292 N.C. App.—No. 2 Pages 112-220

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 26, 2024

MAILING ADDRESS: The Judicial Department
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OF

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Director
David Alan Lagos

Staff Attorneys
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Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James
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Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

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COURT OF APPEALS

CASES REPORTED

FILED 16 JANUARY 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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SUBROGATION—Continued

of N.C.G.S. § 20-279.21(b)(4), to advance to plaintiff the amount of the settlement within thirty days in order to protect its subrogation rights. Despite Intervenor's argument, the plain meaning of the statute did not differentiate between pre-exhaustion payments—where a UIM insurer pays a claim prior to the insured exhausting the tortfeasor's liability insurance coverage—and post-exhaustion payments. Thus, Intervenor was not entitled to exercise any right of subrogation to recoup its UIM payment from defendants' insurer. **Ennis v. Haswell, 112.**

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.

ENNIS v. HASWELL

[292 N.C. App. 112 (2024)]

PAUL ENNIS, AS GUARDIAN AD LITEM OF T.F.G., II, A MINOR, PLAINTIFF
v.
ALEXANDER HASWELL, RONALD HASWELL, JR., AND BETTY HASWELL, DEFENDANTS
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., INTERVENOR

No. COA23-534

Filed 16 January 2024

Subrogation—insurer's right—reimbursement of underinsured motorist coverage—statutory requirements—failure to advance amount of offer

In a case arising from an automobile accident involving a serious injury, where plaintiff's insurer ("Intervenor") paid plaintiff the full amount of underinsured motorist (UIM) coverage under its policy ($100,000) and then received notice that plaintiff and defendants' liability insurer reached a settlement agreement for that insurer to pay plaintiff over $300,000, Intervenor was required, based on the clear and unambiguous language of N.C.G.S. § 20-279.21(b)(4), to advance to plaintiff the amount of the settlement within thirty days in order to protect its subrogation rights. Despite Intervenor's argument, the plain meaning of the statute did not differentiate between pre-exhaustion payments—where a UIM insurer pays a claim prior to the insured exhausting the tortfeasor's liability insurance coverage—and post-exhaustion payments. Thus, Intervenor was not entitled to exercise any right of subrogation to recoup its UIM payment from defendants' insurer.

Appeal by intervenor from order entered 12 December 2022 by Judge James M. Webb in Chatham County Superior Court. Heard in the Court of Appeals 31 October 2023.

White & Stradley, PLLC, by J. David Stradley, and Brian D. Westrom for plaintiff-appellee.

No brief filed for defendants-appellees.

Young, Moore, and Henderson, P.A., by Walter E. Brock, Jr., and Matthew C. Burke, for intervenor-appellant.

ZACHARY, Judge.

Intervenor North Carolina Farm Bureau Mutual Insurance Company, Inc., ("Farm Bureau") appeals from the trial court's order denying its motion to enforce its right of subrogation, in which Farm Bureau sought reimbursement of its $100,000 underinsured motorist ("UIM") coverage payment to Plaintiff from the proceeds of Plaintiff's settlement with Defendants. After careful review, we affirm.

I. Background

On 19 February 2016, T.F.G., II, ("T.F.G.") was severely injured while riding as a passenger in a vehicle operated by Defendant Alexander Haswell and owned by Alexander's parents, Defendants Ronald Haswell, Jr., and Betty Haswell. There is no dispute regarding the relevant insurance policies' coverage at the time of the incident. As the trial court found in its order:

> 5. At the time of the Accident, Defendants were insured by an auto liability insurance policy issued by Nationwide General Insurance Company ("Nationwide") with limits of $300,000 per person and $300,000 per accident. This policy also provided [UIM] coverage in the amount of $300,000 per person and $300,000 per accident. The Nationwide policy provided UIM coverage for [T.F.G.], as a passenger in an insured vehicle, in the amount of $300,000 per person and $300,000 per accident.
>
> 6. At the time of the Accident, [T.F.G.] was an insured under a motor vehicle liability insurance policy issued by [Farm Bureau]. The Farm Bureau policy provided UIM coverage for [T.F.G.] with a limit of $100,000 per person.

On 16 March 2018, Plaintiff's counsel[1] sent a letter to Nationwide, demanding that Nationwide tender its policy limit within 30 days. Nationwide did not respond to this demand. Consequently, on 26 April 2018, Plaintiff, acting on T.F.G.'s behalf as his guardian ad litem, filed suit against Defendants in Chatham County Superior Court. In the complaint, Plaintiff alleged negligence by Defendant Alexander Haswell, and the vicarious liability of Defendants Ronald and Betty Haswell pursuant to the family purpose vehicle doctrine.

On 2 May 2018, Plaintiff's counsel notified Farm Bureau that (1) Nationwide had not responded to the time-limited demand, (2) Plaintiff

1. On 26 April 2018, the trial court granted Plaintiff Paul Ennis's motion to be appointed T.F.G.'s guardian ad litem, as T.F.G. was a minor child without general or testamentary guardian.

had filed suit against Defendants, and (3) Farm Bureau had the right to participate in the litigation as an unnamed party.

On 9 May 2018, Plaintiff's counsel stated to defense counsel that Plaintiff "would not accept $300,000 from Nationwide at this point in time in settlement on behalf of . . . Defendants." On 24 May and 8 June 2018, Nationwide served Plaintiff with offers of judgment in the amount of $300,000 on Defendants' behalf. Plaintiff's counsel sent a copy of the 8 June offer of judgment to Farm Bureau on 14 June 2018, but Farm Bureau did not advance the amount of Nationwide's tender. Plaintiff did not accept the offer of judgment, and the litigation continued.

A month later, on 20 July 2018, Farm Bureau offered to pay Plaintiff $100,000 pursuant to its UIM coverage. Plaintiff accepted this offer, and by consent order entered on 28 January 2019, the trial court approved the parties' settlement of the Farm Bureau UIM claim. Farm Bureau "reserv[ed] any and all rights, if any, it may have to recover its payments from the tortfeasor, and acknowledg[ed] that [Defendants] contend that these rights have been waived."

On 23 September 2022, Plaintiff and Defendants participated in court-ordered mediation, which culminated in an agreement to settle for an amount in excess of $300,000. That same day, Plaintiff's counsel notified Farm Bureau via email of the settlement agreement and suggested that Farm Bureau could "choose to advance to secure its subrogation rights." On 12 October 2022, Farm Bureau declined to advance the amount of the settlement agreement.

On 26 October 2022, Farm Bureau filed (1) a motion to intervene in the action and (2) a motion to enforce its subrogation right, pursuant to N.C. Gen. Stat. § 20-279.21(b)(4) (2021). The matter came on for hearing on 31 October 2022.

After entering a sealed order approving the confidential settlement, the trial court heard Farm Bureau's motions. The trial court granted Farm Bureau's motion to intervene without objection from the other parties. On 12 December 2022, the trial court entered an order denying Farm Bureau's motion to enforce its subrogation right. Farm Bureau timely filed notice of appeal.

II. Discussion

This case involves the interpretation of N.C. Gen. Stat. § 20-279.21(b)(4): in sum, the question presented is whether Farm Bureau was required to advance to Plaintiff the amount of the liability settlement offer in order to preserve its subrogation claim against the proceeds of any recovery from the tortfeasor.

Farm Bureau argues that, because it paid its UIM policy limit before the liability insurer exhausted its policy limits, pursuant to § 20-279.21(b)(4), "Farm Bureau became subrogated to the extent of that payment and therefore earned the right to reimbursement of its $100,000 payment from any money that Plaintiff recovered from the owner or operator of the underinsured vehicle or their liability insurer." Plaintiff, on the other hand, contends that the plain text of § 20-279.21(b)(4) is clear—if a UIM insurer "wishes to preserve its subrogation rights against the tortfeasor, it must advance a payment to the insured in the amount of the tentative settlement with a liability insurer within 30 days of the date it receives notice of the offer. If it does not, it loses all subrogation rights." For the reasons that follow, we agree with Plaintiff.

A. Standard of Review

The question presented is purely a matter of law. "Answering this question primarily involves interpretation of the Motor Vehicle Safety and Financial Responsibility Act of 1953 (commonly referred to as the 'FRA'), and examination of the terms of Farm Bureau's motor vehicle insurance policy, each a question of law." *Lunsford v. Mills*, 367 N.C. 618, 622–23, 766 S.E.2d 297, 301 (2014) (citation omitted). "This Court reviews questions of law de novo, meaning that we consider the matter anew and freely substitute our judgment for the judgment of the lower court." *Id.* at 623, 766 S.E.2d at 301.

B. Analysis

"According to well-established North Carolina law, the intent of the Legislature controls the interpretation of a statute." *C Invs. 2, LLC v. Auger*, 383 N.C. 1, 8, 881 S.E.2d 270, 276 (2022) (citation omitted). "The avowed purpose of the [FRA], of which [N.C. Gen. Stat.] § 20-279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists. It is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (citations omitted), *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

One portion of N.C. Gen. Stat. § 20-279.21(b)(4) addresses a UIM insurer's right to subrogation:

> *An underinsured motorist insurer may at its option*, upon a claim pursuant to underinsured motorist coverage, *pay moneys without there having first been an exhaustion of the liability insurance policy* covering the ownership, use, and maintenance of the underinsured highway vehicle. *In the event of payment, the underinsured motorist insurer*

> *shall be either*: (a) entitled to receive by assignment from the claimant any right or (b) *subrogated to the claimant's right* regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. *No insurer shall exercise any right of subrogation* or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist *where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days* following receipt of that notice.

N.C. Gen. Stat. § 20-279.21(b)(4) (emphases added).

Farm Bureau contends that this section of the statute creates two kinds of subrogation rights, differentiated by whether the UIM insurer pays a claim before the insured exhausts the tortfeasor's liability insurance coverage or after the exhaustion of coverage. According to Farm Bureau, if a UIM insurer elects to make a pre-exhaustion payment, as it did in the instant case, the insurer "become[s] subrogated to the claimant's rights against the tortfeasor, to the extent of [the insurer's] payment." Notably, Farm Bureau only cites the first two sentences of the above-quoted portion of § 20-279.21(b)(4) to support this "type of subrogation"; Farm Bureau's citation ends before the sentence limiting "*any* right of subrogation . . . where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days[.]" *Id.* (emphasis added).

In Farm Bureau's view, the omitted, limiting language of § 20-279.21(b)(4) solely applies to the other "type of subrogation" that Farm Bureau identifies: a post-exhaustion payment. In the event of a post-exhaustion payment, Farm Bureau asserts that the UIM insurer may either appear and defend the action or "advance" the amount of settlement. Thus, according to Farm Bureau, by applying the statutory limits from this "separate portion" of § 20-279.21(b)(4), the trial court erroneously "engrafted an inapplicable requirement on Farm Bureau's

subrogation right and effectively ruled that Farm Bureau had no subrogation right whatsoever."

Farm Bureau's argument is unpersuasive for several reasons. To begin, there is no ambiguity in the plain language of § 20-279.21(b)(4). "Where the language of a statute is clear and unambiguous, there is no 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." *C Invs. 2*, 383 N.C. at 8, 881 S.E.2d at 276 (cleaned up). Section 20-279.21(b)(4) plainly states:

> *No insurer* shall exercise *any right of subrogation* . . . where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice.

N.C. Gen. Stat. § 20-279.21(b)(4) (emphases added).

The language used by our General Assembly in this subsection is "clear and unambiguous" and thus, we "are without power to interpolate, or superimpose, provisions and limitations not contained" within its text. *C Invs. 2*, 383 N.C. at 8, 881 S.E.2d at 276 (citation omitted); *see also Haarhuis v. Cheek*, 261 N.C. App. 358, 366, 820 S.E.2d 844, 851 (2018) ("This language is clear and unambiguous, and we are not at liberty to divine a different meaning through other methods of judicial construction." (cleaned up)), *disc. review denied*, 372 N.C. 298, 826 S.E.2d 698 (2019). Consequently, it matters not whether there are "two different types of statutory subrogation rights[,]" as Farm Bureau contemplates. In that Farm Bureau "fail[ed] to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice[,]" Farm Bureau is not entitled to "exercise *any* right of subrogation"—regardless of whether that right of subrogation arises from a pre-exhaustion payment. N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis added).

Moreover, Farm Bureau misplaces its reliance on *Farm Bureau Insurance Co. of North Carolina v. Blong*, 159 N.C. App. 365, 583 S.E.2d 307, *disc. review denied*, 357 N.C. 578, 589 S.E.2d 125 (2003), and *Tutterow v. Hall*, 283 N.C. App. 314, 872 S.E.2d 171 (2022), *petition for disc. review dismissed and cert. denied*, 384 N.C. 33, 883 S.E.2d 475 (2023).

Farm Bureau cites *Blong* for the proposition that Farm Bureau "was not required to advance [payment] in order to preserve its subrogation

right." However, *Blong* stands for no such proposition. After quoting the section of the Farm Bureau UIM policy at issue in *Blong*—with its provision that subrogation rights do not apply "if we have been given written notice in advance of a settlement and fail to advance payment in an amount equal to the tentative settlement within 30 days following receipt of such notice"—this Court noted that "[t]he contingency in the latter provision has not been alleged, therefore no impediment from the policy exists." 159 N.C. App. at 372, 583 S.E.2d at 311. *Blong* is simply inapplicable to the dispositive issue in the present case.

Similarly inapplicable is *Tutterow*, in which we held that "[t]he trial court properly determined that [N.C. Gen. Stat. § 20-279.21(b)(4)] is inapplicable" in that "the UIM carriers had no duty to advance any payments because they owed nothing under their policies"; the amounts of the liability policies' coverage and the UIM coverage were equal, and therefore, there was no UIM obligation. 283 N.C. App. at 320, 872 S.E.2d at 176.

In light of our conclusion that no distinction exists between pre-exhaustion and post-exhaustion payments under § 20-279.21(b)(4), we need not address Farm Bureau's argument that "there had been no exhaustion of [Defendants'] liability insurance policy" at the time that Farm Bureau paid its $100,000. Farm Bureau's position is based on the premise that Plaintiff "had expressly rejected the tender of policy limits and stated [an] intent to continue to reject settlement offers for the liability insurer's policy limits." This argument has been repeatedly rejected by this Court:

> Both the statute and case law require a UIM insurer be notified when a settlement *offer* is made, and when the primary liability insurance carrier has *offered* the limits of its policy in settlement, as was done in this case, the insurer must advance that amount to the insured within 30 days to protect its subrogation rights. Neither the statute nor case law require that the settlement be completed or that the UIM carrier must have notice of its insured's acceptance of the offer.

Daughtry v. Castleberry, 123 N.C. App. 671, 675, 474 S.E.2d 137, 140 (1996), *aff'd*, 346 N.C. 272, 485 S.E.2d 45 (1997). Accordingly, under *Daughtry*, the only requirement to trigger the 30-day deadline is an *offer*, and the insured's response—whether known or unknown to the UIM insurer—is immaterial.

We acknowledge the public policy concerns advanced by Farm Bureau. However, this Court is "an error-correcting body, not a

policy-making or law-making one." *Shearin v. Brown*, 276 N.C. App. 8, 14, 854 S.E.2d 443, 448 (2021) (citation omitted). Our role "is not to speculate about the consequences of the language the legislature chose; we interpret that language according to its plain meaning and if the result is unintended, the legislature will clarify the statute." *Wake Radiology Diagnostic Imaging LLC v. N.C. Dep't of Health & Hum. Servs.*, 279 N.C. App. 673, 681, 866 S.E.2d 489, 495 (2021) (cleaned up). Accordingly, although we decline to address Farm Bureau's policy arguments, the arguments are preserved should Farm Bureau seek further review.

III. Conclusion

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

AFFIRMED.

Judges STADING and THOMPSON concur.

JEAN HILL AND JAMES HILL, PETITIONERS
v.
THE DIVISION OF SOCIAL SERVICES AND THE DIVISION OF HEALTH BENEFITS OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENTS

No. COA23-197

Filed 16 January 2024

Public Assistance—Medicaid plan—full benefits denied—definition of "caretaker relative"—great-aunt and great-uncle excluded

The trial court properly upheld decisions of the N.C. Department of Health and Human Services determining that a great-aunt and great-uncle were not entitled to full Medicaid benefits for medical expenses that they incurred while taking care of their great-niece—and were only entitled to Family Planning Medicaid benefits—because those family members did not meet the definition of "caretaker relative" under applicable administrative rules. Although a North Carolina administrative rule previously allowed extended family members to collect benefits, after a new federal law took effect that revised Medicaid eligibility groups, North Carolina adopted a State Plan Amendment (SPA) in which the State declined to adopt an expanded definition of "caretaker relative" as allowed by the new federal law. Since the previously-enacted and still-existing

rule and the SPA were in direct conflict with each other, the SPA controlled as the most recent expression of the State's intent regarding this issue.

Appeal by petitioners from order entered 7 October 2022 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 3 October 2023.

Ott Cone & Redpath, P.A., by Stephen J. White, for petitioners-appellants.

Attorney General Joshua H. Stein, by Assistant Attorney General Chris D. Agosto Carreiro and Assistant Attorney General Adrian W. Dellinger, for the State.

ZACHARY, Judge.

This case concerns a single issue of law: whether great-aunts and great-uncles were included within the definition of "caretaker relatives" under the North Carolina State Medicaid Plan prior to 1 May 2022. Petitioners Jean and James Hill ("the Hills") appeal from the superior court's order affirming the ruling by Respondent North Carolina Department of Health and Human Services ("DHHS"), which approved the Hills for Family Planning Medicaid benefits rather than retroactive and ongoing full Medicaid benefits covering the medical expenses that they incurred during their period of caring for their great-niece. After careful review, we affirm.

I. Background

At the outset, the Hills acknowledge that "[t]his appeal does not raise any substantive disputes concerning the material facts." We therefore need only recite the legal and procedural facts pertinent to our analysis.

A. Medicaid

"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. Div. 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).

"The federal and state governments share the cost of Medicaid, but each state government administers its own Medicaid plan. State Medicaid plans must, however, comply with applicable federal law and regulations." *N.C. Dep't of Health & Hum. Servs. v. Parker Home Care, LLC*, 246 N.C. App. 551, 556, 784 S.E.2d 552, 556, *disc. review denied*, 369 N.C. 183, 793 S.E.2d 690 (2016) (citation omitted); *see also* 42 U.S.C. § 1396c. "Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures." 42 C.F.R. § 430.0 (2022). A "State plan" is "a comprehensive written commitment by a Medicaid agency, submitted under [42 U.S.C. § 1396a], to administer or supervise the administration of a Medicaid program in accordance with Federal requirements." *Id.* § 400.203.

"North Carolina's Medicaid plan describes the nature and scope of its Medicaid program and gives assurance that it will be administered in conformity with specific federal statutory requirements and other applicable official issuances of the federal Department of Health and Human Services." *Martin v. N.C. Dep't of Health & Hum. Servs.*, 194 N.C. App. 716, 720, 670 S.E.2d 629, 633 (2009). State Medicaid Plans and State Plan Amendments approved by the Centers for Medicare and Medicaid Services ("CMS") "have the force and effect of rules adopted pursuant to Article 2A of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 108A-54.1B(d) (2021).

B. "Caretaker Relative" Status

CMS has promulgated a regulation defining "caretaker relative," a category of individuals who may be eligible for full Medicaid benefits, which includes an optional expansion of the category that a state may choose:

> *Caretaker relative* means a relative of a dependent child by blood, adoption, or marriage with whom the child is living, who assumes primary responsibility for the child's care (as may, but is not required to, be indicated by claiming the child as a tax dependent for Federal income tax purposes), and who is one of the following—
>
> (1) The child's father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece.

> (2) The spouse of such parent or relative, even after the marriage is terminated by death or divorce.
>
> (3) *At State option, another relative of the child based on blood* (including those of half-blood), adoption, or marriage; the domestic partner of the parent or other caretaker relative; or an adult with whom the child is living and who assumes primary responsibility for the dependent child's care.

42 C.F.R. § 435.4 (second emphasis added).

Prior to the enactment of the Patient Protection and Affordable Care Act ("the Affordable Care Act"),[1] North Carolina recognized a more expanded definition of "caretaker relative." The North Carolina Administrative Code contained a regulation ("the Rule")[2] that reflected this expanded definition:

> "Caretaker Relative" means a parent or a person in one of the following groups with whom a child lives:
>
> (a) any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, *and persons of preceding generations as denoted by prefixes of grand, great, or great-great*;
>
> (b) stepfather, stepmother, stepbrother, and stepsister;
>
> (c) persons who legally adopt a child, their parents as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with state law;
>
> (d) spouses of any persons named in the groups in Sub-item (19)(a)–(c) of this Rule even after the marriage is terminated by death or divorce.

10A N.C. Admin. Code 23A.0102(19) (2020) (emphasis added).

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1. The Affordable Care Act is the comprehensive federal health care reform legislation enacted in 2010 with the primary goals of "increas[ing] the number of Americans covered by health insurance and decreas[ing] the cost of health care." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538, 183 L. Ed. 2d 450, 467 (2012).

2. DHHS repealed the Rule with an effective date of 1 May 2022. 36 N.C. Reg. 1869–72 (June 1, 2022). It is undisputed, however, that at all times relevant to this appeal, this explicit repeal had not yet taken effect.

In response to the enactment of the Affordable Care Act, which included revisions to the Medicaid eligibility groups, North Carolina submitted State Plan amendments to CMS on 26 September 2013. On 10 December 2013, CMS approved the North Carolina State Plan Amendment NC-13-00014-MM1 ("the SPA") with an effective date of 1 January 2014. The SPA includes several pages to be incorporated into North Carolina's State Plan. On page S25-1 of the SPA, the State "attests that it operates [the 'caretaker relatives'] group[,]" which includes "parents or other caretaker relatives (defined at 42 CFR 433.4), including pregnant women, of dependent children (defined at 42 CFR 435.4) under age 18. Spouses of parents and other caretaker relatives are also included." Page S25-1 also contains a series of checkboxes related to the various options in defining the category that the State may elect. The box labeled "Options relating to the definition of a caretaker relative (select any that apply)"—which must be checked in order to select an expanded definition of "caretaker relative"—is unchecked. Meanwhile, on page S51-1 of the SPA, the State attests that it declines "to cover individuals qualifying as parents or other caretaker relatives who are not mandatorily eligible and who have income at or below a standard established by the State and in accordance with provisions described at 42 CFR 435.220."

C. Procedural History

The Hills live with and care for their great-niece, a minor child. On 24 June 2021, the Hills submitted an application for retroactive and ongoing Medicaid Assistance for Families & Children; however, they were only approved for Family Planning Medicaid benefits, rather than full Medicaid benefits. On 22 July 2021, the Rutherford County Department of Social Services ("DSS") notified the Hills via mail that their application was approved "only for limited services related to Family Planning and COVID 19 testing." The Hills appealed DSS's decision.

On 25 August 2021, after a local appeal hearing, the Hearing Officer affirmed DSS's decision. The Hearing Officer agreed with DSS that the Hills "did not qualify for full coverage" because the "minor in the home [wa]s a 'great' niece, making the applicants ineligible for caretaker benefits." The Hearing Officer stated that "[t]he regulation[ ] on which this decision [wa]s based is found in" Section 3235 of the North Carolina Family and Children's Medicaid Manual ("the MAF Manual").

The Hills requested a state appeal, which was heard on 13 October 2021. On 15 October 2021, the State Hearing Officer issued a pair of decisions affirming DSS's prior rulings. The State Hearing Officer relied, in significant part, on the federal definition of "caretaker relative" found

in 42 C.F.R. § 435.4, the SPA, and Section 3235 of the MAF Manual. The Hills appealed again, and on 17 December 2021, the Assistant Chief Hearing Officer issued a pair of Final Decisions, once again affirming the earlier rulings.

On 13 January 2022, the Hills filed a petition for judicial review with the Rutherford County Superior Court pursuant to N.C. Gen. Stat. § 108A-79(k). The matter came on for hearing on 30 June 2022. On 7 October 2022, the superior court entered an order affirming the Final Decisions. The superior court concluded:

> [N.C. Gen. Stat. § 108A-54.1B(d)] provides that the [SPA] shall have the force and effect of the Rules. As a result, [the SPA] and the supporting [MAF] Manual are in direct conflict with [the Rule]. The later adopted [SPA] and the [MAF M]anual, however, have the force and effect of a repeal of [the Rule] since they cannot coexist together. Therefore, great[-]aunts and great[-]uncles are not included within the definition of relative caretaker and the rulings by [DHHS] should be affirmed.

The Hills timely filed notice of appeal.

II. Discussion

Before the superior court, the parties conceded that the sole issue to be determined was whether great-aunts and great-uncles "are included within the definition of 'caretaker relatives.' " On appeal to this Court, the Hills argue that the superior court erred in affirming the previous rulings because the Hills satisfied the Rule's definition of "caretaker relative," which they maintain "is a valid and enforceable rule congruent with federal Medicaid requirements[.]" The Hills further argue that there is "no 'direct conflict' with the Rule" and the SPA; "that DHHS may not ignore its own Rule"; and that the superior court "failed to articulate the standard of review it applied in upholding the denial of Medicaid benefits[.]"

For the following reasons, we conclude that there is a direct, irreconcilable conflict between the SPA and the Rule, and that the SPA controls. Accordingly, we affirm the superior court's order.

A. Standard of Review

The North Carolina Administrative Procedure Act ("APA"), "codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Hum. Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). A party aggrieved by a final decision of an administrative law judge in a

contested case has a right to judicial review by the superior court. N.C. Gen. Stat. § 150B-43.

Under the APA, the superior court's scope of review is limited:

> 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.

Id. § 150B-51(b).

The APA also provides two different standards of review, depending on the type of error asserted:

> 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.

Id. § 150B-51(c).

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in [N.C. Gen. Stat. §] 7A-27." *Id.* § 150B-52. "This Court's review

of the superior court's order on appeal from an administrative agency decision generally involves (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Luna v. Div. of Soc. Servs.*, 162 N.C. App. 1, 3, 589 S.E.2d 917, 919 (2004) (cleaned up). "[O]ur review of a [superior] court's order under [N.C. Gen. Stat.] § 150B-52 is the same as in any other civil case—consideration of whether the court committed any error of law." *Id.* (citation omitted). "[W]e review de novo the legal issues, including whether the findings of fact are adequate to support the conclusions of law." *Id.* at 7, 589 S.E.2d at 921.

B. Analysis

The crux of this case is the effect that the 2013 adoption of the SPA had on the Rule. The parties agreed before the superior court that this issue determined the outcome of this matter. Thus, "the appropriate scope of review" was this single question of law, *id.* at 3, 589 S.E.2d at 919 (citation omitted), and the parties agree that de novo review was the applicable standard of review for the superior court, N.C. Gen. Stat. § 150B-51(b)(4), (c). Our careful review of the order on appeal shows that the superior court appropriately conducted de novo review of the Assistant Chief Hearing Officer's ruling. We therefore turn to "whether the court committed any error of law" when conducting its de novo review. *Luna*, 162 N.C. App. at 3, 589 S.E.2d at 919 (citation omitted).

The Hills argue that because the definition of "caretaker relative" found in the Rule applies, the superior court erred in concluding, as a matter of law, that "great[-]aunts and great[-]uncles are not included within the definition of relative caretaker[.]" According to the Hills, "the Rule exists as a valid legislative rule binding on not only the regulated public but also DHHS from promulgation until 1 May 2022." By contrast, DHHS contends that "a plain reading of the two definitions indicates that they are clearly at odds with one another" and that the SPA definition controls because, *inter alia*, "it was the most recently adopted definition at the time of [the Hills'] application." We agree with DHHS.

The SPA has "the force and effect of rules adopted pursuant to Article 2A of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 108A-54.1B. We are thus tasked with interpreting the Rule and the SPA as a pair of administrative regulations. When interpreting administrative regulations, our appellate courts apply the same rules of construction that we apply when interpreting statutes. *Cole v. N.C. Dep't of Pub. Safety*, 253 N.C. App. 270, 278, 800 S.E.2d 708, 714, *disc. review denied*, 370 N.C. 71, 803 S.E.2d 156 (2017).

Accordingly, a reviewing court "looks first to the plain meaning of the words of the [regulation] itself. Interpretations that would create a conflict between two or more [regulations] are to be avoided, and [regulations] should be reconciled with each other whenever possible." *Aetna Better Health of N.C., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 279 N.C. App. 261, 266, 866 S.E.2d 265, 269 (2021) (cleaned up). Further, when determining whether a conflict between regulations exists, "repeals by implication are not favored and the presumption is always against implied repeal. Instead, repeal by implication results only when the [regulations] are inconsistent, necessarily repugnant, utterly irreconcilable, or wholly and irreconcilably repugnant." *State ex rel. Utils. Comm'n v. Town of Kill Devil Hills*, 194 N.C. App. 561, 567, 670 S.E.2d 341, 345 (emphasis omitted) (cleaned up), *aff'd per curiam*, 363 N.C. 739, 686 S.E.2d 151 (2009).

In the instant case, the SPA and the Rule are in irreconcilable conflict with one another. Page S25-1 of the SPA provides that the State declined to adopt the expanded definition of "caretaker relative" found in 42 C.F.R. § 435.4—that is, the State declined to include great-aunts and great-uncles in the definition of "caretaker relative" when it adopted the SPA. This directly and irreconcilably conflicts with the Rule, which included great-aunts and great-uncles in its definition of "caretaker relative."

The Hills do not attempt to harmonize these two regulations; instead, they question whether "a mere blank checkbox" on Page S25-1 of the SPA truly expresses the State's intent to impliedly repeal the Rule via the SPA. The Hills' arguments are unpersuasive. Moreover, the Hills cannot resolve the irreconcilable conflict between the SPA and the Rule: either great-aunts and great-uncles are "caretaker relatives" per the Rule or they are not per the SPA. There is no reconciling these contradictory definitions.

"When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *In re Winstead*, 189 N.C. App. 145, 147, 657 S.E.2d 411, 413 (2008). Again, the same rules of construction apply to administrative regulations. *Cole*, 253 N.C. App. at 278, 800 S.E.2d at 714.

In this instance, neither regulation is more "special and particular" or more "general in nature" than the other, *Winstead*, 189 N.C. App. at 147, 657 S.E.2d at 413; both the SPA and the Rule define "caretaker relative" for the purposes of North Carolina's administration of Medicaid.

However, the SPA controls as the most recent expression of the State's intent with respect to this issue. *See In re Guess*, 324 N.C. 105, 107, 376 S.E.2d 8, 10 (1989) ("It is a generally accepted rule that where there is an irreconcilable conflict between two statutes, the later statute controls as the last expression of legislative intent."). Thus, the trial court properly held that the SPA definition of "caretaker relative" applies in its exercise of de novo review.

Lastly, the Hills contend that the superior court incorrectly compared the Rule to Page S51-1 of the SPA, and "should have evaluated the Rule as compared to SPA Page S25-1." It is true that in its order, the superior court specifically referred to Page S51-1 of the SPA, which refers to the incorrect CMS regulation—42 C.F.R. § 435.220—and concerns income eligibility rather than the definition of "caretaker relative." As Page S25-1 explicitly references the appropriate CMS regulation—42 C.F.R. § 435.4—and offers the opportunity for the State to select "[o]ptions relating to the definition of caretaker relative[,]" the superior court's order reflects that it did not consider the appropriate page of the SPA in making its ruling.

However, this error does not rise to the level of error requiring reversal or remand. "We need not remand for reconsideration if we can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of [N.C. Gen. Stat.] § 150B-51(b)." *Early v. Cty. of Durham DSS*, 172 N.C. App. 344, 360, 616 S.E.2d 553, 564 (2005) (cleaned up), *disc. review improvidently allowed*, 361 N.C. 113, 637 S.E.2d 539 (2006).

Our careful review of the SPA and the Rule demonstrates that the superior court arrived at the correct outcome on the dispositive issue here. Accordingly, the superior court's order is properly affirmed despite the authorities upon which it relies.

III. Conclusion

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

AFFIRMED.

Judges STROUD and MURPHY concur.

LINDSAY OLDHAM MANESS, PLAINTIFF
v.
CIERA KORNEGAY AND EDEN MCNAIR, DEFENDANTS

No. COA23-301

Filed 16 January 2024

1. Appeal and Error—interlocutory order—temporary custody—no clear and specific reconvening time—substantial right

Although the trial court's order granting temporary custody of a child to his grandmother—after concluding that the child's father had acted inconsistent with his constitutionally protected right as a parent—and decreeing that "[p]ermanent custody will be set for trial" was interlocutory, the order was nevertheless properly on review before the appellate court because the trial court did not state a clear and specific reconvening time. Further, the order affected a substantial right because it eliminated the father's fundamental parental rights.

2. Child Custody and Support—temporary custody—awarded to non-relative—constitutionally protected status of parent—sufficiency of findings

In respondent-father's appeal from an order granting temporary custody of his son to a non-relative caretaker (with whom the child's mother left the son without telling respondent), the trial court's findings of fact were insufficient to support the court's conclusion that respondent had acted inconsistent with his constitutionally protected status as a parent. Although the trial court found that respondent failed to provide financial support for a period of time and made insufficient efforts to contact the child's mother or the caretaker, evidence showed that the trial court had previously awarded custody to the father on a regular and increasing basis for nearly a year, that respondent had regularly visited with his son for a period of time when the child and the child's mother moved in with the caretaker, that respondent had been told by the child's mother that the child was living with her in another state when in fact the child was still living with the caretaker, and that when respondent learned of his son's whereabouts he followed advice from the department of social services to take the necessary steps to obtain custody.

Judge ARROWOOD dissenting.

Appeal by defendant Eden McNair from order entered 4 November 2022 by Judge Hathaway S. Pendergrass in Chatham County District Court. Heard in the Court of Appeals 14 November 2023.

Kathryn Hutchinson for plaintiff-appellee (no brief filed).

Ciera Kornegay, pro se, for defendant-appellee Kornegay (no brief filed).

Dobson Law Firm, PLLC, by Shawna D. Vasilko, for defendant-appellant McNair.

THOMPSON, Judge.

In this child custody case, appellant-father appeals from an order entered concluding that he acted inconsistent with his constitutionally protected parental rights and ordering custody proceedings to be decided based on the best interests of the child. We agree and reverse the trial court's temporary custody order entered 7 November 2022.

I. Factual Background and Procedural History

This matter arises from a dispute over the custody of a minor child, Jacob,[1] who was born to mother Ciera Kornegay and father Eden McNair in November 2018. At the time of Jacob's birth, neither Kornegay nor appellant-father was certain that McNair was Jacob's biological father, but once DNA testing confirmed Jacob's parentage, appellant-father began a relationship with his son, including having primary custody of the child for a period of several months when Jacob was an infant and Kornegay lacked a residence. In January 2020, Kornegay and Jacob moved in with plaintiff Lindsay Maness. Kornegay had dated Maness's son for several months before Kornegay became pregnant with Jacob, and after that relationship ended, Maness continued her connection with Kornegay such that she was "like a daughter to" Maness. Once Maness learned that Kornegay was pregnant, she began buying items for Kornegay and preparing for the baby's arrival, causing Maness to feel that she "kind of cemented [her] spot in [Jacob's] life." While Maness expressed clear concerns about Kornegay having custody of Jacob, she testified that she didn't know appellant-father and did "not have enough interaction or communication or dealings with him to be able to form an opinion on" any concerns about appellant-father having custody.

1. A pseudonym is used to protect the privacy of the minor child.

For a number of months after Kornegay and Jacob moved in with Maness, appellant-father continued to exercise regular visits with Jacob, approximately every other weekend. These visits were facilitated by appellant-father's mother, who would pick Jacob up from Maness's home and drive him to appellant-father's location. Appellant-father testified that he thought Maness was simply acting as a babysitter for Jacob.

Unbeknownst to appellant-father, at some point in August 2020, Kornegay left Jacob with Maness, moved out of Maness's residence, and ceased any contact with appellant-father. Appellant-father repeatedly attempted to contact Kornegay "through various means of communication but was unsuccessful." It does not appear that Maness attempted to contact appellant-father, either directly or through appellant-father's mother to tell appellant-father that Kornegay had moved out or that Jacob—appellant-father's child—had been left in Maness's care, despite her lack of any legal custody or other rights to the child. Maness also failed to file a complaint seeking legal custody of Jacob at that time.

In September 2020, Kornegay and Maness executed a "temporary guardianship agreement" which purported to extend custody and other rights over Jacob to Maness but which, in actuality, was of no legal import. Appellant-father was not a party to this agreement and did not consent to it. In January 2021, appellant-father was finally able to contact Kornegay, who claimed that she had moved to South Carolina with Jacob and shared with appellant-father photos of Jacob to support this false claim. Appellant-father told Kornegay that he planned to visit her and Jacob in South Carolina as soon as his car was repaired, but before this proposed trip could take place, appellant-father received a call from the Chatham County Department of Social Services (DSS) informing him that Jacob was in the physical custody of Maness in that locale, not with Kornegay in South Carolina. DSS suggested that appellant-father "go to the city [where Maness resided], grab the police, then go to [Maness's] house and get [your] son," and the following day, he followed that recommendation and called law enforcement to Maness's home for their assistance in regaining physical custody of Jacob—appellant-father's son—from the care of Maness—who had no familial relationship or legal rights to the child. When law enforcement officers arrived, Maness showed them the "temporary guardianship agreement" and the officers, after consulting with DSS, informed Maness that the document was "likely insufficient" and suggested that she seek a court order. Jacob was, however, left in the care of Maness.

Following this incident, Maness blocked appellant-father's mother from picking up Jacob for any visits with appellant-father as had been the arrangement previously and also acknowledged that she rejected at

least one attempt by appellant-father to arrange for visitation by contacting Maness's attorney. At that point, in May 2021, appellant-father filed a report with DSS. Maness responded by filing a "Complaint for Custody for Non-Parent(s)" on 24 May 2021 against Kornegay and appellant-father, and litigation in this case ensued. The record in this matter further reveals the following: Appellant-father initially responded pro se with a handwritten letter to the court on 9 June 2021 expressing that he was "trying to claim custody" of Jacob. On 2 July 2021, appellant-father filed a calendar call request for 26 July 2021. A "Notice for Custody Mediation Orientation" document was filed by Maness on 29 July 2021. By August 2021, appellant-father had obtained counsel, and on 30 August 2021, appellant-father filed an amended answer and motion to dismiss, raising, *inter alia*, appellant-father's constitutionally protected status as a parent and requesting sole physical and legal custody of his son.

The case was not set for hearing until November 2021 and the first order regarding custody in the matter was filed on 13 December 2021, providing "custody" to appellant-father on 24 December 2021 and 1 January 2022, but otherwise apparently leaving Jacob in the physical custody of Maness, despite her non-parent status and lack of any legal rights to the child. The case was continued on 24 February 2022, and on 4 March 2022, the trial court ordered temporary custody of Jacob for appellant-father from Friday evening to Sunday evening every other weekend. The matter was continued again on 2 May 2022 and 3 June 2022. In July 2022, the trial court entered another order, continuing every-other-weekend custody with appellant-father and custody otherwise with Maness, still without any acknowledgment of appellant-father's constitutionally protected parental status or Maness's lack of any familial or legal connection to Jacob. On 12 August 2022, the trial court entered another temporary custody order, extending appellant-father's custody of Jacob to Thursday evening through Monday morning every other weekend. The court also awarded joint legal custody to Maness and appellant-father and directed appellant-father and Maness to custody mediation.

The next order included in the record on appeal was entered on 7 November 2022. In that order, from which this appeal is taken, the trial court made a number of findings of fact, concluded that appellant-father had "acted inconsistent with his constitutionally protected parental rights[,]" and decreed that "[p]ermanent custody will be set for trial" and "[t]he issue of permanent custody will be decided based on the best interests of the minor child."[2] Appellant-father timely appealed.

2. The trial court also concluded that Kornegay was unfit and acted inconsistent with her constitutionally protected status as a parent. Kornegay has not challenged the trial court's order and is not a party to this appeal.

II. Analysis

Appellant-father argues that the trial court erred by concluding that he acted inconsistent with his constitutionally protected parental rights, and as a result, decreeing that it would employ a "best interest of the child" standard at any future permanent custody proceeding as between himself and Maness, a non-parent party. We agree.

A. Appellate posture

[1] As an initial point, we note that this appeal arises from a *temporary* custody order, and thus is interlocutory. This Court has addressed the immediate appealability of orders in such circumstances in several prior cases.

> An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree. Normally, a temporary child custody order is interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits. Temporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody. The trial court's mere designation of an order as temporary is not sufficient to make the order interlocutory and nonappealable. *Rather, an appeal from a temporary custody order is premature only if the trial court: (1) stated a clear and specific reconvening time in the order; and (2) the time interval between the two hearings was reasonably brief.*

Brewer v. Brewer, 139 N.C. App. 222, 227–28, 533 S.E.2d 541, 546 (2000) (citations, quotation marks, brackets, and ellipses omitted) (emphasis added). *See also Graham v. Jones*, 270 N.C. App. 674, 678, 842 S.E.2d 153, 158 (2020) ("Generally, a child custody order is temporary if (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings is reasonably brief, or (3) the order does not determine all the issues. If the order does not meet any of these criteria, it is permanent." (citations, quotation marks, brackets, and ellipsis omitted)). The order from which appellant-father appeals decreed that "[p]ermanent custody will be set for trial," but did not provide any timeframe for such a trial, much less "a clear and specific reconvening time." *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546.

More importantly, this Court has repeatedly held that a trial court's order which "eliminates the fundamental right of . . . a parent, to make decisions concerning the care, custody, and control of [his] children, . . . affects a substantial right and [an] appeal from [such an] order is properly before this Court pursuant to N.C. Gen. Stat. § 1-277(a)." *In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004) (citations and internal quotation marks omitted); *see also Graham*, 270 N.C. App. at 682, 842 S.E.2d at 160. In his brief, appellant-father has appropriately cited N.C. Gen. Stat. § 1-277(a) as the basis for our appellate review, and furthermore this "appeal from a temporary custody order is [not] premature" under *Brewer*. 139 N.C. App. at 228, 533 S.E.2d at 546. Accordingly, we turn to the merits of appellant-father's arguments.

B. Standard of review

> A trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence. The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters.
>
> The trial court's legal conclusion that a parent acted inconsistent[ ] with his constitutionally protected status as a parent is reviewed de novo to determine whether the findings of fact cumulatively support the conclusion and whether the conclusion is supported by clear and convincing evidence. The trial court's findings of fact are conclusive on appeal if unchallenged, or if supported by competent evidence in the record.

In re I.K., 377 N.C. 417, 421–22, 858 S.E.2d 607, 611 (2021) (citations, quotation marks, and brackets omitted).

C. Sufficiency of factual findings

[2] "The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). "[T]he Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72–73. Likewise, "North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children" is

longstanding and deeply rooted. *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994). "[P]arents normally love their children and desire not only what is best for them, but also a deep and meaningful relationship with them. Therefore, the decision to remove a child from the custody of a natural parent must not be lightly undertaken." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). Accordingly, precedent provides that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally[ ]protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen*, 337 N.C. at 403–04, 445 S.E.2d at 905.

The primary import of the "*Petersen* presumption" lies in its impact on the burden of proof to be applied in a custody dispute between a parent and a non-parent party: "So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a non[-]parent regarding those children may not be determined by the application of the 'best interest of the child' standard." *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010) (citing *Price v. Howard*, 346 N.C. 68, 73, 484 S.E.2d 528, 531 (1997)). If the *Petersen* presumption—the presumption that a fit parent will act in the best interest of his or her child—is overcome, however, the provisions of N.C. Gen. Stat. § 50-13.2(a) will apply: "an order for custody of a minor child . . . shall award the custody of such child to such person, agency, organization, or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2021); *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

While "there is no bright line beyond which a parent's conduct [overcomes the *Petersen* presumption,] . . . . conduct rising to the 'statutory level warranting termination of parental rights' is unnecessary." *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503 (citing and then quoting *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35). "Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. . . . [and o]ther types of conduct, which must be viewed on a case-by-case basis, can also rise to this level[.]" *Price*, 346 N.C. at 79, 484 S.E.2d at 534–35. "A determination that a parent has forfeited this status must be based on clear and convincing evidence." *In re N.Z.B.*, 278 N.C. App. 445, 450, 863 S.E.2d 232, 236 (2021) (citations omitted).

The trial court did not find that appellant-father is an unfit parent for Jacob, or that he neglected or abandoned his son.[3] To the contrary,

3. A trial court's conclusion that one parent is unfit does not have any impact on the constitutionally protected parental rights of the other parent, who is still entitled to the benefit of the *Petersen* presumption. *See*, *e.g.*, *Brewer*, 139 N.C. App. at 231–32, 533 S.E.2d at 548.

the trial court plainly had no concerns about appellant-father as a parent as the court initially awarded periods of custody of Jacob to appellant-father beginning on 24 December 2021, increased appellant-father's custody beginning in March 2022, continuing that custody at least once, and then once again increased appellant-father's custody on 12 August 2022. Thus, we turn to a case-specific consideration of the potentially pertinent findings of fact in the trial court's 7 November 2022 order, which include: that appellant-father "provided no financial support to the minor child since January of 2020"; that Kornegay and Jacob moved in with Maness in January 2020 at which point Kornegay allowed Maness to act as a parental figure to Jacob; that "unbeknownst to" appellant-father, Kornegay left Jacob with Maness in August 2020; that appellant-father had visitation with Jacob every other weekend from January to August 2020; that after learning in August 2020 of the existence of the purported temporary guardianship agreement between Kornegay and Maness, which appellant-father was told was intended to facilitate medical appointments for the child, appellant-father never contacted Maness about the agreement; that from August 2020 to January 2021, appellant-father was unable to contact Kornegay, did not attempt to contact Maness about Jacob's or Kornegay's whereabouts, and did not see Jacob; that Kornegay contacted appellant-father in January 2021 and informed him that she and Jacob were residing in South Carolina; and that appellant-father did not seek custody of Jacob until May 2021. Based on these findings of fact, the trial court concluded that appellant-father "withheld [his] care, love, and attention from the minor child through [his] actions while the child resided with" Maness; "failed to act as a reasonable parent when he had no communication from [Kornegay;] did not attempt communication with [Maness] as the last known location of the minor child, [when appellant-father's] mother was in communication with [Maness] until at least September [ ] 2020"; and thus "acted inconsistent with his constitutionally protected parental rights." The trial court did not note that it had placed Jacob in appellant-father's custody on a regular and increasing basis for almost a year prior to the entry of its order or explain how those rulings could be harmonized with its conclusion that appellant-father had acted inconsistent with his constitutionally protected parental rights less than three months following the court's increase of custody with appellant-father.

Upon our de novo review, we hold that the trial court's factual findings are insufficient to support its conclusion that appellant-father acted inconsistent with his constitutionally protected parental rights. These findings of fact boil down to appellant-father's failure to provide financial support for Jacob during a certain period of time and his failure, in

the trial court's view, "to act as a reasonable parent" when, upon being unable to reach Kornegay between September and December 2020, appellant-father did not attempt to contact Maness.

Given appellant-father's testimony that Kornegay had changed residences regularly since Jacob's birth in November 2018—including living with her grandparents, being apparently homeless, living with at least one boyfriend, living "in Sanford," spending several nights sleeping on appellant-father's couch, and moving in with Maness—in conjunction with his belief that Maness was simply acting as a babysitter for Jacob and had sought temporary guardianship to facilitate the child's medical care, we cannot conclude that it was not "reasonable" for appellant-father to act as he did in continuing to try to contact Kornegay over several months, rather than assuming that Kornegay had left Jacob in the care of Maness, a non-relative with no legal rights to the child who did not attempt to alert appellant-father or appellant-father's mother that the child was in her care.

Despite Kornegay's past housing instability, she had never before abandoned Jacob with a non-relative, having only left the child with appellant-father, and in this context, we disagree that a reasonable parent in appellant-father's position would assume that Kornegay had left her child behind and moved away or that Maness would maintain physical custody of appellant-father's child without contacting appellant-father, his family, or DSS. Once Kornegay responded to appellant-father's outreach in January 2021, appellant-father believed Jacob to be in her care out of state and formed a plan to visit his son. When DSS alerted appellant-father of the actual state of affairs—that Maness had been keeping Jacob despite having no legal right to do so—appellant-father immediately followed the recommendation of DSS that he contact law enforcement in an attempt to retrieve his child and filed a report with DSS in an effort to regain custody of Jacob.

These circumstances are easily distinguishable from those present in cases where a natural parent who has never voluntarily relinquished custody of his child to a non-parent have been held to have risen to the level of being inconsistent with the constitutionally protected status of a parent:

- A father had numerous criminal convictions, a history of violating court orders, and only seven brief visits with his son during the two years of the child's life prior to the custody hearing in *Adams*, 354 N.C. at 58–59, 65, 550 S.E.2d at 500–01, 504.

- A mother lived a lifestyle that caused her to neglect her child and evidence suggested that she was involved in the murder of the child's father in *Speagle v. Seitz*, 354 N.C. 525, 528–29, 557 S.E.2d 83, 85 (2001), *cert. denied*, 536 U.S. 923 (2002).

Moreover, as noted above, the trial court had found appellant-father appropriate to have regular custody of his son for nearly a year, increasing those periods of custody less than three months before entering the order from which appellant-father appeals. None of the findings of fact made by the trial court pertain to any concern or change which arose or occurred during that time period. Nor did the trial court ever acknowledge that Maness kept Jacob in her physical custody for eight to nine months after his mother left Maness's residence—in the absence of any legal custody order—without contacting DSS, filing a custody complaint, or notifying appellant-father or his mother, filing her custody complaint only after appellant-father learned that his child was not with Kornegay and took DSS-suggested action to regain custody of Jacob. Given the acts and omissions by Kornegay and Maness regarding where and with whom Jacob was residing between August or September 2020 and May 2021, we hold that the findings of fact in the trial court's order were insufficient to support a conclusion that appellant-father acted in a manner inconsistent with his constitutionally protected status as Jacob's natural parent. For this reason, application of "the best interest of the child" standard is inappropriate in this custody action.

III. Conclusion

Accordingly, the trial court's 7 November 2022 order is reversed, and the case is remanded for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED.

Judge WOOD concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that this interlocutory appeal can be decided on the merits. "An interlocutory order is one made during the pendency of an action, which does not dispose of the

case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362 (1950) (citation omitted). "As a general rule, interlocutory orders are not immediately appealable." *Williams v. Devere Constr. Co., Inc.*, 215 N.C. App. 135, 137 (2011) (citation omitted).

"The purpose of this rule is 'to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.' " *Sharpe v. Worland*, 351 N.C. 159, 161 (1999) (quoting *Bailey v. Gooding*, 301 N.C. 205, 209 (1980)). This Court has noted that "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey*, 231 N.C. at 363.

The majority is correct that orders awarding temporary custody are interlocutory and not appealable if "(1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings is reasonably brief, or (3) the order does not determine all the issues. . . . If the order does not meet any of these criteria, it is permanent." *See Graham v. Jones*, 270 N.C. App. 674, 678 (2020) (cleaned up). Here, the trial court issued an order on 4 November 2022 determining, in relevant part, that appellant-father "acted inconsistent with his constitutionally protected parental rights[,]" "[p]ermanent custody will be set for trial[,]" and "[t]he issue of permanent custody will be decided based on the best interests of the minor child." Thus, the order directed a further proceeding be scheduled and decided using the best interests of the child standard. Further, it did not make any final custody determination. Additionally, there is a hearing on permanent custody referenced which suggests that the trial court directed another hearing to be scheduled and that the time between the hearings would have been reasonably brief but for this appeal. This is unlike the cases where the trial court enters multiple "temporary" custody orders which appear to be an attempt to avoid review. Thus, this order is interlocutory, and we must dismiss this appeal.

The majority notes that appellant-father cited N.C.G.S. § 1-277(a) as the basis for his right to appeal. However, he does not acknowledge the appeal as interlocutory, and he has not articulated how this appeal affects a substantial right. *See* N.C. R. App. P. 28(b)(4) ("When an appeal is interlocutory, the statement [of the grounds for appellate review] *must contain sufficient facts and argument* to support appellate review on the

ground that the challenged order affects a substantial right." (emphasis added)). There are numerous cases that stand for the proposition that if a case is interlocutory and a person is relying on the fact that it affects a substantial right, their brief must articulate the basis for this contention—this Court is not to articulate those grounds for them. *See*, *e.g.*, *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380 (1994); *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78 (2009). The majority here appears to be trying to circumvent this line of cases. That effort in my opinion is violative of our Supreme Court's holding in *In Re Civil Penalty*. 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citation omitted)).

In the case *sub judice*, the trial court did not terminate appellant-father's parental rights, nor did it make a permanent custody or guardianship determination in this order; the court explicitly ordered permanent custody to be determined at a later date. Because the order did not dispose of the case, the appeal is interlocutory. Appellant-father's statement of his grounds for appeal is thus insufficient as "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order[.]" *Jeffreys*, 115 N.C. App. at 380 (citation omitted); *see also Hoke Cnty. Bd. of Educ.*, 198 N.C. App. at 277–78 ("[A]ppellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." (emphasis in original) (citation omitted)). While appellant makes a bare bones assertion that his substantial rights are implicated, he makes no argument to support this statement. Appellant-father's failure to do so subjects his appeal to dismissal for lack of jurisdiction.

As discussed above, this appeal is interlocutory, and this Court should dismiss the appeal. Deciding this case on the merits, though appellant-father merely cited a statute as the basis for this appeal, defies the purpose of the rule against interlocutory appeals, "procrastinate[s] the administration of justice[,]" and binds the other parties in this matter despite their patience to wait for a full adjudication below.

SMITH DEBNAM NARRON DRAKE SAINTSING & MYERS, LLP, PLAINTIFF
v.
PAUL MUNTJAN, DEFENDANT

No. COA23-324

Filed 16 January 2024

1. Statute of Frauds—agreement by father to pay son's legal bills—enforceability—sufficiency of email correspondence

In an action by plaintiff law firm to collect monies owed for legal services it provided to its client, in which plaintiff sued the client's father (defendant) on the basis that it had formed a contract with defendant to pay his son's legal bills, the trial court erred by entering judgment against defendant. Assuming without deciding that the parties had formed a valid contract, the appellate court determined that such a contract was unenforceable because it violated the statute of frauds (N.C.G.S. § 22-1). First, the trial court erred by concluding that defendant made an original promise—which is not a guaranty—and that the promise did not need to be in writing, since defendant's promise to pay in addition to his son was a collateral promise that constituted a guaranty. Second, there was no evidence that the main purpose of the guaranty was to benefit defendant, and thus the promise needed to be written to be enforceable. Finally, defendant's email correspondence with plaintiff, which, despite having some references to plaintiff's invoices, lacked essential contract elements and an explicit promise to pay and was therefore insufficiently definite to constitute a signed "memorandum or note thereof" for purposes of the statute.

2. Quantum Meruit—agreement by father to pay son's legal bills—no benefit passed from law firm to father—father not liable

In an action by plaintiff law firm to collect monies owed for legal services it provided to its client, where the appellate court determined that any purported contract plaintiff had with the client's father (defendant) for defendant to pay his son's legal bills was unenforceable as violating the statute of frauds, plaintiff could not recover under the equitable principle of quantum meruit, because no benefit passed from plaintiff to defendant.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgment entered 3 November 2022 by Judge Ned W. Mangum in Wake County District Court. Heard in the Court of Appeals 1 November 2023.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Byron L. Saintsing & Joseph Alan Davies, for Plaintiff-Appellee.

Law Office of Mark L. Hayes, by Mark L. Hayes, for Defendant-Appellant.

CARPENTER, Judge.

Paul Muntjan ("Defendant") appeals from the trial court's judgment, awarding money damages from Defendant to Smith Debnam Narron Drake Saintsing & Myers, LLP ("Plaintiff"). Defendant argues the judgment is unsupported by a legal theory. Specifically, Defendant argues the judgment is unsupported by breach of contract or quantum meruit. After careful review, we agree with Defendant and reverse the trial court's judgment.

I. Factual & Procedural Background

This case concerns a contract dispute involving three parties: a construction-business owner, the business owner's father, and a law firm. Nick Muntjan is the business owner, Defendant is Nick's father, and Plaintiff is the law firm. In sum, Plaintiff performed legal services for Nick, and Plaintiff eventually sued Defendant to collect fees for its services.

On 16 August 2019, Nick initially met with Brian Saintsing, a partner at Plaintiff. Defendant accompanied Nick to the meeting. At the meeting, the parties did not discuss the cost of Plaintiff's services. Saintsing, however, testified that Defendant promised to pay for Plaintiff's services. Specifically, Saintsing testified as follows: "Paul, the father, volunteered that he would be responsible for the fees in addition to his son because his son was experiencing financial difficulty and did not have the wherewithal to pay for a defense of any litigation that might be brought."

Defendant denied saying this. More specifically, Defendant denied "promis[ing] at that meeting with Mr. Saintsing that [he] would pay [his] son's legal bills." Despite the disputed substance of the discussion, the purpose of the meeting was clear: Nick needed legal representation, and he sought Plaintiff's help.

On 17 September 2019, Plaintiff mailed and emailed Nick an engagement letter, which stated that "[u]pon receipt of the signature page and

the retainer, we will begin work in this matter." The engagement letter listed Plaintiff's hourly rate and how Nick would be billed. Nick and Defendant both testified, however, that they never received the letter.

Some of Nick's former clients eventually sued him on 9 December 2019, and Defendant forwarded the complaint to Plaintiff on 18 December 2019. Despite not receiving a signed engagement letter, Plaintiff began working for and billing Nick. And Plaintiff received payments toward Nick's balance, but those payments were made through Defendant's credit card. Defendant and Nick testified that Defendant did not make the payments; he merely allowed Nick to use his credit card as a loan. These payments are reflected in Plaintiff's invoices, which also detail Plaintiff's hourly rate, time worked, and total charges.

On 12 May 2020, Plaintiff emailed Nick, stating that portions of his bill were past due. On 4 June 2020, Plaintiff again emailed Nick about his overdue bill. On 6 June 2020, Nick responded and asked Plaintiff to "CC" Defendant on future correspondence. Correspondence between Plaintiff and Defendant included the following, all via email. Defendant: stated that it "was important to us to always pay our valued partners quickly for their services"; sent Plaintiff the complaint filed against Nick and asked how "we can best work together in this regard"; questioned whether a payment was missing from an invoice; and asked if discovery could be limited in order to keep costs down. Defendant ended each of these emails with either "Paul" or "Paul Muntjan."

On 31 March 2021, Plaintiff attempted to collect its past-due bills by suing Defendant, rather than Nick. On 3 November 2022, after a bench trial, the trial court entered a $13,528.06 judgment against Defendant. The trial court concluded that Defendant breached an "original promise" to Plaintiff. In other words, the trial court concluded that Defendant breached a contract with Plaintiff, and the contract need not be written to be enforceable. Defendant timely filed notice of appeal on 23 November 2022.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issue

The issue on appeal is whether the trial court erred in holding Defendant liable to Plaintiff for services provided for Defendant's son. The two underlying issues concerning the propriety of the trial court's judgment are whether Plaintiff has a valid claim for (1) breach of contract or (2) quantum meruit.

IV. Standard of Review

We review a trial court's conclusions of law de novo. *Luna ex rel. Johnson v. Div. of Soc. Servs.*, 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004). 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)).

V. Analysis

A. Breach of Contract & the Statute of Frauds

[1] Defendant argues the trial court erred because he and Plaintiff never formed a valid contract, and even if they did, the contract was unenforceable under the statute of frauds. Rather than analyzing contract formation, we will begin with Plaintiff's second argument. We will assume, without deciding, that the parties formed a valid contract, and we will discern whether the contract satisfies the statute of frauds. After careful review, we conclude that even if the parties formed a valid contract, it is unenforceable because it fails the statute of frauds.

A "statute of frauds" requires certain contracts be written and signed to be enforceable. *See Durham Consol. Land & Improv. Co. v. Guthrie*, 116 N.C. 381, 384, 21 S.E. 952, 953 (1895) (explaining that the statute of frauds requires "that the contract shall be in writing and signed by 'the party to be charged therewith' "). North Carolina's statute of frauds is codified in Chapter 22 of our General Statutes. *See* N.C. Gen. Stat. §§ 22-1 to -5 (2021). Section 22-1 states:

> No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Id. § 22-1.

In other words, an enforceable contract to pay another's debt must be in writing and be signed by the party charged. *Id.* A contract to pay another's debt is a "guaranty," and the "guarantor" is the party who promises to pay. *See Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 593–94, 324 S.E.2d 889, 891–92 (1985).

1. Collateral Promise or Original Promise: Whether Defendant's Promise Was a Guaranty

A "collateral promise" is a guaranty, but an "original promise" is not. *See Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 754, 202 S.E.2d 591, 601 (1974). Our courts have distinguished the two categories this way: If "credit was extended directly and exclusively to the promisor, then the promise is considered original and not within the statute of frauds." *Id.* at 754, 202 S.E.2d at 601. But if any credit was extended to a party other than the promisor, the promise is collateral and within the statute of frauds. *Id.* at 754, 202 S.E.2d at 601. Put another way, if only the promisor is liable for the promise, the promise is original; but if another party is also liable for the promise, the promise is collateral. *See id.* at 754, 202 S.E.2d at 601.

Here, Saintsing stated that Defendant "volunteered that he would be responsible for the fees in addition to his son because his son was experiencing financial difficulty and did not have the wherewithal to pay for a defense of any litigation that might be brought." Defendant did not simply promise to pay; he promised to pay in addition to Nick. So a party other than Defendant—Nick—was also liable under the contract. *See id.* at 754, 202 S.E.2d at 601. Therefore, the contract was a guaranty, and the trial court erred when it concluded that Defendant made an "original promise." *See id.* at 754, 202 S.E.2d at 601.

2. The Main Purpose Rule

A guaranty, however, may still avoid the statute of frauds if the main-purpose rule applies. *Id.* at 748, 202 S.E.2d at 597. The main-purpose rule applies to a guaranty if its main purpose is to benefit the guarantor. *Id.* at 748, 202 S.E.2d at 597. But a parent–child relationship, without more, does not trigger the main-purpose rule. *See Ebb Corp. v. Glidden*, 322 N.C. 110, 110, 366 S.E.2d 440, 441 (1988) (adopting the dissenting opinion from this Court as its own); *Ebb Corp. v. Glidden*, 87 N.C. App. 366, 373, 360 S.E.2d 808, 811 (1987) (Becton, J., dissenting) ("[T]he parent-child relationship is not sufficient in and of itself to take an oral promise by a parent to pay a child's debts outside the Statute of Frauds by applying the main purpose doctrine.").

Here, Defendant promised to pay Nick's debt, and Nick is Defendant's son. No other evidence suggests that the main purpose of the guaranty was to benefit Defendant, so the main-purpose rule does not apply, and the statute of frauds does. Therefore, the trial court erred when it concluded Defendant's promise need not be written to be enforceable. *See Ebb Corp.*, 322 N.C. at 110, 366 S.E.2d at 441.

3. Signed "Memorandum or Note Thereof"

Having concluded that the statute of frauds applies to the contract, we must now discern whether any correspondence between Plaintiff and Defendant is a signed "memorandum" of the contract. *See* N.C. Gen. Stat. § 22-1.

"In order to constitute an enforceable contract within the statute of frauds, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract." *Smith v. Joyce*, 214 N.C. 602, 604, 200 S.E. 431, 433 (1939). Price, parties, and the goods or services to be exchanged are essential elements of a contract. *Connor v. Harless*, 176 N.C. App. 402, 405, 626 S.E.2d 755, 757 (2006).

A written correspondence may satisfy the statute of frauds if it "sufficiently refer[s] to some writing in which the terms are set out and which itself contains all the requisites of a valid contract or memorandum under the statute." *Winders v. Hill*, 144 N.C. 614, 618–19, 57 S.E. 456, 457 (1907).[1] When looking for sufficient written memoranda, "separate writings may be considered together to satisfy the statute of frauds requirement." *Crocker v. Delta Grp., Inc.*, 125 N.C. App. 583, 586, 481 S.E.2d 694, 696 (1997). And concerning the requisite signature, email signatures generally suffice. *See Powell v. City of Newton*, 200 N.C. App. 342, 348, 684 S.E.2d 55, 60 (2009) (citing N.C. Gen. Stat. §§ 66-312(9), -315(b)).

Here, all emails sent by Defendant end with his name, which satisfies the signature requirement. *See id.* at 348, 684 S.E.2d at 60. The question is whether the substance of Defendant's emails contains "the essential elements of a valid contract." *See Smith*, 214 N.C. at 604, 200 S.E. at 433. The text of Defendant's emails lacks the price of Plaintiff's services, so the text of Defendant's emails lacks an essential element. *See Connor*, 176 N.C. App. at 405, 626 S.E.2d at 757.

But Defendant's emails may still satisfy the statute of frauds if they refer to a memorandum that includes the essential contract elements. *See Winders*, 144 N.C. at 618–19, 57 S.E. at 457. Here, several of Defendant's emails explicitly refer to Plaintiff's invoices. The invoices provide the price and provided-service terms of the contract because

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1. The Dissent notes that *Winders* is a 116-year-old case, implying that its age dilutes its precedential value. To the contrary, unless overruled, we think a case's precedential value increases with the passage of time. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

they include the services provided by Plaintiff and the price of the services. *See Connor*, 176 N.C. App. at 405, 626 S.E.2d at 757.

Because this dispute involves a guaranty, however, the invoices must show that Defendant promised to pay. Here, the invoices only refer to "Nick" as the customer, not Defendant. Nor do the invoices state any promise by Defendant to pay Nick's invoices. Therefore, the invoices lack an essential term of the guaranty—the alleged paying party, Defendant. *See id.* at 405, 626 S.E.2d at 757.

One of Defendant's emails, though, bears repeating in full. Defendant sent the following email to Plaintiff and signed it as "Paul Muntjan":

> Received your email as addressed to son Nick regarding the case and request for prompt payment. It is important to us to always pay our valued partners quickly for their services rendered[,] so rest assured your invoice will be turned around immediately and a check sent upon receipt. Please note as of this date no invoice has been received. As a reminder, please [e]nsure any and all invoices are sent to my email due to my travel schedule.

The question is whether this email, coupled with other emails and invoices, is enough to "show the essential elements of" the guaranty. *See Smith*, 214 N.C. at 604, 200 S.E. at 433. Defendant spoke in passive, vague terms. Defendant said Plaintiff's invoice "will be turned around immediately," but he did not promise that he, personally, would pay. Defendant said that "no invoice has been received," but he did not say that he, personally, was expecting the invoice.

Taken as a whole, Defendant's emails imply that he agreed to pay for Nick's legal bills, and indeed the trial court found that Defendant verbally promised to do so. But while spoken words and implications can form a contract, *see Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980), they cannot satisfy the statute of frauds, *see Winders*, 144 N.C. at 618–19, 57 S.E. at 457.[2] Defendant's emails are not "sufficiently definite to show the essential elements of a valid contract" because they do not express a clear, written promise by Defendant that *he* would pay Plaintiff. *See Smith*, 214 N.C. at 604, 200 S.E. at 433.

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2. Contrary to the Dissent's position, we are not "attempt[ing] to engender a new rule." In our view, the statute of frauds indeed stands athwart to spoken words and implications. *See* N.C. Gen. Stat. §§ 22-1 to -5. We concede that this is a close case, but the statute of frauds is not a high bar. All Plaintiff needed from Defendant was a signed writing saying, for example, "I promise to pay Nick's debt." Defendant's writings certainly imply that he would pay Nick's debt, but his writings do not say so.

Therefore, Defendant's guaranty is not enforceable, and the trial court erred by concluding otherwise.

In sum, we conclude that because the guaranty between Plaintiff and Defendant is not memorialized and signed by Defendant, it is not enforceable against Defendant. *See* N.C. Gen. Stat. § 22-1.

B. Quantum Meruit

[2] Lastly, we must discern whether the trial court's judgment was supported by quantum meruit, "an equitable principle" that allows recovery without an enforceable contract. *See Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 132, 306 S.E.2d 527, 529 (1983). We conclude it was not.

Quantum meruit is Latin for "as much as he has deserved." *Quantum Meruit*, Black's Law Dictionary (11th ed. 2019). Quantum meruit requires "plaintiff [to] show: (1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously." *Envtl. Landscape Design Specialists v. Shields*, 75 N.C. App. 304, 306, 330 S.E.2d 627, 628 (1985).

In order to recover under quantum meruit, however, a benefit must pass from the plaintiff to the defendant. *Fagen's of N.C., Inc. v. Rocky River Real Est. Co.*, 117 N.C. App. 529, 533, 451 S.E.2d 872, 874–75 (1995). In *Fagen's*, the defendant served as a guarantor concerning the plaintiff's loan to a third-party borrower, an entity which the defendant did not own or operate. *Fagen's*, 117 N.C. App. at 532, 451 S.E.2d at 874. The plaintiff asserted the defendant was liable under quantum meruit, but this Court held that quantum meruit was "without support, because that theory would also require some benefit passing to [the defendant] upon the extension of credit to [the third-party borrower]." *Id.* at 533, 451 S.E.2d at 874–75.

So too here. The benefit of Plaintiff's legal services passed from Plaintiff to Nick, not to Defendant. Although Plaintiff mistakenly believed he was, Defendant is not an owner of Nick's company, and Plaintiff's services were rendered to Nick and his company—not Defendant. Therefore, Plaintiff cannot recover from Defendant under quantum meruit. *See id.* at 533, 451 S.E.2d at 874–75.

VI. Conclusion

We conclude the trial court erred by entering judgment against Defendant. The judgment is not supported by contract theory or quantum meruit; therefore, we reverse.

REVERSED.

Judge FLOOD concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding that the trial court erred by entering judgment against defendant because, in my opinion, defendant's emails satisfied the statute of frauds.

Section 22-1 of the North Carolina General Statutes codifies the statute of frauds requirement that a contract to pay a third-party's debt "be in writing, and signed by the party charged[.]" N.C.G.S. § 22-1 (2023). Such requirement "was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation[.]" *House v. Stokes*, 66 N.C. App. 636, 641, *cert. denied*, 311 N.C. 755 (1984).

" 'In order to constitute an enforceable contract within the statute of frauds, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract.' " *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 243 (1967) (quoting *Smith v. Joyce*, 214 N.C. 602 (1939)). Essential elements of a valid contract include the parties, price, and subject-matter of the contract. *Hurdle v. White*, 34 N.C. App. 644, 648 (1977).

Further, "[a] memorandum, by its very nature, is an informal instrument, and the statute of frauds does not require that it be in any particular form." *Hurdle v. White*, 34 N.C. App. 644, 648 (1977). Even "separate writings may be considered together to satisfy the statute of frauds requirement." *Crocker v. Delta Grp., Inc.*, 125 N.C. App. 583, 586 (1997).

The majority contends that defendant's emails do not satisfy the statute of frauds because "they do not express a clear, written promise by [d]efendant that he would pay [p]laintiff." Yet, to satisfy the requirement, the emails only need to be "sufficiently definite to show the essential elements of a valid contract." *Carr*, 269 N.C. at 243. And when "considered together[,]" defendant's emails undoubtedly do that. *See Crocker*, 125 N.C. App. at 586.

As the majority states, the essential elements of the parties, price, and signature were met, leaving only the element of defendant's promise to pay in question. Here, defendant's September 2019 email states that

"it is important to *us* to always pay *our* valued partners quickly for their services rendered so rest assured your invoice will be turned around immediately and a check sent upon receipt." (emphasis added). The same email also accounts for payment of "any and all [future] invoices" by asking that such invoices be sent directly to defendant's personal email address. I think this sufficiently shows in writing defendant's promise to pay.

Defendant further memorializes his agreement to pay plaintiff for legal services in five emails sent by defendant between December 2019 and July 2020. Specifically, defendant's 19 December 2019 email specifically refers to subject-matter of the contract by attaching the filed complaint against defendant's son and requesting plaintiff's legal review of it. The four subsequent emails—sent directly from defendant in June and July 2020—refer to various invoices and questions about payments for legal services, including defendant's clear acknowledgement that he would need to "deal with" a $3,000.00 payment for plaintiff's work "answering the discovery served upon" defendant's son. Thus, when considered together, defendant's emails constitute a signed memorialization of the guaranty between plaintiff and defendant and satisfy the requirements of § 22-1 and our precedents.

To support the contention that these emails somehow miss the mark of satisfying the statute of frauds, the majority cites *Winders v. Hill*, 144 N.C. 614, a 116-year-old case that—until this filing—has not been mentioned for sixty-nine years. *See Clapp v. Clapp*, 241 N.C. 281, 283–84 (1954) (citing *Winders* to support the rule that "it is settled law that a party may rely on the statute of frauds under a general denial."); *see also Weant v. McCanless*, 235 N.C. 384, 386 (1952) ("[T]he contract, as alleged, may be denied and the statute pleaded, and in such case if it 'develops on the trial that the contract is in parol, it must be declared invalid'.").

In *Winders*, our Supreme Court explained that the writings did not satisfy the statute of frauds because they were insufficient to constitute an admission of the contract in that they did not "contain internal evidence of the contract or refer to some that writing that does." 144 N.C. at 618 (citations omitted). Our Supreme Court reaffirmed the rule set forth in *Winders* that in a breach of contract case, the plaintiff "must establish the contract by legal evidence, and if it is required by the statute to be in writing, then by the writing itself, for that is the only admissible proof" *Jamerson v. Logan*, 228 N.C. 540, 543 (1948) (citing *Winders*, 144 N.C. at 617).

Yet, even in light of *Winders*, the majority's argument fails. In the case *sub judice*, unlike in *Winders*, we have multiple emails from

defendant that not only "contain internal evidence of the [guaranty]" but as discussed above, are sufficiently definite to show the contract's essential elements. *See Winders*, 144 N.C. at 618. The emails may also be considered "legal evidence" and taken together constitute "the writing itself" and accordingly are "admissible proof" of the contract. *Jamerson*, 228 N.C. at 543.

The majority also attempts to engender a new rule from *Winders* that written "implications" cannot support satisfying the statute of frauds. I cannot agree with such proposition, however, as neither *Winders* nor N.C.G.S. §§ 22-1 through 22-5 states this. In fact, § 22-1 simply requires that "*some memorandum or note thereof*, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized." (emphasis added). More importantly, I believe that defendant's emails, which the majority states "imply that he agreed to pay for Nick's legal bills," go further than mere implication, and instead "contain internal evidence of the contract" and satisfy the statute of frauds. As the majority acknowledges, the statute of frauds "is not a high bar," and in my view the evidence here easily clears.

For the foregoing reasons, I would affirm the trial court's judgment. Therefore, I dissent.

STATE OF NORTH CAROLINA
v.
JOSEPH BALL

No. COA22-1029

Filed 16 January 2024

1. Kidnapping—rape case—"restraint" element of kidnapping—separate from restraint inherent in rape

In a prosecution arising from the rape of a sixty-five-year-old woman, the trial court properly denied defendant's motion to dismiss a charge of second-degree kidnapping, where the State presented sufficient evidence of restraint that was separate and distinct from that which was required to commit the rape. Specifically, the evidence showed that defendant forced his way into the woman's home, intercepted her as she tried to flee from him, trapped her inside her own bedroom, and held her down onto her bed while the two engaged in an extended physical struggle leading up to the rape.

2. Constitutional Law—Confrontation Clause—sexual assault nurse examination report—prepared by nontestifying nurse —different nurse's expert testimony regarding report

In a prosecution arising from the rape of a sixty-five-year-old woman, the trial court did not commit plain error by admitting a sexual assault nurse examination report into evidence or by allowing a different nurse from the one who prepared the report to testify about it as an expert in sexual assault nurse examinations. Although the report constituted testimonial evidence, testimonial statements will not be barred under the Confrontation Clause under certain circumstances, such as where they are admitted for nonhearsay purposes. Further, because the nurse testified only as to her independent opinion of the exam results detailed in the report, she was the witness that defendant had the right to confront, not the nurse who prepared the report; therefore, because defendant was able to cross-examine the testifying nurse at trial, his confrontation rights were not violated.

3. Criminal Law—prosecutor's closing argument—differences in defendant's pretrial statements and trial testimony—credibility argument

In a prosecution arising from the rape of a sixty-five-year-old woman, the trial court did not abuse its discretion by failing to intervene ex mero motu during the prosecutor's closing argument, during which the prosecutor highlighted the differences between defendant's recorded statement to law enforcement days after the rape and his trial testimony, describing the differences as "the evolution of a defense." Rather than improperly suggesting—as defendant contended on appeal—that defendant testified falsely at trial pursuant to his lawyers' advice, it could be reasonably inferred from the record that the prosecutor was merely pointing out defendant's differing statements in order to call defendant's credibility into question.

Appeal by Defendant from judgment entered 17 December 2021 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Ryan C. Zellar, for the State.

Joseph P. Lattimore, for the Defendant-Appellant.

WOOD, Judge.

Joseph Ball ("Defendant") appeals from judgments entered by the trial court after a jury verdict finding him guilty of second-degree forcible rape, first-degree burglary, interfering with an emergency communication, second-degree kidnapping, and assault on a female. For the reasons stated below, we hold Defendant received a fair trial, free from error.

I. Factual and Procedural Background

On the evening of 11 May 2019, Defendant appeared at the residence of K.V.[1] K.V.'s residence is situated on a seventeen-acre farm and contains her primary residence, a storage building, and a guest house. Defendant and K.V. knew each other previously as they had worked together at a Christmas tree lot in Atlanta, Georgia and Defendant had completed carpentry work at her property years earlier.

When K.V. answered the door, Defendant informed K.V. his car was stuck in a nearby ditch, and he could not drive it. K.V. offered Defendant her guest house for the night, walked him to the structure, and returned to her residence. K.V. texted two friends notifying them that a person was staying in her guest house and asked them to check in with her in the morning because she felt uncomfortable.

At trial, the parties offered different accounts of what followed. K.V. testified that after she returned to her home, Defendant came to her front door again and asked for a cigarette lighter. After she handed a lighter to Defendant, he barged through the front door into the home. K.V. ran to retrieve her phone to call for help, but before she could reach her phone, Defendant "intercepted [her] and threw [her] on the bed." K.V. landed on her bed face down.

Defendant jumped on the bed, placed his knee in K.V.'s back, grabbed her wrists, and attempted to roll her over. K.V. began to scream, kick, and repeatedly ordered Defendant to leave her home. When Defendant ignored her, K.V. began to beg Defendant not to hurt her and told him she would not call the police if he left her home without hurting her. According to K.V., Defendant responded "I've made it this far, I'm going to finish it." K.V. testified she warned Defendant that "if he did finish it, there would be consequences that he might not like" to which Defendant responded, "I don't care what the consequences are." Defendant moved K.V. onto her back, at which point she kicked Defendant in the face, causing his glasses to fly off his face. At some point during the struggle, K.V. noticed Defendant's cell phone on the

1. The prosecuting witness is referred to by her initials to protect her identity.

bed, picked it up, and attempted to dial 911. However, before she could complete the call, Defendant grabbed the phone out of K.V.'s hands and threw it against the wall.

K.V. testified that during this struggle, she feared for her life as she, a sixty-five-year-old woman, measuring 5'1", and weighing 140 pounds, was resisting a man likely around forty years old, measuring around 6'1", and weighing around 250 to 300 pounds. Recounting the struggle, K.V. testified:

> [I]t became pretty clear to me that my choice was to submit or die. I think every woman at some point in their life has imagined what they would do if they were put in this circumstance. And I simply knew I needed to submit so that I could live, so I let him roll me over.

Once K.V. was rolled onto her back, Defendant attempted to vaginally penetrate her but was unable to do so. Defendant then grabbed K.V.'s hair, pushed her face into his crotch, and demanded oral sex. K.V. refused. Defendant eventually penetrated K.V.'s vagina with his penis.

After Defendant ejaculated, he rolled off her, and she quickly leapt off the bed, attempting to escape. As she was running from her bedroom, Defendant, while still lying on the bed, grabbed and ripped off K.V.'s nightgown. K.V. escaped out of her front door nude, grabbed a blanket from the guest house to cover herself, and ran to her neighbor's home to ask for help. After failing to obtain help from her neighbors, K.V. approached a nearby sheriff's vehicle for assistance and reported that she had been raped by a man who was still in her home. The officers accompanied K.V. back to her home and found Defendant asleep on the bed. Defendant did not respond to the officers. The officers rolled him onto his side to handcuff him and removed him from K.V.'s home. K.V. underwent a sexual assault nurse examination ("SANE exam") the following morning on 12 May 2019.

In Defendant's recount of the night in question, he testified he was on his way to Atlanta but realized he was too intoxicated from alcohol to drive and needed to rest before continuing his travels. Defendant testified he had several drinks over the course of the day and by the evening began to "fade in and out of consciousness" after consuming six "Long Island iced teas" at a restaurant. Remembering K.V. lived near the travel route he was planning to take, Defendant decided to try to stay with her until he became sober. According to Defendant, after K.V. agreed to let him stay in her guest house, the two later went into K.V.'s bedroom, where he caressed and kissed K.V.'s breasts while they were lying

together on the bed. Defendant testified he initially could not perform sexually, so he had to "manually stimulate" himself. He testified that he and K.V. eventually engaged in consensual sexual intercourse.

On 15 July 2019, Defendant was charged with second-degree forcible rape, first-degree burglary, and interfering with an emergency communication. On 22 January 2020, Defendant was charged with second-degree kidnapping, sexual battery, and assault on a female in a superseding indictment. Defendant's trial was held during the 13 December 2021 criminal session of the Macon County Superior Court.

In addition to the testimony presented by K.V., the State presented the testimony of Corporal Lynch of the Macon County Sheriff's Department, who accompanied K.V. back to her home. Corporal Lynch testified that when he entered K.V.'s home, he found "a large naked man in the bed." Corporal Lynch noted, "he's way over 6 foot tall, I would estimate; and he was in excess of 200 pounds, probably 250 pounds. He was much larger than I was and much larger than [K.V]." Corporal Lynch placed Defendant under arrest, handcuffed him and rolled him onto his side because he was vomiting. Corporal Lynch testified there was a strong odor of alcohol and opined that Defendant was "appreciably intoxicated."

The State also called Detective Wright of the Macon County Sheriff's Office Special Victim's Unit who testified to taking pictures and collecting evidence at K.V.'s home as part of her normal investigation practice. Some of the pictures and evidence collected were accepted into evidence at trial and included a photograph of Defendant lying on K.V.'s bed, men's clothing, boots and boxer shorts, a broken cell phone with a cell phone battery, a cigarette butt, a photograph of metal framed eyeglasses on the floor, and a photograph of a torn nightgown on K.V.'s bed.

The State called as a witness Mr. Wendell Ivory of the North Carolina State Crime Lab who reviewed Defendant's DNA samples as well as DNA samples obtained through vaginal swabs of K.V. Mr. Ivory testified "[t]he major DNA profile matches the DNA profile from [Defendant]," while "the minor profile is no different from that of [K.V.]."

The State called Nurse Maillet, a forensic nursing supervisor at Mission Hospital, who was tendered at trial, without objection, as an expert in sexual assault nurse examinations. Nurse Maillet provided expert testimony regarding the SANE exam report, which was performed by Nurse Sullivan, a registered nurse at Mission Hospital, on 12 May 2019.

Nurse Maillet testified she personally reviewed K.V.'s SANE exam report and concluded the examination was conducted in accordance with the proper protocols governing all sexual assault examinations. Nurse Maillet further explained that part of the general protocol governing all sexual assault examinations is for the examining nurse to take photographs of nearly every part of the patient's body. Nurse Maillet personally reviewed the photographs taken during K.V.'s examination, and she observed bruising, abrasions and redness in the photographs that were "consistent with blunt trauma, which is what happens during a sexual assault." In connection with Nurse Maillet's testimony, the SANE exam report was admitted into evidence at trial, without objection.

Additionally, the State admitted into evidence, without objection, a recorded interview between Defendant and members of the Macon County Sheriff's Office conducted two days after the incident. During the recorded interview, which was played for the jury at trial, Defendant stated several times "I was too drunk[,] I don't remember anything" concerning the night in question. In the interview, when asked by officers "why did you do it," Defendant responded by stating, "I don't know."

On 17 December 2021, the jury found Defendant guilty of second-degree forcible rape, first-degree burglary, interfering with an emergency communication, second-degree kidnapping, and assault on a female. Following the jury's guilty verdicts, the trial court imposed the following active sentences, which were ordered to run consecutively: 96 to 176 months in prison for the conviction for second-degree forcible rape; 84 to 113 months for first-degree burglary; 75 days for interfering with an emergency communication; 33 to 52 months for second-degree kidnapping; and 75 days for assault on a female. Defendant gave oral notice of appeal in open court on this same day.

II. Analysis

Defendant brings three issues on appeal. We address each in turn.

A. Motion to Dismiss the Kidnapping Charge.

[1] Defendant first argues the trial court erred in denying his motion to dismiss the charge of second-degree kidnapping. Specifically, Defendant challenges the State's failure to "introduce sufficient evidence of confinement separate from that which was inherent in the commission of the alleged sexual assault" on K.V. We disagree.

Upon a defendant's motion to dismiss, the question for the trial 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." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The trial court views the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000). "Contradictions and discrepancies [in the evidence] do not warrant dismissal of the case but are for the jury to resolve." *Id.* at 379, 526 S.E.2d at 455. "[I]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Woods*, 275 N.C. App. 364, 368, 853 S.E.2d 177, 180 (2020), *aff'd*, 381 N.C. 160, 871 S.E.2d 495 (2022) (citation omitted).

This Court reviews a trial court's denial of a motion to dismiss *de novo*. *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015) (citation omitted). Under a *de novo* standard of 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) (citation and internal quotation marks omitted).

Kidnapping is defined pursuant to N.C. Gen. Stat. § 14-39:

> Any person who shall unlawfully confine, restrain or remove from one place to another . . . without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint, or removal is for the purpose of: (1) Holding such other person for ransom or as a hostage or using such other person as a shield or (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony or (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

N.C. Gen. Stat. § 14-39(a) (2023). Our case law provides kidnapping has no durational requirements, and instead, lasts until the victim regains her free will. *State v. White*, 127 N.C. App. 565, 571, 492 S.E.2d 48, 51 (1997). Similarly, confinement and restraint need not last for a significant amount of time, nor does removal require asportation of the victim across a substantial distance. *See State v. Fulcher*, 294 N.C. 503, 522, 243 S.E.2d 338, 351 (1978).

"[A] kidnapping charge cannot be sustained if based upon restraint [or confinement] which is an inherent feature of another felony." *State v. Williams*, 308 N.C. 339, 346, 302 S.E.2d 441, 447 (1983). Thus, the

restraint for kidnapping "must be an act independent of the intended felony." *State v. Ackerman*, 144 N.C. App. 452, 457, 551 S.E.2d 139, 142 (2001).

The test of the independent act "does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense." *Williams*, 308 N.C. at 347, 302 S.E.2d at 447. "It has been held, quite properly, that where movement is merely incidental to an assault the prosecution must be for that offense and not for kidnapping." *State v. Ripley*, 360 N.C. 333, 338, 626 S.E.2d 289, 293 (2006) (quoting Rollin M. Perkins, *Criminal Law*, ch. 2, § 7(A)(1), at 178 (2d ed. 1969)). A court may also consider whether the restraint subjected the victim to the type of danger the kidnapping statute was designed to prevent, and whether defendant's acts "increase[d] the victim's helplessness and vulnerability." *State v. Key*, 180 N.C. App. 286, 290, 636 S.E.2d 816, 820 (2006) (citation omitted).

In rape cases, this Court has previously determined a separate charge of second-degree kidnapping requires a defendant's restraint or confinement of the victim to be separate from that necessary to accomplish the rape. *State v. Harris*, 140 N.C. App. 208, 213, 535 S.E.2d 614, 618 (2000). Additionally, we have held acts of confinement or restraint prior to the commission of a rape are separate and distinct from the force used during the rape itself. *See State v. Robertson*, 149 N.C. App. 563, 569, 562 S.E.2d 551, 556 (2002).

In the present case, the State introduced evidence tending to show restraint, which was separate and distinct from that required to accomplish the charge of second-degree forcible rape. Evidence was presented tending to show Defendant and K.V. were engaged in an ongoing struggle. K.V. testified Defendant forced himself into her front door, "intercepted" her as she tried to flee from him, threw her onto her bed, climbed on top of her and placed his knee in the small of her back while holding both of her wrists behind her back. K.V. began kicking and screaming at Defendant "a dozen or more times" to get out of her house. After her requests were ignored by Defendant, K.V. testified she mentally "moved to the next phase which was to beg him not to hurt [her]." Defendant instead responded, "I've made it this far, I'm going to finish it."

During the physical struggle, K.V. reached for Defendant's cell phone on the bed and attempted to dial 911, but Defendant allegedly grabbed the phone out of K.V.'s hands and threw it against the wall. Defendant continued to restrain K.V. as he forced her to roll over onto her back, and K.V. attempted to resist by kicking Defendant in the face, causing his glasses to fly off his face. The evidence shows K.V. was trapped and restrained in her own bedroom during this physical struggle

before Defendant sexually assaulted her. Moreover, after attempting to resist Defendant, K.V. testified she felt helpless, feared for her life, and believed she had the choice to either submit to Defendant's assaults or die. As K.V. attempted to flee after the assaults and rape, Defendant grabbed and ripped off her nightgown, causing her to flee from her own home outside into the night naked.

When viewed in the light most favorable to the State, we hold Defendant's restraints of K.V. were separate and apart from that inherent in the commission of the rape. Therefore, Defendant's motion to dismiss the charge of second-degree kidnapping was properly denied. Defendant's argument is overruled.

B. The SANE Exam Report and Expert Witness Testimony.

[2] Next, Defendant contends the trial court plainly erred in admitting the SANE exam report prepared by Nurse Sullivan and in allowing Nurse Maillet to provide "surrogate testimony for Sullivan, in violation of the Confrontation Clause." We disagree.

On appeal, Defendant concedes he failed to object to the admission of Nurse Sullivan's SANE exam report containing her observations of injuries to K.V.'s genital area. Likewise, Defendant acknowledges he failed to object to Nurse Maillet's testimony regarding the report.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). However, in criminal cases,

> an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4).

Generally, "plain error review is available in criminal appeals for challenges to jury instructions and evidentiary issues." *State v. Miller*, 371 N.C. 266, 268, 814 S.E.2d 81, 83 (2018) (citation omitted). To find plain error, an appellate court must determine that an error occurred at trial. *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Additionally, the defendant must demonstrate that the error was

"fundamental"—meaning the error "had a probable impact on the jury's finding that the defendant was guilty and seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Miller*, 371 N.C. at 269, 814 S.E.2d at 83 (cleaned up).

> Thus, plain error should only be found where the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial.

State v. Lane, 271 N.C. App. 307, 312, 844 S.E.2d 32, 38 (2020) (cleaned up). Courts reverse for plain error only in the "most exceptional cases." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (citation omitted).

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees 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 Confrontation Clause "bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citations omitted).

The Supreme Court of the United States noted in *Melendez-Diaz v. Massachusetts* that forensic analyses qualify as testimonial statements subject to the Confrontation Clause. 557 U.S. 305, 310, 129 S. Ct. 2527, 2532, 174 L. Ed. 2d 314, 321 (2009) (holding that reports stating the substance at issue was cocaine was testimonial). Thus, in the present case, the SANE exam report constitutes a testimonial statement. However, as the State notes, the Confrontation Clause is subject to several exceptions that limit its applicability, including that testimonial statements will not be barred when they are admitted for "purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 60 n.9, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 198 (2004) (citation omitted).

Rule 702 of the North Carolina Rules of Evidence states: "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 . . . may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, R. 702(a). North Carolina courts have consistently held

> when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible.

State v. Ortiz-Zape, 367 N.C. 1, 9, 743 S.E.2d 156, 161 (2013) (cleaned up).

An expert witness "may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinions; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusion in [the] case." *State v. Crumitie*, 266 N.C. App. 373, 379, 831 S.E.2d 592, 596 (2019) (citations omitted). Importantly, "the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements." *Ortiz-Zape*, 367 N.C. at 9, 743 S.E.2d at 162 (citation omitted). In short, an expert witness may properly base her independent opinion "on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field," without violating the Confrontation Clause. *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001).

In the present case, Nurse Maillet identified herself as a forensic nursing supervisor at the hospital, and who has the responsibility to "go through the other nurse's charting and documentation and photographs and make sure that everything is up to standard." Nurse Maillet testified she has twenty-five years of experience both performing and overseeing sexual assault examinations. The State tendered Nurse Maillet as an expert in sexual assault nurse examinations, and the trial court accepted her as an expert without objection from Defendant. Nurse Maillet testified the protocol for a sexual assault examination includes speaking with the patient and gathering medical history, explaining to the patient what treatments and procedures are offered, gaining the patient's consent as to what procedures and examinations she would like to undergo, and then conducting a general physical examination as well as the physical collection for the sexual assault kit, including taking photographs of areas on the body that have suffered injury or abnormality.

Nurse Maillet testified that she had an opportunity to review K.V.'s sexual assault examination conducted by Nurse Sullivan. Nurse Maillet affirmed that Nurse Sullivan conducted the SANE exam in accordance

with proper procedures and protocols. The SANE exam report conducted on K.V. was admitted into evidence without objection.

Nurse Maillet then provided her own independent opinion of the images taken during K.V.'s examination showing injury to K.V.'s body, which were included in the SANE exam report. Nurse Maillet testified in her review of the photographs indicating bruising, she "found three instances of what [she] consider[s] an incident worth reporting" and the injury she observed "is consistent with blunt trauma, which is what happens during a sexual assault." Nurse Maillet's testimony was based upon her personal knowledge and her professional judgement in her independent review of the information from the SANE exam report. Hence, Nurse Maillet's opinion was her "own independently reasoned opinion" and did not serve as "surrogate testimony parroting the testing analyst's opinion." *Ortiz-Zape*, 367 N.C. at 12, 743 S.E.2d at 163 (citation omitted). Because Nurse Maillet provided her independently reasoned opinion, she is the witness whom Defendant had the right to confront, and which he did confront during cross-examination. *Id.* at 8, 743 S.E.2d at 161. Because there was no violation of Defendant's rights to confrontation, the trial court did not err, much less plainly err, in admitting the SANE exam report and in allowing Nurse Maillet's testimony.

C. The Prosecutor's Closing Argument.

[3] In his final argument, Defendant contends that the trial court erred by failing to intervene *ex mero motu* in response to statements made by the Prosecutor during his closing argument. We disagree.

During closing arguments, a lawyer is "to provide the jury with a summation of the evidence, which in turn serves to sharpen and clarify the issues for resolution by the trier of fact, and should be limited to relevant legal issues." *State v. Jones*, 355 N.C. 117, 127, 558 S.E.2d 97, 103 (2002) (cleaned up). In a criminal jury trial, N.C. Gen. Stat. § 15A-123(a) provides specific guidelines for closing arguments:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2023). Additionally, our Supreme Court has determined that "argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). Nonetheless, this wide latitude has limitations as a closing argument must: "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108.

We note Defendant's attorney failed to object to the Prosecutor's closing argument, so Defendant "must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Tart*, 372 N.C. 73, 80-81, 824 S.E.2d 837, 842 (2019) (cleaned up).

Even when an appellate court determines that a trial court erred in failing to intervene *ex mero motu*, a new trial will be granted only if "the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* at 82, 824 S.E.2d at 843 (citation omitted).

In the present case, Defendant argues the Prosecutor attempted to undermine Defendant's testimony by pointing out the differences "in his testimony about the sexual encounter with [K.V.] and his previous recorded statement to law enforcement" in describing it as "the evolution of a defense." Specifically, Defendant challenges the following portion of the closing argument:

> So why is this important? Why the change? The rape, voluntary intoxication is not a defense. On May 13th of 2019 [Defendant] was in custody. You've heard testimony that he didn't have a lawyer. "I was too drunk. I don't remember anything." It sounded pretty good, but it's not a defense. What's the only thing left for [Defendant] to avoid facing consequences? It's a red herring all day long. That's why the testimony was what it was. That's why they're excruciating minute details about all of these interactions with [K.V.] that she didn't testify about that he didn't tell Detective Burrows or Detective Wright about. Consent is

> the last card that could be played. The burglary, kidnapping, interfere with emergency communications, voluntary intoxication is a defense. Go back one. Why is that important? [Defendant's] recall and memory and testimony from the stand only involved consent. He doesn't remember anything else to do with these crimes where voluntary intoxication is a defense, nothing. He's like a light bulb except only when it's convenient for him and his case.

Defendant contends "[t]here was absolutely no support in the evidence for this comment, which suggested that [he] testified falsely in accordance with the advice he received from his lawyers."

When making closing arguments, prosecutors may argue based on the law, the facts in evidence, and "all reasonable inferences drawn therefrom." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citation omitted). Additionally, attorneys may properly refer to evidence of prior misconduct by the defendant to make arguments regarding the defendant's credibility. *State v. Bondurant*, 309 N.C. 674, 688, 309 S.E.2d 170, 179 (1983).

Here, the Prosecutor's closing statements were consistent with the record, as his arguments highlighted the differences between Defendant's statements to the police two days after the incident, which were properly admitted at trial, and Defendant's own testimony during his trial. When viewing this argument in light of the overall factual circumstances to which it refers, it is clear the Prosecutor was making a credibility argument against Defendant. This questioning of Defendant's credibility was reasonably inferred from the record and did not violate the requirements of N.C. Gen. Stat. § 15A-1230. Thus, the Prosecutor's remarks were not grossly improper or so extreme and of such a magnitude that their inclusion in the State's argument prejudiced Defendant by rendering the proceedings fundamentally unfair.

III. Conclusion

For the reasons stated above, we conclude Defendant received a fair trial, free from error.

NO ERROR.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
CORY MICAH FORNEY

No. COA23-338

Filed 16 January 2024

Motor Vehicles—driving while impaired—breath chemical analysis—chewing gum in mouth—shortened observation period—no prejudicial error

There was no prejudicial error in defendant's trial for impaired driving by the admission of breath chemical analysis results, which were collected from defendant after three standardized field sobriety tests indicated a high likelihood that defendant was appreciably impaired. Where defendant gave an initial breath sample while he had chewing gum in his mouth, and a second sample was collected two minutes after he was made to spit out the gum, the admission of the results was error because the officer did not start a new fifteen-minute observation period prior to collecting the second sample as required by administrative rules. However, the error was not prejudicial where there was not a reasonable possibility that, absent the error, a different result would have been reached at trial, based on the arresting officer's direct observations of defendant's demeanor at the scene and the results of the field sobriety tests.

Judge ARROWOOD concurring in the result only.

Judge WOOD concurring by separate opinion.

Appeal by defendant from judgments entered 8 July 2022 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 14 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General J.D. Prather, for the State.

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

THOMPSON, Judge.

In this appeal from defendant's conviction on a charge of impaired driving, among other offenses, he argues that the trial court erred in admitting the results of a chemical analysis of defendant's breath. While we agree that the evidence in question should not have been admitted at trial, we conclude that the error was not prejudicial to defendant. Accordingly, defendant's conviction on a charge of impaired driving must be upheld.

I. Factual Background and Procedural History

The evidence introduced at defendant's trial tended to show the following: On 9 March 2021, Officer Samuel DeGrave, of the Asheville Police Department, was on traffic enforcement duty observing a stop sign located in East Asheville. Just after 10:00 p.m., a red Dodge minivan being operated by defendant[1] failed to stop at the stop sign, and DeGrave initiated a traffic stop. At the beginning of their interaction, DeGrave explained the reason for the traffic stop and defendant informed DeGrave that defendant had no driver's license. DeGrave detected an odor of alcohol emanating from the vehicle and noticed that the odor was stronger when defendant spoke. DeGrave further observed that defendant's speech was slow and slurred and his eyes were red and glassy; DeGrave's suspicion that defendant had consumed alcohol was also raised when he saw defendant put a piece of mint gum into his mouth while DeGrave was verifying defendant's identity and that of the female passenger in the vehicle.

After completing that process, DeGrave returned to the minivan and informed defendant that DeGrave was going to conduct three standardized field sobriety tests, which the officer was certified to perform. He thereafter performed three such tests on defendant. On the horizontal gaze nystagmus (HGN) test—about which DeGrave was allowed to testify as an expert—DeGrave noted six of six possible indications of impairment. DeGrave noted two of eight possible indications of impairment on the walk-and-turn test and three of four indications of impairment on the one-leg-stand test. DeGrave testified that a research study of these results created a 91% likelihood that defendant was appreciably impaired. Based upon his observations and the test results, DeGrave formed the opinion that defendant had consumed a sufficient quantity of alcohol to appreciably impair his faculties and arrested him.

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1. The vehicle's occupants also included a female passenger in the passenger seat and a child in the back seat.

At the Buncombe County Jail, Officer Kenneth Merritt of the Biltmore Forest Police Department, a certified chemical analyst, was called in to perform a breath analysis of defendant using an "EC/IR II Intoximeter." After advising defendant of his implied consent rights, Merritt began a fifteen-minute "observation period" designed to ensure that the individual does not eat food, consume alcohol, regurgitate, or smoke prior to testing, primarily to ensure the presence of no "mouth alcohol" that might affect the accuracy of the blood alcohol reading. Merritt administered a breath test at 12:05 a.m. which resulted in a 0.11 blood alcohol concentration (BAC) reading. When Merritt then noticed that defendant had chewing gum in his mouth, he had defendant spit out the gum and then administered a second breath test at 12:07 a.m., which again resulted in a 0.11 BAC reading.

Defendant was later charged with driving while impaired, driving while impaired with three prior convictions of driving while impaired within 10 years of the date of the offense, driving while license revoked, and failure to stop for a stop sign. The case came on for hearing before Judge Gregory Horne at the 5 July 2022 session of Superior Court, Buncombe County. Defendant filed several pretrial motions, including a motion in limine which sought to exclude the results of the EC/IR II breath testing on the basis that Merritt failed to follow the required observation protocol before administering the second breath test. That motion was denied following an evidentiary hearing. Defendant then pled guilty to the offenses of driving while impaired with three prior convictions of driving while impaired within 10 years of the date of the offense and driving while license revoked, not guilty to driving while impaired, and not responsible for the stop sign violation.

The other matters proceeded to trial before a jury, and when Merritt was asked to describe the step of the Intoximeter procedure known as the "observation period," he testified that "the observation period is a 15-minute period that I'm looking for regurgitation, or as bad as it sounds, throw up, eating food, consuming alcohol, or smoking cigarettes. *It is mainly to detect for mouth alcohol*." (Emphasis added.) Merritt also stated that he did not see defendant "put anything in his mouth or . . . see any signs of him regurgitating or drinking or anything like that." Nevertheless, Merritt testified that after he then collected a first breath sample from defendant, Merritt "was notified that [defendant] had gum in his mouth." Merritt had defendant spit out the gum and collected the second breath sample required under the pertinent procedures two minutes later. Defendant renewed his objection to the admission of the Intoximeter results, and the trial court overruled those objections and allowed the results to be published to the jury.

On cross examination, defendant's trial counsel discussed the waiting period with Merritt:

> Q. And the reason that we need an observation period is to make sure that there's nothing going on internally for the subject of the test that could skew the results of the test, correct?
>
> A. For the most part, yes, sir. My understanding is to allow for deterioration of mouth alcohol.

Merritt acknowledged that "the reason for the rules and regulations, again, is to assure us of the accuracy and reliability of the results that the [Intoximeter] provides" and also agreed that "for best practices" he should have restarted the observation period after having defendant spit out the gum. However, Merritt repeatedly stated that he did not believe the rules had been violated because they only explicitly ask the analyst "to look for consuming alcohol, smoking, eating, and regurgitating" and do not address chewing gum.

The State then called Daniel Cutler, an employee of the North Carolina Forensic Tests for Alcohol Branch of the Division of Public Health within DHHS, who was then acting as a Drug and Alcohol Impaired Driving Regional Coordinator supervising the affairs of the Forensic Tests for Alcohol Branch within the western 18 counties of the State, and Cutler was admitted as an expert in the EC/IR II breath testing instrument and its procedures without objection. Cutler testified that "[g]um in the mouth will not, and by all indications, looking at the test record, did not affect the results of the breath sample," citing two published studies. Cutler explained that one of those studies indicated that chewing "sugar-free gum, which is a salivary flow promoter" for five minutes led to lower BAC results as compared to the control situation in which no gum was chewed. The first study was conducted using "an Intoxilyzer 5000C," the testing instrument used in North Carolina prior to our State's adoption of the Intoximeter Model EC/IR II. The second study cited involved testing with "75 different brands of chewing gum" and indicated that one brand of gum, "Trident Splash Strawberry with Kiwi" caused elevated BAC results, but the remaining varieties of gum did not. The testing instruments used in that study were "the Alco-Sensor IV DWF, and Alcotest 7410 GLC."

Dr. Andy Ewans, a forensic toxicologist, testified for the defense as an expert in toxicology and agreed that "in general" gum in a test subject's mouth would not affect chemical analysis results. He further noted, however, Cutler's own reference to a study indicating an impact

on BAC results from at least some types of gum and also emphasized that regardless, "the protocol established by statute was not followed by Sergeant Merritt."

On 8 July 2022, the jury found defendant guilty of the impaired driving charge and responsible for the stop sign violation. Defendant gave notice of appeal in open court.

II. Analysis

Defendant's sole contention on appeal is that the trial court committed error in denying his motion to exclude the results of the Intoximeter's chemical analysis and in overruling defendant's objections to the admission of that evidence when it was introduced at trial. Specifically, defendant argues that after having defendant remove the gum from his mouth, Merritt's failure to conduct a new observation period rendered the Intoximeter results inadmissible under the relevant provision of the North Carolina General Statutes and related Department of Health and Human Services rules. We agree. However, because defendant has failed to show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial," N.C. Gen. Stat. §15A-1443(a) (2021), we hold that he has not demonstrated prejudice.

A. Error in admission of chemical analysis results

The primary issue before us in this appeal, which appears to be a matter of first impression, is one of statutory and regulatory interpretation. Such questions are reviewed de novo. *Sound Rivers Inc. v. N.C. Dep't of Envtl. Quality*, 271 N.C. App. 674, 727, 845 S.E.2d 802, 834 (2020), *affirmed in part and disc. review allowed in part*, 385 N.C. 1, 891 S.E.2d 83 (2023).

> An appeal de novo is one in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings. Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

In re K.S., 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (citations, quotation marks, and brackets omitted).

The provisions at the heart of this appeal concern the admissibility of breath test results obtained by means of chemical analysis. "A chemical analysis of the breath . . . is admissible in any court . . . if it . . . is

performed in accordance with the rules of the Department of Health and Human Services." N.C. Gen. Stat. § 20-139.1(b)(1) (2021).[2] *See also State v. Davis*, 208 N.C. App. 26, 34, 702 S.E.2d 507, 513 (2010). The pertinent Department of Health and Human Services (DHHS) rules are found in Chapter 10A, Subchapter 41B of the North Carolina Administrative Code, titled "Injury Control." The testing procedure for the type of Intoximeter employed for the chemical analysis of defendant's breath—the EC/IR II—is found in 10A NCAC 41B.0322 and provides that "when administering a test using the Intoximeters," a chemical analyst must, *inter alia*, "[e]nsure [that] observation period requirements have been met" before collecting two breath samples for analysis. 10A NCAC 41B.0322(2), (6), (7); *see also* N.C. Gen. Stat. § 20-139.1(b)(1), (b3). The "observation period," in turn, is defined as

> a period during which a chemical analyst observes the person or persons to be tested to determine *that the person* or persons *has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen.* The chemical analyst may observe while conducting the operational procedures in using a breath testing instrument. *Dental devices or oral jewelry need not be removed.*

10A NCAC 41B.0101(6) (emphases added). As the proponent of breath test evidence in an impaired driving case, "the State bears the burden of proving compliance with the 'observation period' requirement set out in N.C. Gen. Stat. § 20-139.1." *State v. Roberts*, 237 N.C. App. 551, 560, 767 S.E.2d 543, 550 (2014), *disc. review denied*, 368 N.C. 258, 771 S.E.2d 324 (2015).

The basis of defendant's motion in limine to exclude the chemical analysis results was that, while Merritt conducted an observation period before obtaining the first breath sample from defendant, after determining that defendant had gum in his mouth and having defendant spit out the gum, Merritt did not conduct an additional observation period and then began the testing process again. At the hearing on the motion, the State contended that Merritt did not violate the statutory mandate or the DHHS rules "because chewing gum is not eating," further emphasizing that "it would be different if [defendant] had actually taken the

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2. This statute also requires that "[t]he person performing the analysis ha[ve] . . . a current permit . . . to perform a test of the breath using the type of instrument employed." N.C. Gen. Stat. § 20-139.1(b)(1). Merritt's certification to perform the chemical analysis here is not disputed.

gum and put it in his mouth during the observation period, but there's nothing in this observation period definition that required the officer to actually check the person's mouth." Rather, the State argued that an analyst need only "make sure [test subjects] don't eat, drink, regurgitate, anything like that." Defendant, in contrast, argued that the determination of whether a violation occurred centered on whether "[t]here's a foreign substance in his mouth . . . . We did not have a second observation period after the foreign substance was found. Therefore, we do not have the proper procedure."

In explaining the decision to deny defendant's motion to exclude, the trial court appears to have adopted the State's, rather than defendant's, framing of the question and therefore focused on whether "chewing gum" was an activity covered by the plain language of 10A NCAC 41B.0101(6). In so doing, the trial court found "that there is no evidence that [defendant] ingested alcohol or other fluids, that he regurgitated, vomited or smoked during the 15 minutes. Therefore, the issue is . . . *whether or not chewing gum equates to eating or having eaten* within the 15-minute period." (Emphasis added.) After noting that "eaten" is not defined in the pertinent portion of the Administrative Code, the trial court consulted an online dictionary and found that a definition for "eat" is "to take in through the mouth as food, ingest, chew and swallow in turn."[3] The trial court then held that because "chewing gum does not equal having eaten something[,]" Merritt's failure to conduct a second observation period after having defendant spit out his gum was in "technical compliance with the rules and regulations." While it may be the case that "chewing gum does not equal having eaten something[,]" upon our de novo consideration, we agree with defendant's appellate assertions that "the trial court was wrong in following the State's suggestion that the issue boiled down to "whether or not chewing gum constitutes eating" and that instead, the DHHS rules here must be "interpreted to contain an implicit requirement that foreign objects must generally be removed from the test subject's mouth during the observation period."

As our Supreme Court has recently emphasized:

> "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134 (1990).

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3. Consulting a dictionary to determine the plain meaning of a word not defined in a statute is entirely appropriate. *Wing v. Goldman Sachs Trust Co., N.A.*, 382 N.C. 288, 298, 876 S.E.2d 390, 398 (2022).

> Although the first step in determining legislative intent involves an examination of the "plain words of the statute," *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291 (1991), "[l]egislative intent can be *ascertained not only from the phraseology of the statute but also from* the nature and purpose of the act and *the consequences which would follow its construction one way or the other*," *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759 (1989) (citations omitted).

State v. Alexander, 380 N.C. 572, 587, 869 S.E.2d 215, 227 (2022) (emphases added). Thus, in attempting to ascertain the legislative intent behind a statute or rule, "strict literalism [should] not be applied to the point of producing 'absurd results.' " *Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (quoting *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975)). *See also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470, (1989) (Kennedy, J., concurring) ("Where the plain language of the statute would lead to patently absurd consequences that [the legislature] could not *possibly* have intended, [courts] need not apply the language in such a fashion.") (citations and internal quotation marks omitted) and *Commissioner of Ins. v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) (holding that a reviewing court must avoid reading the plain language of a statute or rule in a manner that leads to absurd or bizarre consequences).

Here, the plain language of the rule defining the observation period—the individual words themselves—may appear to be clear and unambiguous, providing a specific list of actions that an analyst must determine the person to be tested has not engaged in for the fifteen minutes prior to the sample being taken: "ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked," with "chewed" or "chewed gum" not appearing in the list. 10A NCAC 41B.0106(6). In addition, DHHS elected not to end the list in this rule with a catch-all term such as "or had other substances or foreign objects in the mouth." Nevertheless, the intent of subsection N.C. Gen. Stat. § 20-139.1(b)(1), titled "Approval of Valid Test Methods; Licensing Chemical Analysts," is also plain and unambiguous: to ensure that chemical analysis results are sufficiently valid that they may be admitted "in any court or administrative hearing or proceeding" as evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(b)(1). In an effort to achieve that end, the legislature has delegated to DHHS—an agency undoubtedly more expert than the General Assembly regarding BAC measurement, chemical analysis, and the procedures appropriate

to maximize scientific reliability and validity—the task of rulemaking regarding breath testing via Intoximeters. In turn, DHHS has set forth various relevant definitions in 10A NCAC 41B.0106(6) and a specific procedure for the Intoximeter employed here in 10A NCAC 41B.0322.

In sum, we believe the intent of both the legislature and DHHS in the provisions pertinent here is clear: to ensure that the chemical analysis of a subject's breath is accurate in measuring BAC and not tainted by the presence of substances in the mouth during testing. And in our view, to adopt the State's position that the observation period requirement is not violated when a subject "chews" something during the period would lead to absurd results and have bizarre consequences because it would mean, for example, that a subject could engage in the following activities not listed in 10A NCAC 41B.0106(6) moments before the taking of breath samples: *chewing* gum—presumably including nicotine gum—or tobacco or food that is spit out before swallowing, *dipping* snuff, *sucking* on a medicated throat lozenge or a hard candy, *using* an inhaler, and *swallowing* a pill. Surely if "ingest[ing] . . . other fluids," which would include ordinary tap water, is considered a potential problem in ensuring an admissible chemical analysis of a breath sample, the examples just stated would likewise be problematic. This assumption aligns with the testimony from Merritt, a certified chemical analyst, that the purpose of the observation period "is to allow for deterioration of *mouth* alcohol" before taking breath samples.

We acknowledge the testimony at trial from the State's expert witness Cutler but note that one of the studies he cited used only sugar-free gum and the other did find an increased BAC reading after one type of gum was tested. Here, there was no evidence presented about the specific type or brand of gum in defendant's mouth during the observation period and testing and DeGrave's observation of defendant putting a piece of "mint gum" in his mouth occurred some two hours before the chemical analysis. Further, while defendant's chemical analysis was conducted using the Intox EC/IR II, the two studies Cutler cited regarding the effect of chewing gum were conducted using other testing instruments, one of which was previously used in North Carolina, but which has since been replaced by the Intoximeter EC/ER II. In any event, the procedures promulgated by DHHS in 10A NCAC 41B.0322 are specified to "be followed when administering a test using the Intoximeters, Model Intox EC/IR II and Model Intox EC/IR II (Enhanced with serial number 10,000 or higher)" and Cutler himself testified that "over the years there have been many different technologies for breath testing," presumably with different procedures for their use.

We also reject the State's contention that chewing gum would actually make the chemical analysis "more accurate," citing Cutler's testimony that chewing gum might reduce the "mouth alcohol effect" by 85%. We disagree that the reduction of the "mouth alcohol effect" would make the test more *accurate*, even if chewing gum could have some effect, potentially beneficial to a test subject, on the chemical analysis results. More importantly, as Cutler testified, the Intoximeter estimates alcohol in the blood (BAC) based on a measurement of alcohol in the breath—a ratio which in reality varies amongst different people—by using a single specific ratio to standardize the testing of all test subjects. Test results for breath samples taken from persons chewing gum, even under Cutler's testimony, would likely *differ* from those where a test subject did not have foreign substances in his or her mouth during the observation period (and while giving a breath sample). This circumstance undercuts the efforts indicated by the DHHS rules to standardize chemical analysis by Intoximeter and frustrates the intent of the General Assembly to automatically permit the admission of such evidence in any court.

In this appeal, we need only address an asserted violation of the requirements for automatic admissibility of chemical analysis of the breath on the facts before us: that defendant had gum of an unknown sort[4] in his mouth during the observation period and during the taking of the first breath sample. For the reasons discussed above, we hold that the DHHS observation provisions were violated in defendant's case and that Merritt should have conducted a new fifteen-minute observation period after having defendant spit out his gum and before taking breath samples.

B. Prejudicial impact of error

Having concluded that the trial court erred in allowing the chemical analysis results to be admitted in this case, we must now determine whether this error prejudiced defendant.

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4. At trial, DeGrave testified that he saw defendant "putting mint gum in his mouth" as DeGrave was walking back to defendant's vehicle after returning to his patrol car where he had attempted to check defendant's identification materials and that of the passenger in the car. DeGrave did not testify about whether he was able to assess whether the gum was ordinary chewing gum, nicotine gum, or some other type of gum. In addition, the traffic stop was several hours prior to the chemical analysis, and nothing in the record establishes whether the gum in defendant's mouth during the observation period and the taking of the first breath sample was the same gum which DeGrave witnessed defendant putting into his mouth.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2021).

In accordance with N.C. Gen. Stat. § 20-138.1(a)(1) and (2), the jury in this trial was instructed that the State could establish the impairment element of driving while impaired either by establishing that defendant (1) drove while his mental and physical faculties were substantially impaired by the consumption of alcohol, or (2) drove after he had consumed sufficient alcohol that he "had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath." Regarding the latter option of proving impairment, the jury was further instructed that "[t]he results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration." In light of our holding above, the question is whether "there is a reasonable possibility that" the erroneous admission of evidence of defendant's BAC impacted the jury's verdict.

The arresting officer in this matter testified that running a stop sign is not, standing alone, evidence of impairment, and that he did not witness any other illegal or unsafe driving by defendant. Defendant was at all times during the traffic stop, arrest, and detention able to: respond almost immediately when DeGrave turned on the blue lights in his vehicle; pull off onto a less-traveled side street, which DeGrave "appreciate[d]"; appear not disheveled; have already removed the keys from his vehicle's ignition and placed them on the dashboard, which DeGrave again "appreciated"; be "polite and cooperative"; understand and follow directions; engage in conversation; inform DeGrave that he had "blades" on his person and arrange with the officer to place them on the roof of the vehicle; place the blades on the roof without difficulty or fumbling; and maintain his balance.

However, when DeGrave conducted standardized field sobriety tests on defendant, he observed six out of six possible clues of impairment on the horizontal nystagmus gaze test, two out of eight clues of impairment on the walk-and-turn test, and two out of four clues of impairment on the one-leg-stand test. DeGrave testified that these results taken together suggested "a 91 percent case that" defendant was appreciably impaired. In light of this evidence and DeGrave's testimony about defendant's red glassy eyes, slurred speech, and strong odor of alcohol, we

conclude that there is not a reasonable possibility that the jury would have returned a verdict of not guilty in the absence of the erroneously admitted chemical analysis evidence.

III. Conclusion

The trial court in this matter should have excluded the State's chemical analysis evidence due to the analyst's failure to conduct a proper observation period after defendant removed gum from his mouth. Nevertheless, because defendant has failed to establish that he was prejudiced by the trial court's error, his conviction must be upheld. *See* N.C. Gen. Stat. § 15A-1443(a).

NO PREJUDICIAL ERROR.

Judge ARROWOOD concurs in result only.

Judge WOOD concurs by separate opinion.

WOOD, Judge, concurring in the result only.

Although I agree with the result reached by the majority, I would hold the trial court's admission of the breath chemical analysis results was not error. The majority holds the admission of the breath chemical analysis results was error but not prejudicial error.

As the majority recognizes, "[t]he primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). Thus, "[t]he best indicia of that intent are the [plain] language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). However, "if the statutory language is clear and unambiguous, then the statutory analysis ends, and the court gives the words in the statute their plain and definite meaning." *State v. Lemus*, 273 N.C. App. 155, 159, 848 S.E.2d 239, 242 (2020) (cleaned up).

As discussed by the majority, the statutory and regulatory provisions in this case address the admissibility of breath tests results obtained by means of chemical analysis. N.C. Gen. Stat. § 20-139.1(b) provides in pertinent part:

> A chemical analysis of the breath . . . is admissible in any court . . . if it meets both of the following requirements:
>
> (1) It is performed in accordance with the rules of the Department of Health and Human Services.
>
> (2) The person performing the analysis had . . . a current permit . . . to perform a test of the breath using the type of instrument employed."

N.C. Gen. Stat. § 20-139.1(b) (2021).

The pertinent DHHS regulations are found at 10A NCAC 41B.0322 and 10A NCAC 41B.0101(6) of the North Carolina Administrative Code. 10A NCAC 41B.0322 provides that when administering a test using the Intoximeter, such as the one used in the present case, a chemical analyst must "[e]nsure [that] observation period requirements have been met" before collecting two breath samples for analysis. In turn, 10A NCAC 41B.0101(6) defines "observation period" as:

> a period during which a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. The chemical analyst may observe while conducting the operational procedures in using a breath testing instrument. Dental devices or oral jewelry need not be removed[.]

10A NCAC 41B.0101(6).

Here, the DHHS regulations do not explicitly list chewing gum or having gum in one's mouth under 10A NCAC 41B.0101(6)'s definition of "observation period." After hearing the evidence presented during Defendant's motion *in limine*, the trial court determined the issue regarding adherence to the regulatory procedures during the observation period concerned whether the act of chewing gum constitutes eating. As the trial court noted, there is nothing in the Administrative Code which offers a definition of "eaten" as the term is used in 10A NCAC 41B.0101(6). Therefore, this word "must be given [its] common and ordinary meaning." *Lemus*, 273 N.C. App. at 159, 848 S.E.2d at 242 (citation omitted).

Consequently, the trial court consulted a Merriam-Webster dictionary to determine that the definition of "eat" is "to take in through the mouth as food, ingest, chew and swallow in turn." Based upon the

ordinary understanding of the word "eaten" in the context of the DHHS regulations, the trial court held that the officer complied with the regulatory requirements for the observation period. Applying the plain and unambiguous language of the statutory and regulatory provisions, the trial court determined no evidence was presented that anything had been eaten by Defendant during the fifteen minutes of Officer Merritt's observations.

Although "best practice" operating procedures might have prompted Officer Merritt to restart the observation period after having Defendant spit out the gum, this "best practice" is not controlling. Instead, the statutory and regulatory provisions control.

While the majority suggests we should depart from the plain language of the DHHS regulations to avoid "absurd results" in the future, it is this Court's role to "interpret statutes as they are written; we do not rewrite statutes to ensure they achieve what we believe is the legislative intent." *C Invs. 2, LLC v. Auger*, 277 N.C. App. 420, 422, 860 S.E.2d 295, 298 (2021), *aff'd*, 383 N.C. 1, 881 S.E.2d 270 (2022). Thus, if "our interpretation of the plain language of a statute yields unintended results, the General Assembly can amend the statute to ensure it achieves the intent of the legislative branch of our government." *Id.* Because the trial court made its determination based on the plain reading of the statute and DHHS regulations, I would find no error. Therefore, I respectfully concur in the result only.

STATE OF NORTH CAROLINA
v.
ROBERT TODD GUFFEY, DEFENDANT

No. COA22-1043

Filed 16 January 2024

1. Indictment and Information—fatal defect—continuing criminal enterprise—essential element—allegation of each underlying act required

In a criminal case arising from a drug trafficking scheme, defendant's conviction for aiding and abetting a continuing criminal enterprise was vacated because the indictment—by failing to specify the individual criminal acts composing the enterprise—failed to allege an essential element of the charged crime and was therefore fatally defective.

2. Jury—verdict—unanimity—conspiracy to traffic methamphetamine—by possession "or" transportation

In a drug trafficking case, defendant's conviction on a conspiracy charge was upheld where the verdict sheets indicated that defendant was found guilty of conspiring to traffic in methamphetamine "by possession or transportation." When the court instructed the jury disjunctively on trafficking by possession and trafficking by transportation, it was not listing two different conspiracies (characterized by two different underlying acts), either of which defendant could be found guilty of; rather, the court was identifying two alternative acts by which the jury could find defendant guilty of the singular conspiracy alleged. Thus, where the verdict sheet also listed the two types of trafficking in the disjunctive, the jury's verdict was not fatally ambiguous because it reflected a unanimous verdict convicting defendant of one particular offense.

Judge STROUD concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 18 February 2022 by Judge Forrest D. Bridges in McDowell County Superior Court. Heard in the Court of Appeals 19 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Asher P. Spiller, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

MURPHY, Judge.

When a defendant is charged with a continuing criminal enterprise, each act alleged to have constituted the enterprise is an essential element of the offense. As an indictment must allege all the essential elements of an offense, an indictment charging a defendant with a continuing criminal enterprise is invalid unless it specifies the acts alleged to have constituted the enterprise itself. Here, where the indictment charging Defendant with aiding and abetting a continuing criminal enterprise did not specify the acts alleged to have constituted the enterprise, the indictment was fatally defective.

However, the jury's verdict with respect to Defendant's separate charge of conspiracy to traffic in methamphetamine was not fatally ambiguous under our longstanding precedent pertaining to disjunctive conspiracy instructions, and no error occurred with respect to that charge.

BACKGROUND

Defendant is an admitted participant in a drug trafficking enterprise appealing his 17 February 2022 convictions of conspiracy to traffic in methamphetamine and aiding and abetting a continuing criminal enterprise ("CCE"). The enterprise in question distributed meth, crack cocaine, opiate pills, and marijuana and moved quantities whose total dollar value was in the hundreds of thousands. However, by the State's own characterization, Defendant was neither an organizer nor employee of the principal operation, instead being a routine purchaser of drugs for resale with whom some more immediate members of the operation were familiar.

Defendant was indicted on 21 August 2017, and the indictments with which Defendant was charged provided as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [] [D]efendant named above unlawfully, willfully and feloniously did conspire with Jamie Leonard Tate to commit the felony of trafficking by possession and transportation of 28 grams or more but less than 200 grams of methamphetamine.
>
> . . . .

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [] [D]efendant named above unlawfully, willfully, and feloniously did aid and abet Jamie Leonard Tate and Dwayne Bullock in unlawfully, willfully, and feloniously engaging in a continuing criminal enterprise by violating [N.C.G.S. §] 90-95(h)(3b) by trafficking in methamphetamine. The violation was part of a continuing series of violations of Article 5 of Chapter 90 of the General Statutes, which Jamie Leonard Tate and Dwayne Bullock undertook in concert with more than five other persons, including Jackie Pearson, Marqueseo Pearson, Gregory Rutherford, Randy Scott, Aretha Fullwood, Aretha Giles, and Karita Bullock, with respect to whom Jamie Leonard Tate and Dwayne Bullock occupied a position of organizer, a supervisory position, and a management position, and from which Jamie Leonard Tate and Dwayne Bullock obtained substantial income and resources.

Defendant was tried beginning on 14 February 2022. During trial, Defendant made "[a] general motion to dismiss for insufficiency of the evidence[,]" arguing, in particular, that the evidence did not establish sufficient involvement in the criminal enterprise for purposes of the CCE charge and that the evidence also did not establish Defendant trafficked the amount of methamphetamine specified in the charge. The trial court denied the motion. When the jury returned its verdict, the verdict sheets indicated Defendant was "guilty of conspiracy to traffic[] in methamphetamine by possession or transportation of 28 grams or more, but less than 200 grams[,]" as well as "guilty of aiding and abetting a continuing criminal enterprise[.]"

ANALYSIS

On appeal, Defendant argues both that the trial court lacked subject matter jurisdiction over the charge of aiding and abetting a CCE because the indictment was fatally defective and that it erred in denying his motion to dismiss the charge of aiding and abetting a CCE because a defendant may not be guilty of that offense under a theory of aiding and abetting. He also argues both verdicts were fatally ambiguous because the jury was instructed disjunctively on two separate theories of trafficking to support both charges.

As we agree that the trial court lacked subject matter jurisdiction over the charge of aiding and abetting a CCE, we vacate that charge; therefore, we need not address whether, as a general matter, a defendant

may be guilty of aiding and abetting a CCE or whether that verdict was fatally ambiguous. However, we hold that the jury's verdict with respect to conspiracy to traffic in methamphetamine was not fatally ambiguous and find no error with respect to that charge.

A. Subject Matter Jurisdiction

[1] We first address Defendant's argument that the charge of aiding and abetting a CCE in the indictment was fatally defective. Specifically, Defendant argues the trial court lacked subject matter jurisdiction over the offense because the indictment did not specify each of the offenses comprising the CCE. "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *State v. Herman*, 221 N.C. App. 204, 209 (2012) (citation omitted).

North Carolina defines the offense of continuing criminal enterprise in N.C.G.S. § 90-95.1:

> (a) Any person who engages in a continuing criminal enterprise shall be punished as a Class C felon and in addition shall be subject to the forfeiture prescribed in subsection (b) of this section.
>
> (b) Any person who is convicted under subsection (a) of engaging in a continuing criminal enterprise shall forfeit to the State of North Carolina:
>
> (1) The profits obtained by him in such enterprise, and
>
> (2) Any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.
>
> (c) For purposes of this section, a person is engaged in a continuing criminal enterprise if:
>
> (1) He violates any provision of this Article, the punishment of which is a felony; and
>
> (2) Such violation is a part of a continuing series of violations of this Article;
>
> a. Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management; and
>
> b. From which such person obtains substantial income or resources.

N.C.G.S. § 90-95.1 (2022).

In interpreting a federal statute with nearly identical wording, *see* 21 U.S.C. § 848, the United States Supreme Court held in *Richardson v. United States* that each individual offense comprising a CCE constitutes an essential element of the offense:

> When interpreting a statute, we look first to the language. *United States v. Wells*, 519 U.S. 482, 490 (1997). In this case, that language may seem to permit either interpretation, that of the Government or of the petitioner, for the statute does not explicitly tell us whether the individual violation is an element or a means. But the language is not totally neutral. The words "violates" and "violations" are words that have a legal ring. A "violation" is not simply an act or conduct; it is an act or conduct that is contrary to law. Black's Law Dictionary 1570 (6th ed.1990). That circumstance is significant because the criminal law ordinarily entrusts a jury with determining whether alleged conduct "violates" the law, see *infra*, at 822, and, as noted above, a federal criminal jury must act unanimously when doing so. Indeed, even though the words "violates" and "violations" appear more than 1,000 times in the United States Code, the Government has not pointed us to, nor have we found, any legal source reading any instance of either word as the Government would have us read them in this case. To hold that each "violation" here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not.
>
> The CCE statute's breadth also argues against treating each individual violation as a means, for that breadth aggravates the dangers of unfairness that doing so would risk. Cf. *Schad v. Arizona*, [501 U.S. 624, 645 (1991)] (plurality opinion). The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. The two chapters of the Federal Criminal Code setting forth drug crimes contain approximately 90 numbered sections, many of which proscribe various acts that may be alleged as "violations" for purposes of the series requirement in the statute. Compare, *e.g.*, 21 U.S.C. §§ 842(a)(4) and (c) (1994 ed. and Supp. III) (providing civil penalties for removing drug labels) and 21 U.S.C.

> § 844(a) (Supp.III) (simple possession of a controlled substance) with 21 U.S.C. § 858 (endangering human life while manufacturing a controlled substance in violation of the drug laws) and § 841(b)(1)(A) (possession with intent to distribute large quantities of drugs). At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, or did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.
>
> Finally, this Court has indicated that the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition. *Schad v. Arizona*, 501 U.S., at 632-633 (plurality opinion); *id.*[] at 651 (SCALIA, J., concurring) ("We would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday . . ."). We have no reason to believe that Congress intended to come close to, or to test, those constitutional limits when it wrote this statute. See *Garrett v. United States*, 471 U.S. 773, 783-784[] . . . (1985) (citing H.R. Rep. No. 91-1444, pt. 1, pp. 83-84, (1970)) (in making CCE a separate crime, rather than a sentencing provision, Congress sought increased procedural protections for defendants); cf. *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question"); *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

Richardson v. United States, 526 U.S. 813, 818-20 (1999).

The United States Supreme Court's expression of constitutional concern with respect to CCE in *Richardson*, while avoided for prudential reasons in the opinion proper, was well-founded. *Id.* at 820; *cf. Matter of Arthur*, 291 N.C. 640, 642 (1977) ("If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, it is well settled that the courts should construe the statute so as to avoid the constitutional question."). While the State has some latitude to "define different courses of conduct, or states of mind, as [] alternative means of committing a single offense," its ability to do so is not boundless under the Fourteenth Amendment's Due Process Clause. *Schad v. Arizona*, 501 U.S. at 632. "The axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him." *Id.* at 632-33 (citations omitted) (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). For this reason, "no person may be punished criminally save upon proof of some *specific* illegal conduct." *Id.* at 633 (emphasis added).

Here, the specificity concerns raised by the United States Supreme Court in *Richardson* are fully present in the indictment. The indictment does not allege that the enterprise engaged in any specific conduct, only defining the CCE as "a continuing series of violations of Article 5 of Chapter 90 of the General Statutes" and generally naming the participants and their positions in the trafficking scheme's hierarchy. A juror would have no way of knowing how many criminal acts were committed within the organization or how Defendant's acts advanced them; while the indictment specifies that Defendant aided and abetted the CCE "by trafficking in methamphetamine[,]" it says nothing of why the enterprise with which Defendant dealt constituted a CCE. Moreover, if such an indictment were sufficient as to the establishment of a CCE, a future indictment could permissibly invite little to no agreement from individual jurors as to in which acts a defendant actually participated.

While *Richardson* is not a directly binding authority as to the interpretation of North Carolina's statute, the command of the Due Process Clause is; and we, like the United States Supreme Court, will not construe a statute so as to jeopardize that statute's constitutionality. *Richardson*, 526 U.S. at 820; *Matter of Arthur*, 291 N.C. at 642. We therefore hold that each underlying act alleged under N.C.G.S. § 90-95.1 constitutes an essential element of the offense. Moreover, as "an indictment . . . must allege all the essential elements of the offense[,]" *State v. Rankin*, 371

N.C. 885, 887 (2018) (marks and citations omitted), we further hold that a valid indictment under N.C.G.S. § 90-95.1 requires the state to specifically enumerate the acts alleged.

Defendant's charge of aiding and abetting a CCE was therefore fatally defective, and we vacate the judgment on that charge. Having so held, Defendant's other arguments with respect to that charge are moot. *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99 (1996) (marks and citations omitted) ("A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.")

B. Motion to Dismiss

[2] We turn next to whether Defendant's conspiracy to traffic methamphetamine verdict was fatally ambiguous. Specifically, Defendant argues the verdict was "fatally ambiguous because it is not possible to determine from the indictments, evidence, jury instructions, and verdict sheets whether the jury unanimously found trafficking by *possession* versus trafficking by *transportation* . . . ."

"A verdict should be certain and import a definite meaning free from ambiguity, with an uncertain or ambiguous verdict being insufficient to support the entry of a judgment." *Chisum v. Campagna*, 376 N.C. 680, 710 (marks and citations omitted), *reh'g denied*, 377 N.C. 217 (2021). Jury verdicts are "fatally ambiguous in the event that the verdict sheet or the underlying instructions were vague, making it unclear precisely what the jury intended by its verdict." *Id.* As ambiguity in a jury verdict creates an issue of jury unanimity, we review this argument de novo. *See State v. Surrett*, 217 N.C. App. 89, 93 (2011) ("We review the existence of a unanimous jury verdict *de novo* on appeal . . . .").

Here, as Defendant's argument depends on the failure to distinguish between trafficking by possession and trafficking by transportation, a determinative question is whether these offenses, if presented to the jury in the disjunctive, would actually render the jury's verdict fatally ambiguous. Under our binding conspiracy precedent, the answer is no. "[O]ur case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense." *State v. Walters*, 368 N.C. 749, 753 (2016). On the one hand, "a disjunctive instruction[] [that] allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to

determine whether the jury unanimously found that the defendant committed one particular offense. In such cases, the focus is on the conduct of the defendant." *Id.* (marks omitted) (emphasis in original). On the other hand, "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied. In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct." *Id.* (marks omitted) (emphasis in original).

Where a conspiracy charge disjunctively lists multiple offenses, we have held that each underlying offense does not create a separate conspiracy, but is instead an alternative act by which a Defendant may be found guilty of the singular conspiracy alleged. In *State v. Overton*, the defendant's verdict sheet charged a conspiracy to "manufacture, possess with intent to sell and deliver *or* sell and deliver[] . . . heroin[,]" and the jury's verdict mirrored that use of the disjunctive. *State v. Overton*, 60 N.C. App. 1, 34 (1982), *disc. rev. denied*, 307 N.C. 581 (1983). Although we "acknowledge[d] that the verdict sheet was not artfully drawn," we nonetheless held that "[t]he parameters of the conspiracy could include either a conspiracy to manufacture *or* to possess with intent to sell or deliver *or* to sell and deliver heroin." *Id.* We reasoned that the defendant "could not have been prejudiced by the inexact nature of this verdict form because the punishments for conspiracy to do any one of these three offenses are the same, and the trial court's judgment contained a sentence well within the statutory limits. *Id.* Moreover, in *State v. Davis*, we applied a similar principle to hold that a defendant "charged only with conspiracy to traffic in cocaine" was not subject to the risk of a non-unanimous verdict because "fact that the different methods of trafficking constitute separate offenses is immaterial." *State v. Davis*, 188 N.C. App. 735, 741 (2008) (citing *State v. McLamb*, 313 N.C. 572, 578-79 (1985)).

We are bound by this precedent and therefore hold the jury's verdict was not fatally ambiguous.

CONCLUSION

Defendant's verdict with respect to conspiracy to traffic methamphetamine was not fatally ambiguous. However, as Defendant's judgment for aiding and abetting a CCE did not enumerate the acts alleged to have constituted the CCE as necessary elements of the offense, we vacate that judgment.

VACATED IN PART; NO ERROR IN PART.

Judge FLOOD concurs.

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

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

While I concur with the majority's decision regarding the issue of a fatal ambiguity in the verdict, I write separately to dissent as to the indictment issue. Because the indictment was not fatally defective, the trial court had subject matter jurisdiction, and I would find no error as to the indictment of continuing criminal enterprise ("CCE").

I. Indictment

It is well-established that

> [t]o be sufficient, an indictment must include, inter alia, a plain and concise factual statement asserting facts supporting every element of a criminal offense and the defendant's commission thereof. If the indictment fails to state an essential element of the offense, any resulting conviction must be vacated. The law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed.

State v. Rankin, 371 N.C. 885, 886-87, 821 S.E.2d 787, 790-91 (2018) (citations, quotation marks, and brackets omitted). Our Supreme Court has clearly stated "the purpose of an indictment is to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy." *State v. Newborn*, 384 N.C. 656, 659, 887 S.E.2d 868, 871 (2023) (citation omitted). "[T]he traditional test is whether the indictment alleges facts supporting the essential elements of the offense to be charged." *Id.*

North Carolina General Statute Section 90-95.1 establishes the criminal charge of CCE, stating:

> (a) Any person who engages in a . . . [CCE] shall be punished as a Class C felon and in addition shall be subject to the forfeiture prescribed in subsection (b) of this section.
>
> (b) Any person who is convicted under subsection (a) of engaging in a . . . [CCE] shall forfeit to the State of North Carolina:

(1) The profits obtained by him in such enterprise; and

(2) Any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(c) For purposes of this section, a person is engaged in a .. . . [CCE] if:

(1) He violates any provision of this Article, the punishment of which is a felony; and

(2) Such violation is a part of a continuing series of violations of this Article;

a. Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management; and

b. From which such person obtains substantial income or resources.

N.C. Gen. Stat. § 90-95.1 (2021).

The indictment charging Defendant with CCE stated:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [Defendant] named above unlawfully, willfully, and feloniously did aid and abet Jamie Leonard Tate and Dwayne Bullock in unlawfully, willfully, and feloniously engaging in a . . . [CCE] by violating G.S. 90-95(h)(3b) by trafficking in methamphetamine. The violation was part of a continuing series of violations of Article 5 of Chapter 90 of the General Statutes, which Jamie Leonard Tate and Dwayne Bullock undertook in concert with more than five other persons, including Jackie Pearson, Marqueseo Pearson, Gregory Rutherford, Randy Scott, Aretha Fullwood, Aretha Giles, and Karita Bullock, with respect to whom Jamie Leonard Tate and Dwayne Bullock occupied a position of organizer, a supervisory position, and a management position, and from which Jamie Leonard

> Tate and Dwayne Bullock obtained substantial income and resources.

The majority relies on a United States Supreme Court case, *Richardson v. United States*, 526 U.S. 813, 143 L. Ed. 2d 985 (1999), to determine "each underlying act alleged under N.C.G.S. § 90-95.1 constitutes an essential element of the offense." However, as the majority noted, this decision is not binding on this Court as to North Carolina's CCE statute since *Richardson* was interpreting a federal statute, not North Carolina's statute. *See generally id.* I believe, under current North Carolina case law, North Carolina's law is more in line with the dissenting opinion in *Richardson* than the majority opinion. The dissenting justices would have held that an indictment alleging CCE need not allege each underlying act that is the basis for this type of charge. As the dissent in *Richardson* notes, requiring the government to specifically allege the underlying acts that constitute a CCE charge "is a substantial departure from what Congress intended." *Richardson*, 526 U.S. at 826, 143 L. Ed. 2d at 998 (Kennedy, J., dissenting).

Here, the indictment specifically alleged Defendant aided and abetted Jamie Leonard Tate and Dwayne Bullock by "engaging in a . . . [CCE] by violating G.S. 90-95(h)(3b) by trafficking in methamphetamine[,]" which is a felony offense under North Carolina law. *See* N.C. Gen. Stat. § 90-95(h)(3b) (2021). The indictment specifically alleged this felony offense was part of a "continuing series of violations of Article 5 of Chapter 90 of the General Statutes" and states Defendant undertook the violations "in concert with more than five other persons[,]" naming each person, and alleging Jamie Leonard Tate and Dwayne Bullock "occupied a position of organizer, a supervisory position, and a management position, and from which Jamie Leonard Tate and Dwayne Bullock obtained substantial income and resources."

The indictment tracks the statutory language of North Carolina General Statute Section 90-95.1 by naming the underlying felony offense as required by subsection 90-95.1(c)(1); expressly stating the person was part of a "continuing series of violations" as required by subsection 90-95.1(c)(2); the violations were in concert with five other people and the person occupied a "position of organizer, a supervisory position, and a management position" as required by subsection 90-95.1(c)(2)(a); and the person "obtained substantial income and resources" as required by subsection 90-95.1(c)(2)(b). *See* N.C. Gen. Stat. § 90-95.1.

Since, as the dissent in *Richardson* also notes, the underlying violations that constitute the CCE charge could involve "hundreds or thousands of sales[,]" and the indictment is sufficient under North Carolina

law to put Defendant on notice and tracks the statutory language, I would hold there was no error with respect to the indictment of the CCE charge. *Richardson*, 526 U.S. at 826, 143 L. Ed. 2d at 998 (Kennedy, J., dissenting); *see Newborn*, 384 N.C. at 659, 887 S.E.2d at 871 ("[T]he purpose of an indictment is to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy." (citation omitted)); *see also State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953) ("The general rule in this state and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." (citation omitted)).

II. Motion to Dismiss

Defendant also argues "[t]he trial court erred by denying [Defendant's] motion to dismiss the CCE charge where a defendant cannot be guilty of that offense based on a theory of aiding and abetting[.]" While the majority did not discuss this argument since it concludes the indictment was fatally defective, I will briefly discuss the issue since I would conclude there was no error as to the indictment.

The State's evidence tended to show that Jamie Tate and Dwayne Bullock were leaders of a criminal enterprise specifically related to drug trafficking. As the majority notes, the criminal enterprise trafficked various drugs and collected hundreds of thousands of dollars from the trafficking enterprise. Defendant's role in this enterprise was limited to purchasing drugs from Jamie Tate and Dwayne Bullock, or their associates, and re-selling the drugs. There is no indication that Defendant was under the direction or control of Jamie Tate or Dwayne Bullock, or was otherwise involved in the enterprise aside from purchasing drugs to re-sell.

At the close of the State's evidence, Defendant made a motion to dismiss for insufficiency of the evidence, which the court did not rule on. Defendant did not testify on his own behalf or present any evidence, and renewed his motion to dismiss at the close of all evidence. The trial court ultimately denied the motions to dismiss.

Defendant's argument is essentially that he could not be convicted of aiding and abetting a criminal enterprise since he was not involved in any leadership role, and his purchase of drugs from the enterprise was a small part of the enterprise's overall operation. Defendant discusses federal caselaw regarding the federal equivalent to North Carolina's CCE statute, stating:

> The Second Circuit has held that a defendant cannot be guilty of the offense based on this theory of vicarious liability, while the Seventh Circuit, sitting *en banc*, concluded that a defendant can be liable as an aider and abettor under some circumstances. Both circuits concluded, however, that such aiding-and-abetting liability should not exist where, as here, the defendant is an employee or agent of the CCE.

Defendant cites to *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989) (*en banc*) and *United States v. Amen*, 831 F.2d 373 (2nd Cir. 1987).

While I would not conclude a defendant can *never* be charged as an aider and abettor to a CCE, I would conclude, under these facts, the trial court erred by not dismissing the CCE charge. The State correctly notes that "aider and abettor liability in North Carolina is a principle of common law." *See State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (laying out the common law elements of aider and abettor liability). The plain language of North Carolina General Statute Section 90-95.1 abrogates aider and abettor liability for those who are not in a management or leadership position in a criminal enterprise. *See* N.C. Gen. Stat. § 90-95.1; *see also State v. James*, 371 N.C. 77, 87, 813 S.E.2d 195, 203 (2018) ("The intent of the General Assembly *may be found first from the plain language* of the statute[.] If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." (emphasis added) (citation omitted)).

North Carolina General Statute Section 90-95.1(c) states:

> (c) For purposes of this section, a person is engaged in a . . . [CCE] if:
>
> (1) He violates any provision of this Article, the punishment of which is a felony; and
>
> (2) Such violation is a part of a continuing series of violations of this Article;
>
> a. Which are undertaken by such person in concert with five or more other persons *with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management*; and

b. From which such person obtains substantial income or resources.

Id. (emphasis added).

Subsection (c)(2)(a) states a person who "occupies a position of organizer, a supervisory position, or any other position of management" can be liable for a CCE charge. N.C. Gen. Stat. § 90-95.1(c)(2)(a). Thus, the plain meaning of the words "organizer," "supervisor," and "management" will control the meaning of the statute. *See James*, 371 N.C. at 87, 813 S.E.2d at 203. "Organizer" means "one that organizes[,]" which means "to cause to develop an organic structure[,] to form into a coherent unity or functioning whole[,] to set up an administrative structure for[,] to persuade to associate in an organization[,] to arrange by systematic planning and united effort[.]" Merriam-Webster's Collegiate Dictionary 874 (11th ed. 2003). "Supervisor" means "one that supervises; an administrative officer in charge of business, government, or school unit or operation[.]" Merriam-Webster's Collegiate Dictionary 1255 (11th ed. 2003). "Management" means "the act or art of managing: the conducting or supervising of something[,] judicious use of means to accomplish an end[,] the collective body of those who manage or direct an enterprise[.]" Merriam-Webster's Collegiate Dictionary 754 (11th ed. 2003).

Taken together, the clear legislative intent of North Carolina General Statute Section 90-95.1 is that it should apply to those who are drug kingpins, not those who are not involved in the overall enterprise leadership structure. *See* N.C. Gen. Stat. § 90-95.1. Holding to the contrary would impose criminal liability under a theory of CCE for any person who purchases drugs from a criminal enterprise, which the General Assembly did not intend. *See id.* Here, it is undisputed Defendant was involved in the purchase and distribution of large quantities of illegal drugs, and he was charged and convicted of those crimes. Those convictions are not affected by this appeal. But the evidence was clear that Defendant's role in this enterprise was limited to purchasing drugs from Jamie Tate and Dwayne Bullock, or their associates, and re-selling the drugs. The State even conceded at trial that Defendant "wasn't a kingpin. So you can treat him differently than you would the kingpin." In the State's brief to this Court, it again conceded that "Tate and Bullock soon formed [a] close-knit organization of 'seven or eight' associates and family members who ran the drug-trafficking enterprise[,]" listing "[t]he individuals under Tate and Bullock's supervision[,]" without listing Defendant. The State does not characterize Defendant as an employee of the organization, while it specifically referred to the seven listed individuals as employees of the organization.

While it is clear and undisputed that Defendant sold drugs obtained by the criminal enterprise, it is also clear Defendant was not one of the organizers, supervisors, or managers listed in North Carolina General Statute Section 90-95.1. *See* N.C. Gen. Stat. § 90-95.1(c)(2)(a). Since North Carolina General Statute Section 90-95.1 demonstrates a clear legislative intent to punish those acting as drug kingpins, I would conclude the trial court erred in not dismissing the CCE charge at the close of all evidence.

For the reasons outlined above, I concur in part and dissent in part.

STATE OF NORTH CAROLINA
v.
MICHAEL JUSTIN HAGAMAN, DEFENDANT

No. COA22-434

Filed 16 January 2024

1. Search and Seizure—motion to suppress—denied—findings of fact—search of defendant's notebooks—cursory inspection

After a criminal defendant pled guilty to one count of indecent liberties with a child in a prosecution for various sexual offenses against children, an order denying defendant's motion to suppress evidence seized from his home was affirmed where, of the findings of fact in the order that defendant challenged on appeal, the ones that were actually conclusions of law were treated as such on appellate review, and the findings containing facts upon which the trial court relied in making its conclusions were supported by competent evidence. Notably, competent evidence supported the trial court's findings that, where law enforcement—while searching defendant's home pursuant to a warrant—inspected defendant's personal notebooks for evidence of child pornography and came across a description of defendant committing a hands-on sexual offense involving a minor, law enforcement's examination of the notebooks amounted to a cursory reading falling within the search warrant's scope.

2. Search and Seizure—warrant to search home—scope—evidence of child pornography—search of defendant's personal notebooks—evidence of other crime found—cursory inspection

After a criminal defendant pled guilty to one count of indecent liberties with a child in a prosecution for various sexual offenses

against children, an order denying defendant's motion to suppress evidence seized from his home was affirmed where, while executing a warrant to search the home for evidence of defendant's involvement in producing or purchasing child pornography, law enforcement inspected defendant's "substance abuse recovery journals" and came across a description of defendant committing a hands-on sexual offense involving a minor. The officer's cursory review of the journals neither exceeded the search warrant's scope nor constituted an improper invasion of defendant's privacy where: the warrant permitted the search of any documents or records inside defendant's home containing passwords for accessing online child pornography; the officer merely flipped through the journals' pages looking for such passwords rather than reading the journals word for word; and, upon discovering the description of the other crime, the officer stopped reading and sought another search warrant for the journals.

Appeal by defendant from order and judgment entered 10 November 2021 by Judge Gary M. Gavenus in Superior Court, Watauga County. Heard in the Court of Appeals 21 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

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

STROUD, Judge.

Defendant-appellant appeals from an order and judgment entered pursuant to a guilty plea for one count of indecent liberties with a child. In the plea agreement, Defendant-appellant reserved his right to appeal from the trial court's ruling on his motion to suppress. Defendant-appellant argues on appeal the trial court erred in denying his motion to suppress. For the following reasons, we affirm.

I. Background

The State's evidence at the motion to suppress hearing tended to show that on or about 25 May and 30 May 2018, Detective J.B. Reid of the Boone Police Department was "conducting an undercover operation involving the distribution of child pornography on certain file sharing networks." Detective Reid found ten files containing explicit videos of child pornography uploaded to a file sharing network on the internet

known as BitTorrent. Based upon the Internet Protocol ("IP") address that uploaded the videos, Detective Reid determined the files came from Defendant's residence. On or about 6 June 2018, Detective Reid applied for, received, and executed two search warrants permitting a search of (1) Defendant and his vehicle or vehicle(s) in his control, and (2) Defendant's residence. The warrants authorized law enforcement to, in part, search for:

> 6. Text files containing information pertaining to the interest in child pornography or sexual activity with children and/or pertaining to the production, trafficking in, or possession of child pornography.
>
> 7. Correspondence…. Pertaining to the trafficking in, production of, or possession of visual depictions of minors engaged in sexually explicit conduct.
>
> 8. Correspondence…. Soliciting minors to engage in sexually explicit conduct for the purposes of committing an unlawful sex act and/or producing child pornography.
>
> 10. Names and addresses of minors visually depicted while engaged in sexually explicit conduct.
>
> 12. Any book, . . ., or any other material that contains an image of child pornography.
>
> 13. Any and all documents and records pertaining to the purchase of any child pornography.
>
> 14. Notations of any password that may control access to a computer operating system or individual computer files. Evidence of payment for child pornography[.][1]

We first note we need not discuss the vehicle search. As Defendant states in his brief and confirmed by the record, "[h]e only filed a motion to suppress in file number 18-CRS-50936, in which he ultimately pled guilty to one count of indecent liberties. . . . Accordingly, [Defendant's] appeal and appellate brief focuses exclusively on file number 18-CRS-50936." The indecent liberties with a child charge stems from the search conducted in Defendant's residence. Accordingly, we direct our focus to that search.

In the search of Defendant's residence, State Bureau of Investigation Special Agent Chris Chambliss assisted in the execution of the search

1. The order skipped numbers 9 and 11.

warrant and found four notebooks. Special Agent Chambliss was "[p]rimarily looking for passcodes, or keywords, or something that would potentially show something along those lines, something that would further the investigation" during his initial review of the notebooks. One of the notebooks included a reference to Defendant's commission of a hands-on sexual offense involving a minor. Thereafter, Detective Reid applied for two additional search warrants and identified the victim of the hands-on offense. Ultimately, Defendant was indicted for (1) ten counts of second-degree sexual exploitation of a minor and (2) two counts of first-degree sexual offense.

On or about 28 June 2019, Defendant filed a (1) motion to suppress "evidence seized in excess of the scope" of the initial search warrants and (2) motion to quash the third and fourth warrants and suppress "any evidence seized thereby[.]" On or about 4 March 2020, the trial court entered an order denying Defendant's motion to suppress and motion to quash. On or about 10 November 2021, Defendant entered a guilty plea on ten counts of second-degree sexual exploitation of a minor and one count of indecent liberties with a child reserving his right to appeal the order denying his motion to suppress and motion to quash.

II. Motion to Suppress

Defendant contends (1) "[m]any of the trial court's findings of fact are not actually factual findings or are not supported by competent evidence" and (2) "search of [his notebooks] went beyond the scope of the search warrants[,]" so the trial court should have granted his motion to suppress.

A. Standard of Review

As our Supreme Court has explained:

> In evaluating the denial of a motion to suppress, the reviewing court must determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.

State v. Williams, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citations and quotation marks omitted). When "the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

Appellate courts "accord[] great deference to the trial court" when reviewing findings of fact because the trial court "is entrusted with the duty to hear testimony, weigh [the evidence,] and resolve any conflicts in the evidence[.]" *Williams*, 366 N.C. at 114, 726 S.E.2d at 165 (citation and quotation marks omitted). Our deference to the trial court reflects that the trial court "sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The appellate court is much less favored because it sees only a cold, written record." *State v. Cooke*, 306 N.C. 132, 134-35, 291 S.E.2d 618, 620 (1982) (citation and quotation marks omitted). In contrast, "[c]onclusions of law are reviewed *de novo* and are subject to full review." *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citations and quotation marks omitted).

B. Challenged Findings of Fact

[1] Defendant challenges many findings of fact and grouped his arguments into four categories based upon the nature of the challenge: (1) finding 17 "is not supported by competent evidence[;]" (2) findings 24-26 "are, in whole or in part, conclusions of law and/or are not supported by competent evidence[;]" (3) findings 20, 21, and 27 are not findings of fact but conclusions of law; and (4) findings 19 and 23 are "not factual findings" but are instead the trial court's interpretations of Defendant's argument or of caselaw. (Capitalization altered.) We review each category in turn.

1. Finding 17

Finding 17 states:

> The court finds from the credible testimony that paper writings including notebooks often carry information regarding child pornography including passcodes or keywords, correspondence, communication with individuals involved in child pornography, documentation of episodes of child pornography and other information that will further the investigation into child pornography.

Defendant asserts finding 17 is "not supported by competent evidence" because it

> overstates the evidence in two ways. First, Agents Chambliss and Anderson did not testify that law enforcement "often" found information regarding child

> pornography in notebooks. . . Second, neither testified that he had ever discovered handwritten records that included correspondence or communications with individuals involved in child pornography or documentation of episodes of child pornography.

We disagree.

Defendant engages in a hyper-technical, word-for-word interpretation of the testimonies. First, Defendant mentions only Special Agent Chambliss and Special Agent Nathan Anderson, but the trial court did not name these two specific agents in finding 17. Another witness, Detective Reid, testified paper writings in this type of investigation "commonly" include relevant items such as passcodes or passwords. "Commonly" is the adverbial version of the word "common" meaning "occurring or appearing frequently[.]" Merriam-Webster's Collegiate Dictionary 250 (11th ed. 2003). Similarly, the word "often" means "many times" or "frequently[.]" *Id.* at 862 (capitalization altered). Thus, the word "commonly[,]" at least as used in this testimony, is a functional equivalent of the word "often" as used in finding 17.

Defendant also argues that "neither [Special Agents Chambliss nor Anderson] testified that [they] had ever discovered handwritten records that included correspondence or communications with individuals involved in child pornography or documentation of episodes of child pornography[;]" finding of fact 17 does not state those two specific agents so testified. Finding of fact 17 simply finds "*from the credible testimony* that paper writings . . . often carry information regarding child pornography. . . [,]" not which specific law enforcement officers testified about this information. Finding No. 17 is supported by the evidence.

2. Findings 24-26

Findings 24-26 state:

> 24. A cursory reading of the notebook found in the Xterra, Exhibit D-1, although not revealing any passcodes, did reveal incriminating statements made by [D]efendant as to his possession of child pornography which was the crime providing for the search and was subject to seizure.
>
> 25. During a cursory reading of one of the notebooks found in the residence, Exhibit D-2, although not revealing any passcodes, it did reveal incriminating statements made by [D]efendant relative to a new crime, the crime of indecent liberties, was subject to seizure, and was subsequently

> searched in detail pursuant to the June 11, 2018 search warrant. "Courts have never held that a search is overbroad merely because it results in additional charges." United States v. Phillips, 588 F.3d 218 (4th Cir. 2009).
>
> 26. The seizure of the notebooks both from the Xterra and the residence was within the scope of the June 6, 2018 search warrants and the scope of the search authorized by the warrants included the authority to cursorily view each notebook.

Here, Defendant contends that (1) portions of findings 24-26 contain conclusions of law, and (2) portions of findings 24-26 are not supported by competent evidence.

As to the label applied to "findings" 24-26, it is well-established that the labels assigned by a trial court do not dictate the standard of review for this Court. *State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758-59 (2016) ("[W]e do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) ("Although labeled findings of fact, these quoted findings mingle findings of fact and conclusions of law. While we give appropriate deference to the portions of Findings No. 37 and 39 that are findings of fact, we review *de novo* the portions of those findings that are conclusions of law." (ellipses omitted)). Thus, no matter how the trial court classified findings 24-26, we will "give appropriate deference to the portions . . . that are findings of fact, [and] we review *de novo* the portions of those findings that are conclusions of law." *Id.*

As to whether there was competent evidence to support the factual portions of these findings, Defendant makes a two-sentence argument:

> To the extent this Court views the trial court characterization of law enforcement's actions as a "cursory reading" or "cursorily view[ing]" of the notebooks as factual findings, they are not supported by competent evidence. As noted above, Agents Colvard and Chambliss read beyond the 30th pages of the two journals in question despite the fact that they were plainly substance abuse recovery journals. . . . This speaks to an in depth reading of the journals, not a skimming of their contents.

Again, Defendant only challenges the hands-on sexual offense; Defendant does not challenge the child pornography charges which were related to the initial warrants. While Defendant does challenge

the above findings in his brief and these findings include references to the search of Defendant's car, his motion to suppress and appeal is limited to the hands-on offense, and Defendant concedes "[h]e filed a motion to suppress in file number 18-CRS-50936, in which he ultimately pled guilty to one count of indecent liberties, however. Accordingly, [Defendant]'s appeal and appellate brief focuses exclusively on file number 18-CRS-50936."

The evidence supporting the indecent liberties charge was based upon one of the notebooks found in Defendant's home; thus, we only review Special Agent Chambliss's actions since he was the person who located and reviewed the notebook which contained the reference to the hands-on offense. The notebook found in the car referenced Defendant's activities regarding child pornography, but the notebook from Defendant's car did not contain evidence regarding the hands-on offense. As Defendant only challenged the hands-on offense at his motion to suppress hearing and on appeal, we need not discuss the notebook from Defendant's car.

Special Agent Chambliss testified that in looking through the notebooks for "passcodes" he discovered the passage regarding a hands-on offense, but he did not read the notebooks "word for word[.]" Special Agent Chambliss's testimony does not say he "read beyond the 30th pages" as he was not reading "word for word" but was looking through the journal for passcodes "when [he] noticed . . . [the notebook] had language that was consistent with somebody talking about committing hands-on offenses." Thereafter, rather than going through the rest of the notebook continuing to look for passcodes, as he could have done under the warrant, Special Agent Chambliss informed other officers and they immediately applied for an additional warrant specifically applicable to the notebook. Defendant fails to direct us to any testimony which supports "an in depth reading of the [notebooks]" during the execution of the initial search warrant.

We further note that Defendant's argument the notebooks were "plainly substance abuse recovery journals" does not change our analysis. The search warrant authorized the officers to look for:

> 6. Text files containing information pertaining to the interest in child pornography or sexual activity with children and/or pertaining to the production, trafficking in, or possession of child pornography.
>
> 7. Correspondence…. Pertaining to the trafficking in, production of, or possession of visual depictions of minors engaged in sexually explicit conduct.

> 8. Correspondence…. Soliciting minors to engage in sexually explicit conduct for the purposes of committing an unlawful sex act and/or producing child pornography.
>
> 10. Names and addresses of minors visually depicted while engaged in sexually explicit conduct.
>
> 12. Any book, …, or any other material that contains an image of child pornography.
>
> 13. Any and all documents and records pertaining to the purchase of any child pornography.
>
> 14. Notations of any password that may control access to a computer operating system or individual computer files. Evidence of payment for child pornography[.]

This sort of information could easily be kept in a notebook such as the ones the officers found in Defendant's home. As the Second Circuit persuasively recognized in *Riley*,

> [i]t is true that a warrant authorizing seizure of records of criminal activity permits officers to examine many papers in a suspect's possession to determine if they are within the described category. But allowing some latitude in this regard simply recognizes the reality that few people keep documents of their criminal transactions in a folder marked "drug records."

U.S. v. Riley, 906 F.2d 841, 845 (1990).

Even if the notebook was "plainly a substance abuse [notebook]," the apparent topic of the notebook does not shield it from a cursory review in accord with the search warrant. Just as "few people keep documents of their criminal transactions in a folder marked 'drug records[,]' " few people keep passwords or other information regarding their child pornography in a notebook marked "child pornography records." *Id.* Someone who records potentially incriminating information would logically seek to keep it in a place where it is not obvious or easy to find.

In opening the notebook and looking for "passcodes[,]" Special Agent Chambliss discovered the hands-on offense. There is no dispute that the search warrant allowed Special Agent Chambliss to seize and inspect the notebook to look for passcodes, potential correspondence involving child pornography, names and addresses of potential victims, and other potentially written information as listed above. It is entirely reasonable

to assume a written spiral-bound notebook with hand-written notations might include information on a myriad of topics, including child pornography. Defendant cites to no law, nor have we found any, requiring law enforcement officers to limit their search for information or documents as authorized by a valid search warrant in a manner dictated by a defendant's own labels or characterization of a document. A passcode such as Special Agent Chambliss was looking for could be written in any sort of document or book, and a defendant would most likely not want to make this sort of information easy for others to find and identify. Accordingly, these findings are supported by competent evidence.

3. Findings 20, 21, and 27

Defendant next contends findings 20, 21, and 27 are not findings of fact but are actually conclusions of law and "therefore, are reviewed de novo." Defendant makes no other challenge to these findings. The State agrees with Defendant's argument. Findings 20, 21, and 27 state:

> 20. A "commonsense and realistic" approach to the interpretation of the search warrants clearly indicates that the seizure of the notebooks was well within the purview of and authorized by the June 6, 2018 search warrants.
>
> 21. Even assuming *arguendo* that paragraphs 6, 7, 8, 10 and 12 did not authorize the seizure and cursory search of the notebooks, paragraphs 13 and 14 clearly did.
>
> . . . .
>
> 27. That the June 6, 2018, June 11, 2018 and June 26, 2018 search warrants were each based upon probable cause and were not issued or executed in violation of the Constitutional rights of the defendant and all items seized and searched thereby were seized and searched legally.

We again note, we will review "findings" under the appropriate standard depending on their actual classification, not the label given by the trial court. *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009). We agree these are conclusions of law, and we review them below accordingly.

4. Findings 19 and 23

Findings 19 and 23 state:

> 19. [D]efendant argues that the June 6, 2018 search warrants should be interpreted in a "hypertechnical" manner.

> That is, since the focus of the search warrants dealt with computer, digital, photographic and video evidence that it cannot be expanded to include written materials such as the notebooks seized.
>
> . . . .
>
> 23. Each of the officers could conduct "some cursory reading" of the notebooks discovered during the course of the searches to determine their relevance to the crime providing for the search. *United States v. Crouch*, 648 F.2d 932, 933-34 (4th Cir.), cert. denied, 454 U.S. 952, 70 L. Ed. 2d 259, 102 S. Ct. 491 (1981).

Finally, as to the findings of fact, Defendant asserts findings 19 and 23 are "not factual findings" nor "conclusions of law" because they represent the trial court's "characterization" of Defendant's argument or of caselaw. The State, and we, agree. Nonetheless, these "findings" do not affect this analysis since neither "finding" is required to support the trial court's conclusions of law because neither "finding" actually finds facts upon which the trial court relied in making its conclusions. Thus, we will not review them further.

C. Scope of Search Warrants

[2] Beyond Defendant's challenges to the findings of fact, he argues law enforcement's search of his notebooks "went beyond the scope of the search warrants." The crux of Defendant's argument is

> [W]hen conducting searches of a person's papers, officers "must take care to assure that they are conducted in a manner that minimizes unwarranted [intrusions] upon privacy." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). This reflects not only an aversion to "general warrant[s] to rummage and seize at will[,]" *Crabtree*, 126 N.C. App. at 735, 487 S.E.2d at 578, but also due consideration of the particular privacy interests at issue, *see* 6 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.6(a) (2020) [hereinafter "LaFave"]. Consistent with the textual constitutional commitment to their protection, U.S. Const. amend. IV, searching a person's papers in executing a warrant raises "grave dangers[,]" *Andresen*, 427 U.S. at 482 n.11. Given the wariness of general warrants and the corresponding commitment to protecting privacy rights, especially relating to sensitive materials, *id.*, law enforcement may only search papers for "as long and as intensely

> as is reasonable to find the things described in the warrant[.]" LaFave § 4.6(a).
>
> Law enforcement is accordingly limited in its examination of papers in executing a warrant. They are, of course, permitted to search and seize evidence specified by the warrant. *Crabtree*, 126 N.C. App. at 735, 487 S.E.2d at 578. Law enforcement may also seize evidence in plain view, *Coolidge*, 403 U.S. at 465, including materials that are "clearly and immediately incriminating[,]" *Crouch*, 648 F.2d at 933. And courts recognize "that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among the papers to be seized." *Andresen*, 427 U.S. at 482 n.11. But a cursory examination is a surface-level glance at materials, *Cursory*, WEBSTER'S DICTIONARY (2nd ed. 1975) (defining cursory as "hasty; slight; superficial; careless; without close attention"); *see also Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (defining cursory inspections in a similarly narrow fashion); this makes sense given the weighty privacy interests an individual has in his or her papers. Anything more intensive touching upon materials beyond the warrant authorization constitutes an impermissible search. *See Hicks*, 480 U.S. at 324-25, 328-29.

Defendant contends the journals were not "clearly and immediately incriminating[,]" but they could be immediately identified as "sensitive" since they were substance abuse recovery journals and thus presented " 'grave dangers' of unwarranted invasion of privacy[.]" Defendant argues that "Agents Colvard and Chambliss read, page by page, more than 30 journal pages" despite the sensitive nature of the journals and this examination was unconstitutional.

According to Defendant, the agents were allowed to cursorily look in the notebook but immediately upon discovering it was a substance abuse journal, they should have looked no further, not even for passwords or passcodes. Again, Defendant is essentially arguing, with no legal support, that law enforcement officers must trust and rely upon a defendant's label on documents, particularly since the notebooks were "substance abuse recovery journals." But the evidence and findings in this case do not support Defendant's assertions.

The initial search warrant allowed for the search of Defendant's residence including, "[a]ny and all documents and records pertaining to the purchase of any child pornography" and "notations of any password

that may control access" to a computer. Special Agent Chambliss testified he was in Defendant's residence looking at a document for notations of a password when he found the portion of the journal suggesting a hands-on sexual offense, and he then sought and obtained another search warrant. The State presented extensive testimony regarding how passcodes to access online child pornography are often written on paper. Special Agent Chambliss testified that while he was specifically searching for "passcodes" page by page, he was not reading every word on the pages, but instead flipping through looking for information relevant to his search, and in that search he happened to see evidence of a hands-on crime. Special Agent Chambliss immediately stopped looking at the notebook, which he had not been reading "word for word," spoke with a supervisor, and another warrant was obtained. Defendant's entire argument is premised upon the manner in which Special Agent Chambliss looked at the notebook. But the evidence does not support Defendant's claim that Special Agent Chambliss carefully read every word for the first 30 pages of the notebook and thus would have known the notebook was a substance abuse journal as Defendant contends.

In summary, the search was conducted in accordance with a properly issued search warrant to search Defendant's home for "[a]ny and all documents and records pertaining to the purchase of any child pornography" and "notations of any password that may control access" to a computer. During execution of the warrant an officer looking for a "passcode" happened to find evidence of another crime, and then sought another search warrant. The trial court did not err in denying Defendant's motion to suppress or quash. This argument is overruled.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges HAMPSON and GORE concur.

STATE v. SPRINGS

[292 N.C. App. 207 (2024)]

STATE OF NORTH CAROLINA
v.
ANTONIO DEMONT SPRINGS

No. COA23-9

Filed 16 January 2024

1. Appeal and Error—criminal appeal—by State—Appellate Rules violations—jurisdictional defects—substantial non-jurisdictional violations—certiorari allowed—sanctions imposed

In a prosecution for multiple drug-related offenses, the State's appeal from an interlocutory, orally rendered order granting defendant's motion to suppress was subject to dismissal where the State: violated Appellate Rule 4(b) by mistakenly stating on its notice of appeal that it was appealing an order granting defendant's "motion to dismiss," even though the State subsequently filed a certification of its appeal under N.C.G.S. § 15A-979(c) (required for appeals from orders granting motions to suppress); and violated Appellate Rule 28(b)(4) by failing to include a statement of grounds for appellate review in its principal brief. The State's violations of the Appellate Rules constituted, at most, jurisdictional defects in the appeal, or, at minimum, substantial non-jurisdictional violations justifying the appeal's dismissal. Ultimately, although the State did not petition for certiorari review, the appellate court exercised its discretion to issue a writ of certiorari to hear the appeal. However, the costs of the appeal were taxed to the State as a sanction pursuant to Appellate Rule 34(b)(2)(a).

2. Search and Seizure—probable cause—warrantless search—vehicle and its contents—odor of marijuana—additional circumstances

In a prosecution for multiple drug-related offenses, where an officer had searched defendant's car during a traffic stop after detecting an odor of marijuana, the trial court erred in granting defendant's motion to suppress evidence seized during the warrantless search, including drug paraphernalia found inside a bag that defendant kept on his person during the search. The appellate court did not have to determine on appeal whether the scent of marijuana alone would be sufficient to grant an officer probable cause to search a vehicle because, here, additional circumstances beyond the marijuana odor—including that defendant was driving without a valid license and that the car had a fictitious tag—gave

the officer probable cause to search defendant's vehicle and its contents, including the bag of paraphernalia.

Judge MURPHY concurring in part and dissenting in part.

Appeal by State from Order rendered 23 August 2022 by Judge Jesse B. Caldwell, IV in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for Defendant.

HAMPSON, Judge.

Factual and Procedural Background

The State appeals from an orally rendered Order granting a Motion to Suppress filed by Antonio Demont Springs (Defendant) and suppressing evidence seized during a traffic stop. The Record before us tends to reflect the following:

On 17 May 2021, an Officer with the Charlotte-Mecklenburg Police Department initiated a stop of Defendant's vehicle on suspicion of a fictitious tag. When the Officer pulled over Defendant and approached the car, he observed Defendant "fumbling through to get some paperwork" with his hands "shaking," and noted Defendant appeared "very nervous." Defendant was the only person in the car. Defendant gave the Officer his identification card and the car's paperwork. The Officer determined the car was not stolen, but Defendant was driving on a revoked license. The Officer returned to Defendant's vehicle and asked him "about the odor of marijuana in the vehicle." Defendant denied smoking marijuana in the car, prompting the following exchange:

> Officer: You didn't have a blunt earlier or anything?
>
> Defendant: No. I just got the car from my homeboy. That's probably why.
>
> Officer: Is that why it smells like weed in here?
>
> Defendant: Yeah—

> Officer: —because he might have smoked a blunt or something earlier?
>
> Defendant: Yeah.

The Officer then asked Defendant to get out of the car. Defendant did so and took some belongings with him, including a cellphone, cigarettes, and a Crown Royal bag. The Officer took Defendant's items and put them in the driver's seat of the car to pat down Defendant for weapons. After the search and finding no weapons, the Officer returned Defendant's cellphone and cigarettes, but opened and searched the Crown Royal bag. In the bag, the Officer found a digital scale, a green leafy substance, two baggies of white powder, and "numerous baggies of colorful pills[.]"

On 24 May 2021, Defendant was subsequently indicted for Possession of Drug Paraphernalia, Trafficking in Drugs, and Possession with Intent to Sell or Deliver a Controlled Substance based on this evidence. On 17 August 2022, Defendant filed a Motion to Suppress the evidence from the Crown Royal bag, arguing the Officer lacked probable cause to search the car, and consequently, lacked probable cause to search the bag.

Specifically, at the hearing on Defendant's Motion to Suppress on 23 August 2022, Defendant contended that because hemp, which Defendant argued is indistinguishable from marijuana in odor and appearance, is legal in North Carolina, the odor of marijuana alone was no longer sufficient to establish probable cause for the ensuing searches. The State argued that binding precedent in this state holds that marijuana odor alone per se supports a finding of probable cause to support a search. Further, the State asserted even presuming odor alone was insufficient, the Officer had additional evidence supporting probable cause, including Defendant's "fidgety" behavior, the fact Defendant was driving with a fictitious tag and without a valid license, and Defendant's agreement marijuana may have been smoked in the car earlier, which the trial court characterized as "an acknowledgment, if not an admission" marijuana had been smoked in the car.

At the conclusion of the hearing, the trial court orally granted Defendant's Motion. In rendering its ruling, the trial court stated: "So I think that the standards set forth in *Parker*[1] which is abbreviated odor plus is certainly the appropriate standard to use here." The trial court acknowledged "the odor of something that could be marijuana but might be CBD or hemp or a legal hemp-related product is certainly an issue or

1. *State v. Parker*, 277 N.C. App. 531, 860 S.E.2d 21, *appeal dismissed, review denied*, 860 S.E.2d 917 (2021).

a consideration for law enforcement to make note of when evaluating or trying to reach probable cause." The trial court further acknowledged, "[a]nd in this circumstance arguably there were additional factors to consider" including the traffic violations and the acknowledgment "that weed, bud, the colloquial for marijuana, was smoked in the vehicle previously." The trial court, however, concluded: "I just think in the totality here and given the new world that we live in, that odor plus is the standard and we didn't get the plus here. There was no probable cause."

The State filed written Notice of Appeal on 29 August 2022. The Notice of Appeal, however, stated the appeal was from an order "grant[ing] the defendant's motion to dismiss[.]" Two days later, on 31 August 2022, the State filed a Certification, certifying that the appeal was not taken for the purpose of delay and that the evidence suppressed is essential to the case.

Appellate Jurisdiction

[1] The parties do not address appellate jurisdiction in their briefing to this Court. However, the State's Notice of Appeal, the later Certification of its interlocutory appeal, failure to include a Statement of Grounds for Appellate Review in its brief, failure to address our authority to review an orally rendered order granting a Motion to Suppress, and overall failure to provide this Court with any jurisdictional basis to review this matter requires this Court examine the basis for our appellate jurisdiction. *See State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) ("It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even . . . by a court sua sponte.").

First, "when a [party] has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). Rule 4 of the North Carolina Rules of Appellate Procedure sets out the requirements for a notice of appeal in criminal cases. *See* N.C. R. App. P. 4 (2023). Relevant to this case, Rule 4(b) provides the requisite contents of a written notice of appeal:

> The notice of appeal required to be filed and served . . . shall specify the party or parties taking the appeal; *shall designate the judgment or order from which appeal is taken* and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C. R. App. P 4(b) (emphasis added). "Our Supreme Court has said that a jurisdictional default, such as a failure to comply with Rule 4, 'precludes the appellate court from acting in any manner other than to dismiss the appeal.' " *State v. Hammonds*, 218 N.C. App. 158, 162, 720 S.E.2d 820, 823 (2012) (quoting *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008)).

Here, the State's Notice of Appeal indicates it is from an order granting "the defendant's motion to dismiss[.]" No such order appears in the Record. Rather, the State's arguments focus entirely on the grant of Defendant's Motion to Suppress. We acknowledge, however, " 'a mistake in designating the judgment . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appeal is not misled by the mistake[.]' " *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (2006) (quoting *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990)).

Our Court has observed that granting a motion to suppress—even of evidence which is essential to the State's case—is not synonymous with dismissal of the case. *See State v. Romano*, 268 N.C. App. 440, 447, 836 S.E.2d 760, 768 (2019) (affirming denial of a motion to dismiss at trial because "[e]ven though this Court and our Supreme Court agreed the trial court properly suppressed the evidence, that did not impede the State from proceeding to trial without the suppressed evidence since our appellate courts' decisions on the motion to suppress were made prior to trial."); *see also State v. Fowler*, 197 N.C. App. 1, 28-29, 676 S.E.2d 523, 545 (2009) ("A trial court's decision to grant a pretrial motion to suppress evidence 'does not mandate a pretrial dismissal of the underlying indictments' because '[t]he district attorney may elect to dismiss or proceed to trial without the suppressed evidence and attempt to establish a prima facie case.' " (quoting *State v. Edwards*, 185 N.C. App. 701, 706, 649 S.E.2d 646, 650 (2007))).

Indeed, this highlights a second jurisdictional issue: the State's appeal is from an interlocutory order. *See Romano*, 268 N.C. App. at 445, 836 S.E.2d at 767 (an order granting a motion to suppress is an interlocutory—not final—decision). N.C. Gen. Stat. § 15A-979(c) provides the State a statutory right of appeal from an Order granting a motion to suppress prior to trial "upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case." N.C. Gen. Stat. § 15A-979(c) (2021). This Court has recognized Section 15A-979(c) "not only requires the State to raise its right to appeal according to the

statutory mandate, but also places the burden on the State to demonstrate that it had done so." *State v. Dobson*, 51 N.C. App. 445, 447, 276 S.E.2d 480, 482 (1981). Similarly, Rule 28(b)(4) of the Rules of Appellate Procedure requires: "An appellant's brief shall contain . . . [a] statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review." N.C. R. App. P. 28(b)(4) (2023).

Crucially, "when an appeal is interlocutory, Rule 28(b)(4) is not a 'nonjurisdictional' rule. Rather, the *only way* an appellant may establish appellate jurisdiction in an interlocutory case . . . is by showing grounds for appellate review[.]" *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77-78, 772 S.E.2d 93, 96 (2015) (emphasis in original); *see also Coates v. Durham Cnty.*, 266 N.C. App. 271, 273-74, 831 S.E.2d 392, 394 (2019) ("Our Court has noted that in the context of interlocutory appeals, a violation of Rule 28(b)(4) is jurisdictional and requires dismissal."). This burden rests solely with the appellant. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

Here, in violation of N.C. R. App. P. 28(b)(4), the State wholly failed to include any statement of grounds for appellate review. The State's brief offers no discussion of its defective Notice of Appeal or the timeliness of its subsequently filed Certification of the appeal. Nowhere in briefing does the State cite to N.C. Gen. Stat. § 15A-979 as statutory support for its interlocutory appeal. Moreover, the State's appeal is from an orally rendered Order granting a Motion to Suppress without written findings of fact or conclusions of law. The State, however, offers no basis or rationale for our ability to review the orally rendered Order in this circumstance. The State's failure to comply with Rule 4 of the Rules of Appellate Procedure combined with its failure to comply with Rule 28(b)(4) of the Rules of Appellate Procedure constitutes a jurisdictional defect in the appeal depriving this Court of appellate jurisdiction requiring dismissal of the appeal.

Nevertheless, even assuming the shortcomings in the State's appeal and briefing do not rise to the level of jurisdictional defects, they still constitute substantial violations of the Rules of Appellate Procedure impairing and frustrating this Court's ability to review the merits. *See Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. Here, the defects in the appeal—at a minimum—raise substantial jurisdictional questions, which the State, as the appellant, fails to address before this Court. This not only hampers our ability to judicially review this matter efficiently and effectively but also frustrates the appellate adversarial process by not squarely raising these issues to be briefed or addressed by Defendant.

The State has also not taken steps to recognize or remedy these defects, such as petitioning for certiorari.

Mindful of the admonishment "it is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein[,]" *Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018), we conclude the State's violations of the appellate rules are substantial enough to potentially warrant dismissal of its interlocutory appeal.

Thus, the State's violations of the Rules of Appellate Procedure constitute either jurisdictional defects in the appeal mandating dismissal or substantial non-jurisdictional violations of the appellate rules justifying dismissal of the appeal on the basis that the State has failed to demonstrate appellate jurisdiction in this Court. Therefore, the State—as the appellant—has failed to meet its burden of establishing appellate jurisdiction over this interlocutory appeal.

Nevertheless, under N.C. Gen. Stat. § 7A-32(c), "[t]he Court of Appeals has jurisdiction . . . to issue the prerogative writs, including . . . certiorari . . . in aid of its own jurisdiction[.]" N.C. Gen. Stat. § 7A-32(c) (2021). The decision to issue a writ is governed by statute and by common law. *See State v. Killette*, 381 N.C. 686, 691, 873 S.E.2d 317, 320 (2022). "Our precedent establishes a two-factor test to assess whether certiorari review by an appellate court is appropriate. First, a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Cryan v. Nat'l Council of YMCA of the United States*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023). Second, a writ of certiorari should only issue if there are extraordinary circumstances to justify it. *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811, 812 (1982). "There is no fixed list of 'extraordinary circumstances' that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Cryan*, 384 N.C. at 573, 887 S.E.2d at 851 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020)).

Here, despite its defects, we conclude the State's appeal raises sufficient merit to consider issuance of the writ of certiorari. Moreover, given the posture of the case, judicial economy and efficient use of judicial resources weighs in favor of exercising our discretion to issue the writ of certiorari pursuant to N.C. Gen. Stat. § 7A-32(c). However, given the substantial and gross violations of the Rules of Appellate Procedure, we tax the costs of this appeal to the State as a sanction pursuant to N.C. R. App. P. 34(b)(2)(a).

Issue

[2] The sole issue on appeal is whether the trial court erred in granting Defendant's Motion to Suppress on the basis the Officer did not have probable cause to conduct a warrantless search under the totality of the circumstances, notwithstanding the Officer detecting the odor of marijuana.

Analysis

In reviewing a trial court's determination on a motion to suppress, the trial court's findings of fact "are conclusive on appeal if supported by competent evidence[.]" *State v. O'Connor*, 222 N.C. App. 235, 238, 730 S.E.2d 248, 251 (2012) (citation and quotation marks omitted). "A trial court's conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Ashworth*, 248 N.C. App. 649, 658, 790 S.E.2d 173, 179-80 (2016).

Generally, a warrant is required for every search and seizure. *State v. Trull*, 153 N.C. App. 630, 638, 571 S.E.2d 592, 598 (2002) (citation omitted). However, "[i]t is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle . . . in a public vehicular area may take place." *State v. Downing*, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005) (citations omitted). Thus, "[a]n officer may search an automobile without a warrant if he has probable cause to believe the vehicle contains contraband." *State v. Poczontek*, 90 N.C. App. 455, 457, 368 S.E.2d 659, 660-61 (1988) (citation omitted). "A court determines whether probable cause exists under the Fourth Amendment of the U.S. Constitution and Article I, Section 20, of the Constitution of North Carolina with a totality-of-the-circumstances test." *State v. Caddell*, 267 N.C. App. 426, 433, 833 S.E.2d 400, 406 (2019).

"If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *State v. Mitchell*, 224 N.C. App. 171, 175, 735 S.E.2d 438, 441 (2012) (citation and quotation marks omitted). "An officer has probable cause to believe that contraband is concealed within a vehicle when given all the circumstances known to him, he believes there is a 'fair probability that contraband or evidence of a crime will be found' therein." *State v. Ford*, 70 N.C. App. 244, 247, 318 S.E.2d 914, 916 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1983)).

This Court and our state Supreme Court have repeatedly held that the odor of marijuana alone provides probable cause to search the object or area that is the source of that odor. *See, e.g.*, *State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981); *State v. Smith*, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (2008); *State v. Armstrong*, 236 N.C. App. 130, 133, 762 S.E.2d 641, 644 (2014).

Here, however, the trial court relied on our Court's decision in *State v. Parker* to apply what it described as an "odor plus" standard in which while—as the trial court articulated—the odor of marijuana was a factor to consider, additional circumstances were required to establish probable cause. In *Parker*, this Court noted: "The legal issues raised by the recent legalization of hemp have yet to be analyzed by the appellate courts of this state." *Parker*, 277 N.C. App. at 541, 860 S.E.2d at 29. This Court went on, however, to determine "in the case before us today we need not determine whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle." *Id.* This was so because we determined there were additional circumstances that supported probable cause for a warrantless search in that case beyond the odor of marijuana. *Id.*

As in *Parker*, Defendant here also relied on a memorandum published by the State Bureau of Investigation (SBI). The SBI memo explains that industrial hemp is a variety of the same species of plant as marijuana, but it contains lower levels of tetrahydrocannabinol (THC), which is the psychoactive chemical in marijuana. According to the SBI memo, the legalization of hemp poses significant issues for law enforcement because "[t]here is no easy way for law enforcement to distinguish between industrial hemp and marijuana" and there is no way for law enforcement to quickly test and determine whether a substance is hemp or marijuana. Thus, Defendant contended—and the trial court agreed—the odor of marijuana in this case detected by the Officer did not itself give rise to probable cause to conduct the warrantless search—in particular—of the Crown Royal bag on Defendant's person.

In this case, however, as in *Parker*, the Officer had several reasons in addition to the odor of marijuana to support probable cause to search the vehicle and, consequently, the Crown Royal bag. As such, again, "we need not determine whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle." *Id.*

First, as the trial court found, Defendant made "an acknowledgment, if not an admission" that marijuana had been smoked in the car

earlier. Defendant made no assertion at the time the odor derived from legalized hemp. *See id.* at 541-42, 860 S.E.2d at 29 (finding probable cause where a police officer smelled marijuana, the defendant admitted to smoking marijuana earlier, and the defendant produced a partially smoked marijuana cigarette from his person). Further, Defendant was driving a car with a fictitious tag, which the Officer had observed, and which prompted this stop. *Cf. State v. Murray*, 192 N.C. App. 684, 688-89, 666 S.E.2d 205, 208 (2008) (finding a police officer lacked reasonable suspicion to support a traffic stop where the vehicle was obeying all traffic laws, and a check of the license plate showed no irregularities). Additionally, Defendant was driving with an invalid license, which the Officer confirmed prior to the search. *See State v. Duncan*, 287 N.C. App. 467, 473-76, 883 S.E.2d 210, 214-16 (2023) (finding probable cause for a warrantless arrest where law enforcement learned from a license plate check that defendant's driver's license was medically cancelled).[2]

Additionally, the Officer had probable cause to search both the vehicle itself and the Crown Royal bag. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle *and its contents* that may conceal the object of the search." *Mitchell*, 224 N.C. App. at 175, 735 S.E.2d at 441 (emphasis added); *see also Arizona v. Gant*, 556 U.S. 332, 347, 129 S. Ct. 1710, 1721 (2009) (holding probable cause to believe a vehicle contains evidence of criminal activity "authorizes a search of any area of the vehicle in which the evidence might be found." (citation omitted)). This Court in *Armstrong* upheld the search of a vehicle's glove compartment even after defendants were handcuffed and secured in a police patrol vehicle, which resulted in the discovery of cocaine. 236 N.C. App. at 133, 762 S.E.2d at 644. There, this Court found that the officers involved had probable cause to search the vehicle based on the odor of marijuana emanating from it. *Id.* at 132-33, 762 S.E.2d at 643-44. The present case is analogous.

As discussed *supra*, the Officer had probable cause to search the vehicle based on the odor of marijuana and additional suspicious circumstances. On that basis, the Officer had probable cause to search the vehicle "and its contents" for evidence. *Mitchell*, 224 N.C. App. at 175,

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2. There was also testimony—although disputed—Defendant appeared nervous to the Officer because his hands were "shaking" and he was "fumbling through some paperwork" when the Officer approached the vehicle. *See State v. Corpening*, 109 N.C. App. 586, 589-90, 427 S.E.2d 892, 895 (1993) (noting that a defendant's nervous behavior supported probable cause to search his vehicle). In rendering its Order, the trial court did not address this evidence. This underscores the utility of a written order in these circumstances including specific findings of fact and conclusions of law when allowing a motion to suppress.

735 S.E.2d at 441. The Crown Royal bag, as one of the contents of the vehicle, was thus subject to the Officer's search. The fact that Defendant attempted to remove the Crown Royal bag is immaterial because the bag was in the car at the time of the stop. *See State v. Massenburg*, 66 N.C. App. 127, 130, 310 S.E.2d 619, 622 (1984) ("The scope of the search is not defined by the nature of the container in which the contraband is secreted but is defined by the object of the search and the places in which there is probable cause to believe it may be found.") Here, the object of the Officer's search was evidence of marijuana, which it was reasonable to believe could have been in the Crown Royal bag. Therefore, because the Officer had probable cause to search the vehicle, he also had probable cause to search the Crown Royal bag.

Thus, the Officer was aware of several suspicious circumstances—including the odor of marijuana—at the time of the search. Therefore, under the totality of the circumstances, the Officer had probable cause to search the Crown Royal bag. Consequently, the trial court erred in granting Defendant's Motion to Suppress the evidence that resulted from the search.

Conclusion

Accordingly, for the foregoing reasons, the trial court's grant of Defendant's Motion to Suppress is reversed, and this case is remanded for additional proceedings. Additionally, due to the substantial violations of the Rules of Appellate Procedure, the costs of this appeal are taxed to the State.

REVERSED AND REMANDED.

Judge GRIFFIN concurs.

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

MURPHY, Judge, dissenting in part.

While I agree with the Majority's analysis that we lack jurisdiction over this appeal, I dissent from its decision to nevertheless exercise jurisdiction in this case. Although Judge Carpenter's reasoning below was provided by our Court in a recent unpublished opinion, I believe that this case, in which the State has not even sought the issuance of a writ of certiorari, fits squarely within his analysis:

> "We require extraordinary circumstances because a writ of certiorari 'is not intended as a substitute for a notice of appeal.' " [*Cryan v. Nat'l Council of YMCAs of the U.S.*, 384 N.C. 569, 573 (2023) (quoting *State v. Ricks*, 378 N.C. 737, 741 (2021))]. "If courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Id.* at 573 (quoting *Ricks*, 378 N.C. at 741). An extraordinary circumstance "generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Id.* at 573 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23 (2020)).
>
> Here, Defendant argues the trial court erred, but Defendant fails to explain why this case involves an extraordinary circumstance sufficient to excuse his failure to preserve his right to appeal. Notably, Defendant fails to mention the word "extraordinary" in his PWC. Defendant merely concludes that the "interests of justice thus require" us to grant a writ of certiorari. Defendant's argument falls far short of our extraordinary-circumstance standard, and further, our review of the record reveals no extraordinary circumstances. *See id.* at 573. Therefore, we deny Defendant's PWC and dismiss his appeal for lack of jurisdiction. *See* [*State v. Reynolds*, 298 N.C. 380, 397 (1979)].

State v. Duncan, No. COA22-906, 2023 WL 8742997, at *1–2 (N.C. Ct. App. Dec. 19, 2023) (unpublished) (parallel citations omitted). The State has not argued, and the record does not reveal, anything extraordinary regarding the State's negligence in invoking our jurisdiction. I decline this opportunity to do to the State's job for it and would dismiss its appeal.[1]

1. I would further note that, unlike in *Lakins v. W. N.C. Conf. of United Methodist Church*, the Majority's result does not provide this Court with an opportunity to reach the ultimate undecided issue regarding probable cause and the odor of marijuana. *See Lakins v. W. N.C. Conf. of United Methodist Church*, 283 N.C. App. 385, 390-91 (2022).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JANUARY 2024)

HORSEY v. GOODYEAR TIRE & RUBBER CO. No. 23-107	N.C. Industrial Commission (14-009286)	Affirmed
IN RE EST. OF BLUE No. 23-505	Moore (21E160)	Affirmed
IN RE P.C. No. 23-253	Randolph (21JA118) (21JA119) (21JA120) (21JA121) (21JA122)	Affirmed
IN RE Z.M. No. 23-45	Alleghany (22JA11) (22JA12) (22JA13)	Affirmed
JONNA v. YARAMADA No. 22-954	Wake (15CVD16510)	Vacated and Remanded for Additional Findings of Fact.
MAXISIQ, LLC v. HOWARD No. 23-478	Mecklenburg (22CVS2113)	Affirmed
MILFORD v. MILFORD No. 23-379	Mecklenburg (19CVD23744)	Affirmed
MUNN v. N.C. DEP'T OF PUB. SAFETY No. 23-299	N.C. Industrial Commission (TA-28363)	Affirmed
NLEND v. NLEND No. 23-516	Mecklenburg (22CVD6955)	Dismissed In Part; Affirmed In Part.
PEELE v. PEELE No. 23-614	Beaufort (22CVD123)	Dismissed
PEREZ v. PEREZ No. 23-371	Forsyth (22CVD948)	Affirmed.
STATE v. GILL No. 23-381	Craven (17CRS50459) (17CRS50507) (17CRS51161)	No Error in part; Vacated and Remanded in part.

STATE v. GLENN No. 23-201	Rowan (19CRS52075)	Dismissed
STATE v. HALL No. 23-320	Wake (20CRS201267)	No Error.
STATE v. HOLLIS No. 22-817	Martin (18CRS50600) (18CRS50691)	No Error
STATE v. STEELE No. 23-425	Iredell (20CRS1501) (20CRS52949-51) (20CRS52968)	No Error.
STATE v. WILLOUGHBY No. 23-3	Pender (20CRS50730)	No Error.