291 N.C. App.—No. 5 Pages 522-694

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 3, 2024

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

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OF
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[1] Resigned 13 September 2023. [2] Appointed 11 September and sworn in 13 September 2023.

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COURT OF APPEALS

CASES REPORTED

FILED 19 DECEMBER 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

the children, the trial court had subject matter jurisdiction to adjudicate a father's five children emotionally abused where the petitions contained sufficient factual allegations and supporting material regarding the parents' behavior and its effect on the children to put the father on notice that emotional abuse was raised as a ground for adjudication. **In re M.M., 571.**

CRIMINAL LAW

Competency to stand trial—memory loss—ability to assist in defense—findings supported by evidence—The trial court did not abuse its discretion by determining that defendant was competent to stand trial for attempted first-degree murder and other charges related to a shooting incident with law enforcement—during which defendant sustained multiple injuries, including a traumatic brain injury—where the trial court's findings that defendant could remember events before and after the shooting incident and that defendant was capable of assisting in his defense were supported by competent evidence, including a report submitted by the forensic psychologist who examined defendant and defendant's implicit concession that he was able to understand the nature of the proceedings against him. **State v. Bethea, 591.**

Jury instruction—insanity—commitment procedure—additional instruction properly denied—In defendant's trial for numerous charges (including murder, rape, and robbery arising from a multi-day crime spree) in which defendant entered a plea of not guilty by reason of insanity, the trial court did not err during its instructions to the jury on insanity and commitment procedures by declining to include an additional instruction requested by defendant, where the trial court used the pattern jury instructions and where there was no merit to defendant's argument that the instructions as given were misleading or incomplete. **State v. Gregory, 617.**

Motion for appropriate relief—newly discovered evidence—mistake by ballistics expert in different trial—After defendant's conviction of first-degree murder, the trial court did not err by denying defendant's motion for appropriate relief, in which defendant asserted the existence of newly discovered evidence showing that the State's ballistics expert had made a mistake in a different trial, that the State had suppressed this evidence, and that defendant was entitled to a new trial as a result. The trial court's determinations that the State did not possess the expert's personnel records from the state crime lab prior to trial and was not aware that the expert may have made a mistake in another case were supported by the record, and no new trial was needed where the types of purported "new evidence" raised by defendant tended merely to question the expert's past but not the State's evidence at trial. **State v. Burnett, 596.**

Motion to withdraw guilty plea—conditional discharge—treated as motion for appropriate relief—manifest injustice standard applied—The trial court did not err by denying defendant's motion to withdraw his guilty plea (entered in 2005), which defendant filed nearly eighteen years later after he was detained by federal immigration officials on the basis of that guilty plea. Although defendant argued in his motion that since his 2005 charges were dismissed (pursuant to a conditional discharge after successfully completing various conditions), he misunderstood the consequences of his plea and thus had a "fair and just" reason for withdrawal, the trial court correctly categorized defendant's motion as a post-judgment motion for appropriate relief (MAR) and properly applied the standard of whether "manifest injustice" had occurred. The standard had not been met where defendant, an

undocumented immigrant, acknowledged at the time of his plea that he was subject to deportation and where he received the benefit of what he had bargained for by having his remaining charges dismissed and receiving the conditional discharge of the felony to which he had pleaded guilty. **State v. Saldana, 674.**

Prosecutor's closing argument—improper statements—defendant's prior criminal convictions—In a prosecution for trafficking methamphetamine, where defendant's prior convictions for larceny and obtaining property by false pretense were admitted under Evidence Rule 609(a) for the purpose of impeaching defendant's credibility, the trial court did not err by failing to intervene ex mero motu during the prosecutor's closing argument. Although the prosecutor improperly suggested that defendant was more likely to be guilty of the trafficking offense based on her past convictions, this improper statement comprised only a few lines of the eighteen-page transcript of the prosecutor's closing argument. Further, the vast majority of the prosecutor's closing argument permissibly questioned defendant's credibility. **State v. Figueroa, 610.**

Prosecutor's closing argument—murder trial—retaliatory motive—There was no error in defendant's trial for first-degree murder based on premeditation and deliberation where, during the State's closing statement, despite the parties agreeing not to refer to the incident as a gang killing, the prosecutor stated that defendant shot the victim in retaliation for a fatal shooting that took place two weeks before. The statement did not improperly shift the burden of proof to defendant, and the prosecutor's argument that the two shootings may have been linked was supported by competent evidence and testimony properly admitted at trial. **State v. Burnett, 596.**

DRUGS

Death by distribution—motion to dismiss—sufficiency of evidence—cause of death—proximate cause—The trial court properly denied defendant's motion to dismiss a charge of death by distribution where, when viewed in the light most favorable to the State, the evidence was sufficient to persuade a rational juror to conclude that defendant sold fentanyl to the victim, fentanyl caused the victim's death, and defendant's act proximately caused the victim's death. Although the victim's friend requested that defendant sell them heroin and cocaine, the State presented enough circumstantial evidence suggesting that defendant sold them fentanyl, including the fact that the only drugs found in the victim's toxicology report were cocaine and fentanyl. Further, although the victim's autopsy revealed lethal amounts of both cocaine and fentanyl in her system, there was ample evidence suggesting that the fentanyl killed her, including the tourniquet around her arm and the needles found at the scene of her death. Finally, defendant's argument regarding proximate cause—that the victim's simultaneous consumption of all the drugs he sold her was not reasonably foreseeable—lacked merit. **State v. McCrorey, 650.**

Possession—constructive—driver of vehicle—inference of control—The State presented sufficient evidence in a drug prosecution from which a jury could find that defendant constructively possessed cocaine found in the car that he was driving, even though two other passengers were also in the car. Defendant's status as the driver of a vehicle gave rise to an inference that he had control over the vehicle and, therefore, constructively possessed the drugs that were discovered during a search of the car. **State v. Michael, 659.**

EVIDENCE

Expert testimony—drug trafficking case—chemical analysis identifying drugs—methodology unexplained—plain error analysis—In a prosecution for trafficking methamphetamine, where undercover law enforcement officers saw a suspected drug dealer arrive at the location of a drug transaction in a vehicle driven by defendant, the trial court did not commit plain error by admitting expert testimony and a lab report identifying the substance found inside defendant's vehicle as methamphetamine. The expert identified the type of chemical analysis she performed on the substance but did not explain the methodology of that analysis, and the trial court failed in its gatekeeping function of requiring the expert to testify to that methodology. However, this error did not amount to plain error because the expert did identify the tests she performed and the results of those tests; therefore, the expert's testimony did not amount to "baseless speculation" and was not so prejudicial that justice could not have been done. **State v. Figueroa, 610.**

Expert testimony—forensic psychiatrist—scope of cross-examination limited—abuse of discretion analysis—In defendant's trial for numerous charges arising from a multi-day crime spree—in which defendant entered a plea of not guilty by reason of insanity—the trial court did not abuse its discretion by limiting defense counsel's cross-examination of the State's forensic psychiatrist, who had examined defendant multiple times during his pre-trial detention to make determinations regarding defendant's competency to proceed to trial. Although the trial court prevented defense counsel from explicitly referring by name to the pre-trial hearing held pursuant to *Sell v. United States* 539 U.S. 166 (2003), to determine whether defendant's capacity should be restored via forced medication, or from referring to forced medication in any way, the issue of forced medication was not before the jury, and defense counsel was permitted to question the State's witness regarding her testimony at that hearing and the basis for her differing opinions at different points in time in the case. **State v. Gregory, 617.**

Expert witness—ballistics analysis—reliability—In defendant's trial for first-degree murder, the trial court did not err by allowing the State's ballistics expert to testify regarding a firearm carried by defendant when he was apprehended by law enforcement and its connection to a bullet recovered from the victim's body and a shell casing found at the scene of the shooting. There was no violation of Evidence Rule 702(a) regarding reliability of the expert's analysis methods where the trial court's detailed findings about the expert's methods supported the court's resolution of purported contradictions between competing experts and where the court found that the expert's decision to conduct a microanalysis test rather than measuring lands and grooves—because it was a more definitive test—was a rational discretionary decision based on the state crime lab's guidelines and protocols. **State v. Burnett, 596.**

Other crimes, wrongs, or acts—murder trial—removal of electronic monitoring device two weeks prior to shooting—In defendant's trial for first-degree murder based on premeditation and deliberation, in which the State introduced evidence that the victim was shot in retaliation for a fatal shooting that occurred two weeks before, the trial court did not err by allowing the State to introduce evidence that defendant had disabled his electronic monitoring device approximately one hour after the prior fatal shooting. The evidence did not violate Evidence Rule 404(b) because defendant's actions were close enough in time and proximity to the incident giving rise to the charge and were part of a chain of events that provided context for the murder. **State v. Burnett, 596.**

Other crimes, wrongs, or acts—previous drug sales—intent, identity, and common scheme or plan—danger of unfair prejudice—In a prosecution for death by distribution, where evidence showed that defendant sold drugs to the victim's friend (to be split between the victim and her friend) and that the victim died after consuming those drugs, the trial court neither abused its discretion nor committed prejudicial error when it allowed the friend to testify about previous transactions in which defendant sold drugs to her and to the victim. This testimony was admissible under Evidence Rule 404(b), since it demonstrated not only the common scheme or plan behind defendant's drug sales but also defendant's intent during the transaction at issue in the case. Additionally, the friend's statement that she put individuals in contact with defendant for the purpose of buying drugs from him tended to confirm defendant's identity. Furthermore, given the copious amounts of other evidence showing that defendant sold drugs to the victim and her friend, it could not be said that the probative value of the friend's testimony was outweighed by a danger of unfair prejudice under Rule 403. **State v. McCrorey, 650.**

FIREARMS AND OTHER WEAPONS

Discharging firearm into occupied vehicle while in operation—jury instructions—definition of "in operation" not required—In defendant's prosecution for discharging a firearm into an occupied vehicle while in operation pursuant to N.C.G.S. § 14-34.1, where defendant did not object to the jury instructions as given, the trial court did not commit plain error by failing to define the phrase "in operation," which is not defined in the statute, because those words were of common usage and meaning to the general public. **State v. Shumate, 684.**

Discharging firearm into occupied vehicle while in operation—jury instructions—lesser-included offense not required—In defendant's prosecution for discharging a firearm into an occupied vehicle while in operation, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of discharging a firearm into an occupied vehicle. The evidence supported each element of the greater offense, including that the vehicle was "in operation" where, after three persons took a puppy from defendant's property and began to drive away, although the driver had to stop the vehicle to prevent it from going off a ledge, the engine was still running and an occupant was still in the driver's seat when defendant fired a gun into the vehicle. **State v. Shumate, 684.**

Discharging firearm into occupied vehicle while in operation—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of discharging a firearm into an occupied vehicle while in operation where the State presented substantial evidence of each essential element of the offense and that defendant was the perpetrator, including that defendant deliberately fired a gun into a vehicle while the engine was still running and an occupant was still in the driver's seat, even though the vehicle was not moving. **State v. Shumate, 684.**

HOMICIDE

First-degree murder—jury instruction—voluntary intoxication—evidence of premeditation and deliberation—In a prosecution for first-degree murder, where defendant was tried for the death of his wife, the trial court did not commit plain error by declining to instruct the jury on voluntary intoxication as an affirmative defense. Although defendant drank multiple beers throughout the twelve hours

leading up to the murder, the evidence did not show that he was so completely intoxicated that he could not form a deliberate and premeditated purpose to kill. Notably, the evidence showed that: defendant had been a heavy drinker for years, and therefore had a high tolerance for alcohol; defendant testified that he got drunk after he killed his wife, indicating that he was not already drunk before the murder; defendant's memory of the events leading up to the murder was both clear and detailed; and, at the time of the killing, he was cognizant enough to hide the murder weapon and confess his actions to his daughter before law enforcement arrived. **State v. Rubenstahl, 667.**

First-degree murder—premeditation and deliberation—jury instruction—lesser-included offense not supported—In a prosecution for first-degree murder, where defendant was tried for the death of his wife, the trial court did not err in declining to instruct the jury on the lesser-included offense of second-degree murder, since the evidence supported only one inference: that defendant specifically intended to kill his wife, acting with both premeditation and deliberation on the day of the murder. The evidence showed that: defendant shot his wife ten times with a single-action revolver, which would have required a great deal of effort (manually cocking the gun before pulling the trigger for each shot, then unloading and reloading it to continue shooting since its cylinder only held six bullets at a time); before the killing, defendant had both threatened and physically abused his wife; and his wife's body did not show any defensive wounds, suggesting that defendant continued to shoot her after she was already rendered helpless. **State v. Rubenstahl, 667.**

First-degree—premeditation and deliberation—identity of defendant as perpetrator—opportunity and means—Where the State presented substantial evidence that defendant had the motive, opportunity, and means to shoot the victim, the trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder based on premeditation and deliberation. Although the evidence was mainly circumstantial, it showed that the shooting was in retaliation for a fatal shooting that occurred two weeks earlier; about thirty minutes prior to this murder, a person was seen waiting in a car park at the corner where the victim was shot; a bullet recovered from the victim's body and a shell casing found at the scene matched the weapon defendant was carrying when he was apprehended; and defendant made incriminating statements to law enforcement. **State v. Burnett, 596.**

INDICTMENT AND INFORMATION

Indictment—misdemeanor larceny—fatal variance—essential and material allegations—Defendant was not entitled to dismissal of a misdemeanor larceny charge where there was no fatal variance between the indictment, which alleged that defendant took two sewing machines from a retail store, and the evidence presented, which established that defendant took only one sewing machine. The indictment adequately alleged each essential element of the offense, and the number and type of retail items allegedly taken constituted surplusage that was neither essential nor material to the charge. **State v. Hill, 633.**

LARCENY

Felony larceny from a merchant by product code fraud—essential elements—creation of code—mere transfer of price tag insufficient—Defendant's conviction for felony larceny by product code fraud was vacated where the State did not

children based on abuse, neglect, and failure to make reasonable progress was affirmed where clear, cogent, and convincing evidence supported each of the legally-necessary findings of fact that the mother challenged on appeal. Although many of the court's findings were based upon judicially-noticed facts from prior orders, the court did not rely solely on the evidence from which those facts were made when entering its findings; instead, the court received additional testimony to corroborate the judicially-noticed facts and then made an independent determination regarding the new evidence presented. **In re K.N., 555.**

Grounds for termination—failure to make reasonable progress—nexus between case plan and conditions that led to removal—The trial court properly terminated a mother's parental rights in her two children for failure to make reasonable progress (N.C.G.S. § 7B-1111(a)(2)), where the record showed a sufficient nexus between the components of the mother's case plan that she failed to comply with and the conditions which led to the children's removal from her home. Specifically, one of the biggest factors leading to the children's removal was the mother's inability to treat or manage her bipolar disorder, which in turn caused her to discipline the children through severe physical abuse, and many of the case plan's objectives (including the ones the mother did not comply with) were geared toward addressing this issue. **In re K.N., 555.**

WORKERS' COMPENSATION

Employer-employee relationship—off-duty sheriff's deputy—traffic control for construction company—joint employment doctrine—The Full Commission of the N.C. Industrial Commission erred by determining that plaintiff, employed as a deputy with a county sheriff's office, worked solely for the sheriff's office at the time he was injured while working off duty directing traffic near a highway construction project, because the record showed that plaintiff was simultaneously employed by both the sheriff's office and the construction company conducting the project. First, there was an implied contract between plaintiff and the company, which directly hired and paid plaintiff and which maintained supervisory control over plaintiff's work schedule and duties. Second, the appellate court interpreted the joint employment doctrine as requiring that the service being performed by the employee for each employer must be the same or closely related to the service for the other, and not that the nature of the work of each employer had to be the same or closely related. Since plaintiff was employed by both entities, was under the simultaneous control of both entities, and performed traffic control duty for the company similar to how he performed the same service for the sheriff's office, he was jointly employed by both, and both were liable for his workers' compensation claim. **Lassiter v. Robeson Cnty. Sheriff's Dep't, 579.**

Employer-employee relationship—status at time of injury—off-duty deputy working traffic control—independent contractor factors—The Full Commission of the N.C. Industrial Commission correctly concluded that a sheriff's deputy was not an independent contractor when he was injured while working off duty directing traffic near a highway construction project but was an employee of his sheriff's office, in accordance with the factors contained in *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11 (1944). Plaintiff was hired for traffic control by the construction company on the basis of his official status as a law enforcement officer (as required by the company's contract with the state transportation department); he was visibly identifiable as law enforcement based on his gear; his vehicle was

displaying his blue lights; he did not have the independent use of his skill, knowledge, or training as a law enforcement officer and had no ability to freely direct traffic other than to carry out the instructions given to him by a captain from the sheriff's office; he did not choose the times he worked traffic control; and he did not work for a fixed price or lump sum. **Lassiter v. Robeson Cnty. Sheriff's Dep't, 579.**

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.

CARCANO v. JBSS, LLC

[291 N.C. App. 522 (2023)]

JAMES R. CARCANO AND CARCANO REALTY GROUP, LLC, PLAINTIFFS
v.
JBSS, LLC, AND DAVID BROWDER, LUCY BROWDER,
AND JASON BROWDER, DEFENDANTS

No. COA23-685

Filed 19 December 2023

1. Statutes of Limitation and Repose—action for renewal of judgment—judgment amended—no jurisdiction to amend—limitations period running as of initial judgment

In an action seeking to renew a money judgment, where plaintiffs filed their complaint for renewal over ten years after the judgment was entered but less than ten years after the trial court amended the judgment (to correct the name of a party), the trial court properly granted summary judgment to defendants on the ground that plaintiffs did not file their complaint within the applicable ten-year statute of limitations. The limitations period could not have begun on the date that the amended judgment was entered because the trial court lacked jurisdiction to amend the judgment: (1) under Civil Procedure Rule 59(e), since there was no evidence that plaintiffs filed a motion to amend the initial judgment within the requisite ten-day period; (2) under Civil Procedure Rule 60(b)(1), since there was no evidence that plaintiffs moved to amend the judgment under this rule, and even if they had, a Rule 60(b) amendment would not have affected the finality of the initial judgment; or (3) as a *nunc pro tunc* judgment, where the amended judgment did not include language designating it as *nunc pro tunc* and where the record did not suggest that the initial judgment was never entered to begin with.

2. Statutes of Limitation and Repose—summary judgment granted—individual defendant—did not raise affirmative defense—corporate defendant—appearing pro se and without agent

In an action seeking to renew a money judgment, an order granting summary judgment to defendants—on the ground that plaintiffs failed to file their complaint within the applicable ten-year statute of limitations—was affirmed in part and reversed in part. Although one of the individual defendants did not join in the other defendants' pro se answer to plaintiffs' complaint, in which defendants asserted their statute of limitations argument as an affirmative defense,

plaintiffs conceded to having executed a release of their claim of judgment against that individual defendant. Because there was no existing claim against the individual defendant that the court could have renewed, plaintiffs failed to present a genuine issue of material fact as to that defendant, and therefore it did not matter that the defendant had failed to personally raise an affirmative defense to plaintiffs' complaint. Conversely, the court did err in granting summary judgment as to a corporate defendant, since corporations cannot appear pro se and this particular defendant was not represented by an agent in the action.

Appeal by plaintiffs from order entered 20 December 2022 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 28 November 2023.

King Law Offices, PLLC, by Alexander M. Sherret, for plaintiffs-appellants.

David Browder and Lucy Browder, pro se for defendants-appellees.

FLOOD, Judge.

James R. Carcano and Carcano Realty Group (collectively, "Plaintiffs") appeal from the trial court's order granting summary judgment in favor of JBSS, LLC ("JBSS"), David Browder, Lucy Browder, and Jason Browder (collectively, "Defendants"). Plaintiffs argue the trial court erred in denying Plaintiffs' motion for summary judgment and granting summary judgment in favor of Defendants because, (A) Plaintiffs sufficiently pled and filed their complaint within the statute of limitations, and (B) Defendants JBSS and Jason Browder did not raise the affirmative defense of statute of limitations. As explained in further detail below, we affirm in part, reverse in part, and remand.

I. Facts and Procedural Background

On 12 October 2010, based on a prior civil action, the trial court entered a judgment (the "Initial Judgment") against Defendants, ordering that Defendants were jointly and severally liable to Plaintiffs in the amount of $95,000.00 for breach of contract. The Initial Judgment, however, included an erroneous caption that indicated the parties to whom the judgment was being awarded were "James R. Carcano and the Carcano Family Trust, LLC." On 23 May 2012, the trial court amended the Initial Judgment (the "Amended Judgment"), such that Plaintiffs

were properly listed as "James R. Carcano and Carcano Realty Group LLC." The monetary judgment listed in the Amended Judgment was the same as in the Initial Judgment—$95,000.00.

On 29 July 2017, Plaintiffs received a check from Defendant Jason Browder in the amount of $7,000.00 towards the Amended Judgment, and the current Record on appeal contains no evidence of other payments from any Defendant. On 7 April 2022, Plaintiffs filed a complaint (the "Complaint") to "obtain a new Judgment, renewing the [p]rior Judgment for an additional term of ten [] years." In the Complaint, Plaintiffs requested they recover judgment against Defendants for the remaining balance of the monetary judgment as of 1 April 2022. On 12 May 2022, Defendants JBSS, David Browder, and Lucy Browder filed *pro se* an Answer to the Complaint where they asserted, *inter alia*, Plaintiffs' claim is barred by the ten-year statute of limitations under N.C. Gen. Stat. § 1-47(1) (2021). Defendant Jason Browder was not included in this Answer to the Complaint.

On 2 December 2022, Plaintiffs filed a Motion for Summary Judgment (the "Motion"). This matter came on before the trial court, and on 20 December 2022, the trial court entered an order denying the Motion. In its order, the trial court found, *inter alia*:

> 3. The current action was filed on [7 April 2022], ten years after the [Initial J]udgment, but prior to the [A]mended [J]udgment.
>
> 4. There is nothing in [the Amended Judgment] to indicate that any motion was filed to amend the [Initial J]udgment, nor anything to indicate that [D]efendants were given notice or an opportunity to be heard about the amendment.
>
> . . . .
>
> 6. [P]laintiffs have not set out the legal basis upon which the amendment to the judgment was made, nor cited any authority of the [c]ourt to make such an amendment nineteen months after the [Initial J]udgment. Rule 59(e) of the Rules of Civil Procedure provides that a motion to amend a judgment must be made within [ten] days after the entry of the judgment, which was not done. Rule 60(b)(1) may give authority to amend a judgment to correct the party, however, this provision is limited to one year after the judgment was entered. [P]laintiff[s] do[] not assert the correction was clerical in nature in that [P]laintiff[s]

> contend[] the statute of limitations should begin after the amended judgment, and the changing of the name of the party in a case, to which is entitled to judgment, would be substantive. Rule 60, however, provides: "A motion under this section does not affect the finality of a judgment or suspend its operation."
>
> 7. While it does not appear the case here, even if [P]laintiff[s] contend[] the correction is merely clerical and corrected under Rule 60(a), the amendment again would not affect the finality of the [Initial J]udgment or suspend its operation.
>
> 8. The Judge lacked any jurisdiction or authority to enter the amended judgment, [D]efendants were not given notice of its amendment nor the request to have it amended, the amendment was not timely, and the amendment had no affect [sic] on the finality of the original judgment nor suspend its operation.

Plaintiffs timely appealed.

II. Jurisdiction

As the trial court's granting of summary judgment for Defendants constitutes a final judgment, Plaintiffs' appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)a. (2021).

III. Standard of Review

"This Court reviews decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 358, 866 S.E.2d 675, 684 (2021) (citation omitted). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Dallaire v. Bank of America, N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021)).

IV. Analysis

Plaintiffs argue on appeal they: (A) are entitled to summary judgment against Defendants because Plaintiffs sufficiently pled and filed their Complaint within the statute of limitations; and, (B) are entitled to summary judgment against Defendants JBSS and Jason Browder

because these Defendants did not properly raise the affirmative defense of the statute of limitations. We address each argument in turn.

A. Statute of Limitations

[1] In their first issue on appeal, Plaintiffs argue that 23 May 2012—the date the Amended Judgment was entered—is the date of entry for the purposes of the ten-year statute of limitations, and their 7 April 2022 filing of the Complaint was therefore timely. *See* N.C. Gen. Stat. § 1-47(1) (2021); *see Unifund CCR Partners v. Young*, 282 N.C. App. 381, 386, 871 S.E.2d 347, 351 (2022) (providing that under N.C. Gen. Stat. § 1-47(1), "[a]n independent action seeking to renew a judgment must be brought within ten years of entry of the original judgment, and such renewal action can be brought only once"). In support of this contention, Plaintiffs present three sub-arguments: (1) Plaintiffs sufficiently pled their action to renew the judgment entered against Defendants; (2) 23 May 2012[1] is the date of entry for the purpose of the statute, and the statute of limitations window therefore did not run until 23 May 2022; and, (3) the trial court had authority and jurisdiction to enter the Amended Judgment *nunc pro tunc*. As Plaintiffs' third sub-argument is determinative of our statute of limitations analysis, we address this issue.

In arguing the trial court had authority and jurisdiction to enter the Amended Judgment, Plaintiffs specifically contend that the trial court had the power to enter the Amended Judgment *nunc pro tunc* "to ensure the proper order of the court was reflected." Plaintiffs further contend the Initial Judgment did not reflect the order of the trial court because it did not name the proper Plaintiffs, and Plaintiffs therefore could not enforce or collect a judgment to which they were not parties. Plaintiffs' contentions are without merit.

Under the North Carolina Rules of Civil Procedure, a party's motion to alter or amend a judgment "shall be served not later than [ten] days after the entry of the judgment." N.C. R. Civ. P. 59(e). Under Rule 60(b)(1) of the North Carolina Rules of Civil Procedure, a trial court may correct a party's name that was erroneously designated in the court's judgment or order, but this corrective action may be taken only upon a party's motion, to be brought "not more than one year after the judgment, order, or proceeding was entered or taken." N.C. R. Civ. P. 60(b). A motion made under Rule 60(b), however, "does not affect the finality of a judgment or suspend its operation." N.C. R. Civ. P. 60(b).

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1. In their Brief, Plaintiffs list 12 May 2012 as the date the trial court entered the Amended Judgment. This is in error as, per the Record, the Amended Judgment was entered on 23 May 2012.

Absent a proper motion under the Rules of Civil Procedure, a trial court may issue *nunc pro tunc* a corrective judgment or order. Regarding *nunc pro tunc* orders or judgments, this Court has provided:

> A nunc pro tunc order is a correcting order. The function of an entry of nunc pro tunc is to correct the record to reflect a prior ruling made in fact but defectively recorded. A nunc pro tunc order merely recites court actions previously taken, but not properly or adequately recorded. A court may rightfully exercise its power merely to amend or correct the record of the judgment, so as to make the court's record speak the truth or to show that which actually occurred, under circumstances which would not at all justify it in exercising its power to vacate the judgment. However, a nunc pro tunc entry *may not be used to accomplish something which ought to have been done but was not done.*

K&S Res., LLC v. Gilmore, 284 N.C. App. 78, 83, 875 S.E.2d 538, 542 (2022) (emphasis added) (cleaned up) (citation omitted); *see Whitworth v. Whitworth*, 222 N.C. App. 771, 778–79, 731 S.E.2d 707, 713 (2012) (holding an amended order was not *nunc pro tunc* where it "essentially created an order with findings of fact and conclusions of law that had not previously existed"); s*ee also Dabbondanza v. Hansley*, 249 N.C. App. 18, 22, 791 S.E.2d 116, 120 (2016) ("[O]rders may be entered *nunc pro tunc* in the same manner as judgments." (cleaned up) (citation omitted)). Further,

> before a court order or judgment may be ordered *nunc pro tunc to take effect on a certain prior date*, there must first be an order or judgment actually decreed or signed on that prior date. If such decreed or signed order or judgment is then not entered due to accident, mistake, or neglect of the clerk, and provided that no prejudice has arisen, the order or judgment may be appropriately entered at a later date *nunc pro tunc to the date when it was decreed or signed.*

Whitworth, 222 N.C. App. at 778–79, 731 S.E.2d at 713 (emphasis added).

Regardless of the means by which a trial court enters an amended judgment, however,

> [o]n the question of the effect of clerical errors in the names and designation of parties, our case law is clear. Names are to designate persons, and where the identity

> is certain a variance in the name is immaterial. Errors or defects in the pleadings or proceedings not affecting substantial rights are to be disregarded *at every stage of the action*.

Bank of Hampton Rds. v. Wilkins, 266 N.C. App. 404, 408, 831 S.E.2d 635, 639–40 (2019) (citation and internal quotation marks omitted); *see also Gordon v. Pintsch Gas Co.*, 178 N.C. 435, 100 S.E.2d 878, 880 (1919) (holding the defendant did not suffer any prejudice by reason of a misnomer in the trial court's judgment, as "a misnomer does not vitiate [a judgment], provided the identity of the *corporation* or person . . . intended by the parties is apparent, whether it is in a deed, *or in a judgment*, or in a criminal proceeding" (emphasis added) (citations omitted)).

Here, the Initial Judgment was entered on 12 October 2010 and the Amended Judgment on 23 May 2012. There is no Record evidence Plaintiffs filed a motion to amend the Initial Judgment within ten days after its entry, and as such the trial court did not have jurisdiction to enter its Amended Judgment under Rule 59(e). *See* N.C. R. Civ. P. 59(e). As to Rule 60(b)(1), there is nothing in the Record to suggest Plaintiffs moved to amend the Initial Judgment under this Rule, and even if they did, the function of Rule 60(b) is such that amended judgments do not affect the finality of the prior judgment. *See* N.C. R. Civ. P. 60(b).

As the trial court had no jurisdiction under the North Carolina Rules of Civil Procedure to enter the Amended Judgment, the only means by which the court may have had jurisdiction or authority to enter the Amended Judgment was by entering it *nunc pro tunc*, "to correct the record to reflect a prior ruling made in fact but defectively recorded." *K&S Res., LLC*, 284 N.C. App. at 83, 875 S.E.2d at 542. In review of the Record, however, nowhere in the Amended Judgment did the trial court include language indicating it was *nunc pro tunc*. Additionally, for an amended judgment to be *nunc pro tunc*, the prior judgment *must not have been entered* "due to accident, mistake, or neglect of the clerk," and there is nothing in the Record here that indicates the Initial Judgment was not, in fact, entered. *See Whitworth*, 222 N.C. App. at 778–79, 731 S.E.2d at 713.

Even if the trial court did enter the Amended Judgment *nunc pro tunc*, however, this would actually be to the detriment of Plaintiffs' ultimate argument regarding the statute of limitations. "The function of an entry of nunc pro tunc is to correct the record to reflect a prior ruling made in fact but defectively recorded" and "to make the court's record speak the truth or to show that which actually occurred[.]" *See K&S*

Res., *LLC*, 284 N.C. App. at 83, 875 S.E.2d at 542 (cleaned up). This function is reflected in this Court's articulation of what is required in a *nunc pro tunc* judgment—when appropriately entered, a *nunc pro tunc* judgment is entered "*to the date when it was decreed or signed.*" *Whitworth*, 222 N.C. App. at 778–79, 731 S.E.2d at 713 (emphasis added). It is therefore evident Plaintiffs misapprehend the function of a *nunc pro tunc* judgment; if the Amended Judgment here had been entered *nunc pro tunc*, it would have been dated to 12 October 2010, *the date of the Initial Judgment*. Although Plaintiffs' argument is that, by filing the Complaint on 7 April 2022, they conformed to the ten-year statute of limitations, their contention concerning *nunc pro tunc* defeats their argument in its effect. In fact, to have complied with the statute of limitations, Plaintiffs had to file the Complaint by 11 October 2020, and they failed to do so. *See* N.C. Gen. Stat. § 1-47(1).

Finally, presuming by some procedural mechanism the trial court had jurisdiction to enter the Amended Judgment, we are unpersuaded by Plaintiffs' argument the Initial Judgment did not reflect the order of the court because it did not properly name Plaintiffs. As articulated above, in a judgment, where the identity of a party is clear—be it a person or corporation—a non-consequential variance in the party's name is immaterial. *See Bank of Hampton Rds.*, 266 N.C. App. at 408, 831 S.E.2d at 639–40; *see Gordon*, 178 N.C. at 435, 100 S.E.2d at 880. Here, in the Initial Judgment, Plaintiff, Carcano Realty Group, was erroneously listed as "Carcano Family Trust, LLC," and the Amended Judgment served only to correct this name. Nothing in the Record indicates, at any point in the proceedings, any uncertainty as to Plaintiff Carcano Realty Group's identity. As such, this error in the Initial Judgment is disregarded. *See Bank of Hampton Rds*., 266 N.C. App. at 408, 831 S.E.2d at 639–40.

As the trial court did not have jurisdiction to enter the Amended Judgment, and the Initial Judgment did not prejudice Plaintiffs' ability to enforce or collect the monetary judgment, the ten-year statute of limitations ran from the date of entry of the final, Initial Judgment—12 October 2010. *See* N.C. Gen. Stat. § 1-47(1). Plaintiffs filed the Complaint on 7 April 2022, which was more than ten years following the entry of the Initial Judgment and therefore, after the running of the statute of limitations.

Accordingly, Plaintiffs failed to meet their burden of proving the Complaint was timely filed, the trial court was presented with no issues of material fact, and its order of summary judgment in favor of Defendants was proper. *See K&S Res.*, *LLC*, 284 N.C. App. at 81, 875 S.E.2d at 541 ("The question whether a cause of action is barred by

the statute of limitations is a mixed question of law and fact. When a defendant asserts the statute of limitations as an affirmative defense, the burden rests on the plaintiff to prove that his claims were timely filed." (citation and internal quotation marks omitted)); *see also Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266. The trial court did not err.

B. Affirmative Defense

[2] Plaintiffs argue the trial court erred in denying the Motion and granting summary judgment in favor of Defendants Jason Browder and JBSS, as Jason Browder did not file an answer and raise the affirmative defense of statute of limitations, and JBSS is a corporation and may not proceed *pro se*. After careful review, we disagree with Plaintiffs' contentions as to Defendant Jason Browder, and agree as to Defendant JBSS.

1. Jason Browder

Under North Carolina law, "[t]he bar of the statute of limitations is an affirmative defense and cannot be availed of by a party who fails, in due time and proper form, to invoke its protection." *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assoc., P.C.*, 180 N.C. App. 257, 262, 636 S.E.2d 835, 839 (2006) (quoting *Overton v. Overton*, 259 N.C. 31, 36, 129 S.E.2d 593, 597 (1963)). Here, the Record shows that Jason Browder did not join Defendants JBSS, David Browder, and Lucy Browder in filing their *pro se* Answer to the Complaint, where they asserted the Complaint was barred by the ten-year statute of limitations.

In our *de novo* review of the Record, however, we find Plaintiffs conceded in the Complaint that they have executed a "release of their claim of judgment against only [] Defendant Jason Browder." As such, in moving for summary judgment to renew their prior claim of judgment against Jason Browder, Plaintiffs presented to the trial court no genuine issue of material fact, as Plaintiffs had against Jason Browder no claim of judgment that the trial court may have renewed for an additional term of ten years. *See Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266; *see* N.C. Gen. Stat. § 1-47(1). We therefore hold the trial court did not err in granting summary judgment in favor of Jason Browder and dismissing with prejudice Plaintiffs' claim against him, and affirm the trial court's order as to Jason Browder.

2. Defendant JBSS

As a general rule,

> while an individual may appear *pro se* before [a] court, a corporation is not an individual under North Carolina

> law, and must be represented by an agent. Further, a corporation cannot appear *pro se*; it must be represented by an attorney licensed to practice law in North Carolina, pursuant to certain limited exceptions. These exceptions include the drafting by non-lawyer officers of some legal documents, and appearances in small claims courts and administrative proceedings.

HSBC Bank, USA, Nat'l Ass'n v. PRMC, Inc., 249 N.C. App. 255, 259, 790 S.E.2d 583, 586 (2016) (citations omitted); *see also Shen Yu Ke v. Heng-Qian Zhou*, 256 N.C. App. 485, 490, 808 S.E.2d 458, 462 (2017) (holding that an entry of default against the defendant corporation was proper where "the answer was not a valid response for [the defendant] corporation because [the corporation's agent] was not a licensed attorney").

Here, in the answer signed and filed by Defendants JBSS, David Browder, and Lucy Browder, David Browder was denoted as representing JBSS in his capacity as manager. As a corporation cannot appear *pro se*, and filing an answer does not fall under the limited exceptions where a corporation need not be represented by an attorney licensed to practice law in North Carolina, JBSS's defense of the statute of limitations was not proper because David Browder is not a licensed attorney. *See HSBC Bank, USA, Nat'l Ass'n*, 249 N.C. App. at 259, 790 S.E.2d at 586; *see also Shen Yu Ke*, 256 N.C. App. at 490, 808 S.E.2d at 462. Accordingly, as it concerns JBSS, it was error for the trial court to enter summary judgment against Plaintiffs and to deny Plaintiffs' claims with prejudice. We therefore reverse the trial court's order as to JBSS.

V. Conclusion

For the reasons aforesaid, we affirm in part the trial court's order, affirm the the order as it concerns Defendant Jason Browder, reverse the order as it concerns Defendant JBSS, and remand to the trial court for further proceedings.

AFFIRMED in part, REVERSED in part, and REMANDED.

Judges TYSON and ZACHARY concur.

CRANES CREEK, LLC, PLAINTIFF
v.
NEAL SMITH ENGINEERING, INC., DEFENDANT

No. COA23-472

Filed 19 December 2023

Negligence—professional negligence—engineering—summary judgment—standard of care—expert testimony

In a professional negligence action filed against an engineering business (defendant) that performed civil engineering services on land that a corporation (plaintiff) was in the process of purchasing, where plaintiff discovered that the water flow on the property did not meet the minimum requirements for fire suppression despite defendant's statements to the contrary, the trial court did not err in granting defendant's motion for summary judgment and dismissing plaintiff's claims for negligence and negligent misrepresentation. Plaintiff failed to meet its burden of establishing the standard of care applicable to engineers, since none of plaintiff's expert witnesses were able to testify as to what that standard was and whether defendant breached it. Consequently, plaintiff failed to show that a genuine issue of material fact existed at the summary judgment phase.

Appeal by Plaintiff from order entered 22 November 2022 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 18 October 2023.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp and Michael J. Newman, for Plaintiff-Appellant.

Ragsdale Liggett PLLC, by Melissa Dewey Brumback, Amie C. Sivon, and Michael Hutcherson, for Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff, Cranes Creek, LLC, appeals from the trial court's order granting Defendant, Neal Smith Engineering, Inc.'s, motion for summary judgment. Plaintiff argues the trial court erred in granting Defendant's motion for summary judgment asserting genuine issues of material fact exist concerning Plaintiff's claims for negligence and

negligent misrepresentation. We hold the trial court did not err in granting Defendant's motion for summary judgment and affirm.

I. Factual and Procedural Background

In November 2015, Mid-State Development, LLC, purchased several acres located in Southern Pines. Mid-State intended to subdivide and develop the land into a residential subdivision ("Shaw Landing"). The Town of Aberdeen annexed the proposed subdivision from Southern Pines. On 12 November 2015, Mid-State entered into a contract with Defendant to provide civil engineering site services.

On 8 June 2019, Plaintiff signed an offer to purchase Shaw Landing from Mid-State. During the due diligence period, Plaintiff reached out to C. Webster, Defendant's member-manager, to ask if waterflow tests had been conducted. Plaintiff asked Webster to send the results and confirm whether flow was sufficient for fire suppression. B. Welborn, an employee of Defendant, responded to Plaintiff's email on 2 July 2019 stating, in relevant part: "We will need to model the proposed water mains for the NCDEQ-DWR permit, but the fire flow at the dead-end hydrant meets the minimum fire flow requirements at 20 psi."

On 2 October 2019, Plaintiff completed the purchase of Shaw Landing. Sometime later, Plaintiff discovered additional water supply and pipes would have to be installed and run to the subdivision to meet the minimum flow requirements for fire suppression.

On 20 July 2021, Plaintiff filed a complaint against Defendant asserting claims for negligent misrepresentation, negligence, breach of contract, and breach of implied warranties. On 29 September 2021, Defendant filed an answer and counterclaims. On 25 October 2021, Plaintiff filed an answer to Defendant's counterclaims. On 11 October 2022, Defendant filed a motion for summary judgment. On 25 October 2022, Plaintiff filed a motion to amend their complaint and an amended complaint asserting claims for negligent misrepresentation and negligence.

On 10 November 2022, Defendant's motion for summary judgment came on for hearing in Moore County Superior Court. On 22 November 2022, the trial court entered an order granting Defendant's motion for summary judgment and dismissing Plaintiff's complaint and amended complaint. Plaintiff timely filed notice of appeal on 19 December 2022.

II. Analysis

Plaintiff contends the trial court erred in granting Defendant's motion for summary judgment as there were genuine issues of material

fact concerning Plaintiff's claims for negligence and negligent misrepresentation. We disagree.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2023). In a summary judgment proceeding, the movant "bears the burden of establishing the lack of any triable issue." *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999). We review the trial court's allowance of a motion for summary judgment de novo, considering the evidence in the light most favorable to the non-moving party. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

Plaintiff's claims for negligence and negligent misrepresentation are both claims of professional negligence, as Plaintiff alleges Defendant was negligent in its professional capacity as an engineer. *See Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (citation omitted) (stating a claim for "negligence" is actually a claim for "professional negligence" where the plaintiff alleges negligent performance by the defendant in its professional capacity). "In a professional negligence action, the plaintiff bears the burden of showing: '(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.' " *Id.* at 35, 760 S.E.2d at 101 (quoting *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008)).

Further, the plaintiff must establish the standard of conduct or care through expert testimony. *Id.* Through this requirement, the expert is able to "assist the jury in discerning whether [the] defendant's professional performance or conduct did not conform [with the standard of care], and thus was in breach of that duty and the proximate cause of [the] plaintiff's injury." *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 11, 607 S.E.2d 25, 31 (2005).

Expert testimony is not required to establish the standard of care where "the common knowledge and experience of the jury is sufficient to evaluate [the defendant's] compliance with [the] standard[.]" *Id.* (internal marks and citation omitted). This exception "is implicated where the conduct is gross, or of such a nature that the common knowledge of lay persons is sufficient to find the standard of care required, a departure therefrom, or proximate causation." *Id.* (internal marks and

citations omitted). Where the common knowledge exception does not apply and the plaintiff fails to establish the professional standard of care through expert testimony, "summary judgement for the defendant is proper." *Frankenmuth*, 235 N.C. App. at 35, 760 S.E.2d at 101 (citation omitted); *see also Huffman Oil Co.*, 190 N.C. App. at 271, 661 S.E.2d at 11 (holding the plaintiffs failed to establish a prima facie showing of professional negligence where expert testimony regarding the standard of care was lacking).

Thus, this Court will affirm the trial court's grant of summary judgment where the plaintiff's expert testimony "does not show, as is required to sustain the claim [for professional negligence], what an engineer practicing under the relevant standard of care actually does, nor any specific instances of breach of that relevant standard." *Handex*, 168 N.C. App. at 12, 607 S.E.2d at 32 (emphasis omitted).

Here, Plaintiff made professional negligence claims against Defendant for negligent misrepresentation and negligence. Specifically, as to its negligent misrepresentation claim, Plaintiff asserted:

> Plaintiff justifiably relied, to his detriment, on information prepared and conveyed by Defendant without reasonable care, and Defendant owed to Plaintiff a duty of care to make a full and fair disclosure of all relevant facts concerning the sufficiency of waterflow for fire suppression for the project.

Moreover, in its negligence claim, Plaintiff claimed:

> [Defendant] owed a duty to Plaintiff to exercise the ability, skill and care ordinarily used by engineers on similar projects.
>
> [Defendant] did not perform its duties as owed to Plaintiff. [Defendant] failed to exercise the ability, skill and care customarily used by engineers on similar projects. [Defendant] thereby breached its duties to Plaintiff. In doing so, [Defendant] was negligent.
>
> Specifically, [Defendant's] negligence includes but is not limited to, failing to know that the SW Broad Street Hydrant Flow at 20 psi did not meet the applicable Fire Code standards for the project, or negligently misreading the Hydrant Flow Test Report as somehow providing sufficient flow for fire suppression purposes for the project.

Each of these claims required Plaintiff to establish, through expert witness testimony, Defendant's professional standard of care as an engineer. *See Frankenmuth*, 235 N.C. App. at 34, 760 S.E.2d at 101. Plaintiff offered deposition testimony from several experts, M. Zaccardo, T. Cross, and R. Briggs. None of these experts was able to testify as to whether Defendant had breached the standard of care as was required to support Plaintiff's claims. In his deposition, Zaccardo's stated:

> Q: Did they ask you if you thought [Defendant] violated the standard of care for engineers?
>
> A: In a sense, I think they asked me that question.
>
> Q: And what was your answer?
>
> A: My answer was I couldn't really say, because the plans weren't approved.
>
> Q: And that's true sitting here today, as well, right?
>
> A: Yes.
>
> Q: So because the plans were not approved, you can't say that [Defendant] violated the standard of care?
>
> A: Because they weren't complete. Yes.

Cross testified similarly stating:

> Q: Do you have an opinion that [Defendant] violated the standard of care in any capacity?
>
> A: Based on information provided to me, I do not.

Moreover, Briggs, when asked if Defendant violated the professional standard of care for engineers noted:

> A: [ ] [Defendant] conducted the fire flow test totally correctly. Some of the wording with respect to the dead-end hydrant you could take issue with, but that is really minor in this case. [Defendant] also correctly identified the fire flow at the dead-end hydrant of five hundred gallons per minute does meet the minimum fire flow requirement at twenty psi. The issue with this is does the five hundred gallons per minute satisfy the proposed development requirement with the municipality of Aberdeen. Everything that I have reviewed indicates that it did not.

Further, Briggs stated, in his opinion, Defendant should have communicated more clearly "some of the quirks" on the project. Nonetheless, Briggs was never able to definitively testify to the standard or whether Defendant breached the standard, only that he would have included more information in the email.

Because none of Plaintiff's experts were able to testify to the professional standard of care for engineers, Plaintiff failed to present a genuine issue of material fact in support of its professional negligence claims against Defendant. Thus, the trial court did not err in granting Defendant's motion for summary judgment.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not err in granting Defendant's motion for summary judgment.

AFFIRMED.

Judges DILLON and TYSON concur.

ELITE HOME HEALTH CARE, INC., AND
ELITE TOO HOME HEALTH CARE, INC., PETITIONERS
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, DIVISION OF HEALTH BENEFITS, RESPONDENTS

No. COA23-122

Filed 19 December 2023

Administrative Law—Medicaid reimbursements—prepayment review—definition of "clean claim"—federal regulation controls

The decision of the Department of Health and Human Services terminating petitioners' continued participation in North Carolina's Medicaid program was properly upheld by the administrative law judge (ALJ) and, subsequently, the superior court, based on the ALJ's findings and conclusion that petitioners failed to achieve a minimum level of accuracy when submitting "clean claims" during prepayment review. The agency properly applied the definition of "clean claim" (which is undefined in the governing statute) used in the Code of Federal Regulations pertaining to prepayment claims review; there was no merit to petitioners' contention that the agency should have applied the definition that appears in the North

Carolina Administrative Code in a section that is solely applicable to local management entities (LMEs) or to services payable from funds administered by an LME, since petitioners are not LMEs and had never submitted claims to or through an LME.

Appeal by petitioners from order entered 12 September 2022 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 October 2023.

Ralph Bryant Law Firm, by Ralph T. Bryant, Jr., for petitioners-appellants.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

ZACHARY, Judge.

This appeal concerns the definition of a "clean claim" for the purposes of prepayment claims review of Medicaid providers in North Carolina, pursuant to N.C. Gen. Stat. § 108C-7 (2021). After conducting prepayment claims review, Respondent North Carolina Department of Health and Human Services ("DHHS") terminated Petitioners Elite Home Health Care, Inc., and Elite Too Home Health Care, Inc., (collectively, "Elite")[1] from participation in North Carolina's Medicaid program, due to Elite's "failure to successfully meet the accuracy requirements of prepayment review pursuant to [N.C. Gen. Stat.] § 108C-7." Elite appeals from the superior court's order affirming the final decision of the administrative law judge, which upheld the termination. After careful review, we affirm.

I. Background

The dispositive issue in this appeal is the definition of a "clean claim" as used in N.C. Gen. Stat. § 108C-7. The relevant legal and procedural facts are undisputed.

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1. We use "Elite" as a collective term, consistent with the record on appeal and the proceedings below. As the superior court explained: "Petitioners Elite Home Health Care, Inc.[,] and Elite Too Home Health Care, Inc[.,] are two separate entities. [However,] Tara Ellerbe is the CEO and sole shareholder of each. Each was enrolled as a [Medicaid] provider . . . . Each was subject to the same prepayment review at issue in this case and both were referred to in the hearing as if a single entity."

Similarly, we use "DHHS" as a collective term to include Respondents Division of Medical Assistance and Division of Health Benefits, both of which are divisions within the Department of Health and Human Services.

A. Medicaid and Prepayment Claims Review

"The Medicaid program was established by Congress in 1965 to provide federal assistance to states which chose to pay for some of the medical costs for the needy." *Correll v. Division of Soc. Servs.*, 332 N.C. 141, 143, 418 S.E.2d 232, 234 (1992). "Whether a state participates in the program is entirely optional. However, once an election is made to participate, the state must comply with the requirements of federal law." *Id.* (cleaned up). In essence, "Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323, 191 L. Ed. 2d 471, 476 (2015).

Among the conditions imposed by Congress for a State's receipt of Medicaid funds is the requirement that "[a] State plan for medical assistance must . . . provide for procedures of prepayment and postpayment claims review[.]" 42 U.S.C. § 1396a(a)(37). Accordingly, N.C. Gen. Stat. § 108C-7 authorizes DHHS to conduct prepayment claims review "to ensure that claims presented by a provider for payment by [DHHS] meet the requirements of federal and State laws and regulations and medical necessity criteria[.]" N.C. Gen. Stat. § 108C-7(a).

Medicaid claims are generally paid upon receipt, and providers are subject to periodic audits thereafter. *See Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 201 N.C. App. 70, 74, 685 S.E.2d 562, 566 (2009), *disc. review denied*, 363 N.C. 854, 694 S.E.2d 201 (2010). Under certain circumstances, however, a Medicaid provider may receive notice that it has been placed on prepayment claims review. N.C. Gen. Stat. § 108C-7(b). The "[g]rounds for being placed on prepayment claims review" include:

> [R]eceipt by [DHHS] of credible allegations of fraud, identification of aberrant billing practices as a result of investigations, data analysis performed by [DHHS], the failure of the provider to timely respond to a request for documentation made by [DHHS] or one of its authorized representatives, or other grounds as defined by [DHHS] in rule.

Id. § 108C-7(a).

Before placing a provider on prepayment claims review, DHHS must "notify the provider in writing of the decision and the process for submitting claims for prepayment claims review." *Id.* § 108C-7(b). Such notice must contain:

> (1) An explanation of [DHHS]'s decision to place the provider on prepayment claims review.
>
> (2) A description of the review process and claims processing times.
>
> (3) A description of the claims subject to prepayment claims review.
>
> (4) A specific list of all supporting documentation that the provider will need to submit to the prepayment review vendor for all claims that are subject to the prepayment claims review.
>
> (5) The process for submitting claims and supporting documentation.
>
> (6) The standard of evaluation used by [DHHS] to determine when a provider's claims will no longer be subject to prepayment claims review.

Id.

Once a provider is placed on prepayment claims review, that provider must achieve an acceptable level of "clean claims submitted" to be released from review or else risk sanction, which potentially includes termination from the Medicaid program:

> (d) [DHHS] shall process all clean claims submitted for prepayment review within 20 calendar days of receipt of the supporting documentation for each claim by the prepayment review vendor. To be considered by [DHHS], the documentation submitted must be complete, legible, and clearly identify the provider to which the documentation applies. If the provider failed to provide any of the specifically requested supporting documentation necessary to process a claim pursuant to this section, [DHHS] shall send to the provider written notification of the lacking or deficient documentation within 15 calendar days of the due date of requested supporting documentation. [DHHS] shall have an additional 20 days to process a claim upon receipt of the documentation.
>
> (e) The provider shall remain subject to the prepayment claims review process until the provider achieves three consecutive months with a minimum seventy percent

> (70%) clean claims rate, provided that the number of claims submitted per month is no less than fifty percent (50%) of the provider's average monthly submission of Medicaid claims for the three-month period prior to the provider's placement on prepayment review. If a provider does not submit any claims following placement on prepayment review in any given month, then the claims accuracy rating shall be zero percent (0%) for each month in which no claims were submitted. If the provider does not meet the seventy percent (70%) clean claims rate minimum requirement for three consecutive months within six months of being placed on prepayment claims review, [DHHS] may implement sanctions, including termination of the applicable Medicaid Administrative Participation Agreement, or continuation of prepayment review. [DHHS] shall give adequate advance notice of any modification, suspension, or termination of the Medicaid Administrative Participation Agreement.

Id. § 108C-7(d)–(e).

B. Procedural History

Elite was party to a Medicaid Participation Agreement, pursuant to which it was required to abide by the policies developed by DHHS in Elite's provision of services. The Carolina Centers for Medical Excellence ("CCME") is a private corporation with which DHHS contracted to conduct prepayment claims reviews of particular Medicaid providers in North Carolina.

On 3 July 2019, at the direction of DHHS, CCME issued initial notices of prepayment claims review to Elite via certified mail. After a failed delivery attempt and after receiving no response to the notices left for Elite, CCME sent the notices to Elite by secured email on 22 July 2019. Between July 2019 and May 2020, CCME and Elite "made or attempted contact 263 times to discuss the prepayment review process, including, but not limited to, documentation requests, claims submissions, submission timelines, and denials." Elite submitted "roughly 60,000" claims while on prepayment claims review.

On 6 March 2020, DHHS sent to Elite, via certified mail, tentative notices of its decision to terminate Elite from participation in the North Carolina Medicaid program. The tentative notices stated that the decision was "a result of [Elite] not meeting minimum

accuracy rate requirements of prepayment review[.]" On 20 April 2020, Elite filed a petition for a contested case hearing with the Office of Administrative Hearings.

The matter came on for hearing before the administrative law judge on 26 and 27 April 2021. On 3 November 2021, the administrative law judge entered a final decision upholding DHHS's decision.

In his final decision, the administrative law judge made the following pertinent findings of fact:

> 12. The Notices informed [Elite] that CCME would conduct prepayment review of claims submitted by [Elite]. The Notices described the prepayment review process and specifically explained that the provider must attain a claims submission accuracy rate of at least 70% for three consecutive calendar months. Further, the Notices informed [Elite] that if this rate was not achieved within six months of being placed on prepayment review, . . . [DHHS] could implement sanctions, including termination of the provider from providing services.
>
> 13. The Notices specifically stated: "However, the prepayment review contractor will review the documentation for services billed, including prior authorized services, to determine if the documentation is compliant with policy. An example is obtaining staff credentials to verify that a service has been rendered by an appropriately credentialed person, as required by Medicaid policy."
>
> 14. The Notices from CCME also set out a list of documents CCME would need to review and included a sample Audit Tool. An Audit Tool lists what documentation the reviewer needs to review for each claim.
>
> . . . .
>
> 16. A claim submitted for a given date of service must be completely compliant with Clinical Coverage Policy as of that date of service.
>
> 17. This methodology has been approved by [DHHS] and is applied by CCME for all [personal care services] providers in the NC Medicaid Program that are on prepayment review.

18. CCME is in nearly daily contact with providers who are subject to prepayment review and have questions about the process, about records requests, about specific denials, and other issues and concerns about the prepayment review process.

19. The number of claims submitted while [Elite was] on prepayment review was roughly 60,000.

20. Between July 2019 and May 2020, [Elite] and CCME made or attempted contact 263 times to discuss the prepayment review process, including, but not limited to, documentation requests, claims submissions, submission timelines, and denials.

21. [Elite was] fully informed and aware of the requirements for accuracy.

22. In calculating the monthly accuracy report, CCME reviews each claim detail line item.

23. Petitioner Elite Home Health Care, Inc. failed to send all required documentation 78 [percent] of the time while on prepayment review. Petitioner Elite Too Home Health Care, Inc. failed to send all required documentation 74 [percent] of the time while on prepayment review.

24. [Elite] failed to meet the minimum accuracy requirements.

25. [Elite] ha[s] not proven that all required documentation was provided at the time claims were submitted and was available for review by the prepayment review vendor, nor that claims should not have been denied at the time of the vendor's initial review.

26. The term "clean claim" is not defined in [N.C. Gen. Stat. §] 108C.

27. The term "clean claim" is defined in 42 C.F.R. § 447.45 as "one that can be processed without obtaining additional information from the provider of the service or from a third party."

28. The term "clean claim" is not defined by the North Carolina Administrative Code as it relates to Medicaid claims.

On 2 December 2021, Elite filed a petition for judicial review in the Mecklenburg County Superior Court. In its petition, Elite specifically challenged the administrative law judge's findings of fact 16, 21, 23–25, and 28. Elite also challenged the conclusions of law in which the administrative law judge applied the federal definition of "clean claim" from 42 C.F.R. § 447.45 rather than the definition of "clean claim" from 10A N.C. Admin. Code 27A.0302 (2022), which Elite argued applied instead.

On 23 August 2022, the matter came on for hearing in Mecklenburg County Superior Court. By order entered on 12 September 2022, the superior court affirmed the final decision of the administrative law judge. Elite timely filed notice of appeal.

II. Discussion

On appeal, Elite argues that the superior court erred by affirming the final decision of the administrative law judge, and makes the same argument that it made below: that "DHHS was not authorized by statute to terminate [Elite's] participation in the Medicaid program" because it "failed to apply the correct definition of clean claim to determine the provider prepayment review accuracy rate[.]" We disagree.

A. Standard of Review

N.C. Gen. Stat. § 150B-51 sets forth the standard of review of decisions of an administrative agency, such as DHHS, and "governs both trial and appellate court review of administrative agency decisions." *Williford v. N.C. Dep't of Health & Hum. Servs.*, 250 N.C. App. 491, 493, 792 S.E.2d 843, 846 (2016) (citation omitted). Section 150B-51 provides, in pertinent part, that:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)–(c).

Thus, pursuant to § 150B-51(b)–(c), our standard of review depends upon the error asserted by the petitioner. *Id.* When the petitioner's appeal raises an issue of law, such as the scope of the agency's statutory authority, "this Court considers the matter anew and freely substitutes its own judgment for the agency's." *Christian v. Dep't of Health & Hum. Servs.*, 258 N.C. App. 581, 584, 813 S.E.2d 470, 472 (cleaned up), *appeal dismissed*, 371 N.C. 451, 817 S.E.2d 575 (2018). However, when the petitioner's appeal raises arguments pursuant to § 150B-51(b)(5)–(6), we review using the whole record test. "Using the whole record standard of review, we examine the entire record to determine whether the agency decision was based on substantial evidence such that a reasonable mind may reach the same decision." *Id.* at 584–85, 813 S.E.2d at 472.

In the present case, Elite acknowledges that the dispositive facts are undisputed and "the definition of a clean claim is determinative in this matter." In that this issue presents a pure question of law, we apply a de novo standard of review to the legal issue raised in this appeal.

B. Analysis

The question presented is the definition of the term "clean claim," which is not defined in the text of N.C. Gen. Stat. § 108C-7. However, the Centers for Medicare & Medicaid Services ("CMS") promulgated a federal regulation defining the term "clean claim" for the purposes of

prepayment claims review pursuant to 42 U.S.C. § 1396a(a)(37). CMS defines a "clean claim" in the Code of Federal Regulations as "one that can be processed without obtaining additional information from the provider of the service or from a third party." 42 C.F.R. § 447.45(b) (2022). DHHS asserts that the definition in this federal regulation controls in this case.

On the other hand, Elite contends that a "clean claim" is "an electronic invoice for payment that contains all of the information that is required to be completed on that invoice." Elite derives this definition from the North Carolina Administrative Code, one section of which ("the Rule") defines a "clean claim" as "an itemized statement with standardized elements, completed in its entirety in a format as set forth in Rule .0303 of this Section." 10A N.C. Admin. Code 27A.0302(b).

Elite correctly notes that the Rule is "the only DHHS[-]promulgated rule in the administrative code" that defines the term "clean claim." Nonetheless, the Rule is plainly inapplicable to the case before us. The Rule is found in a section of the Administrative Code that is solely "applicable to local management entities (LMEs) and public and private providers who seek to provide services that are payable from funds administered by an LME." 10A N.C. Admin. Code 27A.0301. LMEs are "area mental health, developmental disabilities, and substance abuse authorit[ies]" that operate under the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985. N.C. Gen. Stat. § 122C-3(1), (20b).

Elite is not an LME, nor has it ever contended that it "provide[s] services that are payable from funds administered by an LME." 10A N.C. Admin. Code 27A.0301. As Robyn Winters—a contract supervisor with CCME, the independent contractor that processes documents submitted for prepayment claims review—testified before the administrative law judge: "None of the claims that were submitted by Elite were submitted to or through any of the [LMEs] in North Carolina." Elite does not contest this fact. Rather than arguing that this case involves claims that fall within the scope of the Rule, Elite instead argues that the Rule reaches beyond its text to encompass "all agencies that [DHHS] allows to administer Medicaid funds." This argument is meritless, and disregards the plain text limiting the scope of the Rule, which simply does not apply in the context presented in the case at bar.

It is evident that the CMS definition controls: for the purposes of prepayment claims review, a clean claim is "one that can be processed without obtaining additional information from the provider of the service or from a third party." 42 C.F.R. § 447.45(b).

Significantly, Elite candidly admits in its reply brief that, in the event that we reject its definitional argument and agree with DHHS that the definition promulgated by CMS in 42 C.F.R. § 447.45 applies, "DHHS would have made a showing of less than perfect compliance in over 70% of the claims submitted." Consequently, there are no contested issues of fact to resolve; our answer to this determinative question of law controls. Elite's argument is overruled.

III. Conclusion

For the foregoing reasons, the superior court's order is affirmed.

AFFIRMED.

Chief Judge STROUD and Judge MURPHY concur.

IN THE MATTER OF ESTATE OF RICKY W. SEAMON, DECEASED

No. COA23-497

Filed 19 December 2023

Attorney Fees—petition for attorney fees—attorney representing administrator of estate—contemporaneously working for decedent's wife—improper alignment of interests

The trial court properly affirmed the clerk of court's order denying a lawyer's petition for attorney fees in an estate action, in which the decedent's cousin had hired the lawyer to represent her in her capacity as administrator of the decedent's estate. At the same time that the lawyer was representing the decedent's cousin, he also filed an application for a year's allowance on behalf of decedent's wife, even though he was aware of a prenuptial agreement barring the wife from receiving any part of the estate. Therefore, although the clerk of court had discretionary authority (under N.C.G.S. § 28A-23-3(d)(1)) to allow an award of attorney fees as a "necessary charge" incurred in the management of the estate, the legal services that the lawyer provided here did not constitute "necessary charges" because he labored under a conflict of interest that improperly aligned the interests of the personal representative of the estate with those of a competing claimant.

Appeal by Petitioner from order entered 19 April 2022 by Judge Susan E. Bray in Davie County Superior Court. Heard in the Court of Appeals 1 November 2023.

James A. Davis, Pro se, Petitioner-Appellant.

Robinson & Lawing, LLP, by Christopher M. Watford, for Respondent-Appellee.

COLLINS, Judge.

Petitioner, James Davis, appeals from the superior court's order affirming a prior order entered by the clerk of court that denied his petition for attorney's fees in the underlying estate proceeding. Petitioner argues that the clerk's finding that Petitioner "rendered legal services to Cynthia Cuthrell in her capacity as Administrator of the Estate of Ricky Seamon" was sufficient by itself to justify an award of attorney's fees to be paid by the estate. We disagree, and we affirm the superior court's order.

I. Background

Prior to their marriage, Ricky Seamon ("Decedent") and Tatyana Seamon ("Seamon") entered into a prenuptial agreement in April 2001 that barred Seamon from receiving any portion of Decedent's estate and from serving as personal representative of Decedent's estate. Seamon contacted Petitioner on 4 August 2015, expressing concern that when Decedent died, "she would get nothing as stipulated in the [prenuptial agreement] and she would be homeless." Petitioner emailed Seamon on 6 August 2015 and "reassure[d] [her] that he will be able to assist her in the matter[.]"

Decedent died intestate on 9 August 2015. Seamon emailed Petitioner on 10 August 2015 and asked him "to assist her in taking care of" Decedent's estate and informed him that Decedent's attorneys "will be against her defending [Decedent's] prenuptial aggreement (sic)."

Cynthia Cuthrell, Decedent's cousin, contacted Petitioner on or about 30 August 2015 to inquire about Petitioner representing her in her role as Administrator of Decedent's estate. Petitioner assisted Cuthrell in applying for letters of administration, and letters of administration were issued by the Clerk of Superior Court of Davie County ("Clerk") on 6 November 2015.

Despite the prenuptial agreement barring Seamon from receiving any portion of Decedent's estate, Petitioner filed an application for a year's allowance on behalf of Seamon on 27 April 2016. The Clerk

contacted Petitioner shortly thereafter and "made him aware that [she] would not sign the years allowance for Tatyana Seamon due to the language in the prenuptial agreement[.]"

Several weeks later, Petitioner told Seamon that he could no longer represent her due to a conflict of interest. On 3 June 2016, an attorney hired by Seamon sent Petitioner a letter stating that he believed it was a conflict of interest for Petitioner to continue representing Cuthrell in her capacity as Administrator of Decedent's estate and requesting that Petitioner withdraw as Cuthrell's counsel. Petitioner filed a motion to withdraw on 5 July 2016, and the Clerk allowed the motion by written order entered 22 July 2016.

Decedent's intestate heirs filed a motion for revocation of the letters of administration issued to Cuthrell, alleging that "[t]he estate involves special proceeding[s] and the potential for an attack by a surviving spouse who is disinherited due to a pre-nuptial" and that "[t]his litigation will provide potential conflicts with the existing administrator and be complex." The Clerk entered an order on 30 August 2016 removing Cuthrell as Administrator and appointing Bryan Thompson as Public Administrator of Decedent's estate.

More than three years later, on 20 December 2019, Petitioner filed a petition for payment of attorney's fees in the estate proceeding, alleging that he "assisted the Administrator in the administration of the Estate of [Decedent] and has performed valuable legal services" totaling $14,793.64, and that his fees are "fair and reasonable in every respect and should be paid from the funds on hand in the Estate."

After a hearing on 15 November 2021, the Clerk entered an order on 3 January 2022 denying Petitioner's petition for attorney's fees. Petitioner appealed to the superior court. After a hearing, the superior court entered an order on 19 April 2022 affirming the Clerk's order.[1] Petitioner appealed to this Court.

II. Discussion

Petitioner argues that the superior court erred by affirming the Clerk's order denying his petition for attorney's fees.

N.C. Gen. Stat. § 1-301.3 governs "matters arising in the administration of trusts and of estates of decedents[.]" N.C. Gen. Stat. § 1-301.3(a) (2021). "In matters covered by this section, the clerk shall determine

1. Both the Clerk's order and the superior court's order incorrectly indicate that the petition for attorney's fees was filed on 20 December 2018 instead of 20 December 2019.

all issues of fact and law . . . [and] shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment." *Id.* § 1-301.3(b). A party aggrieved by the clerk's order or judgment may appeal to the superior court. *Id.* § 1-301.3(c).

On appeal, the superior court "shall review the order or judgment of the clerk for the purpose of determining only the following:"

> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of facts.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

Id. § 1-301.3(d). To determine whether the findings of fact are supported by the evidence, the superior court reviews the whole record. *In re Estate of Pate*, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2 (1995). Conclusions of law are reviewed de novo. *In re Estate of Mullins*, 182 N.C. App. 667, 671, 643 S.E.2d 599, 602 (2007). "The standard of review in this Court is the same as that in the [s]uperior [c]ourt." *In re Estate of Monk*, 146 N.C. App. 695, 697, 554 S.E.2d 370, 371 (2001) (citation omitted).

N.C. Gen. Stat. § 28A-13-3(a)(19) authorizes a personal representative to "employ persons, including attorneys, . . . to advise or assist the personal representative in the performance of the personal representative's administrative duties." N.C. Gen. Stat. § 28A-13-3(a)(19) (2021). No direct statutory provision governs the payment of attorney's fees from an estate to an attorney representing the personal representative of the estate; the personal representative is generally personally liable for such fees. *See Kelly v. Odum*, 139 N.C. 278, 282, 51 S.E. 953, 954 (1905) ("An executor is always personally liable to his counsel for his fee or compensation; but it is in no sense a debt of the estate. He is liable in such case in his individual, and not in his official, capacity."). However, under N.C. Gen. Stat. § 28A-23-3(d)(1), the clerk of court possesses the authority to allow "reasonable sums for necessary charges and disbursements incurred in the management of the estate." N.C. Gen. Stat. § 28A-23-3(d)(1) (2021).

"The Supreme Court has expressly recognized that attorneys' fees incurred in the administration of an estate fall within this statutory provision." *In re Taylor*, 242 N.C. App. 30, 40, 774 S.E.2d 863, 870 (2015) (citing *Phillips v. Phillips*, 296 N.C. 590, 602, 252 S.E.2d 761, 769 (1979)).

Nonetheless, the clerk may deny the payment of attorney's fees from an estate to an attorney representing the personal representative of an estate where the attorney improperly aligns the personal representative's interests with those of a competing claimant. *See McMichael v. Proctor*, 243 N.C. 479, 485, 91 S.E.2d 231, 235-36 (1956).

Here, the Clerk made the following relevant findings of fact:

> 5. James A. Davis (Attorney Davis) is an attorney licensed to practice law in the State of North Carolina [and] rendered legal services to Cynthia Cuthrell in her capacity as Administrator of the Estate of Ricky Seamon and rendered legal services to Tatyana Seamon.
>
> 6. Attorney Davis received contact from Tatyana Seamon on August 4, 2015 at a time when the deceased had fallen ill, and Tatyana Seamon was concerned that she would be barred from receiving anything from her husband's estate because of the terms of a prenuptial agreement executed by the deceased and Tatyana in 2001.
>
> 7. Subsequent to this interaction, Tatyana Seamon, contacted Attorney Davis on August 10, 2015 in which she informed Attorney Davis that she wished to challenge the validity of the prenuptial agreement.
>
> 8. Attorney Davis entered into a formal agreement for representation with Tatyana Seamon [o]n August 11, 2015. Later tha[t] same month, Tatyana Seamon sought out Attorney Davis to ask how to address certain questions in challenging the validity of the prenuptial agreement.
>
> . . . .
>
> 11. On April 27, 2016 Attorney Davis submitted an "Application and Assignment of Years Allowance" or a Spouse's Yearly Allowance (SYA) on behalf of Tatyana Seamon.
>
> . . . .
>
> 19. The exact duration of Attorney Davis' representation of the Estate, as compared with his representation of Tatyana Seamon, cannot be determined because of the competing billing statements Attorney Davis submitted in support of his petition for payment of attorney fees, one of which recites a beginning date that actually precedes

> the death of the decedent. The ending date on both billing statements is a date after the Court granted Attorney Davis' motion to withdraw from representation.
>
> . . . .
>
> 21. The work of James A. Davis as counsel to Cynthia Cuthrell improperly aligned the interest of the Estate with competing claimants, namely Tatyana Seamon. Tatyana Seamon filed a counterclaim to an action to resolve pending estate issues on November 14, 2018 to set aside the prenuptial agreement and the [c]ourt finds that Tatyana Seamon's intent was consistent with the fact that she wished to set aside the prenuptial agreement, and thereby become the sole beneficiary of the Estate, since her first contact with Attorney Davis prior to Mr. Seamon's death.
>
> 22. Attorney Davis maintained a right to proceed against Cynthia Cuthrell for payment of said attorney's fees but did not do so based on the evidence provided to the [c]ourt. Cynthia Cuthrell instituted litigation against Attorney Davis in file 18 CVS 628, Davie County Clerk of Superior Court alleging malpractice by Attorney Davis, which concluded by that Stipulation of Dismissal with Prejudice dated July 13, 2021.
>
> 23. After a thorough and conscious consideration, this [c]ourt finds that charges submitted by Attorney Davis and supported by the two competing billing documents were not necessary nor were they properly incurred in the management of the Estate of Ricky Seamon, deceased, as provided by N.C. Gen. Stat. § 28A-23-3(d)(1).

Based on these findings of fact, the Clerk made the following relevant conclusions of law:[2]

> 16. Pursuant to N.C. Gen. Stat. §28A-13-3(a)(19) a personal representative is authorized to employ persons, including attorneys to advise or assist the personal representative in the performance of his or her administrative duties. If a

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2. Findings of fact 16, 17, and 20 are not findings but are instead conclusions of law, and we therefore review them de novo. *See Norwood v. Village of Sugar Mountain*, 193 N.C. App. 293, 298, 667 S.E.2d 524, 528 (2008) ("Findings of fact which are essentially conclusions of law will be treated as such on appeal." (quotation marks, brackets, ellipses, and citations omitted)).

personal representative retains an attorney to assist in the administration of the estate, the personal representative is personally liable for the associated attorney's fees. The fees are not a debt of the estate, and the attorney does not become a creditor of the estate. *Kelly v. Odum*, 139 N.C. 278, 51 S.E. 953 (1905).

17. Unless otherwise ordered by this [c]ourt, attorney fees are to be paid by the personal representative of the Estate.

. . . .

20. The [c]ourt should deny a request to recover fees from an Estate to an attorney who improperly aligns the interest of the personal representative with that of a competing claimant. *McMichael v. Proctor*, 243 N.C. 479, 91 S.E.2d 231 (1956).

. . . .

2. There is no direct statutory provision governing the payment of attorney fees for an attorney representing a personal representative hired by the personal representative in the administration of an estate, but the Clerk is authorized, in its discretion, to allow such fees as a "necessary" charge incurred in the management of the estate pursuant to N.C. Gen. Stat. § 28A 23-3(d)(1).

3. The fees requested by the Petitioner are not necessary nor proper charges incurred in management of the Estate of Ricky Seamon, deceased, as provided by N.C. Gen. Stat. § 28A 23-3(d)(1). Furthermore, the nature of the representation was an improper alignment of the interest of the personal representative with a potential claimant, thus any attorney's fees incurred by Attorney Davis should not be paid from the Estate of Ricky W. Seamon.

The Clerk thus denied Petitioner's petition for attorney's fees.

Petitioner does not argue that the findings of fact are not supported by the evidence, and they are thus binding on appeal. *See In re Estate of Harper*, 269 N.C. App. 213, 215, 837 S.E.2d 602, 604 (2020). Petitioner's sole argument on appeal is that the portion of finding of fact 5 which states that Petitioner "rendered legal services to Cynthia Cuthrell in her capacity as Administrator of the Estate of Ricky Seamon" "is sufficient by itself to justify an award of attorney fees and reimbursed expenses to Petitioner[.]" We disagree.

Petitioner's argument ignores well-settled law that an attorney who improperly aligns the interests of the personal representative of the estate with those of a competing claimant is not entitled to attorney's fees paid from the estate. *See McMichael*, 243 N.C. at 485, 91 S.E.2d at 235-36 (holding that a personal representative was not entitled to attorney's fees from the estate for "assert[ing] the widow's defense to the affirmative allegations made by the heirs as the basis of their claim that the widow had forfeited her right of dower").

The Clerk found Petitioner rendered legal services to both Cuthrell, in her capacity as Administrator, and to Seamon, often contemporaneously. Petitioner knew of the prenuptial agreement barring Seamon from receiving any portion of Decedent's estate and Seamon's desire to invalidate the agreement and become the sole beneficiary of the estate. Despite his awareness of the prenuptial agreement, Petitioner filed an application for a year's allowance on behalf of Seamon, during which time he also represented Cuthrell as Administrator of Decedent's estate.

While a clerk possesses the authority to allow "reasonable sums for necessary charges and disbursements incurred in the management of the estate[,]" N.C. Gen. Stat. § 28A-23-3(d)(1), the services Petitioner rendered to Cuthrell were not "necessary charges" incurred in the management of the estate because Petitioner labored under a conflict of interest that improperly aligned Cuthrell's interests as Administrator of Decedent's estate with those of Seamon as a competing claimant. *McMichael*, 243 N.C. at 485, 91 S.E.2d at 235-36.

The findings of fact support the Clerk's conclusions of law that "[t]he fees requested by the Petitioner are not necessary nor proper charges incurred in management of the Estate of Ricky Seamon, deceased, as provided by N.C. Gen. Stat. § 28A 23-3(d)(1)" in that "the nature of the representation was an improper alignment of the interest of the personal representative with a potential claimant, thus any attorney's fees incurred by Attorney Davis should not be paid from the Estate of Ricky W. Seamon."

Accordingly, the superior court did not err by affirming the Clerk's order denying Petitioner's petition for attorney's fees.

III. Conclusion

For the foregoing reasons, we affirm the superior court's order.

AFFIRMED.

Judges TYSON and MURPHY concur.

IN RE K.N.

[291 N.C. App. 555 (2023)]

IN THE MATTER OF K.N., K.N.

No. COA23-296

Filed 19 December 2023

1. Termination of Parental Rights—findings of fact—incorporating judicially-noticed facts—corroborated by additional evidence

An order terminating a mother's parental rights in her two children based on abuse, neglect, and failure to make reasonable progress was affirmed where clear, cogent, and convincing evidence supported each of the legally-necessary findings of fact that the mother challenged on appeal. Although many of the court's findings were based upon judicially-noticed facts from prior orders, the court did not rely solely on the evidence from which those facts were made when entering its findings; instead, the court received additional testimony to corroborate the judicially-noticed facts and then made an independent determination regarding the new evidence presented.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—nexus between case plan and conditions that led to removal

The trial court properly terminated a mother's parental rights in her two children for failure to make reasonable progress (N.C.G.S. § 7B-1111(a)(2)), where the record showed a sufficient nexus between the components of the mother's case plan that she failed to comply with and the conditions which led to the children's removal from her home. Specifically, one of the biggest factors leading to the children's removal was the mother's inability to treat or manage her bipolar disorder, which in turn caused her to discipline the children through severe physical abuse, and many of the case plan's objectives (including the ones the mother did not comply with) were geared toward addressing this issue.

3. Termination of Parental Rights—best interests of the children—consideration of factors—likelihood of adoption—parent-child bond

The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in her children's best interests where it entered sufficient findings addressing the dispositional factors enumerated in N.C.G.S. § 7B-1110(a). Notably,

the court found that: the mother's eleven-year-old son had been in a stable placement with a foster family that had already expressed a desire to adopt him and likely would adopt him if the mother's parental rights were terminated; while immediate adoption was unlikely for the mother's twelve-year-old daughter, adoption was still possible given that the child wished to find a family and had shown an ability to bond with her former foster family; the mother and her son had a "bond of friendship" rather than a parent-child bond; and there was no bond at all between the mother and her daughter.

Appeal by defendant from judgment entered 21 December 2022 by Judge Theodore Kazakos in Forsyth County District Court. Heard in the Court of Appeals 1 November 2023.

Office of the Parent Defender, by Assistant Parent Defender Jacky L. Brammer, for the respondent-appellant.

Forsyth County Department of Social Services, by Melissa Starr Livesay, for the petitioner-appellee.

Manning Fulton & Skinner P.A., by Michael S. Harrell, for guardian ad litem.

TYSON, Judge.

Respondent Mother ("Respondent") appeals from an order entered on 21 December 2022, which terminated her parental rights to two of her children. We affirm.

I. Background

Respondent is the biological mother of Karen and Karl, who were twelve and eleven years old respectively when Respondent's parental rights were terminated on 21 December 2022. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). Mother struggles to effectively manage her Bipolar Disorder condition, which the court found has negatively impacted her ability to parent and her relationships with her children.

Karen and Karl were removed from Respondent's home on 8 November 2018. The order terminating Respondent's parental rights was entered 21 December 2022 and summarized incidents surrounding the initial

investigation of Respondent by the Forsyth County Department of Social Services ("DSS"):

> FCDSS received a Child Protective Services Report on April 26, 2018 alleging the inappropriate discipline of the minor child [Karen].
>
> On July 12, 2018, FCDSS received a second report after [Karen] was seen running from the home in her underwear bleeding from the head.
>
> On July 12, 2018, an FCDSS Social Worker interviewed [Karen], [Karl], and their sibling [Matthew]. The children reported that [Respondent] had beaten them with a phone charger as punishment for [Matthew] having eaten all the cookies. [Karen] reported that [Respondent] had hit her in the face, arm, and back, punched her in the lip, and thrown her against a wall. [Karen] stated that [Respondent] had turned the shower on hot and was going to make her get in so [Respondent] could strike her while the water was running. [Karen] reported this was not the first time she and her siblings had been spanked while in the shower. [Karen] ran from the home to avoid this punishment. [Karl] and [Matthew] stated they saw [Karen] running out the door because she did not want to get beat [sic] in the hot shower. [Karl] stated a lady saw [Respondent] beating [Karen] and contacted law enforcement. [Karl] and [Matthew] stated [Respondent] had kicked[,] smacked, punched, and dragged [Karen] on the ground by the foot back to the apartment. [Karl] and [Matthew] told [Respondent] they ate the cookies, and [Respondent] assaulted them with the phone charger chord [sic] as a result.
>
> The Social Worker observed injuries on all three children, to include welts and broken skin on the backs of all three children, welts on [Karen]'s arms and chest and bleeding marks, and welts on [Karl]'s back and chest as well as old/healed marks on his back.
>
> On July 13, 2018, an FCDSS Social Worker spoke with [Respondent], who stated that her medication for Bipolar Disorder was not getting her in the right place mentally and leaves her very tired. [Respondent] admitted that she physically beat and assaulted [Karen], [Karl], and [Matthew] and had been criminally charged with three counts of misdemeanor child abuse.

> In August 2018, [Respondent] was referred to In Home Services. [Respondent] was asked to comply with Intensive In Home Services through Family Preservation Services, comply with mental health treatment through Monarch, and ensure that the children received trauma assessments for mental health therapy. [Respondent] failed to comply with Family Preservation Services, and the organization discontinued services and closed its case.
>
> On November 8, 2018, [Respondent] was convicted of three counts of misdemeanor child abuse and incarcerated at the Forsyth County Jail. [Respondent] requested that the children be placed with a neighbor. However, that placement did not occur and [Respondent] did not have alternative child care arrangements for [Karl] or [Karen]. [Matthew]'s father picked the child up and took him to Erie, Pennsylvania.
>
> The Mother had prior child protective services history dating back to 2015 for allegations of improper care and improper discipline.
>
> At the time of the Adjudication, [Karen's and Karl's Father] was incarcerated through the Somerset, Pennsylvania Department of Corrections.

The first adjudication and disposition hearing was held on 1 February 2019, wherein the trial court adjudicated Karen and Karl as abused, neglected, and dependent juveniles, with the order entered on 1 March 2019. Respondent was required to complete the following tasks to achieve reunification with her children: (1) "[c]omplete a Family Service Agreement and visitation plan with FCDSS," (2) "[c]omplete a Parenting Capacity Assessment/Psychological Evaluation and follow all recommendations[,]" (3) "[c]omplete parenting classes at [ ] Parenting Path, PACT, or another approved program[,]" (4) [o]btain and maintain stable housing[,]" and, (5) "[d]emonstrate the ability to meet the basic and therapeutic needs of the children."

Several permanency planning hearings were held between the initial adjudication and the hearing terminating Respondent's parental rights. Respondent completed the parenting assessment. Respondent's case plan also required her to complete the following recommendations, as were identified in the termination order:

> 29. The recommendations of the Respondent Mother's Parenting Capacity Evaluation which was completed on

or about May 14, 2019 by Dr. Bennett, were adopted and ordered by the Court as part of [Respondent]'s case plan. The Respondent Mother was therefore also required to:

> a. Re-engage with Monarch, keep appointments as scheduled, and take medications as prescribed. [Respondent] was encouraged to contact Monarch as they have funding which allows them to treat individuals like [Respondent], who do not have insurance or financial resources.
>
> b. Work with a counselor to help her review and challenge her irrational and distorted thinking so that she can begin to stabilize her life. Dr. Bennett believed cognitive approaches including rational emotive therapy would be effective models for working with [Respondent].
>
> c. Participate in parenting classes to learn more appropriate skills to respond to her children in a manner that is less aggressive and more effective.
>
> d. Work with FCDSS and others with the goal of stabilizing her environment in terms of housing and finances.
>
> e. Work to expand her support network, which should include challenging some of her distorted beliefs about how she should never lean on anyone else.
>
> f. Attend the COOL program to help manage her aggressive impulses.
>
> g. Complete random drug testing, with no-shows or refusals being counted as positive tests.

30. As reflected by the Permanency Planning Hearing from June 12, 2020, the order from which was filed on July 6, 2020, the Court also required [Respondent] to participate in the WISH program and substance abuse treatment.

31. Additionally, following a Permanency Planning Hearing from a hearing occurring on December 12, 2020, January 6, 2021, and March 3, 2021, the order from which was the order entered April 15, 2021, the Court required the Respondent Mother to:

a. Engage in all of [Karen]'s treatment team meetings and provide information as requested by the team. However, there shall be no direct contact between [Respondent] and [Karen] unless [Karen]'s therapeutic providers determine it to be beneficial for the minor child.

b. Sign release of information forms that allow [Karen]'s therapeutic treatment team to obtain [Respondent]'s treatment records from WISH, Monarch, and COOL.

A Motion to Terminate Parental Rights was filed against Respondent on 16 June 2021, citing the grounds in N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), (a)(3), and (a)(6). Termination of parental rights hearings were held over four months on 18 July 2022, 1 August 2022, 1 September 2022, and 19 October 2022. The court made extensive findings of fact following the admission of numerous pieces of evidence and the testimony of several witnesses.

The trial court's order found the following: (1) Respondent was pregnant; (2) Respondent was "not receptive" to Cognitive Behavioral Therapy, as required by her case plan; (3) Respondent had terminated her treatment with her therapist; (4) Respondent had not consistently taken her Bipolar Disorder medication throughout the life of the case; (5) Respondent was "not currently taking mental health medication, and [wa]s unlikely to be able to do so for some period of time up to and after the baby's birth"; and (6) Respondent picked up her son, Matthew, from Pennsylvania, which was concerning because DSS' investigation in 2018 revealed Respondent had "allowed [Matthew] to take part in the over-discipline of [Karl] and [Karen] and that [Matthew] choked and beat up his sister [Karen]."

The court adopted several findings of fact from previous permanency planning orders, which were entered on 1 March 2019, 6 July 2020, 15 April 2021, 18 July 2021, and 18 July 2022. The court entered the final order terminating Respondent's parental rights on 21 December 2022.

Based upon the evidence presented at the termination of parental rights hearings and the incorporated findings and conclusions contained in the previous permanency planning orders, Respondent's parental rights to Karen and Karl were terminated for abuse, neglect, and for leaving her children in custody for more than twelve months without making reasonable progress towards correcting the circumstances that caused the children's removal pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) (2021).

The trial court held termination of parental rights pursuant to the grounds in N.C. Gen. Stat. § 7B-1111(a)(3) and (a)(6) had not been adequately proven, and it dismissed those grounds as a basis to terminate Respondent's parental rights.

The trial court explained its reasoning in the following findings of fact:

> 120. Based upon a showing of clear, cogent, and convincing evidence, grounds have been proven to terminate the parental rights of the Respondent Mother [ ] in and to the minor children pursuant to NCGS § 7B-1111(a)(1), the ground of abuse. [Respondent] created a substantial risk of serious physical injury to the children by other than accidental means through the practice of "whooping" the children with cords in the running shower, which resulted in injuries including bleeding welts on the children's bodies. Further, [Respondent]'s conduct constituted cruel and grossly inappropriate procedures for the modification of the children's behavior.
>
> 121. Based upon a showing of clear, cogent, and convincing evidence, grounds have been proven to terminate the parental rights of the Respondent Mother [ ] in and to the minor children pursuant to NCGS § 7B-1111(a)(1), the ground of neglect. [Respondent]'s mental health was a contributing factor to the circumstances surrounding the children's removal and adjudication as abused and neglected juveniles. [Respondent] has not consistently engaged in mental health treatment during the 41 months since Disposition. She has been non-compliant with mental health medication and [ ] cannot currently take her medication as prescribed. [Respondent] has expressed distrust of treatment providers and terminated a long-term therapeutic relationship with Ms. Connelly when Ms. Connelly sought to move forward in therapy. [Respondent] has recently voiced that she did not feel she had learned anything useful during her therapy. Based upon her demeanor during her testimony, [Respondent] either fails to appreciate the serious nature of her conduct in abusing and neglecting the children or she wishes to move on and regard this as all past while her children continue to struggle with the traumatic consequences of her actions. Additionally, [Respondent] has not achieved

> stability with regard to her household and overall circumstances. [Respondent] has suddenly returned her older son, [Matthew], to her home, is expecting a baby in the near future, and has a newly obtained house and job. Based upon all of the foregoing, the likelihood that the children would be neglected if returned to her care is high.
>
> 122. Based upon a showing of clear, cogent, and convincing evidence, grounds have been proven to terminate the parental rights of the Respondent Mother [ ] in and to the minor children pursuant to NCGS § 7B-1111(a)(2), the ground that she has willfully left the minor children in custody for more than 12 months without showing to the satisfaction of the Court that she has made reasonable progress towards correcting the circumstances that caused the children's removal. [Respondent] has participated to a degree in therapy, but when her therapist Ms. Connelly sought to progress in treatment, [Respondent] chose to terminate a 4-year therapeutic relationship. When [Respondent] was confronted by information she disliked in conversation with Social Worker Baker or others, she did not respond well. [Respondent] opted to terminate her involvement with WISH, despite her acknowledged use of marijuana at that time, because she did not trust the counselor. These facts show that [Respondent] may have engaged in services to a degree, but a meaningful change in the circumstances that caused or contributed to the children's removal has not occurred. [Respondent] has not adequately prepared herself to meet the mental and emotional health needs of her children, nor has she created the stable living environment which has proven beneficial to both children.

The trial court also concluded: "Pursuant to NCGS § 7B-1110, it is in the best interests of the minor children that the parental rights of [ ] Respondent[ ] [Mother and Father] be terminated so that the minor children's primary permanent plan of adoption can move forward." Respondent filed a timely notice of appeal. Karen's and Karl's biological father, whose rights were also terminated, does not appeal the trial court's order. The order is final as it relates to his parental rights.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 7B-1001(a)(7) (2021).

III. Issues

Respondent challenges several findings of fact and argues those findings of fact are not supported by clear, cogent, and convincing evidence. She argues without those findings of fact, the trial court's termination of her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) cannot be supported by the remaining findings of fact.

Respondent lastly asserts the trial court abused its discretion by terminating her parental rights to Karen and Karl, because termination was not in either of their best interests.

IV. Challenged Findings of Fact

[1] Respondent argues several findings of fact were not supported by, or are contrary to, the evidence presented at the hearing. She challenges the findings of fact regarding: (1) the period of time Respondent was compliant versus noncompliant with her case plan from the time the children were taken away in 2018 to the hearings held in 2022; (2) Respondent's feelings and attitude towards therapy and her progress; (3) Respondent's compliance and diligence with taking the medication to treat her Bipolar Disorder; (4) Respondent's involvement with Karen's mental health treatment; (5) the validity of Mother's healthcare plan; (6) the description of Matthew's return to Respondent's home as "sudden"; (7) Respondent's reactions when confronted with information she disliked; (8) her decision to stop attending substance abuse classes given her negative drug screenings; and, (9) the trial court's concerns regarding Respondent's stability.

A. Standard of Review

"We review a trial court's adjudication [to terminate parental rights] under N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (citation and quotation marks omitted). "The trial court's supported findings are deemed conclusive even if the record contains evidence that would support a contrary finding." *In re L.D.*, 380 N.C. 766, 770, 869 S.E.2d 667, 671 (2022) (citation and quotation marks omitted).

Unchallenged findings of fact are presumed to be supported by sufficient evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citations omitted)).

B. Analysis

In a termination of parental rights hearing, "[t]he burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-1109(f) (2021). When a challenged finding of fact is not necessary to support a trial court's conclusions, those findings "need not be reviewed on appeal." *See In re C.J.*, 373 N.C. 260, 262, 837 S.E.2d 859, 860 (2020) (citation omitted).

Here, properly-admitted testimony and other relevant and substantial evidence in the record exists to support each of the legally-necessary findings of fact Respondent challenges on appeal. *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52; *In re L.D.*, 380 N.C. at 770, 869 S.E.2d at 671. Respondent's arguments challenging several of the trial court's findings of facts are without merit.

Respondent also argues several of the findings of fact she challenges are based upon judicially-noticed facts from prior orders. Respondent relies upon the reasoning in *In re T.N.H.*, 372 N.C. 403, 831 S.E.2d 54 (2019), and argues judicially-noticed evidence may only support a finding of fact in a current order when it is supported by new evidence received at the adjudicatory hearing.

While a trial court "may not rely *solely*" on judicially-noticed evidence from prior hearings or rely on evidence from "prior dispositional orders, which have a lower standard of proof[,]" a trial court may use testimony from former hearings to corroborate additional testimony received at the current adjudicatory hearing. *Id.* at 410, 831 S.E.2d at 60 (emphasis supplied) (citations omitted). A trial court "must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *Id.* (citation omitted).

The trial court received additional testimony to corroborate the judicially-noticed facts and made an independent determination regarding the new evidence presented at the hearings. *Id.* at 410, 831 S.E.2d at 60-61 ("The trial court's findings of fact appear to be based, at least in part, on testimony provided at the hearing, sufficient to demonstrate that the trial court made an independent determination regarding the evidence presented. . . . [W]e conclude that respondent's argument is without merit."). Respondent's argument is overruled.

V. Termination of Parental Rights

[2] "[A]n adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination

order. . . . [I]f this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted).

A. Standard of Review

This Court reviews a trial court's adjudication of grounds to terminate parental rights by examining "whether the court's findings of fact are supported by clear, cogent[,] and convincing evidence and whether the findings support the conclusions of law. Any unchallenged findings are deemed supported by competent evidence and are binding on appeal. The trial court's conclusions of law are reviewed de novo." *In re T.B.*, 380 N.C. 807, 812, 870 S.E.2d 119, 123 (2022) (quoting *In re Z.G.J.*, 378 N.C. 500, 508-09, 862 S.E.2d 180, 187 (2021)).

B. Analysis

Our general statutes limit the grounds to terminate parental rights to a specific set of statutorily-defined grounds. N.C. Gen. Stat. § 7B-1111(a) (2021). Under the second prong, a trial court may terminate parental rights after:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2).

Our Supreme Court has outlined the analysis trial courts must perform before terminating a parent's parental rights pursuant to this ground:

> Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (emphasis supplied) (citation omitted).

"[A] respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress . . . sufficient to warrant termination of parental rights under section 7B-1111(a)(2)." *In re J.W.*, 173 N.C. App. 450, 465-66, 619 S.E.2d 534, 545 (2005) (citation and internal quotation marks omitted). "Leaving a child in foster care or placement outside the home is willful when a parent has the ability to show reasonable progress, but is unwilling to make the effort." *In re A.J.P.*, 375 N.C. 516, 525, 849 S.E.2d 839, 848 (2020) (citation, internal quotation marks, and alterations omitted).

Our Supreme Court has stated:

> Parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2). However, in order for a respondent's noncompliance with her case plan to support the termination of her parental rights, there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home.

In re J.S., 374 N.C. at 815-16, 845 S.E.2d at 71 (citation, internal quotation marks, and alterations omitted).

The Court has further explained that compliance with case plan conditions are relevant, "provided that the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." *In re T.M.L.*, 377 N.C. 369, 379, 856 S.E.2d 785, 793 (2021) (citation and quotation marks omitted).

Here, Respondent's parental rights to Karen and Karl were terminated for failure to implement "meaningful change in the circumstances that caused or contributed to the children's removal" because she had "not adequately prepared herself to meet the mental and emotional health needs of her children, nor has she created the stable living environment which has proven beneficial to both children."

One of the biggest factors in the removal of Karen and Karl was Respondent's violence and actions toward the children due to her inability to manage her Bipolar Disorder condition and the negative

ways her mental health condition caused her to find fault and discipline Karen and Karl. Respondent admitted she did not consistently take prescribed medication to treat or manage her Bipolar Disorder condition. During the termination for parental rights hearing, she further admitted she had ceased taking her Bipolar Disorder medication when she became pregnant.

Respondent failed to create and maintain a stable living environment for both children without also actively treating and managing her behaviors resulting from her mental health condition. "[T]he objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile[s'] removal from the parental home." *Id.* (citation and quotation marks omitted). The trial court did not err by terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

VI. Best Interests

[3] Respondent argues the trial court abused its discretion by holding termination was in Karl's best interest, because Karl had expressed a desire to live with Respondent. She similarly argues termination was not in Karen's best interest. The trial court based its decision on Respondent's failure to participate in Karen's treatment. Respondent asserts Karen's placement in forty foster homes while in DSS custody demonstrates Karen's instability, and terminating Respondent's parental rights would not be helpful to Karen.

A. Standard of Review

"We review the trial court's dispositional findings of fact to determine whether they are supported by the evidence received during the termination hearing[.]" *In re S.C.C.*, 379 N.C. 303, 313, 864 S.E.2d 521, 528 (2021) (citation omitted). "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed for [an] abuse of discretion." *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52 (citation omitted). "Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re J.J.B.*, 374 N.C. 787, 791, 845 S.E.2d 1, 4 (2020) (citation and quotation marks omitted).

B. Analysis

"If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage, at which it determines whether terminating the parent's rights is in the juvenile's best interest." *In re A.E.*, 379 N.C. 177, 184, 864 S.E.2d

487, 495 (2021) (citations, quotation marks, and alterations omitted). N.C. Gen. Stat. § 7B-1110(a) provides a list of factors trial courts must consider, including the child's age, their likelihood of being adopted, whether termination will result in accomplishing the permanent plan established for the child, the child's bond with their parent, the child's bond with any proposed adoptive parent or guardian, and a catch-all provision encompassing any other relevant consideration.

The trial court addressed all statutory factors required by N.C. Gen. Stat. § 7B-1110(a). The trial court made findings about Karen and Karl's age and Respondent's inability to provide and maintain a safe and stable home. The trial court made findings regarding the likelihood of Karen and Karl being adopted and whether termination of Respondent's parental rights would accomplish their permanent plan:

> 125. The Court makes the following findings consistent with the requirements enumerated in NCGS § 7B-1110:
>
> . . .
>
> c. [Karl] has been in a stable placement with the same licensed foster family since November 2018, when he entered FCDSS custody. This family has expressed commitment to [Karl] and a desire to adopt him. Both FCDSS and the GAL regard it as likely that [Karl] will be adopted if he is legally free. The likelihood that [Karl] will be adopted is high.
>
> d. [Karen] has lacked a stable placement and has frequently required increases in therapeutic care, including periodic hospitalizations. [Karen] has clearly shared with her GAL that she wishes to have a family, and that she wants that family to include her and an older married couple. [Karen] has shown the ability to form a bond and attachment with a former foster family, those fosters being an older couple. The former foster family has continued to maintain contact with [Karen] during her current placement in a residential treatment setting. FCDSS and the GAL are hopeful that, with changes in [Karen]'s medication and continued therapy, this can be a potential adoptive home. While the immediate adoption of [Karen] is unlikely, she wishes to have a family and has shown an ability to bond, and therefore adoption is possible.

> e. The current primary plan for both children is the plan of adoption, and termination of parental rights will aid with the accomplishment of that plan.

The court also made the following findings regarding Karen's and Karl's relationship with Respondent:

> g. [Karl] has a bond with his Mother, [Respondent]. This bond, as described by the GAL and the Social Worker, is a "fun bond" associated with having fun within the context of the safety and structure provided in supervised visitation. [Karl] has repeatedly expressed a desire to remain in the home and care of his foster parents. [Karl] made a recent statement, after learning about [Respondent]'s current pregnancy, that he wanted to live with his Mother. However, this also happened around a time [Karl] was experiencing frustration with the rules and limitations of his foster home. Since that time, he has also stated he wished to remain with his foster parents. While the Court finds a bond exists between [Karl] and [Respondent], it is more accurately described as a bond of friendship or kinship than a parent-child bond.
>
> . . .
>
> i. [Karen] does not have a bond or connection with [Respondent]. [Karen] has made statements that she loves her Mother [Respondent] and forgives her Mother, but has been consistent in stating that she does not want to have a relationship with her Mother or return to [Respondent]'s care.

Respondent has failed to show the trial court abused its discretion by holding termination of her parental rights was in Karen's and Karl's best interests. N.C. Gen. Stat. § 7B-1110(a). *See also In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52. Her argument is without merit.

VII. Conclusion

Clear, cogent, and convincing evidence supports each of the legally relevant and necessary findings of fact Respondent challenged on appeal. N.C. Gen. Stat. § 7B-1109(f); *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52; *In re L.D.*, 380 N.C. at 770, 869 S.E.2d at 671.; *In re C.J.*, 373 N.C. at 262, 837 S.E.2d at 860.

The trial court received additional testimony to corroborate the judicially-noticed facts from prior orders and made independent determinations regarding the new evidence presented. *In re T.N.H.*, 372 N.C. at 410, 831 S.E.2d at 60-61.

Respondent's failure to acknowledge, adequately address, and manage her behaviors toward the children resulting from her Bipolar Disorder condition led to Karen's and Karl's removal from her home. The trial court found Respondent had been provided many opportunities and extensions to address these conditions and did not err by terminating Respondent's parental rights for her willful failure to make reasonable progress toward her case plan objectives. These objectives relate the reasons for the children's removal to Respondent's lack of treatment and management of her mental health disorder. *In re T.M.L.*, 377 N.C. at 379, 856 S.E.2d at 793.

If one ground for the termination of Respondent's parental rights exists, we need not address the remaining two grounds. *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020).

The trial court properly addressed all statutory factors outlined in N.C. Gen. Stat. § 7B-1110(a). Respondent has not shown any abuse of discretion in its holding termination was in Karen's and Karl's best interest. *See In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges MURPHY and COLLINS concur.

IN RE M.M.

[291 N.C. App. 571 (2023)]

IN RE M.M., E.M., J.M., S.M., C.M.

No. COA23-114

Filed 19 December 2023

1. Child Abuse, Dependency, and Neglect—subject matter jurisdiction—sufficiency of allegations in petition—emotional abuse

In an abuse and neglect proceeding, although the department of social services did not check a box on either its original or supplemental petitions specifically alleging that the children's parents created serious emotional damage to the children, the trial court had subject matter jurisdiction to adjudicate a father's five children emotionally abused where the petitions contained sufficient factual allegations and supporting material regarding the parents' behavior and its effect on the children to put the father on notice that emotional abuse was raised as a ground for adjudication.

2. Child Abuse, Dependency, and Neglect—sexual abuse allegations—expert testimony—effective assistance of counsel—no objections lodged

In an abuse and neglect proceeding regarding respondent-father's five children, respondent's counsel was not ineffective for failing to object to testimony by a forensic interviewer regarding her interviews with three of the children or to testimony by a nurse practitioner who conducted child medical evaluations of each child because neither expert's testimony was improper. When asked about one child's credibility, the forensic interviewer declined to state her personal opinion about credibility, and although the nurse practitioner concluded that several children made statements consistent with sexual abuse, she never testified that any of the children had, in fact, been sexually abused.

Appeal by Respondent-Father from order entered 28 September 2022 by Judge Justin K. Brackett in Cleveland County District Court. Heard in the Court of Appeals 28 November 2023.

Charles E. Wilson, Jr., for Petitioner-Appellee Cleveland County Department of Social Services.

Michelle FormyDuval Lynch for Guardian ad Litem.

Richard Croutharmel for Respondent-Appellant Father.

COLLINS, Judge.

Respondent-Father appeals from the trial court's order adjudicating his minor children abused and neglected. Father argues that the trial court lacked subject matter jurisdiction to adjudicate the children abused and that he received ineffective assistance of counsel because his attorney failed to object to certain testimony at trial. We affirm.

I. Background

Father and Mother were married on 26 February 2010 and separated on 13 August 2020.[1] Father and Mother share five children together: Megan, Evan, Jade, Stella, and Chloe.[2] The trial court entered an order on 26 October 2020 granting Father temporary primary physical custody of the children and awarding Mother visitation.

The Cleveland County Department of Social Services ("DSS") filed a juvenile petition on 19 February 2021, alleging that all five children were abused and neglected. The petition alleged, in part:

> There is an ongoing custody battle between the parents and every time there is a court date for custody, dad starts coaching the children and making false reports to Law Enforcement and DSS against the mother. Prior reports were made by dad and were unfounded. Dad is very possessive of the children and wants to keep them away from mom. Law Enforcement reports were made that mom choked her child [Megan]. [Megan] was interviewed, she said that mom grabbed her by throat. There was no evidence of abuse on any part of her body. [Megan] was very robotic with her answers and all of the kids are when speaking with them. . . .
>
> . . . .
>
> . . . . The Department is very concerned about the safety and emotional well-being of [the children] under the care and supervision of their parents. The children are very sad, withdrawn emotionally, continues to have unexplained marks and bruises. . . .

An order for nonsecure custody was entered that same day.

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1. Mother is not a party to this appeal.

2. We use pseudonyms to protect the identities of the children.

DSS filed a supplemental juvenile petition on 25 August 2021, alleging that Father had sexually abused Megan, Jade, Stella, and Chloe. The supplemental petition alleged, in relevant part:

> [DSS] accepted another report on May 17, 2021 which alleged possible sexual abuse of [Megan] by her father . . . . The report stated that [Megan] had disclosed that her father tickles her in places she doesn't like, and that [Megan] had stated that she did not want to return home due to her dad tickling her.
>
> . . . . [Megan] disclosed to the social worker that she did not want to return to her father's home for various reasons, including being tickled in places she didn't like. [Megan] shared with [the social worker] that she was being tickled by her father on her inner thigh near her vagina.
>
> . . . . All five children completed a Child Medical Exam (CME) as well as forensic interviews. During the interviews, [Stella, Chloe, and Jade] each disclosed being touched on their vagina by their father . . . .

On 28 September 2022, the trial court entered an order adjudicating all five children abused and neglected and concluding, in relevant part:

> 3. That the juveniles [Megan, Jade, Chloe, and Stella] are abused juveniles as defined by N.C.G.S. 7B-101(1)(d) and (e).
>
> 4. That the juvenile [Evan] is an abused juvenile as defined by N.C.G.S. 7B-101(1)(e).
>
> 5. That the juveniles [Megan, Evan, Jade, Chloe, and Stella] are neglected individuals as defined by N.C.G.S. 7B-101(15)(a) and (e) in that the juvenile[s'] parents did not provide the juveniles with proper care, supervision, or discipline; and that the juveniles' parents created or allowed to be created a living environment that was injurious to the juveniles' welfare.

Father appealed.

II. Discussion

A. Subject Matter Jurisdiction

[1] Father first argues that the trial court "lacked subject matter jurisdiction to adjudicate any of the juveniles emotionally abused because DSS had not alleged emotional abuse in either of its juvenile petitions."

Whether a trial court possesses subject-matter jurisdiction is a question of law that we review de novo. *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1, 4 (2020). Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *In re T.N.G.*, 244 N.C. App. 398, 402, 781 S.E.2d 93, 97 (2015).

"The pleading in an abuse, neglect, or dependency action is the petition." N.C. Gen. Stat. § 7B-401(a) (2021). The petition must contain "allegations of facts sufficient to invoke jurisdiction over the juvenile." *Id.* § 7B-402(a) (2021). "If the allegations are insufficient to put the party on notice as to which alleged grounds are at issue, then the trial court lacks subject matter jurisdiction over the action." *In re K.L.*, 272 N.C. App. 30, 47, 845 S.E.2d 182, 195 (2020) (citations omitted). "While it is certainly the better practice for the petitioner to 'check' the appropriate box on the petition for each ground for adjudication, if the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate." *In re D.C.*, 183 N.C. App. 344, 350, 644 S.E.2d 640, 643 (2007).

The statutory definition of an abused juvenile includes any juvenile whose parent, guardian, custodian, or caretaker "[c]ommits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: . . . taking indecent liberties with the juvenile[,]" or "[c]reates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others[.]" N.C. Gen. Stat. § 7B-101(1)(d), (e) (2021).

Here, in the juvenile petition, DSS checked the box next to "A. The juvenile is an ABUSED JUVENILE, in that: . . . ." Directly below, DSS checked the box next to the following allegations: "the juvenile's parent, guardian, custodian, or caretaker has created or allowed to be created a substantial risk of serious physical injury to the juvenile by other than accidental means" and "the juvenile's parent, guardian, custodian, or caretaker has used or allowed to be used upon the juvenile cruel or grossly inappropriate devices or procedures to modify behavior." DSS also attached additional pages to the juvenile petition detailing the following facts supporting the allegations:

> The reporter states to have been involved with [the family] since last year and is very concerned about the physical and emotional well- being of the children. There is an ongoing custody battle between the parents and every time there is a court date for custody, dad starts coaching the children and making false reports to Law Enforcement

> and DSS against the mother. Prior reports were made by dad and were unfounded. Dad is very possessive of the children and wants to keep them away from mom. Law Enforcement reports were made that mom choked her child [Megan]. [Megan] was interviewed, she said that mom grabbed her by throat. There was no evidence of abuse on any part of her body. [Megan] was very robotic with her answers and all of the kids are when speaking with them. They seem to be coached, withdrawn, seems very depressed, no eye contact and no affect. . . . Reporter is concerned that dad keeps putting these kids through this. Dad encourages the kids to run away whenever they are visiting with their mother and also to take mom's tablet or phone, lock themselves in the bathroom and read him the text messages from other people. The children are seen by a therapist virtually and dad never leaves them alone with the therapist. . . .
>
> . . . .
>
> . . . . The Department is very concerned about the safety and emotional well-being of [the children] under the care and supervision of their parents. The children are very sad, withdrawn emotionally, continues to have unexplained marks and bruises. . . .

In the supplemental juvenile petition, DSS checked the box next to "A. The juvenile is an ABUSED JUVENILE, in that: . . . ." Directly below, DSS checked the box next to the following allegation: "the juvenile's parent, guardian, custodian, or caretaker has committed, permitted, or encouraged the commission of a sex or pornography offense by, with, or upon the juvenile in violation of the criminal law." DSS also attached an additional page to the supplemental juvenile petition detailing the following facts supporting the allegation:

> All five children completed a Child Medical Exam (CME) as well as forensic interviews. During the interviews, [Stella, Chloe, and Jade] each disclosed being touched on their vagina by [Father]. [Megan] disclosed that her father tickled her inside of her inner [thigh] near "where she uses the restroom." The Child Medical Exam report listed high concerns that [Megan, Jade, Chloe, and Stella] have been sexually abused, emotionally abused, physically abused and neglected . . . . The Child Medical Exam reported for [Evan] listed high concerns for [Evan] having been

> emotionally abused, physically abused and neglected as well.

Father argues that, because DSS did not check the box on either petition next to the specific allegation that "the juvenile's parent, guardian, custodian, or caretaker has created or allowed to be created serious emotional damage to the juvenile[,]" the trial court lacked jurisdiction to adjudicate the children abused under N.C. Gen. Stat. § 7B-101(1)(e). Father's argument lacks merit.

Our case law requires allegations "sufficient to put the respondent on notice as to each alleged ground for adjudication[.]" *In re D.C.*, 183 N.C. App. at 350, 644 S.E.2d at 643. Here, DSS checked the box on both petitions indicating that it was alleging that the children were abused and attached additional pages to the juvenile petitions detailing the facts supporting the allegations. Although DSS did not check the box stating that "the juvenile's parent, guardian, custodian, or caretaker has created or allowed to be created serious emotional damage to the juvenile[,]" the petition contained sufficient factual allegations to put Father on notice as to the alleged abuse. *See id.*; *see also* N.C. Gen. Stat. § 7B-402(a).

Accordingly, the trial court did not lack subject matter jurisdiction to adjudicate the children abused under N.C. Gen. Stat. § 7B-101(1)(e).

B. Ineffective Assistance of Counsel

[2] Father next argues that he received ineffective assistance of counsel because "his court-appointed trial attorney failed to object to DSS's testimonial evidence that [his] daughters had been sexually abused where the witnesses had not been accepted as experts and where no physical findings supported such conclusions." Father mischaracterizes the challenged testimony, and his argument is without merit.

"In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2021). "A party alleging ineffective assistance of counsel must show that counsel's performance was deficient and the deficiency was so serious as to deprive the party of a fair hearing." *In re L.N.H.*, 382 N.C. 536, 541, 879 S.E.2d 138, 143 (2022) (quotation marks, brackets, and citations omitted). "In order to show deprivation of a fair hearing, the party must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* (quotation marks and citation omitted).

Here, Vanessa Parton, a forensic interviewer, testified that she conducted forensic interviews of Evan, Stella, and Chloe. Parton did not testify at any point that sexual abuse had occurred. Rather, Parton testified, in relevant part, as follows:

> Q. Okay. So, is part of your training -- is part of your training to determine the credibility of the person you're interviewing?
>
> A. That's really not as simple as a "yes" or "no" question.
>
> Do you mind if I expand on that?
>
> Q. Yeah.
>
> A. I give the child an opportunity to express themselves. It's not up to me; it's part of a bigger investigative -- you know, it's part of a bigger investigation. The forensic interview is really just a piece of that investigation. My -- it's not my role to form an opinion on that child's credibility, and there are many factors that play into a child's statement, and their disclosures during the interview.
>
> Q. So, in my questioning today, would it be fair to say, did you believe [Stella] when she said that? Did you find that credible?
>
> Would that be a fair question to ask you as a person testifying today?
>
> A. I don't generally comment on my own personal opinion on their credibility.

Moreover, Dianna Pendleton, a nurse practitioner, testified that she conducted child medical evaluations of each of the children. Pendleton testified, in relevant part:

> Q. Did you reach any type of conclusions or determinations at the end of your exam with regard to the possibility of physical or sexual or emotional abuse?
>
> A. Yes. . . .
>
> . . . .
>
> Q. Will you tell the [c]ourt what those were?
>
> A. Yes. So, with regard to sexual abuse, [Chloe] made statements consistent with sexual abuse during her medical

> interview. [Chloe] made statements consistent with sexual abuse during her forensic interview with Ms. Parton. There were no physical findings. Based on that history, it was highly concerning that [Chloe] has been sexually abused.
>
> . . . .
>
> Q. And what, if any, conclusions or determinations did you make with regard to [Stella]?
>
> A. So, sexual abuse, I said, "[Stella] made statements consistent with sexual abuse during her medical interview. She made statements consistent with sexual abuse during her forensic interview." And it was highly concerning that she has been sexually abused.
>
> . . . .
>
> Q. Okay. Did you reach any type of conclusions, or have any concerns that you expressed in your report?
>
> A. Yes.
>
> Q. Tell the [c]ourt about those, please.
>
> A. I said that [Megan] made statements consistent with sexual abuse. During her medical interview, she made statements consistent with sexual abuse. During her forensic interview, reportedly made statements consistent with sexual abuse during her forensic interview . . . . I said, "Based on this history, it is highly concerning that she may have been sexually abused."

At no point did Pendleton testify that Megan, Jade, Stella, and Chloe had, in fact, been sexually abused.

Because the challenged testimony was not improper, Father's trial counsel was not deficient by failing to object to the evidence. Accordingly, Father did not receive ineffective assistance of counsel.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order adjudicating the children abused and neglected.

AFFIRMED.

Judges CARPENTER and WOOD concur.

LASSITER v. ROBESON CNTY. SHERRIF'S DEP'T

[291 N.C. App. 579 (2023)]

STEPHEN MATTHEW LASSITER, EMPLOYEE, PLAINTIFF
v.
ROBESON COUNTY SHERIFF'S DEPARTMENT, ALLEGED-EMPLOYER, SYNERGY COVERAGE SOLUTIONS, ALLEGED-CARRIER, TRUESDELL CORPORATION, ALLEGED-EMPLOYER, THE PHOENIX INSURANCE CO., ALLEGED-CARRIER, DEFENDANTS

No. COA23-267

Filed 19 December 2023

1. Workers' Compensation—employer-employee relationship—status at time of injury—off-duty deputy working traffic control—independent contractor factors

The Full Commission of the N.C. Industrial Commission correctly concluded that a sheriff's deputy was not an independent contractor when he was injured while working off duty directing traffic near a highway construction project but was an employee of his sheriff's office, in accordance with the factors contained in *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11 (1944). Plaintiff was hired for traffic control by the construction company on the basis of his official status as a law enforcement officer (as required by the company's contract with the state transportation department); he was visibly identifiable as law enforcement based on his gear; his vehicle was displaying his blue lights; he did not have the independent use of his skill, knowledge, or training as a law enforcement officer and had no ability to freely direct traffic other than to carry out the instructions given to him by a captain from the sheriff's office; he did not choose the times he worked traffic control; and he did not work for a fixed price or lump sum.

2. Workers' Compensation—employer-employee relationship—off-duty sheriff's deputy—traffic control for construction company—joint employment doctrine

The Full Commission of the N.C. Industrial Commission erred by determining that plaintiff, employed as a deputy with a county sheriff's office, worked solely for the sheriff's office at the time he was injured while working off duty directing traffic near a highway construction project, because the record showed that plaintiff was simultaneously employed by both the sheriff's office and the construction company conducting the project. First, there was an implied contract between plaintiff and the company, which directly hired and paid plaintiff and which maintained supervisory control over plaintiff's work schedule and duties. Second, the appellate court interpreted the joint employment doctrine as requiring that

the service being performed by the employee for each employer must be the same or closely related to the service for the other, and not that the nature of the work of each employer had to be the same or closely related. Since plaintiff was employed by both entities, was under the simultaneous control of both entities, and performed traffic control duty for the company similar to how he performed the same service for the sheriff's office, he was jointly employed by both, and both were liable for his workers' compensation claim.

Appeal by Defendants from opinion and award entered 17 November 2022 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 August 2023.

Musselwhite Musselwhite Branch & Grantham, by Stephen C. McIntyre, for Plaintiff-Appellee.

Goldberg Segalla LLP, by Gregory S. Horner and Allegra A. Sinclair, for Defendant-Appellants Robeson County Sheriff's Department and Synergy Coverage Solutions.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Neil P. Andrews, and Brennan C. Cumalander, for Defendant-Appellees Truesdell Corporation and The Phoenix Insurance Co.

GRIFFIN, Judge.

Defendant Robeson County Sheriff's Office[1] and Synergy Coverage Solutions (collectively, "RCSO") appeal from an opinion and award of the Full Commission of the North Carolina Industrial Commission awarding Plaintiff, Stephen Matthew Lassiter, ongoing medical expenses, to be paid solely by RCSO; and dismissing Defendant-Appellees, Truesdell Corporation and The Phoenix Insurance Company (collectively, "Truesdell"). RCSO argues the Full Commission erred in concluding Plaintiff was an employee of RCSO at the time of his injury, or in the alternative, the Full Commission erred in concluding Plaintiff was not jointly employed by both RCSO and Truesdell at the time of his injury. We hold Plaintiff was jointly employed by RCSO and Truesdell at the time of his injury making both RCSO and Truesdell jointly liable for Plaintiff's workers' compensation.

1. Though the caption on appeal from the Industrial Commission references the party as the "Department," we use Robeson County Sheriff's "Office" throughout.

I. Factual and Procedural History

On 5 October 2017, Truesdell contracted with the North Carolina Department of Transportation ("NCDOT") to perform bridge preservation work along Interstate 95 in Cumberland and Robeson Counties. Within the contract, NCDOT required Truesdell to have law enforcement officers on scene, with blue lights activated, to direct traffic in accordance with an independently created traffic control plan. Pursuant to a referral by NCDOT, Truesdell engaged Captain Obershea of RCSO and Chief Edwards of Fairmont Police Department to secure law enforcement officers to perform the required traffic control work.

On 28 March 2019, upon reviewing the proposed traffic control plan, Captain Obershea and Chief Edwards agreed they would need additional officers to carry out the plan. After NCDOT and Truesdell signed off on their request for additional officers, Captain Obershea contacted Plaintiff, a deputy with the Robeson County Sheriff's Office, to inform him of the work opportunity. Plaintiff, who was off duty at the time, accepted.

Plaintiff reported to his designated position in his unmarked patrol car and began performing his assigned duties. At around 12:00 a.m., Captain Obershea directed Plaintiff to switch positions with him. Sometime after moving to Captain Obershea's position, Plaintiff was struck by a vehicle and sustained injuries to his head, arms, hands, and legs. Due to the severity of injuries, Plaintiff was airlifted to a hospital in Florence, South Carolina. Plaintiff underwent extensive treatment and two subsequent surgeries.

On 15 April 2019, Plaintiff, in seeking workers' compensation, filed a Form 18 notice of accident to employer, listing both RCSO and Truesdell as his employers at the time of injury. Both RCSO and Truesdell denied the existence of employment. Plaintiff filed a Form 33 request for hearing.

On 12 July 2021, subsequent to a hearing on the matter, Deputy Commissioner Peaslee entered an opinion and award, concluding Plaintiff was employed by RCSO at the time of his injury, but that no employment relationship existed between Plaintiff and Truesdell. Deputy Commissioner Peaslee dismissed Truesdell from the claim. On 19 July 2021, RCSO appealed to the Full Commission. On 17 November 2022, the Full Commission entered its opinion and award affirming the Deputy Commissioner's conclusions.

On 12 December 2022, RCSO timely filed notice of appeal to this Court.

II. Standard of Review

Ordinarily, we review an opinion and award of the Industrial Commission to determine "[1] whether the Commission's findings of fact are supported by competent evidence, and [2] whether its conclusions of law are supported by its findings of fact." *Tanner v. State Dep't of Correction*, 19 N.C. App. 689, 691, 200 S.E.2d 350, 351 (1973) (citations omitted). Where, however, an appeal concerns issues of jurisdiction, "the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court and we are required to make independent findings with respect to jurisdictional facts." *Williams v. ARL, Inc.*, 133 N.C. App. 625, 628, 516 S.E.2d 187, 190 (1999) (citation and internal quotation marks omitted). Notably, "[t]he issue of whether an employer-employee relationship existed at the time of [an] injury . . . is a jurisdictional fact." *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, 205 N.C. App. 712, 714, 698 S.E.2d 91, 93 (2010) (citation omitted). Thus, this Court reviews issues as to whether an employment relationship existed between the parties de novo. *Whicker v. Compass Group USA, Inc.*, 246 N.C. App. 791, 795–96, 784 S.E.2d 564, 568 (2016) (citation omitted).

III. Analysis

Our appellate courts have yet to address whether a law enforcement officer, working off duty as a traffic control officer, is an independent contractor excluded from coverage under the Workers' Compensation Act; or whether he is to be considered an employee of the law enforcement agency for which he is primarily employed, an employee of the private corporation for which he is providing traffic control services, or a joint employee of both.

RCSO specifically argues the Full Commission erred in concluding Plaintiff was an employee of RCSO, rather than working as an independent contractor, at the time of his injury. In the alternative, RCSO argues the Full Commission erred in concluding Plaintiff was solely employed by RCSO as he was jointly employed by both RCSO and Truesdell at the time of his injury.

A. Employer-Employee or Employer-Independent Contractor

[1] We first determine whether Plaintiff was acting as an independent contractor at the time of his injury.

In order to recover under our Workers' Compensation Act, "the claimant must be, in fact and in law, *an employee of the party from whom compensation is claimed*[,]" and must have been in an

employer-employee relationship with that party at the time of their injury. *Fagundes v. Ammons Dev. Grp., Inc.*, 261 N.C. App. 138, 150, 820 S.E.2d 350, 359 (2018) (citations and internal quotation marks omitted). Independent contractors are not entitled to compensation under the Workers' Compensation Act. *See Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) ("An independent contractor is not a person included within the terms of the Workers' Compensation Act, and the Industrial Commission has no jurisdiction to apply the Act to a person who is not subject to its provisions." (citation omitted)). An independent contractor is an individual "who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Id.* at 384, 364 S.E.2d at 437 (citations omitted). Conversely, "an employer-employee relationship exists '[w]here the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed.' " *McCown v. Hines*, 353 N.C. 683, 687–88, 549 S.E.2d 175, 177 (2001) (quoting *Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437). Our Supreme Court in *Hayes v. Board of Trustees* identified eight factors to consider when determining whether an individual is an independent contractor or an employee:

> The person employed [1] is engaged in an independent business, calling, or occupation; [2] is to have the independent use of his special skill, knowledge, or training in the execution of the work; [3] is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; [4] is not subject to discharge because he adopts one method of doing the work rather than another; [5] is not in the regular employ of the other contracting party; [6] is free to use such assistants as he may think proper; [7] has full control over such assistants; and [8] selects his own time.

Hayes v. Board of Trustees, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944) (citations omitted). These factors are not independently determinative and must be "considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee." *Id.*

While our Courts have yet to address whether a law enforcement officer, working off duty as a traffic control officer, is acting as an independent contractor, we consider our Supreme Court's decision in

State v. Gaines to be instructive here in considering the *Hayes* factors, namely, whether, at the time of his injury, Plaintiff was engaged in an independent occupation or business.

In *Gaines*, a duly sworn police officer with Charlotte Police Department was killed while working off duty providing security for Red Roof Inn. *State v. Gaines*, 332 N.C. 461, 466, 421 S.E.2d 569, 571 (1992). The officer wore his Charlotte PD uniform, service weapon, badge, and portable radio. *Id.* Further, the officer was to conform to the same standard of conduct which applied to his on-duty activities. *Id.* Nonetheless, the defendant argued he did not murder a law enforcement officer, as the officer was acting solely as a security officer for Red Roof Inn at the time of the incident. *Id.* at 470, 421 S.E.2d at 573. Our Supreme Court disagreed noting, per North Carolina law, all municipal law enforcement officers acting within their jurisdiction are to be considered peace officers—an officer who " 'when off duty is still an officer and a policeman having the authority, if not indeed the duty to exercise functions pertaining to his office in appropriate circumstances, without regard to departmental rules relating to hours.' " *Id.* at 472, 421 S.E.2d at 574 (quoting 18 McQuillion, MUNICIPAL CORPORATIONS 3D, § 53.80B at 348). Further, the Court stated the official duties of law enforcement officers include: "investigative work (including stakeouts), crowd or traffic control, and routine patrol by automobile." *Id.* at 471, 421 S.E.2d at 574. Moreover, the Court, in citing to several legislative expressions, stated, our state legislation specifically indicates "a police officer retains his official law enforcement officer status even while 'off duty' unless it is clear from the nature of his activities that he is acting solely on behalf of a private entity, or is engaged in some frolic or private business of his own." *Id.* at 472, 421 S.E.2d at 575.

In reversing the trial court, our Supreme Court held the duty of a law enforcement officer, regardless of whether he is off duty performing a secondary employment, is to act as a peace officer, whose primary duty is to "enforce the law and insure the safety of the public at large." *Id.* at 475, 421 S.E.2d at 576. Further, the Supreme Court held the officer was hired on the basis of his official status as a police officer with the advantages such a status would bring to his secondary employment—to deter crime and enforce a system of law in an area it was needed. *Id.* The Court noted that while his uniformed presence alone was a symbol of the rule of law, he also served to benefit Red Roof Inn as "his ultimate or primary purpose was to keep the peace at all times without regard to his 'off-duty' or 'off-shift' status." *Id.*

Here, we recognize Plaintiff was, at the time of his injury, acting as a law enforcement officer, conducting traffic duty—an official duty of law

enforcement officers. In so doing, Plaintiff retained his official status as he was neither acting solely on behalf of a private entity nor engaged in some private business of his own. Further, evidence at the hearing indicated Plaintiff was hired on the basis of his official status as a police officer, as required by Truesdell's contract with NCDOT, and while undoubtably benefitting Truesdell by performing traffic duty, Plaintiff was also serving and protecting the safety of the community.

Plaintiff testified he was using his knowledge, skill, experience, and training as a law enforcement officer on the job. Captain Obershea testified similarly, noting the officers were "using the skills, the tools, and the equipment that's provided to them as a result of their law enforcement training and their law enforcement position." Plaintiff was outfitted in a reflective vest with his badge visibly displayed upon his belt. He also had a service weapon and personal flashlight with him. Plaintiff testified any member of the public, driving down the interstate, would have been able to obviously identify him as law enforcement. Additionally, Plaintiff was displaying his blue lights—of which only publicly owned vehicles, used for law enforcement purposes are legally allowed to display. *See* N.C. Gen. Stat. § 20-130.1(c) (2023).

Plaintiff did not have the independent use of his skill, knowledge, or training as a law enforcement officer. He was required to comply with instruction from both Truesdell and RCSO. Chief Edwards testified he and Captain Obershea were relayed instructions through Truesdell who indicated to them the way in which traffic should flow and the number of officers approved to complete the service. Further, Chief Edwards testified Plaintiff had no independent ability to freely direct traffic and was subject to discharge if he failed to comply with the tasks assigned to him by Chief Edwards and Captain Obershea. Although Plaintiff was not in the regular employ of Truesdell, he neither selected the times he worked for Truesdell nor did he work for a fixed price or lump sum.

In applying the *Hayes* factors to the record evidence here and considering the circumstances surrounding Plaintiff's work as a traffic control officer, we hold Plaintiff failed to possess the independence necessary to classify him as an independent contractor at the time of his injury. Guided by our Supreme Court's holding in *Gaines*, Plaintiff was acting as a law enforcement officer in conducting traffic control duty and was therefore not engaged in an independent business, calling, or occupation. Further, Plaintiff did not have the independent use of his skill, knowledge, or training; was subject to discharge by RCSO if he failed to follow instruction; was under the control of both RCSO and Truesdell; was not able to select his own time or hire his own assistants; and was paid hourly instead of a fixed price or lump sum.

Because these circumstances indicate Plaintiff was not an independent contractor at the time of his injury, the Full Commission did not err in concluding Plaintiff was not an independent contractor at the time of his injury but an employee of RCSO.

B. Sole or Joint Employment

[2] We must now determine whether RCSO was Plaintiff's sole employer or whether Plaintiff was also jointly employed by Truesdell.

As noted above, a claimant is entitled to recover under our Workers' Compensation Act from a party with whom he was in an employer-employee relationship at the time of his injury. *See Fagundes*, 261 N.C. App. at 150, 820 S.E.2d at 359 (internal marks and citations omitted). Our Workers' Compensation Act defines an employee to be, among other things, a person engaged in employment under a contract of hire. N.C. Gen. Stat. § 97-2(2) (2021); *see also Hollowell v. N.C. Dep't of Conservation & Dev.*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934) (stating an employer-employee relationship "is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts" (citation omitted)).

Under certain circumstances, a person may be an employee of two different employers at the time of their injury. *Leggette v. McCotter, Inc.*, 265 N.C. 617, 625, 144 S.E.2d 849, 855 (1965). To prove simultaneous employment by two separate employers, a claimant may rely on two doctrines: the joint employment doctrine or the lent employee doctrine. *Whicker v. Compass Group USA, Inc.*, 246 N.C. App. 791, 797, 784 S.E.2d 564, 569 (2016) (citation omitted). Under the joint employment doctrine, Plaintiff must prove he was, at the time of his injury, "a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously perform[ing] services for both employers, and [] the service for each employer is the same as, or is closely related to, that for the other." *McGuine v. Nat'l Copier Logistics, LLC*, 270 N.C. App. 694, 700–01, 841 S.E.2d 333, 338 (2020) (citations and internal quotation marks omitted).

1. Contract of Employment

The joint employment doctrine requires an employment contract exist between both Plaintiff and RCSO and Plaintiff and Truesdell. While we have established there existed an employment contract between Plaintiff and RCSO, we must determine whether there also existed an employment contract between Plaintiff and Truesdell.

An employment contract may be "express or implied, oral or written[.]" N.C. Gen. Stat. § 97-2(2). An implied contract is "an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 557, 548 S.E.2d 788, 793 (2001) (citations omitted). To determine whether an implied employment contract existed between the parties, consideration must be given as to who "hired, paid, trained, and supervised" the employee. *McGuine*, 270 N.C. App. at 701, 841 S.E.2d at 339 (citations and internal marks omitted).

Plaintiff here was not under any express contract of employment with Truesdell. However, record evidence reflects the existence of an implied contract. We acknowledge Truesdell was not responsible for training Plaintiff, but Truesdell did hire, pay, and supervise Plaintiff.

A law enforcement officer, performing law enforcement duties, will always be under the command of the officers who outrank him, even when working in an off-duty capacity. Accordingly, Truesdell did not have independent direct supervision over Plaintiff. While Plaintiff was under the direct command and supervision of his superior officers—Captain Obershea and Chief Edwards—Truesdell still exercised some supervisory authority and control over the officers. Truesdell was directly responsible for the project and making sure officers were on scene. Truesdell contacted RCSO requesting officers to perform traffic duty and provided Captain Obershea and Chief Edwards with plans of how to direct or control traffic as provided by their engineer. Although Truesdell did not speak directly with every officer on site, Truesdell was directly in control of how many officers were working as neither Captain Obershea nor Chief Edwards had the independent authority to hire additional officers. Notably, Plaintiff was not originally scheduled to work on the date of his accident. Instead, Captain Obershea and Chief Edwards, after consulting the plan and recommended officer count offered by Truesdell, believed there needed to be additional officers on site. Captain Obershea and Chief Edwards contacted Truesdell to ask permission before calling Plaintiff to request his assistance in traffic control work. This indicates a consistent level of supervision or control which Truesdell had over the officers; if Truesdell had rejected the request for an additional officer or refused to present the idea to NCDOT, Plaintiff would not have been on the scene the night of his injury.

This evidence is also indicative of Truesdell's hiring authority. Truesdell engaged Captain Obershea and Chief Edwards to secure an allotted number of law enforcement officers to perform the required traffic control work. Truesdell also required each officer fill out a W-9 of

which indicated the officers who worked for them; had the officers complete timesheets on which Truesdell signed off after submission; and directly paid each officer $55 per hour.

In considering this record evidence, we hold there existed an implied contract of employment between Truesdell and Plaintiff as Truesdell, while not responsible for training Plaintiff, maintained a level of supervision and control over the Plaintiff's work for them, had independent hiring authority, and paid Plaintiff directly for his services.

2. Simultaneous Control and Performance of Closely Related Services

Although we hold there existed a contract of employment between Plaintiff and Truesdell, we must determine whether Plaintiff was under the simultaneous control of RCSO and Truesdell while simultaneously performing similar services for both RCSO and Truesdell.

Our Court's opinion in *Whicker v. Compass Group USA, Inc.*, illustrates circumstances to consider in making such a determination. In *Whicker*, Crothall Services Group entered into a contract with Novant Health, Inc., under which Crothall agreed to provide cleaning services to several Novant healthcare facilities. *Whicker*, 246 N.C. App. at 792, 784 S.E.2d at 566. The plaintiff was employed by Crothall and assigned to clean Forsyth Medical Center. *Id.* The plaintiff, while on her lunch break at Forsyth Medical Center, fell and injured her shoulder. *Id.* The plaintiff filed a claim seeking workers' compensation and asserted she was employed by both Crothall and Novant. *Id.* at 793, 784 S.E.2d at 567. The Full Commission concluded no employment relationship existed between the plaintiff and Novant under either the joint employment or lent employee doctrine. *Id.* The plaintiff appealed to this Court which affirmed the opinion and award of the Full Commission holding: the plaintiff failed to show she was a joint employee of Crothall and Novant as there was no express or implied employment contract with Novant and the plaintiff; Crothall and Novant did not engage in similar work; and Novant did not have control over the manner and execution of the plaintiff's work. *Id.* at 801, 784 S.E.2d at 571.

Our case can be distinguished from *Whicker*. Here, there existed an employment contract between both Plaintiff and RCSO and Plaintiff and Truesdell. Additionally, Plaintiff was under the simultaneous control of both RCSO and Truesdell. As noted above, Captain Obershea and Chief Edwards were directly responsible for supervising Plaintiff while Truesdell, having direct hiring authority, was directly responsible for Plaintiff being on scene at the time of his injury. Additionally, Truesdell

had control over the execution of Plaintiff's work. Truesdell had engineers draw up traffic plans with the number of officers necessary at each location point, then relayed the information, through Captain Obershea and Chief Edwards, to Plaintiff. Further, as indicated in Chief Edwards's testimony, Truesdell had control over which officers were on scene. Chief Edwards noted, rather than losing the contract, he would have asked an officer not to return to service under the direction of Truesdell if Truesdell had an issue with an officer's performance.

There are clear discrepancies between the Court's decision in *Whicker* and the instant case, but we note our inability to decisively state the nature of the work Plaintiff was performing at the time of his injury was of the same nature as the work performed by Truesdell. However, we are persuaded this requirement, per our Court's opinion in *Whicker*, is not required to show joint employment under the joint employment doctrine.

In *Whicker*, a prior panel of this Court stated, "[u]nder both the joint employment and lent employee doctrines, [the] [p]laintiff must show the work she was performing at the time of her injury was of the same nature as the work performed by Novant." *Whicker*, 246 N.C. App. at 800, 784 S.E. 2d at 570. The Court, without citing any supporting authority, reasoned that where the plaintiff was not required to show the work being performed—cleaning services—was of the same nature of the work performed by Novant—healthcare services—virtually any contractor retained by Novant to upkeep its facilities would be deemed an employee of Novant. *Id.* at 800, 784 S.E.2d at 570–71.

We interpret the joint employment doctrine differently. As stated, the doctrine requires, in relevant part, the service for each employer to be the same or closely related to that for the other. *See id.* at 797, 784 S.E.2d at 569 (citing *Anderson v. Texas Gulf, Inc.*, 83 N.C. App. 634, 636, 351 S.E.2d 109, 110 (1986)). This rule, provided by the Court in *Whicker*, can be traced back to our Court's opinion in *Anderson* and further to the authoritative treatise, *Larson's Workers' Compensation Law*. *See id.*; *see also* 5, Larson, Larson's Workers' Compensation Law § 68.02, p. 68-1. Neither our Court's opinion in *Anderson* nor *Larson's Workers' Compensation Law* interpret these rules to require the work being done by the plaintiff to be of the same nature of the work performed by the company for which the plaintiff is working when injured. *See id.*

We recognize, instead, the joint employee doctrine specifically states the service being performed by the plaintiff for each employer must be the same or closely related to the service for the other, not that the nature of the work of each employer had to be the same or

closely related. For, if we were to accept the Court's interpretation in *Whicker*, we would be effectively prohibiting, at a minimum, any off-duty law enforcement officer performing traffic duty from recovering from the company for which he was performing traffic duty, regardless of whether an express or implied contract existed, unless the officer was performing traffic duty for a private company whose business was also performing traffic duty.

Based on our interpretation of the joint employment doctrine, we need not reach whether the nature of the work Plaintiff was performing at the time of his injury, traffic duty, was of the same nature of the work traditionally performed by Truesdell. Further, we hold the Full Commission's conclusion which states, in pertinent part, "because the work Plaintiff was performing at the time of his injury was essentially law enforcement work, not concrete work . . . Truesdell is not liable as a joint or special employer[,]" was made in error.

Here, Plaintiff was, at the time of his injury: a single employee; under a contract of employment with both RCSO and Truesdell; under the simultaneous control of both RCSO and Truesdell; and performing a service similar to the service he performed for RCSO when performing traffic duty for Truesdell. Thus, we hold Plaintiff was jointly employed by both RCSO and Truesdell at the time of his injury, and the Full Commission erred in concluding otherwise.

IV. Conclusion

For the aforementioned reasons, the Full Commission correctly concluded Plaintiff was not an independent contractor but erred in concluding Truesdell was not liable as a joint employer.

AFFIRMED IN PART AND REVERSED IN PART.

Judges MURPHY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
DESMOND JAKEEM BETHEA

No. COA22-932

Filed 19 December 2023

Criminal Law—competency to stand trial—memory loss—ability to assist in defense—findings supported by evidence

The trial court did not abuse its discretion by determining that defendant was competent to stand trial for attempted first-degree murder and other charges related to a shooting incident with law enforcement—during which defendant sustained multiple injuries, including a traumatic brain injury—where the trial court's findings that defendant could remember events before and after the shooting incident and that defendant was capable of assisting in his defense were supported by competent evidence, including a report submitted by the forensic psychologist who examined defendant and defendant's implicit concession that he was able to understand the nature of the proceedings against him.

Appeal by Defendant from judgments entered 28 March 2022 by Judge Stephan R. Futrell in Scotland County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Orlando L. Rodriguez, for the State-Appellee.

Sarah Holladay for Defendant-Appellant.

COLLINS, Judge.

Defendant Desmond Jakeem Bethea appeals from judgments entered upon jury verdicts of guilty of three counts of attempted first-degree murder, one count of assault with a deadly weapon with intent to kill inflicting serious injury, two counts of assault with a firearm on an officer, and one count of "carrying a concealed gun." Defendant argues that the trial court abused its discretion when it found him competent to stand trial. We find no error.

I. Background

On 26 May 2018, Corporal Benjamin Teasley and Officer Jeremy Rodriguez with the Laurinburg Police Department responded to a call

about an individual who had been shot outside of a grocery store. The two officers arrived on scene and found a man who had been shot in the arm. As the officers worked to secure the crime scene, they watched Defendant walk up, cross under the police tape, and enter the secured area. The officers asked Defendant if he saw the police tape and told him to get out.

The officers moved towards Defendant, and Teasley began to arrest Defendant; Defendant resisted and started a physical altercation with Teasley. During the physical altercation, Defendant pulled a gun from his waistband and fired at Teasley, narrowly missing Teasley's ear. Teasley yelled "gun," drew his service weapon, and fired at Defendant. As Teasley fired at Defendant, Defendant pointed his gun at Rodriguez, who had fallen during the altercation and was on the ground.

Defendant attempted to flee, but Teasley fired his weapon and struck Defendant multiple times. Defendant was found incapacitated on the ground near the crime scene with injuries to his head, jaw, large intestine, liver, stomach, and right arm. Defendant was transported to the hospital for emergency surgery; it was determined that he had suffered a traumatic brain injury.

Defendant was indicted on 19 August 2019 on three counts of attempted first-degree murder; one count of assault with a deadly weapon with intent to kill inflicting serious injury; two counts of assault with a deadly weapon on a public officer; two counts of resisting, delaying, or obstructing a public officer; one count of carrying a concealed gun; and one count of discharging a weapon into an occupied dwelling. On 21 March 2022, Defendant's counsel filed a Motion for Capacity Hearing, alleging that Defendant was incompetent because he was "unable . . . to assist in his defense in a rational or reasonable manner" due to his lack of memory of the incident. Defendant's counsel attached a report written by Dr. James Hilkey, which concluded that Defendant "has no memory of the events" and thus "cannot assist his attorney in explaining his mental state or provide relevant information in offering a defense."

A competency hearing was held that same day. Dr. Hilkey was tendered and qualified as an expert in forensic psychology and testified that Defendant did not remember the days leading up to the crime and did not remember anything from the weeks directly following the crime. Dr. Hilkey also testified that Defendant had a "rational understanding" of the legal proceedings against him. The trial court then heard arguments from Defendant's counsel and the State, and it determined that Defendant was competent and therefore capable of standing trial.

Directly following the competency hearing, Defendant's case proceeded to trial. The jury convicted Defendant of all charges except for the one count of discharging a weapon into an occupied dwelling, and the trial court sentenced Defendant. Defendant gave proper oral notice of appeal in open court.

II. Discussion

Defendant argues that the trial court abused its discretion by finding him incompetent to stand trial because the "evidence showed he was unable to assist in his defense due to a total lack of memory about the days surrounding the incident."

A. Preservation

The State argues that "Defendant did not preserve the issue of competency for appeal because he failed to object to the competency finding below."

North Carolina Rule of Appellate Procedure 10 states, in relevant part:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, *or motion*, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. . . .

N.C. R. App. P. 10(a)(1) (2022) (emphasis added).

Here, Defendant's counsel filed a Motion for Capacity Hearing, alleging that Defendant was not competent to stand trial. A competency hearing was held on 21 March 2022 and the trial court found that Defendant was competent to stand trial. As Defendant presented to the trial court a timely motion and obtained a ruling upon that motion, the issue of Defendant's competency to stand trial is properly preserved for our review.

B. Analysis

After hearing a motion on a defendant's mental capacity, a trial court shall issue an order containing "findings of fact to support its determination of the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b1) (2022). The trial court's "findings of fact as to defendant's mental capacity are conclusive on appeal if supported by the evidence."

State v. Baker, 312 N.C. 34, 43, 320 S.E.2d 670, 677 (1984) (citations omitted). We review the trial court's denial of a defendant's motion for incapacity for an abuse of discretion. *State v. Flow*, 384 N.C. 528, 547, 886 S.E.2d 71, 85 (2023). An abuse of discretion requires a showing that the trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

N.C. Gen. Stat. § 15A-1001(a) provides:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. . . .

N.C. Gen. Stat. § 15A-1001(a) (2022). As to the requirement that a defendant be able to assist in his defense, our Supreme Court has explained that, "[s]o long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner." *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989) (considering and rejecting the defendant's argument that the test is whether the defendant could participate in her defense in a "meaningful way"). Additionally, our Supreme Court has explained that even when a defendant's ability to participate in his defense is limited by amnesia, it does not per se render him incapable of standing trial. *See State v. Willard*, 292 N.C. 567, 576-77, 234 S.E.2d 587, 593 (1977) ("Obviously if [a] defendant is unable to recall the events of the crime, his available defenses may be limited. We do not believe this fact alone renders him incompetent to stand trial[.]"); *see also State v. Avery*, 315 N.C. 1, 11, 337 S.E.2d 786, 791 (1985) (rejecting the defendant's argument that "complete loss of memory of the events in question" prevented defendant from "rationally and reasonably consult[ing] with his defense counsel").

Here, Defendant implicitly concedes that he was able to understand the nature and object of the proceedings against him and able to comprehend his own situation in reference to the proceedings. He argues only that his memory loss rendered him unable to assist in his defense in a rational or reasonable manner and that the trial court's finding of fact as to his competency is unsupported by the evidence.

At the hearing, the trial court explained that it considered the evidence presented, along with *Willard* and *Avery*, and further stated:

> [T]he Court finds that the defendant is capable of assisting in his defense to the extent that he can remember events before and after and can stand trial in accordance with the standards in the North Carolina Constitution and General Statute 15A-1001(a), as amended.

The evidence presented at trial, which included Dr. Hilkey's written report, supports this challenged finding. Dr. Hilkey's written report shows that: Defendant retained memories of his childhood, including the years in elementary school, middle school, and the three years of high school that he completed; Defendant recalled playing and enjoying basketball; Defendant remembered beginning recreational use of marijuana in high school; and Defendant recalled being "in good health until being shot during the instant offenses." Additionally, Defendant stated that he was able to attend his grandmother's wake in June 2021, which took place after the incident and after he sustained his injuries.

This evidence supports the challenged finding that Defendant "can remember events before and after." Moreover, the record evidence shows that the trial court carefully considered Dr. Hilkey's written report and testimony, in light of *Willard* and *Avery*, when making its determination that Defendant was competent to stand trial.

III. Conclusion

As the challenged finding of fact is supported by the evidence, it is conclusive on appeal. *Baker*, 312 N.C. at 43, 320 S.E.2d at 677. Further, the record shows that the trial court carefully considered the evidence before it, along with the controlling case law. Accordingly, we cannot say that the trial court abused its discretion in determining that Defendant was mentally competent to stand trial. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

NO ERROR.

Judges GORE and FLOOD concur.

STATE OF NORTH CAROLINA
v.
CEDRIC ALDEN BURNETT

No. COA23-246

Filed 19 December 2023

1. Homicide—first-degree—premeditation and deliberation—identity of defendant as perpetrator—opportunity and means

Where the State presented substantial evidence that defendant had the motive, opportunity, and means to shoot the victim, the trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder based on premeditation and deliberation. Although the evidence was mainly circumstantial, it showed that the shooting was in retaliation for a fatal shooting that occurred two weeks earlier; about thirty minutes prior to this murder, a person was seen waiting in a car park at the corner where the victim was shot; a bullet recovered from the victim's body and a shell casing found at the scene matched the weapon defendant was carrying when he was apprehended; and defendant made incriminating statements to law enforcement.

2. Evidence—expert witness—ballistics analysis—reliability

In defendant's trial for first-degree murder, the trial court did not err by allowing the State's ballistics expert to testify regarding a firearm carried by defendant when he was apprehended by law enforcement and its connection to a bullet recovered from the victim's body and a shell casing found at the scene of the shooting. There was no violation of Evidence Rule 702(a) regarding reliability of the expert's analysis methods where the trial court's detailed findings about the expert's methods supported the court's resolution of purported contradictions between competing experts and where the court found that the expert's decision to conduct a microanalysis test rather than measuring lands and grooves—because it was a more definitive test—was a rational discretionary decision based on the state crime lab's guidelines and protocols.

3. Criminal Law—motion for appropriate relief—newly discovered evidence—mistake by ballistics expert in different trial

After defendant's conviction of first-degree murder, the trial court did not err by denying defendant's motion for appropriate relief, in which defendant asserted the existence of newly discovered evidence showing that the State's ballistics expert had made

a mistake in a different trial, that the State had suppressed this evidence, and that defendant was entitled to a new trial as a result. The trial court's determinations that the State did not possess the expert's personnel records from the state crime lab prior to trial and was not aware that the expert may have made a mistake in another case were supported by the record, and no new trial was needed where the types of purported "new evidence" raised by defendant tended merely to question the expert's past but not the State's evidence at trial.

4. Evidence—other crimes, wrongs, or acts—murder trial—removal of electronic monitoring device two weeks prior to shooting

In defendant's trial for first-degree murder based on premeditation and deliberation, in which the State introduced evidence that the victim was shot in retaliation for a fatal shooting that occurred two weeks before, the trial court did not err by allowing the State to introduce evidence that defendant had disabled his electronic monitoring device approximately one hour after the prior fatal shooting. The evidence did not violate Evidence Rule 404(b) because defendant's actions were close enough in time and proximity to the incident giving rise to the charge and were part of a chain of events that provided context for the murder.

5. Criminal Law—prosecutor's closing argument—murder trial—retaliatory motive

There was no error in defendant's trial for first-degree murder based on premeditation and deliberation where, during the State's closing statement, despite the parties agreeing not to refer to the incident as a gang killing, the prosecutor stated that defendant shot the victim in retaliation for a fatal shooting that took place two weeks before. The statement did not improperly shift the burden of proof to defendant, and the prosecutor's argument that the two shootings may have been linked was supported by competent evidence and testimony properly admitted at trial.

Appeal by defendant from judgment entered 1 April 2023 by Judge Thomas R. Wilson in New Hanover County Superior Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery, for the State.

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

TYSON, Judge.

Cedric Alden Burnett ("Defendant") appeals from judgment entered upon a jury's verdict finding him guilty of first-degree murder. Our review reveals no error.

I. Background

Fourteen-year-old Aljean Williams ("Williams") was murdered while visiting his grandmother in Wilmington on 3 January 2016. Williams was shot twice while standing on Emory Street and died at the hospital a short time later.

New Hanover County Sheriff's Sergeant Daniel Roehrig ("Sgt. Roehrig") responded to the report of a shooting on Emory Street near the intersection with Stewart Circle. Law enforcement officers were concerned about retaliation occurring in that area following another murder two weeks prior. When Sgt. Roehrig arrived, he saw Williams lying on the ground with several other people standing over him. Sgt. Roehrig did not notice any wounds on Williams and began CPR. Sgt. Roehrig did not find any weapons on the scene.

Officers found several spent casings at the scene: one 9-millimeter Luger and six .40 caliber Winchester. Lieutenant Joshua Bryant and Sheriff's Deputy Bryan Thigpen also responded to the shooting. Upon arrival on the scene, they were asked to follow the ambulance carrying Williams to the hospital. While enroute to the hospital, they were diverted by a dispatch of shots being fired at 11th Street at Castle Street.

Upon arrival, the officers saw Defendant running from the area. The officers activated their blue lights. Defendant looked back, saw the officers, and began to quickly run away from the area. The officers exited their vehicle and chased after Defendant until he was stopped and seized by the officers.

Defendant was reluctant to give his name to the officers. Defendant told the officers: "It don't matter because once you find out who I am I am not getting out of jail." Officers found a Kel-Tec P-11 9mm semi-automatic handgun on Defendant.

Defendant was arrested for carrying a concealed weapon and resisting arrest. Once Defendant revealed his name following his arrest, the officers discovered Defendant was a convicted felon in possession of a

firearm and there was an outstanding warrant for his arrest for cutting an electronic monitoring device on 20 December 2015.

The officers determined the Kel-Tec handgun contained four rounds of 9-millimeter full-metal-jacket rounds. A gunshot residue test ("GSR") performed on Defendant showed the presence of gunshot residue.

Williams' autopsy revealed two gunshot wounds, both bullets entering his back and rear. One bullet had entered the left buttock, traveled straight up, hitting the stomach and liver, before passing through the diaphragm and coming to rest in his heart. The other bullet entered Williams' upper left back, and traveled behind the heart, through the lungs, and through the spine.

The State Crime Laboratory determined the 9mm casing from the scene and the bullet removed from Williams' heart, was fired from the Kel-Tec P-11 9mm found on Defendant when he was arrested. Defendant pleaded guilty to possession of a firearm by a felon and interfering with an electronic monitoring device on 25 July 2016. Defendant was indicted for first-degree murder on 29 May 2020. Defendant was convicted of first-degree murder and was sentenced to life without parole. Defendant appealed.

Defendant filed a motion for appropriate relief ("MAR"). The superior court conducted an evidentiary hearing and denied the MAR on 30 December 2022. Defendant filed a written notice of appeal on 4 January 2023.

II. Jurisdiction

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

III. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss the first-degree murder charge; (2) overruling objections to expert testimony; (3) denying his post-conviction MAR; (4) admitting evidence of his prior removal of an electronic monitoring device; and, (5) overruling his objections to the State's closing argument.

IV. Motion to Dismiss

A. Standard of Review

This Court's standard of review of a denial of a motion to dismiss is well established: "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each

essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. Even if circumstantial evidence does not rule out "every hypothesis of innocence," the motion to dismiss may be overcome and denied. *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted).

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

B. Analysis

[1] Defendant argues the trial court erred by denying his motion to dismiss the first-degree murder charge based on premeditation and deliberation. He asserts insufficient evidence tending to show he was the perpetrator was introduced.

To support a conviction for first-degree murder, "the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (citations omitted).

Premeditation means "the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Bullock*, 326 N.C. 253, 257, 388 S.E.2d 81, 83 (1990) (citation omitted). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *State v. Davis*, 349 N.C. 1, 33, 506 S.E.2d 455, 472 (1998) (citation omitted). Premeditation and deliberation do not require a "fixed length of time." *State v. Walters*, 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969) (citation omitted).

Our Supreme Court has long held:

> Premeditation and deliberation are processes of the mind. In most cases, they are not subject to proof by direct evidence but must be proved, if at all, by circumstantial evidence. Among other circumstances from which premeditation and deliberation may be inferred are (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Vause, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (citation omitted).

When evidence of whether the defendant was the perpetrator of the crime is circumstantial: "courts often [look towards] proof of motive, opportunity, capability, and identity to determine whether a reasonable inference of [the] defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator." *State v. Hayden*, 212 N.C. App. 482, 485, 711 S.E.2d 492, 494 (2011) (citation and quotation marks omitted). "The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury." *Stone*, 323 N.C. at 452, 373 S.E.2d at 433.

To survive a motion to dismiss, evidence of motive alone is insufficient and evidence of a defendant's opportunity and means to commit the crime must also be considered. *State v. Bell*, 65 N.C. App. 234, 241, 309 S.E.2d 464, 469 (1983), *aff'd per curiam*, 311 N.C. 299, 316 S.E.2d 72 (1984).

This Court has also held:

> The real problem lies in applying the test to the individual facts of a case, particularly where the proof is circumstantial. One method courts use to assist analysis is to classify evidence of guilt into several rather broad categories. Although the language is by no means consistent, courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular

> crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime. . . .
>
> While the cases do not generally indicate what weight is to be given evidence of these various factors, a few rough rules do appear. It is clear, for instance, that evidence of either motive or opportunity alone is insufficient to carry a case to the jury. On the other hand, when the question is whether evidence of both motive and opportunity will be sufficient to survive a motion to dismiss, the answer is much less clear. The answer appears to rest upon the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable "bright line" test.

State v. Lowry, 198 N.C. App. 457, 466, 679 S.E.2d 865, 870-71 (2009) (internal citations and quotation marks omitted).

The State presented evidence tending to show motive, opportunity, and means. Testimony was presented tending to show the shooting was in retaliation for a fatal shooting two weeks prior, even though the trial court had granted Defendant's motion to prohibit any references to "gangs" or "gang shooting." The State also presented testimony that thirty minutes before Williams was shot, a report was received of someone seeing a car park at the corner where Williams was shot and someone in the backseat pointed out of the window.

The State also presented evidence tending to show Defendant's opportunity and means to commit the crime. Physical evidence of the 9mm shell casing at the murder scene, the bullet recovered from Williams body, weapon on Defendant's person upon arrest, and Defendant's statements to police after he was arrested tended to tie him to Williams' murder. A reasonable juror could find Defendant had the opportunity and means to commit the murder. The trial court did not err in denying Defendant's motion to dismiss the first-degree murder charge based on premeditation and deliberation. Defendant's argument is overruled.

V. Expert Witness

A. Standard of Review

"Trial courts enjoy wide latitude and discretion when making a determination about the admissibility of expert testimony." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012) (citation omitted).

A trial court's ruling on Rule 702(a) is reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). "A trial court may be reversed for abuse of discretion only upon showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

B. Analysis

[2] Defendant argues the trial court erred in allowing the State's expert witness to testify without making necessary findings on reliability.

North Carolina Rules of Evidence governs testimony by an expert witness at trial:

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

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021).

Defendant contends the State's expert witness testimony was not "the product of reliable principles and methods" in violation of Rule 702(a)(2). *Id.*

The superior court made the following findings of fact in its order on allowing the expert testimony:

> 14. In error, [the State's expert] entered that the firearm, noted as K1, was "polygonal" as opposed to "conventional." This error was not caught by the peer review process[;] however[,] it did not affect the outcome or integrity of her examination.
>
> 15. Otherwise, [the State's expert]'s methods and conclusions as to this examination are not rebutted and her microanalysis and conclusions were subject to peer review.

16. Moreover, despite and with exception to her acknowledged error, [the State's expert] testified as to each and every step taken in this examination, and each and every step drew on her training and experience which included her competency and near annual proficiency exams.

17. During the Casing Examination, [the State's expert] fired the K-1 (the firearm) three times and analyzed the casing and additionally maintained the three known projectiles. [The State's Expert] selected the ammunition to be used for these test fires.

18. Regarding, the Projectile Examination (approximately two years later) which was requested as a rush exam, [the State's expert] testified this examination was cross referenced from the Casing Examination.

19. [The State's expert] testified to each and every step taken during the Projectile Examination, and that each and every step drew on her training and experience.

20. Regarding [the State's expert's] methodoly [sic] in this regard, she was challenged in the rebuttal testimony by [the Defendant's expert] as asserted failure in following certain standard operating procedures.

21. There exists a tension between the testimony of [the State's expert] and her examination of the projectile and that of [the Defendant's expert] as set forth in her testimony and report (Defendants voir dire exhibit 25) as to the Projectile Examination. This tension is founded in a disparity in their respective interpretation and application of standard operating procedures in effect at the time of [the expert]'s examination.

22. [The expert] elected not to examine/measure the lands and grooves of the fired projectile where the submitted projectile and the maintained control projectiles initially collected as part of the Casing Examination (the three test fires) were—in accordance to the standard operating procedure she applied and pursuant to her training and experience—sufficiently similar to move to microanalysis.

23. Based on this decision and her analysis, she determined the projectile taken from the victim's heart as compared to the three projectiles maintained from the

> Casing Examination were sufficiently similar under micro-analysis for her to form an opinion.
>
> 24. [The State's expert's] opinion from her Projectile Examination was based on sufficient facts and data as taken from the three projectiles maintained from the Casing Examination and fired from the firearm in question; she clearly explained her methodology under the operating procedures in place at the time and her decision not to measure the lands and grooves of the projectile taken from the victim's heart based on her analysis of the comparative test projectiles being taken from the known source firearm and known source ammunition; and she applied her methods reliably and peer review of her micro-analysis confirmed her opinion.

The trial court found the State's expert witness' decision to conduct the micro-analysis test, instead of measuring the lands and grooves because it was more definitive, was a "rational discretionary decision" based on the State Crime Lab's "guidelines and protocols." The superior court made supported findings to resolve purported contradictions between the competing experts. The trial court did not abuse its discretion in admitting the State's expert's testimony and the superior court did not err in denying Defendant's MAR on this ground.

VI. Newly Discovered Evidence

A. Standard of Review

This Court reviews a trial court's ruling on a defendant's MAR for "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions of law are fully reviewable on appeal." *State v. Lane*, 271 N.C. App. 307, 311, 844 S.E.2d 32, 37 (2020) (citation omitted).

B. Analysis

[3] The Supreme Court of the United States held in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 10 L. Ed. 2d at 218.

"Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence." *State v. Williams*, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008) (citing *United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 490 (1985)). Evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494.

The trial court found the State was not in possession of the expert's personnel records from the State Crime Lab prior to trial and was not aware of a purported mistake she had made in another case prior to trial. "The State is not required to conduct an independent investigation to determine possible deficiencies suggested by defendant in State's evidence." *State v. Smith*, 337 N.C. 658, 664, 447 S.E.2d 376, 379 (1994). The Record does not indicate the State had suppressed material evidence. The superior court did not err in denying Defendant's MAR on this ground.

Defendant further argues the superior court erred in denying him a new trial based upon newly discovered evidence. Our Supreme Court has held the perquisites for a new trial on the grounds of newly discovered evidence are:

1. That the witness or witnesses will give the newly discovered evidence.
2. That such newly discovered evidence is probably true
3. That it is competent, material and relevant.
4. That due diligence was used and proper means were employed to procure the testimony at trial.
5. That the newly discovered evidence is not merely cumulative.
6. That it does not tend only to contradict a former witness or to impeach or discredit him.
7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

State v. Cronin, 299 N.C. 229, 243-44, 262 S.E.2d 277, 286 (1980) (citations omitted).

Reviewing Defendant's argument in light of these factors, both pieces of purported "new evidence" proffered by Defendant concerning the State's expert: (1) a complaint by a superior court judge resulting in an investigation and (2) a prior mistake made during a firearm examination, are the sort of evidence that merely questions the expert witness' past, not the State's evidence at this trial, and does not necessitate a new trial. *Id*. The trial court did not err in denying Defendant's MAR on this ground.

VII. Rule 404(b)

[4] Defendant argues the trial court erred in admitting evidence of his removing an electronic monitoring device fifteen days earlier.

A. Standard of Review

Our Supreme Court has held:

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusions that the evidence is, or is not, within the coverage of Rule 404(b).

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

B. Analysis

Rule 404(b) provides:

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

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

The Supreme Court of North Carolina has repeatedly interpreted Rule 404(b) to be a rule of inclusion, and not exclusion. *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159. This inclusion of Rule 404(b) testimony or evidence is constrained by the requirements of similarity and temporal proximity of the evidence of the acts. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

Rule 404(b) is "subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (citation omitted).

The trial court admitted information over Defendant's objection of Defendant's removing his electronic monitoring device fifteen days prior to the shooting. The State argues the evidence of Defendant's actions is properly admitted under Rule 404(b) to show "the natural development of the facts or is necessary to complete the story of the charged crime for the jury." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (1995).

Our Supreme Court has held:

> Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (citation and internal quotation marks omitted).

Defendant disabled his electronic monitoring device approximately an hour after another murder was committed two weeks earlier in the same area of Wilmington. At the time of Williams' murder, law enforcement officers were monitoring that area for retaliation. The evidence and timing of these incidents and Defendant's actions are part of the chain of events that contextualize the crime. The trial court did not err in admitting this evidence. Defendant's argument is overruled.

VIII. State's Closing Argument

A. Standard of Review

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted).

B. Analysis

[5] Defendant argues the State's closing argument was grossly improper. Defendant argues the State improperly shifted the burden of proof onto him and improperly asserted the murder was in retaliation for another murder, after agreeing not to argue Williams' murder was a gang killing.

The State's closing statement referred to Defendant's failure to refute the State's evidence concerning the physical evidence. The prosecutor's remarks concerning the two murders possibly being linked by retaliation were supported by competent evidence and testimony properly admitted at trial. The State's statement did not shift the burden of proof from the State onto Defendant. Defendant's argument is overruled.

IX. Conclusion

When viewed in the light most favorable to the State, including the reasonable inferences thereon, the State presented sufficient evidence for the first-degree murder charge based upon premeditation and deliberation to be submitted to the jury. The trial court properly denied Defendant's motion to dismiss the charges submitted to the jury.

The trial court made sufficient findings to allow the admission of the State's ballistics expert witness testimony under Rule 702(a). N.C. Gen. Stat. § 8C-1, Rule 702(a). Defendant has failed to show any error in the denial of his post-conviction MAR on his alleged new evidence.

The trial court properly admitted evidence of Defendant disabling an electronic monitoring device two weeks prior to Williams' murder as meeting temporal proximity and other circumstances required under Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b). The State's closing argument did not mention "gangs" and was not improper.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges ZACHARY and FLOOD concur.

STATE OF NORTH CAROLINA
v.
ZENAIDA FRANCHESCA FIGUEROA

No. COA23-313

Filed 19 December 2023

1. Evidence—expert testimony—drug trafficking case—chemical analysis identifying drugs—methodology unexplained—plain error analysis

In a prosecution for trafficking methamphetamine, where undercover law enforcement officers saw a suspected drug dealer arrive at the location of a drug transaction in a vehicle driven by defendant, the trial court did not commit plain error by admitting expert testimony and a lab report identifying the substance found inside defendant's vehicle as methamphetamine. The expert identified the type of chemical analysis she performed on the substance but did not explain the methodology of that analysis, and the trial court failed in its gatekeeping function of requiring the expert to testify to that methodology. However, this error did not amount to plain error because the expert did identify the tests she performed and the results of those tests; therefore, the expert's testimony did not amount to "baseless speculation" and was not so prejudicial that justice could not have been done.

2. Criminal Law—prosecutor's closing argument—improper statements—defendant's prior criminal convictions

In a prosecution for trafficking methamphetamine, where defendant's prior convictions for larceny and obtaining property by false pretense were admitted under Evidence Rule 609(a) for the purpose of impeaching defendant's credibility, the trial court did not err by failing to intervene ex mero motu during the prosecutor's closing argument. Although the prosecutor improperly suggested that defendant was more likely to be guilty of the trafficking offense based on her past convictions, this improper statement comprised only a few lines of the eighteen-page transcript of the prosecutor's closing argument. Further, the vast majority of the prosecutor's closing argument permissibly questioned defendant's credibility.

Appeal by Defendant from judgment entered 7 February 2022 by Judge Martin B. McGee in Guilford County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas Sorensen, for the State-Appellee.

Joseph P. Lattimore for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from a judgment entered upon a guilty verdict of trafficking methamphetamine. Defendant argues that the trial court plainly erred by admitting expert testimony without first ensuring that the expert's methods were sufficiently reliable or reliably applied to the facts of the case, and that the trial court erred by failing to intervene ex mero motu when the prosecutor made improper remarks during closing argument. Upon review, we hold that the trial court did not plainly err by admitting the expert testimony, and that the trial court did not err by failing to intervene ex mero motu during closing argument.

I. Background

In November 2018, Guilford County law enforcement officers were conducting an undercover investigation of a suspected drug dealer ("the Suspect"). An undercover officer arranged to purchase two ounces of methamphetamine from the Suspect on 26 November 2018 and established a meeting location a few days later. The Suspect arrived at the meeting location in a vehicle driven by Defendant. When the Suspect arrived at the meeting location, Detective C.E. Sheets and a takedown team of four or five officers approached the vehicle, detained the Suspect and Defendant, and searched the vehicle. Sheets recovered a brown paper bag from the front passenger's seat, which contained what Sheets described as a "clear white crystally substance" that he suspected was methamphetamine. Sheets interviewed Defendant and informed her that she would be charged at a later date based on the suspected methamphetamine found in the vehicle. Sheets then sent the suspected methamphetamine to the state crime lab for analysis.

Defendant was indicted on 18 March 2019 for trafficking methamphetamine by possession. Defendant was also charged with trafficking methamphetamine by transportation and conspiracy to traffic methamphetamine. At trial, the State presented expert testimony from Brittnee Meyers, the forensic scientist who examined the suspected methamphetamine that Sheets recovered from the vehicle. Meyers testified that she performed a preliminary color test and a confirmatory infrared spectrophotometer test on the substance, from which she identified the substance to be methamphetamine. Meyers measured the weight of the methamphetamine to be 56.40 grams.

Sheets also testified about his interview with Defendant. Sheets testified that Defendant initially disclaimed any knowledge of the methamphetamine, but later told him that she "kind of know[s] what's going on." According to Sheets, Defendant stated that the Suspect had asked Defendant if she could "get ahold of two ounces of ice," to which Defendant responded that she could. Defendant then contacted her sister, who put her in touch with a man who goes by the name "Dread." Defendant met with Dread near the meeting location arranged by the undercover officer and the Suspect.

Defendant testified in her own defense and gave an alternate version of events. Defendant testified that the Suspect asked Defendant for a ride to Greensboro but did not explain why. The Suspect asked Defendant to park in a certain spot and within two minutes the vehicle was surrounded by law enforcement. Defendant testified that she consistently denied any knowledge of the methamphetamine while speaking to law enforcement officers, that she did not tell officers that she worked with her sister to procure methamphetamine, and that she did not know anyone named Dread.

The jury found Defendant guilty of trafficking methamphetamine by possession, and not guilty of trafficking methamphetamine by transportation and conspiracy to traffic methamphetamine. Defendant filed written notice of appeal.

II. Discussion

A. Expert Testimony

[1] Defendant argues that the trial court plainly erred by admitting Meyers' testimony and lab report identifying the substance in Defendant's vehicle as methamphetamine because her testimony failed to lay a sufficient foundation for reliability under Evidence Rule 702.

"[A]n unpreserved challenge to the performance of a trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review." *State v. Gray*, 259 N.C. App. 351, 354, 815 S.E.2d 736, 739 (2018) (citation omitted). To show 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 citations omitted). "[B]ecause plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation

of judicial proceedings." *Id.* (quotation marks and citations omitted). The standard is so high "in part at least because the defendant could have prevented any error by making a timely objection." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986) (citation omitted).

Rule 702(a) provides a three-part test for determining whether expert testimony is admissible:

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

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2022). Where the State seeks to prove the identity of a controlled substance through expert testimony, such testimony is admissible only when it is "based on a scientifically valid chemical analysis and not mere visual inspection." *State v. Ward*, 364 N.C. 133, 142, 694 S.E.2d 738, 744 (2010).

At trial, Meyers was tendered and qualified as an expert in forensic science and forensic drug chemistry without objection. Upon being qualified as an expert, Meyers gave the following testimony:

> [STATE:] . . . [D]id you receive this substance at your lab?
>
> [MEYERS:] Yes, I did.
>
> [STATE:] And if you'll tell the jurors if you know when you received it and what, if anything, you did with the item.
>
> [MEYERS:] I received the evidence on February 10, 2020, and I conducted an analysis on the crystalline material that was contained inside.
>
> [STATE:] Okay. And I guess without being too technical for us, could you tell us what -- what do you do to determine what type of controlled substance -- substance that you may have received?

> [MEYERS:] In this case, I performed a preliminary color test known as the marquis color test, and I also completed a confirmatory infrared spectrophotometer test as well. And in this case, I identified methamphetamine, which is a Schedule II controlled substance.
>
> [STATE:] Okay. And that was your opinion based on your analysis?
>
> [MEYERS:] Yes.

Defendant argues that Meyers' testimony was admitted in violation of Rule 702(a) because Meyers failed to explain the procedure she employed or how that procedure was applied to the facts of this case.

This Court rejected a similar argument in *State v. Piland*, 263 N.C. App. 323, 822 S.E.2d 876 (2018). In *Piland*, defendant was charged with several drug-related offenses after law enforcement officers recovered a bottle containing a large quantity of tablets from his residence. 263 N.C. App. at 326-27, 822 S.E.2d at 881. At defendant's trial, a forensic scientist gave expert testimony that she "performed a chemical analysis on a single tablet to confirm that they did in fact contain [hydrocodone]," but the expert did not identify the chemical analysis she performed or describe how it was performed. *Id.* at 338-39, 822 S.E.2d at 888. This Court held that "it was error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify to the methodology of her chemical analysis." *Id.* at 339-40, 822 S.E.2d at 888. Nonetheless, the error did not amount to plain error because "the expert testified that she performed a 'chemical analysis' and as to the results of that chemical analysis." *Id.* at 340, 822 S.E.2d at 888. This Court reasoned that the expert's testimony did "not amount to 'baseless speculation,' " and thus "was not so prejudicial that justice could not have been done." *Id.* (citation omitted).

We reach the same conclusion here. At Defendant's trial, Meyers gave expert testimony that she "performed a preliminary color test known as the marquis color test" and "a confirmatory infrared spectrophotometer test" from which she identified the evidence in this case to be methamphetamine. Although Meyers identified the analysis that she performed, she did not explain the methodology of that analysis. Thus, the trial court erred by failing to exercise its gatekeeping function. *See id.* at 339-40, 822 S.E.2d at 888. However, the error does not amount to plain error because Meyers identified the tests she performed and the result of those tests. *See id.* at 340, 822 S.E.2d at 888. Accordingly, Meyers' testimony did "not amount to 'baseless speculation,' " and thus

"was not so prejudicial that justice could not have been done." *Id.* (citation omitted).

B. Closing Argument

[2] Defendant argues that the trial court erred by failing to intervene ex mero motu when the prosecutor used Defendant's past convictions as substantive evidence of Defendant's guilt during closing argument.

"When a defendant appears as a witness at trial, evidence of the defendant's past convictions may be admissible for the purpose of attacking the defendant's credibility as a witness." *State v. McEachin*, 142 N.C. App. 60, 69, 541 S.E.2d 792, 799 (2001) (citing N.C. Gen. Stat. § 8C-1, Rule 609(a)). However, "it is improper for the State to suggest in its closing argument to the jury that [such] evidence is substantive evidence of the defendant's guilt." *Id.* (citation omitted).

Where, as here, the defendant did not object at trial to an improper jury argument, the defendant must show that the prosecutor's argument was "so grossly improper that the trial court abused its discretion by failing to intervene ex mero motu." *State v. Campbell*, 359 N.C. 644, 676, 617 S.E.2d 1, 21 (2005) (citation omitted). "To make this showing, defendant must demonstrate that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* (quotation marks and citation omitted).

Here, Defendant testified in her own defense, and her past convictions were admitted for the purpose of attacking her credibility under Rule 609(a). Throughout his closing argument, the prosecutor permissibly attacked Defendant's credibility, arguing to the jury that, "[i]f you want to believe her story, . . . you have to believe that Officer Sheets is lying," and asking the jury to discount Defendant's testimony:

> I would ask you to discount everything she said. She doesn't get to call [Sheets] -- and I'll just say a liar or giving a mistruthful statement from that stand and then say, okay, believe me, believe my testimony up here. Either you're going to believe her or you don't. And my position is you don't believe her because Detective Sheets was credible and he's truthful about what took place.

The prosecutor emphasized that credibility was the crux of the jury's decision:

> What it comes down to, ladies and gentlemen, I'll contend to you is the believability of the witnesses. If you believe everything . . . Sheets has said, then she's guilty

> of transporting methamphetamine and possession of methamphetamine by trafficking. If you disbelieve what Detective Sheets has told you with regards to her statements, then you could find her not guilty.
>
> But, in essence, that's what it really boils down to. I can sit here and argue all the elements of the case[,] . . . but if you believe his testimony, she's guilty. If you don't believe his testimony, then she's not guilty.

The prosecutor also referenced Defendant's past convictions without objection:

> And so that -- that begs the question, who is this young lady? I will contend to you she's -- she's someone who's involved in drug deals. You heard about her prior record. Although it is larceny and obtaining property by false pretense, that gives you some preview as to who she is.

While the vast majority of the prosecutor's closing argument permissibly attacked Defendant's credibility, the contested statement improperly suggested that Defendant was more likely to be guilty of the charged offenses based on her past convictions. However, the improper statement comprised only a few lines of the prosecutor's eighteen-page closing argument, as transcribed, and was not so grossly improper that it warranted judicial intervention. *Cf. State v. Tucker*, 317 N.C. 532, 543-45, 346 S.E.2d 417, 423-24 (1986) (ordering a new trial when prosecutor repeatedly used defendant's past convictions as substantive evidence of defendant's guilt over objection); *McEachin*, 142 N.C. App. at 70, 541 S.E.2d at 799-800 (assuming without deciding that prosecutor's argument that defendant had 'killed before and . . . he's killed again' was grossly improper). Thus, the prosecutor's reference to Defendant's past convictions did not "so infect[] the trial with unfairness that [it] rendered the conviction fundamentally unfair." *Campbell*, 359 N.C. at 676, 617 S.E.2d at 21 (citation omitted). Accordingly, the trial court did not abuse its discretion by failing to intervene ex mero motu.

III. Conclusion

For the foregoing reasons, the trial court did not plainly err by allowing the expert to testify that the substance was methamphetamine, and the trial court did not abuse its discretion by failing to intervene ex mero motu during closing argument.

NO PLAIN ERROR AND NO ERROR.

Judges GORE and FLOOD concur.

STATE v. GREGORY

[291 N.C. App. 617 (2023)]

STATE OF NORTH CAROLINA
v.
KENDRICK KEYANTI GREGORY, DEFENDANT

No. COA22-1034

Filed 19 December 2023

1. Evidence—expert testimony—forensic psychiatrist—scope of cross-examination limited—abuse of discretion analysis

In defendant's trial for numerous charges arising from a multi-day crime spree—in which defendant entered a plea of not guilty by reason of insanity—the trial court did not abuse its discretion by limiting defense counsel's cross-examination of the State's forensic psychiatrist, who had examined defendant multiple times during his pre-trial detention to make determinations regarding defendant's competency to proceed to trial. Although the trial court prevented defense counsel from explicitly referring by name to the pre-trial hearing held pursuant to *Sell v. United States* 539 U.S. 166 (2003), to determine whether defendant's capacity should be restored via forced medication, or from referring to forced medication in any way, the issue of forced medication was not before the jury, and defense counsel was permitted to question the State's witness regarding her testimony at that hearing and the basis for her differing opinions at different points in time in the case.

2. Criminal Law—jury instruction—insanity—commitment procedure—additional instruction properly denied

In defendant's trial for numerous charges (including murder, rape, and robbery arising from a multi-day crime spree) in which defendant entered a plea of not guilty by reason of insanity, the trial court did not err during its instructions to the jury on insanity and commitment procedures by declining to include an additional instruction requested by defendant, where the trial court used the pattern jury instructions and where there was no merit to defendant's argument that the instructions as given were misleading or incomplete.

Judge HAMPSON dissenting.

Appeal by defendant from judgments entered 4 August 2021 by Judge Thomas H. Lock in Wake County Superior Court. Heard in the Court of Appeals 31 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zachary K. Dunn, for the State-appellee.

Thomas, Ferguson & Beskind, LLP, by Kellie Dorise Mannette, for defendant-appellant.

GORE, Judge.

Defendant Kendrick Keyanti Gregory appeals from the trial court's judgments entered upon his conviction for first-degree murder, three counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree sexual offense, first-degree rape, first-degree kidnapping, two counts of assault with a deadly weapon with intent to kill, and possession of a firearm by a felon. Consistent with the jury's verdicts, the trial court imposed a sentence of life imprisonment without possibility of parole, and consecutive sentences totaling 616-800 months' imprisonment. The trial court arrested judgment on one count of robbery with a dangerous weapon and the first-degree kidnapping conviction. Defendant gave oral notice of appeal in open court. This Court has jurisdiction to hear this appeal pursuant to N.C.G.S. §§ 15A-1444 and 7A-27(b).

The instant appeal is centered on the trial court's limitation on defendant's cross-examination of Dr. Nicole Wolfe (the State's expert witness in forensic psychiatry), and the trial court's denial of defendant's request for a special jury instruction on insanity. We discern no error in the trial court's judgments.

I.

The facts of defendant's underlying crimes are mostly undisputed and hold no relevance to the issues now before us. Nonetheless, considering the severity of defendant's crimes, it is appropriate to present a summary for context.

A.

In the evening hours of 30 August 2015, defendant stole two vehicles from different locations around Raleigh, North Carolina — first a Pontiac Grand Prix from the Mini City Market, then a BMW 328 from the Royal India restaurant.

Around 9:00 a.m. the next morning, detectives from the Raleigh Police Department ("RPD") were called to the Knights Inn motel on reports of a shooting. Defendant had shot Lenin Peraza after watching

Mr. Peraza pull cash out of his wallet and purchase items at a nearby Exxon station. Video surveillance footage confirmed defendant was the shooter. The footage showed defendant pulling Mr. Peraza into a stairwell, taking money from his pocket, and then leaving in a blue BMW.

That same day, RPD received a call about a shooting at the Mini City Market. The 911 call reported that someone in a red shirt, later identified as defendant, had shot someone, and was running towards the Food Lion located in the same shopping center. Officer D.P. Patterson responded to the scene and noticed people screaming in front of a business called "Mr. Pawn." When Officer Patterson arrived at the business, he could "see the victim laying down in the doorway." The victim, later identified as Thomas Durand, died from his injuries. Defendant had shot Mr. Durand in the back of the head and stolen his gun.

A few minutes after leaving Mini City Market in the stolen BMW, defendant drove a short distance away and kidnapped a fifteen-year-old girl, J.D., from outside of her home. J.D. recognized defendant as she had seen him the previous day "staring at [her] most of the time" while she was riding bikes in her neighborhood with her friends. As J.D. walked home, now alone, defendant again approached her, "came up and put his arms around [J.D.'s] neck and told [her] [that she] would have to come with him." Defendant took J.D. to the stolen BMW and drove away. While driving, defendant showed J.D. the two handguns that he had in the car and told her "[t]hat he had murdered somebody at the pawnshop."

After driving for a while, the pair arrived at an apartment complex that was unknown to J.D. Defendant forced J.D. into the woods behind the apartment complex; he vaginally raped J.D., unsuccessfully attempted anal penetration, and then vaginally raped her again. Defendant was "hyped up" and told her that she would have his child. The pair then returned to the stolen BMW, and defendant drove J.D. back to her apartment complex. As defendant dropped J.D. off, he told her that "if [she] told somebody what happened, he would come back because he knew where [she] stayed."

Later that evening, defendant robbed a clerk at the International Food Store. During this robbery, defendant fired a shot at a clerk who chased him, but no one was hurt.

On 1 September 2015, defendant was arrested in New York City after police stopped a stolen car being driven by defendant. Defendant was extradited back to North Carolina.

B.

Shortly after being arrested, defendant was committed to Central Regional Hospital for an examination on his capacity to proceed. Defendant was found incapable to proceed on 6 February 2018 and was involuntarily committed. On 19 February 2020, the State moved to have defendant forcibly medicated, if necessary, to restore his capacity. On 5 March 2020, the trial court convened a hearing pursuant to *Sell v. United States*, 539 U.S. 166, 156 L. Ed. 2d 197 (2003), to determine whether to restore defendant's capacity to proceed via forced medication.

At the hearing, and as is relevant here, the State called Dr. Nicole Wolfe to testify regarding defendant's mental illnesses. Dr. Wolfe, a forensic psychiatrist at Central Regional Hospital, testified that she first examined defendant in late 2017 to determine whether he was competent to proceed to trial; she determined that he was not. Dr. Wolfe thereafter examined defendant twice more: once in April 2018 and again in January 2020. During the April 2018 evaluation, defendant was medicated, and Dr. Wolfe determined that defendant was able to proceed to trial. However, at the January 2020 evaluation, defendant was unmedicated, and Dr. Wolfe determined that he was no longer able to proceed to trial.

Speaking about defendant's then-current mental state in March of 2020, Dr. Wolfe stated:

> [PROSECUTOR]: And, finally, I want to talk about what's medically appropriate for the defendant. You know, aside from restoring him to capacity, what, in your opinion, is in his best interests just regarding his health?
>
> [DR. WOLFE]: Treatment of his psychotic condition is medically appropriate.
>
> [PROSECUTOR]: And why is it appropriate that he receive antipsychotic medications against his will? Go through that cost-benefit analysis for us, if you would?
>
> [DR. WOLFE]: Well, he's not going to spontaneously improve without treatment. The other thing is that there are significant risks with lack of treatment, and psychotic people do unpredictable actions, and sometimes that's dangerousness to self or others. So untreated psychosis can lead to suicide, not uncommonly, and it can also lead to aggression.

The hearing was continued, and before it concluded, defendant began taking his medication voluntarily.

C.

Defendant's trial began on 6 July 2020. The State presented dozens of witnesses in its case in chief, and six witnesses in rebuttal. Among the State's rebuttal witnesses was Dr. Wolfe, who was admitted at trial as an expert in forensic psychiatry and psychology.

1.

On direct examination, Dr. Wolfe's opinion was that in 2017, defendant exhibited symptoms of psychosis, schizophrenia, and mania, and was not capable of proceeding to trial. Defendant was then kept at Central Regional Hospital for a process called "capacity restoration," where he was given psychiatric treatment to target symptoms that were interfering with his capacity to proceed. Dr. Wolfe deemed defendant capable to proceed in April 2018.

Shortly after making that determination, the State asked Dr. Wolfe to "render an opinion about defendant's mental state at the time of the offense," 31 August 2015. When rendering an insanity determination regarding defendant's mental state when he committed his crimes, Dr. Wolfe reviewed "a compilation of understanding the mental illness, what was present, and looking at anything at the time of the offense." Dr. Wolfe interviewed defendant numerous times between 17 and 27 April 2018, produced a report of her findings (the "2018 Report"), and noted "several things that [defendant] said . . . that made [her] suspicious of some of his symptom reporting. Dr. Wolfe referred defendant to another physician who confirmed her suspicions that defendant was feigning or malingering some of his symptoms.

Dr. Wolfe "suspected malingered or feigned mental illness" in 2017 when she first evaluated defendant, "even when he was psychotic just based on his symptom presentation" and, after consulting his full psychiatric history, learned that "there were many psychiatrists who suspected that he was malingering or claiming symptoms for a secondary gain." Dr. Wolfe questioned defendant's self-reported symptoms of hallucinations, and defendant also admitted to Dr. Wolfe that he would sometimes "go on suicide watch" so he could "get more food," which Dr. Wolfe testified is "sort of an admission to malingering."

Dr. Wolfe also testified about defendant's incarcerations shortly before 30 August 2015. Defendant was incarcerated on 1 August 2015 at the Wake County Detention Center but displayed "no odd behavior"

and "no self-report. So he didn't see mental health because his behavior seemed pretty unremarkable." The 2018 Report was admitted into evidence without objection from defendant. Dr. Wolfe's underlying conclusion in the 2018 Report was that defendant's "mental illness did not prevent him from understanding the nature and quality or wrongfulness of his actions."

2.

On cross-examination, defendant's counsel began recounting Dr. Wolfe's findings in her 2017, 2018, and 2020 reports. Defense counsel asked about a January 2020 evaluation of defendant. At that time, Dr. Wolfe determined that defendant was again incapable of proceeding to trial and recommended a high dose of an antipsychotic medication to restore his competency. Shortly thereafter, the following colloquy regarding the 5 May 2020 *Sell* hearing occurred:

> [DEFENSE COUNSEL]: So after you wrote [the January 2020] report, you testified at another hearing in this case; is that correct?
>
> [DR. WOLFE]: I don't remember.
>
> [DEFENSE COUNSEL]: Well, this will be a hearing about whether or not it might be necessary to have forced medication?
>
> [DR. WOLFE]: Oh, okay. That. Yes.
>
> [DEFENSE COUNSEL]: And there's a procedure when somebody –
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

Outside the presence of the jury, defense counsel asked whether he was permitted to go "into anything about the *Sell* hearing." The State confirmed that its objection was based on defendant's counsel asking about forced medication, and the court confirmed, "that was the basis for the [c]ourt's ruling." However, the trial court did not bar defendant from asking Dr. Wolfe about her testimony at the *Sell* hearing, "as long as [defense counsel does not], in your questions, make reference to forced medications, I would think that line of questioning would be appropriate." After hearing a proffer, the State renewed its objection to defense counsel, "talk[ing] about a *Sell* hearing or any forcible injections." After hearing from the defense, the trial court ruled that "the probative value of that line of questioning" regarding forced medication "is minimal. But

to the extent that it is relevant, that upon apply[ing] the balancing test required by 403, the [c]ourt does find that the probative value of the line of questions is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

After the trial court sustained the State's objection, defense counsel resumed asking Dr. Wolfe "about a hearing that occurred in March of 2020" — the *Sell* hearing. Defense counsel asked Dr. Wolfe to review a verbatim transcript of her testimony at the *Sell* hearing, and asked her multiple questions about her testimony in that proceeding, including the following:

> [DEFENSE COUNSEL]: If you looked at page 144 [of the *Sell* hearing transcript], did you testify that you believe that medication can restore [defendant's] competency?
>
> [DR. WOLFE]: It sounds like something I would have said.
>
> . . .
>
> [DEFENSE COUNSEL]: And you also said at the bottom of page 144, going through 115, "Without medication, I do not believe that [defendant] would regain capacity without antipsychotic medication"?
>
> [DR. WOLFE]: That is correct.
>
> [DEFENSE COUNSEL]: And 115, you also said, "Seen him in both a state where he was capable of proceeding to trial and where he is not, and it is a pretty drastic difference in terms of how he communicates, organizes his thoughts, and interacts with others"?
>
> [DR. WOLFE]: Yes.

Defense counsel continued questioning Dr. Wolfe about her testimony at the *Sell* hearing and an April 2021 report she produced about defendant's competency to proceed. Dr. Wolfe also outlined the differences between her diagnosis in 2017 and her testimony at trial:

> Diagnostically, some of the difference that – some of the things that came into play that are slightly different than 2017 is I didn't have the full breadth of the family history, the reports from friends, a lot of these criminal reports, and all these other treatment records. So the diagnosis of the psychotic disorder, it does appear that there are psychotic symptoms that started in 2014 and they appeared

> to have full manifested into a very consistent state in 2017. And the other thing that I didn't diagnose more than 2017 but that's quite relevant is antisocial personality disorder. And that's something that is a more longstanding type of behavior that somebody engages in, in terms of the way they choose to live their life. And by having all of these additional records, I was able to see his pattern – longstanding pattern of manipulative behavior, callousness, that way preceded the development of any psychotic symptom.

Dr. Wolfe admitted that she did not write a report which contained the words "antisocial personality disorder," and explained that "wouldn't be necessary because it doesn't really change the opinion, which is that he doesn't have a mental disease or defect that stops him from being able to understand what he was doing at the time." Reviewing her records, Dr. Wolfe confirmed that defendant had not taken anti-psychotic medication from roughly 8 July 2015 through his arrest in New York after the crimes in question.

D.

At the charge conference, the parties agreed that the pattern jury instruction regarding insanity, N.C.P.I. – Crim. 304.10, should be given. The pattern instruction includes the following statement regarding release from a mental facility after being found not guilty by reason of insanity:

> A defendant found not guilty by reason of insanity shall immediately be committed to a State mental facility. After the defendant has been automatically committed, the defendant shall be provided a hearing within 50 days. At this hearing the defendant shall have the burden of proving by a preponderance of the evidence that the defendant no longer has a mental illness or is no longer dangerous to others. If the court is so satisfied, it shall order the defendant discharged and released. If the court finds that the defendant has not met the defendant's burden of proof, then it shall order the inpatient commitment continue for a period not to exceed 90 days. This involuntary commitment will continue, subject to periodic review, until the court finds that the defendant no longer has a mental illness or is no longer dangerous to others.

N.C.P.I. – Crim. 304.10. In addition to this standard language, defendant requested in writing that the trial court add a subsequent paragraph to the pattern jury instruction, as follows:

> No matter how much time has passed since the crime, a defendant who committed a violent homicide "will be presumed dangerous to others" and has a "high hurdle" and "difficult burden" to overcome this presumption. Even years after the crime, when the court considers a mentally ill defendant's dangerousness, the probative value of a violent homicide *far outweighs* the fact that the crime happened years or decades ago. Thus, during a civil commitment hearing, the judge will always consider a defendant's prior violent crime and the defendant faces a difficult burden to prove he is not dangerous to others.

The State objected to the addition of the paragraph, while acknowledging some past cases where prosecutors had, during closing arguments, prejudicially misrepresented the term of a defendant's involuntary commitment upon a finding of not guilty by reason of insanity. The State disclaimed any intention to make such an argument in this case. After some consideration, the trial court declined to give defendant's requested special instruction.

During closing arguments, the State did not make any argument that defendant could be released within a short period of time. Defendant's counsel made arguments, without objection, consistent with the special instruction that the trial court declined to give. Defense counsel explained to the jury that when someone is "found not guilty by reason of insanity, they are sent to a secured location at a mental hospital." Defense counsel argued that the mental hospital would "never cure [defendant's] disease. Never. That's not a possibility." Defense counsel further stated:

> [defendant is] going to be [at a mental hospital] for a long, long time, if not forever. Because they can take into account not only the fact that he's been untreated in an uncurable disease that he will also have, but in deciding whether he's a danger, we look at what events that have happened beforehand. And they will look at the fact what happened beforehand was that somebody got killed, somebody was sexually violated, and there were violent robberies. All of that was going to be taken into consideration. It's going to prevent him from getting out.

The jury returned verdicts finding defendant guilty on all charges.

II.

A.

[1] Defendant argues the trial court abused its discretion in limiting cross-examination of Dr. Wolfe regarding the *Sell* hearing, and specifically, her testimony that defendant needed to be forcibly medicated to regain his capacity to proceed. Defendant asserts "the inability of the defense to cross-examine Dr. Wolfe on her position regarding forced medication severely impaired their ability to undermine her opinion on insanity." We disagree.

In this case, Dr. Wolfe was the State's expert witness who rebutted defendant's defense of insanity. Dr. Wolfe testified, that in her opinion, defendant was mentally ill, malingering his symptoms, and was fully able to appreciate his conduct during the crimes committed. When defense counsel attempted to impeach Dr. Wolfe with her testimony from the *Sell* hearing, the State objected, and after a proffer, the trial court sustained the State's objection to the line of questioning under Rule 403 grounds.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. "The principal purpose of confrontation is to secure to the defendant the right to test the evidence of the witnesses against him through cross-examination." *State v. Mason*, 315 N.C. 724, 729 (1986) (citing *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347 (1974)). "However, the right of cross-examination is not absolute and may be limited in appropriate cases." *Id.* at 730 (citation omitted).

"Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985) (per curiam). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 683 (1986).

"In general, we review a trial court's limitation on cross-examination for abuse of discretion. If the trial court errs in excluding witness testimony showing possible bias, thus violating the Confrontation Clause, the error is reviewed to determine whether it was harmless beyond a reasonable doubt." *State v. Bowman*, 372 N.C. 439, 444 (2019) (citations omitted).

As a preliminary matter, defendant does not explain how the fact that a *Sell* hearing occurred, or that defendant may have been subject to forced medication, was probative in any way. *See State v. Young*, 368 N.C. 188, 212 (2015) ("Evidence has 'probative value' if it 'tends to prove or disprove a point in issue.' ") (quoting *Probative Evidence*, Black's Law Dictionary (8th ed. 2004)). The issue of forced medication was not before the jury, and defendant concedes he was not forcibly medicated because he "began taking his medication voluntarily."

After the trial court sustained the State's objection, defense counsel resumed asking Dr. Wolfe "about a hearing that occurred in March of 2020" – the *Sell* hearing. Defense counsel asked Dr. Wolfe to review a verbatim transcript of her testimony at the *Sell* hearing and asked her multiple questions about her testimony in that proceeding. Dr. Wolfe explained the differences between her diagnosis in 2017 and her testimony at trial, noting that her initial diagnosis was made without the benefit of additional records.

It is true that findings of incapacity to proceed are generally admissible evidence when a defendant asserts insanity as a defense, and "when such evidence is admitted, the trial judge should clearly instruct the jury that this evidence is not conclusive but is merely another circumstance to be considered by the jury in reaching its decision." *State v. Bundridge*, 294 N.C. 45, 51 (1978). However, this is not a case where the trial court refused to admit such evidence. To the contrary, witness testimony "placed before the jury a complete history and description of defendant's mental condition." *Id*. The jury was aware that: (i) defendant was not medicated at the time of his crimes; (ii) defendant was deemed incompetent to proceed to trial by Dr. Wolfe at various times; (iii) defendant was prescribed medication by Dr. Wolfe, and others, to help treat defendant's mental illnesses; and (iv) Dr. Wolfe previously testified that medication was not only medically appropriate, but also necessary for defendant to maintain competency to proceed to trial. Although the trial court prohibited defense counsel from mentioning the *Sell* hearing or forced medication specifically, defendant was not limited in attacking Dr. Wolfe's credibility or asking about the differences between her previous testimony at the hearing and her subsequent testimony at trial.

Presuming, *arguendo*, facts that a *Sell* hearing occurred and that the State may have sought to forcibly medicate defendant were broadly relevant and had some probative value on defendant's plea of not guilty by reason of insanity, the trial court did not abuse its discretion in its determination that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury . . . ." N.C.G.S. § 8C-1, Rule 403 (2022). Further, defendant's assertion that "the jury was deprived of the information about [Dr. Wolfe's] bias . . . at least in part due to her belief that he was a danger to others when he was unmedicated" lacks any real substantive support in the record.

B.

[2] Next, defendant argues the trial court erred by declining to give his requested special jury instruction on commitment procedure. We disagree. Defendant properly preserved this issue for appellate review. *See* N.C. R. App. P. 10(a)(2). We review errors "challenging the trial court's decisions regarding jury instructions . . ." de novo." *State v. Osorio*, 196 N.C. App. 458, 466 (2009).

At the charge conference, the parties agreed the pattern jury instruction regarding insanity, N.C.P.I. – Crim. 304.10, should be given, including, upon defendant's request, an instruction on commitment procedure. Defendant also requested an additional instruction paragraph that reads, in part, "a defendant who committed a violent homicide 'will be presumed dangerous to others' and has a 'high hurdle' and 'difficult burden' to overcome this presumption." Defendant's trial counsel admitted this was "a unique instruction," and there were "no cases where [the requested paragraph has] been given." Defendant requested the instruction be given because, *inter alia*, "it's consistent with the law" and not including it could be "misleading to the jury."

"[U]pon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out *in substance* the commitment procedures [now provided for in N.C.G.S §§ 15A-1321 and -1322], applicable to acquittal by reason of mental illness." *State v. Hammonds*, 290 N.C. 1, 15 (1976) (emphasis added). "This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *Caudill v. Smith*, 117 N.C. App. 64, 70 (1994), *disc. rev. denied*, 339 N.C. 610 (1995). Generally, a requested jury instruction should be given when "(1) the requested instruction was a correct statement of the law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534 (citation omitted), *disc. rev. denied*, 356 N.C. 304 (2002).

Here, the pattern jury instruction on commitment procedures, N.C.P.I. – Crim. 304.10, sufficiently encompasses the substance of the law. *See State v. Allen*, 322 N.C. 176, 198–99 (1988) ("The trial court gave

the pattern jury instruction in N.C.P.I. –Crim. 304.10 which informed the jury of the commitment hearing procedures in N.C.G.S. §§ 15A-1321 and -1322, pursuant to article 5 of chapter 122C. This instruction adequately charged the jury regarding procedures upon acquittal on the ground of insanity.").

Defendant offers no compelling argument or authority to support his assertion that the pattern jury instruction, as written, was "incomplete" or "misleading" "in the context of this case." Our Supreme Court adopted the rule requiring an instruction on commitment procedures precisely because the "fear for the safety of the community could motivate a jury to insure that a defendant will be incarcerated for his own safety and the safety of the community at large." *Dalton*, 369 N.C. 311, 321 (Jackson, J., concurring) (cleaned up). Here, defendant interposed a defense of insanity to criminal charges based upon, in his own words, "a series of violent and dangerous acts." Defendant's case is neither so exceptional nor extraordinary such that the pattern jury instruction on commitment procedures fails to adequately encompass the law or risks misleading the jury. The uniquely abhorrent nature of defendant's criminal conduct does not entitle him to unique instruction on matters beyond the jury's consideration. Accordingly, we discern no error in the trial court's decision to deny defendant's request for an additional jury instruction.

III.

For the foregoing reasons, we discern no error in this case. The trial court did not abuse its discretion in limiting cross-examination of Dr. Wolfe, and defendant's confrontation rights were not violated. Further, the trial court did not err in declining to give defendant's requested special instruction to the jury.

NO ERROR.

Judge STADING concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

In my view, it was an abuse of discretion constituting error to exclude cross-examination of Dr. Wolfe on the purpose of her testimony at the *Sell* hearing where Defendant's defense in this case was premised

solely on a plea of insanity. In particular, the trial court erred by not permitting cross-examination on Dr. Wolfe's opinion offered at the 2020 *Sell* hearing concerning the medical appropriateness of Defendant receiving "antipsychotic medications against his will[.]"

Our Supreme Court in *Bundridge* acknowledged:

> it is well established in this jurisdiction that in criminal cases, every circumstance that is calculated to shed any light upon the supposed crime is admissible into evidence. *State v. Sneeden*, 274 N.C. 498, 164 S.E.2d 190 (1968). Likewise, our courts have allowed wide latitude in admitting evidence having a tendency to throw light upon the mental condition of a defendant who has entered a plea of not guilty by reason of insanity. For example, we allow opinion evidence by lay witnesses and lay testimony reciting irrational acts prior or subsequent to the alleged offense.

State v. Bundridge, 294 N.C. 45, 50-51, 239 S.E.2d 811, 816 (1978).

Moreover, that Court has also recognized:

> North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. N.C.G.S. § 8C–1, Rule 611(b) (1992). The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. " 'The largest possible scope should be given,' and 'almost any question' may be put 'to test the value of his testimony.' " 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 42 (3d ed.1988) (footnotes omitted) (citations omitted).

State v. Bacon, 337 N.C. 66, 88, 446 S.E.2d 542, 553 (1994). No rationale could apply to otherwise limit a Defendant's cross-examination of the State's experts.

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974).

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

Id. at 317, 94 S. Ct. at 1110, 39 L. Ed. 2d 347.

Here, Dr. Wolfe's testimony indicated she "had suspected malingered or feigned mental illness in 2017 even when [Defendant] was psychotic just based on his symptom presentation, which was quite atypical." At Dr. Wolfe's 2018 evaluation, Dr. Wolfe testified Defendant "clearly exceeded the threshold for feigned psychotic symptoms." As the majority points out, the gist of Dr. Wolfe's trial testimony was that she suspected Defendant was malingering or feigning symptoms of mental illness as early as 2017 and eventually, upon a subsequent review of records, determined that, in her opinion, was in fact the case, even though she agreed Defendant suffered from mental illness. Nevertheless, in 2020, Dr. Wolfe not only testified that Defendant required medication to restore his competency but also testified as to why forced medication of Defendant to treat his mental illness was medically appropriate to prevent Defendant from being a danger to himself and others. The jury, however, was not permitted to hear the motivation—to compel forced medication of Defendant—for Dr. Wolfe's 2020 testimony.

The motivation for Dr. Wolfe's testimony in 2020 was quite clearly probative both of Dr. Wolfe's credibility and Defendant's mental condition. Indeed, Defendant's case hinged on the fact that while Defendant had sporadically received mental health treatment since at least 2014, Defendant was unmedicated at the time of the offenses in 2015 and, thus, incapable of knowing the nature and quality of his actions or the wrongfulness of his acts as result of his mental illness. Dr. Wolfe's testimony that not only was Defendant responsive to medication but that

she advocated for Defendant to be forcibly medicated for his own health and protection and to restore his competency was certainly relevant and probative material for cross-examination.

Moreover, there is no rationale for excluding this piece of evidence under Rule 403(b). First, the jury was permitted to hear practically everything else from and about the 2020 *Sell* hearing, except perhaps the most important part: the context in which it was held. Surely if the jury could hear evidence of the contents of that hearing as bearing on Defendant's mental health, the context of that hearing was just as probative to throw light on Defendant's mental condition. *See Bundridge*, 294 N.C. at 50-51, 239 S.E.2d at 816. Like with the other evidence of the hearing, any potential unfair prejudice could be cured by an appropriate instruction—just like the trial court gave in this case. *See id.*

In fact, neither the trial court nor the State at trial identified any unfair prejudice that would arise out of allowing the jury to hear the context of Dr. Wolfe's 2020 testimony. On appeal, the State unhelpfully contends allowing the jury to hear that the State wished to forcibly medicate Defendant might bias the jury against the State. It is true, Defendant's evidence might have hurt the State's case—but that is not *ipso facto* unfair. It is what usually happens in a trial. The State further argues that Defendant began taking his medication voluntarily after the *Sell* hearing. That, however, does not change the fact the State—supported by its expert witness—advocated for forced medication of Defendant to restore his competency prior to a trial at which the State argued—and the very same expert testified—Defendant was malingering and feigning his mental illness. As yet, nobody has articulated any actual unfair prejudice or potential confusion to the jury justifying exclusion under Rule 403. To exclude this piece of evidence—this important context—was an abuse of discretion and constituted error.

In *Bundridge*, our Court held the exclusion of a trial court's order deeming the defendant incapable of proceeding was harmless error. However, critical to that analysis was the fact multiple experts and lay witnesses "placed before the jury a complete history and description of defendant's mental condition." *Bundridge*, 294 N.C. at 51, 239 S.E.2d at 816. Here, because of the exclusion of evidence the State and Dr. Wolfe sought an order compelling Defendant's forced medication improperly limited the history and description of Defendant's mental condition before the jury.

In the end, this was a close case, and Defendant had the right to place before the jury testimony through cross-examination of the State's expert having a tendency to throw light upon Defendant's mental

condition. On the issue of Defendant's insanity, the case was primarily a battle between the Defense and State's respective experts. It is evident that substantial evidence in the Record supports Defendant's insanity defense and that this was the critical issue the jury struggled with—as illustrated by the jury's notes and initial indication it was hung. There is a reasonable possibility that, had the jury heard the context for Dr. Wolfe's 2020 *Sell* hearing testimony, it would have reached a different result. N.C. Gen. Stat. § 15A-1443(a) (2021); *see State v. Duncan*, 244 N.C. 374, 379, 93 S.E.2d 421, 424 (1956); *see also Bundridge*, 294 N.C. at 59, 239 S.E.2d at 821 (Exum, J. dissenting) ("Who knows, however, how much evidence it takes to persuade a jury? They might well have been persuaded by the evidence offered plus the evidence which defendant should have been allowed to offer but which the trial judge improperly kept out.").

Thus, the trial court exclusion of testimony regarding the purpose of the *Sell* hearing was prejudicial error. Therefore, Defendant is entitled to a new trial.

STATE OF NORTH CAROLINA
v.
DAVID JONATHAN HILL, DEFENDANT

No. COA22-620

Filed 19 December 2023

1. Larceny—felony larceny from a merchant by product code fraud—essential elements—creation of code—mere transfer of price tag insufficient

Defendant's conviction for felony larceny by product code fraud was vacated where the State did not present substantial evidence of each essential element of the offense as defined in N.C.G.S. § 14-72.11. In particular, there was no evidence that defendant "created" a product code for the purpose of obtaining an item for less than its actual sale price, where, although defendant removed a sticker with a $7.98 product code from one item in the store and placed it on another item that actually cost $227.00 (itself punishable as a misdemeanor under a separate statute), the plain meaning of the word "created" would have required that defendant brought into existence a new code rather than merely transfer an existing one from one product to another.

2. Indictment and Information—indictment—misdemeanor larceny—fatal variance—essential and material allegations

Defendant was not entitled to dismissal of a misdemeanor larceny charge where there was no fatal variance between the indictment, which alleged that defendant took two sewing machines from a retail store, and the evidence presented, which established that defendant took only one sewing machine. The indictment adequately alleged each essential element of the offense, and the number and type of retail items allegedly taken constituted surplusage that was neither essential nor material to the charge.

3. Sentencing—restitution—larceny—value of items taken—item left in store included—remand for recalculation

Upon defendant's conviction for misdemeanor larceny, where defendant was ordered to pay an amount of restitution that not only included the value of items he took from a retail store that were never recovered but also the value of a sewing machine that defendant left behind in the store, the matter was remanded for entry of a judgment of restitution based on the damages suffered by the retail store, excluding the value of the item that was recovered.

Judge TYSON concurring in a separate opinion.

Judge STADING concurring in result only.

Appeal by defendant from judgment entered 15 December 2021 by Judge Imelda J. Pate in Superior Court, Onslow County. Heard in the Court of Appeals 27 February 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher R. McLennan, for the State.

Caryn Strickland for defendant-appellant.

STROUD, Chief Judge.

Defendant appeals his convictions for larceny from a merchant by product code fraud and for misdemeanor larceny, arguing the trial court erred in denying his motion to dismiss based on insufficiency of the evidence and fatal variances in the indictments. Defendant also contends the trial court ordered Defendant to pay an incorrect amount of restitution. Because the evidence did not show Defendant "created" a product code

"for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price" within the plain meaning of North Carolina General Statute § 14-72.11(3), the charge of larceny from a merchant should have been dismissed. There was no fatal variance in the indictment as to the remaining misdemeanor larceny since any erroneous statements in the indictment were mere surplusage. However, the trial court erroneously included property returned to Walmart when calculating the restitution Defendant should pay. Therefore, we find no error as to his conviction for misdemeanor larceny, vacate Defendant's conviction of larceny from a merchant, and remand to the trial court for re-sentencing and to enter a new order of restitution.

I. Background

On 14 February 2020, a Walmart Asset Protection Manager ("manager") saw Defendant "placing a sticker over the top of a box" in the fabrics department of a Jacksonville, North Carolina Walmart. The boxed item was identified as a Cricut Air 2 sewing machine ("Cricut"). Because Defendant's behavior was unusual, the manager followed Defendant through the store. Defendant put the box into a shopping cart and went to the electronics department, where he took several items, then moved along to the women's apparel department. Stopping between two racks, Defendant concealed unpurchased electronics inside a backpack. The manager testified these items included, "several sets of headphones, some earbuds, a movie, [and] some little odds and ends that [Defendant] just grabbed off the shelf[.]"

Once the electronics were in the backpack, Defendant put the backpack on and pushed his cart with the Cricut in it to self-checkout. At checkout, Defendant scanned the $7.98 product code he had placed on the Cricut box and paid $7.98 for the $227.00 Cricut. After Defendant passed the point of sale, the manager approached, identified himself as a Walmart representative, and asked Defendant for his identification, which Defendant provided. However, when the representative confronted Defendant about not paying the correct price for the Cricut, and asked to talk to Defendant about it, Defendant shouted "[d]on't touch me" and ran out of the store wearing the backpack full of electronics, leaving the Cricut behind in the shopping cart still inside the store.

The Walmart manager called law enforcement, who investigated the theft the same day. To help law enforcement in the investigation, the manager provided "a receipt of all the merchandise that was taken, as well as the receipt for what the defendant actually paid for in self-checkout." These receipts were admitted into evidence. At trial,

the manager testified, based on these receipts, that the items Defendant placed in his backpack included four sets of headphones, a pack of Bic lighters, a John Wick DVD, a webcam, and a portable battery. The total value of the merchandise reported stolen, including the Cricut, was $477.15. The items Defendant put in his backpack were never recovered.

The manager testified the product code Defendant scanned on the Cricut box was "for a little shoe Tupperware that you would keep a single pair of shoes in[.]" A photograph of this product code was admitted at trial and is included in the record.[1] The product code on the sticker is legible, although the sticker is wrinkled, torn on the side, and slightly curled on the side of the Cricut box. According to the manager, the Tupperware products were sold in the department located next to the fabrics and crafts department, the same place where the manager saw Defendant placing the sticker on the Cricut.

Defendant was indicted for (1) felony larceny from a merchant by product code fraud under North Carolina General Statute Section 14-72.11(3) and (2) misdemeanor larceny under North Carolina General Statute Section 14-72(a). The trial was held on 23-24 August 2021, and the State's evidence showed the facts summarized above. At trial, Defendant made a motion to dismiss at the close of the State's evidence, made no arguments to support his motion, and the motion was subsequently denied. Defendant renewed the motion to dismiss at the close of all evidence, made no arguments to support his motion, and was again denied.

The jury returned a verdict finding Defendant guilty of both larceny from a merchant by product code fraud under North Carolina General Statute Section 14-72.11(3), a felony, and misdemeanor larceny under Section 14-47(a). The trial court entered the judgment and ordered Defendant to pay $477.15 in restitution. Defendant gave oral notice of appeal.

II. Motion to Dismiss

Defendant contends the trial court erred in denying his motion to dismiss as to both charges.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Under a *de novo* review, the court considers the matter

1. The product code is commonly known as a UPC, or "Universal Product Code -- a combination of a bar code and numbers by which a scanner can identify a product and usu[ally] assign a price[.]" Merriam-Webster's Collegiate Dictionary 1369 (11th ed. 2003).

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) (citation and quotation marks omitted).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation and quotation marks omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

B. N.C. Gen. Stat. § 14-72.11

[1] We first address Defendant's argument as to the charge of felony larceny by a product code. North Carolina General Statute Section 14-72.11 defines felonious larceny against a merchant as follows:

> A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:
>
> (1) By taking property that has a value of more than two hundred dollars ($200.00), using an exit door erected and maintained to comply with the requirements of 29 C.F.R. § 1910.36 and 29 C.F.R. § 1910.37, to exit the premises of a store.
>
> (2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.
>
> (3) *By affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price.*

N.C. Gen. Stat. § 14-72.11 (2019) (emphasis added). Defendant's first argument as to sufficiency of the evidence hinges on the meaning of the

word "created" as used in subsection 3 of the statute. This presents an issue of statutory interpretation and is a case of first impression as to the meaning of the word "created" under North Carolina General Statute Section 14-72.11(3).

"Statutory interpretation properly begins with an examination of the plain words of the statute." *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (citation and quotation marks omitted). "When the language of a statute is clear and unambiguous, there is not room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* (citation and quotation marks omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citations and quotation marks omitted). "Statutory language is ambiguous if it is fairly susceptible of two or more meanings." *Purcell v. Friday Staffing*, 235 N.C. App. 342, 347, 761 S.E.2d 694, 698 (2014) (citation and quotation marks omitted). "We generally construe criminal statutes against the State. However, this does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing common sense and legislative intent." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (citations and quotation marks omitted).

The pertinent part of the statute for purposes of our analysis as to larceny from a merchant by product code fraud states that "[a] person is guilty of a Class H felony if the person commits larceny against a merchant . . . [b]y affixing a product code *created* for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price." N.C. Gen. Stat. § 14-72.11(3) (emphasis added). This statute, Section 14-72.11, was first adopted in 2007, and subsection (3) has not been amended since its adoption. *Compare* N.C. Gen. Stat. § 14-72.11(3) (2019) *with* N.C. Gen. Stat. § 14-72.11(3) (2007).

Defendant argues the word "created," as used in Section 14-72.11, is synonymous with "made" and refers to behavior found in "especially sophisticated and pernicious larceny schemes . . . where individuals *make* fake barcodes to get items at cheaper prices." (Emphasis added.) Under Defendant's interpretation of the statute, a product code made by the retailer or manufacturer for the legitimate purpose of identifying the merchandise and its sales price was not "created for the purpose of fraudulently obtaining goods or merchandise . . . at less than its

actual sale price." N.C. Gen. Stat. § 14-72.11(3). Defendant contends his conduct in the store does not fall within the statute because he transferred the product code from another product and did not "create" it. Defendant argues that his conduct at most falls under a misdemeanor statute, North Carolina General Statute Section 14-72.1(d), which states:

> [w]hoever, without authority, willfully transfers any price tag from goods or merchandise to other goods or merchandise having a higher selling price or marks said goods at a lower price or substitutes or superimposes thereon a false price tag and then presents said goods or merchandise for purchase shall be guilty of a misdemeanor[.]

N.C. Gen. Stat. § 14-72.1(d) (2019). The State, on the other hand, argues for a more expansive interpretation, asserting that "created," as used in Section 14-72.11(3), should also include cases "when an individual generates *or repurposes* a product code to commit a larceny from a merchant[.]" (Emphasis added.) To decide the question, we first look at the plain meaning of the word "create;" second, examine the word "create" within its context; and third, look at North Carolina larceny-related statutes in *pari-materia*. *See Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 358, 768 S.E.2d 23, 28 (2014) ("It is also a well-established principle of statutory construction that statutes *in pari materia* must be read in context with each other." (quotation marks and citations omitted)).

a. Plain meaning of "create"

We begin with the plain meaning of the word "create." *See State v. Carr*, 145 N.C. App. at 343, 549 S.E.2d at 902. Three dictionary definitions of "create" could potentially apply here: (1) "to bring into existence," (2) "to invest with a new form, office, or rank" or (3) "to produce or bring about by a course of action or behavior[.]" Merriam-Webster's Collegiate Dictionary 293 (11th ed. 2003). The first definition, "to bring into existence," is the most commonly used definition of "create," and in the context of Section 14-72.11(3), would mean a defendant could only be convicted if they affixed a product code *specifically made* or "[brought into existence] for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price." *See* N.C. Gen. Stat. § 14-72.11(3); *see also* Merriam-Webster Collegiate Dictionary 293 (11th ed. 2003). The second definition, "to invest with a new form" supposes a situation where the form of the label is changed to the extent that it takes on a new form different than the original product code. *See* Merriam-Webster Collegiate Dictionary 293 (11th ed. 2003).

The third definition, "to produce or bring about by a course of action or behavior" still requires something to be "produced" or "brought about" by an actor. *Id.*

Said differently, the first two plain dictionary definitions of "create" seem to contemplate (1) bringing something into existence that did not exist before, or (2) changing the form of a thing, to the extent something new and different is created. *Id.* The third definition, however, "bringing about by a course of action," is closest to the State's proposed definition of "repurposing" a product code by removing it from one item and affixing it to another item. *Id.* Looking at the word "create" in isolation, an argument could be made that the word is "fairly susceptible of two . . . meanings." *See Purcell*, 235 N.C. App. at 347, 761 S.E.2d at 698 ("Statutory language is ambiguous if it is fairly susceptible of two or more meanings."). But words in a statute are not construed in isolation, so we must next look at the word in context. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

b. "Create" in Context

The meaning of a word can change depending on its context. For example, the word "fire" can be a noun describing a pile of burning wood or a verb describing the act of terminating an employee from a job. *See* Merriam-Webster's Collegiate Dictionary 470-471 (11th ed. 2003). Because the actual meaning of a word may sometimes become obvious when the word is used in a sentence, we next consider the use of the word "created" within the context of the statute to determine if the meaning is indeed ambiguous. *See C Investments 2, LLC v. Auger*, 383 N.C. 1, 10, 881 S.E.2d 270, 278 (2022) ("Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." (citation and quotation marks omitted)).

The full sentence in the statute, including the opening phrase, is:

> A person . . . commits larceny against a merchant under any of the following circumstances:
>
> . . . .

(3) By affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price.

N.C. Gen. Stat. § 14-72.11(3).

Here, the phrase "created for the purpose of" modifies and characterizes the phrase "product code"[2] and means that an actor, the creator of the product code, must have had a specific purpose for creating the product code, namely a purpose or aim to "fraudulently obtain[] goods or merchandise from a merchant at less than its actual sale price." *Id.* We next consider the grammatical construction of the statute to identify who is doing the "affixing" and who is doing the "creating." *See id.*

The "person" doing the "affix[ing]" in this sentence can only be the defendant charged with committing the crime of larceny because larceny in this statute is achieved "[b]y affixing a product code[.]" *Id.* The next clause, "created for the purpose of fraudulently obtaining goods or merchandise at less than its actual sale price" uses the passive voice to modify the noun "product code." *Id.* It is the passive use of "created" that tells us the defendant who "affixes" the price code need not necessarily be the same person who physically "created" the product code because the phrase "for the purpose of" modifies "created," not "affixed." *Id.* Said differently, the "affixing" defendant may or may not have personally "created" the product code; however, the creator of the product code must have had the statutorily defined fraudulent purpose in creating the code. *Id.*

Thus, under the language of the statute, a defendant commits this crime if he (1) affixes the product code *and* (2) the product code was "created for the purpose of fraudulently obtaining goods or merchandise from a merchant at a reduced price." *Id.* Reading the word "created" in the context of the statute supports Defendant's definition of "created," and is more appropriate here because it points to the moment that the product code was "brought into existence," not the moment it was relocated by the actor affixing it to another product. *See id.*; *see also* Merriam-Webster's Collegiate Dictionary 293 (11th ed. 2003).

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2. The technical grammatical terminology for the clause "created for the purpose of" as used in this statute is a reduced restrictive relative clause. It is a specific type of adjective phrase modifying "product code" in the statute.

c. In pari materia review of North Carolina's larceny-related statutes

But if the awkward wording and grammatical structure of the statute leave any questions of ambiguity, this interpretation of "create," based on the plain reading of the statute, is supported by an *in pari materia* review of the statutory framework for various types of larceny as defined in the General Statutes within Subchapter V, entitled "Offenses Against Property" and in Article 16, entitled "Larceny." *See* N.C. Gen. Stat. § 14-70 (2019) *et seq.*; *see State v. Mayo*, 256 N.C. App. 298, 301, 807 S.E.2d 654, 657 (2017) ("In discerning the intent of the legislature statutes *in pari materia* should be construed together and harmonized whenever possible." (citation and quotation marks omitted)). We will therefore consider N.C. Gen. Stat. Section 14-72.11(3) in the context of the other related larceny statutes.

"[A] statute must be strictly construed with regard to the evil which it is intended to suppress and interpreted to give effect to the legislative intent." *State v. Stephenson*, 267 N.C. App. 475, 479, 833 S.E.2d 393, 397 (2019) (citation and quotation marks omitted).

The structure and specificity of our larceny statutes, and the context in which Section 14-72.11(3) was enacted, make it clear that "created" must be interpreted to mean "brought into existence" and not "repurposed" as the State argues, because "repurposing" is already covered under another statute. *See* N.C. Gen. Stat. § 14-72.1(d) (describing the action of "willfully transferring" (or repurposing) a price tag from one item to another to get a lower price). In general, larceny is "(1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Speas*, 265 N.C. App. 351, 352, 827 S.E.2d 548, 550 (2019) (citations omitted). North Carolina's larceny-related statutes detail specific methods of committing larceny against specific property owners and delineate the particular types of property included in the offense. For example, Section 14-72(a) establishes felony larceny as larceny of goods exceeding $1,000 in value, and misdemeanor larceny as larceny of goods under that threshold, except as provided in subsections (b) and (c); subsection (c) sets out specific conduct by which a person might commit larceny and defines when such conduct rises to the level of a felony. *See* N.C. Gen. Stat. § 14-72(b)-(c) (2019). This trend continues through Article 16: the General Assembly delineates specific acts and circumstances by which a person might commit larceny and larceny-related offenses and whether those specific acts constitute a misdemeanor or felony. *See*, *e.g.*, N.C. Gen. Stat. § 14-72.5(a) (2019) ("If

any person shall take and carry away *motor fuel* valued at less than one thousand dollars ($1,000) *from an establishment where motor fuel is offered for retail sale* with the intent to steal the motor fuel, that person shall be guilty of a Class 1 misdemeanor." (emphasis added)); N.C. Gen. Stat. § 14-72.6 (2019) ("A person is guilty of a Class I felony if he commits . . . [l]arceny of *goods from a permitted construction site*." (emphasis added)). The structure of Article 16 indicates that the *specific act* defendant is alleged to have committed dictates which specific type of larceny the defendant may have committed. *See* N.C. Gen. Stat. § 14-70 (2019) *et seq*.

Defendant was correct that the State's evidence was insufficient to convict him of a felony under Section 14-72.11(3), because his conduct was, at most, punishable as a misdemeanor. *See also* N.C. Gen. Stat. § 14-72.1(d) ("Whoever, without authority, willfully *transfers any price tag from goods or merchandise to other goods or merchandise having a higher selling price* or marks said goods at a lower price *or substitutes or superimposes thereon a false price tag* and then presents said goods or merchandise for purchase shall be guilty of a misdemeanor[.]" (emphasis added)). Here, two statutes criminalize the similar acts of purchasing a product at a fraudulently reduced price, *see* N.C. Gen. Stat. §§ 14-72.11(3), 14-72.1(d), but for the purposes of this case, an important distinction between the two statutes lies in the nature of the "label," whether it was simply a transferred price tag, regardless of how it was created, or if it was a product code "created for the purpose of" fraudulent activity.[3] *Compare* N.C. Gen. Stat. § 14-72.1(d) (describing the price tag required for the misdemeanor offense as "any price tag") *with* N.C. Gen. Stat. § 14-72.11 (describing the "product code" necessary for the offense as being created for the purpose of fraud).

The General Statutes provide no definition for either "product code" or "price tag," so we must use the ordinary definitions of these terms. *See Surgical Care Affiliates, LLC v. N.C. Indus. Comm'n*, 256 N.C. App. 614, 621, 807 S.E.2d 679, 684 (2017) ("When a statute employs a term without redefining it, the accepted method of determining the word's plain meaning is not to look at how other statutes or regulations have used or defined the term–but to simply consult a dictionary.").

A "price tag" is defined as "a tag on merchandise showing the price at which it is offered for sale[.]" Merriam-Webster's Collegiate Dictionary 985 (11th ed. 2003). Prior cases have used the term "price

3. Here, we use the term "label" to include both product codes and price tags.

tag" with its ordinary meaning: a tag affixed to a product to show the price of the product. *See*, *e.g.*, *State v. Odom*, 99 N.C. App. 265, 269, 393 S.E.2d 146, 149 (1990) (describing a price tag with the brand-name, item code and number, followed by the price). The price tag may show a hand-written or typed price, or it may show the price by using a "product code" instead. A "product code" is defined as a "Universal Product Code," or UPC, which is "a combination of a bar code and numbers by which a scanner can identify a product and usu[ally] assign a price[.]" Merriam-Webster's Collegiate Dictionary 1369 (11th ed. 2003). Thus, it would be possible for an item offered for sale to have two separate indications of price – both a price tag and a product code – or an item may have only a price tag, or only a product code, or the price tag and the product code may be the same thing.

Here, the evidence shows the product code was on a sticker which also served as the price tag. Neither State nor Defendant contends there is any relevant difference between these two terms based on the evidence in this case. The tag affixed to the Cricut box was a partially torn rectangular sticker – commonly known as a "price tag" – with a printed product code, or a "combination of a bar code and numbers by which a scanner can identify a product." *Id.* Based on the evidence, this tag was both the price tag and product code for the Tupperware box, and it was substituted for the price tag and product code of the Cricut. Walmart's scanner identified the item as a Tupperware box priced at $7.98 based on the "product code" printed on the "price tag."

Assuming *arguendo* that "created" in Section 14-72.11(3) could apply to repurposed or transferred product codes or to price tags obtained from another product, there would have been no need for two separate statutes, one a misdemeanor and the other a felony. N.C. Gen. Stat. §§ 14-72.1 (misdemeanor), 14-72.11 (felony). Indeed, it would be absurd to interpret the statutes as creating both a misdemeanor and felony achieved by the exact same action. *See Duplin Cnty. Bd. of Educ. v. Duplin Cnty. Bd. of Cnty. Comm'rs*, 201 N.C. App. 113, 119, 686 S.E.2d 169, 173 (2009) ("It is well settled that in construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results. Accordingly, an unnecessary implication arising from one statutory section, inconsistent with the express terms of another on the same subject, yields to the expressed intent." (citations, quotation marks, and brackets omitted)).

Because the larceny statues are explicit about the conduct which constitutes each level of offense, we conclude the word "created" in

Section 14-72.11(3) applies to the *specific scenario* where (1) an actor (the defendant or another person) created a false product code "for the purpose of fraudulently obtaining goods or merchandise at a reduced price" and (2) the defendant affixed it to the merchandise. Section 14-72.11(3) does not apply where a defendant transfers a legitimate product code printed on the price tag from one product to another, which is already punishable as a misdemeanor under Section 14-72.1. *Compare* N.C. Gen. Stat. § 14-72.11(3), *with* N.C. Gen. Stat. § 14-72.1.

Even viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor[,]" *Rose*, 339 N.C. at 192, 451 S.E.2d at 223, there is insufficient evidence of larceny from a merchant by product code fraud because there is no evidence the product code that was affixed was "created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price." N.C. Gen. Stat § 14-72.11(3). The trial court erred by denying Defendant's motion to dismiss as to the charge of larceny from a merchant by product code fraud.

III. Variance in Indictment

[2] We still must address Defendant's conviction for misdemeanor larceny under North Carolina General Statute Section 14-72(a). N.C. Gen. Stat. § 14-72(a). Defendant argues, "[t]he trial court erred in denying [Defendant's] motion to dismiss because there were fatal variances between the indictment and the evidence presented at trial."[4] Defendant specifically argues the indictment alleged he took two Cricuts, and at trial, the State only proved Defendant took one machine. Defendant does not, however, argue that the indictment otherwise failed to allege that he committed misdemeanor larceny of the other electronic items he placed in the backpack; his argument is limited to the reference to two Cricuts, where the evidence showed only one Cricut was taken.

A. Standard of Review

"We review *de novo* the issue of a fatal variance." *State v. Clagon*, 279 N.C. App. 425, 431, 865 S.E.2d 343, 347 (2021). "Under a *de novo* review,

4. The State argues this issue was not preserved for appellate review under North Carolina Rules of Appellate Procedure 10. We note, "Our Supreme Court recently clarified that merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review. [An indictment] variance-based challenge is essentially, a contention that the evidence is insufficient to support a conviction." *State v. Clagon*, 279 N.C. App. 425, 431, 865 S.E.2d 343, 347 (2021) (emphasis in original) (citations, quotations, and brackets omitted). Defendant's general motions to dismiss, therefore, preserved his variance challenge for 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 (citations and quotations omitted).

B. Fatal Variance

Generally, "the evidence in a criminal case must correspond with the allegations of the indictment which are *essential and material* to charge the offense." *State v. Simmons*, 57 N.C. App. 548, 551, 291 S.E.2d 815, 817 (1982) (emphasis added) (citation and quotation marks omitted). This rule is based on "the obvious requirements that the accused . . . be definitely informed as to the charges against him, so that he may be enabled to present his defense and be protected against another prosecution for the same offense." *Id.* (citation omitted). "However, a variance will not result where the allegations and proof, although variant, are of the same legal signification. An immaterial variance in an indictment is not fatal." *Id.* at 551, 291 S.E.2d at 817-18 (citations, quotation marks, and brackets omitted). An indictment need only "reasonably notif[y] [a] defendant of the crime for which he was being charged by plainly describing *who did what and when* and by indicating which statute was violated by such conduct." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981) (emphasis in original). "[T]o be fatal, a variance must relate to an essential element of the offense. Alternately, when an averment in an indictment is not necessary in charging the offense, it will be deemed to be surplusage." *State v. Bacon*, 254 N.C. App. 463, 467-68, 803 S.E.2d 402, 406 (2017) (citation, quotation marks, and original brackets omitted).

Here, there was a variance between the indictment and the State's evidence. The indictment alleged:

> [T]hat on or about [14 February 2020] and in Onslow County [Defendant] unlawfully and willfully did steal, take, and carry away *2 Cricut sewing machines*, 1 pack of 3 BIC lighters, 1 John Wick Movie DVD, 4 sets of headphones, 1 webcam, 1 FM Transmitter, 1 BW 10k gray battery pack, and 1 Anker battery pack, the personal property of Wal-Mart Stores, INC., a Corporation d/b/a Walmart Store, such property having a value of $477.15.

(Emphasis added.) The indictment alleged Defendant violated North Carolina General Statute Section 14-72(a) (a misdemeanor) by this conduct, and, the evidence at trial indicates Defendant only took one Cricut machine.

Defendant asserts this variance is fatal and his motion to dismiss should have been granted. We disagree. The indictment's allegation that Defendant took 2 Cricut sewing machines is "surplusage" and "not necessary in charging the offense" of misdemeanor larceny. *See Bacon*, 254 N.C. App. at 468, 803 S.E.2d at 406.

Defendant was charged with misdemeanor larceny in violation of North Carolina General Statute Section 14-72(a). N.C. Gen. Stat. § 14-72(a) (2019). "The essential elements of larceny are: (1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *Speas*, 265 N.C. App. at 352, 827 S.E.2d at 550. Reading the indictment without reference to the 2 Cricut sewing machines, the indictment states:

> [T]hat on or about the date of offense shown and in Onslow County [Defendant] unlawfully and willfully did steal, take, and carry away . . . 1 pack of 3 BIC lighters, 1 John Wick Movie DVD, 4 sets of headphones, 1 webcam, 1 FM Transmitter, 1 BW 10k gray battery pack, and 1 Anker battery pack, the personal property of Wal-Mart Stores, INC., a Corporation d/b/a Walmart Store, such property having a value of $477.15.

This indictment, even without mention of the Cricut machines, still alleges the four essential elements of larceny. *See id.*; *see also Bacon*, 254 N.C. App. at 470-71, 803 S.E.2d at 408 (holding an indictment is sufficient to allege larceny after omitting a variance between the property alleged to have been taken and the evidence proven at trial).[5]

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5. We also note fatal variances between the indictment and the evidence offered at trial as to the property taken tend to arise where property is inadequately described by the use of "general and broadly comprehensive words," *see State v. Ingram*, 271 N.C. 538, 542-44, 157 S.E.2d 119, 123-24 (1967) (noting fatal variance where property taken described as "merchandise, chattels, money, valuable securities and other personal property"); where the property proven to be stolen at trial deviates *entirely* from the property alleged in the indictment, *see Simmons*, 57 N.C. App. at 552, 291 S.E.2d at 818 (reversing trial court's judgment where indictment alleged the defendant stole eight freezers with unique serial numbers, but evidence of only one freezer at trial was shown and the serial number did not match any of the alleged eight freezers); or where the property is alleged to be owned by one party but at trial is proven to be owned by another. *See Bacon*, 254 N.C. App. at 467-71, 803 S.E.2d at 406-08. The present case is dissimilar, because the indictment specifically alleged several items were taken, these items were proven at trial, and there is only a variance as to the quantity of one item which is not a "necessary element of the offense of which the defendant is found guilty." *State v. Clark*, 208 N.C. App. 388, 390, 702 S.E.2d 324, 326 (2010).

Here, the indictment "definitely inform[s Defendant] as to the charges against him, so that he may be enabled to present his defense and . . . be protected against another prosecution for the same offense." *Simmons*, 57 N.C. App. at 551, 291 S.E.2d at 817.

Therefore, the variance between the evidence presented at trial and the indictment is not fatal. *See id.* at 551, 291 S.E.2d at 817-18. The trial court did not err by denying Defendant's motion to dismiss as to his conviction for misdemeanor larceny.

IV. Restitution

[3] Finally, Defendant makes an argument as to the amount of restitution. "On appeal, we review *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing." *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (citation and quotation marks omitted). "Under 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.

Here, the trial court ordered Defendant to pay restitution of $477.15. Based on the evidence, this amount includes the value of the Cricut and the various items in Defendant's backpack when he fled Walmart. But the State acknowledges Defendant left the Cricut behind in the cart when he ran from the store. The other items in the backpack were not recovered. Our statutes governing restitution only require Defendant to repay Walmart "for any injuries or damages arising directly and proximately" by Defendant's larceny. N.C. Gen. Stat. § 15A-1340.34 (2019). The trial court must consider the return of property to the injured owner and the condition in which that property was returned. *See id.* ("In determining the amount of restitution, the court shall consider . . . in the case of an offense resulting in the damage, loss or destruction of property of a victim: [r]eturn of the property to the owner of the property or someone designated by the owner[.]").

We therefore reverse the judgment as to the amount of restitution ordered and remand for entry of a judgment of restitution based on the damages Walmart suffered for the loss of the other items stolen, excluding the value of the Cricut which was never removed from the store.

V. Conclusion

We conclude the trial court erred by denying Defendant's motion to dismiss as to the charge of larceny from a merchant by product code fraud under North Carolina General Statute Section 14-72.11(3). We vacate Defendant's conviction for this charge. However, the trial

court did not err in denying Defendant's motion to dismiss the charge of misdemeanor larceny based on a fatal variance under North Carolina General Statute Section 14-72(a). Finally, we conclude the trial court erred in calculating restitution and remand for the trial court to enter a new restitution order.

NO ERROR IN PART; VACATED IN PART; AND REMANDED FOR RESENTENCING.

Judge TYSON concurs in a separate opinion.

Judge STADING concurs in result only.

TYSON, Judge, concurring by separate opinion.

We all agree the evidence presented to the trial court did not show Defendant "created" a product code "for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price" to elevate the charge of larceny from a merchant to a felony by switching an unrelated and lower price tag. *See* N.C. Gen. Stat. § 14-72.11(3) (2021). We also all agree no fatal variance in the indictment is shown concerning the remaining misdemeanor larceny charge, and there is no error. Finally, we all agree Defendant's restitution order improperly calculated the amount of restitution, because the items stolen were recovered in a re-sellable condition by Wal-Mart. I concur and write separately to address the proper additional larceny from a merchant charge, which should have been charged, based upon the evidence.

The evidence clearly showed Defendant: (1) willfully; (2) "transfer[ed] a price tag from goods or merchandise to other goods or merchandise having a higher selling price;" (3) "without authority;" and, (4) "present[ed] the goods for purchase. N.C. Gen. Stat. § 14-72.1(d) (2021). Defendant should have been charged with shoplifting by substitution of price tags for the Cricut machine and using an unrelated lower price tag to pass the point of sale to steal the merchant's property. *Id.*

STATE OF NORTH CAROLINA
v.
RONALD McCROREY, DEFENDANT

No. COA23-592

Filed 19 December 2023

1. Drugs—death by distribution—motion to dismiss—sufficiency of evidence—cause of death—proximate cause

The trial court properly denied defendant's motion to dismiss a charge of death by distribution where, when viewed in the light most favorable to the State, the evidence was sufficient to persuade a rational juror to conclude that defendant sold fentanyl to the victim, fentanyl caused the victim's death, and defendant's act proximately caused the victim's death. Although the victim's friend requested that defendant sell them heroin and cocaine, the State presented enough circumstantial evidence suggesting that defendant sold them fentanyl, including the fact that the only drugs found in the victim's toxicology report were cocaine and fentanyl. Further, although the victim's autopsy revealed lethal amounts of both cocaine and fentanyl in her system, there was ample evidence suggesting that the fentanyl killed her, including the tourniquet around her arm and the needles found at the scene of her death. Finally, defendant's argument regarding proximate cause—that the victim's simultaneous consumption of all the drugs he sold her was not reasonably foreseeable—lacked merit.

2. Evidence—other crimes, wrongs, or acts—previous drug sales—intent, identity, and common scheme or plan—danger of unfair prejudice

In a prosecution for death by distribution, where evidence showed that defendant sold drugs to the victim's friend (to be split between the victim and her friend) and that the victim died after consuming those drugs, the trial court neither abused its discretion nor committed prejudicial error when it allowed the friend to testify about previous transactions in which defendant sold drugs to her and to the victim. This testimony was admissible under Evidence Rule 404(b), since it demonstrated not only the common scheme or plan behind defendant's drug sales but also defendant's intent during the transaction at issue in the case. Additionally, the friend's statement that she put individuals in contact with defendant for the purpose of buying drugs from him tended to confirm defendant's

identity. Furthermore, given the copious amounts of other evidence showing that defendant sold drugs to the victim and her friend, it could not be said that the probative value of the friend's testimony was outweighed by a danger of unfair prejudice under Rule 403.

Appeal by defendant from judgment entered 17 November 2022 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 15 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Justin Isaac Eason, for the State.

Sarah Holladay for defendant-appellant.

FLOOD, Judge.

Ronald McCrorey ("Defendant") appeals his conviction for Death by Distribution, arguing the trial court erred when it (1) denied his motion to dismiss and (2) improperly admitted Rule 404(b) evidence. For the reasons discussed below, we hold the trial court did not err.

I. Facts and Procedural Background

In March 2020, Michelle Hooper ("Michelle") returned home to live with her mother, Lisa Hooper ("Ms. Hooper"), after having spent a few months at a residential drug treatment center in Charlotte, North Carolina. In an effort to keep Michelle away from heroin and cocaine, Ms. Hooper imposed strict rules: curfews were to be observed, random drug tests were to be performed, and substance abuse group meetings were to be attended via Zoom. Ms. Hooper feared that Michelle returning home to her "former using area" might trigger a relapse.

On the evening of 24 March 2020, Michelle attended an Alcoholics Anonymous meeting on Zoom from 7:00 p.m. until 8:00 p.m. At 9:33 p.m., Michelle sent a text message to her childhood friend, Kayla Wood ("Kayla"), saying "[s]et your alarm for 830. I'll be there at 9am and leave by 1:30. And like I said I wanna [sic] buy some crack[.]"

The next morning, Michelle left home and told Ms. Hooper that she had a doctor's appointment but would return home around 1:00 p.m. Michelle did not have a doctor's appointment—instead, Michelle drove to the hotel room where Kayla was staying. Upon arrival, Michelle gave Kayla fifty dollars with the understanding that the money would be used to buy crack cocaine and heroin. Approximately fifteen minutes later,

Defendant arrived at the hotel, and Kayla met him downstairs while Michelle waited in Kayla's hotel room. Kayla paid Defendant one hundred dollars for one gram of crack cocaine and one gram of heroin, which were to be split between Kayla and Michelle. The drugs purchased from Defendant came in four separate baggies, each containing one half gram of a substance Michelle and Kayla believed to be either crack cocaine or heroin. After purchasing the drugs, Kayla went back to her hotel room, where she gave Michelle two baggies—one containing crack cocaine and one containing heroin. Michelle and Kayla each did a small amount of heroin from Kayla's baggie and smoked crack cocaine from each of their respective baggies. From there, Kayla and Michelle went to a parking lot and smoked more crack cocaine. Michelle then dropped Kayla off at a park and drove back home so as not to break the curfew imposed by Ms. Hooper.

Michelle arrived back home and spent some time with her family before going to a church gathering with Ms. Hooper. After leaving the church gathering, Michelle and Ms. Hooper returned home and went to bed.

The following morning on 26 March 2020, Ms. Hooper awoke at 6:00 a.m. and noticed a light on in Michelle's room. Speaking through the door, Michelle told Ms. Hooper that she had a headache and was going back to bed. Ms. Hooper went on with her morning, left the house to run errands, and eventually returned at approximately noon. When she returned home, Ms. Hooper noticed the light in Michelle's room was still on. When Ms. Hooper opened the door, she found Michelle doubled over, deceased, with an address book open to the contact information for Kayla on the bed next to her.

Ms. Hooper immediately called 911. Upon arriving at the home, officer Dallas Hurley ("Officer Hurley") went into Michelle's room where he found her with a tourniquet around her arm and several needles in the room. A second officer, Sergeant Christopher Gorman ("Sergeant Gorman") secured the scene. Sergeant Gorman collected four empty baggies from Michelle's room. No drugs were recovered from Michelle's room or car. The four empty baggies found in Michelle's room were not sent off for lab testing.

When the police later located Kayla, she was "spaced out" and "nodding off" in front of a convenience store. When the officers told Kayla about Michelle's death, Kayla began crying and explained that she and Michelle had purchased drugs from Defendant at a hotel the day before. Kayla then consented to the officers seizing her cell phone. A review of

the data on Kayla's cell phone revealed text messages sent on 25 March 2020 between Kayla and Defendant, setting up the sale of drugs.

After Michelle's death, forensic pathologist Dr. Jonathan Privette ("Dr. Privette") performed an autopsy and sent tissue samples to Dr. Justin Brower ("Dr. Brower"), a forensic toxicologist, for testing. When the results of the toxicology report were returned, they showed the presence of benzoylecgonine, which is a metabolite of cocaine, and fentanyl in Michelle's blood. Both Dr. Privette and Dr. Brower opined that the level of fentanyl in Michelle's blood was within the fatal range, and given the totality of the circumstances, Michelle's death was consistent with a fentanyl overdose. Both doctors also agreed, however, that the level of cocaine metabolites in Michelle's system were, by themselves, high enough to be fatal. Notably absent from the toxicology report was the presence of heroin, which was one of the two substances Michelle and Kayla believed they had purchased from Defendant.

On 11 April 2021, Defendant's trial began in Cabarrus County Superior Court. At trial, several witnesses were called to testify including Officer Hurley, Sergeant Gorman, Dr. Privette, Dr. Brower, Ms. Hooper, and Kayla. Of particular note on appeal is the testimony given by Kayla regarding previous drug sale transactions she had with Defendant. After a lengthy exchange between counselors and the trial judge outside the presence of the jury, the trial court allowed Kayla to testify regarding prior drug sales involving Defendant as evidence under Rule 404(b) to show Defendant's intent, identity, and common scheme or plan.

On direct examination, when asked if she ever "put any other individuals in contact with [] Defendant for the purpose of buying drugs," Kayla answered "[y]eah." Additionally, Kayla testified about the two or three times where she and Michelle purchased drugs from Defendant, and she indicated that the sale on 25 March was "generally consistent with how [they] had previously purchased drugs from [] Defendant."

At the conclusion of the trial, a jury found Defendant guilty of Death by Distribution. Defendant was sentenced to seventy to ninety-six months' imprisonment. Defendant gave an oral notice of appeal following the verdict.

II. Jurisdiction

This case is properly before this Court as an appeal from a final judgment of a superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021).

III. Analysis

On appeal, Defendant argues the trial court made two errors: first, when it denied his motion to dismiss; and second, when it admitted evidence of his prior drug sales under Rule 404(b) of the North Carolina Rules of Evidence. We take the analysis of each argument in turn.

A. Motion to Dismiss

[1] Defendant begins by arguing the trial court erred when it denied his motion to dismiss because the State failed to present substantial evidence that (1) he sold fentanyl, rather than heroin, to Kayla; (2) fentanyl was the cause of Michelle's death; and (3) the drugs he sold were the proximate cause of Michelle's death. For the reasons discussed below, we disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the [trial c]ourt is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). Evidence is considered "substantial" if it would be relevant and "necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). Finally, "in ruling on a motion to dismiss[,] the trial court is to consider the evidence in the light most favorable to the State." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

In our present case, Defendant was charged with the unlawful, willful, and felonious sale of fentanyl, the ingestion of which caused the death of Michelle. Under North Carolina's Death by Distribution statute, a person may be found guilty if all of the following requirements are met:

> (1) the person unlawfully sells at least one certain controlled substance; (2) the ingestion of the certain controlled substance or substances causes the death of the user; (3) the commission of the offense in subdivision (1) of this subsection was the proximate cause of the victim's death; and (4) the person did not act with malice.

N.C. Gen. Stat. § 14-18.4(b) (2021). Under our *de novo* standard of review, we now consider each of Defendant's three arguments regarding why the trial court erred in denying his motion to dismiss, construing all the evidence in the light most favorable to the State.

First, Defendant contends the State failed to present substantial evidence that he sold fentanyl to Kayla, rather than heroin. Specifically, Defendant argues that "[t]he State assumed from the absence of heroin in [Michelle's] blood on [26 March] that what she purchased on [25 March] was fentanyl." In essence, Defendant argues that assumptions cannot be substantial evidence. What Defendant describes as an assumption, however, can more appropriately be called circumstantial evidence—evidence which "may withstand a motion to dismiss and support a conviction when [it] does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). "Circumstantial evidence is proof of a chain of facts and circumstances" and need only give rise to a reasonable inference of guilt in order for it to be admitted to the jury. *State v. Wilkie*, 289 N.C. App. 101, 103, 887 S.E.2d 485, 486 (2023) (citing *State v. Lee*, 213 N.C. App. 392, 396, 713 S.E.2d 174, 177 (2011)). As long as the record contains actual evidence, either direct or circumstantial, that supports a reasonable inference of the defendant's guilt, a motion to dismiss should be denied. *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020) (clarifying that substantial evidence may be justified by direct or circumstantial evidence).

Here, the uncontroverted facts in the Record show that: Kayla requested Defendant sell her one gram of heroin and one gram crack cocaine, to be split between Kayla and Michelle; Michelle ingested the drugs sold by Defendant; Michelle was found dead the following morning; and the only drugs found in Michelle's toxicology report were cocaine and fentanyl. Viewed in the light most favorable to the State, this evidence, while circumstantial, could be enough to "persuade a rational juror to accept a conclusion" that the substance sold by Defendant was fentanyl, not heroin. *See Mann*, 355 N.C. at 301, 560 S.E.2d at 781.

Next, Defendant argues there was not substantial evidence that fentanyl was, in fact, the cause of Michelle's death. The Record confirms Michelle had both cocaine and fentanyl in her system. Likewise, the Record shows that Dr. Privette stated Michelle had enough cocaine in her system to be lethal on its own. Those two facts, however, are dwarfed by the overwhelming direct evidence from both medical experts and the conditions observed by law enforcement responding to the scene of Michelle's death: the tourniquet around Michelle's arm; the needles in Michelle's room; the four empty baggies; the toxicology report; and the autopsy revealing lethal amounts of both cocaine and fentanyl in Michelle's system.

While the evidence does not foreclose the possibility that fentanyl may not have been the sole cause of Michelle's death, there is ample evidence to support a conclusion that it was, in fact, fentanyl that killed

Michelle. When this evidence is viewed in the light most favorable to the State, we hold it is enough to survive a motion to dismiss. *See Golder*, 374 N.C. at 250, 839 S.E.2d at 790.

Finally, Defendant argues the State failed to present substantial evidence of the element of proximate cause, which is required under the Death by Distribution statute. Defendant posits that Michelle's decision to consume, at once, all of the drugs she had purchased, broke the causal chain because Defendant could not have reasonably foreseen Michelle would do such a thing.

> Foreseeability is an essential element of proximate cause. This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

State v. Powell, 336 N.C. 762, 771–72, 446 S.E.2d 26, 31 (1994) (quoting *Williams v. Boulerice*, 268 N.C. 62, 68, 149 S.E.2d 590, 594 (1966)) (internal citations omitted). "[T]he question of whether [a] defendant's conduct was the proximate cause of death is a question for the jury." *State v. Noble*, 226 N.C. App. 531, 535, 741 S.E.2d 473, 478 (2013) (quoting *State v. Bailey*, 184 N.C. App. 746, 749, 646 S.E.2d 837, 839 (2007)).

Here, Defendant's argument that Michelle's consumption of all the drugs she had purchased from him was not reasonably foreseeable is not only disingenuous, it misses the mark. To survive a motion to dismiss, the State must present the evidence "necessary to persuade a rational juror to accept a conclusion." *Mann*, 355 N.C. at 301, 560 S.E.2d at 781. Our *de novo* review of the Record reveals evidence that Michelle had obtained drugs sold by Defendant, Michelle had ingested drugs sold by Defendant, and Defendant knew the drugs he was selling to Kayla were to be shared between Kayla and Michelle. This evidence is enough to survive a motion to dismiss and submit the question of proximate cause to the jury. *See Noble*, 226 N.C. App. at 535, 741 S.E.2d at 478.

Viewed in the light most favorable to the State, the evidence in the Record was enough to persuade a rational juror that Defendant might not be innocent of the crime charged. Because the evidence presented did not "rule out every hypothesis of innocence," we hold the trial court did not err when it denied Defendant's motion to dismiss. *Stone*, 323 N.C. at 452, 373 S.E.2d at 433; *see Mann*, 355 N.C. at 301, 560 S.E.2d at 781.

B. Rule 404(b)

[2] Finally, Defendant argues the trial court committed a prejudicial error when it allowed testimonial evidence that he sold drugs on prior occasions. Specifically, Defendant argues the prior sales to Kayla were not sufficiently similar to show intent, identity, and a common plan or scheme. We disagree.

Whether Rule 404(b) evidence was improperly admitted is a question of law reviewed *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). This Court reviews whether Rule 404(b) evidence should have nonetheless been excluded under Rule 403 for abuse of discretion. *State v. Al-Bayyinah*, 359 N.C. 741, 747, 616 S.E.2d 500, 506 (2005). An error is prejudicial and requires a new trial if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443 (2021).

Under Rule 404(b), evidence of a defendant's other crimes, wrongs, or acts, may be admissible as proof of intent, identity, or a common scheme or plan. N.C. Gen. Stat. § 8C-404(b) (2021). Generally, Rule 404(b) is considered a rule of inclusion. *See State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990). This evidence, however, is barred "if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-403 (2021). In reviewing a trial court's determination under Rule 403, this Court will overturn the trial court only if the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Thomas*, 268 N.C. App. 121, 135, 834 S.E.2d 654, 665 (2019) (quoting *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006)).

"In drug cases, evidence of other drug violations is often admissible to prove many of the purposes under Rule 404(b)." *State v. Williams*, 156 N.C. 661, 663–64, 577 S.E.2d 143, 145 (2003). In order to show intent or motive, evidence of the prior act must " 'pertain to the chain of events explaining the context, motive, and set-up of the crime' and 'form an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury.' " *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (quoting *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174-75 (1990)). Additionally, "temporal and geographic proximity" as well as the aid of an accomplice are factors that may tend to show both identity and a common plan or scheme under Rule 404(b). *Thomas*, 268 N.C. App. at 135, 834 S.E.2d at 664–65.

Here, our *de novo* review of the Record reveals the trial court engaged in a lengthy analysis regarding the admissibility of Kayla's testimony regarding prior drug sales involving Defendant. Testimony about previous transactions in which Defendant sold drugs to Kayla and Michelle demonstrates not only the common plan or scheme of Defendant's drug sales, but also his intent when transacting with Kayla on 25 March 2020. *See White*, 349 N.C. at 552, 508 S.E.2d at 264. Additionally, Kayla's testimony that she put individuals in contact with Defendant for the purpose of buying drugs from him is evidence that tends to confirm Defendant's identity. *See Thomas*, 268 N.C. App. at 135, 834 S.E.2d at 664–65.

Given the propriety of the testimonial evidence under Rule 404(b), the trial court did not err when it allowed the inclusion of Kayla's testimony. *See* N.C. Gen. Stat. § 15A-1443. Further, considering the copious amount of evidence showing Defendant sold drugs to Kayla and Michelle, it cannot be said that the probative value of Kayla's testimony showing Defendant's intent, common plan or scheme, and identity was outweighed by a danger of unfair prejudice. *See* N.C. R. Evid. 403. For those reasons, we hold the trial court neither abused its discretion nor committed a prejudicial error when it allowed Kayla's testimony regarding prior drug sales involving Defendant.

IV. Conclusion

For the aforementioned reasons, we hold the trial court did not err when it denied Defendant's motion to dismiss; further, the trial court did not commit prejudicial error when it allowed evidence of his prior drug sales under Rule 404(b).

NO ERROR.

Judges CARPENTER and GORE concur.

STATE v. MICHAEL

[291 N.C. App. 659 (2023)]

STATE OF NORTH CAROLINA
v.
KEVIN BRIAN MICHAEL, DEFENDANT

No. COA22-846

Filed 19 December 2023

1. Search and Seizure—traffic stop—extended stop—alternate bases—plain error analysis

There was no plain error in the trial court's denial of defendant's motion to suppress drugs found by law enforcement during a vehicle search, where, although the trial court's order appeared to be based on its conclusion that the officer had reasonable suspicion to search the vehicle—after the initial reason for the stop had been resolved—based on the vehicle occupants' nervous behavior, even if that conclusion was in error, there was also evidence presented at trial from which the trial court could have found as an alternate basis for its ruling that defendant voluntarily consented to a search of the vehicle (based on his responses to the officer's request to search the vehicle that, as a probationer, he could not refuse, and then giving his affirmative consent).

2. Drugs—possession—constructive—driver of vehicle—inference of control

The State presented sufficient evidence in a drug prosecution from which a jury could find that defendant constructively possessed cocaine found in the car that he was driving, even though two other passengers were also in the car. Defendant's status as the driver of a vehicle gave rise to an inference that he had control over the vehicle and, therefore, constructively possessed the drugs that were discovered during a search of the car.

Judge ARROWOOD concurring with separate opinion.

Appeal by defendant from judgment entered 3 February 2022 by Judge Lori I. Hamilton in Davidson County Superior Court. Heard in the Court of Appeals 4 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew W. Bream, for the State.

Kimberly P. Hoppin, for the Defendant.

DILLON, Judge.

Defendant Kevin Brian Michael appeals his conviction for possession of a controlled substance. We conclude that Defendant received a fair trial, free of reversible error.

I. Background

On 11 July 2019, Defendant was driving with two passengers. He was pulled over by Officer Kattner of the Thomasville police for failing to yield.

During the stop, Officer Kattner called another officer, Officer Rowe, to the scene. At the conclusion of the traffic stop, Officer Kattner returned to Defendant and the passengers their identification cards and told them that they were free to go.

However, based on the nervous behavior of Defendant and the other passengers, Officer Kattner asked Defendant for permission to search the vehicle. Defendant stated that he was on probation and that, therefore, he was required to allow the search. Officer Kattner again asked for Defendant's consent, whereupon Defendant consented.

During the search of the vehicle, Officer Kattner found cocaine and drug paraphernalia. Defendant and the two occupants were arrested.

Defendant filed a motion to suppress the results of the search, which the trial court denied. Defendant renewed his motion prior to jury selection, and the trial court reconfirmed its ruling. However, Defendant did not object during the trial when the State introduced the results of the search into evidence. Defendant was convicted of possession of a controlled substance. He appeals.

On appeal, Defendant argues that the search violated his Fourth Amendment right against unreasonable search and seizure, and further, that the trial court erred when it denied Defendant's motion to dismiss because there was insufficient evidence that he knowingly possessed cocaine.

II. Analysis

Defendant argues that the trial court erred by not suppressing the evidence of the search and by not granting his motion to dismiss. We address each argument in turn.

A. Motion to Suppress

[1] We first consider whether Defendant's Fourth Amendment right was violated by Officer Kattner's search of the vehicle.

Our appellate review is limited to plain error, as Defendant failed to object during the trial to the admission of cocaine found in the vehicle. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000) ("[A] motion *in limine* [is] not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial."). Plain error occurs if "absent the error, the jury would have probably reached a different verdict." *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991).

Both the federal and our state constitutions generally render evidence obtained from a suspect in violation of the Fourth Amendment inadmissible at trial. *Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006).

"A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008). "[R]easonable suspicion is the necessary standard for traffic stops." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). Further, "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop." *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017).

"[A]n investigation unrelated to the reasons for the traffic stop must not prolong the roadside detention." *State v. Reed*, 373 N.C. 498, 509, 838 S.E.2d 414, 423 (2020). To prolong a detention "beyond the scope of a routine traffic stop" requires that an officer "possess a justification for doing so other than the initial traffic violation that prompted the stop in the first place," which requires "either the driver's consent or a 'reasonable suspicion' that illegal activity is afoot." *Id.* at 510, 838 S.E.2d at 423.

Here, Officer Kattner testified that as she approached the vehicle . . .

> [t]he backseat passenger was making it a point to avoid any eye contact with me. She was trying to hide her face from me. The front two were -- I could at least see their faces, but they were still nervous upon initial interaction… [t]hey were not wanting to maintain eye contact. They were short in their responses to me…. They were a little fidgety…anxious.

She ran the information of all the vehicle occupants, which revealed that Defendant and one of the passengers did not have any outstanding warrants but that the other passenger had an outstanding warrant for failure to appear in another county.

As Officer Kattner was completing the traffic stop, Officer Rowe arrived on the scene. Officer Kattner approached the vehicle with Officer Rowe to give Defendant a verbal warning and to return identification cards to Defendant and the other passengers. She gave a verbal warning to Defendant and told him and the passengers that they were free to leave. We conclude that the seizure associated with the traffic stop was concluded at this point. *See Reed*, 373 N.C. at 513, 838 S.E.2d at 425-26.

Officer Kattner testified that the vehicle occupants, however, continued to appear "nervous" even though "they knew they weren't getting in trouble for a traffic violation." She reiterated that the traffic stop was completed but then asked Defendant if there was anything illegal in the vehicle, to which he responded, "No." She then proceeded to ask for consent to search the vehicle, to which Defendant replied, "By law, since I am on probation, I cannot tell you no."

Officer Kattner, though, responded by asking Defendant "to confirm yes or no," to which Defendant responded in the affirmative. It was during the search of the vehicle that Officer Kattner found cocaine and other drug paraphernalia.

The State argues that Defendant consented to the search or, otherwise, Officer Kattner had reasonable suspicion to conduct the search.

Defendant, as a probationer, is considered to have given consent to a search where an officer has reasonable suspicion of a crime. Specifically, our General Statutes provide that a probationer agrees to:

> (14) Submit to warrantless searches by a law enforcement officer of the probationer's person and of the probationer's vehicle, *upon a reasonable suspicion* that the probationer is engaged in criminal activity…

N.C. Gen. Stat. § 15A-1343 (2021) (emphasis added).

Defendant, otherwise, may consent to a search absent reasonable suspicion where his consent is given freely and voluntarily. *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967) ("Implicit in the very nature of the term 'consent' is the requirement of voluntariness. To be voluntary the consent must be 'unequivocal and specific,' and freely and intelligently given."). "[T]he question whether a consent to search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). *See also State v. Romano*, 369 N.C. 678, 691, 800 S.E.2d 644, 652-53 (2017) (holding that whether consent to a search was voluntary is a question of fact, not law).

The trial court judge did not articulate in her written order her reasoning for denying Defendant's suppression motion. However, she stated in open court that she was denying the motion based on her conclusion that Officer Kattner had reasonable suspicion to conduct the search:

> The motion to suppress with regard to the basis for -- I'm not going to refer to it as extending the traffic stop, because it's something else. But it's so dangerously close to extending the traffic stop as to be almost indistinguishable -- is denied, because I believe the North Carolina courts have held as long as the officer can articulate a reasonable suspicion of additional criminal activity, they may, at least minimally, extend the stop without getting into constitutionally unreasonable conduct. And I will find from a totality of the circumstances, based just on Kattner's testimony of what she observed, that she had that very minimal reasonable articulable suspicion.

We note that the trial court judge did not articulate any finding as to whether Defendant had otherwise validly consented to the search as an alternative ground for denying Defendant's suppression motion.

We hold that the trial court did not plainly err in allowing the results of the search of Defendant's vehicle into evidence at trial. Even assuming Officer Kattner lacked reasonable suspicion to conduct the search of Defendant's vehicle, we conclude that Defendant has failed to show plain error. Specifically, we note that there was sufficient evidence from which the trial court could have found as fact *at trial* that Defendant voluntarily consented to the search had Defendant objected when the evidence was offered by the State. That is, whether the outcome of the trial "probably" would have been different hinges on whether the trial court probably would not have found *at trial* had Defendant objected that Defendant had voluntarily consented to the search, at least as an alternate ground to uphold her prior ruling. *See State v. Mann*, 355 N.C. 294, 311, 560 S.E.2d 776,787 (2002) (holding that "[t]o establish plain error, defendant must demonstrate not only that there was error, but also had the error not occurred, the outcome of the proceeding probably would have been different.").

B. Motion to Dismiss

[2] To survive a motion to dismiss, there must be substantial evidence of each essential element of the crime and that the defendant is the perpetrator. *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015). Whether the evidence is sufficient to survive a motion to dismiss, it must

be considered in the light most favorable to the State; and the State is entitled to every reasonable inference from the evidence. *Id.* at 574, 780 S.E.2d 826.

Here, Defendant contends that the State failed to present sufficient evidence that he constructively possessed the cocaine found in his car, contending that his mere presence "in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs." *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976). However, our Court has likewise recognized that:

> [A]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [contraband] was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where [contraband] was found *is sufficient, in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury.

State v. Mitchell, 224 N.C. App. 171, 177, 735 S.E.2d 438, 443 (internal citations omitted). *See also State v. Alson*, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386-87 (2008), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009).

It is undisputed that Defendant was the driver of the vehicle and, therefore, exercised a degree of dominion and control over the vehicle. Additionally, the State also presented evidence of other incriminating circumstances, including the placement of the cocaine in the driver's door, as well as the Defendant's nervous behavior. We conclude that the State's evidence was, therefore, sufficient to survive a motion to dismiss.

III. Conclusion

For the reasons stated above, we conclude that the trial court did not plainly err by allowing the results of Officer Kattner's search of Defendant's vehicle into evidence. We further conclude that the trial court did not err by denying Defendant's motion to dismiss the charge of possession of cocaine for insufficiency of the evidence.

NO ERROR.

Judge STADING concurs.

Judge ARROWOOD concurs with separate opinion.

ARROWOOD, Judge, concurring.

I agree with the majority that the trial court did not plainly err because of the evidence indicating defendant voluntarily consented to the search. However, because it appears that the trial court's primary analysis turned on whether the officer had a reasonable suspicion to extend the traffic stop rather than on the defendant's consent to search his car, I believe the trial court's analysis of that issue is incorrect. Thus, I write separately to clarify the issue of reasonable suspicion.

Officer Kattner testified that when she approached defendant's car during the traffic stop, defendant and his passengers were acting "nervous." When asked what made her believe they were nervous, Officer Kattner stated, "They were not wanting to maintain eye contact[,] [t]hey were short in their responses[,]" and "were a little fidgety." Officer Kattner further testified that such signs of nervousness continued after giving defendant a verbal warning for failing to yield.

When ruling on defendant's motion to dismiss, the trial court concluded that reasonable suspicion existed based on these observations alone. However, such a conclusion is sharply at odds with North Carolina law. Specifically, an appearance of nervousness does not give police carte blanche to extend a stop or conduct a search. *See State v. Fields*, 195 N.C. App. 740, 745 (2009) (citing *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, 11 (1989)) ("In order to preserve an individual's Fourth Amendment rights, it is of the utmost importance that we recognize that the presence of [extreme nervousness] is not, by itself, proof of any illegal conduct and is often quite consistent with innocent travel."); *see also State v. Myles*, 188 N.C. App. 42, 50 (2008), *aff'd*, 362 N.C. 344 (2008) ("[O]ur Supreme Court has never said nervousness alone is sufficient to determine whether reasonable suspicion exists when looking at the totality of the circumstances.").

For example, in *State v. McClendon*, our Supreme Court explained that "several factors . . . gave rise to reasonable suspicion under the totality of the circumstances." 350 N.C. 630, 637 (1999). Such factors specified by the *McClendon* Court were (1) extreme nervousness, which involved defendant sweating, breathing rapidly, sighing heavily, chuckling nervously when answering questions, and refusing to make eye contact; (2) inconsistent and confusing statements; and (3) the fact that

"although defendant seemed unsure of who owned the car, the address of the owner listed seem[ed] to indicate that [defendant and the owner] both lived in the same residence." *Id.* Thus, in *McClendon*, "extreme nervousness" constituted reasonable suspicion only when combined with two other pertinent factors.

Here, unlike in *McClendon*, no factors were present other than Officer Kattner's perception of nervousness. The perceived fidgetiness, eye contact avoidance, and short responses were not separate factors supporting reasonable suspicion; rather, they were physical mannerisms that—when combined—led Officer Kattner to believe defendant and the passengers were nervous. *See State v. Downey*, 251 N.C. App. 829, 834 (2017) (explaining that police testimony that defendant avoided eye contact supported the trial court's finding that defendant exhibited nervous behavior). Moreover, a general statement that defendant was acting nervous—without specific facts to support such observation like the ones discussed here—does not constitute a factor supporting reasonable suspicion. *See United States v. Crawford*, 891 F.2d 680, 682 n.4 (8th Cir. 1989). ("The statement that [defendant] appeared nervous . . . is a mere rephrasing of the other evidence, offered in an attempt to enhance the value of that evidence."). Accordingly, Officer Kattner's observations were inadequate to support a finding of reasonable suspicion.

It is also important to point out that nothing in the record suggests that Officer Kattner had prior knowledge of defendant or his passengers before the traffic stop. I thus find it hard to understand how Officer Kattner would know whether they were indeed nervous or simply behaving normally. Without such prior knowledge, Officer Kattner's observations likely constitute subjective and "unparticularized suspicion." *See State v. Watkins*, 337 N.C. 437, 442 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)) (stating that reasonable suspicion must be " 'based on objective facts, that the individual is involved in criminal activity.' ").

STATE v. RUBENSTAHL

[291 N.C. App. 667 (2023)]

STATE OF NORTH CAROLINA
v.
LEO GEORGE RUBENSTAHL, DEFENDANT

No. COA23-314

Filed 19 December 2023

1. Homicide—first-degree murder—jury instruction—voluntary intoxication—evidence of premeditation and deliberation

In a prosecution for first-degree murder, where defendant was tried for the death of his wife, the trial court did not commit plain error by declining to instruct the jury on voluntary intoxication as an affirmative defense. Although defendant drank multiple beers throughout the twelve hours leading up to the murder, the evidence did not show that he was so completely intoxicated that he could not form a deliberate and premeditated purpose to kill. Notably, the evidence showed that: defendant had been a heavy drinker for years, and therefore had a high tolerance for alcohol; defendant testified that he got drunk after he killed his wife, indicating that he was not already drunk before the murder; defendant's memory of the events leading up to the murder was both clear and detailed; and, at the time of the killing, he was cognizant enough to hide the murder weapon and confess his actions to his daughter before law enforcement arrived.

2. Homicide—first-degree murder—premeditation and deliberation—jury instruction—lesser-included offense not supported

In a prosecution for first-degree murder, where defendant was tried for the death of his wife, the trial court did not err in declining to instruct the jury on the lesser-included offense of second-degree murder, since the evidence supported only one inference: that defendant specifically intended to kill his wife, acting with both premeditation and deliberation on the day of the murder. The evidence showed that: defendant shot his wife ten times with a single-action revolver, which would have required a great deal of effort (manually cocking the gun before pulling the trigger for each shot, then unloading and reloading it to continue shooting since its cylinder only held six bullets at a time); before the killing, defendant had both threatened and physically abused his wife; and his wife's body did not show any defensive wounds, suggesting that defendant continued to shoot her after she was already rendered helpless.

Appeal by defendant from judgment entered 23 September 2022 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant General Counsel South A. Moore, for the State.

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for defendant-appellant.

DILLON, Judge.

Defendant Leo George Rubenstahl appeals from judgment entered upon a jury's verdict convicting him of first-degree murder for causing the death of his wife. Our review shows no error.

I. Background

At approximately 2 a.m. on 25 February 2021, Defendant's wife Enelrae Rubenstahl was found dead in the home she shared with Defendant in Linden. Evidence at trial tended to show as follows:

Leading up to her death, Enelrae expressed fears to friends and family that Defendant was going to shoot her. In particular, she was uncomfortable that Defendant kept his handgun on his nightstand while they slept; her friend testified that Enelrae said, "I sleep scared." A co-worker even offered to intervene to protect her from Defendant. Three weeks before her murder, Enelrae met with her church's pastor and deacon. They noticed bruises on both sides of her neck consistent with strangulation, and she admitted that Defendant had "been holding her head down[.]"

On 24 February 2021, the day before her death, Enelrae spent the afternoon and evening with Defendant, his daughter Christina, and her children. At approximately 1 a.m. the next morning, Defendant called Christina to confess that he had killed Enelrae. Christina testified,

> All he kept saying over and over again was I messed up. I messed up. I did something that I can't come back from. I just wanted you to know that I love you and I love the kids. . . . And he said, I shot [Enelrae]. . . . while we were on the phone, he said that he had no regrets about it and that he had shot her and then realized she was still breathing and kept shooting her. . . . it eventually got to the point of him talking about taking his own life because he didn't want to deal with the consequences of what he had done.

When Christina arrived at the house, she asked Defendant about the location of his handgun. He initially lied to her—saying he "threw it in the pond"—before admitting that he hid it within a pile of towels in the bathroom. Before the police arrived, Christina heard Defendant call his sister and "explain[ ] to her on voicemail . . . what he had done."

When law enforcement arrived at the scene, they found Enelrae deceased in the bedroom hallway. She was unclothed except for her undergarments, which were on inside out. They also found Defendant's handgun hidden within the towels. They promptly arrested Defendant, and he was subsequently indicted.

At trial, the medical examiner testified that Enelrae was shot ten times on her chest, arms, and face (including both eyes) at a close range, injuries which "would take probably several minutes for her to die[,]" rather than cause an instantaneous death. Enelrae also had a large bruise covering the right side of her neck and face and her right ear, likely caused by blunt force trauma prior to her death. The medical examiner did not observe any defensive wounds.

The firearms forensic examiner testified regarding Defendant's handgun found at the scene: a 45 Colt single-action revolver. This type of revolver requires the user to first cock the hammer and then pull the trigger each time the gun is fired—in other words, pulling the trigger does not automatically cock the hammer, as it would in a double-action revolver. The cylinder holds only six cartridges when fully loaded. To load it, one must rotate the cylinder and load each cartridge (containing a bullet) individually. After firing the six cartridges, one must repeat the process of rotating the cylinder to unload each one individually before reloading the gun. In sum, this is a cumbersome process.

At trial, Defendant took the stand and testified that Enelrae's niece had shot and killed Enelrae.

Defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. Defendant timely appealed.

II. Analysis

Defendant argues the trial court erred when it did not instruct the jury on (1) the affirmative defense of voluntary intoxication and (2) the lesser-included offense of second-degree murder. We disagree.

A. Voluntary Intoxication Jury Instruction

[1] On appeal—for the first time—Defendant asserts the defense of voluntary intoxication. Defendant did not request a jury instruction on

voluntary intoxication at trial. Thus, we review this argument for plain error. *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020) ("[U]npreserved issues related to jury instructions are reviewed under a plain error standard, while preserved issues are reviewed under a harmless error standard."). *See also State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) ("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.").

During the charge conference, the trial court explicitly asked if Defendant wanted to include voluntary or involuntary intoxication instructions, to which his counsel declined. Thus, this challenge was not preserved. Assuming the trial court otherwise erred by not giving the intoxication instruction, for the reasoning below, we conclude that the trial court did not plainly err.

To warrant a jury instruction on voluntary intoxication,

> [t]he evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

State v. Strickland, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (citations omitted). Our Supreme Court warns our courts to apply "great caution" in allowing a voluntary intoxication instruction. *State v. Meader*, 377 N.C. 157, 162, 856 S.E.2d 533, 537 (2021) (quoting *State v. Murphy*, 157 N.C. 614, 617-18, 72 S.E. 1075, 1076-77 (1911)). "[A]n instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages[.]" *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). In making this determination, the evidence must be viewed in the light most favorable to the defendant. *Meader*, 377 N.C. at 162, 856 S.E.2d at 537.

Courts consider a variety of factors when determining whether a defendant should receive a voluntary intoxication jury instruction. One important factor is the amount of alcohol consumed. *See State v. Golden*, 143 N.C. App. 426, 431-33, 546 S.E.2d 163, 167-68 (2001). Further, the defendant's alcohol tolerance affects the determination—particularly if the defendant is an alcoholic with a presumably higher tolerance. *See State v. Walls*, 342 N.C. 1, 46, 463 S.E.2d 738, 761-62 (1995). Another factor is the defendant's memory of the killing and the time

leading up to and following the killing, with a detailed memory weighing against a voluntary intoxication instruction. *See State v. Herring*, 338 N.C. 271, 276, 449 S.E.2d 183, 186 (1994); *Golden*, 143 N.C. App. at 431, 546 S.E.2d at 167.

In this case, Defendant was a heavy drinker and had been for years, suggesting a higher tolerance for alcohol than the average person. He was unsure how many beers he consumed, speculating the number could be approximately ten or eleven from the afternoon of 24 February 2021 through the midnight hours of 25 February 2021 (a nearly twelve-hour period). Further, Defendant testified that he was "slowly drinking" throughout the day and it was a "normal" day for himself.

In his own testimony, Defendant said he "got drunk" *after* the killing because his wife was dead, indicating he was not already drunk during the killing. Additionally, Defendant's memory of that day and night are clear. He was able to describe the people he saw and what they were wearing, his activities that evening, and a detailed timeline (including his mental processes) leading up to the killing, the killing itself, and the time and events afterwards. He was also cognizant enough to hide the revolver and call Christina to confess his actions before Christina and law enforcement arrived at the scene.

Though Defendant may have been intoxicated from drinking a number of beers throughout the course of the afternoon, evening, and night, the evidence does not show that he was "so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Strickland*, 321 N.C. at 41, 361 S.E.2d at 888. Thus, we conclude Defendant has failed to show plain error by the trial court not instructing the jury on the affirmative defense of voluntary intoxication.

B. Second-Degree Murder Jury Instruction

[2] Defendant argues the jury could have reasonably found that Defendant committed only second-degree murder because he lacked the requisite deliberation and premeditation elements for first-degree murder. In his brief, Defendant characterizes himself as "a volatile alcoholic who fired his gun at anything that frustrated him" and claims he could have shot his wife during an "explosive marital argument" during which he lacked a "cool state of mind."

A request for jury instructions on a lesser-included offense during the charge conference is sufficient to preserve the issue for appellate review. *See State v. Collins*, 334 N.C. 54, 61-62, 431 S.E.2d 188, 193 (1993).

Here, defense counsel requested a jury instruction on second-degree murder during the charge conference, but the trial court denied this request. Even though counsel did not repeat his objections after the charge was given, he nevertheless preserved this issue for review.

In 1979, our Supreme Court stated that a second-degree murder instruction *must* be given where the State seeks a conviction for first-degree murder based on premeditation and deliberation, so as to leave it up to the jury to decide whether the defendant premeditated/deliberated to kill rather than merely to assault:

> Assuming *arguendo* that there was no positive evidence of the absence of premeditation and deliberation, the trial court was still required to submit the issue of second degree murder to the jury. In the instant case the [S]tate relied upon premeditation and deliberation to support a conviction of murder in the first degree. In *State v. Harris*, 290 N.C. 718, 730, 228 S.E.2d 424, 432 (1976), we held that, "in all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree." This requirement is present because premeditation and deliberation are operations of the mind which must always be proved, if at all, by circumstantial evidence. If the jury chooses not to infer the presence of premeditation and deliberation, it should be given the alternative of finding the defendant guilty of second degree murder. *State v. Keller*, 297 N.C. 674, 256 S.E.2d 710 (1979).

State v. Poole, 298 N.C. 254, 258, 258 S.E.2d 339, 342 (1979).

However, four years later, our Supreme Court stated that a second-degree murder instruction is not required "in *every case* in which the State relies on premeditation and deliberation to support a conviction of first-degree murder." *State v. Strickland*, 307 N.C. 274, 281, 298 S.E.2d 645, 651 (1983) (emphasis in original). And where the State has put forth evidence which establishes premeditation and deliberation of the intent to kill "and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial court should properly exclude from jury consideration the possibility of a conviction of second-degree murder." *Id.* at 293, 298 S.E.2d at 658.

The Court has since stated that "a defendant is not entitled to an instruction on [second-degree murder] merely because the jury could possibly believe some of the State's evidence [supporting first-degree

murder] but not all of it." *State v. Leazer*, 353 N.C. 234, 240, 539 S.E.2d 922, 926 (2000) (cleaned up).

However, where the State's evidence, if believed, is capable of conflicting reasonable inferences either that (1) the defendant premeditated/deliberated a specific intent to kill or, alternatively, (2) the defendant merely premeditated/deliberated an assault, the defendant is entitled to both first-degree and second-degree murder instructions.[1] *See*, *e.g.*, *State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 352 (1983) (stating that it is "for the jury to resolve the conflicting inferences arising from the evidence"); *State v. Benton*, 299 N.C. 16, 24, 260 S.E.2d 917, 922 (1980) (concluding that testimony permitting conflicting inferences is for the jury to resolve).

Here, though, we conclude that the evidence only leads to one inference regarding premeditation and deliberation: Defendant specifically intended to kill his wife. The evidence indicates that Defendant shot Enelrae many times with a firearm that required a great deal of effort to operate, manually cocking the gun and pulling the trigger for each shot. And to shoot Enelrae ten times with the Colt 45 single-action revolver, Defendant must have unloaded and reloaded the revolver during the killing (since the cylinder only held six bullets at a time).

Defendant also made threats to Enelrae prior to her killing. For example, Defendant allegedly once shot holes into his above-ground pool; while recounting what happened, he looked into Enelrae's eyes and said, "I should have shot you." Further, Enelrae did not have defensive wounds, suggesting Defendant continued to shoot her after she was rendered helpless. Finally, there was evidence of prior physical and domestic abuse, such as the bruises on Enelrae's neck three weeks before her murder that suggested strangulation.

III. Conclusion

In sum, we conclude Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges TYSON and GRIFFIN concur.

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1. Where the evidence is capable of conflicting inferences on premeditation and deliberation, and if the defendant fails to request that a second-degree murder instruction be given and he is subsequently convicted for first-degree murder, he would only be entitled to plain error review of the trial court's failure to instruct on second-degree murder where he would have to show that the jury "probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

STATE OF NORTH CAROLINA
v.
LUIS FERNANDO SALDANA

No. COA23-51

Filed 19 December 2023

Criminal Law—motion to withdraw guilty plea—conditional discharge—treated as motion for appropriate relief—manifest injustice standard applied

The trial court did not err by denying defendant's motion to withdraw his guilty plea (entered in 2005), which defendant filed nearly eighteen years later after he was detained by federal immigration officials on the basis of that guilty plea. Although defendant argued in his motion that since his 2005 charges were dismissed (pursuant to a conditional discharge after successfully completing various conditions), he misunderstood the consequences of his plea and thus had a "fair and just" reason for withdrawal, the trial court correctly categorized defendant's motion as a post-judgment motion for appropriate relief (MAR) and properly applied the standard of whether "manifest injustice" had occurred. The standard had not been met where defendant, an undocumented immigrant, acknowledged at the time of his plea that he was subject to deportation and where he received the benefit of what he had bargained for by having his remaining charges dismissed and receiving the conditional discharge of the felony to which he had pleaded guilty.

Appeal by Defendant from an order entered 10 May 2022 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

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

North Carolina Advocates for Justice, by Christopher J. Heaney and North Carolina Justice Center, by Daniel Melo, Amici Curiea.

WOOD, Judge.

Luis Fernando Saldana ("Defendant") appeals from the trial court's order denying his motion to withdraw his guilty plea entered 8 February 2005. After careful consideration of the record and applicable law, we affirm the trial court's order.

I. Factual and Procedural Background

On 3 January 2005, Defendant was indicted by a grand jury for felony possession of cocaine, misdemeanor possession of a controlled substance, and misdemeanor possession of drug paraphernalia. On 8 February 2005, Defendant, through counsel, entered a plea of guilty to felony possession of cocaine in order to receive a conditional discharge pursuant to N.C. Gen. Stat. § 90-96. As a part of the plea transcript, Defendant affirmed, under oath, that he was satisfied "with [his] lawyer's legal services"; that he understood "the nature of the charges" and discussed "possible defenses" with his lawyer; that he had "the right to plead not guilty and be tried by a jury"; and that "if [he] was not a citizen of the United States of America, [his] plea[] of guilty . . . may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." The State, as part of the agreement, agreed to dismiss the pending misdemeanor charges.

The trial court accepted Defendant's plea on 8 February 2005 and, pursuant to the provisions of § 90-96, "defer[red] further proceedings" pending successful completion of various conditions, including payment of all fees, completion of a drug education program, and supervised probation. On 7 February 2006, the trial court, satisfied Defendant had complied with the previously imposed conditions for a conditional discharge, dismissed the charges against Defendant pursuant to the provisions of § 90-96.

At the time of these proceedings, Defendant, an undocumented immigrant, resided in North Carolina, had been married since 2004 to an American citizen, and was the father to a child born of the marriage. After the charges were dismissed against Defendant, he continued to reside in the United States and raise his three children with his wife. In 2021, Defendant was detained by immigration officials and sent to Stewart Detention Center in Lumpkin, Georgia as a consequence of the 2005 guilty plea entered pursuant to § 90-96. Because of his undocumented status and guilty plea to a felony, Defendant was subject to mandatory detention without bond.

On 19 January 2022, Defendant, through new counsel, filed a motion to withdraw his § 90-96 guilty plea. Defendant asserted that he had a "fair and just" reason to withdraw his guilty plea, because he was

"confused" and did not know "that the conditional discharge would not result in the withdrawal of his guilty plea and that the guilty plea would still continue to constitute a conviction for [federal law] immigration purposes." Specifically, Defendant alleged he did not "understand that the guilty plea would not be fully withdrawn upon his discharge from the post-plea diversion program." Defendant further alleged his guilty plea "is unfairly preventing Defendant from applying [for] cancellation of removal for non-lawful permanent residents or consular processing with a 1-601A waiver" in order for Defendant to remain in the United States. Defendant's motion also specifically stated he was not contending his original trial attorney rendered ineffective assistance of counsel.

On 6 May 2022, the trial court heard Defendant's motion. At the hearing, Defendant's counsel argued Defendant "was confused, he was misled by the circumstances" when he entered the § 90-96 guilty plea and based on communications with "officers of the court, . . . he believed that he would be left with, quote, a clean slate." During the hearing, Defendant's wife testified that shortly after Defendant's guilty plea was dismissed, the couple met with an immigration attorney "about what process we would need to go through to get him legal status." According to Defendant's wife, the immigration attorney told them there were "some laws or something hindering at the time, but they didn't tell him specifically what it was, that it would be better if we waited and came back because there was going to be an election at the time, and they didn't know if that would affect things."

Following Defendant's wife's testimony and arguments from the parties, the trial court denied Defendant's motion. On 10 May 2022, the trial court entered a written order, formally denying Defendant's motion. In its written order, the trial court treated Defendant's motion as a motion for appropriate relief ("MAR") but noted that under either the "fair and just" standard or the "manifest injustice" standard, Defendant had not shown entitlement to relief. The "fair and just" standard applies to motions to withdraw a plea, and the "manifest injustice" standard applies to MARs. The trial court found "[D]efendant was represented by competent counsel . . . well-known to the court as a skilled attorney with years of experience." Additionally, the trial court noted that in the plea transcript Defendant marked the box acknowledging that he understood the plea could have immigration consequences and "nothing was presented or shown to support any assertion that [D]efendant was 'misled' by the court or by his trial counsel." Accordingly, the court found "[t]he plea was not the result of misunderstanding, haste, coercion, or confusion, but was entered knowingly and voluntarily." The trial court further found that while "[t]he contention that sentencing was never

entered is probably correct," this is "not a dispositive issue" because the case "was fully dismissed by the court in a fair and just manner." On 11 May 2022, Defendant filed written notice of appeal.

II. Analysis

A. Appellate Jurisdiction

Defendant alleges the trial court addressed his claim as a motion to withdraw a plea and as a MAR. Defendant contends his pleading should have been treated by the trial court solely as a pre-sentence motion to withdraw his plea allowing him a right of direct appeal, but he has also filed a petition for *writ of certiorari* with this Court requesting appellate review of the merits of his appeal if his motion is treated as a MAR. According to Defendant, in consideration of the "seriousness of the consequences of allowing this plea to remain, the questionable constitutional validity of the plea itself, and the unusual procedural posture of his case," this Court should grant his *writ of certiorari* to "address the meritorious claim raised in [his] brief." In response, the State has filed a motion to dismiss Defendant's appeal.

Because Defendant filed the MAR "long after the time for taking appeal had expired, he can obtain appellate review of the court's ruling only by a petition for a *writ of certiorari*." *State v. Isom*, 119 N.C. App. 225, 227, 458 S.E.2d 420, 421 (1996) (emphasis added); N.C. Gen. Stat. § 15A-1422(c)(3) (2023). In our discretion, we grant Defendant's petition for *writ of certiorari* to consider the merits of Defendant's appeal and deny the State's motion to dismiss Defendant's appeal.

B. Standard of Review

Defendant argues the trial court "erred by denying [his] motion to withdraw his [§ 90-96] guilty plea because [he] gave fair and just reasons for doing so." The basis of Defendant's argument rests on the misapprehension that his motion to withdraw was asserted before sentencing on his plea and thus can be withdrawn if he can show a fair and just reason to do so. In refuting Defendant's characterization of the motion to withdraw, the State argues the trial court appropriately categorized Defendant's motion as a MAR which requires Defendant to prove his guilty plea amounts to "manifest injustice" and that Defendant is unable to do so.

Whether a defendant should be allowed to withdraw a guilty plea is a question of law, which is reviewed *de novo*. *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990). Under the *de novo* standard of review, the reviewing court considers the matter anew and freely

substitutes its own judgment for the lower court's judgment. *Sutton v. N.C. Dep't of Lab.*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999) (citation omitted).

When considering rulings on MARs, we review the trial court's order to determine "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation omitted). When a trial court's findings on a MAR are reviewed, "these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted). Because the facts underlying this case as described in the trial court's findings of fact are undisputed, we only consider whether the trial court correctly concluded that Defendant was not entitled to relief.

C. N.C. Gen. Stat. § 90-96 Conditional Discharge Guilty Plea

Under § 90-96, in certain circumstances, when an individual who has not previously been convicted of "(i) any felony offense under any state or federal laws . . . pleads guilty to or is found guilty of" certain drug and controlled substances offenses, the trial court "shall, without entering a judgment of guilt and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require . . ." N.C. Gen. Stat. § 90-96(a) (2023). Thus, § 90-96 provides a special form of conditional discharge wherein certain qualifying defendants may, for only their first qualifying offense, plead guilty or no contest, and "[u]pon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings." N.C. Gen. Stat. § 90-96(a). The statute further provides that after successful completion of these terms and conditions, the discharge and dismissal of the case "shall be without court adjudication of guilt and shall not be deemed a conviction." N.C. Gen. Stat. § 90-96(a). Such a dismissal is "final for the purpose of appeal." N.C. Gen. Stat. § 90-96(a).

The record evidence shows Defendant entered a guilty plea pursuant to § 90-96 to defer further prosecutorial proceedings, complied with the conditions set forth in the guilty plea, and after successfully complying with the conditions, the trial court discharged and dismissed the proceedings against him. N.C. Gen. Stat. § 90-96. However, Defendant and the State characterize Defendant's motion to withdraw his guilty plea as two different procedural mechanisms for requesting relief.

In *State v. Handy*, our Supreme Court examined the distinction between the treatment of a motion to withdraw a guilty plea made prior to sentencing and one made after sentencing. 326 N.C. at 536, 391 S.E.2d at 161. According to *Handy*, "[a] motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for appropriate relief." *Id.* (citations omitted).

> A motion for appropriate relief is a *post-verdict* motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial. N.C.G.S. § 15A-1411 (1988); Bailey, *Trial Stage and Appellate Procedure Act: An Overview*, 14 Wake Forest L. Rev. 899, 905-06 (1978). A party may make the motion "[a]fter the verdict but not more than 10 days after entry of judgment." N.C.G.S. § 15A-1414(a) (1988). "Entry of [j]udgment" occurs "when sentence is pronounced." N.C.G.S. § 15A-101(4a) (1988).

Id. at 535, 391 S.E.2d at 160-61. The Court reasoned that a "fundamental distinction exists between situations in which a defendant pleads guilty but changes his mind and seeks to withdraw the plea before sentencing and in which a defendant only attempts to withdraw the guilty plea after he hears and is dissatisfied with the sentence." *Id.* at 536, 391 S.E.2d at 161. In explaining the difference in treatment of the two motions, the Court noted:

> [i]n a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason. On the other hand, where the guilty plea is sought to be withdrawn by the defendant after sentence, it should be granted only to avoid manifest injustice.

Id. (citations omitted).

In the present case, the trial court correctly interpreted Defendant's motion as a post-judgment motion on a guilty plea and thus, treated the motion as a MAR. The trial court's dismissal of Defendant's charge in 2006 pursuant to § 90-96, constituted the "final judgment" of this matter. When Defendant pleaded guilty in 2005, the trial court imposed various conditions to the § 90-96 conditional discharge, including payment of restitution and community service, which Defendant eventually fulfilled. On 7 February 2006, the trial court entered final judgment on Defendant's felony possession of cocaine charge by dismissing the

charge under the terms of the § 90-96 judgment. Therefore, Defendant's motion, brought nearly eighteen years after his case was dismissed, is a post-sentence MAR requiring Defendant to show manifest injustice in order to withdraw his guilty plea.

Our case law sets forth six non-exclusive factors to consider when determining whether a defendant has shown sufficient cause to withdraw his plea and these factors remain the same whether defendant has made a "pre-" or "post-sentencing" motion. *State v. Konakh*, 266 N.C. App. 551, 556-57, 831 S.E.2d 865, 869 (2019) (citation omitted). The six factors include: (1) defendant's assertion of legal innocence; (2) the strength of the State's case; (3) the length of time between entry of the plea and the motion to withdraw; (4) the competency of counsel; (5) misunderstanding the consequences of the guilty plea, hasty entry, confusion, and coercion; and (6) prejudice to the State. *See State v. Taylor*, 374 N.C. 710, 719-25, 843 S.E.2d 46, 52-56 (2020) (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163).

If a defendant makes a *prima facie* showing of the existence of manifest injustice, "[t]he State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea. *Prejudice to the State is a germane factor against granting a motion to withdraw*." *Id.* at 725, 843 S.E.2d at 56 (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163).

In the present case, Defendant does not argue the first four factors related to the denial of his motion to withdraw his plea. Defendant has not asserted his legal innocence and he has not contested the strength of the State's proffer of evidence for his felony possession of a controlled substance. Furthermore, Defendant filed his "motion to withdraw" the guilty plea nearly eighteen years after it was entered. Additionally, Defendant's motion at trial and in his brief before this Court clearly states he is not raising an argument as to his attorney's competency or effective assistance. Instead, Defendant alleges he should be permitted to withdraw his guilty plea based upon a "[m]isunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion." Defendant contends

> his hasty plea was marred by confusion and a lack of understanding about the severe immigration consequences that would result from the plea. In the month between indictment and plea, [Defendant] was not informed about, nor did he come to understand, the certain and grave immigration-related consequences his conditional

> discharge plea would entail. Instead, [Defendant] reasonably understood a conditional discharge to mean dismissal of the charges and restoration to the position he was in before any allegations were made. [Defendant] had no inkling that a dismissal would be used against him to bar granting him a green card, to deport him, and to permanently bar him from reentering the United States.

Defendant asserts he believed that his guilty plea would be "fully withdrawn" upon his completion of the conditions imposed by the trial court pursuant to § 90-96, so that the dismissed felony charge would be wiped clean from his record and could not later be used against him. Defendant argues he did not learn until 2021 that his "conviction in this matter was only discharged for state purposes but not for immigration purposes" and that his guilty plea could lead to him being "held in immigration custody subject to mandatory detention." Defendant contends he was unaware that his entering a guilty plea under a § 90-96 conditional discharge agreement would qualify as a "conviction" under federal immigration law. Defendant argues had he "fully understood the consequences of taking the plea, in light of the extreme immigration consequences, [he] likely would have made a different choice and taken his chance at trial." While we are sympathetic to Defendant's purported misunderstanding of the consequences of his guilty plea, Defendant has not demonstrated the existence of a manifest injustice.

A plea agreement is contractual in nature, and the parties are bound by its terms. *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) (citation omitted). A court may accept a guilty plea only if it is "made knowingly and voluntarily." *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998) (citations omitted). A plea is voluntarily and knowingly made if the defendant is made fully aware of the direct consequences of his plea. *Id.* at 224, 506 S.E.2d at 277 (citations omitted).

In consideration of whether there is manifest injustice on the grounds of a misunderstanding of the consequences of a guilty plea, a defendant "must show that the misunderstanding related to the *direct consequences* of his plea, not a misunderstanding regarding the effect of the plea on some collateral matter." *State v. Marshburn*, 109 N.C. App. 105, 109, 425 S.E.2d 715, 718 (1993). "Direct consequences are those having a definite, immediate and largely automatic effect on the range of the defendant's punishment for the crime charged." *Id.* (cleaned up).

In *Marshburn*, we considered the effect a defendant's guilty plea would have upon his pending federal criminal proceedings. In that case, the defendant sought to withdraw his eight-month-old guilty plea prior to "sentencing." *Id.* Seeking to withdraw his plea, the defendant argued he entered the plea "with the understanding that it would not count as a conviction in a pending federal drug case when in fact it was considered by the federal court as a conviction." *Id.* at 108, 425 S.E.2d at 718. This Court rejected such a contention and concluded that "[a]ny effect [the defendant's] plea had on the pending federal criminal proceedings was collateral and therefore not a basis for supporting a motion to withdraw the plea at issue." *Id.* at 109, 425 S.E.2d at 718. Accordingly, the defendant did not even satisfy the "fair and just reason" standard. *Id.*

Here, Defendant's contention that he misunderstood the consequences of his guilty plea under a state statute would qualify as a conviction under federal immigration law is similar to the defendant's argument in *Marshburn*. Here, as in *Marshburn*, the effect of Defendant's guilty plea on his federal immigration proceedings is a collateral rather than a direct consequence of his plea.

Furthermore, this Court has previously determined "if the defendant signed a Transcript of Plea and the record reveals the trial court made 'a careful inquiry' of the defendant, it is sufficient to show the defendant's plea was knowingly and voluntarily made, with full awareness of the direct consequences." *Russell*, 153 N.C. App. at 511, 570 S.E.2d at 248 (citation omitted). Here, Defendant acknowledged under oath his awareness that his "plea[] of guilty . . . may result in deportation . . . or the denial of naturalization under federal law[.]" Therefore, at the time Defendant entered his guilty plea, he was warned he was subject to deportation as an undocumented immigrant residing in the United States. Defendant has not presented any "clear and convincing evidence to the contrary." *State v. Ager*, 152 N.C. App. 577, 584, 568 S.E.2d, 328, 332 (2002) (noting that when a defendant states something under oath in conjunction with a plea, he is bound by such assertion "absent clear and convincing evidence to the contrary."). Furthermore, we note that at the time of Defendant's guilty plea, he was subject to removal from the United States regardless of the conditional discharge because of his status as an undocumented immigrant.

The State also aptly notes that at the time Defendant entered his guilty plea,

> the law was unclear as to whether a conditional discharge would qualify as a "conviction" for immigration purposes.

> Indeed, it was not until 2017 that the Fourth Circuit definitively ruled that a conditional discharge guilty plea is a conviction under federal immigration law. *See Jacquez v. Sessions*, 859 F.3d, 258, 261-64 (2017). Before that, the Fourth Circuit had ruled that, at least in some instances, a conditional discharge was not a "conviction," for immigration purposes. *See Crespo v. Holder*, 631 F.3d 130, 136 (2011).

Defendant has not presented "clear and convincing" evidence to show he misunderstood the consequences of his plea or that he did not do so willingly and knowingly at the time his § 90-96 guilty plea was entered. Under North Carolina law, Defendant received exactly what he bargained for under his plea agreement: in exchange for his plea of guilty to the felony possession of cocaine charge, Defendant's remaining charges were dismissed, and he received a conditional discharge of the felony upon the completion of the conditions set by the court under state law. While Defendant may now regret the consequences of his guilty plea in light of its implications under federal law, his remorse does not reflect a misunderstanding of the guilty plea *at the time* he entered into it. Based upon the record evidence before us, Defendant has not presented sufficient evidence to establish "manifest injustice" in order for his guilty plea under N.C. Gen. Stat. § 90-96 to be withdrawn.

III. Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendant's motion to withdraw his guilty plea under N.C. Gen. Stat. § 90-96.

AFFIRMED.

Judges CARPENTER and STADING concur.

STATE v. SHUMATE

[291 N.C. App. 684 (2023)]

STATE OF NORTH CAROLINA
v.
ROBBIE EUGENE SHUMATE, DEFENDANT

No. COA23-256

Filed 19 December 2023

1. Firearms and Other Weapons—discharging firearm into occupied vehicle while in operation—jury instructions—lesser-included offense not required

In defendant's prosecution for discharging a firearm into an occupied vehicle while in operation, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of discharging a firearm into an occupied vehicle. The evidence supported each element of the greater offense, including that the vehicle was "in operation" where, after three persons took a puppy from defendant's property and began to drive away, although the driver had to stop the vehicle to prevent it from going off a ledge, the engine was still running and an occupant was still in the driver's seat when defendant fired a gun into the vehicle.

2. Firearms and Other Weapons—discharging firearm into occupied vehicle while in operation—jury instructions—definition of "in operation" not required

In defendant's prosecution for discharging a firearm into an occupied vehicle while in operation pursuant to N.C.G.S. § 14-34.1, where defendant did not object to the jury instructions as given, the trial court did not commit plain error by failing to define the phrase "in operation," which is not defined in the statute, because those words were of common usage and meaning to the general public.

3. Firearms and Other Weapons—discharging firearm into occupied vehicle while in operation—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of discharging a firearm into an occupied vehicle while in operation where the State presented substantial evidence of each essential element of the offense and that defendant was the perpetrator, including that defendant deliberately fired a gun into a vehicle while the engine was still running and an occupant was still in the driver's seat, even though the vehicle was not moving.

STATE v. SHUMATE

[291 N.C. App. 684 (2023)]

Appeal by Defendant from judgment entered 13 July 2022 by Judge Bradley B. Letts in McDowell County Superior Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher R. McLennan, for the State.

Gilda C. Rodriguez, for Defendant-Appellant.

CARPENTER, Judge.

Robbie Eugene Shumate ("Defendant") appeals from judgment after a jury convicted him of discharging a firearm into an occupied vehicle in operation and of possessing of a firearm as a felon. On appeal, Defendant argues the trial court erred by: (1) not instructing the jury on the lesser included offense of discharging a firearm into an occupied vehicle; (2) not defining "in operation" during its jury instructions; and (3) denying Defendant's motion to dismiss. After careful review, we disagree with Defendant and find no error.

I. Factual & Procedural Background

On 3 August 2020, a McDowell County grand jury indicted Defendant for discharging a firearm into an occupied vehicle in operation, possessing a firearm as a felon, and being a habitual felon. On 11 July 2022, the State tried Defendant in McDowell County Superior Court.

Evidence at trial tended to show the following. On 8 June 2022, Defendant's former girlfriend and two accomplices (collectively, the "Intruders") agreed to enter Defendant's property to take a puppy from Defendant's home. After driving a vehicle onto Defendant's property, the Intruders called for Defendant's puppy, the puppy entered the Intruders' vehicle, and the Intruders attempted to drive away.

But when the Intruders attempted to drive away, their vehicle "almost fell off a ledge on the driveway," so they had to stop. From there, testimony differed. One Intruder testified that Defendant approached the vehicle with a rifle. And while the vehicle was running, Defendant fired the rifle through the rear passenger-side window. On the other hand, Defendant testified that he did not have a rifle when he approached the vehicle. Rather, he attempted to grab a rifle from one of the Intruders, and the rifle accidentally fired. Defendant did not dispute that the vehicle's engine was running or that an Intruder was in the driver's seat.

The trial court instructed the jury on discharging a firearm into an occupied vehicle in operation, but the trial court did not instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle. The trial court also did not instruct the jury on the meaning of "in operation." Defendant did not object to the trial court's instructions.

The jury found Defendant guilty of discharging a firearm into an occupied vehicle in operation and of possessing a firearm as a felon. Defendant admitted to attaining habitual-felon status. On 13 July 2022, the trial court entered a consolidated judgment, sentencing Defendant to between 96 and 128 months of imprisonment. That same day, Defendant gave oral notice of appeal in open court.

II. Jurisdiction

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

III. Issues

The issues on appeal are whether the trial court erred by: (1) not instructing the jury on the lesser included offense of discharging a firearm into an occupied vehicle; (2) not defining "in operation" during its jury instructions; and (3) denying Defendant's motion to dismiss.

IV. Analysis

A. Lesser Included Offense

[1] Defendant first argues that the trial court erred by failing to instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle. We disagree.

Defendant failed to object to the trial court's jury instructions; therefore, we review the instructions for plain error. *State v. Wright*, 252 N.C. App. 501, 506, 798 S.E.2d 785, 788 (2017) ("Because Defendant failed to object to the trial court's jury instructions, our review of this issue is limited to plain error."); *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) ("[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error.").

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 *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334–35). 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)).

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

"The elements of discharging a firearm into an occupied vehicle while in operation are (1) willfully and wantonly discharging (2) a firearm (3) into an occupied vehicle (4) that is in operation." *State v. Juarez*, 369 N.C. 351, 357 n.2, 794 S.E.2d 293, 299 n.2 (2016) (citing N.C. Gen. Stat. § 14-34.1(b)). The crime is codified in section 14-34.1, but "in operation" is undefined in the body of the statute. *See* N.C. Gen. Stat. § 14-34.1 (2021). And until now, our Court has only defined "in operation" through an unpublished case, *see State v. Garner*, 2013 N.C. App. LEXIS 1080 at *20–21 (Oct. 15, 2013), and in other statutory contexts, *see, e.g.*, *State v. Fields*, 77 N.C. App. 404, 406–07, 335 S.E.2d 69, 70 (1985) (discussing "operating" and "operator" concerning section 20-138.1).

Although unpublished, we think the *Garner* Court took the correct approach in defining "in operation." *See Garner*, 2013 N.C. App. LEXIS 1080 at *20–21 (using a dictionary to define "operation"). This is because 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). And absent precedent, we look to dictionaries to discern a word's common meaning. *Midrex Techs., Inc. v. N.C. Dept. of Rev.*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016).

Merriam-Webster's defines "operation" as "the quality or state of being functional or operative." *Operation*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Although this definition is a bit circular, we understand its application to a vehicle to mean this: A vehicle is "in operation" if it is "in the state of being functional," i.e., if it can be driven under its own power. *See id.* For a vehicle to be driven, there must be a person in the driver's seat, and its engine must be running.

Defendant, however, suggests that "in operation" means the vehicle must be moving. But this would create absurd results. For example, if someone shot into a vehicle temporarily stopped at a redlight, it would be unreasonable to say the vehicle was not "in operation." Accordingly, until the General Assembly adopts a different definition, we hold that "in operation" carries its common meaning: For a vehicle to be in operation, a person must be in the driver's seat with the vehicle's engine running.

Here, the State charged Defendant with discharging a firearm into an occupied vehicle in operation, and the trial court declined to instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle. Because the only difference between the charges is whether the vehicle was "in operation," the question here is whether "the evidence would permit" a rational jury to find the Intruders' vehicle was not in operation. *See Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771; N.C. Gen. Stat. § 14-34.1(a)–(b).

Defendant presented no evidence indicating the Intruders' vehicle engine was off or that no one was in the driver's seat. Indeed, the only evidence concerning these two questions was testimony in the affirmative. In other words, there is no "evidence in the record which might convince a rational trier of fact" that the Intruders' vehicle was not "in operation." *See Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772; N.C. Gen. Stat. § 14-34.1(a)–(b). Therefore, the trial court did not err by failing to instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle. *See Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772.

B. Defining "In Operation"

[2] Defendant next argues that the trial court erred because it failed to define "in operation" during its jury instruction. We disagree.

Defendant's "in operation" argument also concerns the trial court's jury instructions, which we must review for plain error because Defendant failed to object at trial. *See Wright*, 252 N.C. App. at 506, 798 S.E.2d at 788.

"It is the duty of the trial court to instruct the jury on the law applicable to the substantive features of the case arising on the evidence . . . ." *State v. Robbins*, 309 N.C. 771, 776–77, 309 S.E.2d 188, 191 (1983). But " '[i]t is not error for the court to fail to define and explain words of common usage and meaning to the general public.' " *State v. Mylett*, 262 N.C. App. 661, 676, 822 S.E.2d 518, 530 (2018) (quoting *S. Ry. Co. v. Jeffco Fibres, Inc.*, 41 N.C. App. 694, 700, 255 S.E.2d 749, 753 (1979)).

As detailed above, "in operation" under section 14-34.1 carries its common meaning. Therefore, the trial court did not err by failing to

explain "in operation" during its jury instructions. *See id.* at 676, 822 S.E.2d at 530.

C. Motion to Dismiss

[3] In his final argument, Defendant asserts the trial court erred when it failed to grant his motion to dismiss the charge of discharging a firearm into an occupied vehicle in operation. Again, we disagree.

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). 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)).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In evaluating the sufficiency of the evidence concerning a motion to dismiss, the evidence must be considered " 'in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . .' " *State v. Winkler*, 368 N.C. 572, 574–75, 780 S.E.2d 824, 826 (2015) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)).

" 'Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration.' " *State v. Agustin*, 229 N.C. App. 240, 242, 747 S.E.2d 316, 318 (2013) (quoting *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990)).

Again, "[t]he elements of discharging a firearm into an occupied vehicle while in operation are (1) willfully and wantonly discharging (2) a firearm (3) into an occupied vehicle (4) that is in operation." *Juarez*, 369 N.C. at 357 n.2, 794 S.E.2d at 299 n.2 (citing N.C. Gen. Stat. § 14-34.1(b)).

Here, the State offered testimony concerning each element of discharging a firearm into an occupied vehicle in operation. An Intruder testified that Defendant deliberately fired a gun into a vehicle while the vehicle's engine was running and while an Intruder was in the driver's seat. *See Juarez*, 369 N.C. at 357 n.2, 794 S.E.2d at 299 n.2. This evidence is substantial because it is relevant, and a "reasonable mind might accept [it] as adequate to" conclude that Defendant discharged a firearm into an occupied vehicle in operation. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Therefore, the trial court did not err by denying Defendant's motion to dismiss because the State presented substantial evidence "of each essential element of the offense charged" and of Defendant "being the perpetrator of such offense." *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

V. Conclusion

We conclude that the trial court did not err by failing to instruct the jury on the lesser included offense of discharging a firearm into an occupied vehicle, by not defining "in operation" during its jury instructions, or by denying Defendant's motion to dismiss.

NO ERROR.

Judges COLLINS and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 DECEMBER 2023)

BETTIS v. WEISS No. 23-514	Craven (21CVS294)	Dismissed
GLOB. OUTREACH TELE-REHAB. SERVS., INC. v. WOODS No. 23-325	Cumberland (20CVS2439)	Affirmed
HONEYCUTT v. VELASQUEZ-MORALES No. 23-406	Wayne (20CVS592)	No Error
IN RE A.C. No. 23-188	Cumberland (19JA301)	Affirmed
IN RE D.A.M. No. 23-399	Mecklenburg (19JT151)	Affirmed
IN RE D.L. No. 23-219	Alexander (20JA42)	Affirmed in Part; Vacated in Part, and Remanded
IN RE E.R.B. No. 23-435	Haywood (21JT27)	Affirmed.
IN RE G.R.N. No. 23-499	Davidson (21JA5)	Affirmed
IN RE H.R.M. No. 23-97	Chatham (17JT37)	Vacated and Remanded
IN RE I.G. No. 23-445	Beaufort (22JT42) (22JT43) (22JT44) (22JT45) (22JT46)	Affirmed
IN RE I.K. No. 23-518	Rowan (19JT153-155)	Affirmed
IN RE J.H. No. 23-402	Perquimans (19JT12)	Reversed
IN RE J.K. No. 23-265	Edgecombe (22JA19) (22JA20) (22JA21) (22JA22)	Affirmed.

IN RE K.R.C. No. 23-587	Alamance (21JT101)	Affirmed
IN RE L.A.R. No. 23-428	New Hanover (17JT139)	Affirmed
IN RE L.A.S. No. 23-574	McDowell (21JT88)	Affirmed
IN RE M.E.W. No. 23-21	Guilford (20JB697)	Affirmed in Part; Remanded in Part
IN RE N.T. No. 23-456	Durham (18J130) (18J132) (18J133)	Affirmed
IN RE R-M.M.A. No. 23-276	Yancey (21JT2)	Affirmed
IN RE S.O.R. No. 23-422	Yancey (19JT31)	Affirmed
IN RE S.Z.H. No. 23-536	Alamance (21JT146) (21JT147) (21JT148) (21JT149)	Affirmed
IN RE T.L.A. No. 23-506	Randolph (21JT69)	Affirmed
IN RE Z.J. No. 22-835	Mecklenburg (18JT199)	Affirmed
IN RE Z.Y. No. 23-522	Alexander (21JA43)	Vacated and Remanded
LITTLE v. CLAY No. 23-213	New Hanover (22CVS353)	Remanded
LOPEZ v. PRUDENTIAL INS. CO. OF AM. No. 23-427	Gaston (20CVS1700)	Affirmed
MATTHEWS v. HERRING No. 22-1026	Johnston (19SP654)	Affirmed
NELSON v. GOODYEAR TIRE & RUBBER, CO. No. 23-595	N.C. Industrial Commission (18-053490)	Affirmed

PARKER v. McCOY No. 23-341	Guilford (20CVD3674)	Vacated and Remanded
PORTER v. ALLIANCE CREDIT COUNSELING No. 23-363	N.C. Industrial Commission (16-053823)	Affirmed
RIFFLE v. EST. OF MORGAN No. 23-560	Mecklenburg (21CVS3868)	Dismissed
ROBERTSON v. ZAXBY'S OF KNIGHTDALE No. 23-513	Wake (22CVS129)	Affirmed
SIMMONS v. SIMMONS No. 22-855	Pitt (19CVD2825)	Reversed in part; vacated in part
STATE v. BERRYMAN No. 23-225	Graham (21CRS285) (21CRS288) (21CRS299)	Affirmed in part and remanded for correction to the judgment.
STATE v. BLUE No. 23-450	Dare (21CRS50682-83) (22CRS30-31)	Affirmed
STATE v. BOWEN No. 23-776	Forsyth (17CRS53913)	Dismissed
STATE v. BURRUS No. 23-85	Beaufort (18CRS51590)	Affirmed
STATE v. C.K.D. No. 23-204	Iredell (19CRS51918) (22R306)	Affirmed
STATE v. DUNCAN No. 22-906	Catawba (19CRS53701-02) (20CRS1227)	Dismissed
STATE v. FREEMAN No. 23-654	Buncombe (21CRS86691-98) (22CRS335860) (22CRS84072) (23CRS54-56)	Reversed in Part and Remanded
STATE v. GARCIA No. 23-110	Mecklenburg (17CRS210128)	No Error
STATE v. GEORGE No. 23-664	Surry (20CRS50453)	No Error

STATE v. GREEN No. 23-321	Lee (16CRS51444)	No Error
STATE v. JOHNSON No. 23-359	Forsyth (20CRS51343)	No Error
STATE v. JOHNSON No. 22-658	Pasquotank (18CRS317) (19CRS364-65)	No error in part; remanded for correction of clerical error in part
STATE v. LOFTIS No. 23-311	McDowell (20CRS51264-65)	No Error
STATE v. OTT No. 23-648	Scotland (21CRS52308)	Affirmed.
STATE v. PITTMAN No. 22-779	Edgecombe (19CRS50399) (21CRS606)	No error in part; remanded in part
STATE v. PORTER No. 22-516	Cabarrus (18CRS52885) (18CRS52926)	No Error
STATE v. SELF No. 23-523	Mitchell (22CRS192) (22CRS50092)	NO PLAIN ERROR
STATE v. STEELE No. 23-552	Randolph (18CRS55178)	No Error
STATE v. YATES No. 23-49	Chatham (19CRS50643-46)	Dismissed in Part; No Error in Part

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