:

> The defendant has been charged with possession -- possessing a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that on March 31st, 2010, in Moore County Superior Court, the defendant pled guilty to or was found guilty of a felony that was committed in violation of the laws of the State of North Carolina.
>
> And second, that after March 31st, 2010, the defendant possessed a firearm. A person has actual possession of a firearm -- strike that . A person has actual possession of an article if the person has it on the person, is aware

> of its presence, and either alone or together with others has both the power and intent to control its disposition or use.
>
> If you find from the evidence beyond a reasonable doubt that on March 31st, 2010, in Moore County Superior Court, the defendant pled guilty to or was found guilty of a felony that was committed in violation of the laws of the State of North Carolina and that the defendant, after March 31st, 2010, possessed a firearm, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Aside from briefly stepping out of the rear door on the right side of the pharmacy, Defendant was not near the Jeep where the Byrna PepperBall pistol and nine-millimeter Beretta were later found. Rather, Defendant exited the pharmacy through the front door and dropped what "looked to be a gun" while running through the parking lot. After Defendant was apprehended, "a .22 Ruger caliber [revolver] in a holster" was found in the parking lot. The trial court instructed the jury that "[a] person has actual possession of an article if the person has it on the person, is aware of its presence, and either alone or together with others has both the power and intent to control its disposition or use." Because Defendant was not near the Jeep where the Byrna PepperBall pistol and nine-millimeter Beretta were found and thus could not have had actual possession of either weapon, the trial court did not plainly err by not specifically identifying the .22 Ruger caliber revolver in its jury instructions for possession of a firearm by a felon.

III. Conclusion

The trial court did not err by denying Defendant's request for a jury instruction on voluntary intoxication. Furthermore, the trial court did not plainly err by not identifying the specific firearm in its jury instructions for possession of a firearm by a felon.

NO ERROR; NO PLAIN ERROR.

Judge TYSON concurs.

Judge MURPHY concurs in the result only as to Part II-A and concurs in Part II-B.

STATE OF NORTH CAROLINA
v.
JOHNNY LEE WILLIAMS, DEFENDANT

No. COA22-914

Filed 5 December 2023

Search and Seizure—motion to suppress—erroneous finding and conclusion—plain error analysis—no constitutional violation

In a drug prosecution, there was no plain error in the trial court's denial of defendant's motion to suppress evidence found during a traffic stop where, although the trial court's order contained a factual error (regarding the contents of an anonymous tip about possible drug activity) and an erroneous conclusion of law (that Fourth Amendment scrutiny was not triggered during the stop even though an officer assisted defendant out of the vehicle, at which point no reasonable person would have felt free to leave), those errors did not amount to fundamental error seriously affecting the fairness of the proceedings. Defendant's constitutional rights were not violated during the stop because officers' initial interactions with the vehicle's occupants were consensual, and the occupants were not seized until after officers had reasonable suspicion that illegal drug activity was taking place based on smelling an odor of marijuana coming from the car, seeing marijuana crumbs in plain view, and soliciting an explanation from one of the occupants that he possessed no marijuana but that he "was just making a blunt."

Chief Judge STROUD concurring in result only.

Appeal by Defendant from order entered 17 August 2022 by Judge Vince Rozier, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip T. Reynolds, for the State.

Dysart Willis, by Andrew Nelson, for Defendant-Appellant.

CARPENTER, Judge.

Johnny Lee Williams ("Defendant") appeals from judgment entered after a jury found him guilty of one count of possessing methamphetamine, one count of possessing drug paraphernalia, one count of resisting a public officer, and one count of carrying a concealed weapon. On appeal, Defendant argues the trial court plainly erred in denying his motion to suppress because the suppression order contains erroneous findings of fact and conclusions of law. After careful review, we disagree with Defendant and find no plain error.

I. Factual & Procedural Background

This case began with a traffic stop initiated by two Johnston County Sheriff's deputies on 3 August 2018 in a mobile-home park. On 4 September 2018, a Johnston County grand jury returned true bills of indictment against Defendant, charging him with one count each of the following: trafficking in methamphetamine by possession; trafficking in methamphetamine by transportation; possession of drug paraphernalia; possessing up to one-half ounce of marijuana; resisting a public officer; carrying a concealed weapon; and attaining the status of habitual felon. On 21 January 2020, a Johnston County grand jury returned a superseding true bill of indictment, indicting Defendant of one count of possession with intent to sell or deliver methamphetamine. On 22 March 2019, Defendant filed a pretrial motion to suppress the evidence collected by the deputies on 3 August 2018. On 17 February 2020, the Honorable Vince Rozier, Jr. conducted a pretrial hearing concerning Defendant's motion to suppress.

The evidence presented at the pretrial suppression hearing tended to show the following: On 3 August 2018, the Johnston County Sheriff's Department dispatched two deputies, Deputy Andrew McCoy and Deputy Jonathan Lee, in response to a service call concerning drug activity. Deputy McCoy testified that an anonymous caller stated "the meth man is on the way over [to the mobile-home park]," and that "a deal is about to happen." A follow-up call came in stating, "it's either lot 10 or 11 [of the mobile-home park] and should have a silver Saturn in the yard."

When Deputy McCoy arrived at the scene, he saw one silver car and one black car, both parked near a mobile home. Deputy McCoy parked behind the mobile home; he did not block either vehicle or use emergency signaling. There were four individuals in the silver car, and one individual in the black car. Deputy McCoy stood between the two vehicles and began speaking with the driver of the black car.

While Deputy McCoy was speaking with the driver of the black car, a passenger in the back seat of the silver car rolled down his window and

spoke to Deputy McCoy. Deputy McCoy then "began to smell the odor of marijuana coming from the car." He also saw "marijuana crumbs," in plain view, on the rear passenger's lap and clothing. When questioned by Deputy McCoy as to how much marijuana he had in the car, the passenger responded, "none, I was just making a blunt." At that time, another back-seat passenger exited the silver vehicle and walked to the front of the vehicle.

Deputy Lee then arrived at the scene and parked directly behind Deputy McCoy. He "noticed the vehicle that had been described by the call notes" and walked up between the cars, where Deputy McCoy stood. Deputy McCoy approached the front passenger window of the silver car, where Defendant was seated. According to Deputy McCoy, Defendant's "hand was completely under his buttocks," and he "appeared to be stuffing something under his person and in his seat." After multiple requests, Defendant refused to show his hands or get out of the car. Deputy McCoy ultimately assisted Defendant out of the vehicle. Before Deputy McCoy could pat down Defendant, another passenger started to run from the silver car, and Deputy McCoy chased him on foot.

Deputy Lee stayed with the vehicles and "tr[ied] to keep [the subjects, who had all exited from the vehicles,] centralized in one area" while also keeping an eye on Deputy McCoy's pursuit. Deputy Lee witnessed Defendant approach the driver's side of the black vehicle. Deputy Lee ordered Defendant to stay where he was.

Shortly thereafter, Deputy Lee observed Defendant "bend over in the front end of the vehicle in the grill area" and make "a swinging motion [with] his arm." Deputy Lee asked Defendant to stop moving. Defendant did not respond to Deputy Lee. Instead, Defendant moved to the opposite side of the vehicle and ran from the scene. Deputy Lee caught Defendant and patted him down, but Deputy Lee did not find any weapons or contraband on Defendant. After securing Defendant in a patrol car, the officers searched the area, including under and inside the vehicles. In the silver car, the officers found digital scales, a glass smoking pipe, a plastic bag containing what the officers believed was methamphetamine, a plastic bag containing what the officers believed was marijuana, and other drug paraphernalia.

On 17 February 2020, the trial court issued a written order denying Defendant's motion to suppress. On 8 March 2021, a jury trial began before the Honorable Thomas H. Locke, and the State introduced evidence collected from the scene without objection. The jury returned unanimous verdicts finding Defendant guilty of one count of possession

of methamphetamine, one count of possession of drug paraphernalia, one count of resisting a public officer, and one count of carrying a concealed weapon. Defendant admitted to attaining the status of habitual felon. The trial court sentenced Defendant to a minimum term of thirty-six months and a maximum term of fifty-six months in prison. Defendant filed deficient[1] written notice of appeal on 19 March 2021.

On 3 May 2022, after granting Defendant's first petition for writ of certiorari, this Court concluded the trial court's order denying Defendant's pretrial motion to suppress lacked sufficient conclusions of law. We remanded so the trial court could make the required conclusions. The trial court executed an amended order denying Defendant's motion to suppress on 17 August 2022. Defendant filed timely written notice of appeal on 25 August 2022.

II. Jurisdiction

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

III. Issue

The issue on appeal is whether the trial court plainly erred in denying Defendant's motion to suppress.

IV. Analysis

On appeal, Defendant argues that the trial court erred in denying his motion to suppress because the suppression order contains erroneous findings of fact and conclusions of law. Defendant argues Deputies McCoy and Lee violated his Fourth Amendment rights. After careful review, we disagree.

A. Standard of Review

Normally, "[t]he standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)). And we review the trial court's conclusions of law de novo. *State v. Leach*, 166 N.C. App. 711, 715, 603 S.E.2d 831, 834 (2004).

1. Defendant's notice of appeal inaccurately described the criminal counts included in the judgment issued by the trial court.

But our standard of review changes when a motion-to-suppress issue is not preserved. *See State v. Burwell*, 256 N.C. App. 722, 729, 808 S.E.2d 583, 590 (2017). This is because we review certain unpreserved issues for plain error: "(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). The second plain-error category "includes the denial of a pre-trial motion to suppress when a defendant fails to object to the admission of evidence that was the subject of his pre-trial motion to suppress." *Burwell*, 256 N.C. App. at 729, 808 S.E.2d at 590; *see also State v. Waring*, 364 N.C. 443, 468, 701 S.E.2d 615, 631–32 (2010) ("[T]o the extent defendant failed to preserve issues relating to the motion to suppress, we review for plain error.").[2]

"To preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial." *State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (citation omitted); *see State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (holding that "a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue . . . for appeal unless a defendant renews the objection during trial").

Here, Defendant filed a motion to suppress the challenged evidence, but at trial, Defendant failed to object to the admission of the evidence. Thus, Defendant failed to preserve any issues concerning his motion to suppress. *See Golphin*, 352 N.C. at 463, 533 S.E.2d at 232. Defendant appealed, and in February 2022, we remanded the matter to allow the trial court to make adequate conclusions of law. Our remand, however, did not negate the fact that Defendant failed to preserve the issues raised in his motion to suppress at trial. Thus, we review the trial court's denial of Defendant's motion to suppress for plain error. *See Burwell*, 256 N.C. App. at 729, 808 S.E.2d at 590; *Waring*, 364 N.C. at 468, 701 S.E.2d at 632.

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2. In *Waring*, the Court declared the plain-error standard of review, yet it used the approach designated for preserved motion-to-suppress issues. *See Waring*, 364 N.C. at 468–74, 701 S.E.2d at 631–35. This, however, was not a rejection of the plain-error standard; it was an application of the first plain-error step. The first step of the plain-error review is to determine if the trial court erred. *See State v. Lawrence*, 365 N.C. 512, 519, 723 S.E.2d 330, 335 (2012). In other words, if the trial court did not err, the trial court could not have *plainly* erred, so the analysis is complete. *See id.* at 519, 723 S.E.2d at 335. The *Waring* Court found no errors in the challenged motion to suppress, so there was no need to proceed to the second step of the plain-error review. *See Waring*, 364 N.C. at 468–74, 701 S.E.2d at 631–35; *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335 (stating that the second step of the plain-error review is to discern whether an error was "fundamental").

To find plain error, this Court must first determine that an error occurred at trial. *See 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 probably caused a guilty verdict 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) (quoting *State v. Lawrence*, 365 N.C. 512, 519, 723 S.E.2d 330, 335 (2012)). Notably, the "plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

B. The Fourth Amendment and Applicable Rules

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." U.S. CONST. amend. IV. The Fourth Amendment protects citizens from unreasonable searches or seizures within their homes, *State v. Borders*, 236 N.C. App. 149, 163, 762 S.E.2d 490, 502 (2014), and within their vehicles, *State v. Mackey*, 209 N.C. App. 116, 124, 708 S.E.2d 719, 724 (2011).

Under the Fourth Amendment, "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). Freedom of movement is restrained by a show of authority " 'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *State v. Isenhour*, 194 N.C. App. 539, 543, 670 S.E.2d 264, 267 (2008) (quoting *Mendenhall*, 446 U.S. at 553, 100 S. Ct. at 1877, 64 L. Ed. 2d at 509). Whether a reasonable person would feel "free to leave" a police encounter is determined by analyzing the totality of circumstances. *Id.* at 543, 670 S.E.2d at 267–68; *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009).

Circumstances that shape whether a reasonable person would feel free to leave a police encounter include, but are not limited to: (1) whether blue lights were illuminated; (2) whether police sirens were engaged; (3) whether weapons were displayed; (4) whether there was physical touching; (5) an officer's language and tone; and (6) the location of an officer's patrol car. *See Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267–68; *Icard*, 363 N.C. at 309–10, 677 S.E.2d at 827–28. Notably, "[p]olice are free to approach and question individuals in public places when circumstances indicate that citizens may need help or mischief might be afoot." *Icard*, 363 N.C. at 311, 677 S.E.2d at 828.

Generally, seizures conducted without a warrant are "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967) (footnote omitted). One such exception is when there is probable cause that an automobile contains contraband, such as a controlled substance. *State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018).

Probable cause is generally defined as "a reasonable ground" to suspect criminal activity. *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004); *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 800, 157 L. Ed. 2d 769, 775 (2003) (" '[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt . . . .' ") (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879, 1890 (1949)). Under the North Carolina Controlled Substances Act, it is unlawful for anyone in North Carolina to possess a controlled substance, and marijuana is a controlled substance. *See* N.C. Gen. Stat. §§ 90-94(b)(1), -95(a)(3) (2021).

C. The Suppression Order

Here, Defendant was neither a resident nor had any possessory interest in the mobile home; thus, his reasonable expectation of privacy is limited to the vehicle in which he was a passenger. *See Borders*, 236 N.C. App. at 163, 762 S.E.2d at 502; *Mackey*, 209 N.C. App. at 124, 708 S.E.2d at 724.

1. Challenged Finding of Fact

First, Defendant challenges a portion of finding of fact 7, that "[a] black car was referenced in the anonymous call." The State concedes error, and we agree: The trial court's reference to an anonymous tip concerning a black car constitutes error, as the testimony only referenced a tip concerning a silver car.

But as we detail below, the trial court's error concerning finding of fact 7 was not plain error because admitting the challenged evidence did not violate Defendant's Fourth Amendment rights. In other words, the trial court's seventh finding of fact was not a plain error because it did not "seriously affect the fairness, integrity, or public reputation" of the trial, as the evidence found in the silver vehicle was appropriately admitted. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21.

2. Challenged Conclusions of Law

Next, Defendant challenges conclusions of law 10 and 11. Conclusion of law 10 states:

> As in *Florida v. Bostick*. . . , a seizure did not occur here simply because of the approach of law enforcement and the asking of a few questions. The individuals who were approached had the right . . . "to disregard the police and go about [their] business". . . . Their failure to do so and the voluntary statements made resulted in the encounter being consensual and no reasonable suspicion was required.

Conclusion of law 11 states: "The encounter with the Defendant did not trigger Fourth Amendment scrutiny." Defendant argues these conclusions are incorrect, and the deputies violated his Fourth Amendment rights. Although the suppression order lacked clear constitutional analysis, we disagree with Defendant.

Here, when Deputy McCoy arrived at the scene, he saw one silver car and one black car, both parked near a mobile home. Prior to arrival, Deputy McCoy received an anonymous tip that an occupant of a silver car was about to engage in a drug deal. On arrival, Deputy McCoy parked behind the mobile home; he did not block the vehicles or use any emergency signaling. There were four individuals, including Defendant, in the silver car, and one individual in the black car. Deputy McCoy stood between the two vehicles and began speaking with the driver of the black car. While Deputy McCoy spoke with the driver of the black car, an occupant in the back seat of the silver car rolled down his window and spoke to Deputy McCoy.

At this point, the encounter between Deputy McCoy and the occupants of the vehicles, including Defendant, was consensual. *See Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267–68; *Icard*, 363 N.C. at 309, 677 S.E.2d at 827. We analyze this encounter against the backdrop presumption that "[p]olice are free to approach and question individuals in public places when circumstances indicate that . . . mischief might be afoot." *See Icard*, 363 N.C. at 311, 677 S.E.2d at 828. Here, Deputy McCoy received a tip that the occupant of a silver car in the trailer park was about to engage in a drug deal, reasonably leading Deputy McCoy to believe that "mischief might be afoot." *See id.* at 311, 677 S.E.2d at 828.

Further, Deputy McCoy did not block the vehicles in; he did not engage his blue lights or sirens; he did not draw his weapon; and he did not touch any of the occupants. Also, the conversations between Deputy McCoy and the vehicle occupants were not coerced; one of the occupants of the silver car rolled down his window to talk with Deputy McCoy—without Deputy McCoy asking the occupant to do so. Under the totality of circumstances, a reasonable person would have felt free

to leave the encounter; thus, Defendant and the other vehicle occupants were not seized at this point. *See Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267–68. Therefore, the trial court did not err in its tenth conclusion of law because the encounter was initially consensual. *See id.* at 543, 670 S.E.2d at 267–68.

After the back-seat occupant of the silver car rolled down his window to speak, Deputy McCoy "began to smell the odor of marijuana coming from the car." He also saw "marijuana crumbs," in plain view, on one occupant's lap and clothing. When questioned by Deputy McCoy as to how much marijuana he had in the car, the occupant responded, "none, I was just making a blunt."

As mentioned, marijuana is illegal in North Carolina. *See* N.C. Gen. Stat. §§ 90-94(b)(1), -95(a)(3). And the smell and sight of marijuana, coupled with an occupant's statement that he "was just making a blunt," are enough to establish "a reasonable ground" to suspect illegal drug possession. *See Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904. Therefore, at this point in the interaction, the deputies had the requisite probable cause to seize the occupants of the vehicles, including Defendant. *See Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 336.

Further, and more specific to Defendant, Deputy McCoy then approached the front passenger window of the silver car, where Defendant was seated. Defendant's "hand was completely under his buttocks," and he "appeared to be stuffing something under his person and in his seat." After multiple requests, Defendant refused to show his hands or get out of the car. Deputy McCoy ultimately assisted Defendant out of the vehicle. These facts are specific to Defendant, and coupled with the facts above, are enough to establish "a reasonable ground" for suspicion of illegal drug possession. *See Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904. Therefore, these facts bolstered the deputies' authority to seize Defendant. *See Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 336.

Nonetheless, the trial court's eleventh conclusion of law was erroneous: Contrary to the trial court's conclusion, "Fourth Amendment scrutiny" was "triggered" when Deputy McCoy assisted Defendant out of the vehicle because no reasonable person would have felt free to leave at that point. *See Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267–68. But even so, the deputies had the requisite probable cause to seize Defendant, as a reasonable person would view Defendant's actions as "a reasonable ground" to suspect illegal drug possession. *See Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904; *Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 336.

Although the trial court's eleventh conclusion of law was an error, it was not plain error because the deputies did not violate Defendant's Fourth Amendment rights. *See Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904. In other words, the trial court's eleventh conclusion of law was not a plain error because it did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings," as the evidence was appropriately admitted. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Accordingly, this is not "the exceptional case" that clears the plain-error threshold. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

V. Conclusion

We conclude that the trial court did not plainly err in denying Defendant's pretrial motion to suppress. Even though the suppression order contains an erroneous finding of fact and conclusion of law, the trial court appropriately denied Defendant's motion to suppress because the deputies did not violate Defendant's Fourth Amendment rights.

NO PREJUDICIAL ERROR.

Judge DILLON concurs.

Chief Judge STROUD concurs in result only.

UNIVERSAL LIFE INSURANCE COMPANY, Plaintiff
v.
GREG E. LINDBERG, Defendant

No. COA23-274

Filed 5 December 2023

1. Appeal and Error—interlocutory orders—having effect of determining the action—enforcement of federal money judgment

In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, defendant had a right to immediately appeal two orders entered by the state court: one enjoining defendant from encumbering or withdrawing from any entity he owned or controlled without prior authorization, and another requiring defendant to send plaintiff any distributions he was to receive from several LLCs he had an interest in. Although

both orders were interlocutory, their purpose was to enforce the underlying federal judgment, which was a final judgment in the case. Furthermore, both interlocutory orders had the effect of determining the action given that, absent immediate appeal, defendant would have to either comply with the potentially invalid orders or be held in contempt for noncompliance in order to appeal.

2. Enforcement of Judgments—state court enforcement—federal money judgment—jurisdiction to issue injunction—unsatisfied writ of execution required

In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, the state court lacked jurisdiction to enter an order enjoining defendant from encumbering or withdrawing from any entity he owned or controlled without prior authorization. Although Chapter 1, Article 31 of the General Statutes allows a court to forbid transfers or other dispositions of a judgment debtor's property (under section 1-358) and permits a court to order that a judgment debtor's non-exempt property be applied toward the judgment (under section 1-362), both sections 1-358 and 1-362 required plaintiff to return an unsatisfied writ of execution in order for the court to have had jurisdiction; here, plaintiff returned an unsatisfied writ, but the record showed that plaintiff never attempted to execute it.

3. Enforcement of Judgments—state court action—enforcement of federal money judgment—charging order—Limited Liability Company Act—interest owner—exclusive remedy provision

In a case concerning a state court's enforcement of a federal court judgment requiring an individual (defendant) to pay an insurance company (plaintiff) hundreds of millions of dollars, where the state court entered a charging order requiring defendant to send plaintiff any distributions he was entitled to receive from several LLCs, the court erred by including a significant number of LLCs in the charging order of which defendant was neither a member nor an assignee of an economic interest. Further, the charging order violated the North Carolina Limited Liability Company Act by requiring defendant to produce all governing company documents and compelling the LLCs to freeze distributions to defendant, which went beyond the "exclusive remedy" established under the Act (providing that entry of a charging order is the "exclusive remedy" by which a judgment creditor of an interest owner may satisfy the judgment).

Appeal by Defendant from orders entered 27 October 2022 and 16 November 2022 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 4 October 2023.

Fox Rothschild LLP, by Matthew Nis Leerberg & Elizabeth Sims Hedrick, for Defendant-Appellant.

Troutman Pepper Hamilton Sanders, LLP, by Christopher G. Browning, Jr., for Plaintiff-Appellee.

Williams Mullen, by Wes J. Camden, for Appellee-Southland National Insurance Company, et al.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Daniel S. Johnson & M. Denise Stanford, for Intervenor-Appellee North Carolina Commissioner of Insurance Mike Causey.

CARPENTER, Judge.

Greg E. Lindberg ("Defendant") appeals from the trial court's orders issuing an injunction (the "Injunction") and issuing a charging order (the "Charging Order"). After careful review, we vacate the Injunction, and we reverse the Charging Order in part and affirm the Charging Order in part.

I. Factual & Procedural Background

This case concerns state-court enforcement of a federal-court judgment. On 3 May 2022, the United States District Court for the Middle District of North Carolina entered a money judgment requiring Defendant to pay Plaintiff $524,009,051.26, plus interest (the "MDNC Judgment").[1] On 12 July 2022, Plaintiff registered the MDNC Judgment with the Durham County Clerk of Court and moved to enforce the judgment under the Uniform Enforcement of Foreign Judgments Act. On 19 August 2022, the Durham County Superior Court granted Plaintiff's motion to enforce the MDNC Judgment. On 19 September 2022, Defendant appealed the enforcement order.

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1. On 26 September 2023, Plaintiff filed a motion requesting this Court to take judicial notice of two Middle District orders; neither order is in the record, but both relate to the MDNC Judgment. We grant Plaintiff's motion. *See State v. Watson*, 258 N.C. App. 347, 352, 812 S.E.2d 392, 395 (2018) ("North Carolina law clearly contemplates that our courts, both trial and appellate, may take judicial notice of documents filed in federal courts.").

On 1 August 2022, Plaintiff filed a motion for the entry of a charging order concerning all limited liability companies ("LLCs") in which Defendant has an interest. On 7 September 2022, Plaintiff filed a motion to compel Defendant to turn over stock to the local sheriff and to enjoin Defendant from interfering, pledging, encumbering, assigning, or otherwise disposing of his ownership interest in any businesses.

On 13 September 2022, the trial court allowed Southland National Insurance Company, Bankers Life Insurance Company, Colorado Bankers Life Insurance Company, and Southland National Reinsurance Corporation to intervene. On 13 October 2022, the trial court also allowed Mike Causey, in his official capacity as Commissioner of Insurance on behalf of the North Carolina Insurance Companies (the "NCIC"), to intervene.

On 27 October 2022, the trial court issued the Injunction, granting Plaintiff's 7 September motion, in part, by enjoining Defendant from withdrawing or encumbering more than $5,000 from any entity owned or controlled by Defendant without Plaintiff's and the NCIC's consent or by court order. The Injunction also scheduled a November 2022 status conference "to hear pending motions" and stated Plaintiff could use "any judicial process permitted by law to pursue execution on its judgment against [Defendant]" in the meantime. Defendant appealed from the Injunction on 31 October 2022.

On 16 November 2022, the trial court issued the Charging Order, which affected 626 different LLCs. In order to satisfy the MDNC Judgment, the Charging Order required all LLC distributions intended for Defendant be sent to Plaintiff, instead. The Charging Order also compelled Defendant to produce all governing documents and verified accountings concerning the 626 LLCs. Further, the Charging Order required Defendant to update the governing documents and accountings every sixty days. Finally, the Charging Order compelled the 626 LLCs to "freeze" all payments, other than wages, to Defendant. The requirements of the Charging Order were all "pending further orders of [the trial court]." Defendant appealed the Charging Order on 9 December 2022.

On 22 December 2022, the trial court amended the Injunction "to expressly permit the payment of reasonable business expenses of ordinary course operations." On 30 December 2022, this Court consolidated Defendant's appeals. On 10 August 2023, Defendant filed a petition for writ of certiorari. On 15 September 2023, Plaintiff filed a motion to dismiss this appeal. On appeal, Defendant argues the trial court erred in issuing both the Injunction and the Charging Order.

II. Jurisdiction

[1] The initial issue is whether this Court has jurisdiction over this appeal. We must first discern whether this case is interlocutory because "[g]enerally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Cap., L.C.*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998).

In the Injunction, the trial court enjoined Defendant from withdrawing more than $5,000 from any entity owned or controlled by Defendant. Additionally, the trial court set a future status conference "to hear pending motions." And the Charging Order required Defendant to update and deliver accountings of the 626 LLCs to Plaintiff every sixty days, "pending further orders of [the trial court]."

Although the underlying MDNC Judgment is a final judgment, both the Charging Order and the Injunction fail to "determine the entire controversy between all of the parties" because both are subject to change, pending further proceedings by the trial court. *See id.* at 334, 502 S.E.2d at 881. Thus, though not typical, this appeal is interlocutory. *See id.* at 334, 502 S.E.2d at 881.

There are, however, exceptions to the general rule prohibiting appeals of interlocutory orders. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). One such exception applies to an interlocutory order that "[i]n effect determines the action and prevents a judgment from which an appeal might be taken." N.C. Gen. Stat. § 7A-27(b)(3)(b) (2021).

The challenged orders effectively determine this action. First, although this case is interlocutory, the MDNC Judgement is a valid, enforceable judgement. So, paradoxically, this case is "determined" in that respect. *See id.* Second, if there is no right of immediate appeal here, Defendant has two options: Either Defendant can appeal after adhering to the orders and satisfying the MDNC Judgment, or Defendant can appeal from a judgment adjudicating him in contempt of the orders.

In other words, unless we conclude the challenged orders effectively determine this case, Defendant must either comply with potentially invalid orders in order to appeal or be held in contempt in order to appeal. If these orders do not "in effect determine the action," no order will. *See id.* Therefore, this Court has jurisdiction over this appeal under subsection 7A-27(b)(3)(b). *See id.* We accordingly deny Plaintiff's

motion to dismiss this appeal, and we dismiss Defendant's petition for writ of certiorari as moot.

III. Issues

The issues on appeal are whether the trial court erred in issuing: (1) the Injunction; and (2) the Charging Order.

IV. Analysis

A. The Injunction

1. Standard of Review

Our caselaw lacks definitive authority concerning our standard of review. In *84 Lumber Co. v. Habitech Enterprises*, an unpublished case, this Court interpreted multiple supplemental-proceeding statutes and stated that the statutes were "discretionary in nature, and therefore, we will not disturb them absent an abuse of discretion." 2007 N.C. App. LEXIS 2425 at * 4 (Dec. 4, 2007) (citing *State ex rel. Long v. Interstate Cas. Ins. Co.*, 120 N.C. App. 743, 750, 464 S.E.2d 73, 77 (1995)). On the other hand, we review a trial court's grant of a preliminary injunction "essentially" de novo. *QSP, Inc. v. Hair*, 152 N.C. App. 174, 176, 566 S.E.2d 851, 852 (2002). Similarly, we review questions of statutory interpretation de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

Here, we must interpret supplemental-proceeding statutes. If published, we would be bound by *84 Lumber*, but it remains only persuasive authority. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989); *Erie Ins. Exch. v. Miller*, 160 N.C. App. 217, 222, 584 S.E.2d 857, 860 (2003) ("Unpublished decisions are not . . . controlling authority."); *84 Lumber*, 2007 N.C. App. LEXIS 2425 (unpublished).

We review preliminary injunctions and statutory interpretations de novo, and this case involves an injunction based upon statutory authority. *See Hair*, 152 N.C. App. at 176, 566 S.E.2d at 852; *McKoy*, 202 N.C. App. at 511, 689 S.E.2d at 592. Therefore, we review supplemental-proceeding injunctions, like the challenged injunction here, de novo.

" '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) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

2. Authority to Issue the Injunction

[2] First, Defendant argues the trial court lacked authority to issue the Injunction because Rule 65 of the North Carolina Rules of Civil Procedure does not apply to post-judgment proceedings. We disagree.

We agree that Rule 65 concerns temporary restraining orders and preliminary injunctions—neither of which occur post-judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 65(a)–(b) (2021). But within Chapter 1 of our General Statutes lies Article 31, labeled "Supplemental Proceedings." Article 31 statutes facilitate the satisfaction of judgments. *See* N.C. Gen. Stat. §§ 1-352 to -368 (2021). More specifically, section 1-358 states: "The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution." *Id.* § 1-358.

Here, the trial court issued the Injunction under "Rule 65 of the North Carolina Rules of Civil Procedure *and the equitable powers of this Court to issue the injunctive equitable relief*." Regardless of the applicability of Rule 65, the "equitable powers" of the trial court include section 1-358, which allows a court to "forbid a transfer or other disposition of . . . the property of the judgment debtor." *See id.*

The MDNC Judgment is no longer disputed, and it renders Defendant a judgment debtor. Therefore, the trial court had the authority to issue the Injunction under "the equitable powers" detailed in Article 31, regardless of its mention of Rule 65. *See id.*

3. Jurisdiction to Issue the Injunction

Defendant also argues the trial court lacked jurisdiction to issue the Injunction because a writ of execution was never issued and returned unsatisfied. Specifically, Defendant asserts that sections 1-358 and 1-362 of Article 31 require a returned, unsatisfied writ of execution. We agree.

i. Section 1-358

We have held that Article 31 statutes require the return of an unsatisfied writ of execution. *See Milone & Macbroom, Inc. v. Corkum*, 279 N.C. App. 576, 582, 865 S.E.2d 763, 767–68 (2021). In *Milone*, the plaintiff did not return an unsatisfied writ of execution, and accordingly, we said the "supplemental proceedings under Article 31 of Chapter 1 of the General Statutes were not available to Plaintiff." *Id.* at 582, 865 S.E.2d at 768.

In *Radiance Capital Receivables Twenty One, LLC v. Lancsek*, however, this Court distinguished *Milone* and held that section 1-358

does not require a returned, unsatisfied writ. 286 N.C. App. 674, 677, 881 S.E.2d 883, 887 (2022) ("Section 1-358 . . . [does] not require a return of the execution unsatisfied prior to any supplemental proceeding."). This Court in *Radiance* reasoned that the sections analyzed in *Milone* were "directed at the judgment debtor to discover his property." *Id.* at 678, 881 S.E.2d at 887. According to the analysis in *Radiance*, however, the order before it "was entered to prevent transfer of defendant's property and/or funds by a Dare County financial institution, a third party with access to the property." *Id.* at 678–79, 881 S.E.2d at 887.

In other words, according to *Radiance*, section 1-358 does not require the return of an unsatisfied writ when the section is applied to enforce third-party action. *See id.* at 678–79, 881 S.E.2d at 887–88 ("Since the [order] was issued pursuant to Sections 1-358 and 1-360 to prevent third parties from disposing of property, the [order] differed from the supplemental proceeding in *Milone & MacBroom, Inc.*, in which the trial court lacked subject matter jurisdiction.").

Either the *Radiance* Court astutely distinguished *Milone*, or the *Radiance* Court improperly held to the contrary of *Milone*. If the latter, we are bound by *Milone*. *See State v. Gardner*, 225 N.C. App. 161, 169, 736 S.E.2d 826, 832 (2013) ("[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines.") (citing *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005)). If the former, the writ requirement hinges on the identity of the compelled party. *See Radiance*, 286 N.C. App. at 678–79, 881 S.E.2d at 887–88. If the compelled party is a party to the suit, a returned writ is required; if the compelled party is a third party, a returned writ is not required. *See id.* at 678–79, 881 S.E.2d at 887–88.

Here, each enjoining conclusion of law within the Injunction begins with, "Defendant is hereby enjoined." The Injunction compels Defendant's actions, not third-party actions. So regardless of whether the distinction in *Radiance* is valid, the trial court needed a returned, unsatisfied writ of execution to have jurisdiction under section 1-358. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68 (requiring a returned writ for Article 31 statutes); *Radiance*, 286 N.C. App. at 678–79, 881 S.E.2d at 887–88 (creating an exception for when third parties are compelled); *Gardner*, 225 N.C. App. at 169, 736 S.E.2d at 832 (binding us by *Milone* if *Radiance* conflicts with *Milone*).

ii. Section 1-362

Section 1-362 states:

> The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within 60 days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor.

N.C. Gen. Stat. § 1-362.

Stated differently, the trial court may order a judgment debtor's non-exempt property be applied towards the judgment. *See id.* But without an exception, section 1-362, like the other Article 31 statutes, requires the return of an unsatisfied writ of execution. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68.

As detailed above, the Injunction prevents Defendant's actions, not third-party actions. Therefore, section 1-362 also requires a returned, unsatisfied writ of execution, regardless of whether the *Radiance* distinction is valid. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68 (requiring a returned writ for Article 31 statutes); *Radiance*, 286 N.C. App. at 678–79, 881 S.E.2d at 887–88 (creating an exception for when third parties are compelled); *Gardner*, 225 N.C. App. at 169, 736 S.E.2d at 832 (binding us by *Milone* if *Radiance* conflicts with *Milone*).

Thus, under both sections 1-358 and 1-362, the trial court's jurisdiction hinged on whether Plaintiff returned an unsatisfied writ of execution, so we must determine whether Plaintiff did so.

iii. Whether Plaintiff Returned an Unsatisfied Writ of Execution

In *Massey v. Cates*, the plaintiff sought relief through section 1-363. 2 N.C. App. 162, 164, 162 S.E.2d 589, 591 (1968). This Court in *Massey* acknowledged the requirement of a returned, unsatisfied writ. *See id.* at 164, 162 S.E.2d at 591. The Court also stated that "[Article 31] proceedings are available only after execution is attempted." *Id.* at 164, 162 S.E.2d at 591.

Here, Plaintiff returned an unsatisfied writ. Defendant, however, asserts that no officer ever attempted to execute on the MDNC Judgment. Plaintiff does not dispute this assertion. Rather, in a footnote, Plaintiff merely argues that a returned writ of execution is valid "regardless of whether the Sheriff was unable to find assets, the Sheriff could not track down the judgment debtor's assets within the 90-day statutory period, or the judgment creditor requested the Sheriff to return the execution as quickly as possible."

We disagree. The officer who signed the writ checked a box stating, "I did not serve this Writ of Execution," and he made a separate handwritten notation: "Per plaintiff's attorney, writ requested to be served unsatisfied." Further, the writ shows the date of receipt and date of return are the same: 21 September 2022. In other words, Plaintiff merely asked the deputy to check a box and return the writ—a far cry from the required attempted execution. *See id.* at 164, 162 S.E.2d at 591.

Because Plaintiff did not attempt to execute the writ, the trial court lacked jurisdiction to enter the Injunction. *See id.* at 164, 162 S.E.2d at 591. Accordingly, we vacate the Injunction. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68.

B. The Charging Order

1. Standard of Review

Whether a charging order complies with the North Carolina Limited Liability Company Act (the "NC LLC Act") is a question of statutory interpretation, which we review de novo. *See First Bank v. S&R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014). Again, " '[u]nder a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. at 647, 576 S.E.2d at 319).

2. Relief Granted by the NC LLC Act

[3] The NC LLC Act is located in Chapter 57D of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 57D-1-01 (2021). Section 57D-5-03, titled "Rights of judgment creditor," states:

> On application to a court of competent jurisdiction by any judgment creditor of an interest owner, the court may charge the economic interest of an interest owner with the payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor

> has only the right to receive the distributions that otherwise would be paid to the interest owner with respect to the economic interest.

Id. § 57D-5-03(a).

In other words, to facilitate the satisfaction of judgments, trial courts can enter charging orders compelling the redirection of distributions from LLCs in which a judgment debtor is an interest owner. *See id.* Further, "[t]he entry of a charging order is the exclusive remedy by which a judgment creditor of an interest owner may satisfy the judgment from or with the judgment debtor's ownership interest." *Id.* § 57D-5-03(d).

An "interest owner" is a "member or an economic interest owner." *Id.* § 57D-1-03(15). An "economic interest owner" is a "person who owns an economic interest but is not a member." *Id.* § 57D-1-03(11). And an "economic interest" is the "proprietary interest of an interest owner in the capital, income, losses, credits, and other economic rights and interests of a limited liability company, including the right of the owner of the interest to receive distributions from the limited liability company." *Id.* § 57D-1-03(10).

i. Entities in Which Defendant has an Economic Interest

First, Defendant argues the Charging Order is erroneous because it includes LLCs in which Defendant has no "economic interest." We agree.

There are discrepancies in the record concerning the number of LLCs in which Defendant has an economic interest. Defendant does not challenge the validity of the Charging Order concerning 73 LLCs, as Defendant admits to being a member of those companies. Plaintiff, on the other hand, says Defendant is a member or manager of 190 LLCs, and has an economic interest in the remainder. An affidavit filed with the United States District Court for the Middle District of North Carolina, by a third-party licensed attorney, lists 329 LLCs of which Defendant is a member or manager. Yet the Charging Order says Defendant has an "economic interest" in 626 LLCs. Concerning these 626 LLCs, Plaintiff asserts that Defendant has at least an indirect economic interest in hundreds of them through a complex web of holding companies.

The definition of "economic interest" is wide. *See id.* § 57D-1-03(10) (including "proprietary interest of an interest owner in the capital, income, losses, credits, and other economic rights"). The NC LLC Act, however, does not define "proprietary interests." And when examining statutes, words undefined by the General Assembly "must be given their

common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974). Absent precedent, we look to dictionaries to discern a word's common meaning. *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016).

Merriam-Webster's defines "proprietary," in adjective form, as "used, made, or marketed by one having the exclusive legal right." *Proprietary*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Black's defines "proprietary interest" as "a property right." *Proprietary Interest*, Black's Law Dictionary (11th ed. 2019). So, a "proprietary interest of an interest owner" is a non-member's exclusive legal entitlement to the member's property rights—namely, the member's economic rights. *See* N.C. Gen. Stat. § 57D-1-03(10), *Proprietary*, Merriam-Webster's Collegiate Dictionary, *supra*; *Proprietary Interest*, Black's Law Dictionary, *supra*.

An assignment is a legal transfer of property rights. *See Hinshaw v. Wright*, 105 N.C. App. 158, 164, 412 S.E.2d 138, 143 (1992). LLC members may assign their economic interests in the LLC. *See Haynes v. B & B Realty Grp., LLC*, 179 N.C. App. 104, 111, 633 S.E.2d 691, 695–96 (2006); N.C. Gen. Stat. § 57D-5-02 (2021) ("An economic interest is transferable in whole or in part."). But absent an assignment, non-members of LLCs are not entitled to any "capital, income, losses, credits, [or] . . . distributions" from an LLC. *See* N.C. Gen. Stat. § 57D-1-03(10).

There is conflicting evidence in the record concerning how many LLCs Defendant is a member of, but all evidence suggests it is fewer than 626. And there is nothing in the record detailing how many "economic interests" have been legally assigned to Defendant. Because charging orders only apply to interest owners, *see id.* § 57D-5-03(a); because interest owners are only LLC members and non-member economic-interest holders, *see id.* § 57D-1-03(15); and because Defendant can only become a non-member economic-interest holder by assignment, *see id.* § 57D-5-02; the Charging Order is erroneous insofar as it includes LLCs of which Defendant is not a member or an assignee of an economic interest.

Therefore, the trial court erred by including 626 LLCs in the Charging Order. The record indicates Defendant was an interest owner in far fewer. On remand, the trial court must reduce the number of LLCs in the Charging Order to the number of LLCs of which Defendant is a member or an assignee of an economic interest. *See id.* § 57D-5-03(a).

ii. Obligations Beyond the "Exclusive Remedy"

Next, Defendant argues that the Charging Order imposes obligations that go beyond the "exclusive remedy" established in the NC LLC Act.

He asserts the Charging Order: (1) requires him to provide operating agreements and accountings concerning the 626 LLCs; and (2) requires the 626 LLCs to "freeze all membership interests, economic interests, or payment of any sums to [Defendant] (other than wages) pending further order of this Court." Again, we agree with Defendant.

Subsection 57D-5-03(d) states "[t]he entry of a charging order is the *exclusive* remedy by which a judgment creditor of an interest owner may satisfy the judgment from or with the judgment debtor's ownership interest." *Id.* § 57D-5-03(d) (emphasis added). And subsection 57D-5-03(a) states that "the judgment creditor has *only* the right to receive the distributions that otherwise would be paid to the interest owner with respect to the economic interest." *Id.* § 57D-5-03(a) (emphasis added).

The plain text of Chapter 57D only gives Plaintiff the right to receive distributions. *See id.* The text says nothing about producing documents or freezing distributions. *See id.* Thus, the trial court violated the NC LLC Act when it compelled the production of documents and the freezing of distributions through the Charging Order. *See id.* § 57D-5-03(d).

Compelling the production of documents and the "freezing" of distributions may be possible under Article 31, however. *See* N.C. Gen. Stat. §§ 1-352 to -368. But as already discussed, the trial court lacked jurisdiction to operate under Article 31. *See Milone*, 279 N.C. App. at 582, 865 S.E.2d at 767–68. Therefore, even if the trial court purported to act under Article 31 when it issued the Charging Order, it lacked jurisdiction to compel the production of documents and to freeze distributions.

V. Conclusion

The trial court lacked jurisdiction to enter the Injunction; therefore, we vacate the Injunction. Concerning the Charging Order, the trial court erred by including any LLCs of which Defendant was not a member or an assignee of an economic interest, and the trial court erred by compelling the production of documents and the freezing of distributions. Therefore, we reverse those portions of the Charging Order and remand this case to the trial court to continue proceedings in accordance with this opinion.

AFFIRMED in part, VACATED in part, REVERSED in part, and REMANDED.

Judges TYSON and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 5 December 2023)

ABRANTES v. ABRANTES No. 23-333	Onslow (22CVD600605)	Vacated
ALEXANDER v. BURKEY No. 23-179	Mecklenburg (20CVS2194)	Reversed and Remanded
CHAGARIS v. VANDERGRIFT No. 23-164	Iredell (20CVS2472)	Affirmed
DAVIS v. LAW No. 22-1053	Wake (14CVD15242)	Affirmed
DAVIS v. LAW No. 22-1054	Wake (14CVD15242)	Affirmed
DETROI v. SABER HEALTHCARE HOLDINGS, LLC No. 23-465	Mecklenburg (22CVS8794)	Affirmed
EASTWOOD CONSTR. PARTNERS, LLC v. WAXHAW DEVS., LLC No. 23-180	Mecklenburg (21CVS876)	Affirmed
ENV'T JUST. CMTY. ACTION NETWORK v. N.C. DEP'T OF ENV'T QUALITY No. 22-1047	New Hanover (22CVS443)	Affirmed
GARRITY v. GODBEY No. 22-471	Wake (21CVS7789)	Affirmed
HERMOSA v. SPELLANE No. 23-373	Guilford (18CVD8698)	Affirmed
IN RE A.J.G. No. 23-704	Carteret (21JB43)	Vacated and Remanded
IN RE G.E. No. 22-1056	Mecklenburg (20JA330)	Affirmed
IN RE J.R. No. 23-554	Durham (19J186) (19J187)	VACATED IN PART AND REMANDED.
IN RE L.M. No. 23-19	Cumberland (20JA287)	Dismissed

IN RE N.I.R.W. No. 23-389	Lenoir (22JT33)	Affirmed
STATE v. DAVIS No. 23-551	Forsyth (20CRS986-87)	No error in part; remanded for correction of clerical error in part.
STATE v. ELLERBE No. 23-60	Richmond (21CRS50262-63)	Dismissed.
STATE v. GALES No. 23-689	Mecklenburg (20CRS213051-52) (21CRS12027)	No Error
STATE v. HOFFMAN No. 23-76	Richmond (19CRS50890-92)	No Error
STATE v. MACON No. 23-357	Randolph (20CRS52132-43)	No Error
STATE v. MINOR No. 22-845	Franklin (18CRS50124)	Affirmed.
STATE v. OGLESBY No. 23-783	Beaufort (22CRS50700) (22CRS50702)	Affirmed in part; vacated and remanded in part
STATE v. SHINE No. 23-106	Buncombe (21CRS80768-77)	No Error
STATE v. SINGLETARY No. 23-175	Columbus (20CRS50984)	No Error
STATE v. SPANN No. 22-1004	Caldwell (07CRS3906-08)	Dismissed
STATE v. SPRUILL No. 23-248	Martin (20CRS50284) (20CRS50294)	No Error
STATE v. STEVENS No. 22-1057	Lincoln (20CRS50881)	Affirmed
STATE v. STOKES No. 22-921	Wayne (20CRS54440) (21CRS484)	No Error
STATE v. SWINDELL No. 23-217	Craven (18CRS53598)	No Error

STATE v. TERRY No. 23-378	Orange (20CRS52102)	Affirmed in Part, Remanded for Correction of Judgment
STATE v. WADE No. 23-492	Caswell (16CRS50435-36)	No Error
STATE v. ZAPATA No. 23-63	Pender (20CRS51264) (20CRS51408)	No Error in Part, Dismissed in Part.

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