292 N.C. App.—No. 3 Pages 221-373

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 4, 2024

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

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OF

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COURT OF APPEALS

CASES REPORTED

FILED 6 FEBRUARY 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Guilty plea to habitual felon status—statutory right of appeal—statutory mandate—factual basis for plea—After a criminal defendant was convicted of embezzlement and obtaining property by false pretenses and then pleaded guilty to attaining habitual felon status, defendant had a statutory right of appeal from the entry of her guilty plea under N.C.G.S. § 15A-1444(a2), since she disputed her status as a habitual felon and was therefore arguing pursuant to subsection (a2)(3) that her term of imprisonment was unauthorized by statute. Furthermore, defendant's right to appeal was automatically preserved where she argued that the trial court acted contrary to the statutory mandate in N.C.G.S. § 15A-1022(c), which required the court to determine whether a factual basis existed for defendant's guilty plea. **State v. Mincey, 345.**

APPEAL AND ERROR—Continued

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Preservation of issues—criminal case—objections to evidence—not raised at trial—not raised in appellate brief—plain error not argued—In a prosecution for first-degree murder and discharging a weapon into an occupied vehicle causing serious bodily injury, defendant failed to preserve for appellate review his objections to the admission of text messages relating to his motive for trying to rob the victims before shooting them. First, defendant could not raise his constitutional challenges to the evidence on appeal where he did not first raise them at trial. Second, where defendant's appellate brief did not mention the objections defendant did raise at trial, those objections were deemed abandoned on appeal. Finally, defendant could not argue for the first time on appeal that the text messages were irrelevant or unfairly prejudicial, because he did not specifically and distinctly contend in his brief that plain error review applied to those arguments. **State v. Robinson, 355.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Felony child abuse inflicting serious bodily injury—intent—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of felony child abuse inflicting serious bodily injury, where substantial evidence showed that defendant intentionally inflicted serious bodily injury upon his eight-month-old daughter. Although defendant testified that his daughter fell out of his arms and hit her head on the bar of her portable bed after he tripped and fell while carrying her, the child's post-injury medical reports and the testimony of a child abuse pediatrician who examined her indicated that the child's injuries—which included a large subdural hemorrhage, significant cerebral edema, and areas of infarction throughout her brain—were consistent with physical abuse and were too severe to have resulted from the type of fall that defendant had described. **State v. Buchanan, 304.**

Felony child abuse inflicting serious bodily injury—jury instruction—lesser-included offenses—degree of bodily injury—In a prosecution for felony child abuse inflicting serious bodily injury, the trial court did not err in declining defendant's requests for jury instructions on two lesser-included offenses—felony child abuse inflicting serious physical injury and misdemeanor child abuse—because the State's evidence was positive as to the element of serious bodily injury, and there was no conflicting evidence pointing to a lesser degree of bodily harm associated with the lesser offenses. Notably, the evidence showed that the victim—defendant's eight-month-old daughter—suffered a large subdural hemorrhage, significant cerebral edema, and areas of infarction throughout her brain; underwent an emergency craniotomy, after which she was intubated and completely sedated for one week; experienced multiple seizures and periods of blindness while in the hospital; underwent three more surgeries; and ultimately suffered permanent brain damage and eyesight impairment. **State v. Buchanan, 304.**

Felony child abuse inflicting serious bodily injury—jury instructions—accident—plain error analysis—There was no plain error in a prosecution for felony child abuse inflicting serious bodily injury, where defendant could not show that the trial court's failure to instruct the jury on the defense of accident prejudiced him at trial. The court's instructions conformed to the pattern jury instructions for the charged offense, the definition of intent, and the State's burden to prove every element of the charged offense beyond a reasonable doubt. Further, although defendant testified that the injuries his eight-month-old daughter sustained were accidental, the jury also heard testimony from a child abuse pediatrician who examined the child and opined that the child's injuries were consistent with physical abuse and too severe to have been accidental. **State v. Buchanan, 304.**

Juvenile petitions dismissed—Rule 59 and 60 motion improperly granted—lack of subject matter jurisdiction—In a child neglect matter, once the trial court dismissed the juvenile petition filed by the department of social services (DSS) for failure to prove the allegations by clear, cogent, and convincing evidence, the trial court was thereafter divested of subject matter jurisdiction to enter any further orders in the matter, including on DSS's motion pursuant to Civil Procedure Rules 59 and 60 seeking to have the trial court reconsider the dismissal. Pursuant to N.C.G.S. §§ 7B-201 and 7B-807, the trial court's jurisdiction was terminated when it dismissed the petition; therefore, DSS's motion to reconsider was an improper method to seek review of the trial court's dismissal order, and granting that motion did not revive the trial court's jurisdiction. **In re K.C., 231.**

CITIES AND TOWNS

Water and sewer—capacity use fees—city's motion to strike new affidavits denied—no abuse of discretion—In an action by developers (plaintiffs) seeking a refund of capacity use fees collected by the city of Greensboro (defendant), the trial court did not abuse its discretion by denying defendant's motion to strike portions of two affidavits that were submitted by plaintiffs' employees after giving deposition testimony. Despite defendant's argument that the new affidavits contradicted previous interrogatories and depositions, the affidavits highlighted the central dispute in the case regarding what qualified as water and sewer service by explaining the temporary nature of the water and sewer availability given to plaintiffs until they paid the capacity use fees, at which time they were granted official access to the system. **True Homes, LLC v. City of Greensboro, 361.**

motion to amend its pleadings—since defendant could have amended its pleadings as a matter of course without seeking leave—defendant could not show prejudice from the error because defendant was still able to present its affirmative defenses and counterclaim to the trial court in response to plaintiff landlord's motion for summary judgment. The trial court's error was not enough, on its own, to require reversal of its order granting summary judgment in favor of plaintiff. **Silwal v. Akshar Lenoir, Inc., 274.**

PUBLIC OFFICERS AND EMPLOYEES

Campus police officer—Special Separation Allowance—eligibility—membership of participating retirement plan required—In a declaratory judgment action to determine whether plaintiff, a law enforcement officer hired by a county board of education (defendant) as a campus police officer, was eligible to receive a Special Separation Allowance upon retiring from his position, the trial court properly concluded that plaintiff was not entitled to the allowance, which by statute was expressly premised on membership in, and retirement from, the Local Government Employees' Retirement System. The record reflected that plaintiff retired under the Teachers' and State Employees' Retirement System instead. **Hanson v. Charlotte-Mecklenburg Bd. of Educ., 221.**

Campus police officers—Supplemental Retirement Income Plan—eligibility—county board of education—definition of "employer"—In a declaratory judgment action to determine whether plaintiffs—all current or former law enforcement officers employed by a county board of education (defendant) as campus police officers—were eligible for certain retirement contributions and benefits under the Supplemental Retirement Income Plan (Plan) for Local Government Law-Enforcement Officers, the portion of the trial court's order declaring that defendant was not required to pay plaintiffs the 5% contribution to the Plan was reversed. Contrary to the trial court's conclusions, since defendant is a political subdivision of the State, it met the definition of "employer" provided in N.C.G.S. § 143-166.50(a)(2). Further, the plain language of N.C.G.S. § 143-166.50(e) did not restrict eligibility for the supplemental benefits to only members of the Local Government Employees' Retirement System. Therefore, plaintiffs met the statutory criteria of being law enforcement officers employed by a local government employer and were thus participating members in the Plan. **Hanson v. Charlotte-Mecklenburg Bd. of Educ., 221.**

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SENTENCING

Clerical errors—prior record level—aggravating factor—acceptance of defendant's admission—remand required—Where the trial court committed multiple clerical errors in defendant's judgment for rape and related charges—including marking defendant as a prior record level V with fourteen points rather than a prior record level IV with twelve points, marking a box for the aggravating factor that the offense was committed while defendant was on pretrial release even though he had not been on pretrial release, and failing to check a box indicating the trial court's acceptance of defendant's admission to a different aggravating factor—the matter was remanded for correction of those errors. **State v. Bowman, 290.**

Habitual felon status—underlying felony reclassified as misdemeanor—factual basis for guilty plea—After a jury convicted defendant of embezzlement and obtaining property by false pretenses, the trial court properly determined pursuant to N.C.G.S. § 15A-1022(c) that a factual basis existed for defendant's guilty plea to attaining habitual felon status where, even though one of defendant's underlying felonies (committed in Colorado) used to determine whether she had attained habitual felon status was later reclassified as a misdemeanor under Colorado law, the evidence presented during the colloquy (held pursuant to section 15A-1022(c)) showed that the crime constituted a felony at the time that defendant committed it. **State v. Mincey, 345.**

Juvenile—first-degree murder—life without parole—statutory factors—incorrigibility—The sentencing court did not abuse its discretion by sentencing defendant to two consecutive sentences of life imprisonment without parole for the murders of two law enforcement officers killed by defendant and his brother in 1997 when defendant was 17 years old. The sentences, which were imposed after a new sentencing hearing was held in light of *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), were based on the court's unchallenged—and therefore binding—findings of fact, which properly addressed and weighed each of the nine mitigating factors contained in N.C.G.S. § 15A-1340.19B(c). Further, the court expressly made the additional required finding that defendant was one of those exceedingly rare juveniles who could not be rehabilitated and was permanently incorrigible and that, as a result, life imprisonment without parole should be imposed rather than life imprisonment with parole. **State v. Golphin, 316.**

SEXUAL OFFENSES

Right to unanimous verdict—first-degree forcible sexual offense—multiple "sexual acts" alleged—jury instructed on only one of two counts—In defendant's trial for rape, assault, and related charges, the trial court committed plain error by instructing the jury on only one of two counts of first-degree forcible sexual offense, which violated defendant's right to a unanimous verdict and entitled him to a new trial on those charges. Although the trial court informed the jury that its verdict needed to be unanimous, where defendant was alleged to have committed—and the evidence at trial supported—three "sexual acts" for purposes of forcible sexual offense but was only charged with two counts of that offense, since neither the trial court's instruction nor the verdict sheet specified which sexual act was to be considered for each charge, the jury's verdict could not be matched with discrete acts committed by defendant. **State v. Bowman, 290.**

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.

HANSON v. CHARLOTTE-MECKLENBURG BD. OF EDUC.

[292 N.C. App. 221 (2024)]

RICHARD C. HANSON, FRED ALLEN, RICHARD BURGESS, VERNON L. CATHCART, ANGIE CATHCART, CHRISTOPHER L. DAVIS, JAMES J. FLOWERS, KENNETH C. LYNCH, LARRY F. MATKINS, THOMAS RODDEY, DARYL STURDIVANT, ALVESTER W. TUCKER AND CARLOS VALENTIN, PLAINTIFFS
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, DEFENDANT

No. COA22-1044

Filed 6 February 2024

1. Public Officers and Employees—campus police officers—Supplemental Retirement Income Plan—eligibility—county board of education—definition of "employer"

In a declaratory judgment action to determine whether plaintiffs—all current or former law enforcement officers employed by a county board of education (defendant) as campus police officers—were eligible for certain retirement contributions and benefits under the Supplemental Retirement Income Plan (Plan) for Local Government Law-Enforcement Officers, the portion of the trial court's order declaring that defendant was not required to pay plaintiffs the 5% contribution to the Plan was reversed. Contrary to the trial court's conclusions, since defendant is a political subdivision of the State, it met the definition of "employer" provided in N.C.G.S. § 143-166.50(a)(2). Further, the plain language of N.C.G.S. § 143-166.50(e) did not restrict eligibility for the supplemental benefits to only members of the Local Government Employees' Retirement System. Therefore, plaintiffs met the statutory criteria of being law enforcement officers employed by a local government employer and were thus participating members in the Plan.

2. Public Officers and Employees—campus police officer—Special Separation Allowance—eligibility—membership of participating retirement plan required

In a declaratory judgment action to determine whether plaintiff, a law enforcement officer hired by a county board of education (defendant) as a campus police officer, was eligible to receive a Special Separation Allowance upon retiring from his position, the trial court properly concluded that plaintiff was not entitled to the allowance, which by statute was expressly premised on membership in, and retirement from, the Local Government Employees' Retirement System. The record reflected that plaintiff retired under the Teachers' and State Employees' Retirement System instead.

Appeal by Plaintiffs from Order entered 30 June 2022 by Judge Casey Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2023.

Tin Fulton Walker & Owen, P.L.L.C., by John W. Gresham, for Plaintiffs-Appellants.

Wallace Law Firm PLLC, by Terry L. Wallace, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Richard C. Hanson, Fred Allen, Richard Burgess, Vernon L. Cathcart (Cathcart), Angi Cathcart, Christopher L. Davis, James J. Flowers, Kenneth C. Lynch, Larry F. Matkins, Thomas Roddey, Alvester W. Tucker, and Carlos Valentin (collectively, Plaintiffs) appeal from an Order on Complaint for Declaratory Judgment (Declaratory Judgment).[1] The Declaratory Judgment declared: (1) Plaintiffs ineligible for contributions by Charlotte-Mecklenburg Board of Education (Defendant) under the Supplemental Retirement Income Plan for Local Government Law-Enforcement Officers pursuant to N.C. Gen. Stat. § 143-166.50; and (2) Cathcart ineligible for the Special Separation Allowance for law-enforcement officers employed by local government employers under N.C. Gen. Stat. § 143-166.42. The Record before us—including facts stipulated to by the parties—reflects the following:

On 10 June 2009, the North Carolina General Assembly enacted a Local Act entitled "AN ACT TO ALLOW THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION TO MAINTAIN A CAMPUS POLICE AGENCY." 2009 N.C. Sess. Law 73. This Local Act, applicable only to Defendant, amended Chapter 115C by adding section 147.1. 2009 N.C. Sess. Law 73, § 2. This Act—applicable only to Defendant—provides:

> A local board of education may establish a campus law enforcement agency and employ campus police officers. These officers shall meet the requirements of Chapter 17C of the General Statutes, shall take the oath of office prescribed by Article VI, Section 7 of the Constitution,

1. Plaintiff Daryl Sturdivant filed a Voluntary Dismissal without Prejudice on 2 June 2021.

> and shall have all the powers of law enforcement officers generally.

Id.[2]

Under the authorization provided by Section 115C-147.1, Defendant established a campus law-enforcement agency staffed by campus police officers. Plaintiffs all are or were sworn law-enforcement officers who are or were employed by Defendant as campus police officers. In particular, Cathcart retired from employment with Defendant on 30 September 2016.

On 21 May 2019, Plaintiffs filed a Complaint in Mecklenburg County Superior Court. The Complaint alleged that Plaintiffs, as sworn law-enforcement officers employed or retired from employment by Defendant, were entitled to certain retirement contributions and benefits for law-enforcement officers employed by local government employers. Specifically, the Complaint alleged Defendant was required to contribute amounts equal to 5% of the Plaintiffs' monthly compensation to the Supplemental Retirement Income Plan provided for by N.C. Gen. Stat. § 143-166.50(e) and, separately, that Cathcart—a retired officer—was entitled to a Special Separation Allowance provided for by N.C. Gen. Stat. § 143-166.42. The Complaint sought declaratory relief that Plaintiffs were entitled to these benefits and Defendant was required to pay the amounts due. The Complaint further sought a declaration Defendant was required to pay these benefits going forward.

Defendant filed an Answer to the Complaint on 15 November 2019. The Answer alleged Plaintiffs do not meet the statutory criteria to receive the additional benefits. The Answer also included an affirmative defense Plaintiffs' claims were otherwise barred by any applicable statute of limitations.

The trial court heard the matter on 11 June 2021. The parties submitted three questions for determination by the trial court based on a series of stipulated facts:

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2. Frustratingly, the text of this Local Act appears nowhere in the Record and neither party includes the text of this Act in their briefing or as an Appendix to the parties' briefing. While we acknowledge the Local Act is not the statute requiring interpretation in this case, it quite obviously provides crucial context. We take this opportunity to urge compliance with N.C. R. App. P. 28(d)(1)(c) requiring an appellant to reproduce as an appendix to its brief: "relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief[.]" N.C. R. App. P. 28(d)(1)(c). Indeed, it would have been helpful for the parties to append *any* of the relevant statutes to their briefing in this case.

> 1) Whether the Defendant is Required to Pay Plaintiff Vernon Cathcart a Special Separation Allowance Under N.C. Gen. Stat. § 143-166.42?
>
> 2) Whether Defendant is Required to Pay Plaintiffs a 5% contribution into the Supplemental Retirement Income Plan as Set Forth in N.C. Gen. Stat. § 143-166.50(e)?
>
> 3) Does the Statute of Limitations Apply to bar or limit Plaintiffs' claims?

The trial court entered its Order on Complaint for Declaratory Judgment on 30 June 2022. The trial court concluded, in relevant part, Defendant is not a "county, nor is it a city, or town or 'other political subdivision of the State.' " Based on this conclusion, the trial court reasoned Defendant was not an Employer as that term is defined in N.C. Gen. Stat. § 143-166.50. The trial court further concluded Plaintiffs were not members of the Local Government Employees' Retirement System (LGERS). The trial court also concluded its review of legislative history indicated "it was the intent of the legislature to specifically exclude law enforcement officers employed by a county board of education" from LGERS benefits.

Based on its conclusions, the trial court declared Defendant is not required to pay Cathcart the Special Separation Allowance or pay Plaintiffs the 5% contribution to the Supplemental Retirement Income Plan. Because of these rulings, the trial court determined Defendant's statute of limitations argument was moot. On 28 July 2022, Plaintiffs timely filed Notice of Appeal.

Issues

The dispositive issues on appeal are whether the trial court erred in declaring: (I) Plaintiffs are not eligible for the Supplemental Retirement Income Plan; and (II) Cathcart is not eligible for the Special Separation Allowance.

Analysis

" 'The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal.' " *Nelson v. Bennett*, 204 N.C. App. 467, 470, 694 S.E.2d 771, 774 (2010) (quoting *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008)). " 'However, the trial court's conclusions of law are reviewable *de novo*.' " *Id.* Here,

because there are no factual disputes between the parties, the ultimate issues relate solely to the trial court's conclusions of law construing the applicable statutes. *See id.*

I. Supplemental Retirement Income Plan

[1] Plaintiffs contend the trial court erred in declaring they are not entitled to the Supplemental Retirement Income Plan under N.C. Gen. Stat. § 143-166.50(e). Defendant contends Plaintiffs are not entitled to this benefit because, consistent with the trial court's conclusions, it is not an employer as contemplated by the statute as Plaintiffs should not be deemed law-enforcement employees of "a county, city, town or other political subdivision of the State." Defendant further asserts Plaintiffs are not members of LGERS and, thus, are not eligible for the benefits thereunder.

"In resolving issues of statutory interpretation, we look first to the language of the statute itself." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 685, 562 S.E.2d 82, 92 (2002). N.C. Gen. Stat. § 143-166.50(e) provides, in relevant part:

> (e) Supplemental Retirement Income Plan for Local Governmental Law-Enforcement Officers. – As of January 1, 1986, *all law-enforcement officers employed by a local government employer, are participating members of the Supplemental Retirement Income Plan as provided by Article 5 of Chapter 135 of the General Statutes.* In addition to the contributions transferred from the Law-Enforcement Officers' Retirement System, participants may make voluntary contributions to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participants. From July 1, 1987, until July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to at least two percent (2%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers; and *on and after July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to five percent (5%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers.*

N.C. Gen. Stat. § 143-166.50(e) (2021) (emphasis added). The definitional sub-section of Section 143-166.50 defines employer: " 'Employer' means a county, city, town or other political subdivision of the State." N.C. Gen. Stat. § 143-166.50(a)(2) (2021). Relevant to this case, " 'Law-enforcement officer' means a full-time paid employee of an employer, who possesses the power of arrest, who has taken the law enforcement oath administered under the authority of the State as prescribed by G.S. 11-11, and who is certified as a law enforcement officer under the provisions of Article 1 of Chapter 17C of the General Statutes or certified as a deputy sheriff under the provisions of Chapter 17E of the General Statutes." N.C. Gen. Stat. § 143-166.50(a)(3).[3]

A. Political Subdivision

Under the North Carolina Constitution, the General Assembly is required to provide for a general and uniform system of public schools. N.C. Const. art. IX, § 2. The General Assembly has sought to meet this constitutional obligation to provide a general and uniform system of schools through enactment of Chapter 115C of the General Statutes. *See* N.C. Gen. Stat. § 115C-1 (2021) (General and Uniform System of Schools). As part of this system, the General Assembly has constituted elected county boards of education. N.C. Gen. Stat. § 115C-35. County boards of education are bodies corporate and "subject to any paramount powers vested by law in the State Board of Education or any other authorized agency shall have general control and supervision of all matters pertaining to the public schools in their respective local school administrative units; they shall execute the school laws in their units . . . ." N.C. Gen. Stat. § 115C-40. Under Section 115C-5, a local school administrative unit is defined as "a subdivision of the public school system which is governed by a local board of education." N.C. Gen. Stat. § 115C-5(6) (2021). By way of illustration, Black's Law Dictionary defines "Political Subdivision" as "[a] division of a state that exists primarily to discharge some function of local government." *Black's Law Dictionary* (11th ed. 2019).

Indeed, our Courts have historically recognized local Boards of Education to be political subdivisions of the State. In 1948, our Supreme Court observed: "The Board of Trustees of the Kinston Graded Schools is a body politic and corporate charged with the public duty of providing

3. Defendant does not contest that Plaintiffs are or were sworn law-enforcement officers. The argument centers solely on whether Defendant itself should be deemed a local government employer for purposes of application of the retirement benefit statutes at issue.

an adequate public school system for children residing in the Kinston Graded School District, *a political subdivision of the State*." *Boney v. Bd. of Trs. of Kinston Graded Schs.*, 229 N.C. 136, 137, 48 S.E.2d 56, 57 (1948) (emphasis added).[4] Later, in 1979, the Supreme Court observed a plaintiff employed by the Surry County Board of Education "was employed by a political subdivision of the state[.]" *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 616 (1979). In *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, this Court determined the Rowan County Board of Education was a political subdivision of the State engaged in "a governmental function exercised in pursuit of a sovereign purpose for the public good on behalf of the State." 87 N.C. App. 106, 115, 359 S.E.2d 814, 819 (1987) (citations omitted). More recently, this Court has expressly held: "the [local boards of education], like the counties themselves, are mere subdivisions of the State." *Silver v. Halifax Cnty. Bd. of Comm'rs*, 255 N.C. App. 559, 584, 805 S.E.2d 320, 337 (2017), *aff'd*, 371 N.C. 855, 821 S.E.2d 755 (2018); *see also Moore v. Bd. of Educ. of Iredell Cnty.*, 212 N.C. 499, 502, 193 S.E. 732, 733-34 (1937) ("It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, *school districts*, road districts, and *the like subdivisions*, and invest them, and agencies in them, with powers corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both." (emphasis added)); *Branch v. Bd. of Educ. of Robeson Cnty.*, 233 N.C. 623, 626, 65 S.E.2d 124, 126 (1951) (Plaintiffs could not bring a suit on behalf of school administrative units as taxpayers on behalf of a public agency or political subdivision); *Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ.*, 236 N.C. App. 207, 215, 763 S.E.2d 288, 295 (2014) ("Local school boards and local school administrative units are local governmental units, and, as such, are not 'agencies' for the purpose of the [Administrative Procedure Act].").

Thus, Defendant—a county board of education—is a political subdivision of the State. Therefore, Defendant falls under the definition of employer provided in N.C. Gen. Stat. § 143-166.50(a)(2). Consequently, the trial court erred in concluding Plaintiffs were not law-enforcement officers employed by a local government employer under N.C. Gen. Stat. § 143-166.50(e).

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4. Obviously, this case was decided prior to the adoption of the 1969 State Constitution or the enactment of Chapter 115C of the General Statutes.

B. Membership in LGERS

Defendant further contends, however, that Plaintiffs are nevertheless not eligible for the Supplemental Retirement Income Plan because they are members of the Teachers' and State Employees' Retirement Plan (TSERS) and not LGERS. Specifically, Defendant points to N.C. Gen. Stat. § 143-166.50(b) which provides:

> (b) Basic Retirement System. – On or after January 1, 1986, law-enforcement officers employed by an employer shall be members of the Local Government Employees' Retirement System, and beneficiaries who were last employed as officers by an employer, or who are surviving beneficiaries of officers last employed by an employer, are beneficiaries of the Local Governmental Employees' Retirement System and paid in benefit amounts then in effect. All members of the Law-Enforcement Officers' Retirement System last employed and paid by an employer are members of the Local Retirement System.

N.C. Gen. Stat. § 143-166.50(b) (2021). Defendant argues this provision means only law-enforcement members of LGERS are eligible for the supplemental benefits provided under subsection (e). Plaintiffs, however, make no argument that they are entitled to the basic benefits provided by LGERS under subsection (b). That broader question of whether Plaintiffs are properly enrolled in TSERS rather than LGERS is simply not before us in this case.

Further, the plain language of subsection (e) contains no language limiting the supplemental benefits to only LGERS members. To the contrary, its plain language unequivocally provides: "As of January 1, 1986, all law-enforcement officers employed by a local government employer, are participating members of the Supplemental Retirement Income Plan as provided by Article 5 of Chapter 135 of the General Statutes." N.C. Gen. Stat. § 143-166.50(e). As such, Plaintiffs—law-enforcement officers—employed by Defendant—a local government employer—are participating members in the Supplemental Retirement Income Plan provided for by Article 5 of Chapter 135 of the General Statutes.

Thus, the trial court erred in concluding Plaintiffs are not employees of an employer under Section 143-166.50(e) or eligible for supplemental benefits as non-members of LGERS. Therefore, Plaintiffs are eligible for the Supplemental Retirement Income Plan provided for under Section 143-166.50(e), and Defendant is required to pay the 5% contribution under the statute. Consequently, we reverse the portion of the trial

court's Order declaring Defendant is not required to pay Plaintiffs the 5% contribution to the Supplemental Retirement Income Plan.

II. Special Separation Allowance

[2] Plaintiffs further contend the trial court erred by declaring Cathcart ineligible to receive the Special Separation Allowance provided for under N.C. Gen. Stat. § 143-166.42. Section 143-166.42 provides in relevant part:

> (a) On and after January 1, 1987, every sworn law enforcement officer as defined by G.S. 128-21(11d) or G.S. 143-166.50(a)(3) employed by a local government employer who qualifies under this section shall receive, beginning in the month in which the officer retires on a basic service retirement under the provisions of G.S. 128-27(a), an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to the officer for each year of creditable service.

N.C. Gen. Stat. § 143-166.42(a) (2021).

Defendant again contends Cathcart was not employed by a local government employer. Section 143-166.42(a) provides two separate definitions of law-enforcement officer through N.C. Gen. Stat. § 128-21(11d) or N.C. Gen. Stat. § 143-166.50(a)(3). *Id.* As discussed above Plaintiffs—including Cathcart—meet the definition of a law-enforcement officer under Section 143-166.50(a)(3). Therefore, Defendant's argument on this point fails.

However, Section 143-166.42 contains an additional requirement that the Special Separation Allowance is payable "beginning in the month in which the officer retires on a basic service retirement under the provisions of G.S. 128-27(a)[.]" *Id.* Section 128-27(a) governs the service retirement benefits under LGERS.[5] *See* N.C. Gen. Stat. § 128-27(a) (2021). Here, unlike the Supplemental Retirement Income Plan, the Special Separation Allowance is expressly premised on membership in—and upon retirement from—LGERS.

Here, there is nothing in the Record to indicate Cathcart retired under the provisions of Section 128-27(a). The parties stipulated to the fact Cathcart, instead, retired under TSERS. *See* N.C. Gen. Stat. § 135-1,

5. Article 3 of Chapter 128 is entitled: "Retirement System for Counties, Cities, and Towns."

et seq. In briefing to this Court, Plaintiffs fail to even address this additional requirement under Section 143-166.42.

Thus, on the Record before us, Cathcart did not retire under the provisions of LGERS. Therefore, we are compelled to agree with the trial court Cathcart is not entitled to the Special Separation Allowance provided for under Section 143-166.42. Consequently, we affirm the portion of the trial court's Order declaring Defendant is not required to pay Cathcart the Special Separation Allowance. In so concluding, we do note the definition of employer under LGERS provides a mechanism for its scope to be expanded to other political subdivisions of the State beyond those enumerated in the statute. Section 128-21(11) defines employer as meaning:

> any county, incorporated city or town, the board of alcoholic control of any county or incorporated city or town, the North Carolina League of Municipalities, and the State Association of County Commissioners. *"Employer" shall also mean any separate, juristic political subdivision of the State as may be approved by the Board of Trustees upon the advice of the Attorney General.*

N.C. Gen. Stat. § 128-21(11) (2021) (emphasis added).

Conclusion

Accordingly, for the foregoing reasons, we reverse that portion of the trial court's Order which declared Plaintiffs ineligible for the Supplemental Retirement Income Plan contribution. We affirm the portion of the trial court's Order declaring Cathcart is not entitled to the Special Separation Allowance. We remand this case to the trial court for implementation of our decision and to address any remaining issues raised by the pleadings—including whether Plaintiffs' claims are barred in whole or in part by any applicable statute of limitations.[6]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges MURPHY and WOOD concur.

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6. Based on our resolution of this matter on statutory grounds, we do not reach the remaining issue raised on appeal by Plaintiffs related to the exclusion of a letter from the Assistant General Counsel to the Retirement Systems Division. On remand, if relevant or necessary, the trial court may in its discretion revisit its ruling on that matter.

IN RE K.C.

[292 N.C. App. 231 (2024)]

IN THE MATTER OF K.C., M.A.

No. COA23-612

Filed 6 February 2024

1. Appeal and Error—petition for writ of certiorari—review of void orders—meritorious argument—extraordinary circumstances

In a child neglect matter, the appellate court granted respondent parents' petition for writ of certiorari to review the trial court's orders of adjudication and disposition, which the trial court entered after it granted the department of social services' motion under Civil Procedure Rules 59 and 60 to reconsider the trial court's order dismissing the juvenile petition for lack of proof. Since the orders appealed from were void, respondents' notice of appeal was ineffective; however, certiorari was appropriate because respondents raised a meritorious claim on appeal and made a showing of extraordinary circumstances based on the substantial harm that would result from separating the children from their parents.

2. Child Abuse, Dependency, and Neglect—juvenile petitions dismissed—Rule 59 and 60 motion improperly granted—lack of subject matter jurisdiction

In a child neglect matter, once the trial court dismissed the juvenile petition filed by the department of social services (DSS) for failure to prove the allegations by clear, cogent, and convincing evidence, the trial court was thereafter divested of subject matter jurisdiction to enter any further orders in the matter, including on DSS's motion pursuant to Civil Procedure Rules 59 and 60 seeking to have the trial court reconsider the dismissal. Pursuant to N.C.G.S. §§ 7B-201 and 7B-807, the trial court's jurisdiction was terminated when it dismissed the petition; therefore, DSS's motion to reconsider was an improper method to seek review of the trial court's dismissal order, and granting that motion did not revive the trial court's jurisdiction.

Appeal by Respondents from orders entered 21 December 2022, 30 January 2023, and 4 April 2023 by Judges Hal G. Harrison and Matthew Rupp in Watauga County District Court. Heard in the Court of Appeals 9 January 2024.

Fox Rothschild LLP, by Brian C. Bernhardt, for Guardian ad Litem; and Di Santi Capua & Garrett PLLC, by Chelsea B.

Garrett, for Watauga County Department of Social Services, Petitioner-appellee.

Jeffrey L. Miller, for Respondent-Father-appellant.

Assistant Parent Defender Jacky L. Brammer and Parent Defender Wendy C. Sotolongo, for Respondent-Mother-appellant.

WOOD, Judge.

I. Factual and Procedural History

Father and Mother (together, "Respondents") were unmarried partners living together as a family unit along with their children, Kylie and Martin.[1] Father is the biological father of Martin and stepparent of Kylie. On 24 August 2022, Watauga County Department of Social Services ("DSS") filed juvenile petitions alleging that Kylie and Martin[2] were neglected juveniles within the meaning of N.C. Gen. Stat. § 7B-101(15)(e). The petitions were based on a report from a third party of possible domestic violence, improper discipline, and substance use in the home. Kylie was seven years old, and Martin was two years old at the time juvenile petitions were filed. Upon the filing of the petitions, the trial court entered orders for nonsecure custody as to both children, and DSS removed the children from their home and placed them in foster care.

On 31 August 2022, Selena Moretz ("Moretz"), the director of the Children's Advocacy Center of the Blue Ridge, conducted a forensic interview with Kylie, which was videotaped. During the interview, Kylie and Moretz had the following exchanges:

> [KYLIE]: [S]ometimes [Father] hits my mom. . . . And then she has a black eye. . . . [T]he reason I know—I know how my mommy gets hit by him is because I wake up and I hear her screaming. . . . I heard a, no, like a loud no. And then it just went quiet. . . . And then I heard my mommy come into the bathroom. But then I started to close my eyes so she thought I was sleeping, she went into the bathroom and shut the doors hard. . . . And the morning I saw a black eye

1. Pseudonyms are used to protect the identity of the juveniles pursuant to N.C. R. App. P. 42(b).

2. The original juvenile petition named Martin as an "Unknown male child," but amended juvenile petitions were filed on 29 August 2022 and 28 September 2022 adding Martin's name and identifying Father as his biological father.

on her. . . . So she just said I fell and landed on something. . . . [B]ut then we knowed it wasn't that. . . . [I]t's been more than once.

. . .

I have seen it with my eyes. . . . [S]o when I was younger when I was at Valle Crucis School . . . she woke me up and she had a bruise under her eye and the top of her eye.

. . .

MORETZ: Uh-huh. But whenever you say that you see him hit your mom; tell me about where you're at when you see that.

[KYLIE]: So I am usually on the couch. . . . But, like, I can hear her. . . . I can hear her scream no. . . . But when I said I seen him hit her is . . . I was watching TV and then my mommy looked on his phone and he had—he had another girlfriend that my mommy knowed about it and he dumped her. But then he was texting her and said, I love you, good night. . . . So then she flipped out and then [Father] got mad. And then—and then he hit her. And then they went into the—she wanted me to go into the bathroom some place where he wouldn't hurt us. So we—so she took me and [Martin] in the bathroom and there was blood.

. . .

MORETZ: Tell me about where the blood was at.

[KYLIE]: It was on the curtains and on the ground, it was on the bathtub a little bit. It was on the sink, like she was crying. . . . We stayed there for a couple of more minutes until it was quiet. Then we went out. . . . [Mother] told us to just go to bed. And then nothing—and it's going to be okay.

. . .

MORETZ: Has there ever been a time that you've been scared or worried about what [Father] is doing or saying?

[KYLIE]: Yeah. I am scared that one day [Father] is going to hit me.

Kylie further told Moretz that Father is "very mean to [Martin.] If he cries when he's going to sleep, he will spank him. . . . [H]e won't say what do you want. He would just spank him sometimes." Finally, Kylie stated

there was a time when Mother made breakfast and left for work, planning to bring dinner home that night, and Father did not allow Kylie or Martin to eat the whole day, except for one snack.

The adjudication hearing was held 25 October 2022. DSS presented two witnesses: Ashley Hartley ("Hartley"), the social worker who filed the juvenile petitions and initially brought law enforcement with her to Respondents' home, and Moretz. As its final evidence, DSS entered the videotape of the forensic interview into evidence and played it for the court. The entire interview is approximately one hour. Father testified in opposition to DSS's case; Mother did not testify. Father testified he "heard Kylie's remarks in the video." Father was asked about Kylie's remarks that Mother "was hit and was screaming," and he testified that he did not know what Kylie was talking about. Father was asked if he ever observed Mother with a black eye, and he testified that there was one time Mother had a black eye after she fell down the stairs and another time when she had a pimple near her eye that became swollen, turned black, and had to be lanced. Father testified that he was not responsible for giving Mother a black eye. Father was also asked about Kylie's allegation of domestic violence at the time she attended Valle Crucis School, to which he testified, "that was at the beginning of our relationship where we was barely living together," and that it must have occurred before he entered into the current living arrangement he had with Mother. Regarding Kylie's allegations of seeing blood after an incident between Father and Mother and hearing Mother cry, Father testified he could not remember any incidents involving blood although he has seen Mother cry on numerous occasions. In response to Kylie's allegation of the day Father did not let her or Martin eat during the day except for one snack, Father testified that the children had been snacking too much and not eating their regular food. That morning, Mother made a big breakfast before she left for work and was going to return at approximately 5:00 p.m. to make dinner. Father testified that he was firm that day that the children would only be allowed one snack between breakfast and dinner.

At the close of all evidence, counsel made closing arguments. Counsel for Mother argued:

> We've had nothing but this video of the seven-year-old and her interpretation of what she may or may not have seen. . . . [W]ithout any other evidence and no substantiation of any DV other than what was perceived by a seven-year-old, again, we would just have to leave that in the Court's discretion.

Counsel for Father argued, "I believe[ ] that all we really have in this situation is an interview where a child has made accusations about things, but we're no further along in proving that than when we started here today. None of this has been substantiated." Counsel for DSS argued:

> We've heard that there has been yelling. There was blood in the kitchen. . . . And so neither parent has offered an explanation for that incident. And with all due respect, it comes down simply to credibility. . . . [W]e have a stepfather that said that [Mother] fell down the stairs and got a black eye, which is one of the most clichéd things ever heard about a reason for someone to get a black eye; and then another black eye was because of a stye.

Following all of the evidence and arguments of counsel, the trial court found DSS had failed to produce clear, cogent, and convincing evidence that the children were neglected. The trial court stated:

> The case of the Department is based solely upon the video. The court finds that [Kylie] . . . is a delightful young lady, very articulate; and I believe—probably believed what she was saying, but I also believe that the Department could have, at a minimum, obtained the medical records relative to the mom's black eye. I never saw that.
>
> I believe that the Department at a minimum could have got a criminal history for [Father]. While I have no reason to question his character, but he may—that may be his criminal record and it may not. There may have been other things that would have shown more light on this circumstance.
>
> Maybe if the burden of proof was by the greater weight you might have it. I cannot find and nor can I adjudicate in this matter without clear, cogent, and convincing evidence. And I don't believe that I've been furnished that and this petition is dismissed.

The trial court ordered the children to be reunited with Father and Mother. On 23 November 2022, the trial court filed its written order dismissing the juvenile petitions.

On 1 December 2022, DSS filed a motion pursuant to N.C. R. Civ. P. 59–60 (the "Rule 59/60 motion"). In the motion, DSS stated, in relevant part:

> 1. Pursuant to Rule 59, N.C.R.P., a new trial may be granted or this Court may amend its judgment based upon: insufficiency of the evidence to justify the verdict or that the verdict is contrary to law, or any other reason recognized as grounds therefor.
>
> 2. Alternatively, pursuant to Rule 60(b)(6), N.C.R.P., DSS requests relief of this Court's judgment dismissing its Petition if the Court agrees, after a review of the record and, specifically the forensic interview recording, that it has a justifiable reason to provide DSS the relief sought.

DSS requested that the trial court "reconsider its ruling in light of certain inconsistencies in between the evidence and the [trial court's] ruling." DSS further stated that it believed in good faith "that certain key evidence, that being a video of a forensic interview with one of the Juveniles, was difficult to hear when played in Court and could have contributed to why the Court ruled as it did." DSS included ten quotations of portions of the interview, along with the video time stamps showing the exact time the statements were made. DSS printed some of the quotations in bold typeface. Finally, DSS requested the trial court to "re-listen to the forensic interview in chambers, perhaps with headphones (or where it can be more clearly heard) or, *read a transcribed copy thereof*, *which is in the process of being completed*." (Emphasis added.)

The trial court held a hearing on DSS's Rule 59/60 motion on 16 December 2022. At the hearing, DSS stated that there were "anomalies" for DSS's counsel and for Hartley in that they "found that video somewhat difficult to hear." The trial court agreed, stating, "It was difficult to hear, plus the child was so energetic running around and talking at the same time. It did present an issue for me." DSS argued that the trial court was required to make determinations regarding the credibility of the witnesses due to the conflicting "testimony" between Kylie, as presented through the videotape, and Father. The trial court stated, "I will go ahead and tell everybody here right now, my ruling was based on the fact that I didn't know what that kid was saying." The trial court reiterated that "the child . . . . was constantly moving about, picking this up, running around, talking this quick. . . . I did not hear very much and I couldn't understand very much." Counsel for Father argued that everyone in the courtroom during the adjudication hearing seemed to be able to hear the videotape and that the trial court would have made it audible if anyone had claimed it was not audible. Ultimately, the trial court took the matter under advisement and told DSS, "I do want that transcript." Counsel for Respondents objected to the trial court's consideration of the transcript of the forensic interview.

On 17 December 2022, the trial court emailed counsel its ruling granting DSS's Rule 59/60 motion. The trial court reversed its earlier ruling and adjudicated the children neglected. The trial court stated that the videotape of the forensic interview played at the adjudication hearing had poor sound quality and was difficult to understand. The trial court reported that DSS provided a transcript of the videotape, noting the transcript presented the same evidence as did the video. The trial court stated the transcript was "clear and understandable, and had it been presented at trial, the [trial court] would have adjudicated the juveniles as neglected juveniles." The trial court directed counsel for DSS to prepare adjudication and disposition orders.

On 21 December 2022, the trial court entered its written order granting the Rule 59/60 motion. In it, the trial court stated:

> 2. [The video of the forensic interview] was a pivotal part of DSS's evidence based on the statements of the Juvenile therein. The sound quality of the video was poor which made it difficult to hear all the statements clearly, and depending on one's hearing and position in the courtroom, some of those present were able to hear the video better than others.
>
> 3. After reading the verbatim transcript of the videoed interview, this Court realized that it did not, in fact, hear certain statements that [Kylie] made in the forensic interview. The Court was able to hear- though with some difficulty- other portions of the forensic interview as it was played on the record during the hearing on DSS's Petition.
>
> 4. Therefore, the undersigned was not aware at the time of the Adjudication hearing that he had not heard the several key statements of [Kylie] which were pivotal and constitute clear, cogent, and convincing evidence in support of DSS's Petition.
>
> 5. As a result, this Court dismissed DSS's Petition for failure to meet the requisite burden of proof- clear, cogent, and convincing evidence.
>
> 6. In hindsight, and with the benefit of the verbatim transcript of the forensic interview, the Court sees that it did have clear[,] cogent[,] and convincing evidence in support of DSS's Petition. Therefore, had it clearly heard the entirety of the forensic interview that was played in

> Court from beginning to end, the Court would have not dismissed DSS's Petition.
>
> 7. After the Adjudication hearing, Counsel for Petitioner, DSS, listened to the forensic interview video again to confirm the statements made by [Kylie] and filed Motions pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. In support of these Motions, Counsel for Petitioner offered the verbatim sealed transcript of the forensic interview. Counsel for Respondent parents objected to the Court's consideration of the transcript.
>
> 8. The transcript presented the identical evidence as the video played in Court, but in a clear and understandable manner. Had the Court heard all of the statements of [Kylie] in the interview, it would not have dismissed DSS's Petition.
>
> 9. Extraordinary circumstances exist such that equity and justice demands this Court grant DSS the relief sought from the Court's prior Order Dismissing Juvenile Petition.

Also on 21 December 2022, the trial court held a hearing on "interim disposition." The trial court entered its written order on interim disposition on 22 February 2023 in which it ordered kinship placement of the children with their maternal grandmother. Mother was permitted to reside with them, and Father was permitted two hours supervised visitation per week with Martin and no visitation with Kylie. The permanency plan of care was reunification.

On 30 January 2023, the trial court entered its order on adjudication, finding that Father physically abused Mother in the home in the presence of the children and that Kylie witnessed such abuse, including a black eye, at least once. The trial court adjudicated both Kylie and Martin neglected within the meaning of N.C. Gen. Stat. § 7B-101(15). The trial court granted legal and physical custody of the children to DSS.

On 9 February 2023, Mother filed a notice of reservation of right to appeal the 30 January 2023 order. On 28 February 2023, the trial court held a hearing on final disposition, and on 4 April 2023, it filed its written disposition order which continued the children in the custody of DSS and in kinship placement with their maternal grandmother and retained the permanency plan of reunification.

On 6 April 2023, Father and Mother filed a notice of appeal of the adjudication order entered 30 January 2023 and the disposition order entered 4 April 2023.

II. Analysis

A. Petitions for *Writ of Certiorari*

[1] First, we must determine whether this Court has jurisdiction to review Respondents' appeals on their merits. Both Father and Mother filed petitions for *writ of certiorari* because they seek appellate review of judgments they contend are void. Our Supreme Court has said of void judgments:

> A judgment is void, when there is a want of jurisdiction by the court over the subject matter of the action, and a void judgment may be disregarded and treated as a nullity everywhere. . . . A void judgment is, in legal effect, no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless.

Hart v. Thomasville Motors, Inc., 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citations and quotation marks omitted).

N.C. Gen. Stat. § 7A-32 authorizes this Court to issue a *writ of certiorari* "in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C. Gen. Stat. § 7A-32(c). "The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law." *Id.* Rule 21 of the Rules of Appellate Procedure provides in pertinent part:

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1). Our Supreme Court has explained:

> The procedure governing writs of certiorari is found in Rule 21 of the Rules of Appellate Procedure. But Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued. Instead, the

> decision to issue a writ is governed solely by statute and by common law.

Cryan v. Nat'l Council of Young Men's Christian Associations of United States, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023) (citation and quotation marks omitted). Our appellate courts employ a two-factor test to determine whether a *writ of certiorari* should issue: (1) "if the petitioner can show merit or that error was probably committed below" and (2) "if there are extraordinary circumstances to justify it," including "a showing of substantial harm." *Id.* at 572, 887 S.E.2d at 851 (quotation marks omitted).

Because, as discussed below, we hold the trial court did not possess subject matter jurisdiction to enter its 21 December 2022 order after its order dismissing the petition on 23 November 2022, any order entered after the dismissal was void. Therefore, any notice of appeal by Father and Mother of any order entered after the dismissal of the petition was ineffective because it was an appeal from a void order, and "all proceedings founded upon [a void judgment] are worthless." *Hart*, 244 N.C. at 90, 92 S.E.2d at 678. Although Mother filed a notice of reservation of right to appeal the trial court's 30 January 2023 order, and both Father and Mother filed notices of appeal of that same order as well as the dispositional order entered 4 April 2023, N.C. R. App. P. 21(a)(1) does not apply to these particular circumstances. This is because Father and Mother seek appeal of a void order. Accordingly, we must determine whether this Court should, "in aid of [our] own jurisdiction," grant Respondents' petitions for *writ of certiorari* pursuant to N.C. Gen. Stat. § 7A-32(c).

Because the trial court did not have jurisdiction to enter orders in this matter after dismissing the juvenile petition, Respondents' contention that the trial court erred has merit. They also make a showing of extraordinary circumstances because of the substantial harm resulting from the separation of a family due to a void order and the lack of finality in a juvenile case. Accordingly, we grant their petitions for *writ of certiorari*.

B. The Trial Court's Subject Matter Jurisdiction After Dismissal

[2] Respondents argue: (1) the trial court did not have subject matter jurisdiction to grant DSS's Rule 59/60 motion; (2) even if the trial court did have subject matter jurisdiction, it abused its discretion in granting the motion; and (3) the trial court erred in adjudicating the children neglected. Because we hold that the trial court did not have subject matter jurisdiction to grant the Rule 59/60 motion, we need not reach the other issues raised.

"Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo. Challenges to a trial court's subject-matter jurisdiction may be raised at any stage of proceedings, including for the first time" on appeal. *In re M.R.J.*, 378 N.C. 648, 654, 862 S.E.2d 639, 643 (2021).

Respondents argue that N.C. Gen. Stat. §§ 7B-201 and 7B-807 provide that a trial court's jurisdiction in a juvenile abuse, neglect, or dependency action is terminated upon the dismissal of a juvenile petition. We agree. Initially, a trial court obtains jurisdiction over a juvenile abuse, neglect, or dependency proceeding when a petition alleging the same is filed: "The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a). A trial court's jurisdiction ends, however, when it dismisses the juvenile petition upon a finding that the allegations contained in the petition are unproven. N.C. Gen. Stat. § 7B-201(a) provides, "When the court obtains jurisdiction over a juvenile, *jurisdiction shall continue until terminated by order of the court* or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B-201(a) (emphasis added). N.C. Gen. Stat. § 7B-201(b) further provides that, except in five enumerated circumstances, which are not applicable to this case:

> When the court's jurisdiction terminates, whether automatically or by court order, *the court thereafter shall not modify or enforce any order previously entered in the case*, including any juvenile court order relating to the custody, placement, or guardianship of the juvenile. *The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed*, unless applicable law or a valid court order in another civil action provides otherwise.

N.C. Gen. Stat. § 7B-201(b) (emphasis added). N.C. Gen. Stat. § 7B-807(a) provides, "If the court finds that the allegations have not been proven, the court *shall dismiss the petition with prejudice*, and if the juvenile is in nonsecure custody, the juvenile *shall be released to the parent*, guardian, custodian, or caretaker." N.C. Gen. Stat. § 7B-807(a) (emphasis added). In summary, these statutes provide that the trial court's jurisdiction begins upon the filing of a petition and ends when the trial court dismisses the petition upon a finding that the allegations have not been proven.

Here, in the original adjudication hearing, the trial court explicitly stated in open court that DSS's case was "based solely upon the video"

and that DSS did not prove its case by clear, cogent, and convincing evidence, specifically finding that DSS could have provided other evidence such as medical records pertaining to Mother's black eye as well as Father's criminal history. Upon dismissing the petition, the trial court then ordered the children reunited with Father and Mother, as *required* by N.C. Gen. Stat. § 7B-807(a). Finally, the trial court entered its written order summarily dismissing the juvenile petitions (also as required by N.C. Gen. Stat. § 7B-807(a)), which was an order by the trial court causing the termination of its jurisdiction because there was no longer a juvenile petition before it. N.C. Gen. Stat. § 7B-201(a) ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court"). Upon the trial court's dismissal of the juvenile petition, and the simultaneous termination of its jurisdiction, "[t]he legal status of the juvenile and the custodial rights of the parties . . . revert[ed] to the status they were before the juvenile petition was filed." N.C. Gen. Stat. § 7B-201(b). Therefore, the trial court's jurisdiction terminated, at the latest, on 23 November 2022 when it entered the written order dismissing the petitions.

As a practical matter, it is not immediately apparent on appeal what the auditory issue was during the adjudication hearing. The full recording of the interview was played before the trial court. Aside from the recording, Father testified that he "heard [Kylie's] remarks in the video." He was questioned on direct and cross-examination regarding the particular allegations contained in the recording of the interview: that Mother "was hit and was screaming"; whether he ever saw Mother with a black eye; the allegation of domestic violence while Kylie attended Valle Crucis School; the appearance of blood in the home; and the issue of whether Father deprived the children of proper nutrition while Mother was at work. Even if these particular allegations could not all be heard properly while the recording was played, there was a second chance to hear and consider them during Father's testimony. There was yet another opportunity to hear and consider such allegations during the attorneys' closing arguments. Counsel for Mother argued there was "no substantiation of any DV other than what was perceived by a seven-year-old." Counsel for DSS specifically reiterated the allegations concerning yelling, blood, a black eye, and that Kylie herself witnessed such things. These were further opportunities for the trial court to hear and consider the allegations, weigh credibility, and make findings of fact, if necessary. In its oral ruling on the matter, the trial court weighed Kylie's credibility, demonstrating its understanding that Kylie made allegations of witnessing Father commit domestic violence. The trial court even mentioned "mom's black eye."

The Rule 59/60 motion cannot operate as a method to claw back jurisdiction and reconsider the evidence, as DSS asked the trial court to do in this case. The trial court may have had second thoughts "[i]n hindsight," but the Rule 59/60 motion was the improper method to seek reconsideration, and granting the motion was an improper method to implement remorse for the trial court's initial ruling.[3] Once the trial court summarily dismissed the petition due to DSS's failure to prove its case, the trial court's subject matter jurisdiction terminated. DSS cannot bypass an appeal with a Rule 59/60 motion, and the trial court cannot swap its initial adjudication decision after dismissal of the petition.

Accordingly, we overrule DSS's argument that N.C. R. Civ. P. 59(a) and 60(b) operate to allow a trial court to act on a juvenile petition even after dismissing a petition for failure to prove the allegations contained within it. Because the trial court's subject matter jurisdiction terminated when it entered its order dismissing the juvenile petition, its order granting DSS's Rule 59/60 motion, and all subsequent orders are *void ab initio*. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) ("A judgment is void[ ] when there is a want of jurisdiction by the court over the subject matter. A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars anyone, and all proceedings founded upon it are worthless.") (ellipsis omitted). Regardless of whether or not N.C. R. Civ. P. 59 and 60 may otherwise be applicable in juvenile cases in some limited circumstances, they are inapplicable here because the trial court lacked jurisdiction to enter an order on the Rule 59/60 motion. Once the trial court divests itself of jurisdiction, it cannot thereafter revive it.

III. Conclusion

For the foregoing reasons, we hold the trial court's subject matter jurisdiction terminated when it dismissed the juvenile petitions following its finding that DSS did not prove its case by clear and convincing evidence. Because its order granting DSS's Rule 59/60 motion and all subsequent orders are *void ab initio* and must be vacated, all orders entered after the order of dismissal of the petitions are hereby vacated.

VACATED.

Judges FLOOD and STADING concur.

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3. We note that DSS could have appealed the trial court's initial adjudication decision. N.C. Gen. Stat. § 7B-1001 specifically allows an appeal from an "involuntary dismissal of a petition." N.C. Gen. Stat. § 7B-1001(a)(2). We note that "[n]either a Rule 59 motion nor a Rule 60 motion may be used as a substitute for an appeal." *Musick v. Musick*, 203 N.C. App. 368, 371, 691 S.E.2d 61, 63 (2010).

LAND v. WHITLEY

[292 N.C. App. 244 (2024)]

DORIS GRIFFIN LAND AND ELLIOTT LAND, PLAINTIFFS
v.
KORI B. WHITLEY, M.D., PHYSICIANS EAST, P.A. D/B/A GREENVILLE OB/GYN, PITT COUNTY MEMORIAL HOSPITAL, INC. D/B/A VIDANT MEDICAL CENTER, AND PITT COUNTY MEMORIAL HOSPITAL, INC. D/B/A VIDANT SURGICENTER, DEFENDANTS

No. COA23-250

Filed 6 February 2024

1. Appeal and Error—interlocutory order—denying Rule 12 motions to dismiss—statutory immunity claim—medical malpractice—during pandemic

In a medical malpractice case arising from an incomplete hysterectomy that was performed on plaintiff during the beginning of the COVID-19 pandemic, defendants (the surgeon, medical practice, and hospital involved) had an immediate right of appeal from an order denying their Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, in which they asserted a claim of statutory immunity under the Emergency or Disaster Treatment Protection Act—an act giving health care providers limited immunity from civil liability for damages resulting from care provided during the pandemic. In its discretion, the appellate court also addressed the denial of defendants' Rule 12(b)(6) and Rule 9(j) motions. However, the denial of defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction was not immediately appealable.

2. Medical Malpractice—motions to dismiss—statutory immunity—under COVID-19 legislation—requirements—exception to immunity

In a medical malpractice case arising from an incomplete hysterectomy that was performed on plaintiff during the beginning of the COVID-19 pandemic, the trial court properly denied defendants' motions to dismiss under Civil Procedure Rules 12(b)(2) and (6) where defendants (the surgeon, medical practice, and hospital involved) were not entitled to immunity under the Emergency or Disaster Treatment Protection Act—an act giving health care providers limited immunity from civil liability for damages resulting from care provided during the pandemic. First, defendants' affidavits did not, as required for immunity under the Act, show a causal link between the impact of COVID-19 and their failure to properly complete plaintiff's hysterectomy, take appropriate measures after complications developed during the surgery, and remove a piece of plaintiff's uterus that was left in her pelvic cavity during the

procedure and became dangerously infected. Second, the affidavits did not address the third requirement for immunity under the Act regarding whether defendants acted in good faith when treating plaintiff. Finally, plaintiff's complaint sufficiently alleged that defendants engaged in conduct falling under the Act's exception to immunity.

3. Medical Malpractice—Rule 9(j) certification—language used in Rule—different language used in complaint—no strict pleading required

In a medical malpractice case arising from an incomplete hysterectomy that was performed on plaintiff during the beginning of the COVID-19 pandemic, the trial court properly denied defendants' motion to dismiss where defendants (the surgeon, medical practice, and hospital involved) argued that plaintiff's complaint did not comply with Civil Procedure Rule 9(j). The certification in plaintiff's complaint did not perfectly mirror the language in Rule 9(j), since it stated that a medical expert "reviewed all the allegations of negligence" and "all medical records pertaining to the alleged negligence" whereas the Rule requires a review of "the medical care" itself along with the relevant medical records. However, Rule 9(j) does not contain a strict pleading requirement, and plaintiff's language sufficiently conveyed the same principles reflected in the Rule's certification provision.

Appeal by Defendants from an order entered 27 October 2022 by Judge William R. Pittman in Pitt County Superior Court. Heard in the Court of Appeals 17 October 2023.

Miller Law Group, PLLC, by Bruce W. Berger and MaryAnne M. Hamilton, for Plaintiffs-Appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher G. Smith, Hope C. Garber, and David R. Ortiz, for Defendants-Appellants.

Harris, Creech, Ward & Blackerby, P.A., by W. Gregory Merritt, for Pitt County Memorial Hospital, Inc., d/b/a Vidant Medical Center and Pitt County Memorial Hospital, Inc., d/b/a Vidant SurgiCenter, Defendants-Appellants.

Walker, Allen, Grice, Ammons, Foy, Klick & McCullough, L.L.P., by Elizabeth P. McCullough and Kelsey Heino, for Kori B. Whitley,

M.D. and Physicians East, P.A., d/b/a Greenville OB/GYN, Defendants-Appellants.

Todd Law Offices, PLLC, by Elizabeth C. Todd and Brown, Moore & Associates, PLLC, by Matthew C. Berthold and Jennifer L. Maynard, for North Carolina Advocates for Justice, Amicus Curae.

WOOD, Judge.

Defendants Dr. Whitley, Greenville OB/GYN, Vidant Medical Center, and Vidant SurgiCenter (collectively "Defendants") appeal from the trial court's order denying their motions to dismiss on the basis of Rules 12(b)(1), 12(b)(2), 12(b)(6) and 9(j). After careful review, we affirm the order of the trial court.

I. Factual and Procedural Background

The present case occurred during the beginning months of the COVID-19 pandemic and involves the statute enacted during North Carolina's state of emergency.

On 3 May 2020, the North Carolina General Assembly unanimously passed a bill entitled The Emergency or Disaster Treatment Protection Act ("The Act") providing limited immunity for health care providers during the COVID-19 pandemic. N.C. Gen. Stat. § 90-21.130 (2023). Governor Roy Cooper signed the bill into law on 4 May 2020. Retroactive to March 2020, the beginning of the pandemic, the limited immunity act protected health care providers from civil liability for claims of ordinary negligence as a result of an act or omission in the course of arranging for or providing health care services provided each of the following applied:

> (1) The health care facility, health care provider, or entity is arranging for or providing health care services during the period of the COVID-19 emergency declaration, including, but not limited to, the arrangement or provision of those services pursuant to a COVID-19 emergency rule.
>
> (2) The arrangement or provision of health care services is impacted, directly or indirectly:
>
> a. By a health care facility, health care provider, or entity's decisions or activities in response to or as a result of the COVID-19 pandemic; or
>
> b. By the decisions or activities, in response to or as a result of the COVID-19 pandemic, of a health care facility

> or entity where a health care provider provides health care services.
>
> (3) The health care facility, health care provider, or entity is arranging for or providing health care services in good faith.

N.C. Gen. Stat. § 90-21.133(a). The statute specifically excluded gross negligence and willful or intentional conduct from this statutory immunity:

> (b) The immunity from any civil liability provided in subsection (a) of this section shall not apply if the harm or damages were caused by an act or omission constituting gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care provider providing health care services; provided that the acts, omissions, or decisions resulting from a resource or staffing shortage shall not be considered to be gross negligence, reckless misconduct, or intentional infliction of harm.

N.C. Gen. Stat. § 90-21.133(b). On 15 August 2022, Governor Cooper lifted the state of emergency thereby ending the statutory limited immunity provided for health care providers by the Act.

Mrs. Land was diagnosed with a high-grade squamous intraepithelial lesion in early 2020, which was at high risk of turning into cervical cancer. Mrs. Land's health care providers ultimately determined that a total vaginal hysterectomy ("TVH") was necessary. On 29 June 2020, Defendant Dr. Whitley, assisted by resident-in-training Dr. Faiz, performed a TVH on Mrs. Land at Vidant SurgiCenter.

Dr. Whitley noted in the operative notes that due to Mrs. Land's anatomy she had difficulty during the procedure. Mrs. Land's long cervix and a uterine fibroid obscured the left cornual region of her uterus. Despite these complications, Dr. Whitley did not convert the vaginal hysterectomy to an abdominal or laparoscopic procedure, alternative surgical methods that would have allowed better visualization of Mrs. Land's uterus. Consequently, a three-inch piece of uterine tissue remained undetected in her abdominal cavity following the TVH surgery.

On 14 July 2020, Mrs. Land attended a routine post-operative visit with Dr. Whitley during which she reported experiencing abdominal pain. Dr. Whitley informed Mrs. Land that the surgery had been difficult and renewed her prescription for oxycodone for pain. Dr. Whitley noted

in her medical record that Mrs. Land had no complaints other than "struggling with constipation" and described her abdomen as being soft, nontender, nondistended, with active bowel sounds. Dr. Whitley did not note in the medical records that Mrs. Land had reported abdominal pain. According to Mrs. Land, Dr. Whitley did not physically examine or touch her body during this visit.

On 25 July 2020, Mrs. Land presented with severe abdominal pain to Vidant Emergency Department in Greenville where she was diagnosed with sepsis, stage 4 kidney failure, and an abdominal infection. On 26 July 2020, Dr. McDonald performed an initial laparoscopic exploration of her abdomen followed by emergency surgery after he detected an abscess in her pelvic cavity. Dr. McDonald converted the procedure to a laparotomy, cut open Mrs. Land's abdomen, removed the infected tissue and explored her pelvic cavity. Dr. Coiner, an OB/GYN physician, was called in to assist with the surgery. The physicians found the infected remnant uterine tissue in Mrs. Land's abdomen.

Dr. McDonald removed approximately twelve inches of Mrs. Land's bowel and left the wound open in order to drain the infection. In his post-operative diagnosis, Dr. McDonald noted Mrs. Land had "diffuse peritonitis, pelvic abscess, and an incomplete vaginal hysterectomy with uterine remnant." Mrs. Land was transferred to the intensive care unit where she experienced respiratory failure and had to be intubated on a ventilator until 28 July 2020. Mrs. Land was finally discharged from Vidant Hospital on 7 August 2020. During recovery, Mrs. Land developed pulmonary emboli in both of her lungs, and she was hospitalized again because of complications from the infected uterine remnant. From 31 August 2020 to 16 November 2020, Mrs. Land followed up with Dr. McDonald for treatment of her abdominal wound. On 18 November 2020, Mrs. Land returned to work. According to Mrs. Land, she remains unable to lift anything or to engage in physical activity and has memory loss and mood disturbances requiring psychiatric care.

On 16 February 2022, Plaintiffs, Mrs. Land and her husband, filed a complaint against Defendants Dr. Whitley, Greenville OB/GYN, Vidant Medical Center, and Vidant SurgiCenter alleging claims arising from the hysterectomy performed by Dr. Whitley and Dr. Faiz and her related follow-up care.

In their complaint, Mr. and Mrs. Land alleged negligence and gross negligence against Dr. Whitley and against all other Defendants under the doctrine of *respondeat superior* and sought damages resulting from the medical malpractice causes of actions. Plaintiffs allege Dr. Whitley violated the duty of care she owed to Mrs. Land by:

> [1.] Failing to safely and fully perform a complete vaginal hysterectomy on June 29, 2020;
>
> [2.] Failing to convert the TVH procedure to an open hysterectomy when she encountered difficulty during the TVH;
>
> [3.] Failing to request the assistance of a second surgeon to assist her when the vaginal hysterectomy proved more difficult than expected;
>
> [4.] Failing to see all of the [uterine tissue] material she should have seen and removed during the TVH;
>
> [5.] Failing to remove all pieces of [her]uterus during the TVH and leaving a portion of [her] uterus in her pelvic cavity that, predictably, became dangerously infected and almost killed her;
>
> [6.] Failing to properly evaluate and examine [Mrs. Land] at the two-week postoperative visit to identify the festering infection caused by the infected retained remnant of uterus; and
>
> [7.] Other negligence as may be determined through discovery and trial in this matter.

On 2 May 2022, Dr. Whitley and Physicians East filed a motion to dismiss and an answer. On 9 May 2022, Vidant Medical Center and Vidant SurgiCenter filed a motion to dismiss and an answer. Plaintiffs filed a memorandum in opposition to the motions to dismiss on 19 October 2022.

On 24 and 25 October 2022, Defendants amended their motions to dismiss on the following grounds: (1) they are immune from suit under the Act, requiring dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, lack of personal jurisdiction under Rule 12(b)(2), and failure to state a claim for relief under Rule 12(b)(6); and (2) the complaint was noncompliant with Rule 9(j) on its face. Defendants attached several affidavits to the amended motions to dismiss, including Dr. Whitley's, regarding COVID-19 procedures at the relevant facilities. On 24 October 2022, Defendants submitted a joint memorandum accompanied by exhibits such as case law, legislative documents, press releases, and media publications about the law at issue and about the impact of COVID-19 in support of their motion.

On 26 October 2022, the trial court heard arguments on Defendants' motions to dismiss. On 27 October 2022, the trial court filed an order denying Defendants' motions. The trial court's order states the trial court carefully reviewed the entire record, the written and oral arguments of counsel, and the proffered and other relevant authority in the light most favorable to Mr. and Mrs. Land, "giving [them] every inference, which could be drawn from the allegations and resolving all doubts in favor of the Plaintiffs." Defendants filed a notice of appeal on 28 November 2022.

II. Appellate Jurisdiction

[1] On 26 May 2023, Plaintiffs filed a motion to dismiss Defendants' appeal on the grounds that the appeal is interlocutory and does not implicate a substantial right.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory appeal "may be taken from [a] judicial order or determination of a judge of a superior or district court, . . . that affects a substantial right claimed in any action or proceeding[.]" N.C. Gen. Stat. § 1-277(a). "A substantial right is one affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a person is entitled to have preserved and protected by law: a material right." *Bowling v. Margaret R. Pardee Mem'l Hosp.*, 179 N.C. App. 815, 818, 635 S.E.2d 624, 627 (2006) (citation and internal quotation marks omitted), *disc. review denied*, 361 N.C. 425, 648 S.E.2d 206 (2007).

"As a general rule, claims of immunity affect a substantial right, and therefore merit immediate appeal." *Stahl v. Bowden*, 274 N.C. App. 26, 28, 850 S.E.2d 588, 590 (2020) (citation omitted). Nonetheless, a party claiming the protection of statutory immunity must satisfy "all of the requirements" of the statute granting the claimed immunity in order to establish a substantial right entitling him to an immediate appeal. *Wallace v. Jarvis*, 119 N.C. App. 582, 585, 459 S.E.2d 44, 46 (1995). "[O]ur Courts generally recognize immunity as a defense that can be raised under Rules 12(b)(1), 12(b)(2), or 12(b)(6)." *Suarez v. Am. Ramp Co. (ARC)*, 266 N.C. App. 604, 610, 831 S.E.2d 885, 890 (2019) (citation omitted). However, generally, the denial of a defendant's motion to dismiss under Rule 12(b)(1) is not immediately appealable. *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 28, 732 S.E.2d 614, 616 (2012) (citation omitted). Therefore, we decline to review "the trial court's order denying [D]efendant[s'] motion to dismiss pursuant to Rule 12(b)(1)" because it "is not properly before this Court." *Id.* at 29, 732 S.E.2d at 616.

Defendants contend their appeal of the order denying their motion under Rule 12(b)(2), a motion to dismiss for lack of personal jurisdiction, is an " 'adverse ruling as to the jurisdiction of the court over the person or property of the defendant,' [and] is immediately appealable and properly before this Court under N.C. Gen. Stat. § 1-277(b)." Defendants further argue that "immunity by virtue of a statute . . . affects a court's jurisdiction over a party." According to Defendants, "if a party is immune from suit by statute, then Rule 12(b)(2) is a proper vehicle for dismissal." Because Defendants are entitled to immediate appeal of the denial of Defendants' Rule 12(b)(2) motion, Plaintiffs' motion to dismiss the appeal as to Rule 12(b)(2) is denied, and we consider the merits on appeal. In our discretion, we also address Defendants' arguments pertaining to their Rule 12(b)(6) and Rule 9(j) motions.

III. Analysis

A. Statutory Immunity and the Emergency or Disaster Treatment Protection Act.

[2] First, Defendants contend that the trial court erred by denying their Rule 12(b) motions to dismiss because they have immunity under the Act against Plaintiffs' claim of negligence. Defendants argue that the Act's three statutory requirements for immunity from civil liability "existed on the face of Plaintiffs' complaint and other materials properly before the trial court, so this suit was barred based on the Act's immunity." We disagree.

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). Generally, the parties will present personal jurisdiction issues in one of the following procedural postures: "(1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues." *Id.*

"If the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations in the complaint can no longer be taken as true or controlling and plaintiff cannot rest on the allegations of the complaint." *Id.* (cleaned up). In this circumstance, in order "to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and

(2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence)." *Id.* at 693-94, 611 S.E.2d at 182-83. In other words, where "unverified allegations in the complaint meet plaintiff's initial burden of proving the existence of jurisdiction and defendants do not contradict plaintiff's allegations, such allegations are accepted as true and deemed controlling." *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 101, 545 S.E.2d 243, 246-47 (2001) (cleaned up). Thus, in deciding a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), courts may consider affidavits and other evidence. *Lippard v. Diamond Hill Baptist Church*, 261 N.C. App. 660, 661, 821 S.E.2d 246, 248 (2018).

When this Court reviews a decision regarding personal jurisdiction, it considers only "whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). Although the trial court did not make findings in ruling on a Rule 12(b)(2) motion, under Rule 52(a)(2) of the North Carolina Rules of Civil Procedure, the trial court is not required to make specific findings of fact unless requested by a party. *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (2000).

A motion to dismiss for failure to state a claim under Rule 12(b)(6) should be granted where: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Silver v. Halifax Cty. Bd. of Comm'rs*, 371 N.C. 855, 861, 821 S.E.2d 755, 759 (2018) (citation omitted). The standard of review on appeal from a trial court's order dismissing a complaint pursuant to Rule 12(b)(6) is *de novo*. *McGuire v. Riedle*, 190 N.C. App. 785, 786, 661 S.E.2d 754, 756 (2008).

The Act serves to provide health care providers immunity from any civil liability for any harm or damages resulting from care provided during the COVID-19 pandemic. The Act's stated purpose is

> to promote the public health, safety, and welfare of all citizens by broadly protecting the health care facilities and health care providers in this State from liability that may result from treatment of individuals during the COVID-19

> public health emergency under conditions resulting from circumstances associated with the COVID-19 public health emergency. A public health emergency that occurs on a statewide basis requires an enormous response from State, federal, and local governments working in concert with private and public health care providers in the community. The rendering of treatment to patients during such a public health emergency is a matter of vital State concern affecting the public health, safety, and welfare of all citizens.

N.C. Gen. Stat. § 90-21.131. This purpose is carried out by providing limited statutory immunity for those health care providers who meet the three requirements. For those seeking to use the affirmative defense of the immunity, (1) the health care provider must be "arranging for or providing" health care during the COVID-19 emergency; (2) the care provided must be affected, directly or indirectly, by the COVID-19 pandemic; and (3) the defendant must act in good faith. N.C. Gen. Stat. § 90-21.133(a).

The protections against civil liability afforded the health care providers who qualify for the immunity under these statutes are, however, not unlimited. N.C. Gen. Stat. § 90-21.133(b) provides exceptions to its limitation on liability:

> (b) The immunity from any civil liability provided in subsection (a) of this section shall not apply if the harm or damages were caused by an act or omission constituting gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care provider providing health care services; provided that the acts, omissions, or decisions resulting from a resource or staffing shortage shall not be considered to be gross negligence, reckless misconduct, or intentional infliction of harm.

N.C. Gen. Stat. § 90-21.133(b). Where statutory language is clear and unambiguous, our Courts do not "engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Edwards v. Morrow*, 219 N.C. App. 452, 455, 725 S.E.2d 366, 369 (2012).

When construing these statutory provisions together, it is evident that the Act is not intended to give a health care provider blanket immunity from every claim of civil liability arising during the COVID-19

pandemic. The statutes reflect that the health care provider must show that he or she meets the statutory requirements and has not engaged in actions constituting gross negligence, reckless misconduct, or intentional infliction of harm in order to receive the immunity from any civil liability. This plain reading of the statute is consistent with the general principle of statutory immunity, which as an affirmative defense, is available to a defendant only if he satisfies all of the requirements or elements defined in the relevant statutes. *Stahl*, 274 N.C. App. at 28, 850 S.E.2d at 590.

In reviewing Plaintiffs' complaint on its face and the record evidence before us, we note Plaintiffs concede Defendants have satisfied the first element of the statutory immunity, "as Defendants were providing health care services during the time of the COVID-19 emergency declaration."

The second element of the statute requires Defendants to show Mrs. Land's care was affected, directly or indirectly, by the COVID-19 pandemic. In their affidavits, Dr. Whitley, Dr. Lindbeck, and both the Medical Director and Chief of Staff at ECU Health SurgiCenter, provide detailed information regarding how the pandemic affected health care facilities and patient care in general. However, Defendants' affidavits fail to establish a causal link between the impact of COVID-19 and Mrs. Land's care or treatment. On its face, Plaintiffs' complaint alleges Dr. Whitley failed to fully perform a complete vaginal hysterectomy on 29 June 2020, failed to convert the TVH procedure to an open hysterectomy when she encountered difficulty during the TVH, failed to request the assistance of a second surgeon when the vaginal hysterectomy proved more difficult than expected, failed to see all of the material she should have seen and removed during the TVH, and failed to remove all pieces of the uterus during the TVH leaving a portion of Mrs. Land's uterus in her pelvic cavity.

Dr. Whitley's affidavit does not directly controvert these allegations. Instead, Dr. Whitley's affidavit states that during the pandemic, physicians were concerned that "operative procedures requiring gas insufflation of the abdomen ('laparoscopy') might lead to increase risk of transmission of the virus upon exsufflation and expiration of the gas from the abdomen" which resulted in the reduction of those procedures so that laparoscopy was not viewed as a readily available option should a complication or suspected complication occur. While Dr. Whitley's sworn affidavit provides reasoning for why the TVH procedure was the first option for the hysterectomy procedure, it is devoid of any COVID-19 related explanation of why the TVH procedure was not properly completed, why another surgeon was not consulted after complications

arose, why another surgical procedure could not be utilized on Mrs. Land after complications in the surgery arose, and why a remnant of Mrs. Land's uterus was left in her body.

Furthermore, neither Dr. Whitley's nor Dr. Lindbeck's affidavits offered evidence as to how Mrs. Land's follow-up care was directly or indirectly impacted by the pandemic. Neither affidavit disputes Plaintiffs' contention based upon *respondeat superior* that Dr. Whitley and the other Defendants failed "to properly evaluate and examine Mrs. Land at the two-week postoperative visit to identify the festering infection caused by the infected retained remnant of uterus." The uncontroverted allegations in Plaintiffs' complaint have not been countered by the evidence put forth by Defendants.

Additionally, the affidavits presented by Defendants do not address the last requirement of N.C. Gen. Stat. § 90-21.133(a), that the health care provider must have acted in good faith in providing health care treatment and services. N.C. Gen. Stat. § 90-21.133(a). While Defendants' affidavits discuss how the challenges of COVID-19 impacted their provision of health care to patients in general, there is no assertion Defendants provided treatment and care to Mrs. Land in good faith.

Moreover, even if we were to presume the evidence Defendants presented is sufficient to show that Defendants are entitled to limitations of civil liability based upon the statutory immunity of N.C. Gen. Stat. § 90-21.133(a), Plaintiffs expressly alleged Defendants engaged in acts falling under the statutory exceptions of N.C. Gen. Stat. § 90-21.133(b).

Defendants contend Plaintiffs' complaint contains conclusory allegations of gross negligence with no alleged factual basis. We disagree. A complaint is adequate if it provides sufficient information "to give the substantive elements of a legally recognized claim." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). The allegations in the complaint must only be "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1).

"Gross negligence has been defined as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92 (2002) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988)). "Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages." *Id.* (citation omitted).

Plaintiffs need only provide sufficient facts to support the allegation of gross negligence. The determination of whether a given course of conduct represents gross negligence is for the jury. *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 13, 727 S.E.2d 675, 684 (2012) (citation omitted). At the motion to dismiss stage, the court may only take account of the plaintiffs' allegations, construed liberally, and draw all reasonable inferences in plaintiffs' favor. *In re K.G.*, 260 N.C. App. 373, 376, 817 S.E.2d 790, 792 (2018).

Here, Plaintiffs' complaint adequately describes the negligent care Mrs. Land is alleged to have received and lists several ways in which that care breached Dr. Whitley's duty of care as a medical professional. Plaintiffs' complaint alleges Dr. Whitley violated the duty owed to Mrs. Land by (1) failing to safely and fully perform a TVH; (2) failing to convert the TVH procedure to an open hysterectomy when she encountered complications during the surgery; (3) failing to request the assistance of a second surgeon to assist her when the TVH procedure proved to be difficult; (4) failing to see all of the uterine material that should have been discovered and removed during the TVH; (5) failing to remove all pieces of Mrs. Land's uterus during the TVH and leaving a portion of her uterus in her pelvic cavity, which later became infected; (6) failing to properly evaluate and examine Mrs. Land at the two-week postoperative visit to identify the infection caused by the remnant of uterus; and (7) other negligence as may be determined through discovery and trial.

The complaint further expressly alleges that in so failing to meet her duty of care, "Dr. Whitley's failures and violations of the standard of care were negligent, careless, reckless, and grossly negligent." Consequently, Plaintiffs' complaint sufficiently alleges claims not barred by N.C. Gen. Stat. § 90-21.133(a) and at this stage of the litigation, Defendants are not entitled to dismissal of Plaintiffs' claims of gross negligence. We affirm the trial court's denial of Defendants' motion to dismiss under Rule 12(b)(2) and Rule 12(b)(6).

B. Defendants' Motions to Dismiss under Rule 9(j).

[3] Next, Defendants argue the trial court erred when it denied Defendants' motions to dismiss pursuant to Rule 9(j). Defendants contend Plaintiffs' complaint is subject to the requirements of the plain language of Rule 9(j).

Rule 9(j) of the North Carolina Rules of Civil Procedure requires

> Any complaint alleging medical malpractice . . . shall be dismissed unless . . . [t]he pleading specifically asserts that the medical care and all medical records pertaining to the

> alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care . . .

N.C. Gen. Stat. § 1A-1, Rule 9(j). The rule "serves as a gatekeeper . . . to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Vaughn v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018).

The record demonstrates Plaintiffs provided the following certification as part of their original complaint:

> Plaintiff states that at least one medical health provider who Plaintiff reasonably believes will qualify as expert witnesses under Rule 702 of the North Carolina Rules of Evidence reviewed all of the allegations of negligence related to medical care that is described in this Complaint and all the medical records pertaining to the alleged negligence that are available to Plaintiff after a reasonable inquiry. This expert is, or these experts are, willing to testify that the medical care complained of did not comply with the applicable standard of care . . . .

Defendants specifically argue Plaintiffs'

> assertion that the allegations of negligence pertaining to the medical care described in the Complaint were reviewed similarly fails to comply with the strict pleading requirements of Rule 9(j). The rule does not allow for the certifying expert to rely on a description of allegations of negligence, but requires certification that the medical care itself, and all medical records available to a plaintiff after reasonable inquiry, be reviewed.

We disagree.

The Supreme Court of North Carolina has held Rule 9(j) imposes "a distinct requirement of expert certification." *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 816 (2012) (citation omitted). It is that requirement and not the specific words used to make the certification that must be given "strict consideration." *Id.* While the use of statutory language may be advisable, Plaintiffs' certification conveys the same principles and language from Rule 9(j), even if the statute's language is ordered

differently within the certification. Plaintiffs contend that a requirement that parties mirror exactly any specific certification language in Rule 9(j) "would be counter to the canons of statutory interpretation," and would "superimpose a provision . . . that the General Assembly did not include." We agree. Defendants' argument is without merit and is overruled.

IV. Conclusion

Because Plaintiffs' complaint, liberally construed, sufficiently alleges claims not barred by N.C. Gen. Stat. § 90-21.133(a), Defendants are not entitled to dismissal of Plaintiffs' gross negligence claims at this stage of litigation. Additionally, Plaintiffs' certification has met the requirements pursuant to Rule 9(j). Consequently, we affirm the trial court's order denying Defendants' motions to dismiss pursuant to Rule 12(b)(2), Rule 12(b)(6), and Rule 9(j).

AFFIRMED.

Judges ZACHARY and STADING concur.

GLENN MOSELEY, PLAINTIFF
v.
JOHNNY A. HENDRICKS, JR. AND CITY OF WILSON, DEFENDANTS

No. COA23-576

Filed 6 February 2024

1. Negligence—contributory negligence—summary judgment—golfing accident—plaintiff struck by golf ball—failure to maintain awareness of surroundings

In a negligence action arising from a golfing accident at a municipal golf course, where defendant hit a ball that struck plaintiff's eye while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant (and the city that owned the golf course) on the issue of plaintiff's contributory negligence. The evidence showed that plaintiff—who had previously played and watched golf, and therefore was familiar with the dangers of being exposed to areas where balls are hit—failed to exercise ordinary care for his safety by failing to maintain awareness of his surroundings, in large part because he had consumed substantial amounts of alcohol that day and was

heavily impaired at the time of the accident. Although the parties disputed whether the golf cart plaintiff was sitting in had inadvertently rolled in front of the unfenced section of the driving range or whether it had originally been parked there, that factual dispute did not constitute a genuine issue of material fact because, either way, a prudent person in plaintiff's position would have eventually noticed that he was in harm's way.

2. Negligence—last clear chance—summary judgment—golfing accident—plaintiff struck by golf ball—defendant looking down when hitting ball

In a negligence action arising from a golfing accident, where defendant hit a ball that struck plaintiff's eye while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant upon concluding that the last clear chance doctrine was inapplicable. The evidence showed that defendant neither discovered nor should have discovered plaintiff's precarious position until after defendant had already hit the ball, since it is standard practice for golfers to look down at the ball and not to look up again once they start preparing to take their shot. Further, defendant and a fellow golfer at the scene testified that neither of them saw the exposed golf cart while defendant was preparing to hit the ball.

3. Damages and Remedies—punitive damages—summary judgment—negligence action—golfing accident

In a negligence action arising from a golfing accident, where defendant hit a ball that struck plaintiff's eye while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant on plaintiff's claim for punitive damages, since none of defendant's actions amounted to fraud, malice, or willful or wanton conduct.

4. Negligence—contributory negligence—summary judgment—golfing accident—city-owned golf course

In a negligence action arising from a golfing accident at a municipal golf course, where plaintiff's eye was struck by a golf ball while plaintiff sat inside a golf cart that was parked by the driving range, the trial court properly granted summary judgment to defendant-city because, even if the defense of governmental immunity was unavailable, there was no genuine issue of material fact regarding plaintiff's contributory negligence during the accident, and therefore plaintiff's negligence claim was barred.

Judge THOMPSON dissenting.

Appeal by plaintiff from orders entered 3 June 2021 and 7 December 2022 by Judge William D. Wolfe in Superior Court, Wilson County. Heard in the Court of Appeals 14 November 2023.

Narron & Holdford, P.A., by Ben L. Eagles, and Schmidt Law, PLLC, by Kurt Schmidt, for plaintiff-appellant.

Brown, Crump, Vanore & Tierney, PLLC, by O. Craig Tierney, Jr. and Noelle K. Demeny, for defendant-appellee Johnny A. Hendricks, Jr.

Cauley Pridgen, P.A., by James P. Cauley, III, Emily C. Cauley-Schulken, and Clayton H. Davis, for defendant-appellee City of Wilson.

ARROWOOD, Judge.

Plaintiff-appellant ("plaintiff") appeals from orders entered by the trial court on 3 June 2021 and 7 December 2022. For the following reasons, we affirm the trial court's orders.

I. Background

Around 10:30 a.m. on a weekend in December 2018, plaintiff, defendant-appellee Johnny A. Hendricks, Jr. ("Defendant Hendricks"), Taylor Keith ("Keith"), Michael Taylor ("Taylor"), and Matt Ellis ("Ellis") started a game of golf at Wedgewood Municipal Golf Course. Plaintiff had previously played and watched golf and was familiar with its rules, etiquette, and dangers.

During the game, plaintiff consumed a substantial amount of moonshine and beer. Although each person in the group drank some of the moonshine that defendant Hendricks brought to the course, plaintiff admitted to drinking the most. Further, Keith, who shared a golf cart with plaintiff, estimated that plaintiff consumed an additional five to ten beers while playing. Taylor testified that plaintiff "by far had had the most alcohol that day" and was "heavily impaired." Near the end of the game, plaintiff testified to losing his balance and falling while trying to tee up his golf ball on the sixteenth hole in part due to his alcohol consumption. According to plaintiff, he had nothing to eat between the time he woke up that morning and the accident.

After the golf game concluded, Ellis departed, but the remaining four—defendant Hendricks, Keith, Taylor, and plaintiff—retrieved some range balls and headed to the course's driving range in their two golf carts. Defendant Hendricks and Taylor were in one cart with defendant driving while plaintiff and Keith were in the other cart with Keith driving. Defendant Hendricks and Keith drove the carts onto the asphalt parking lot located to the right of the driving range and parked them facing "towards the driving range[.]" Approximately sixty to seventy yards of fencing sat along the right side of the driving range between the range area and the parking lot. However, part of the asphalt parking lot extended beyond the fencing and thus "is not covered by the fencing[.]" The fencing consisted of a high-net fence and a low-screen fence.

According to defendant Hendricks, he parked his cart in the parking lot "right in front of the fence where if [he] had driven forward [he] would have hit the fence, and Keith parked the other cart "directly beside [his cart] on the asphalt." However, unlike defendant Hendrick's cart, Keith testified that had his cart been driven forward from where it was parked, it would "have gone straight onto the driving range."

Taylor testified both carts were parked with the tires fully "on the asphalt" of the lot.[1] Conversely, plaintiff did not "remember exactly where [Keith] parked" the cart but believed it was parked forward of the asphalt. Keith also testified that he was unsure whether the front tires of the cart were on the asphalt or just forward of it but believed that at least "90% of the cart [was] over asphalt." Although plaintiff testified that he would not have driven the cart forward past the fence line after it was parked by Keith, he also testified that the parking area was flat without "even the slightest bit of hill[.]"

While defendant Hendricks, Keith, and Taylor walked to the driving range's tee-off area—situated approximately thirty yards from where they parked[2]—plaintiff remained seated in the cart.[3] At this point, plaintiff testified that he was not paying attention to his surroundings and was oblivious to the fact he was sitting next to the driving range and that the others had walked away from him "onto the driving range with

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1. Taylor also testified that the cart plaintiff was sitting in remained in the same spot on the asphalt "from the time [he] was messing with [his] clubs to the time that [he] was fixing to walk onto the driving range."

2. Because the fencing was approximately sixty to seventy yards in length, the tee-off area was thus positioned to the left of the middle area of the fence.

3. Taylor recalled [plaintiff] saying he was going to sit in the cart while everyone else hit range balls.

clubs[.]" Taylor testified that while walking away, he recalled [plaintiff] still sitting in the cart, "twiddling with something."[4]

When defendant Hendricks, Keith, and Taylor reached the tee-off area, defendant Hendricks proceeded to hit first. Defendant Hendricks testified that before hitting the ball,

> [I] looked to make sure there's nobody in my target line, make sure I've got my target line. I check again just to make sure. . . . . There was no golf cart there. And then when I commit to the shot, addressed the ball, keep my head down like I've always been taught since high school golf, take the shot, and as I'm following through I hear the sound and see [plaintiff] where he was not there before.

According to defendant Hendricks, the ball did not go where he intended: "If I was hitting to – aiming at 12:00 o'clock on a dial, the ball went in between 1:00 and 2:00 o'clock." Defendant Hendricks further testified that he never saw the flight of the ball or the ball hitting plaintiff. Thus, according to defendant Hendricks, "There was no chance at all to yell fore. It was a split second."

Keith testified that he saw plaintiff "get struck in the eye" by the ball and that defendant Hendricks could have seen plaintiff "on a straight line" if defendant Hendricks had looked up "at the time he hit the ball[.]" However, Keith also testified that he "never saw a cart at the end of the fence line" when defendant Hendricks was preparing to hit the ball.

Although he never saw plaintiff get hit because he was looking in the opposite direction, Taylor testified that he heard the sounds of defendant Hendricks hitting the ball followed by the ball hitting plaintiff. Because of the short time between the two sounds, Taylor testified that there was not enough time for defendant Hendricks to yell, "Fore!" Plaintiff estimated that after Keith parked, he had been sitting in the cart for a few minutes before he was struck in the eye by the ball.

Plaintiff filed suit against defendant Hendricks on 17 June 2019, alleging that the ball strike caused injury and blindness to his left eye. Plaintiff filed an amended complaint on 6 January 2020 adding the City of Wilson as a defendant. On 14 May 2021, defendant Hendricks filed a motion for summary judgment. After the motion was heard, the trial court entered an order in favor of defendant Hendricks on 3 June 2021

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4. Plaintiff testified that he was texting his wife while sitting in the cart after it was parked.

based upon the finding that there was "no genuine issue as to any material fact and that [d]efendant Hendricks [was] entitled to [j]udgment as a matter of law on [p]laintiff's contributory negligence, the defense of [l]ast [c]lear [c]hance, and [p]laintiff's claim for [p]unitive [d]amages."

Defendant City of Wilson moved for summary judgment on 17 November 2022 on the basis that there were "no genuine issues as to any material fact . . . on the issues of immunity, negligence, and contributory negligence." The trial court entered an order in favor of the city on 7 December 2022. Plaintiff filed a notice of appeal from both orders on 16 December 2022.

II. Discussion

On appeal, plaintiff contends the trial court erred in granting defendant Hendricks's motion for summary judgment on the issues of contributory negligence, last clear chance, and punitive damages. Plaintiff further contends the trial court erred in granting defendant City of Wilson's motion for summary judgment on the issues of sovereign immunity, negligence, and contributory negligence. We take each argument in turn.

A. Standard of Review

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524 (2007). "Summary judgment is appropriate when no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law." *Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc.*, 385 N.C. 250, 267 (2023) (citations omitted). Further, under Rule 56(c) of the North Carolina Rules of Civil Procedure, such judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023).

"A genuine issue is one that can be maintained by substantial evidence." *Value Health Sols., Inc.*, 385 N.C. at 267 (cleaned up). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (cleaned up).

B. Contributory Negligence

[1] Plaintiff contends that the trial court erred in granting summary judgment for defendants as to the contributory negligence claim because genuine issues of material fact remain in the matter. We disagree.

"In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Proffitt v. Gosnell*, 257 N.C. App. 148, 152 (2017) (cleaned up). Additionally, "the existence of contributory negligence does not depend on plaintiff's subjective appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an objective standard of behavior . . . ." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673 (1980) (citation omitted).

Thus, "a person who possesses the capacity to understand and avoid a known danger and fails to take advantage of that opportunity, and is injured as a result, is chargeable with contributory negligence." *Proffitt*, 257 N.C. App. at 152–53 (cleaned up). "[I]t is not necessary that plaintiff be actually aware of the unreasonable danger of injury to which his conduct exposes him. Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Smith*, 300 N.C. at 673 (citation omitted).

Here, plaintiff failed to exercise ordinary care for his safety, and there was a proximate connection between that failure and his injury. *See Proffitt*, 257 N.C. App. at 152. Although not an avid golfer, plaintiff testified that—having previously played and watched the sport—he was familiar with its rules and the dangers of being exposed to areas where balls are hit. Thus, when plaintiff became exposed to the flight of defendant Hendricks's ball in the driving range, his lack of situational awareness—due at least in part to his intoxication[5] and the distraction from his cell phone—constituted plaintiff's failure to exercise ordinary care. Although plaintiff testified that he was unaware he was even at the driving range—let alone in an exposed area—he would have known had he acted reasonably by maintaining awareness of his surroundings. *See Pierce v. Murnick*, 265 N.C. 707, 709 (1965) (explaining that a spectator, who was familiar with the sport of wrestling, "was contributorily negligent by sitting in an exposed position when he knew, or should have known, that a [wrestling] contestant might be thrown from the ring.").

Exactly how the golf cart plaintiff was sitting in became exposed to defendant Hendricks's ball is not a material issue. For instance, if the cart was initially parked in the exposed area past the fence line by

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5. Plaintiff's intoxication is evidenced by credible testimony—including his own—that (1) he consumed substantial amounts of moonshine and beer up until the latter part of the golf game and (2) was heavily impaired at the time of the accident.

Keith, a prudent person in plaintiff's position would have noticed such a precarious position and moved out of harm's way—especially given that plaintiff estimated he had been sitting there for a few minutes. Similarly, if the golf cart had rolled forward on its own or if plaintiff himself had inadvertently driven the cart into the exposed area, then plaintiff also failed to exercise reasonable care because a prudent person in such position would have recognized the moving cart and either stopped it before it was exposed or moved out of the way after the fact. Accordingly, the trial court did not err in granting defendants' motions for summary judgment as to contributory negligence.

C. Last Clear Chance

[2] The last clear chance doctrine requires the plaintiff

> show the following essential elements: (1) the plaintiff, by his own negligence put himself into a position of helpless peril; (2) defendant discovered, or should have discovered, the position of the plaintiff; (3) defendant had the time and ability to avoid the injury; (4) defendant negligently failed to do so; and (5) plaintiff was injured as a result of the defendant's failure to avoid the injury.

Trantham v. Est. of Sorrells By & Through Sorrells, 121 N.C. App. 611, 613 (1996) (cleaned up). Additionally, "[t]he doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the injury; it must have been such as would have enabled a reasonably prudent man in like position to have acted effectively." *Culler v. Hamlett*, 148 N.C. App. 372, 379 (2002) (citations omitted).

Here, plaintiff's contention fails because defendant Hendricks did not discover, nor should he have discovered, plaintiff's position until after he had already hit the ball. Specifically, if the cart had moved forward onto the driving range while defendant Hendricks was looking down and addressing his ball, defendant Hendricks would not have known of plaintiff's precarious position until after he hit the ball. This is evidenced by testimony from defendant Hendricks, Taylor, and Brady Pinner—the golf course supervisor and professional at the Wedgewood Golf Course—that it is standard practice for golfers not to look up again after they have started to address the ball.

Defendant Hendricks testified that, before putting his head down and addressing the ball, he checked in front of him twice and saw no golf cart. Similarly, Keith testified that he saw "a portion of the cart" when defendant Hendricks hit the ball but "never saw a cart" while defendant Hendricks was preparing to hit the ball. Although Keith testified

that defendant Hendricks could have seen plaintiff had he looked up "at the time he hit the ball," such testimony differs from saying defendant Hendricks could have seen plaintiff had he looked up during his preparation period before hitting the ball. Thus, a reasonably prudent golfer in defendant Hendrick's position could not have acted effectively to avoid injury. *See Culler*, 148 N.C. App. at 379 ("The doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the injury[.]").

Plaintiff's reliance on *Everett v. Goodwin*, 201 N.C. 734 (1931) is also unavailing. In *Everett*, the defendant was in a group that was playing behind the plaintiff on the same hole. Thus, unlike in this case, the plaintiff was clearly visible to the defendant as he was—and had been—playing right in front of him. *Id.*

Golfers in North Carolina indeed have a duty to "give adequate and timely notice to persons who appear to be unaware of their intentions to hit the ball when they know, or should know, that such persons are so close to the intended flight of the ball that danger to them may be reasonably anticipated." *McWilliams v. Parham*, 273 N.C. 592, 597 (1968) (cleaned up). However, they are not "insurer[s] of such persons, nor does such duty arise for the benefit of persons situate[d] in a place where danger from the driven ball might not be reasonably anticipated." *Id.*

D. Punitive Damages

[3] Plaintiff contends that the trial court erred in granting summary judgment on the issue of punitive damages. We disagree. To recover punitive damages in North Carolina, "a claimant must prove that an aggravating factor of fraud, malice, or willful or wanton conduct is present and related to the injury subject to compensatory damages." *Jones v. J. Kim Hatcher Ins. Agencies Inc.*, 893 S.E.2d 1, 14 (N.C. Ct. App. 2023) (citing N.C.G.S. § 1D-15(a)). As discussed above, none of defendant Hendricks's actions rose to this level.

E. Claims Against Defendant City of Wilson

[4] Plaintiff also contends the trial court erred in granting defendant City of Wilson's motion for summary judgment on the issues of sovereign immunity and negligence. However, even assuming arguendo that governmental immunity is not available to defendant City of Wilson as a defense, neither issue needs to be addressed because there was no genuine dispute of material fact as to plaintiff's contributory negligence as detailed in the analysis for his claim against defendant Hendricks. Plaintiff's negligence claim is thus barred by his own contributory negligence.

III. Conclusion

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

AFFIRMED.

Judge WOOD concurs.

Judge THOMPSON dissents by separate opinion.

THOMPSON, Judge, dissenting.

After careful consideration of the matters discussed below, I conclude that there remain genuine issues of material fact regarding the claims against both defendants in this case which render summary judgment inappropriate. I therefore respectfully dissent.

First, I agree with plaintiff that the trial court's allowance of summary judgment in favor of defendants based on the doctrine of contributory negligence was inappropriate because genuine issues of material fact remain, particularly concerning how the golf cart in which plaintiff was seated at the time he was struck by the golf ball came to be on the driving range.

A defendant can establish that the plaintiff was contributorily negligent by showing: "(1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Daisy v. Yost*, 250 N.C. App. 530, 531, 794 S.E.2d 364, 366 (2016) (citation, internal quotation marks, and brackets omitted). Further, "a plaintiff may relieve the defendant of the burden of showing contributory negligence when it appears from the plaintiff's own evidence that he was contributorily negligent." *Proffitt v. Gosnell*, 257 N.C. App. 148, 152, 809 S.E.2d 200, 204 (2017) (citation, internal quotation marks, and brackets omitted).

> "Summary judgment is rarely an appropriate remedy in cases of negligence or contributory negligence. However, summary judgment is appropriate in a cause of action for negligence where 'the forecast of evidence fails to show negligence on defendant's part, or establishes plaintiff's contributory negligence as a matter of law.' " *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (quoting *Stansfield v. Mahowsky*, 46 N.C. App.

> 829, 830, 266 S.E.2d 28, 29 (1980)). " 'A plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, summary judgment is proper.' " *Id.* (quoting *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996)).

Blackmon v. Tri-Arc Food Systems, Inc., 246 N.C. App. 38, 42, 782 S.E.2d 741, 744 (2016) (brackets omitted). Accordingly, the dispositive question on this argument by defendants is whether evidence from either or both sides in the conflict demonstrates that plaintiff was negligent as a matter of law as to the proximate cause of the injury which occurred when he was seated in a golf cart on the driving range at Wedgewood. My review of the depositions of the witnesses to this incident which appear in the record reveals that genuine issues of material fact remain.

Taylor, who rode in the golf cart with Hendricks on the day in question, testified that the two golf carts were parked fully on the asphalt of the parking lot, with Taylor's and Hendricks's cart facing the fence separating the driving range from the lot and Keith's and plaintiff's cart just past the end of the fencing facing directly onto the driving range. Taylor noted that as he, Hendricks, and Keith walked to the driving range tees, plaintiff was seated in the golf cart, "on his phone . . . [or] twiddling with something." Taylor stated that the threesome intending to drive balls walked past the fence line and onto the edge of the driving range to make their way to the range tees, which Taylor felt was safe because no one was hitting on the driving range. Taylor never saw plaintiff or his golf cart moving or heard any sound from plaintiff or the golf cart in which he was seated up until defendant's drive struck plaintiff. When the ball struck plaintiff, however, Taylor agreed that the golf cart in which plaintiff was seated had "moved" and was then located on the driving range itself.

Keith testified that when the four players parked their two golf carts in or near the parking lot, the cart driven by Hendricks was behind the fencing, while the cart driven by Keith was just past the end of the fence line so that it could have been driven directly onto the driving range. He thought the cart was mainly parked on the parking lot but agreed that the front wheels could have been on the grass. However, he could not recall with certainty the exact location of the golf cart. Keith also stated that "[m]ost of the time" he would engage the brake when stopping a golf cart, but he was not asked and did not state whether he did so in this specific instance. In this circumstance, he did not see the cart, which he had been driving with plaintiff as a passenger, move after he parked it,

took out a club for use on the driving range and walked in that direction. He never saw any golf cart or plaintiff on the driving range.

Defendant testified that plaintiff did not want to hit balls on the driving range and remained in the golf cart on the asphalt of the parking lot. Hendricks further stated that he looked down the driving range once he teed up his first shot and did not see plaintiff or any other obstruction on the range before focusing downward on the ball he was about to hit, but then after hitting the ball, Hendricks saw defendant "sitting in" the golf cart that was "not [there] before." He emphasized that the golf cart in which plaintiff was seated was not on the driving range when he last saw it, but that he never saw the cart move onto the driving range.

Plaintiff testified that he did not recall many details after he fell over, and he specifically did not have clear memories of some members of the group deciding to hit balls on the driving range and explained that he thought the carts might have been parked in the parking lot area because the group was going to load their golf clubs into their vehicles. Although he did not recall much before he was struck by the golf ball, he stated that he had been texting his wife and then, once he was struck, he looked down and saw blood on the gravel, which he believed to be in an area between the asphalt of the parking lot and the grass of the driving range. Plaintiff acknowledged that the golf cart was "more forward" than it had been when Keith parked it, but plaintiff did not recall how any movement occurred. He did emphatically state that he did not move the golf cart himself and, in any event, would not have driven the cart onto the driving range himself because that would be "dangerous."

Brady Pinner, who described his titles as golf course supervisor, golf director, and golf professional at Wedgewood, testified that when he was alerted to the accident, he went to the driving range but could not recall whether a golf cart was located on the range or not. He acknowledged an email incident report from himself which referenced the golf cart in which plaintiff was seated being on the range, but he explained that he did not know whether that report stated his own observation or incorporated the information he received from others in connection to the accident. In any event, Pinner was not present at the time of the accident and thus had no knowledge of how plaintiff came to be on the driving range.

As these excerpts of the deposition testimony show, there are disputes about both the location of the golf cart at the time when plaintiff was struck and about how the golf cart came to be in that location. Plaintiff recalls seeing blood from his injury on gravel (an area between

the parking lot and the driving range). Other parties testified that the cart plaintiff was seated in when struck was partially or fully in the driving range itself. If indeed the golf cart in which plaintiff was seated when he was struck and injured was on the driving range, no witness or party testified to how the golf cart came to be in that location.

Defendant acknowledges this uncertainty but contends:

> There are only two versions of how [p]laintiff ended up on the driving range. Whether the cart was originally parked past the fence line on the driving range; or behind the fence line on asphalt (and then moved), [p]laintiff failed to take reasonable care to notice his surroundings. If he moved the cart onto the range himself, he was negligent in not using ordinary care under [sic] for his own safety. If the cart was parked on the driving range to begin with, then [p]laintiff was negligent by looking down and texting, not being aware of his circumstances and failing to move himself or the cart back behind the fence line.

I disagree. As noted above, the parties and witnesses in this case disagree about where the golf cart was initially parked when plaintiff was left behind by the members of the group who went to see who could hit the longest drive. Further, wherever the golf cart was initially parked by Keith, *if* the cart came to be located on the driving range when plaintiff was struck, there is no evidence regarding how and when it came to be in that location; for example, whether it was moved by plaintiff, rolled or lurched forward without action by plaintiff, or was moved by some party other than plaintiff. Defendant himself testified that when he glanced up at the range before briefly looking down at the ball, he did not see plaintiff. This suggests that the cart could have moved into a dangerous location too quickly for plaintiff to react by looking up. I express no opinion on these possibilities, and I believe that the majority's various suggestions of how plaintiff could have had the time and ability to act to protect himself usurp the role of the factfinder in the trial court. Such "mere speculation or conjecture" is insufficient to sustain summary judgment, *Blackmon*, 246 N.C. App. at 42, 782 S.E.2d at 744 (citation and internal quotation marks omitted), and in any event, the questions of fact regarding exactly where the golf cart was located at the time of the injury and how it came to be there are not for this Court but rather are left to the thoughtful consideration of a factfinder in the trial court, whether a jury or the trial court.

I also find persuasive plaintiff's argument that governmental immunity is not available as a complete defense to the City on plaintiff's

claims that the City was negligent in regard to the fencing not extending fully between the driving range and the adjacent parking area, the location of the tees on the driving range, and in overserving alcohol to the golf group here.

"Under the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Estate of Williams v. Pasquotank County Parks & Rec. Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (citations and internal quotation marks omitted).[1] "Governmental immunity covers *only* the acts of a municipality or a municipal corporation committed pursuant to its governmental functions . . . . [but] does not, however, apply when the municipality engages in a proprietary function." *Id.* at 199, 732 S.E.2d at 141 (emphasis in original) (citations, internal quotation marks, and brackets omitted).

> [A] governmental function is an activity that is discretionary, political, legislative, or public in nature and performed for the public good [o]n behalf of the State rather than for itself[, while a] proprietary function, on the other hand, is one that is commercial or chiefly for the private advantage of the compact community.

Id. (citations and quotation marks omitted). In undertaking this sometimes difficult task of distinguishing the two functions, the North Carolina Supreme Court has noted as "the threshold inquiry . . . whether our legislature has designated the particular function at issue as governmental or proprietary." *Id.* at 199–200, 732 S.E.2d at 141 (citations and internal quotation marks omitted). Our legislature has provided:

> The lack of adequate recreational programs and facilities is a menace to the morals, happiness, and welfare of the people of this State. Making available recreational opportunities for citizens of all ages is a subject of general interest and concern, and a function requiring appropriate action by both State and local government. The General Assembly therefore declares that the public good and the general welfare of the citizens of this State require *adequate recreation programs, that the creation, establishment, and operation of parks and recreation programs is a proper governmental function*, and that

1. Waiver is not an issue in this case.

> it is the policy of North Carolina to forever encourage, foster, and provide these facilities and programs for all its citizens.

N.C. Gen. Stat. § 160A-351 (2021) (emphasis added).

Still, the Supreme Court has

> recognize[d] that not every nuanced action that could occur in a park or other recreational facility has been designated as governmental or proprietary in nature by the legislature. We therefore offer the following guiding principles going forward. When the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant. We have repeatedly held that if the undertaking is one in which only a governmental agency could engage, it is perforce governmental in nature. This principle remains true. So, when an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality.
>
> We concede that this principle has limitations in our changing world. Since we first declared in *Britt*, over half a century ago, that an activity is governmental in nature if it can only be provided by a governmental agency, many services once thought to be the sole purview of the public sector have been privatized in full or in part. Consequently, it is increasingly difficult to identify services that can only be rendered by a governmental entity.
>
> *Given this reality, when the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider.* We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity. *Nevertheless, we note that the distinctions between proprietary and governmental functions are*

> *fluid and courts must be advertent to changes in practice.* We therefore caution against overreliance on these four factors.

Estate of Williams, 366 N.C. at 202, 732 S.E.2d at 142–43 (emphasis added) (citations and quotation marks omitted).

Thus, while municipal parks and recreation programs are generally held to be governmental services, the specific circumstances of the particular "parks and rec" activity must be considered in light of the claims advanced by a plaintiff in a "fluid" manner that reflects considerations that are "advertent" to changes in practice. *See id*. The acts or omissions by the City here which plaintiff alleges to have been negligent—in the placement of the fencing between the driving range and the parking lot area, in the location of the driving range tees on the day in question, and in the serving of alcohol to members of the golf group here—do not appear to have conclusively been held to be governmental functions. The record before this Court, on summary judgment, is not fully developed and no party has cited controlling case law where the specific issues of the fencing and placement of tees on a driving range or the sale and potential overserving of alcohol at a parks and recreation facility are addressed.

Moreover, as noted above, the question of contributory negligence by plaintiff remains undecided, and specifically in connection to claims against the City, deposition testimony suggested that the tee area on the driving range was set about 30–35 yards down the driving range with the fence line extending about 60–70 yards in total, such that the driving range tees were set about halfway down the fence line. Pinner also acknowledged that on the date of the incident, the golf group of five men came into the clubhouse at the eleventh hole and purchased eighteen beers. He further noted "hearing" that some people had previously had their cars hit by golf balls from the driving range, although no formal reports had been filed. All of these issues are for the factfinders at trial.

Genuine issues of material fact remain in this case and accordingly, I would reverse the trial court's orders allowing summary judgment in favor of the defendants and remand for further proceedings in the trial court. For this reason, I dissent.

SANU SILWAL, GITA DEVI SILWAL, AND GS2017RE, LLC, PLAINTIFFS
v.
AKSHAR LENOIR, INC., DEFENDANT

No. COA23-589

Filed 6 February 2024

1. Pleadings—motion to amend—summary ejectment—trial de novo in district court—motion improperly denied—lack of prejudice

In a summary ejectment proceeding, in which defendant tenant appealed an adverse ruling to district court for a trial de novo, although the trial court abused its discretion by denying defendant's motion to amend its pleadings—since defendant could have amended its pleadings as a matter of course without seeking leave—defendant could not show prejudice from the error because defendant was still able to present its affirmative defenses and counterclaim to the trial court in response to plaintiff landlord's motion for summary judgment. The trial court's error was not enough, on its own, to require reversal of its order granting summary judgment in favor of plaintiff.

2. Civil Procedure—summary judgment before responsive pleading—summary ejectment action—trial de novo in district court—summary judgment not premature

In a summary ejectment proceeding, in which defendant tenant appealed an adverse ruling to the district court for a trial de novo, the trial court did not commit reversible error by granting summary judgment to plaintiff landlord before defendant filed an answer, where defendant had a full opportunity to oppose plaintiff's motion for summary judgment with a non-defective filing and by presenting its arguments regarding affirmative defenses for the trial court's consideration.

3. Parties—joinder—necessary party—summary ejectment—denial of third-party complaint—separable interest

In a summary ejectment proceeding, in which defendant tenant appealed an adverse ruling to the district court for a trial de novo, the trial court did not commit reversible error by granting summary judgment to plaintiff landlord without allowing defendant to file a third-party complaint against the prior owner of the property at issue (and with whom defendant had entered into a lease for use of the property), where, because the third party's interest in the

controversy was separable, he was not a necessary party such that his non-joinder voided the trial court's order.

4. Landlord and Tenant—commercial lease—option to renew—omitted from recorded memorandum of lease—option not binding on new landlord

In a summary ejectment proceeding, in which defendant tenant appealed an adverse ruling to the district court for a trial de novo, the trial court did not err by granting summary judgment to plaintiff landlord after it correctly determined that plaintiff was bound only by the initial lease term stated in the recorded Memorandum of Lease but not by the options to renew—which were included in the unrecorded lease entered into between defendant and the prior owner of the property—because the options were not included in the Memorandum.

5. Landlord and Tenant—commercial lease—unrecorded renewal term—summary ejectment—disputed by tenant—bond paid at increased renewal rate—no estoppel

In a summary ejectment proceeding initiated by plaintiff landlord to evict defendant tenant upon the expiration of the initial lease term stated in the recorded Memorandum of Lease, plaintiff was not estopped from denying the validity of the lease's unrecorded renewal terms—which were agreed to by defendant and the property's former owner but were not included in the Memorandum—by accepting rent at the increased renewal rate in the form of defendant's bond to stay execution of summary ejectment. Plaintiff was under no burden to challenge the terms of defendant's bond after initiating eviction procedures.

6. Landlord and Tenant—commercial lease—unrecorded renewal term—enforcement of lease—quasi-estoppel inapplicable

In a summary ejectment proceeding initiated by plaintiff landlord to evict defendant tenant upon the expiration of the initial lease term stated in the recorded Memorandum of Lease, quasi-estoppel principles did not apply to bind plaintiff to the lease's unrecorded renewal terms—which were agreed to by defendant and the property's former owner but were not included in the Memorandum—because plaintiff was bound only to the initial term and did not ratify the unrecorded lease terms by enforcing the recorded terms.

7. Landlord and Tenant—commercial lease—unrecorded renewal term—parties' prior transaction—equitable estoppel

In a summary ejectment proceeding initiated by plaintiff landlord to evict defendant tenant upon the expiration of the initial

lease term stated in the recorded Memorandum of Lease, plaintiff was not equitably estopped from denying the validity of the lease's unrecorded renewal terms—which were agreed to by defendant and the property's former owner but were not included in the Memorandum—based on a prior transaction between the parties, which defendant argued was predicated on defendant securing a long-term lease with the former owner, where defendant failed to identify any act or omission by plaintiff that would justify defendant's reliance on plaintiff honoring the lease with the former owner.

Appeal by Defendant from order entered 5 December 2022 by Judge Wesley W. Barkley in Caldwell County District Court. Heard in the Court of Appeals 29 November 2023.

Wilson, Lackey, Rohr & Hall, P.C., by David S. Lackey, for plaintiffs-appellees.

Young, Morphis, Bach & Taylor, LLP, by Jarryd A. de Boer, for defendant-appellant.

MURPHY, Judge.

The trial court abused its discretion when it denied Defendant an opportunity to file pleadings after appeal of a summary ejectment order for a trial de novo before the District Court. However, Defendant cannot show prejudice from this error, and we affirm the trial court's grant of summary judgment in favor of Plaintiffs.

BACKGROUND

This dispute arises from a series of transactions involving real property between Plaintiffs, Defendant, and a third party, Robert Barlowe. From 2013 or 2014 to 2017, Plaintiffs operated a convenience store on real property ("the Premises") leased from Barlowe on Morganton Blvd. in Lenoir.

In 2017, Plaintiffs sold their business to Defendant. Contemporaneously, Defendant entered into a Lease of the Premises with Barlowe. The written Lease Agreement stated, "[t]he term . . . shall be for a period of twenty (20) years beginning [27 July 2017], through and including [31 July 2037], with option to renew in five (5) year period increments[,]" although the rent terms make clear Defendant-Tenant was bound only for the first five years, with the stated twenty years representing the maximum duration should Defendant exercise every renewal option.

The Lease also required, *inter alia*, that Defendant maintain insurance covering its use of the premises. On 26 July 2017, the Caldwell County Register of Deeds recorded a Memorandum of Lease, which identified the parties to the Lease and the Premises, then recited, "[t]he term of the Lease shall be through and including [31 July 2022]. The terms of the Lease are contained in the Lease Agreement . . . ."

On 16 March 2018, Barlowe conveyed the Premises, in fee simple, to Plaintiffs for valuable consideration via a general warranty deed. At this time, Plaintiffs were aware of Defendant's Lease generally, but the parties dispute whether Plaintiffs had actual knowledge that Defendant held options to extend the lease beyond 2022. The Caldwell County Register of Deeds recorded Plaintiffs' deed on the same day of the conveyance, 16 March 2018. On the following day, the Caldwell County Register of Deeds recorded Defendant's full lease agreement for the Premises.

Initially, Plaintiffs and Defendant carried on a landlord-tenant relationship as "a matter of business" with "no like or dislike." On 3 April 2018, Plaintiffs "became aware of the full lease agreement" and thereafter sought to enforce it as written, except for the term, which they viewed as controlled by the recorded Memorandum of Lease. Specifically, they enforced the provisions requiring Defendant to maintain insurance, pay late fees, and pay a share of property taxes.

On 21 January 2022, Plaintiffs notified Defendant to "vacate the leased premises by the end of the day on [31 July 2022]" pursuant to the recorded Memorandum of Lease. Defendant responded on 1 March 2022 by purporting to exercise its five-year renewal option "for the period beginning [1 August 2022.]" Plaintiffs countered that the recorded Memorandum of Lease controlled and only bound them through 31 July 2022.

On 1 August 2022, when Defendant had not vacated the Premises, Plaintiffs initiated summary ejectment proceedings in small claims court. On 2 September 2022, the small claims court entered a judgment for Plaintiffs and ordered Defendant be removed from the Premises. Defendant appealed the judgment to District Court and executed a bond to stay execution on appeal, pursuant to N.C.G.S. § 42-34. Under this bond, Defendant paid $2,061.00 monthly—the rental amount contemplated under the five-year renewal lease term—to the Clerk of Superior Court.

In District Court, Plaintiffs moved for summary judgment. In response, Defendant moved for further pleadings, seeking to file an answer with affirmative defenses, a counterclaim seeking declaratory judgment, and an alternative third-party complaint against Barlowe seeking $25,000.00 damages for breach of contract. Defendant also

made filings in opposition to summary judgment, including interrogatories of Plaintiff Sanu Silwal, an affidavit of Barlowe, an affidavit of Defendant's president, and a deposition of Silwal. The trial court held a hearing on both motions, then granted Plaintiffs' motion and denied Defendant's motion. It further ordered the Clerk to release all rents to Plaintiffs. Defendant moved to set aside the order of summary judgment, which the District Court also denied. Defendant appealed to this Court and executed another bond to stay execution of the order of summary judgment on appeal.

ANALYSIS

Defendant challenges the trial court's grant of summary judgment to the Plaintiffs on both procedural and substantive grounds. Procedurally, it argues the trial court abused its discretion by denying its motion for further pleadings and, having done so, erred in ruling on Plaintiffs' motion for summary judgment before the pleadings were complete. Substantively, it raises several estoppel-based affirmative defenses, arguing Plaintiffs were bound by the options to renew which were not recorded prior to the deed to Plaintiffs.

A. Pleadings

Defendant argues the trial court abused its discretion by denying its motion for further pleadings and relatedly erred by ruling on Plaintiffs' motion for summary judgment without offering Defendant and Barlowe an opportunity to file pleadings. While the trial court abused its discretion by denying Defendant's motion, the error does not merit reversal, and the court did not err by entering summary judgment without permitting Defendant or Barlowe to file pleadings.

Summary ejectment is a small claim action before the magistrate and appealable to the District Court for a trial de novo. N.C.G.S. §§ 7A-210(2), -211, -228(a)-(b) (2023). On appeal to the District Court, the ordinary rules of civil procedure apply, subject to specialized rules prescribed by N.C.G.S. §§ 7A-210 to -239. *Jones v. Ratley*, 168 N.C. App. 126, 131 (Tyson, J., dissenting) ("*Duke Power* [*Co. v. Daniels*, 86 N.C. App. 469 (1987),] supports the application of the general rules to all cases in [D]istrict [C]ourt, including those that originate in small claims court but are appealed for trial *de novo*."), *dissent adopted per curiam*, 360 N.C. 50 (2005); N.C. R. Civ. P. 1; N.C.G.S. § 1A-1 (2022) ("These rules shall govern the procedure in the [S]uperior and [D]istrict courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute.").

"The North Carolina Rules of Civil Procedure are part of the General Statutes. Accordingly, interpreting the Rules of Civil Procedure is a matter of statutory interpretation. A question of statutory interpretation is ultimately a question of law for the courts. We review conclusions of law de novo." *In re E.D.H.*, 381 N.C. 395, 398 (2022) (marks and citations omitted). We review a trial court's ruling on a motion for leave for abuse of discretion. *Cf. Henry v. Deen*, 310 N.C. 75, 82 (1984) ("A motion to amend is addressed to the discretion of the trial court. Its decision will not be disturbed on appeal absent a showing of abuse of discretion.").

1. Defendant's Motion for Further Pleadings

[1] We first consider whether Defendant needed leave to file its pleadings or could have done so as a matter of course. Defendant argues, "if the counterclaims or third-party claims are appropriate, the [trial] judge has no discretion but to allow the motion [for further pleadings]."

On appeal to the District Court for a trial de novo, the parties may, but are not required to, file further pleadings, including those jurisdictionally barred from small claims court. N.C.G.S. § 7A-220 (2023) ("On appeal from the judgment of the magistrate for trial de novo before a [D]istrict [Court] judge, the judge shall allow appropriate counterclaims, cross claims, third party claims, replies, and answers to cross claims, in accordance with [N.C.]G.S. [§] 1A-1, et seq."); *J. S. & Assocs. v. Stevenson*, 265 N.C. App. 199, 201 (2019) ("[W]hen an aggrieved party properly brings an appeal from small claims court to [D]istrict [C]ourt pursuant to [N.C.G.S. §] 7A-228, the parties may also bring their counterclaims, cross-claims, and third-party claims pursuant to [N.C.G.S. §] 7A-220."); *4U Homes & Sales, Inc. v. McCoy*, 235 N.C. App. 427, 435 (2014) ("As a result[] [of N.C.G.S. §§ 7A-219 to -220,] a defendant in a summary ejection action who wishes to assert counterclaims that have a value greater than the jurisdictional amount applicable in small claims court may either assert their claims on appeal to the District Court from an adverse decision by the magistrate or assert those claims in an entirely separate action."); *Fickley v. Greystone Enters.*, 140 N.C. App. 258, 261-62 (2000) ("[The] plaintiffs had the opportunity to file . . . a counterclaim in an appeal from the magistrate's judgment[.]").

Plaintiffs acknowledge "[N.C.]G.S. [§] 7A-220 does not require a [d]efendant to obtain leave of court to file any of the pleadings that Defendant sought to file"; nonetheless, they argue that "Defendant having unnecessarily sought leave of court, the trial court did not err in denying Defendant's Motion for Additional Pleadings." We considered and rejected a similar argument in *Coble Cranes & Equip. Co. v. B & W*

Utils., *Inc.*, 111 N.C. App. 910 (1993). There, the trial court granted summary judgment for the plaintiff without ruling on the defendant's motion to amend her answer. *Id.* at 912. However, at that stage, the defendant "had an absolute right to amend and thus did not need to file a motion[,]" and we rejected the plaintiff's argument that "this right justified the trial court's action with regard to [the] defendant's motion." *Id.* at 913. Rather, we saw "no reason the trial court should not have allowed [the] defendant's motion to amend" because she "filed the motion in a timely manner, and the plaintiff would not have suffered any discernible prejudice by the judge's allowance of the motion." *Id.* Therefore, we held "the trial court's failure to rule on the motion was error[.]" *Id.* at 912.

Here, the trial court similarly abused its discretion by denying Defendant leave to file the pleadings, which it could have filed as a matter of course. Although N.C.G.S. § 7A-220 does not prescribe a timeline for pleadings on appeal for a trial de novo before a District Court judge, Defendant's motion was timely, whether measured from the judgment of small claims court or Defendant's notice of appeal therefrom. *See* N.C. R. Civ. P. 12(a)(1); N.C.G.S. § 1A-1 (2022). Further, there is no reason to believe Plaintiffs "would [] have suffered any discernible prejudice by the judge's allowance of the motion." *Coble Cranes*, 111 N.C. App. at 913.

This abuse of discretion, however, does not merit reversal. Despite the error, in *Coble Cranes*, we affirmed the trial court's entry of summary judgment because "[t]he trial court's failure to allow [the] defendant's motion to amend . . . did not prejudice the defendant[.]" *Id.* Defendant, here, has likewise not suffered prejudice because, as the trial court noted, "[a]ll of [Defendant's affirmative defenses and counterclaim for declaratory judgment] were argued and considered by the [c]ourt during the Motion for Summary Judgment" and "Defendant may bring an independent action against [] Barlowe[.]"[1]

Although the trial court's improper denial of Defendant's motion does not, by itself, merit reversal, two circumstances here were not

1. Moreover, Defendant's claim against Barlowe was not appropriate for third-party practice: "a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him *for all or part of the plaintiff's claim against him*." N.C. R. Civ. P. 14, N.C.G.S. § 1A-1 (2023) (emphasis added). However, Defendant alleges Barlowe is liable to it for damages upon an independent cause of action. A defendant may not serve a third-party complaint merely because the third-party claim involves common factual issues. *See*, *e.g.*, *McCollum v. McCollum*, 102 N.C. App. 347, 348 (1991) ("[The plaintiff's claims against [the defendant] were for an absolute divorce and for an equitable distribution of the marital property. Obviously, the [third-party] [b]ank could not be held liable to [the defendant] should an absolute divorce be granted.").

present in *Coble Cranes*: (1) the trial court granted Plaintiffs' motion for summary judgment without Defendant having filed any answer and (2) Defendant had sought to plead a third-party complaint. We consider these circumstances in our discussion of Defendant's further arguments.

2. Entry of Summary Judgment Absent Defendant's Answer

[2] We next consider whether the trial court erred by entering summary judgment for Plaintiffs without permitting Defendant to first file its answer.

Defendant cites *Alpine Village, Inc. v. Lomas & Nettleton Financial Corp.*, 27 N.C. App. 403 (1975), *cert. denied*, 289 N.C. 302 (1976), for the proposition that summary judgment before Defendant had the opportunity to file its answer was premature. Although Rule 56 of our Rules of Civil Procedure does not fix an appropriate time for the trial court to enter summary judgment, N.C. R. Civ. P. 56, N.C.G.S. § 1A-1 (2023), in *Village, Inc.*, we held the trial court erred by entering summary judgment for the plaintiffs without giving the defendant an opportunity to file its answer. *Village, Inc.*, 27 N.C. App. at 404-05. There, the trial court simultaneously denied the defendant's motion to dismiss and granted the plaintiff's motion for summary judgment. *Id.* at 403. In doing so, the trial court did not consider the defendant's defective affidavit, which, while raising genuine issues of material fact, did not comply with Rule 56 of our Rules of Civil Procedure. *Id.* at 404. On appeal, we held the trial court entered summary judgment prematurely because the trial court's denial of the defendant's motion to dismiss gave it an additional 20 days to file its answer, and the entry of summary judgment before this timeframe deprived the defendant of the opportunity to plead the defective affidavit's substance in its answer. *Id.*

However, *Village, Inc.* acknowledged "summary judgment for [a] claimant, under some circumstances, might be appropriate before the responsive pleading has been filed or even before the time to file responsive pleadings has expired." *Id.* In *Kavanau Real Estate Trust v. Debnam*, we rejected a similar argument and held there was "no justifiable reason for delaying entry of summary judgment" because "[the defendants opposing summary judgment] had nearly four months to prepare defenses and to come forward with material questions of fact with which to defeat the motion for summary judgment" and still had "not come forward with such questions of fact" and therefore did not satisfy their burden "to set forth specific facts showing that there is a genuine issue for trial." *Kavanau Real Est. Tr. v. Debnam*, 41 N.C. App. 256, 261-62 (1979).

Here, unlike *Village, Inc.*, Defendant made a non-defective filing in opposition to summary judgment, which included Silwal's response to interrogatories, an affidavit of Barlowe, an affidavit of Defendant's president, and a transcript of Silwal's deposition. Moreover, Defendant argued, and the trial court considered, its affirmative defenses at the hearing. Defendant, therefore, had a full opportunity "to prepare defenses and to come forward with material questions of fact with which to defeat the motion for summary judgment[,]" *id.* at 261, so the trial court did not err by ruling on Plaintiffs' motion for summary judgment without permitting Defendant to file pleadings.

3. Entry of Summary Judgment Absent Barlowe's Pleadings

[3] Defendant further argues "Barlowe should have been afforded an opportunity to plead or otherwise defend the action." Unlike Defendant, Barlowe is not a party to this action, so we consider whether Barlowe was a necessary party such that his non-joinder voided the trial court's jurisdiction. *See J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 16-17 (1987) ("[T]he necessary joinder rules of N.C.G.S. [§] 1A-1, Rule 19 place a mandatory duty on the [trial] court to protect its own jurisdiction to enter valid and binding judgments . . . . [A] judgment without such necessary joinder is void[.]").

> The [trial] court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. R. Civ. P. 19(b), N.C.G.S § 1A-1 (2023).

> Necessary parties must be joined in an action. Proper parties may be joined. A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence. A proper party is a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties.

Karner v. Roy White Flowers, Inc., 351 N.C. 433, 438-39 (2000) (marks and citations omitted).

Defendant sought to bring a third-party complaint against Barlowe, alleging that "[i]f the [c]ourt finds that [Plaintiffs] are not bound by the Lease, then and only then is [] Barlowe liable in breach of contract with [Defendant]." Any interest Barlowe had in the controversy between Plaintiffs and Defendant was separable in that the resolution of Plaintiffs' summary ejectment claim against Defendant did not resolve Defendant's potential breach of contract claim against Barlowe and thereby prejudice Barlowe. The trial court did not err by granting Plaintiffs summary judgment against Defendant without affording Barlowe "an opportunity to plead or otherwise defend the action[,]" to which he was neither joined nor a necessary party.

Having considered the trial court's denial of Defendant's motion for further pleadings and simultaneous entry of summary judgment, we conclude the trial court's abuse of discretion in denying Defendant leave to plead an answer and third-party complaint does not merit reversal, and the trial court did not err by ruling on Plaintiffs' motion for summary judgment without these pleadings.

B. Summary Judgment

Turning to the merits of summary judgment, Defendant argues "the trial court erred when it granted Plaintiffs' summary judgment and, based on the record, should have granted summary judgment in favor of [] Defendant."[2]

> The standard of review for an order of summary judgment is firmly established in this state. We review a trial court's order granting or denying summary judgment de novo. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party. The showing required for summary judgment may be accomplished by proving an essential element of the

2. In its reply brief, Defendant argues "there is a substantial amount of evidence in the record that creates genuine issues of material fact[.]" However, Defendant does not point to any specific issues of fact in support of this argument. Although the parties dispute whether Plaintiffs had actual knowledge that Defendant held options to extend the lease beyond 2022, this issue is not material under the Connor Act. *See Bourne v. Lay & Co.*, 264 N.C. 33, 35 (1965).

> opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense[.]

Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, 365 N.C. 520, 523 (2012) (marks and citation omitted); *see* N.C. R. Civ. P. 56; N.C.G.S. § 1A-1 (2023).

Defendant raises three estoppel-based affirmative defenses, arguing Plaintiffs were bound by Defendant's options to renew the Lease, despite the options' absence from the recorded Memorandum of Lease. We first consider the effect of the Memorandum of Lease under the Connor Act, then address each of Defendant's affirmative defenses.

1. The Connor Act

[4] The trial court granted Plaintiffs' motion for summary judgment based on its conclusion they were not bound by the renewal terms in Defendant's Lease because the recorded Memorandum of Lease omitted terms. Reviewing this conclusion de novo, we agree.

Under the Connor Act,

> [n]o . . . lease of land for more than three years[] . . . is valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the . . . lessor but from the time of its registration in the county where the land lies[.] . . . Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, [] instruments registered in the office of the register of deeds have priority based on the order of registration as determined by the time of registration[.]

N.C.G.S. § 47-18 (2023); *see also Greaseoutlet.com, LLC, v. MK South II, LLC*, 290 N.C. App. 17, 22 & n.2 (2023), *disc. rev. denied*, __ N.C. __ (2024) (summarizing the act's legislative history, purpose, and nomenclature). "Actual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel." *Bourne*, 264 N.C. at 35.

A tenant may, but need not, record the full lease agreement to protect its leasehold interest; rather, "[i]t is sufficient under the Connor Act to register a memorandum, rather than the actual lease, so long as the memorandum recites the lease's key terms sufficient to put the world on record notice the extent of tenant's leasehold interest." *Greaseoutlet.com, LLC*, 290 N.C. App. at 23; *see* N.C.G.S. § 47-118 (2023). Such a

memorandum has "the same legal effect as if the written lease agreement had been registered in its entirety" and "shall set forth: (1) The names of the parties thereto; (2) A description of the property leased; (3) The term of the lease, including extensions, renewals and options to purchase, if any; and (4) Reference sufficient to identify the complete agreement between the parties." N.C.G.S. § 47-118(a), (c) (2023).

Here, the recorded Memorandum of Lease inaccurately reflected, "[t]he term of the Lease shall be through and including [31 July 2022,]" when the actual Lease Agreement included options to renew beyond 31 July 2022. Plaintiffs contend, in essence, that this Memorandum recorded all parts of the Lease Agreement except the renewal terms. Their actions were consistent with this view: Plaintiffs enforced the Lease, including provisions not stated in the Memorandum, then sought to evict Defendant upon expiration of the original five-year term.

We recently considered a nearly identical issue in *Greaseoutlet.com, LLC*. There, the plaintiff-tenant entered into a five-year lease for industrial property. *Greaseoutlet.com, LLC*, 290 N.C. App. at 19. The lessor recorded a memorandum of lease accurately stating the five-year term and expressly incorporating all subsequent amendments. *Id.* at 19, 23. Four months later, the plaintiff and lessor amended the lease to add two successive five-year options to renew. *Id.* at 19. Neither party to the lease recorded the lease as amended. *Id.* Three years later, the original lessor sold the property to the defendant in fee simple, and the defendant promptly recorded its deed. *Id.* at 21. Upon expiration of the original term, the defendant refused to honor the plaintiff's exercise of its option. *Id.* at 19. We held the memorandum, despite purporting to incorporate the amended option to renew, was "insufficient to bind [the defendant] beyond the [expressly stated] initial term" because it failed to actually specify any then-anticipatory amended renewal terms and "[o]ur General Assembly requires that a memorandum of lease *shall* state the term of the lease, *including extensions/renewals*[.]" *Id.* at 24.

Here, the Memorandum of Lease likewise reflected the written Lease Agreement's initial term while omitting renewal terms. We agree with the trial court and Plaintiffs that the recorded memorandum bound Plaintiffs to the Lease for the recited five-year term, but not beyond.

2. Defendant's Payment of Rent Pursuant to Its Bond to Stay Execution

[5] We turn to Defendant's estoppel-based arguments as to why Plaintiffs should nevertheless be bound to the Lease's unrecorded renewal terms. The first of these is that Plaintiffs have implicitly agreed

to renew Defendant's Lease by accepting increased rent for the second five-year term via Defendant's bond to stay execution on appeal of summary ejectment judgment.

Landowners who accept rent pursuant to a preexisting but unrecorded lease are not estopped from denying the validity of the lease. *Bourne*, 264 N.C. at 35-36 (asking "[a]re the plaintiffs estopped from denying the validity of [the] defendant's lease by accepting rent in accordance with its terms for a period of two years and one month?" and answering "in the negative"). However, Defendant relies on *Coulter v. Capitol Finance Co.*, 266 N.C. 214 (1966), to argue that "[b]y accepting and not disputing the increased rental amount, [] Plaintiffs accepted the lease for the second five year term."

In *Coulter*, our Supreme Court, considering a lease with an option to extend at a higher rent, held that a tenant's payment of the increased rent upon the expiration of the original term and the landlord's acceptance without comment "clearly indicate[d] an intent on the part of the lessee to exercise its option to extend the term . . . and a similar intent on the part of the lessor to waive the notice to which she was entitled." *Coulter v. Capitol Fin. Co.*, 266 N.C. 214, 219 (1966). Our Supreme Court noted that the lessor, having not received notice of the tenant's intent to exercise its option, would have been entitled to evict the tenant upon the expiration of the original term. *Id.* at 218. However, the landlord was also entitled to waive notice and treat the tenant as having extended the lease. *Id.* Thus, "[w]hen [] the original lessee[] held over after the expiration of its [original] term, [paid] rent at the rate which was to apply only if it exercised its option to extend the term . . . and the lessor accepted this payment, the extension of the lease was effected[.]" *Id.* at 220.

This case is distinguishable. In *Coulter*, the landlord could have, but did not, evict the tenant from the premises. *Id.* at 218. Here, however, Plaintiffs sought to evict Defendant from the Premises. Their eventual receipt of rent while Defendant remains in possession, pursuant to the eviction procedure, permits no inference that Plaintiffs intended to be bound by the Lease's unrecorded renewal terms. *See* N.C.G.S. § 42-34 (2023) ("[I]t shall be sufficient to stay execution of a judgment for ejectment if the defendant appellant pays to the [C]lerk of [S]uperior [C]ourt any rent in arrears . . . and signs an undertaking that he or she will pay into the office of the [C]lerk of [S]uperior [C]ourt the amount of the tenant's share of the contract rent as it becomes due periodically after the judgment was entered.").

Defendant is correct that these payments were made at the renewal rate rather than the original. However, N.C.G.S. § 42-34(b) provides that

Defendant "pay into the office of the [C]lerk of [S]uperior [C]ourt the amount of the tenant's share of the contract rent as it becomes due periodically after the judgment was entered[,]" and, "[i]f either party disputes the amount of the payment[,] . . . *the aggrieved party* may move for modification of the terms of the undertaking before the [C]lerk of [S]uperior [C]ourt or the [D]istrict [C]ourt." N.C.G.S. § 42-34(b) (2023) (emphasis added). Assuming, *arguendo*, the rent should have been at the rate under the original recorded term, our statutes gave *Defendant* the option to dispute the amount. Plaintiffs were under no burden to police the terms of Defendant's bond lest they estop themselves.

Plaintiffs eventual receipt of rent, pursuant to Defendant's bond to stay execution of summary ejectment, does not estop them from executing the judgment upon dissolution of the stay.

3. Plaintiffs' Enforcement of the Lease

[6] Defendant further argues that Plaintiffs are subject to the unrecorded options to renew because they relied on the Lease, enforced some of its provisions not mentioned in the Memorandum of Lease, and used it as "the basis for [their] Complaint."

"Quasi-estoppel has its basis in acceptance of benefits and provides that [w]here one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." *Carolina Medicorp v. Bd. of Trustees of State Med. Plan*, 118 N.C. App. 485, 492 (1995) (alteration in original) (marks omitted). "[A] ratification of an unauthorized act or transaction is not valid and binding unless it proceeds upon a full knowledge of the material facts relative thereto . . . . [T]he very essence of ratification, as of an election, [is] that it be done advisedly, with full knowledge of the party's rights[.]" *Cox v. Kingston Carolina R.R. and Lumber Co.*, 175 N.C. 299, 310 (1918).

Having already held Plaintiffs were bound only to the initial recorded term of the Lease, we conclude quasi-estoppel does not apply here. Although Plaintiffs accepted the benefits of the Lease, including portions not reflected in the Memorandum of Lease, they did so without any "right to accept or reject" the Lease. *See Carolina Medicorp*, 118 N.C. App. at 492.

Defendant resists this by arguing "Plaintiffs needed a declaratory judgment before they could cite to the [L]ease to [] Defendant[] without adopting or ratifying the [L]ease." However, Defendant cites no authority to support this assertion, and such a rule would permit Plaintiffs to have unwittingly ratified the lease without full knowledge of their rights,

in contrast to *Cox*'s holding that "the very essence of ratification, as of an election, [is] that it be done advisedly, with full knowledge of the party's rights[.]" *Cox*, 175 N.C. at 310.

Plaintiffs did not ratify the portions of the untimely-recorded Lease Agreement to which they were *not* bound by enforcing the portions to which the parties *were* bound.

4. Defendant's Prior Transaction with Plaintiffs

[7] Lastly, Defendant contends that Plaintiffs are estopped from denying the Lease based on their 2017 transaction with Defendant. According to Defendant, Plaintiffs understood the transaction "was conditioned on Defendant securing a long-term lease with [Barlowe,]" and "are now estopped from denying the very lease that was the condition and part of the transaction."

> North Carolina courts have also long recognized the doctrine of equitable estoppel, otherwise known as estoppel in pais. Generally speaking, the doctrine applies
>
> > when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.
>
> In such a situation, the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party. In applying the doctrine, a court must consider the conduct of both parties to determine whether each has conformed to strict standards of equity with regard to the matter at issue.

Whitacre Partnership v. Biosignia, Inc., 358 N.C. 1, 16-17 (2004) (marks and citations omitted); *see Bourne*, 264 N.C at 37 ("It is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped. A change of position which will fulfill this element of estoppel must be actual, substantial, and justified.").

Defendant has not identified any act, representation, or omission by Plaintiffs that would justify its reliance on Plaintiffs to honor its Lease with Barlowe should Plaintiffs acquire the Premises. Without this, Defendant has not forecasted evidence sufficient to establish its affirmative defense of equitable estoppel.

Having considered the Connor Act and Defendant's estoppel arguments, we hold the recorded Memorandum of Lease bound Plaintiffs for only the term stated in the Memorandum of Lease and not to the options to renew not stated therein. We further hold Plaintiffs were not bound to the unrecorded renewal terms by adoption or estoppel.

CONCLUSION

On appeal from small claims court for a trial de novo, Defendant had the right to plead as a matter of course, and the trial court abused its discretion by denying, Defendant's motion for leave to plead an answer and third-party complaint against Barlowe. Nevertheless, this abuse of discretion did not prejudice Defendant and does not merit reversal, and the trial court did not err in ruling on Plaintiffs' motion for summary judgment without these pleadings where Defendant made a filing in opposition to summary judgment and Barlowe was not a necessary party.

The trial court did not err on the merits of summary judgment where the recorded Memorandum of Lease bound Plaintiffs only to the now-elapsed original term stated in the Memorandum of Lease and where Plaintiffs neither adopted nor were estopped from denying the Lease's unrecorded options to renew.

AFFIRMED.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
JAMES FREDRICK BOWMAN, DEFENDANT

No. COA23-82

Filed 6 February 2024

1. Sexual Offenses—right to unanimous verdict—first-degree forcible sexual offense—multiple "sexual acts" alleged—jury instructed on only one of two counts

In defendant's trial for rape, assault, and related charges, the trial court committed plain error by instructing the jury on only one of two counts of first-degree forcible sexual offense, which violated defendant's right to a unanimous verdict and entitled him to a new trial on those charges. Although the trial court informed the jury that its verdict needed to be unanimous, where defendant was alleged to have committed—and the evidence at trial supported—three "sexual acts" for purposes of forcible sexual offense but was only charged with two counts of that offense, since neither the trial court's instruction nor the verdict sheet specified which sexual act was to be considered for each charge, the jury's verdict could not be matched with discrete acts committed by defendant.

2. Sentencing—clerical errors—prior record level—aggravating factor—acceptance of defendant's admission—remand required

Where the trial court committed multiple clerical errors in defendant's judgment for rape and related charges—including marking defendant as a prior record level V with fourteen points rather than a prior record level IV with twelve points, marking a box for the aggravating factor that the offense was committed while defendant was on pretrial release even though he had not been on pretrial release, and failing to check a box indicating the trial court's acceptance of defendant's admission to a different aggravating factor—the matter was remanded for correction of those errors.

Judge THOMPSON dissenting in part.

Appeal by Defendant from judgment entered 25 January 2022 by Judge Josephine K. Davis in Durham County Superior Court. Heard in the Court of Appeals 17 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jasmine McGhee, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant-Appellant.

CARPENTER, Judge.

James Fredrick Bowman ("Defendant") appeals from judgment entered after a jury found him guilty of two counts of first-degree forcible sexual offense, one count of first-degree forcible rape, one count of possession of a firearm by a felon, one count of assault by pointing a gun, one count of assault on a female, and one count of communicating threats. On appeal, Defendant argues the trial court erred by instructing the jury on only one count of first-degree forcible sexual offense, thus jeopardizing his right to a unanimous verdict. Additionally, Defendant argues remand is required to correct clerical errors in the judgment. After careful review, we agree with Defendant. Therefore, we reverse in part and remand this case for a new trial concerning the two counts of first-degree forcible sexual offense and for correction of clerical errors in the judgment.

I. Factual & Procedural Background

At around 5:00 a.m. on 9 September 2019, S.B. ("Victim") awoke when Defendant banged on her window, yelling at her to open the door to her home. Once Victim opened the door, Defendant accused Victim of sleeping with someone else and punched her in the chest. Defendant appeared to be heavily intoxicated and was armed with a handgun. Defendant exclaimed, "[s]ince you want to act like a whore, I'm going to treat you like a whore." Defendant, while brandishing a gun, then ordered Victim to strip. Defendant proceeded to assault Victim anally, orally, and vaginally, while threatening to kill Victim, dismember her body, and bury her in pieces.

On 21 October 2019, a Durham County grand jury indicted Defendant for the following seven offenses: one count of first-degree forcible rape, two counts of first-degree forcible sexual offense, one count of possession of a firearm by a felon, one count of assault by pointing a gun, one count of assault on a female, and one count of communicating threats. On 23 March 2021, the case went to trial, which ended in a hung-jury mistrial. On 17 January 2022, the case went to a second trial in Durham County Superior Court.

At the close of all evidence, the trial court held a charge conference and instructed the jury. Defendant did not object to the jury instructions. The trial court read the elements for first-degree forcible sexual offense and explained the burden of proof. The trial court did not read the instructions for each count charged, nor did the court otherwise notify the jury that Defendant was charged with two separate counts of first-degree forcible sexual offense.

The trial court did state that "all 12 of you must agree to your verdict. You cannot reach a verdict by majority vote." But while the verdict sheets listed two counts of first-degree forcible sexual offense, the two counts were not separated by specific instances of sexual act. The two counts were simply separated on the verdict sheet as "count 2" and "count 3." This is similar to Defendant's indictment, which listed the two first-degree forcible sexual offenses as the second and third counts.

The jury found Defendant guilty on all seven charges, including the two counts of first-degree forcible sexual offense. Defendant then admitted the existence of an aggravating factor. The trial court entered judgment on the jury's verdicts and imposed a consolidated aggravated-range sentence of 365 to 498 months of active imprisonment. Defendant gave oral notice of appeal in open court following the entry of judgment.

II. Jurisdiction

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

III. Issues

The issues on appeal are whether: (1) the trial court committed plain error by instructing the jury on only one count of first-degree forcible sexual offense, thus jeopardizing Defendant's right to a unanimous verdict; and (2) remand is required to correct clerical errors in the judgment.

IV. Analysis

A. Jury Instructions

[1] Defendant first contends the trial court committed plain error by instructing the jury on only one count of first-degree forcible sexual offense, thus jeopardizing his right to a unanimous verdict. After careful review, we agree with Defendant.

When the issue is properly preserved at trial, "[t]he question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*." *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d

661, 663 (2014). We review unpreserved jury-instruction issues, however, for plain error. *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020). Here, Defendant did not object to the jury instructions at trial, so we will review only for plain error. *See id.* at 410, 847 S.E.2d at 698.

Under plain-error review, this Court must first determine that an error occurred at trial. *See State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, the defendant must demonstrate the error was "fundamental," which means the error probably caused a guilty verdict and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (quoting *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012)). Notably, the "plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

First-degree forcible sexual offense includes "a sexual act with another person by force and against the will of the other person" by use, or threatened use, of a deadly weapon. N.C. Gen. Stat. § 14-27.26 (2021). A sexual act includes "[c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." *Id.* § 14-27.20(4).

"It is the duty of the trial court to instruct the jury on the law applicable to the substantive features of the case arising on the evidence . . . ." *State v. Robbins*, 309 N.C. 771, 776, 309 S.E.2d 188, 191 (1983). "When reviewing a trial court's charge to the jury, the instructions must be considered in their entirety." *State v. Parker*, 119 N.C. App. 328, 339, 459 S.E.2d 9, 15 (1995). And in criminal cases, "a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986).

In *State v. Bates*, this Court found the trial court's failure to distinguish between separate counts of first-degree sexual offense was a plain error because such a failure jeopardized the defendant's right to a unanimous verdict. 172 N.C. App. 27, 38, 616 S.E.2d 280, 288 (2005). The jury convicted the defendant of six counts of first-degree sexual offense. *Id.* at 29, 616 S.E.2d at 283. The trial court, however, read the instruction only once for eleven counts of the same offense. *Id.* at 38, 616 S.E.2d at 288. Thus, we held that the defendant's right to a unanimous jury verdict was jeopardized. *Id.* at 38, 616 S.E.2d at 288.

But "the Supreme Court remanded the case to this Court for reconsideration in light of its decision in *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006)." *State v. Bates*, 179 N.C. App. 628, 629, 634 S.E.2d 919, 920 (2006). On remand, we reconsidered the case based on four factors: "(1) the evidence; (2) the indictments; (3) the jury charge; and (4) the verdict sheets." *Id.* at 633, 634 S.E.2d at 922. Concerning the evidence and indictments, we looked to determine whether "it is possible" to match guilty verdicts with specific incidents. *Id.* at 633, 634 S.E.2d at 922. Concerning the jury instructions, we looked to whether the "instructions were adequate to ensure that the jury understood that it must agree unanimously as to each verdict on each charge." *Id.* at 633, 634 S.E.2d at 922.

And concerning the verdict sheets, we looked to whether "the presentation of the charges on the verdict sheets was adequate for the jury to distinguish the charges based on the evidence presented at trial." *Id.* at 634, 634 S.E.2d at 922–23. The counts in *Bates* had date ranges and "differentiated between some of the counts by including next to the charge the words '(by cunnilingus)' or '(inserting finger into victim's vagina),' reducing the risk that the jurors considered different incidents in reaching their verdict and increasing the likelihood of unanimity." *Id.* at 634, 634 S.E.2d at 923.

After considering all of the factors, we held that it was "possible to match the jury's verdict of guilty with specific incidents presented in evidence and in the trial court's instructions." *Id.* at 634, 634 S.E.2d at 923. We held that the "defendant's right to unanimous verdicts . . . was not violated." *Id.* at 634, 634 S.E.2d at 923.

Here, the jury convicted Defendant on two counts of first-degree forcible sexual offense, and the trial court instructed the jury on first-degree forcible sexual offense only once. The trial court advised the jury that its verdict must be unanimous as to each charge, but the verdict sheet did not specify which sexual act was to be considered for each charge. Unlike in *Bates*, the jury here could not determine which sexual act applied to which count. The counts in this verdict sheet lacked corresponding dates and descriptions of the alleged sexual acts—both of which were included in the *Bates* verdict sheet. *See id.* at 634, 634 S.E.2d at 923.

The Dissent correctly notes that corresponding dates will be unhelpful here because all of the alleged sexual acts occurred on the same date. And the Dissent correctly notes that the number of alleged sexual acts exceeds the number of first-degree forcible sexual-offense charges. Here, Defendant allegedly committed three sexual acts: At gunpoint,

he penetrated Victim's anus with his fingers and penis; Defendant also forced Victim to perform oral sex. The State, however, only charged Defendant with two counts of first-degree forcible sexual offense.

The jury convicted Defendant on both counts of first-degree forcible sexual offense, which begs the question: Which two sexual acts did the jury unanimously agree upon? Both anal acts? One oral act and one anal act? And if the latter, which anal act? For example, one juror may have been unconvinced about the oral act and completely convinced of both anal acts. Whereas another juror may have been unconvinced about one anal act and completely convinced of the other anal act and the oral act. But because of the ambiguity in the jury instruction and verdict sheets, we cannot confirm whether this actually occurred. Thus, under the facts of this case, we cannot conclude there was unanimity of verdict concerning these offenses.

In *Bates*, the trial court guarded against this possibility by labeling the counts according to the specific type of alleged sexual act. *Id.* at 634, 634 S.E.2d at 923 (noting that the trial court "differentiated between some of the counts by including next to the charge the words '(by cunnilingus)' or '(inserting finger into victim's vagina)' "). Had the trial court done the same here, we would agree with the Dissent. But here, the trial court did not differentiate counts by the type of alleged sexual act, thus jeopardizing Defendant's right to a unanimous verdict concerning the first-degree forcible sexual-offense charges. In other words, we agree with Defendant and disagree with the Dissent because it is impossible to know if the jury convicted Defendant "of the *particular* offense[s] charged in the warrant or bill of indictment." *See Williams*, 318 N.C. at 628, 350 S.E.2d at 356 (emphasis added).

We also disagree with the Dissent's assertion that Defendant's right to a unanimous verdict was not jeopardized because section 14-27.26 lacks a list of "discrete criminal activities in the disjunctive." On the contrary, section 14-27.26 prohibits certain sexual acts, N.C. Gen. Stat. § 14-27.26, and "sexual acts" are discrete criminal activities, *see id.* § 14-27.20(4). These discrete criminal activities include "[c]unnilingus, fellatio, analingus, or anal intercourse, but do not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." *Id.* § 14-27.20(4).

The Dissent cites *State v. Lawrence* for support. 360 N.C. 368, 627 S.E.2d 609 (2006). But sexual acts are distinct and distinguishable from the malleable acts analyzed in *Lawrence*: "immoral, improper, or indecent liberties." *Id.* at 374, 627 S.E.2d at 612. The *Lawrence* Court correctly

described "immoral, improper, or indecent liberties" as an "ambit." *Id.* at 374, 627 S.E.2d at 612. Immoral, improper, or indecent liberties are not defined by statute: We have defined them "as 'such liberties as the common sense of society would regard as indecent and improper.' " *State v. Every*, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (quoting *State v. McClees*, 108 N.C. App. 648, 653, 424 S.E.2d 687, 690 (1993)).

A sexual act, however, is not an ambit. *See* N.C. Gen. Stat. § 14-27.20(4). It is statutorily defined and only includes "[c]unnilingus, fellatio, analingus, or anal intercourse" and "the penetration . . . by any object into the genital or anal opening of another person's body." *Id.* Society cannot differ on what a "sexual act" is because the General Assembly has defined it. *See In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974) ("[When a statute] contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be."). Therefore, the Dissent's *Lawrence* analysis is inapposite.

Accordingly, because it was not "possible to match the jury's verdict of guilty with specific incidents presented in evidence" without a special verdict sheet, the trial court's single instruction as to first-degree forcible sexual offense was erroneous and jeopardized Defendant's right to a unanimous verdict. *See Bates*, 179 N.C. App. at 634, 634 S.E.2d at 923. Further, this error was "fundamental" because it affected the integrity of the trial concerning Defendant's first-degree forcible sexual-offense charges. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Therefore, the trial court plainly erred. *See id.* at 764, 767 S.E.2d at 320–21.[1]

B. Clerical Errors

[2] Defendant also contends the trial court made several clerical errors in the judgment, and thus the judgment should be corrected on remand. In the event we discover a clerical error in the judgment, the State has no objection to remand on this issue. Again, we agree with Defendant.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696–97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). A clerical error is " '[a]n error resulting from a minor

1. We note that Defendant's strategy on appeal is not without risk. The State only charged him with two counts of first-degree forcible sexual offense, but based on the facts, the State could indict Defendant on a third count.

mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.' " *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting BLACK'S LAW DICTIONARY (7th ed. 1999)).

Defendant first contends the trial court made a clerical error by indicating in the judgment that Defendant was a Prior Record Level ("PRL") V with 14 points. The sentencing worksheet reflects that the trial court marked Defendant as a PRL V with 14 points on the sentencing sheet. The record, however, reflects that Defendant is a PRL IV with 12 points. The stipulated prior record-level worksheet established Defendant as a PRL IV with 12 points. During sentencing, both the State and Defendant advised the trial court that Defendant was a PRL IV. Further, the trial court sentenced Defendant to between 365 and 498 months of active imprisonment, which coincides with the sentence applicable to a PRL IV defendant concerning a Class B1 sex-related felony. *See* N.C. Gen. Stat. § 15A-1340.17(c)–(f) (2021). For these reasons, the trial court made a clerical error by listing Defendant as a PRL V with 14 points. *See Jarman*, 140 N.C. App. at 202, 535 S.E.2d at 878.

Defendant next contends the trial court made a clerical error on Defendant's sentencing sheet by marking box twelve for findings of aggravating and mitigating factors. Box twelve states: "The defendant committed the offense while on pretrial release on another charge." And the record shows the trial court marked box twelve on Defendant's sentencing sheet. Prior to sentencing, however, the State expressed it was not proceeding with aggravating factor twelve because Defendant was not on pretrial release. Additionally, the plea arrangement for aggravating factor 12a stated the State was not proceeding with any other factors. Therefore, the trial court made a clerical error in marking box twelve on the sentencing sheet. *See Jarman*, 140 N.C. App. at 202, 535 S.E.2d at 878.

Lastly, Defendant contends the trial court made a clerical error by failing to check the box on the aggravating-factors sheet, indicating it "accept[ed] the defendant's admission to the aggravating factor(s) noted above and finds the supporting evidence to be beyond a reasonable doubt." The record reflects the box was not marked on the aggravating-factors sheet. At trial, however, the trial court accepted Defendant's plea to the aggravating factor and imposed a sentence in the aggravated range. Therefore, the trial court made a clerical error on the aggravating-factors sheet by failing to indicate it accepted Defendant's admission to the aggravating factor. *See Jarman*, 140 N.C. App. at 202, 535 S.E.2d at 878.

Accordingly, because the trial court made several clerical errors in the judgment, we remand this case to allow the trial court to correct them. *See Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696–97.

V. Conclusion

We conclude the trial court committed plain error in its instruction as to the first-degree forcible sexual-offense charges, because in the absence of a special verdict form, the instructions jeopardized Defendant's right to a unanimous verdict. *See Grice*, 367 N.C. at 764, 767 S.E.2d at 320–21. Therefore, we reverse and remand this case for a new trial concerning the two counts of first-degree forcible sexual offense. We also remand for correction of clerical errors in the judgment. *See Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696–97.

REVERSED IN PART AND REMANDED.

Judge HAMPSON concurs.

Judge THOMPSON dissents in part by separate opinion.

THOMPSON, Judge, dissenting.

I respectfully dissent from the portion of the majority opinion that concludes the trial court committed plain error when it instructed the jury only once on the offense of first-degree forcible sexual offense, while defendant was indicted on two counts of that offense and where the jury received two jury verdict sheets, one for each of the counts, and returned each marked guilty. As explained below, controlling precedent indicates that the trial court did not err in failing to repeat its accurate jury instruction regarding this offense a second time in reference to the second count of the offense.

The record reflects that these two offenses—each included in a single indictment designated as case file 19 CRS 2364—cite N.C. Gen. Stat. § 14-27.26 and then allege: "The jurors for the State upon their oath present that on or about [9 September 2019] and in [Durham County] the defendant named above unlawfully, willfully, and feloniously [did] engage in a sex offense with [the victim], by force and against the victim's will." At trial, the victim testified that defendant sexually assaulted her at gunpoint, penetrating her with his penis anally, orally, and vaginally, as well as penetrating her anally with his fingers. The victim's testimony

of vaginal penetration by defendant's penis supported the first-degree rape indictment and related jury instructions, while the assaults by penetration of the victim's mouth and anus by defendant's penis and the penetration of her anus by defendant's fingers could support the two first-degree forcible sexual offenses. Regarding the latter offense, without objection from defendant, the trial court charged the jury:

> The defendant has been charged with first degree forcible sexual offense. For you to find the defendant guilty of first degree forcible sexual offense, the State must prove to you four things beyond a reasonable doubt. First, that the defendant engaged in a sexual act with the alleged victim. A sexual act means fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another; anal intercourse, which is any penetration, however slight, of the anus of any person by their male or sexual organ; and, [ ] any penetration, however slight, by an object into the genital or anal opening of a person's body. And, second, that the defendant used or threatened to use force sufficient to overcome any resistance the alleged victim might make. The force necessary to constitute sexual offense need not be actual physical force. Fear or coercion may take the place of physical force. And, third, that the alleged victim did not consent and it was against the alleged victim's will. Consent induced by fear is not consent at law. And, fourth, that the defendant employed and/or displayed a dangerous or deadly weapon. A handgun is a dangerous or deadly weapon. A dangerous or deadly weapon is a weapon which is likely to cause death or serious injury. In determining whether the particular object is a dangerous or deadly weapon, you should consider the nature of the object, the manner in which it was used, the size and strength of the defendant as compared to that of the alleged victim.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in a sexual act which—act with the alleged victim and the defendant did so by force and/or threat of force and that this was sufficient to overcome any resistance which the alleged victim might make, that the alleged victim did not consent and it was against the alleged victim's will and that the defendant employed and/or displayed a weapon,

> it would be your duty to return a verdict of guilty of first degree forcible sexual offense. If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree forcible sexual offense but consider whether or not the defendant is guilty of second degree forcible sexual offense.

Defendant does not contend that this instruction was incorrect in any way; instead, he represents that the trial court plainly erred in failing to repeat this instruction before sending the jury to deliberate whether, *inter alia*, defendant committed *two* counts of this particular offense. Ultimately, the jury, having before it evidence that defendant had been indicted on two counts of first-degree forcible sexual offense, having heard testimony about three distinct acts which if the testimony were believed would support the two counts of that offense, and having been correctly charged regarding the elements of that offense by the trial court, elected in its role as finder of fact, to return two unanimous verdicts of guilty on the two counts of that offense as listed on one of the verdict sheets as "COUNT 2" and "COUNT 3" following the case file number.

The majority opinion relies primarily on this Court's decision in *State v. Bates*, 179 N.C. App. 628, 629, 634 S.E.2d 919, 920 (2006), *disc. review denied*, 361 N.C. 696, 653 S.E.2d 2 (2007) —where the trial court gave a proper instruction for first-degree sexual offense only once while the defendant was charged with eleven counts of that offense—which opinion in turn was issued on remand from the North Carolina Supreme Court after reconsideration in light of *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). The defendant in *Bates* "was indicted on eleven counts of first-degree sexual offense; evidence was presented of six to ten incidents of first-degree sexual offense, and the jury returned a verdict of guilty on six charges. 179 N.C. App. at 632, 634 S.E.2d at 921–22 (citation omitted). As noted by the majority decision here, on review of these offenses, this Court "adopt[ed] the analysis in [an unpublished post-*Lawrence* Court of Appeals decision] and . . . . consider[ed] four factors to determine whether defendant Bates was denied a unanimous verdict: (1) the evidence; (2) the indictments; (3) the jury charge; and (4) the verdict sheets." *Id.* at 633, 634 S.E.2d at 922.

The Court first noted that as to factors one and two, "[w]here the number of incidents equal the number of indictments, the risk of a non-unanimous verdict is substantially lower," while where "*more counts were charged than the evidence supported*"—as in *Bates*—there is "more opportunity for confusion." *Id.* (emphasis added). Forcible sexual

offense is defined as the commission of "a sexual act[1] with another person by force and against the will of the other person" by means of one or more of three listed methods of force—including by the use of a weapon, an element not contested in defendant's appeal. N.C. Gen. Stat. § 14-27.26 (2021). Here, the evidence at trial that could sustain the two counts of forcible sexual offense by defendant against the victim was (1) anal penetration with defendant's fingers, (2) anal penetration with defendant's penis, and (3) oral penetration with defendant's penis. Thus, this case is distinguishable because defendant was charged with two counts of forcible sexual offense and evidence was presented at trial of three sexual acts which could constitute forcible sexual offense—thus, one *fewer* count was charged than the evidence supported.

Turning to the third factor, the majority decision acknowledges that, as in *Bates*, the trial court here instructed the jury correctly as to forcible sexual offense and instructed the jury as to unanimity, which "adequately ensured that the jury would match its unanimous verdicts with the charges against the defendant [and] favors a finding that the jury verdicts were unanimous in the present case." *Id.* at 634, 634 S.E.2d at 922.

Finally, the Court in *Bates* noted that "where 'the verdict sheets . . . identified the . . . offenses only by the felony charged . . . and their respective case numbers . . . the verdict sheets did not lack the required degree of specificity needed for a unanimous verdict if they could be properly understood by the jury based on the evidence presented at trial.' " *Id.* at 634, 634 S.E.2d at 922 (quoting *State v. Wiggins*, 161 N.C. App. 583, 592–93, 589 S.E.2d 402, 409 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004)). The verdict sheets here, unlike those in *Bates*, include *both* the felony charges *and their respective case numbers*, to wit: the case file number 19 CRS 2364 followed by the designations "COUNT 2" and "COUNT 3." Moreover, while the majority decision suggests that the "lack[of] corresponding dates and descriptions of the alleged sex acts—both of which were included in the *Bates* verdict sheet"—were dispositive in the majority's analysis, a careful reading of *Bates* reveals that the verdict sheets therein only "gave date ranges for the different counts [which] . . . did not correspond with any specific evidence at trial; thus, *they failed to fully clarify which incidents corresponded to which charges*." *See id.* at 634, 634 S.E.2d at 923 (emphasis added). In contrast, here the inclusion of a date for each of the forcible

1. A sexual act includes "[c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2021).

sexual offense charges would have provided the jurors no additional clarity since all of the alleged conduct constituting the offenses was alleged to have occurred on the same date and in very close temporal proximity, unlike the circumstance in *Bates* where the alleged sexual offenses occurred over months.

In sum, on each of the four factors noted in *Bates* and cited by the majority decision, there was *less likelihood of jury confusion than in Bate*s, in which case this Court nonetheless held that "it is possible to match the jury's verdict of guilty with specific incidents presented in evidence and in the trial court's instructions" and therefore the "defendant's right to unanimous verdicts as to his convictions of six counts of first-degree sexual offense was not violated." *Id.* at 634, 634 S.E.2d at 923. Thus, in my view, it is impossible to rely upon *Bates* and reach the result of the majority here in finding that the trial court committed error, let alone plain error, in giving the forcible sexual offense instruction only once in the circumstances of this case. *See id.* at 634, 634 S.E.2d at 923 (finding no error); *see also Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613 (finding no error); *see also Wiggins*, 161 N.C. App. at 595, 589 S.E.2d at 410 (finding no error).

My position is further buttressed by additional pertinent analyses found in *Bates* and the *Lawrence* line of cases.

In *Bates*, the Court also addressed unanimity of jury verdicts in connection with the offense of taking indecent liberties with a child, of which defendant was indicted on ten counts. *Bates*, 179 N.C. App. at 630, 634 S.E.2d at 920. There was evidence at trial of "a number" of such offenses against the child victim over a period of months, and the jury returned guilty verdicts on seven of the ten charges presented to it. *Id.* On appeal, the defendant argued

> that *because he was convicted of a lesser number of counts of indecent liberties than the number of incidents presented in evidence, and the indictment and verdict sheets did not match the counts to the evidence*, it is possible that the jury did not agree about which acts supported the guilty verdict for each count. Thus, defendant argues, a risk of a nonunanimous verdict was created, which violated defendant's right to a unanimous verdict.

Bates, 179 N.C. App. at 631, 634 S.E.2d at 921. This Court rejected that argument, emphasizing that under Lawrence, " 'a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered *a higher number of incidents of immoral or indecent behavior*

than the number of counts charged, and (2) *the indictments lacked specific details to identify the specific incidents*.' " *Id.* (quoting *Lawrence*, 360 N.C. at 375, 627 S.E.2d at 613) (emphasis added).

The Supreme Court in *Lawrence*, in turn based its holding on *State v. Hartness*, stating "that '[t]he risk of a nonunanimous verdict does not arise in cases such as the one at bar *because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive*.' " *Lawrence*, 360 N.C. at 375, 627 S.E.2d at 613 (quoting *State v. Hartness*, 326 N.C. 561, 564, 391 S.E.2d 177, 179 (1990)). "Unlike a drug trafficking statute, which may list possession and transportation, entirely distinct criminal offenses, in the disjunctive, the indecent liberties statute simply forbids 'any immoral, improper, or indecent liberties.' " *Id.* at 374 (citing N.C. Gen. Stat. § 14-202.1(a)(1) (2005)). The Supreme Court then observed, "[t]hus, *even if some jurors found that the defendant engaged in one kind of sexual misconduct, while others found that he engaged in another*, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of 'any immoral, improper, or indecent liberties.' " *Id.* ((emphasis added) (citations omitted)).

Similarly, and pertinent to the case before us, N.C. Gen. Stat. § 14-27.26 does not list "discrete criminal activities in the disjunctive," *id.*, but rather simply defines forcible sexual offense as commission of "a sexual act with another person by force and against the will of the other person," including by the use of a weapon, N.C. Gen. Stat. § 14-27.26. As in *Lawrence*, here, whether the jury found that defendant committed two forcible sexual offenses by any combination of the acts evidenced at trial—anal penetration by defendant's fingers, anal penetration by defendant's penis, or oral penetration by defendant's penis—the jury "unanimously f[ou]nd that there occurred sexual [acts] within the ambit of" the forcible sexual offense statute. *See Lawrence*, 360 N.C. at 375, 627 S.E.2d at 613 (citation omitted). Thus, under the reasoning of *Hartness*, *Lawrence*, and *Bates*, defendant has failed to show error in the jury instructions.

For the reasons explained above, the trial court did not err in instructing the jury. Accordingly, I respectfully dissent from the majority's decision to the contrary on this issue.

STATE OF NORTH CAROLINA
v.
NICHOLAS RYAN BUCHANAN

No. COA23-517

Filed 6 February 2024

1. Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—intent—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of felony child abuse inflicting serious bodily injury, where substantial evidence showed that defendant intentionally inflicted serious bodily injury upon his eight-month-old daughter. Although defendant testified that his daughter fell out of his arms and hit her head on the bar of her portable bed after he tripped and fell while carrying her, the child's post-injury medical reports and the testimony of a child abuse pediatrician who examined her indicated that the child's injuries—which included a large subdural hemorrhage, significant cerebral edema, and areas of infarction throughout her brain—were consistent with physical abuse and were too severe to have resulted from the type of fall that defendant had described.

2. Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—jury instructions—accident—plain error analysis

There was no plain error in a prosecution for felony child abuse inflicting serious bodily injury, where defendant could not show that the trial court's failure to instruct the jury on the defense of accident prejudiced him at trial. The court's instructions conformed to the pattern jury instructions for the charged offense, the definition of intent, and the State's burden to prove every element of the charged offense beyond a reasonable doubt. Further, although defendant testified that the injuries his eight-month-old daughter sustained were accidental, the jury also heard testimony from a child abuse pediatrician who examined the child and opined that the child's injuries were consistent with physical abuse and too severe to have been accidental.

3. Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—jury instruction—lesser-included offenses—degree of bodily injury

In a prosecution for felony child abuse inflicting serious bodily injury, the trial court did not err in declining defendant's requests

for jury instructions on two lesser-included offenses—felony child abuse inflicting serious physical injury and misdemeanor child abuse —because the State's evidence was positive as to the element of serious bodily injury, and there was no conflicting evidence pointing to a lesser degree of bodily harm associated with the lesser offenses. Notably, the evidence showed that the victim—defendant's eight-month-old daughter—suffered a large subdural hemorrhage, significant cerebral edema, and areas of infarction throughout her brain; underwent an emergency craniotomy, after which she was intubated and completely sedated for one week; experienced multiple seizures and periods of blindness while in the hospital; underwent three more surgeries; and ultimately suffered permanent brain damage and eyesight impairment.

Appeal by Defendant from judgment dated 12 August 2022 by Judge Gregory R. Hayes in Mitchell County Superior Court. Heard in the Court of Appeals 10 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Catherine R. Laney, for the State-Appellee.

William D. Spence for Defendant-Appellant.

COLLINS, Judge.

Defendant Nicholas Buchanan appeals from judgment entered upon a guilty verdict of felony child abuse inflicting serious bodily injury. Defendant argues that the trial court erred by denying his motion to dismiss, plainly erred by failing to instruct the jury on the defense of accident, and erred by denying his requested jury instructions on the lesser-included offenses of felony child abuse inflicting serious physical injury and misdemeanor child abuse. We find no error in part and no plain error in part.

I. Background

Defendant was indicted for felony child abuse inflicting serious bodily injury. The matter came on for trial on 9 August 2022. Evidence of the following was presented at trial: Defendant and his wife ("Mother") are the biological parents of Cecilia,[1] who was born on 12 February 2019. Defendant and Mother separated when Cecilia was approximately

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

six months old. Cecilia lived with Mother during the week and with Defendant during the weekend.

Mother dropped Cecilia off at Defendant's residence for the weekend on 25 October 2019. On 26 October 2019, at approximately 1:30 p.m., Defendant brought Cecilia to Blue Ridge Regional Hospital in Spruce Pine with a head injury. Cecilia was immediately transferred by ambulance to Mission Children's Hospital in Asheville due to the severity of her injury. Upon her admission to the hospital, the doctors determined that Cecilia had sustained a large subdural hemorrhage, meaning that there was a "large amount of blood inside her brain"; significant cerebral edema, meaning brain swelling; and widespread infarction, meaning that "portions of her brain . . . were so swollen that blood was prevented from going to those portions of her brain, and so those portions of her brain had become necrotic or died." Cecilia underwent an emergency craniotomy; the neurosurgeon drilled holes into her skull and removed part of her scalp to drain the blood around her brain and allow the swelling to occur without further damaging her brain.

A. Defendant's Narrative and Testimony

Defendant was interviewed by the Department of Social Services ("DSS") at the hospital and gave the following explanation for Cecilia's injuries: Defendant put Cecilia to bed at 9:00 p.m. Cecilia woke up at 1:30 a.m. and Defendant fed her a bottle. Defendant went to put her in the Pack 'n Play where she usually slept, but "he fell because he had lost a significant amount of weight and his pants fell down, so they kind of tripped him and he fell forward." Cecilia's head hit the Pack 'n Play first, and then she fell to the ground. Defendant told DSS that Cecilia vomited after she fell, "but that she always spits up, so he just figured he would put her to sleep and she was fine." Cecilia woke up at approximately 9:30 a.m. and Defendant fed her a bottle, "but she seemed lethargic, like she wasn't crawling, she wasn't trying to sit up, and that's when he became more alarmed." Defendant made "a couple of different statements" as to why he did not seek medical attention sooner. Defendant told DSS that he did not have gas in his car, that he had a flat tire, and that he did not have a car seat and he did not think ambulances had car seats.

Defendant testified at trial to the following: Defendant put Cecilia to bed between 9:00 p.m. and 10:00 p.m. on 25 October 2019. Cecilia woke up at approximately 1:00 a.m. and Defendant fed her a bottle and changed her diaper. After Cecilia fell back asleep in Defendant's arms, he stood up to put her in the Pack 'n Play where she usually slept. Defendant took "maybe one or two steps, then [his] pants fell off and [he] tripped and

fell with [Cecilia]." As a result of Defendant's fall, Cecilia hit the back of her head on the bar of the Pack 'n Play and fell to the ground. Defendant picked Cecilia up and "she was like a little stunned, I guess you would say, but she wasn't crying super hard. She wasn't puking." Cecilia had "like a tiny little knot on the back of her head, like the lower bulb of the head."

Defendant called Mother four times, but she did not answer the phone. Defendant then texted, "[Mother], something is wrong with [Cecilia], answer the phone." When Mother did not reply, he re-sent the text. Defendant called Mother a fifth time approximately twenty seconds later, and Mother answered the phone. Defendant and Mother exchanged a series of phone calls over the next hour and ultimately decided not to take Cecilia to the hospital because Defendant told Mother "she was fine[.]" At approximately 1:45 a.m., Defendant sent Mother a picture of Cecilia "reaching out for [Defendant]" accompanied by a text stating, "I sat her down and she did this so I think we're okay." Defendant kept Cecilia awake for "maybe two, two-and-a-half hours" to "make sure that she didn't lose consciousness or anything else."

Cecilia woke up around 7:30 a.m. Defendant texted Mother that Cecilia was "fine" and sent a photo of her holding a bottle. Shortly before 11:00 a.m., Cecilia started "getting really fussy" and "wouldn't eat hardly[.]" Cecilia then "went limp, intense limp, projectile vomited, and that's when [Defendant] knew something was really bad wrong. And [Defendant] noticed one of her eyes was real tiny and one was huge." Defendant called his mother between 11:00 a.m. and 12:30 p.m. and asked her to take Cecilia and him to the hospital. Defendant testified that he did not seek medical attention sooner because he did not have gas in his car, he had a flat tire, he did not have a car seat, "there might have been . . . something mechanical wrong with the car[,]" and Cecilia "didn't have any symptoms up until I called my mom to come get me and her."

B. Dr. Monahan-Estes' Report and Testimony

Dr. Sarah Monahan-Estes, a child abuse pediatrician at Mission Children's Hospital, examined Cecilia after her surgery and submitted a written report. The report stated, in relevant part, as follows: Cecilia was "referred by the PICU for concerns of physical abuse." Defendant stated that "[Cecilia] fell out of his arms and hit the back of her head on the bar of the pack-n-play." Defendant further stated that Cecilia "went limp then tense, limp then tense" and she "may have" thrown up one time. Defendant told Dr. Monahan-Estes that "he didn't have a car seat so he

couldn't drive [Cecilia] to the hospital" and that "he didn't think ambulances had infant car seats so he didn't call 911." Dr. Monahan-Estes' report noted that "[t]here was significant delay in seeking medical care by both parents as the father was in communication with the mother from the time the incident reportedly happened." Dr. Monahan-Estes ultimately concluded in her report that "[t]he injury seen on examination is not consistent with the history provided, as such there is concern for physical abuse."

At trial, Dr. Monahan-Estes testified to the following: Cecilia's largest injuries were intracranial. Cecilia had a very large subdural hemorrhage, meaning that "there was this large amount of blood inside her brain, and that blood and a series of other things [were] causing swelling in her brain"; significant cerebral edema, meaning brain swelling; and areas of infarction, meaning that "there were portions of her brain that were so swollen that blood was prevented from going to those portions of her brain, and so those portions of her brain had become necrotic or died." Cecilia also had infraspinatus ligamentous injuries, meaning that "the ligaments in between her spine were damaged." Consequently, Dr. Monahan-Estes was "concerned that her neck was injured from moving too far forward or back." Furthermore, Cecilia had bilateral confluent retinal hemorrhages, meaning that there was "bleeding on the inside of both of her eyes, all the way through both all of the layers of her eyes."

Because Cecilia "had significantly more and significantly more severe injuries than would be expected from a short fall, from falling from the father's arms into a Pack 'N Play, or even onto the floor[,]" Dr. Monahan-Estes concluded in her report that "there is concern for physical abuse."

C. Cecilia's Post-Surgery Condition

Cecilia was intubated and completely sedated for one week following the surgery. Because Cecilia was in severe condition, an intracranial pressure monitor was placed in her head to "monitor the level of pressure that her brain is under." After Cecilia regained consciousness, she suffered approximately twelve seizures and at least two periods of blindness while she was in the hospital. Cecilia was transferred to Levine's Children's Hospital in Charlotte on 25 November 2019 for specialized rehabilitation. Cecilia underwent another surgery on 12 December 2019 to replace the part of her scalp that was previously removed. On 16 December 2019, after fifty-one days of hospitalization, Cecilia was discharged from the hospital and moved into her adoptive mother's home for continued rehabilitation.

Cecilia suffered permanent brain damage to the right side of her brain, thereby severely restricting her mobility on the left side of her body. Due to the pressure and swelling in her brain, Cecilia's optical nerve was damaged, and her eyesight is permanently impaired. Just prior to trial, Cecilia underwent two additional surgeries: on 28 May 2020, Cecilia underwent a surgery to repair the bone flap on her head that had started to dissolve, and on 20 June 2022, Cecilia underwent a surgery to remove screws in her skull that were beginning to protrude through her skin.

The jury returned a guilty verdict of felony child abuse inflicting serious bodily injury. The trial court sentenced Defendant to 157 to 201 months of imprisonment. Defendant appealed.

II. Discussion

A. Motion to Dismiss

[1] Defendant first argues that the trial court erred by denying his motion to dismiss because the State failed to produce substantial evidence that he intentionally inflicted serious bodily injury to Cecilia.

We review a trial court's denial of a motion to dismiss de novo. *State v. Chavis*, 278 N.C. App. 482, 485, 863 S.E.2d 225, 228 (2021). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (quotation marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Rivera*, 216 N.C. App. 566, 568, 716 S.E.2d 859, 860 (2011) (quotation marks and citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 549-50 (quotation marks and citation omitted). Any contradictions or discrepancies in the evidence are for the jury to decide. *State v. Wynn*, 276 N.C. App. 411, 416, 856 S.E.2d 919, 923 (2021).

Under North Carolina law,

> [a] parent . . . of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child

> which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class B2 felony.

N.C. Gen. Stat. § 14-318.4(a3) (2023). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120 (2003). "In determining the presence or absence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged." *Id.* (citation omitted). "[W]hen an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." *Id.* at 186, 576 S.E.2d at 120-21 (citations omitted).

Here, Cecilia's medical reports indicate that she sustained a large subdural hemorrhage, meaning that there was a "large amount of blood inside her brain"; significant cerebral edema, meaning brain swelling; and widespread infarction, meaning that "portions of her brain . . . were so swollen that blood was prevented from going to those portions of her brain, and so those portions of her brain had become necrotic or died." Defendant told Dr. Monahan-Estes at the hospital that "he was walking to put [Cecilia] back to sleep [and] his pants fell off around his ankles and he tripped falling with [Cecilia,]" and that "[Cecilia] fell out of his arms and hit the back of her head on the bar of the pack-n-play." However, Dr. Monahan-Estes testified that the injuries Cecilia sustained were inconsistent with Defendant's narrative "[b]ecause she had significantly more and significantly more severe injuries than would be expected from a short fall, from falling from the father's arms into a Pack 'N Play, or even onto the floor." Dr. Monahan-Estes testified that

> accidental injuries happen every day, all the time. Anyone who has children or grandchildren or friends or knows anybody or has tried to walk down a sidewalk, we all trip, we all fall. Accidental injuries occur all the time, and we have expected injuries that occur when those accidents happen. So when you have short falls, parents fall all of the time and bump their kids' heads on things or drop their babies. We all know this occurs. But the injury that [Cecilia] had was so much more severe than what would

> have ever been expected from falling and hitting her head, even if she hit her head really hard on the bar of the Pack 'N Play.

Dr. Monahan-Estes testified that "there was no accidental history provided to [her] that was consistent with the injuries seen on exam" and that the injuries Cecilia sustained were consistent with physical abuse. Cecilia's medical reports and Dr. Monahan Estes' testimony constitute substantial evidence to support a conclusion that Defendant intentionally inflicted serious bodily injury to Cecilia. *See id.* (holding that the trial court did not err by denying defendant's motion to dismiss where two expert witnesses testified that the injuries sustained by the victim were intentionally inflicted, and that "the amount of force required to cause such injuries was greater than that resulting from [the victim] falling off either a mattress or a chair, which was the explanation given by defendant").

Accordingly, the trial court did not err by denying Defendant's motion to dismiss.

B. Jury Instruction on the Defense of Accident

[2] Defendant next argues that the trial court plainly erred by failing to instruct the jury on the defense of accident. Defendant did not request a jury instruction on the defense of accident,[2] nor did he object to its omission; we thus review only for plain error.

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

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Hamilton*, 262 N.C. App. 650, 660, 822 S.E.2d 548, 555 (2018) (quotation marks and citation

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2. Defendant's only mention of the word accident during the charge conference was related to his argument that the trial court should instruct the jury on misdemeanor child abuse.

omitted). "This is a duty which arises notwithstanding the absence of a request by one of the parties for a particular instruction." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (citations omitted). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id.* (citations omitted).

The pattern jury instruction for the defense of accident in non-homicide cases states:

> When evidence has been offered that tends to show that the alleged assault was accidental and you find that the injury was in fact accidental, the defendant would not be guilty of any crime even though the defendant's acts were responsible for the alleged victim's injury. An injury is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. Culpable negligence is such gross negligence or carelessness as imparts a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. When the defendant asserts that the alleged victim's injury was the result of an accident the defendant is, in effect, denying the existence of those facts which the state must prove beyond a reasonable doubt in order to convict the defendant. The burden is on the state to prove those essential facts and in so doing disprove the defendant's assertion of accidental injury. The State must satisfy you beyond a reasonable doubt that the alleged victim's injury was not accidental before you may return a verdict of guilty.

N.C.P.I.—Crim. 307.11 (footnote omitted).

Even assuming arguendo that the trial court erred by not instructing the jury on the defense of accident, Defendant has failed to establish prejudice. The trial court instructed the jury, in relevant part, in accordance with the pattern jury instructions on felony child abuse inflicting serious bodily injury, the definition of intent, and the State having the burden to prove every element of the charged offense beyond a reasonable doubt. N.C.P.I.—Crim. 239.57 (felonious child abuse inflicting serious bodily injury); N.C.P.I.—Crim. 120.10 (definition of intent); N.C.P.I.—Crim. 101.10 (burden of proof and reasonable doubt). The jury instructions, when viewed together, directed the jury that it could only find Defendant guilty of felony child abuse inflicting serious bodily injury if it found beyond a reasonable doubt that Defendant "intentionally

inflicted a serious bodily injury to [Cecilia] or intentionally assaulted [Cecilia] which proximately resulted in serious bodily injury to [Cecilia], or intentionally assaulted [Cecilia], which proximately resulted in permanent or protracted loss or impairment of any mental or emotional function of [Cecilia]."

The jury heard Defendant's testimony that "[his] pants fell off and [he] tripped and fell with [Cecilia]," resulting in her hitting the back of her head on the bar of the Pack 'n Play and falling to the ground. However, the jury also heard testimony from Dr. Monahan-Estes that Cecilia "had significantly more and significantly more severe injuries than would be expected from a short fall, from falling from the father's arms into a Pack 'N Play, or even onto the floor." The jury thus found beyond a reasonable doubt that Defendant's testimony was not credible by finding him guilty of felony child abuse inflicting serious bodily injury. In light of the instructions provided to the jury and the testimony offered at trial, Defendant has failed to show that the trial court's failure to instruct the jury on the defense of accident "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings[.]" *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks, brackets, and citations omitted).

Accordingly, the trial court did not plainly err by not instructing the jury on the defense of accident.

C. Jury Instruction on Lesser-Included Offenses

[3] Defendant argues that the trial court erred by denying his requested jury instructions on the lesser-included offenses of felony child abuse inflicting serious physical injury and misdemeanor child abuse.

We review challenges to the trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citations omitted). "It is well settled that a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts." *Id.* at 562, 572 S.E.2d at 772 (quotation marks and citation omitted). "On the other hand, the trial court need not submit lesser included degrees of a crime to the jury when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime."

Id. (quotation marks, emphasis, and citations omitted). "If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense . . . and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of the lesser-included offense." *State v. Brichikov*, 383 N.C. 543, 554, 881 S.E.2d 103, 112 (2022) (quotation marks, emphasis, brackets, and citations omitted).

The distinguishing element at issue here between felony child abuse inflicting serious bodily injury, felony child abuse inflicting serious physical injury, and misdemeanor child abuse is the level of harm inflicted upon the child. The crux of Defendant's argument is that the trial court's refusal to instruct the jury on the lesser-included offenses "deprived the jury of an option to determine the baby's injuries were not as severe as the State's expert child abuse pediatrician testified/reported[.]"

Felony child abuse inflicting serious bodily injury requires a showing of serious bodily injury, which is defined as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(d)(1) (2023). Felony child abuse inflicting serious physical injury requires a showing of serious physical injury, which is defined as "[p]hysical injury that causes great pain and suffering[,]" including mental injury. *Id.* § 14-318.4(d)(2) (2023). Misdemeanor child abuse requires a showing of physical injury, which "includes cuts, scrapes, bruises, or other physical injury which does not constitute serious injury." *See id.* § 14-34.7(c) (2023).[3]

Here, there was no evidence presented at trial from which the jury could have rationally found that Defendant committed the lesser offense of felony child abuse inflicting serious physical injury or misdemeanor child abuse because the State's evidence is positive as to the element of serious bodily injury and there is no conflicting evidence. Dr. Monahan-Estes testified that Cecilia had a very large subdural hemorrhage; that she had significant cerebral edema; and that her brain had areas of infarction. Cecilia underwent an emergency craniotomy in

3. Physical injury is not defined in N.C. Gen. Stat. § 14-318.2. However, the pattern jury instruction for misdemeanor child abuse cites N.C. Gen. Stat. § 14-34.7(c), which defines physical injury for certain assaults on law enforcement personnel. *See* N.C.P.I.—Crim. 239.60.

which the neurosurgeon drilled holes into her skull and removed part of her scalp to drain the blood around her brain and allow the swelling to occur without further damaging her brain. Cecilia was intubated and completely sedated for one week following the surgery. After Cecilia regained consciousness, she suffered approximately twelve seizures and at least two periods of blindness while she was in the hospital.

Cecilia was transferred to Levine's Children's Hospital in Charlotte on 25 November 2019 for specialized rehabilitation. Cecilia underwent another surgery on 12 December 2019 to replace the part of her scalp that was previously removed. On 16 December 2019, after fifty-one days of hospitalization, Cecilia was discharged from the hospital and moved into her adoptive mother's home for continued rehabilitation.

Cecilia suffered permanent brain damage to the right side of her brain, thereby severely restricting her mobility on the left side of her body. Due to the pressure and swelling in her brain, Cecilia's optical nerve was damaged, and her eyesight is permanently impaired. On 28 May 2020, Cecilia had a third surgery to repair the bone flap on her head that had started to dissolve. Cecilia had a fourth surgery on 20 June 2022 to remove screws in her skull that were beginning to protrude through her skin. This evidence fully satisfies the State's burden of proving that Defendant intentionally inflicted serious bodily injury to Cecilia. *See Brichikov*, 383 N.C. at 554, 881 S.E.2d at 112.

Accordingly, the trial court did not err by denying Defendant's requested jury instructions on the lesser-included offenses of felony child abuse inflicting serious physical injury and misdemeanor child abuse.

III. Conclusion

For the foregoing reasons, we find no error in part and no plain error in part.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges HAMPSON and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
KEVIN SALVADOR GOLPHIN, DEFENDANT

No. COA22-713

Filed 6 February 2024

Sentencing—juvenile—first-degree murder—life without parole —statutory factors—incorrigibility

The sentencing court did not abuse its discretion by sentencing defendant to two consecutive sentences of life imprisonment without parole for the murders of two law enforcement officers killed by defendant and his brother in 1997 when defendant was 17 years old. The sentences, which were imposed after a new sentencing hearing was held in light of *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), were based on the court's unchallenged—and therefore binding—findings of fact, which properly addressed and weighed each of the nine mitigating factors contained in N.C.G.S. § 15A-1340.19B(c). Further, the court expressly made the additional required finding that defendant was one of those exceedingly rare juveniles who could not be rehabilitated and was permanently incorrigible and that, as a result, life imprisonment without parole should be imposed rather than life imprisonment with parole.

Appeal by defendant from order entered on or about 13 April 2022 by Judge Thomas H. Lock in Superior Court, Cumberland County. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly N. Callahan, for the State.

Tarlton Law PLLC, by Raymond C. Tarlton, and Sidley Austin LLP, by Eamon P. Joyce, pro hac vice, Christina Prusak Chianese, pro hac vice, Peter J. Mardian, pro hac vice, Margaret K. Seery, pro hac vice, Brianna O. Gallo, pro hac vice, and Brian C. Earl, pro hac vice, for defendant-appellant.

STROUD, Judge.

Defendant appeals from an order of the superior court sentencing him to life imprisonment without the possibility of parole based on an

offense he committed while a juvenile. Because the sentencing court did not abuse its discretion by sentencing Defendant to life imprisonment without the possibility of parole, we affirm.

I. Background

In 1997, Defendant and his brother shot and killed two law enforcement officers when the officers attempted to arrest the brothers for stealing a car. Defendant was arrested, indicted, and tried, and in 1998 Defendant was found guilty by a jury of two counts of first-degree murder.[1] Defendant was 17 years, 9 months, and 2 days old at the time of the murders. The jury recommended Defendant be sentenced to death on each count of first-degree murder, and the trial court thereafter sentenced Defendant to death. Defendant appealed his convictions, and his convictions were upheld on direct appeal in *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000). Our Supreme Court has already addressed the underlying facts of this case, and we will refer to the Supreme Court's opinion as needed for the purposes of this appeal. *See id.*

In 2002, Defendant filed a motion for appropriate relief ("MAR") challenging his convictions and death sentences. Defendant asserted his trial counsel was ineffective and the first-degree murder indictments were facially defective. The trial court denied his motion in a written order dated March 2004.

In May 2004, Defendant filed a second MAR. The superior court stayed the proceeding pending the United States Supreme Court's decision in *Roper v. Simmons*, in which the Supreme Court ultimately ruled sentencing a juvenile to death was a violation of the Eighth Amendment to the United States Constitution. *See Roper v. Simmons*, 543 U.S. 551, 572-73, 161 L. Ed. 2d 1, 23-24 (2005). The superior court held a resentencing hearing in December 2005, and Defendant was thereafter resentenced to mandatory life imprisonment without the possibility of parole.

In June 2012, the United States Supreme Court ruled a mandatory sentence of life imprisonment without the possibility of parole was unconstitutional for a juvenile, and a sentencing court must instead consider how juvenile offenders differ from adult offenders. *See Miller v. Alabama*, 567 U.S. 460, 479-80, 183 L. Ed. 2d 407, 424 (2012). A month later, in July 2012, the North Carolina General Assembly revised our

1. Defendant was also found guilty of two counts of robbery with a dangerous weapon, one count of assault with a deadly weapon with intent to kill, one count of discharging a firearm into an occupied vehicle, and one count of possession of a stolen vehicle. However, only the two murder convictions are at issue on appeal.

sentencing statutes to remove mandatory life sentences without the possibility of parole for juveniles convicted of murder and enacted a discretionary sentencing framework that permitted a sentencing court to sentence a juvenile offender to either life imprisonment with or without the possibility of parole after considering several factors. *See* 2012 N.C. Sess. Laws 2012-148, § 1; N.C. Gen. Stat. §§ 15A-1340.19A (2012) *et seq*.

In 2016, the United States Supreme Court further determined that the law from *Miller* must be applied retroactively to juveniles already sentenced to mandatory life imprisonment without the possibility of parole. *See Montgomery v. Louisiana*, 577 U.S. 190, 206, 193 L. Ed. 2d 599, 618 (2016). On or about 23 January 2018, Defendant filed another MAR alleging his sentences of life without parole were unconstitutional under *Miller* and *Montgomery*. On 19 July 2018, the superior court granted Defendant's motion and ordered a second resentencing hearing for December 2018.

The resentencing hearing was held in April 2022. The State presented testimony from the officer who performed the initial investigation of the 1997 murders. The officer testified as to the facts underlying the murders, which are consistent with our Supreme Court's recitation in *State v. Golphin*. *See generally Golphin*, 352 N.C. at 380-88, 533 S.E.2d at 183-88. The State also presented victim impact testimony from the family members of the slain officers.

Defendant presented expert testimony regarding his mental state and maturity. Dr. Duquette, an expert on child psychology, pediatric neuropsychology, and mental and psychiatric disorders, performed an examination on Defendant in 2019 when Defendant was thirty-nine years old. Dr. Hilkey, an expert in forensic psychology, also testified about his psychological evaluation of Defendant. Dr. Hilkey met Defendant four times as part of his evaluation. Dr. Hilkey testified his report was also specifically for the purpose of evaluating whether Defendant was "eligible or meets criteria for a reconsideration for parole as is defined in Miller v. Alabama." In addition to Drs. Duquette's and Hilkey's reports, Defendant also admitted into evidence social worker records of his abusive childhood, about 300 pages of Department of Public Safety disciplinary records, additional mental health records and assessments by correctional staff, child protective services records, Defendant's academic records, and a letter from Defendant's wife.

Defendant also testified on his own behalf. Defendant stated he had little structure in his life until he was incarcerated. Defendant also testified he received little psychological or psychiatric treatment before 1997. Defendant stated he had improved mentally while incarcerated by

reading, writing, meditating, praying, and taking advantage of optional mental health and anger management programs. Defendant also earned his GED and testified he wanted to continue his education by taking college courses in psychology and sociology with the goal of counselling other at-risk youths. Defendant further testified his plan in 1997 to steal a car and flee to Virginia was "dumb[,]" and he would inevitably be apprehended. Defendant testified the plan was "[t]o steal a car, go to Richmond, rob the Food Lion that [Defendant] used to work at, build up enough money to go to St. Petersburg, Florida and from there, try to leave the country." Defendant testified he made a mistake and regretted the events leading to the murder of the two law enforcement officers, and he felt remorse for killing Trooper Lowry and Deputy Hathcock.

The State then presented victim impact testimony from the family of the officers. Trooper Lowry's widow testified that her husband's murder had a life-long impact on her and her children. Trooper Lowry's widow testified no family should have to go through the resentencing hearings. Trooper Lowry's brother gave similar testimony. The State also submitted a record of Defendant's disciplinary infractions while incarcerated showing Defendant had frequent issues up until 2014. Since 2014, Defendant only had two disciplinary infractions, and Defendant was "counseled" on both; the record does not indicate the severity of a "counseled" infraction but does indicate that no punishment was imposed.

The superior court entered a written order ("Sentencing Order") in April 2022. The superior court first concluded the factors listed in *Miller* were subsumed into nine factors set out in North Carolina General Statute Section 15A-1340.19B(c). Based on the evidence presented at the resentencing hearing and "the factual summary of the crimes contained in *State v. Golphin*, 352 N.C. 364 (2000)[,]" the superior court found the following as to mitigating factors:

> 1. **Age at the time of the offense.** Defendant was 17 years, 9 months, and 2 days old at the time of these murders. His age stands in stark contrast to that of the defendants in *Miller*, who were 14 years old at the time of the murders of which they were convicted. In that this defendant was less than three months from his eighteenth birthday, the court assigns this factor little mitigating weight.
>
> 2. **Immaturity.** The defendant was immature at the time of the murders, but not in any way substantially

different from other teens of his chronological age. The court finds this factor carries no significant mitigating weight.

3. **Ability to appreciate the risks and consequences of the conduct.** The court finds the defendant suffered from some diminished impulse control at the time of the murders. On the other hand, Defendant, together with his slightly older brother, planned and committed an armed robbery in South Carolina earlier that day, stole an automobile, and were attempting to drive to Virginia on I-95 when Trooper Lowry stopped the vehicle. The evidence shows Defendant was aware he was about to be arrested for the South Carolina crimes and made the decision to resist arrest. The evidence further shows that Defendant and his brother immediately fled the scene of the murders in the stolen car. Shortly thereafter, Defendant and his brother switched positions in the vehicle, and Defendant then drove the car alongside the vehicle of a witness to the murders so that his brother could shoot a rifle at the witness. When Defendant wrecked the automobile while fleeing from law enforcement officers giving chase, he ran from the vehicle toward a group of tractor-trailers parked near a tire repair shop in an effort to avoid apprehension. Defendant's actions demonstrate an ability to appreciate the risks and consequences of his criminal conduct. Hence, the court finds this factor carries little mitigating weight.

4. **Intellectual capacity.** Defendant's educational records suggest he suffered from a possible learning disorder. However, his academic performance improved significantly during the times he was enrolled in the in-patient treatment facilities, the Virginia Treatment Center for Children and Thirteen Acres. Defendant's cognitive functioning was tested in June, 1992 when he was 12 years old, and his full-scale IQ was determined to be 84. In March, 2019, Dr. Peter Duquette administered an IQ test to Defendant and measured his full-scale IQ at 87, lending credence to the earlier score. These scores are in the low average range of IQ scores. The court does not find Defendant's intellectual capacity to be so diminished as to give it any mitigating weight.

5. **Prior record.** The evidence regarding Defendant's prior experience with the juvenile justice system is relatively sparse. Defendant had juvenile delinquency dispositions that apparently stemmed from conflicts with his mother, and he reportedly had received juvenile probation for offenses involving assault and resisting arrest. The court finds this factor to have slight mitigating value.

6. **Mental health.** As a child, Defendant was diagnosed with oppositional defiant disorder, attention deficit hyperactivity disorder (ADHD), and dysthymic disorder. Defendant at no time has exhibited any symptoms of psychosis. Defendant suffers from posttraumatic stress disorder as a result of severe childhood physical and emotional abuse. Though this abuse was tragic, Defendant's mental disorders did not impair his ability to appreciate the risks and consequences of his criminal conduct. The court does not find Defendant's mental health to carry any mitigating weight.

7. **Familial or peer pressure exerted upon the defendant.** Defendant's closest relationship was with his slightly older brother, Tilmon. Though Defendant was about a year and a half younger than his codefendant, Defendant, by his own admission, primarily planned the robbery in South Carolina, and was driving the stolen vehicle at the time Trooper Lowry stopped it. Moreover, Defendant's actions precipitated the Golphins' violent encounter with the law enforcement officers when Defendant refused to submit to Trooper Lowry's command to place his hands behind his back. Defendant appears to have occupied the leadership role in his relationship with his brother and in the commission of their crimes on 23 September 1997. The court does not find this factor to have any mitigating weight.

8. **Likelihood that the defendant would benefit from rehabilitation in confinement.** Upon his incarceration in prison, Defendant committed approximately two dozen infractions that resulted in disciplinary action, including sanctions for disobeying orders and cursing officers. Most notably, Defendant spent almost a decade in solitary confinement due to his participation in an escape plot. Defendant resisted a strip search in 2014

and threatened a correctional officer with a broom handle. Though Defendant's conduct in prison has improved since 2014, improved behavior often accompanies maturation. Aside from some improvement in the level of his disruptive behavior, the court finds no credible evidence that Defendant has experienced any true rehabilitation and assigns this factor no significant weight.

9. **Any other mitigating factor or circumstance.** The court has considered all the evidence presented, and, in particular, has considered the two mitigating circumstances found by the jury at the time of Defendant's original sentencing hearing: the age of the defendant at the time of the crimes, and the defendant's lack of parental involvement or support in treatment for psychological problems. The court analyzed Defendant's age and immaturity in numbered paragraphs (1) and (2) above, and the court analyzed Defendant's childhood psychological problems in paragraph number (6) above. The court again finds these factors to carry no or little mitigating weight, and the court finds no other mitigating factor or circumstance.

Based on these statutory mitigating factors and the circumstances of the murders, the superior court "conclude[d] that Defendant's crimes demonstrate his permanent incorrigibility and not his unfortunate yet transient immaturity" and sentenced Defendant to consecutive sentences of life imprisonment without the possibility of parole for both first-degree murder convictions. Defendant appealed.

II. Standard of Review

Orders weighing the *Miller* factors and sentencing juveniles are reviewed for abuse of discretion. *State v. Sims*, 260 N.C. App. 665, 671, 818 S.E.2d 401, 406 (2018) ("The [sentencing] court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion[,] . . . [i]t is not the role of an appellate court to substitute its judgment for that of the sentencing judge." (citation and quotation marks omitted)). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

III. Sentencing

We begin with a brief summary of relevant constitutional law as to the sentencing of juvenile homicide offenders.

A. Constitutional Standards

Defendant was tried in 1998 for the first-degree murder of two law enforcement officers, and during the sentencing portion of his trial he was sentenced to death. However, after he was sentenced and before his execution, the United States Supreme Court determined in *Roper v. Simmons* that the imposition of the death penalty on juvenile offenders was unconstitutional under the Eighth Amendment. *See Roper*, 543 U.S. at 569-70, 161 L. Ed. 2d at 21-23. The Supreme Court concluded the maximum constitutionally allowed punishment for a juvenile offender, even one who commits first-degree murder, was life imprisonment without the possibility of parole. *Id.* at 572, 161 L. Ed. 2d at 23.

The Supreme Court later held in *Miller v. Alabama* that imposing a *mandatory* sentence of life imprisonment without the possibility of parole on a juvenile also violates the Eighth Amendment. *See Miller*, 567 U.S. at 465, 183 L. Ed. 2d at 414-15. Nonetheless, a sentence of life imprisonment without the possibility of parole is still permissible, but the sentencing framework in any given jurisdiction must allow the sentencing authority the discretion to consider those unique characteristics of youth and the possibility of imposing a sentence less than the maximum permissible punishment under the Eighth Amendment. *See id.* at 474-76, 183 L. Ed. 2d at 420-22.

In response to the Supreme Court of the United States decisions, North Carolina General Statute Section 15A-1340.19A was created to apply when sentencing juveniles "convicted of first degree murder[.]" *See* N.C. Gen. Stat. § 15A-1340.19A (2021). North Carolina General Statute Section 15A-1340.19B establishes nine factors a defendant may submit mitigating evidence on:

> (c) The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:
>
> (1) Age at the time of the offense.
>
> (2) Immaturity.
>
> (3) Ability to appreciate the risks and consequences of the conduct.

(4) Intellectual capacity.
(5) Prior record.
(6) Mental health.
(7) Familial or peer pressure exerted upon the defendant.
(8) Likelihood that the defendant would benefit from rehabilitation in confinement.
(9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2021). The sentencing court must consider these factors "in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." *See* N.C. Gen. Stat. § 15A-1340.19C(a) (2021). North Carolina General Statute Section 15A-1340.19C further requires that a sentencing court's order sentencing a juvenile defendant convicted of murder "shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order." *Id.* The Supreme Court of North Carolina has concluded this statutory sentencing scheme is constitutional and gives effect to "the substantive standard enunciated in *Miller*." *State v. James*, 371 N.C. 77, 89, 813 S.E.2d 195, 204 (2018).

In addition, our Supreme Court has imposed another requirement, above and beyond those required by the Eighth Amendment, when a sentencing court sentences a juvenile defendant to life imprisonment without the possibility of parole. *See State v. Kelliher*, 381 N.C. 558, 587, 873 S.E.2d 366, 387 (2022). In *Kelliher*, our Supreme Court determined under Article I, Section 27 of the North Carolina Constitution that "juvenile offenders are presumed to have the capacity to change" and an express finding of fact as to a juvenile's permanent incorrigibility is required before a juvenile can be sentenced to life imprisonment without the possibility of parole. *See id.* ("Thus, unless the [sentencing] court *expressly finds* that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated, he or she *cannot* be sentenced to life without parole." (emphasis added)). Accordingly, a sentencing court must consider the factors in North Carolina General Statute Section 15A-1340.19B *and* "expressly find[] that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated" to sentence a juvenile to life imprisonment without the possibility of parole. *Id.*

B. Defendant's Arguments

We first note that Defendant did not challenge any of the sentencing court's findings of fact as unsupported by competent evidence. The sentencing court's findings are therefore binding on appeal. *In re K.W.*, 282 N.C. App. 283, 286, 871 S.E.2d 146, 149 (2022) (noting unchallenged findings of fact are binding on appeal). Defendant's arguments are numerous and, in many places, overlap or repeat themselves. For clarity, we will group Defendant's arguments into two major categories. Generally, Defendant contends the superior court incorrectly weighed the evidence of mitigation when applying the factors codified in North Carolina General Statute Section 15A-1340.19B(c). Defendant also argues the superior court should have come to the opposite conclusion and sentenced him to consecutive sentences of life imprisonment with the possibility of parole instead of life imprisonment without the possibility of parole.

1. State v. Kelliher

Defendant's first group of arguments is based on *State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366. Defendant contends: (1) our Supreme Court's opinion in *State v. Kelliher* requires this Court to reverse the Sentencing Order because, under *Kelliher*, no juvenile who "can be rehabilitated" can be sentenced to life imprisonment without the possibility of parole; (2) Defendant not only has the potential for rehabilitation, as identified in *Kelliher*, but the evidence admitted at the resentencing hearing conclusively shows that Defendant *has already been* rehabilitated and is therefore parole eligible; and (3) because Defendant is eligible for parole, he must be parole eligible within forty years of his incarceration.

As to Defendant's argument that "the North Carolina Supreme Court held that this State's Constitution prohibits [life without the possibility of parole] for a juvenile offender who 'can be rehabilitated[,]' " we agree. But Defendant's argument as to how *Kelliher* applies to him *only* takes issue with the weight and credibility the sentencing court assigned to the evidence heard at the resentencing hearing. In Defendant's view, the sole conclusion that could be supported by the evidence was that Defendant was capable of reform, was in fact reformed, and therefore, must be parole eligible within 40 years of his incarceration. However, Defendant did not challenge the sentencing court's findings of fact as unsupported by the evidence, so those findings are binding on appeal. *See In re K.W.*, 282 N.C. App. at 286, 871 S.E.2d at 149. And "[t]he [sentencing] court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion[,] . . . [i]t is not the role of an appellate court to substitute its judgment for

that of the sentencing judge." *Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406 (citation and quotation marks omitted). Accordingly, we turn to the factors considered by the sentencing court.

2. Mitigating Factors

Defendant's second group of arguments is based on how the Court weighed mitigating factors. Defendant asserts the sentencing court erred (1) in applying North Carolina General Statute Section 15A-1340.19B(c), which codified the *Miller* factors, by "ignoring uncontradicted, credible evidence as to" mitigating factors and (2) by relying on the jury's findings regarding additional mitigating factors at the 1998 trial.

North Carolina General Statute Section 15A-1340.19B(c) sets out nine mitigating factors, and North Carolina General Statute Section 15A-1340.19C requires the sentencing court to consider each factor if evidence is presented on that factor. *See* N.C. Gen. Stat. §§ 15A-1340.19B; 15A-1340.19C. Defendant presented evidence on all nine factors and raises arguments regarding the sentencing court's weighing as to each factor. Further, the sentencing court must also "expressly find[] that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated" to sentence a juvenile to life imprisonment without parole. *Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387.

a. Age at the Time of the Offense

The first factor the sentencing court considered was Defendant's "[a]ge at the time of the offense." N.C. Gen. Stat. § 15A-1340.19B(c)(1). The sentencing court found "Defendant was 17 years, 9 months, and 2 days old at the time of these murders." Compared to the defendants in *Miller*, who were 14 years old, the sentencing court assigned Defendant's age "little mitigating weight." *See Miller*, 567 U.S. at 466, 183 L. Ed. 2d at 414. Defendant does not challenge this finding as unsupported by the evidence. Instead, Defendant contends the sentencing court should have weighed this fact differently.

Defendant asserts this factor should have been assigned a greater weight, but "[i]t is not the role of an appellate court to substitute its judgment for that of the sentencing judge." *Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. Defendant contends that by assigning his age "little mitigating weight" the sentencing court essentially rewrote *Miller* and his age should have been accorded "substantial mitigating weight" instead. Defendant does not argue *why* the sentencing court's comparison to *Miller* was an abuse of discretion. Nor does Defendant argue there was no competent evidence to support this finding.

While Defendant was under 18 years old when he participated in killing the law enforcement officers, he was less than 3 months from his 18th birthday, which differs greatly from the 14-year-olds in *Miller*, where the factor weighed heavier. *See Miller*, 567 U.S. at 466, 183 L. Ed. 2d at 414. The sentencing court's reasoning for assigning "little mitigating weight" to Defendant's age is clear.

b. Immaturity

The sentencing court next considered Defendant's "[i]mmaturity" in 1997, at the time of the murders. *See* N.C. Gen. Stat. § 15A-1340.19B(c)(2). The sentencing court found Defendant "was immature at the time of the murders, but not in any way substantially different from other teens of his chronological age. The court finds this factor carries no significant mitigating weight." Again, Defendant does not contend this finding was unsupported by the evidence but argues the sentencing court ignored competent evidence, namely Dr. Hilkey's and Dr. Duquette's reports and testimony, when it assigned this factor "no significant mitigating weight." Defendant asserts the evidence presented could only support the conclusion that he was substantially less mature than his fellow 17-year-olds at the time of the murders.

When Dr. Duquette was asked "did Mr. Golphin have the emotional and behavioral maturity of a much younger boy?" Dr. Duquette answered "my read of that is yes. Without having examined Mr. Golphin at that age, *it's hard for me to know with absolute certainty* but yes, I think so." (Emphasis added.) Dr. Duquette also testified that "adolescents are notorious for, you know, some level of impulsive behavior and sensation seeking[,]" a hallmark of adolescence is an inability to consider the consequences of their actions, and "that [adolescents'] brains may not be fully ready to handle all of that responsibility" of adulthood.

Dr. Hilkey testified that Defendant likely had an underdeveloped frontal cortex when he was 17 years old, but Dr. Hilkey's assessment was based entirely on the records of other entities during Defendant's childhood and his own observations of Defendant 25 years after the murders. Additionally, Dr. Hilkey testified Defendant was aware the purpose of the assessment was for resentencing under *Miller* and that the results might have been skewed by Defendant's answers to the self-assessment portion of Dr. Hilkey's evaluation of Defendant if Defendant were untruthful. Additionally, while these assessments have "some degree of confidence[,]" estimating the impact a Defendant's answers may have on the assessment is still "not an exact science."

Ultimately, as to Defendant's maturity at 17 years old, the sentencing court needed to make a credibility determination as to the evidence presented at the resentencing hearing and "pass upon the credibility of certain evidence and . . . decide what, or how much, weight to assign to it." *Sims*, 260 N.C. App. at 675, 818 S.E.2d at 409 (citation, quotation marks, and original brackets omitted). As to that weight, once again, "[i]t is not the role of an appellate court to substitute its judgment for that of the sentencing judge." *Id.* at 671, 818 S.E.2d at 406. As noted by Dr. Hilkey, while Defendant's experts were highly-experienced and well-qualified, compensating for any potential skewing of results is "not an exact science," and there was competent evidence in the record to support a determination that Defendant's maturity was not significantly less than other 17-year-olds at the time of the murders. *See id.*

c. Ability to Appreciate the Risks and Consequences of the Conduct

The sentencing court then considered Defendant's "[a]bility to appreciate the risks and consequences of [his] conduct[,]" including the murders and circumstances leading to the murders. N.C. Gen. Stat. § 15A-1340.19B(c)(3). The sentencing court found Defendant had some diminished impulse control, but also that Defendant planned an armed robbery, including how he and his brother would escape. The sentencing court also found Defendant was aware that he was about to be arrested and decided to resist arrest, that he immediately fled the scene of the shooting, that he fled on foot after he wrecked the stolen car, and that Defendant tried to "avoid apprehension." The sentencing court found "Defendant's actions demonstrate an ability to appreciate the risks and consequences of his criminal conduct. Hence, the court finds this factor carries little mitigating weight."

Defendant asserts the evidence showed he, at most, only knew right from wrong. Defendant asserts his plan "was the plan of a child[,]" that "all but guaranteed he would be caught." Defendant asserts the expert testimony and reports can only support a conclusion that he was unable to appreciate the risks and consequences of his conduct, and that his poorly thought-out plan only further supports this conclusion.

Again, Defendant simply casts the evidence in the light most favorable to the outcome he desires and asserts only one reasonable conclusion could be drawn from the evidence. But there was competent evidence in the record showing Defendant could appreciate risk and consequences. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. The sentencing court took judicial notice of our Supreme Court's opinion in

State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), to which we defer for a full recitation of the evidence presented at Defendant's 1998 trial, including Defendant's fleeing from police and attempt to hide one of the officers' weapons before he was apprehended. *See Golphin*, 352 N.C. at 384-88, 533 S.E.2d at 186-87. A defendant trying to hide inculpatory evidence and fleeing from the scene of a shooting is competent evidence that supports a finding Defendant was able to appreciate the risks of his conduct. *See Sims*, 260 N.C. App. at 676, 818 S.E.2d at 409. Like the case in *Sims*, "[D]efendant essentially requests that this Court reweigh the evidence which the [sentencing] court was not required to find compelling[,]" which we will not do. *Id.* (citing *Golphin*, 352 N.C. at 484, 533 S.E.2d at 245).

d. Intellectual Capacity

Next, the sentencing court considered Defendant's "[i]ntellectual capacity" in 1997. N.C. Gen. Stat. § 15A-1340.19B(c)(4). The sentencing court found Defendant suffered from a learning disability, his academic performance improved while enrolled at the inpatient care facility, and that Defendant's IQ was "in the low average range of IQ scores." The sentencing court found Defendant's intellectual capacity was not "so diminished as to give it any mitigating weight."

Defendant again argues the sentencing court ignored his evidence, but the sentencing court's finding was supported by evidence presented by Defendant's own expert witnesses. Dr. Duquette's report states Defendant "has a well-documented history of learning disability[;]" Defendant's stay at the inpatient care facility "represented [his] most successful academic period of growth[;]" and Defendant's "cognitive testing showed low average intelligence (WISC-III: Full Scale IQ=84)." Dr. Hilkey's report states Defendant's academic records indicate his "[i]nformation processing speed is impaired, as is behavioral initiation. These deficits are consistent with his diagnosed learning disability[;]" Defendant improved during his two years at the inpatient facility; and Defendant "appeared to be functioning in an average to low average intellectual range based on interview behaviors" during the 2019 assessment. These reports are competent evidence to support the sentencing court's fourth finding that Defendant was in the low to average IQ range. Again, Defendant asks us to disturb the weight the sentencing court assigned to the evidence presented below, which this Court has repeatedly held is not our role. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

e. Prior Record

The sentencing court then considered Defendant's "[p]rior record" at 17 years old. N.C. Gen. Stat. § 15A-1340.19B(c)(5). The sentencing court found "Defendant's prior experience with the juvenile justice system is relatively sparse[,]" with "dispositions that apparently stemmed from conflicts with his mother, and he reportedly had received juvenile probation for offenses involving assault and resisting arrest." The sentencing court found this factor to have "slight mitigating value."

Once again, Defendant does not challenge the sentencing court's finding as to his prior record but claims it should have given it greater mitigating value. Defendant argues "[i]n light of the substantial and undisputed evidence of abuse and trauma that his mother inflicted, it is unreasonable to use" the offenses involving his mother "to undercut the *proper weight of this factor*." (Emphasis added.) But the sentencing court considered the evidence regarding Defendant's abuse as a child by his mother, made findings about this abuse, and considered this along with the other factors. We are not permitted to second-guess the sentencing court. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. Defendant apparently also "had received juvenile probation for offenses involving assault and resisting arrest" that did not stem from his mother, although these offenses were "relatively sparse." Defendant does not make any arguments regarding the offenses not involving his mother, and the sentencing court assigned some mitigating value based on Defendant's minimal criminal record. Again, Defendant asks this Court to weigh the evidence presented differently, and we will not. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

f. Mental Health

The sentencing court next considered Defendant's "[m]ental health" diagnoses and their impact on his behavior. N.C. Gen. Stat. § 15A-1340.19B(c)(6). The sentencing court found Defendant:

> was diagnosed with oppositional defiant disorder, attention deficit hyperactivity disorder (ADHD), and dysthymic disorder. Defendant at no time has exhibited any symptoms of psychosis. Defendant suffers from post-traumatic stress disorder as a result of severe childhood physical and emotional abuse. Though this abuse was tragic, Defendant's mental disorders did not impair his ability to appreciate the risks and consequences of his criminal conduct.

The sentencing court found Defendant's mental health diagnoses did not "carry any mitigating weight."

Defendant asserts the sentencing court erred because (1) "the court rewrote [this factor] by requiring mental health issues cause, or be linked to, the offense[;]" (2) the court merged this factor into the third factor, Defendant's ability to appreciate the risks and consequences of his conduct; and (3) the court's finding Defendant's "mental health conditions played no role in his crime is irreconcilable with the uncontradicted record."

The sentencing court did not rewrite North Carolina General Statute Section 15A-1340.19B(c)(6) by linking Defendant's mental health to the circumstances of the murders. North Carolina General Statute Section 15A-1340.19B(c)(6) lists "[m]ental health" as a factor, and the sentencing court is required to "consider any mitigating factors in determining whether, *based upon all the circumstances of the offense and the particular circumstances of the defendant*, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." N.C. Gen. Stat. § 15A-1340.19C(a) (emphasis added). Here, the sentencing court did not err by considering Defendant's mental health disorders in the context of "the circumstances of the offense and the particular circumstances of the defendant[.]" N.C. Gen. Stat. § 15A-1340.19C(a). North Carolina's sentencing framework does not require the sentencing court to consider Defendant's "mental health" in a vacuum, and the sentencing court must necessarily consider the effect of Defendant's mental health on his criminal conduct. *See generally* N.C. Gen. Stat. § 15A-1340.19C(a).

For similar reasons, the sentencing court did not merge this factor with North Carolina General Statute Section 15A-1340.19B(c)(3) regarding the ability to appreciate risk and consequences. *See* N.C. Gen. Stat. § 15A-1340.19B(c)(3). Although the sentencing court used similar language for two findings, the Sentencing Order shows the sentencing court independently considered both factors.

Finally, we again note, it is not our role to override the sentencing court's determinations on the credibility and weight to assign to Defendant's evidence. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. A sentencing court may assign no weight to a defendant's mental health diagnoses if the court does not find the "defendant's mental health at the time [of the offense] to be a mitigating factor[.]" *See id.* at 679, 818 S.E.2d at 411.

g. Familial or Peer Pressure Exerted upon Defendant

The sentencing court also considered the "[f]amilial or peer pressure exerted" by Defendant's brother on Defendant's actions leading to the 1997 murders. N.C. Gen. Stat. § 15A-1340.19B(c)(7). The sentencing court found (1) "Defendant's closest familial relationship was with his slightly older brother[;]" (2) Defendant, "by his own admission, primarily planned the robbery in South Carolina, and was driving the stolen vehicle at the time Trooper Lowry stopped it[;]" (3) the traffic stop that ultimately led to the death of the two law enforcement officers began escalating when Defendant refused to put his hands behind his back as ordered; and (4) "Defendant appears to have occupied the leadership role in his relationship with his brother and in the commission of their crimes on 23 September 1997." The sentencing court did "not find this factor to have any mitigating weight."

Defendant asserts this was error because the evidence indicates his brother was the initial aggressor on 23 September 1997, and "[i]t is undisputed that [Defendant's brother] escalated the traffic stop by shooting [Trooper] Lowry and [Deputy] Hathcock[.]" Defendant asserts his brother "significantly, if not fatally, wounded both officers before [Defendant] engaged in any violence."

Defendant fails to acknowledge the evidence supporting the sentencing court's finding: Defendant and his brother were closer than Defendant and his mother. Defendant admitted this plan was primarily his. But Defendant admitted that he did not comply with Trooper Lowry's orders to put his hands behind his back, and the situation began escalating after Defendant refused to follow Trooper Lowry's orders. Further, Defendant removed Trooper Lowry's service weapon from its holster and shot each officer again. There is competent evidence in the record to support this finding, and the sentencing court was within its discretion to assign this factor no mitigating weight. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

h. Likelihood that Defendant Would Benefit from Rehabilitation in Confinement

Next, the sentencing court considered the "[l]ikelihood that [Defendant] would benefit from rehabilitation in confinement." N.C. Gen. Stat. § 15A-1340.19B(c)(8). The sentencing court found Defendant committed "approximately two dozen infractions that resulted in disciplinary action[;]" Defendant spent "almost a decade in solitary confinement due to his participation in an escape plot[;]" "Defendant resisted a strip search in 2014 and threatened a correctional officer with a broom

handle[;]" and although his behavior had admittedly improved since 2014, there was "no credible evidence that Defendant has experienced any true rehabilitation and [the sentencing court] assign[ed] this factor no significant weight."

Defendant does not challenge these findings as unsupported by competent evidence but instead highlights the progress he contends he made between 2014 and the resentencing hearing in 2022. Defendant asserts that he has been reformed, and as a result, he is not among the class of juvenile homicide offenders "who cannot be rehabilitated[.]" *See Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387. Defendant argues that (1) *Kelliher* demands reversal of the life imprisonment without the possibility of parole sentences, and (2) this factor ignores "the undisputed evidence of [Defendant's] substantial growth and improvement while incarcerated."

Much of Defendant's argument is dedicated to showing how he has improved while incarcerated, and therefore, he contends he *must* be considered as capable of rehabilitation within the meaning of *Kelliher* and *Miller*. But Defendant's argument ignores both evidence unfavorable to him and the sentencing court's discretion in weighing the evidence. Defendant's disciplinary records documenting his infractions were admitted into evidence, and Dr. Duquette testified the criminality of men decreases as they mature in their "mid to late 20's[.]" While Defendant may be commended on the improvements he has made while incarcerated, every part of this finding of fact is supported by competent evidence. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

i. Any Other Mitigating Factor or Circumstance

Finally, the sentencing court considered additional mitigating factors, circumstances, and evidence under the catch-all factor in North Carolina General Statute Section 15A-1340.19B(c)(9). *See* N.C. Gen. Stat. § 15A-1340.19B(c)(9). The sentencing court noted that it "in particular, has considered the two mitigating circumstances found by the jury at the time of Defendant's original sentencing hearing: the age of the defendant at the time of the crimes, and the defendant's lack of parental involvement or support in treatment for psychological problems." The sentencing court found "these factors to carry no or little mitigating weight, and the court finds no other mitigating factor or circumstance."

Defendant argues the sentencing court abused its discretion by not giving more weight to what he considered the "catch-all" evidence – "Remorse, Childhood abuse and trauma, and Circumstances of the offense" – to which the sentencing court assigned no weight. Contrary to

Defendant's arguments, the sentencing court did consider Defendant's evidence of his remorse, childhood abuse, and the circumstances of the murders in making its findings.

As to remorse, the sentencing court weighed this evidence in factor 8, whether Defendant would benefit from rehabilitation. The sentencing court found Defendant's behavior had improved, but that "improved behavior often accompanies maturation." The sentencing court also found Defendant's behavior had improved only since 2014, shortly after the *Miller* decision, and before 2014 Defendant was frequently disciplined while incarcerated. Further, in the Sentencing Order, the sentencing court explicitly states "[t]he court has considered all the evidence presented" in its discussion of the catch-all mitigating factors. Along with hearing Defendant's apology, the sentencing court heard evidence that Defendant was made aware before his psychological assessments he could be resentenced under *Miller* to life imprisonment with the possibility of parole and that it was possible Defendant provided untruthful answers to the assessments to skew the results. The sentencing court also heard testimony from Trooper Lowry's widow, which is confirmed by the original trial transcript, that on the day of the original sentencing, "[Defendant] stood up and he looked at me and he said I was gonna tell you I was sorry but I'm not now."

As to Defendant's childhood abuse and trauma, the sentencing court found in factor 6 when considering his mental health issues, that "Defendant suffers from posttraumatic stress disorder as a result of severe childhood physical and emotional abuse. Though this abuse was tragic," the sentencing court determined it was ultimately not worth any mitigating weight.

Finally, regarding the circumstances of the murders, the sentencing court took "judicial notice of the factual summary of the crimes contained in *State v. Golphin*, 352 N.C. 364 (2000)[,]" and fully considered the factual circumstances of the murders. As to all three "catch-all" factors argued by Defendant, the sentencing court considered all Defendant's evidence, and we will not disrupt the sentencing court's weighing of the evidence and testimony on appeal. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

Defendant also asserts the sentencing court erred by "relying upon the jury's findings[,]" (capitalization altered), from his 1998 trial because the jury's sentencing findings were "based on outdated law–indeed, legal standards subsequently held unconstitutional–and a different evidentiary record." Defendant asserts the findings at issue here were made in an "irrelevant vacuum[,]" even though the jury's findings were mitigating

factors for purposes of sentencing Defendant, and the jury's findings could have done nothing but help him in 1998 and during resentencing.

This argument is somewhat baffling as Defendant apparently contends the sentencing court should *not* have considered that a jury had previously found there were circumstances outside of Defendant's control that supported a mitigated sentence. Defendant argues, even though the jury in 1998 agreed his age and mental health disorders weighed in favor of mitigation, these findings should be disregarded. In essence, Defendant argues because the findings were made too early, they must be disregarded, even though the findings were favorable to him.

Defendant's argument as to the jury is without merit. First, we note the sentencing court did not "rely" on the jury's previous findings without consideration of *Miller*. The sentencing court expressly *reconsidered* these findings, and the evidentiary support underlying each, *in light of Miller*. The sentencing court "analyzed Defendant's age and immaturity in numbered paragraphs (1) and (2) above, and the court analyzed Defendant's childhood psychological problems in paragraph number (6) above." For the same reasons we discuss above, there is competent evidence to support the sentencing court's findings as to Defendant's age, mental health disorders, and lack of treatment for those disorders, and we will not disrupt this finding. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

j. Incorrigibility

Finally, though not a factor under North Carolina General Statute Section 15A-1340.19B(c), under *Kelliher*, the sentencing court must also find "that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated[.]" *See Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387. Here, the sentencing court found, "Defendant's crimes demonstrate his permanent incorrigibility[.]" While Defendant contends *Kelliher* should control this case as it also involved a 17-year-old in a double murder, the distinguishing factor is that in *Kelliher*, the sentencing court found the defendant was "neither incorrigible nor irredeemable[,]" likely in part based on the fact that the defendant did not pull the trigger for either murder.[2] *Id.* at 559, 873 S.E.2d at 370. Here, after Defendant's brother shot both officers, Defendant shot them both, again. The officers were incapacitated after Defendant's brother first shot them, yet

2. While *Kelliher* involved two consecutive sentences of life with parole, "aggregated sentences may give rise to a *de facto* life without parole punishment[.]" *See State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366 (2022).

Defendant still removed Trooper Lowry's weapon from its holster and shot each officer again. Thus, *Kelliher* does not prevent the sentencing court from finding Defendant to be permanently incorrigible.

k. Summary

Ultimately, the Sentencing Order properly addressed each factor as required by North Carolina General Statute Section 15A-1340.19A and *Kelliher*. *See Kelliher*, 381 N.C. at 587, 873 S.E.2d at 387. Defendant did not challenge the sentencing court's findings of fact as unsupported by the evidence, and we do not reconsider the weight the sentencing court assigned to each finding. *See Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406. We acknowledge there is room for different views on the mitigating impact of each factor, but given the sentencing court's findings, the court did not abuse its discretion in sentencing Defendant to consecutive terms of life imprisonment without the possibility of parole. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *Sims*, 260 N.C. App. at 671, 818 S.E.2d at 406.

IV. Conclusion

The sentencing court did not abuse its discretion when reviewing the mitigating factors under North Carolina General Statute Section 15A-1340.19B(c), or when it concluded Defendant should be sentenced to life imprisonment without the possibility of parole rather than life imprisonment with the possibility of parole. The Sentencing Order is affirmed.

AFFIRMED.

Chief Judge DILLON and Judge STADING concur.

STATE OF NORTH CAROLINA
v.
PASTOR EDENILSON GUERRERO, DEFENDANT

No. COA23-377

Filed 6 February 2024

1. Search and Seizure—traffic stop—probable cause—positive drug dog sniff—heroin trafficking—legalization of hemp irrelevant

In a prosecution for trafficking in heroin by possession and by transportation, the trial court did not err in denying defendant's motion to suppress evidence seized from his car after an officer—based on a tip from a confidential informant—initiated a traffic stop and a police canine alerted to the presence of drugs inside the vehicle. Regardless of whether the informant's tip was reliable, the positive canine alert was sufficient in itself to establish probable cause for the search. Defendant's argument—that, since the legalization of hemp in North Carolina, a positive canine alert does not necessarily indicate the presence of illegal drugs—not only lacked merit, but it also lacked any application to the facts of the case where the substance that defendant was suspected of possessing (and that was eventually discovered inside his vehicle) was heroin, not marijuana or hemp.

2. Drugs—trafficking in heroin—by possession—by transportation—sentencing—no lesser included offense at issue

In a drug trafficking case, defendant's argument on appeal lacked merit where he contended that the trial court improperly sentenced him for trafficking in heroin and for possession of heroin when possession is a lesser included offense of trafficking. In actuality, the court sentenced defendant for one count of trafficking in heroin by possession and one count of trafficking in heroin by transportation, which was proper because the two types of trafficking were distinct offenses that defendant could be convicted of separately even where the same heroin formed the basis for each charge.

Appeal by defendant from judgments entered 31 August 2022 by Judge Nathan Hunt Gwyn III in Union County Superior Court. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Law Office of Mark L. Hayes, by Mark L. Hayes, for defendant-appellant.

FLOOD, Judge.

Pastor Guerrero ("Defendant") appeals his convictions for one count of trafficking in heroin by possession and one count of trafficking in heroin by transportation, arguing the trial court erred (A) in denying his motion to suppress because the information given by a confidential informant and the canine-alert were insufficient to establish probable cause, and (B) because possession is a lesser included offense of trafficking. After careful review, we conclude the canine-alert was sufficient in itself to establish probable cause, and the trial court did not err in sentencing Defendant for trafficking by transportation and possession.

I. Factual and Procedural Background

On 10 January 2022, Defendant was indicted for one count of trafficking in heroin by possession, one count of trafficking in heroin by transportation, and one count of maintaining a vehicle for controlled substances. Based on a traffic stop that resulted in officers discovering heroin in Defendant's vehicle, the indictment alleged Defendant knowingly possessed twenty-eight grams or more of heroin.

On 10 March 2022, Defendant filed a Motion to Suppress the evidence seized during the search of his vehicle, arguing, in relevant part, that information given by a confidential informant ("C.I.") and a positive drug alert by a canine were insufficient to establish probable cause.

On 13 through 15 July 2022, a suppression hearing was held on Defendant's motion. At the hearing, Ben Baker ("Baker"), a lieutenant with the Union County Sheriff's Office, testified that on 11 November 2020, he received a call from a C.I. regarding heroin trafficking in Union County, North Carolina. The C.I. described to Baker a man in a Honda vehicle who had recently been seen at a known heroin trafficker's residence in Union County. According to Baker, the C.I. specifically described a male wearing a reflective vest whom he had recently seen at a heroin trafficker's home, driving a "light – like a goldish maybe Honda Accord," leaving a Taco Bell in Indian Trail on Highway 74 East. The C.I. also provided Baker with the license plate number for the vehicle. When questioned about his history with this particular C.I., Baker testified that he had received reliable information from this C.I. over fifty times in the last seven years.

After receiving this report from the C.I., Baker disseminated the information to his team of nine narcotics investigators in Union County.

One officer who received the report was Union County Sherriff's Officer Jonathan Presson ("Presson"). Presson testified that he received information to "be on the look out for a silver in color Honda Accord occupied by a single Mexican driver wearing a reflective vest traveling eastbound on Highway 74 leaving the Taco Bell." The report further included information that the driver had "recently" been at a known heroin trafficker's house, but there was no timeline given as to when the driver had been at the trafficker's house. Based on the information Presson received, he believed there was a possibility the driver had illegal drugs in the car.

After receiving this information, Presson responded to the described area of Highway 74 and located a vehicle that matched the description relayed by Baker. Presson followed behind the vehicle and initiated a traffic stop after he observed the vehicle run a red light. When Presson approached the passenger side window of the vehicle, he observed a "single occupant, male Mexican driver" who was "wearing a neon orange shirt with reflective tape on the left and right shoulders."

While Presson was conducting the traffic stop, Detective Robillard ("Robillard"), a canine officer, reported to the scene with her canine, "Yago," and conducted a canine narcotics search around the vehicle. Yago was trained to detect cocaine, methamphetamine, heroin, marijuana, and MDMA, but could not differentiate between which substances he detected when he "alerted." Yago "alerted" to the vehicle's passenger side door by sitting, indicating that there was an odor of narcotics coming from the inside of the vehicle. The entirety of the canine search lasted less than one minute.

After Yago alerted, Presson and Robillard conducted a search of the vehicle and found a plastic bag that contained a brownish residue that Presson believed to be heroin. No other narcotics were found in the vehicle.

On 29 August 2022, the trial court denied Defendant's Motion to Suppress. In its order, the trial court made the following, relevant, conclusions of law:

> 14. That while Yago was trained to detect and alert to the presence of multiple controlled substances, including marijuana, there is no evidence before this [c]ourt to suggest that marijuana was located in . . . Defendant's vehicle. Accordingly, a canine's inability to differentiate between legal hemp and illegal marijuana does not appear to be relevant to this inquiry;

> 15. The evidence before this [c]ourt suggests the only controlled substance located in . . . Defendant's vehicle was believed to be heroin, one of the substances to which Yago alerts;
>
> 16. That the positive alert from Yago provided probable cause to search . . . Defendant's vehicle;
>
> 17. That Det. Presson had probable cause to believe . . . Defendant had drugs in his vehicle when he began searching Defendant's car based on the totality of the circumstances, including but not limited to:
>
> a. Yago's positive alert for the presence of narcotics on the suspect vehicle;
>
> b. The corroboration of shared information provided by a [C.I.] believed to be a reliable source of information;
>
> c. . . . Defendant's evasive actions in pulling his car off the road to an unsafe location, as well as Defendant's unusual nervousness under the circumstances.

A jury trial was held from 30 through 31 August 2022. At the conclusion of the evidence, the jury found Defendant guilty of all three counts in the indictment. Defendant was sentenced to two consecutive prison terms of 225 to 282 months for trafficking in heroin by possession and trafficking in heroin by transportation. The trial court entered an arrested judgment for the maintaining a vehicle charge. Defendant gave oral notice of appeal.

II. Jurisdiction

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

III. Analysis

Defendant presents two issues on appeal: whether the trial court erred in (A) denying Defendant's Motion to Suppress when it based probable cause on an unreliable canine sniff and a C.I. whose reliability could not be adequately challenged after the trial court denied Defendant's Motion to Compel the C.I.'s identity, and (B) sentencing Defendant for possession of heroin when possession is a lesser included offense of trafficking.

A. Motion to Suppress

[1] Defendant argues the trial court erred in denying his Motion to Suppress because it based probable cause on Yago's unreliable alert and a C.I. whose reliability could not be adequately challenged. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Unchallenged findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (citation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). Conclusions of law are reviewed *de novo*. *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009).

"[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 roadway . . . may take place." *State v. Highsmith*, 285 N.C. App. 198, 202, 877 S.E.2d 389, 392 (2022) (citation omitted). Whether probable cause exists "is a 'commonsense, practical question' that should be answered using a 'totality-of-the-circumstances approach.' " *State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 335 (2018) (citation omitted). "Probable cause does not mean actual and positive cause nor [does it] import absolute certainty." *State v. Johnson*, 288 N.C. App. 441, 456, 886 S.E.2d 620, 631 (2023) (citation omitted).

1. Reliability of Yago's Alert

First, Defendant argues Yago's alert did not establish probable cause because, since the legalization of hemp in North Carolina, a positive canine alert does not necessarily indicate the presence of illegal drugs; therefore, the alert here did not provide sufficiently reliable information that drugs were present. This argument is unsupported by the facts of this case and the jurisprudence of this State.

"[A] positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts." *Degraphenreed*, 261 N.C. App. at 246, 820 S.E.2d at 338 (alteration in original) (citation omitted) (concluding a canine's positive alert for illegal drugs was "sufficient to support a reasonable belief that the automobile carrie[d] contraband materials"). The legalization of hemp does

not alter this well-established general principle. *See State v. Walters*, 286 N.C. App. 746, 758, 881 S.E.2d 730, 739 (2022) ("The legalization of hemp has no bearing on the continued illegality of methamphetamine, and the Fourth Amendment does not protect against the discovery of contraband, detectable by [a] drug-sniffing dog . . . ."). Moreover, "we have repeatedly applied precedent established before the legalization of hemp, even while acknowledging the difficulties in distinguishing hemp and marijuana *in situ*." *Id.* at 758, 881 S.E.2d at 739.

In this case, the State and Defendant place heavy emphasis on why our analyses in *State v. Teague*, 286 N.C. App. 160, 179, 879 S.E.2d 881, 896 (2022), *disc. rev. denied*, 891 S.E.2d 281 (N.C. 2023) (reasoning the legalization of hemp does not alter the principle that the smell of marijuana is sufficient to show probable cause), and *Johnson*, 288 N.C. App. at 457–58, 886 S.E.2d at 632–33 (declining to reach the issue of whether the smell of marijuana alone is sufficient to give rise to probable cause for the issuance of a search warrant while acknowledging the Industrial Hemp Act does not modify the State's burden of proof), do or do not apply to the facts of this case. Neither party cited to *Walters*, which we conclude is dispositive. *See Walters*, 286 N.C. App. at 758, 881 S.E.2d at 739 (concluding the defendant's argument that the legalization of hemp altered a canine's reliability was "simply not presented by the facts of [the] case, where . . . methamphetamine and hemp were in the same bag, and the canine was trained to detect both substances").

Here, when Presson conducted the traffic stop of Defendant, he believed, based on the C.I.'s information, that Defendant may have had heroin in his vehicle. Neither Presson nor any of the responding officers smelled marijuana on Defendant nor had any suspicions he may have had marijuana. After Yago alerted to the presence of narcotics, Presson and Robillard discovered heroin in Defendant's vehicle, not marijuana or hemp. Not only has our case law made it clear the legalization of hemp has no bearing on our Fourth Amendment jurisprudence, but the argument also does not comport with the facts of this case. *See Teague*, 286 N.C. App. at 179, 879 S.E.2d at 896 ("Assuming, *arguendo*, hemp and marijuana smell 'identical,' then the presence of hemp does not make all police probable cause searches based on the odor unreasonable.") (citation omitted); *see also Johnson*, 288 N.C. App. at 457–58, 886 S.E.2d at 632 ("The smell of marijuana 'alone . . . supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because *only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause*.' ") (citation omitted).

The principle that the legalization of hemp has no bearing on our Fourth Amendment jurisprudence is even more clear in this case than it was in *Walters*, where officers discovered both illegal methamphetamine and legal hemp. In this case, there was no marijuana or hemp discovered on Defendant's person, nor did officers have any suspicions that it would be.

Accordingly, Yago's alert was reliable and gave law enforcement officers the required probable cause to search Defendant's vehicle for illegal contraband. *See Degraphenreed*, 261 N.C. App. at 246, 820 S.E.2d at 338.

2. Certification of Yago

Second, Defendant argues Yago's alert was unreliable because there was insufficient evidence of Yago's training, experience, and certifications. This argument, however, was not preserved for our review. In his reply brief, Defendant asserts that this issue was preserved because he "vigorously" pursued this line of questioning at the hearing when he asked Robillard extensive questions about Yago's training and certification. Despite Defendant's argument, questioning witnesses is insufficient to comply with our preservation rules.

"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 . . . ." N.C. R. App. P. 10(a)(1). "This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount . . . .' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation omitted).

Defendant did not argue to the trial court that Yago's alert was unreliable because of her certification and training. He did not raise this argument in his written Motion to Suppress nor did he raise it in front of the trial court at the hearing. While the suppression order details Yago's training, the order specifically notes that Defendant did not challenge "any aspect of Yago's training[.]" Moreover, Defendant challenges the use of the term "bona fide" organization as insufficient to establish Yago's credentials; however, Defendant did not object to any of the State's questioning or Robillard's testimony that Yago was certified by a "bonda fide" organization.

Accordingly, this issue was not preserved, and we decline to reach it on the merits. *See Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5.

3. Identity of the Confidential Informant

Third, Defendant argues it would be a violation of his due process rights if this Court considered the C.I.'s information in its probable cause analysis because Defendant did not have the information he needed to attack the credibility of the C.I. evidence. Further, the same standard applied to motions to compel a C.I.'s identity cannot be applied to whether the C.I.'s identity should be released for purposes of the motion to suppress. Given that Yago's alert alone was sufficient to establish probable cause, however, we do not need to reach this argument.

B. Possession as a Lesser Included Offense

[2] Finally, Defendant argues the trial court erred in sentencing him for possession of heroin and trafficking in heroin when possession is a lesser included offense of trafficking. This argument is likewise unsupported by the facts of this case and our Supreme Court's jurisprudence.

Defendant was sentenced for trafficking in heroin *by* transportation and possession, not trafficking *and* possession. Moreover, "possessing, manufacturing, and transporting heroin are separate and distinct offenses[,]" and a defendant may be "convicted and punished separately" for trafficking in heroin by possession and trafficking in heroin by transporting "even when the contraband material in each separate offense is the same . . . ." *State v. Perry*, 316 N.C. 87, 103–04, 340 S.E.2d 450, 461 (1986). While Defendant seemingly challenges the validity of this holding, it is not our prerogative to ignore Supreme Court precedent. We further decline Defendant's "challenge" to devise a hypothetical where a defendant transports drugs without possessing drugs.

The trial court, therefore, did not err in sentencing Defendant for each count.

IV. Conclusion

We conclude the trial court did not err in denying Defendant's Motion to Suppress because Yago's alert established the prerequisite probable cause to conduct the search. We further conclude the trial court did not err in sentencing Defendant for trafficking in heroin by transportation and trafficking in heroin by possession.

NO ERROR.

Judges WOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
JULIE ANN MINCEY

No. COA23-447

Filed 6 February 2024

1. Appeal and Error—guilty plea to habitual felon status—statutory right of appeal—statutory mandate—factual basis for plea

After a criminal defendant was convicted of embezzlement and obtaining property by false pretenses and then pleaded guilty to attaining habitual felon status, defendant had a statutory right of appeal from the entry of her guilty plea under N.C.G.S. § 15A-1444(a2), since she disputed her status as a habitual felon and was therefore arguing pursuant to subsection (a2)(3) that her term of imprisonment was unauthorized by statute. Furthermore, defendant's right to appeal was automatically preserved where she argued that the trial court acted contrary to the statutory mandate in N.C.G.S. § 15A-1022(c), which required the court to determine whether a factual basis existed for defendant's guilty plea.

2. Sentencing—habitual felon status—underlying felony reclassified as misdemeanor—factual basis for guilty plea

After a jury convicted defendant of embezzlement and obtaining property by false pretenses, the trial court properly determined pursuant to N.C.G.S. § 15A-1022(c) that a factual basis existed for defendant's guilty plea to attaining habitual felon status where, even though one of defendant's underlying felonies (committed in Colorado) used to determine whether she had attained habitual felon status was later reclassified as a misdemeanor under Colorado law, the evidence presented during the colloquy (held pursuant to section 15A-1022(c)) showed that the crime constituted a felony at the time that defendant committed it.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgment entered 8 August 2022 by Judge John E. Nobles, Jr. in Craven County Superior Court. Heard in the Court of Appeals 14 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Llogan R. Walters, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant.

WOOD, Judge.

On 8 August 2022, a jury convicted Julie Ann Mincey ("Defendant") of nine counts of embezzlement and one count of obtaining property by false pretenses. Defendant then pleaded guilty to attaining habitual felon status. The same day, the trial court sentenced her to forty-four to sixty-five months imprisonment, and Defendant gave oral notice of appeal in open court. Defendant argues the trial court erred in determining a factual basis exists for her guilty plea because the state of Colorado now classifies an underlying felony for which she was convicted as a misdemeanor. We hold the trial court complied with N.C. Gen. Stat. § 15A-1022(c) and therefore committed no error.

I. Factual and Procedural History

On 3 February 2020, 3 August 2020, and 1 February 2021, a grand jury indicted Defendant for sixteen felony offenses: fourteen counts of embezzlement, two counts of obtaining property by false pretenses, and also for attaining habitual felon status. The victims were patrons of the travel agency for which Defendant worked.

Defendant's trial was held 1-8 August 2022. Of the sixteen charged offenses, five were dismissed, and eleven ultimately reached the jury, specifically ten counts of embezzlement and one count of obtaining property by false pretenses. The jury found Defendant not guilty of one count of embezzlement but guilty of the remaining ten offenses. Defendant then pleaded guilty to attaining habitual felon status.

The trial court consolidated the offenses and entered one judgment, imposing a sentence in the mitigated range of forty-four to sixty-five months imprisonment and ordering restitution of $53,402.58. Defendant gave oral notice of appeal in open court. All other facts are provided as necessary in our analysis.

II. Analysis

Defendant argues the trial court failed to comply with N.C. Gen. Stat. § 15A-1022(c), which states:

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c) (2022). Specifically, Defendant argues there was no factual basis for the guilty plea because the second underlying felony used to determine Defendant had attained habitual felon status is no longer a felony. Defendant contends this Court should consider whether a defendant's underlying felonies are still felonies at the time a defendant committed the substantive offense for which he or she is currently being sentenced.

The habitual felon indictment alleged:

> UNDERLYING FELONY NUMBER 2:
>
> On April 22, 1991, in case number 90 CR 1082, in the District Court of Denver County, Colorado, the Defendant, then known as Julie Ann Mincey was convicted of Second Degree Forgery, a Class 5 felony, in violation of Colorado Statute 18-5-103; the aforesaid offense occurred on or about March 15, 1990, and was committed against the State of Colorado.

The trial court engaged in the colloquy required under N.C. Gen. Stat. § 15A-1022(c). Specifically, the State repeated to the trial court the information contained in the indictment regarding the second underlying felony conviction. The State then admitted into evidence "copies of the statutes from Colorado . . . in effect on the dates of those convictions, as well as certified records of [Defendant's] prior convictions." Specifically, the State admitted "State's Sentencing Exhibit Number 3 [which] is the statute from 1991 which is the subject of the second conviction in the defendant's habitual felon indictment."

Defendant's counsel did not object to the factual basis and incorrectly stated that second-degree forgery is still a felony in Colorado:

> THE COURT: All right. All right. Any objection to this being made part of the record?
>
> [DEFENDANT'S COUNSEL]: No, your Honor. I think [the State] and I probably did the same research and we would agree that the statutes under which [Defendant] was convicted, three predicate felonies, were all designated as felonies under Colorado law at the time and still designated as felonies. There are six levels of felonies in Colorado, Judge, these follow within those ranges."

After Defendant's conviction, she determined Colorado had reclassified second-degree forgery as a misdemeanor subsequent to her 1991 conviction. Therefore, Defendant argues, the appropriate remedy is to vacate the trial court's judgment and remand for resentencing, absent the habitual felon sentencing enhancement.

[1] Before reaching the merits of Defendant's argument, we first must determine whether this Court has jurisdiction to address Defendant's appeal. Defendant appeals from the trial court's judgment which is based on her guilty plea. N.C. Gen. Stat. § 15A-1444(a2) provides a limited right of appeal from a defendant's entry of a guilty plea:

> A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> > (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
> >
> > (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
> >
> > (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2) (2022). "Being an habitual felon is not a crime but rather a status which subjects the individual who is subsequently convicted of a crime to increased punishment for that crime." *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 710 (1996). Because Defendant appeals the trial court's judgment based on her purportedly

deficient plea to attaining habitual felon status and therefore challenges whether her term of imprisonment was authorized by statute, she has a right of appeal pursuant to N.C. Gen. Stat. § 15A-1444(a2)(3). Therefore, this Court need not grant Defendant's petition for a *writ of certiorari* because she has a statutory right of appeal. Defendant's petition for *writ of certiorari* is dismissed as moot.

This Court has held "the requirements for accepting a defendant's stipulation to habitual felon status are statutory mandates." *State v. Williamson*, 272 N.C. App. 204, 210, 845 S.E.2d 876, 881 (2020). "[I]t is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Chandler*, 376 N.C. 361, 366, 851 S.E.2d 874, 878 (2020). "[A] trial court's determination as to whether a sufficient factual basis exists to support a defendant's guilty plea is a conclusion of law reviewable de novo on appeal." *State v. Robinson*, 381 N.C. 207, 217, 872 S.E.2d 28, 35 (2022). Therefore, we consider whether the trial court complied with N.C. Gen. Stat. § 15A-1022(c)'s statutory mandate requiring it to determine whether there was a factual basis for Defendant's guilty plea.

[2] N.C. Gen. Stat. § 14-7.1(a) states, "Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon and may be charged as a status offender pursuant to this Article." N.C. Gen. Stat. § 14-7.1(a) (2022). N.C. Gen. Stat. § 14-7.1(b), in turn, provides:

> For the purpose of this Article, a felony offense is defined *to include* all of the following:
>
> (1) An offense that is a felony under the laws of this State.
>
> (2) An offense that is a felony under the laws of another state or sovereign that is substantially similar to an offense that is a felony in North Carolina, and to which a plea of guilty was entered, or a conviction was returned regardless of the sentence actually imposed.
>
> (3) An offense that is a crime under the laws of another state or sovereign that does not classify any crimes as felonies if all of the following apply:
>
> a. The offense is substantially similar to an offense that is a felony in North Carolina.

> b. The offense may be punishable by imprisonment for more than a year in state prison.
>
> c. A plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed.
>
> (4) An offense that is a felony under federal law. Provided, however, that federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors shall not be considered felonies for the purposes of this Article.

N.C. Gen. Stat. § 14-7.1(b). (Emphasis added). This Court has held, "*Any person* who has been convicted of or pled guilty to three felony offenses is declared by statute to be an habitual felon." *State v. Ross*, 221 N.C. App. 185, 188, 727 S.E.2d 370, 373 (2012) (emphasis added).

Here, the trial court conducted the necessary colloquy pursuant to N.C. Gen. Stat. § 15A-1022(c) to determine whether there was a factual basis for Defendant's guilty plea to attaining habitual felon status. The State entered the Colorado statutes to show Defendant's underlying crimes constituted felonies at the time she committed them. Specifically, in 1991, Colorado classified second-degree forgery as a "class 5 felony." Colo. Rev. Stat. § 18-5-103(2) (1991). Therefore, second-degree forgery was a felony at the time of Defendant's April 1991 conviction. Accordingly, we hold the trial court did not err in determining there was a factual basis for Defendant's guilty plea.

It is true that in 1993, Colorado repealed Colo. Rev. Stat.§ 18-5-103 and in its place enacted Colo. Rev. Stat. § 18-5-104 (1993) which classified second-degree forgery as a "class 1 misdemeanor." Colo. Rev. Stat. § 18-5-104(2) (1993); 1993 Colo. Sess. Laws 324 (West). Nonetheless, we hold that pursuant to N.C. Gen. Stat. § 15A-1022(c), there was sufficient evidence for the trial court to properly determine a factual basis existed showing Defendant had committed three prior felonies, including the second-degree forgery felony. Both N.C. Gen. Stat. § 14-7.1(a) and this Court's decision in *Ross* make clear that *any person* who is convicted of or pleads guilty to three felony offenses attains habitual felon status. Moreover, the definition of "felony offense" in N.C. Gen. Stat. § 14-7.1(b) *includes*, but by the language of the statute is not limited to, the examples listed in that subsection. We hold this application of the habitual felon statute is compatible with the "primary goals" of a recidivist statute:

> to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious

> enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

State v. Hall, 174 N.C. App. 353, 354, 620 S.E.2d 723, 725 (2005) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284, 100 S. Ct. 1133, 1144–45 63 L. Ed. 2d 382, 397 (1980)); *see also State v. Kirkpatrick*, 345 N.C. 451, 454, 480 S.E.2d 400, 402 (1997).

Finally, Defendant offers two examples which she argues provide analogous support for the proposition that this Court should consider whether an underlying predicate felony is classified as a felony at the time a defendant commits the substantive offense for which he or she is being sentenced. First, Defendant argues we should read *State v. Mason* to mean that this Court considers reclassifications of felonies rather than prior classifications for purposes of establishing violent habitual offender status under N.C. Gen. Stat. § 14-7.7 (2022). 126 N.C. App. 318, 484 S.E.2d 818, 821 (1997). In *Mason*, however, this Court merely rejected the argument that using reclassified statuses of felonies (from H and F to reclassification as Class E felonies) violated the defendant's protection against *ex post facto* laws. *Id.* at 323–24, 484 S.E.2d at 821.

Second, Defendant argues that for purposes of calculating a defendant's prior record level, the statute specifically provides: "In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." N.C. Gen. Stat. § 15A-1340.14(c) (2014). However, the legislature is entitled to include such a requirement in one part of this State's statutes while choosing not to include it in another part. For purposes of the habitual felon statute in N.C. Gen. Stat. § 14-7.1, there is no statutory requirement to consider whether an underlying crime is a felony at the time of a defendant's substantive offense. We decline to read such a requirement into the statute.

Because the trial court complied with N.C. Gen. Stat. § 15A-1022(c) in accepting Defendant's guilty plea, the trial court committed no error. Therefore, the judgments of the trial court are affirmed.

AFFIRMED.

Judge THOMPSON concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's opinion. Unlike the majority, I believe defendant has no right of appeal under N.C.G.S. § 15A-1444(a2). *See State v. Young*, 120 N.C. App. 456, 459 (1995) ("Having pleaded guilty to being an habitual felon, and not having moved in the trial court to withdraw his guilty plea, defendant is not entitled to an appeal of right from the trial court's ruling."). However, this Court has allowed petitions for writ of certiorari "in order to permit review of appeals concerning the adequacy of the factual bases underlying defendants' guilty pleas." *State v. Robinson*, 275 N.C. App. 330, 333 n. 2 (2020) (citing *State v. Keller*, 198 N.C. App. 639, 641–42 (2009)). Accordingly, I would allow the petition.

Also in my view, the majority erroneously concludes that courts should review prior offenses based on their classification at the time the prior offense was committed. Our law indicates otherwise. Statute governing habitual felon status defines a felony offense as

> (1) An offense that *is* a felony under the laws of this State.
>
> (2) An offense that *is* a felony under the laws of another state or sovereign that is substantially similar to an offense that is a felony in North Carolina, and to which a plea of guilty was entered, or a conviction was returned regardless of the sentence actually imposed.
>
> (3) An offense that *is* a crime under the laws of another state or sovereign that does not classify any crimes as felonies if all of the following apply:
>
> a. The offense is substantially similar to an offense that is a felony in North Carolina.
>
> b. The offense may be punishable by imprisonment for more than a year in state prison.
>
> c. A plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed.

N.C.G.S. § 14-7.1(b) (emphasis added). "It is well-established that the ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context

and approved usage of the language." *State v. Fuller*, 376 N.C. 862, 867 (2021) (cleaned up). The statute's use of the present tense "is," as emphasized above, indicates the legislature's intent that prior offenses must be considered felonies at the time of the offense for which the defendant is being sentenced for purposes of § 14-7.1.

Further, "we may look to other similar statutes to help define terms." *Id.* at 868 (citing *In re Banks*, 295 N.C. 236, 239–40 (1978)); *see also In re Miller*, 243 N.C. 509, 514 (1956) ("[T]here is a presumption against inconsistency, and when there are two or more statutes on the same subject, in the absence of an express repealing clause, they are to be harmonized and every part allowed significance, if it can be done by fair and reasonable interpretation."). Our statute regarding prior record levels for felony sentencing states that "[i]n determining the prior record level, the classification of a prior offense is the classification assigned to that offense *at the time the offense for which the offender is being sentenced is committed.*" N.C.G.S. § 15A-1340.14(c) (emphasis added). While the majority correctly identifies the authority of the legislature to include a provision within one statute and not another, this explicit clarification within a similar statute from our legislature, coupled with the present-tense language of the habitual felon statute, clearly indicates that courts are meant to examine the classifications of prior offenses at the time of the offense the defendant is being sentenced, not at the time the prior offense was committed.

Our case law also supports this interpretation. In *State v. Mason*, the trial court treated a defendant's crimes as Class E felonies for purposes of establishing violent habitual offender status even though they were Class H and F felonies at the time of their commission. 126 N.C. App. 318, 324 (1997). The majority is correct that the Court in *Mason* concluded that considering reclassifications rather than the classification at the time of the offense for violent habitual felon status did not violate *ex post facto* laws. *Id.* However, this Court has held that when the legislature has promoted an offense to a higher class, the amended class is used to determine violent habitual felon status. *See State v. Wolfe*, 157 N.C. App. 22, 37 (2003); *see also State v. Covington*, No. COA06-1575, 2007 WL 2827983 at *4 (N.C. App. Oct. 2, 2007) (holding that where a defendant's previous crimes were Class H felonies at the time of his convictions but had been reclassified by the legislature as Class A through E felonies by the time of his present conviction, the reclassified convictions "may be used to achieve violent habitual felon status.").

In *State v. Wolfe*, a defendant argued that one of the felonies the State presented did not qualify to achieve violent habitual felon status.

157 N.C. App. at 37. Specifically, a previous voluntary manslaughter conviction was a Class F felony when the defendant was convicted in 1987, but it was a Class D felony at the time of his trial for the substantive offense. *Id.* The Court rejected his argument that the State could not "elevate an offense classification from its previous class for purposes of satisfying violent habitual felon status." *Id.* To allow trial courts to enhance punishment under *Mason* and *Wolfe* but instruct them otherwise when the reclassification potentially reduces punishment, as is the case *sub judice*, would be inconsistent and contrary to principles of justice.

In contrast, this Court held that a defendant's prior conviction for grand larceny, though it no longer constituted a felony, served as a valid predicate offense for the defendant to attain habitual felon status. *State v. Hefner*, 289 N.C. App. 223, 230 (2023). However, a statutory amendment after the defendant's conviction increasing the amount required to establish grand larceny included a savings clause that provided the amendment "does not affect liability incurred under the previous version of the statute." *Id.* Additionally, the statutory amendment did not change the classification of grand larceny as a felony. *Id.*

This case is distinguishable from *Hefner*. While the offense in *Hefner* remained a felony after the amendment, the 1993 amendment to the Colorado second-degree forgery statute at issue here reduced the classification of the offense from a Class 5 felony to a Class 1 misdemeanor. Colo. Rev. Stat. § 18-5-104 (2022) (classifying second-degree forgery as a Class 2 misdemeanor); *see also* 1993 Colo. Legis. Serv. H.B. 93-1302 (West). Even more so, the 1993 amendment contained no savings clause maintaining liability under previous versions of the statute. The facts that permitted the outcome in *Hefner* are not present in this case, and *Hefner* does not control here. Accordingly, the trial court should consider the prior conviction's classification at the time of sentencing for the substantive offense. Therefore, I would remand this matter for resentencing.

STATE OF NORTH CAROLINA
v.
JAMES DIA'SHAWN ROBINSON, DEFENDANT

No. COA23-365

Filed 6 February 2024

1. Appeal and Error—preservation of issues—criminal case—objections to evidence—not raised at trial—not raised in appellate brief—plain error not argued

In a prosecution for first-degree murder and discharging a weapon into an occupied vehicle causing serious bodily injury, defendant failed to preserve for appellate review his objections to the admission of text messages relating to his motive for trying to rob the victims before shooting them. First, defendant could not raise his constitutional challenges to the evidence on appeal where he did not first raise them at trial. Second, where defendant's appellate brief did not mention the objections defendant did raise at trial, those objections were deemed abandoned on appeal. Finally, defendant could not argue for the first time on appeal that the text messages were irrelevant or unfairly prejudicial, because he did not specifically and distinctly contend in his brief that plain error review applied to those arguments.

2. Constitutional Law—fair-cross-section claim—underrepresentation of Black jurors in jury pool—systematic exclusion—sufficiency of evidence

In a prosecution for first-degree murder and discharging a weapon into an occupied vehicle causing serious bodily injury, the trial court did not err in denying defendant's fair-cross-section claim, in which defendant—a Black male—argued that his Sixth Amendment right to an impartial jury was violated where only eight of the fifty members of the jury pool for his trial were also Black. Although defendant offered statistical evidence tending to show Black underrepresentation in the jury pool, this evidence, standing alone, was insufficient to show that such underrepresentation was due to systematic exclusion of Black jurors in the jury selection process.

Appeal by Defendant from judgment entered 27 May 2022 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 4 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Heidi M. Williams, for the State.

Marilyn G. Ozer, for Defendant-Appellant.

CARPENTER, Judge.

James Dia'Shawn Robinson ("Defendant") appeals from judgment entered after a jury found him guilty of two counts of first-degree murder and four counts of discharging a weapon into an occupied vehicle causing serious bodily injury. On appeal, Defendant argues the trial court erred by: (1) allowing certain text messages into evidence; and (2) denying his challenge to the selection of the jury pool. After careful review, we dismiss Defendant's first argument and disagree with his second argument. Accordingly, we discern no error.

I. Factual & Procedural Background

On 12 August 2019, a Wake County grand jury indicted Defendant for two counts of first-degree murder. On 24 August 2021, a Wake County grand jury indicted Defendant for four counts of discharging a weapon into an occupied vehicle causing serious bodily injury. Beginning on 13 May 2022, the State tried Defendant in Wake County Superior Court.

During jury selection, Defendant raised a fair-cross-section challenge under the Sixth Amendment, arguing that members of Defendant's race were underrepresented in the jury pool. Of the fifty-member jury pool, thirty-nine were White, eight were Black, and three were Hispanic. Defendant is a Black male.

Defendant offered statistical evidence tending to show Black underrepresentation in the jury pool for his trial, but Defendant admitted that he lacked evidence "that the underrepresentation was due to systematic exclusion of the group in the jury selection process." The trial court denied Defendant's challenge to the jury pool.

At trial, evidence relevant to this appeal tended to show the following. On 16 July 2019, Ryan Veach, an admitted drug dealer, drove Defendant to the parking lot of a skating rink in Raleigh, North Carolina to meet Brendan Hurley and Anthony McCall. During the encounter, Defendant shot and killed Hurley and McCall. Defendant also sustained three gunshot wounds. Defendant and Veach disposed of the bodies and other evidence in various locations around Raleigh.

In order to prove that Defendant and Veach met with Hurley and McCall in order to rob Hurley and McCall, the State sought to introduce

text messages between Veach and a third party. The third party was one of Veach's drug customers, to whom Veach allegedly owed money. The challenged text messages concerned Veach's alleged scam of the third party, which was the alleged reason why Veach owed money to the third party. The State offered the text messages to show that Defendant, through Veach, was motivated to rob Hurley and McCall because Veach owed money to the third party.

Defendant objected to the introduction of the text messages because the messages were hearsay, were not illustrative, and lacked a proper foundation. The trial court ruled that only Veach's messages, not the third party's, could be admitted, and the State agreed to allow Veach to read the messages aloud, rather than publishing the document to the jury.

On 27 May 2022, the jury found Defendant guilty of two counts of first-degree murder and four counts of discharging a weapon into an occupied vehicle causing serious bodily injury. The trial court sentenced Defendant to two consecutive terms of life imprisonment without parole for each first-degree murder count. The trial court consolidated the four counts of discharging a weapon into an occupied vehicle causing serious bodily injury and sentenced Defendant to the between sixty and eight-four months of imprisonment, to run concurrently with his life sentences. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

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

III. Issues

The issues on appeal are whether the trial court erred by: (1) allowing Veach's text messages into evidence; and (2) denying Defendant's challenge to the selection of the jury pool.

IV. Analysis

A. Text Messages

[1] First, Defendant challenges the admission of Veach's text messages on several grounds. Defendant argues that: (1) they are irrelevant; (2) they are unfairly prejudicial; (3) they violate the Confrontation Clause; and (4) they violate Defendant's "right to a fair trial." After careful review, we dismiss Defendant's arguments because they are not properly before this Court.

"In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it

to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)); *State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)) ("The specific grounds for objection raised before the trial court must be the theory argued on appeal because 'the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court].' ").

This rule applies equally to unraised constitutional issues. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982); *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

The North Carolina Supreme Court, however, "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citing *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)).

But when an appellant is limited to plain-error review and fails to make a plain-error argument, we will "only address the grounds under which the contested admission of evidence was objected, as any other grounds have been waived." *Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680; *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) (citing N.C. R. App. P. 10(a)(4)) (holding that an appellant "waived appellate review of those arguments by failing specifically and distinctly to argue plain error"); N.C. R. App. P. 10(a)(4) (allowing certain unpreserved arguments in criminal appeals only "when the judicial action questioned is specifically and distinctly contended to amount to plain error").

Furthermore, "[i]t is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal." *Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) (citing N.C. R. App. P. 28(b)(6)); *State v. Evans*, 251 N.C. App. 610, 625, 795 S.E.2d 444, 455 (2017) (deeming an argument abandoned because the appellant did "not set forth any legal argument or citation to authority").

At trial, Defendant objected to Veach's text messages because they were hearsay, were not illustrative, and lacked a proper foundation. But on appeal, Defendant fails to argue about hearsay, illustration, or foundation. Thus, any such arguments are now abandoned. *See Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394.

Rather than pressing his trial-court arguments, Defendant now attempts to "swap horses" on appeal. *See Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680. And because Veach's text messages were admitted evidence in a criminal trial, Defendant may press a different argument—so long as he argues plain error. *See Gregory*, 342 N.C. at 584, 467 S.E.2d at 31; *Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

Defendant, however, has made no plain-error argument on appeal. Defendant failed to explain the plain-error standard in his brief; indeed, Defendant never even mentioned "plain error" in his brief. In other words, Defendant has failed to "specifically and distinctly . . . argue plain error." *See Frye*, 341 N.C. at 496, 461 S.E.2d at 677. Therefore, Defendant waived his unpreserved arguments and is limited to "the grounds under which the contested admission of evidence was objected." *See Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680; *Frye*, 341 N.C. at 496, 461 S.E.2d at 677.

But as we detailed above, Defendant failed to make any hearsay, illustration, or foundation arguments on appeal. With those arguments also abandoned, Defendant has no horse left. *See Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680. Therefore, we dismiss Defendant's arguments concerning Veach's text messages because they are not properly before this Court. *See Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394; *Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

B. Fair Cross Section Challenge

[2] In his final argument, Defendant asserts that his right to an impartial jury was violated, and the trial court erred in denying his fair-cross-section claim. After careful review, we disagree.

"A criminal defendant has a constitutional right to be tried by a jury of his or her peers." *State v. Blakeney*, 352 N.C. 287, 296, 531 S.E.2d 799, 808 (2000) (citing U.S. Const. amend. VI; N.C. Const. art. I, §§ 24, 26). "This constitutional guarantee assures that members of a defendant's 'own race have not been systematically and arbitrarily excluded from the jury pool which is to decide [his] guilt or innocence.' " *State v. Bowman*, 349 N.C. 459, 467, 509 S.E.2d 428, 434 (1998) (quoting *State v. McNeill*, 326 N.C. 712, 718, 392 S.E.2d 78, 81 (1990)).

This constitutional right is known as the "fair cross section requirement," and it has three elements:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not

> fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579, 587 (1979).

Concerning the third element, "statistical evidence indicating a disparity between the number of minorities serving on a jury in relation to the number of minorities in the community, standing alone, is insufficient to prove that the underrepresentation is a product of systematic exclusion of the minority group." *State v. Corpening*, 129 N.C. App. 60, 64, 497 S.E.2d 303, 306 (1998) (citing *State v. Harbison*, 293 N.C. 474, 481, 238 S.E.2d 449, 453 (1977)).

Here, Defendant only offers statistical evidence tending to show disparities to prove systematic exclusion. Indeed, at trial, Defendant admitted that he "lacked the third factor: that the underrepresentation was due to systematic exclusion of the group in the jury selection process." To compensate for this missing element, Defendant now points to several fair-cross-section cases and asserts that "[r]acial disparity in jury pools has been a pervasive, uncured problem in our State which North Carolina's dependence on *Duren* has failed to remedy, affecting the community's sense of justice."

Defendant, however, only offers statistical evidence as proof of systematic exclusion, and without more, he fails to establish a fair-cross-section claim under *Duren*. *See Duren*, 439 U.S. at 364, 99 S. Ct. at 668, 58 L. Ed. 2d at 587; *Corpening*, 129 N.C. App. at 64, 497 S.E.2d at 306. Therefore, the trial court did not err in denying Defendant's challenge to the jury pool.

V. Conclusion

We dismiss Defendant's first issue concerning Veach's text messages because Defendant's arguments are not properly before this Court, and we conclude the trial court did not err in denying Defendant's fair-cross-section claim.

NO ERROR.

Judges TYSON and HAMPSON concur.

TRUE HOMES, LLC v. CITY OF GREENSBORO

[292 N.C. App. 361 (2024)]

TRUE HOMES, LLC AND D.R. HORTON, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
CITY OF GREENSBORO, DEFENDANT

No. COA23-48

Filed 6 February 2024

1. Cities and Towns—water and sewer—capacity use fees—prospective fees for new development—statutory authority exceeded

In an action by developers (plaintiffs) seeking a refund of capacity use fees collected by the city of Greensboro (defendant) to recover costs associated with the expansion of the city's water and sewer system for new development, the trial court properly granted summary judgment in favor of plaintiffs regarding fees charged by defendant prior to the 2017 amendment of N.C.G.S. § 160A-314(a), where defendant exceeded its authority under the pre-2017 version of the statute by charging fees for prospective services, since the fees were collected prior to when plaintiffs were given official access to water and sewer service.

2. Cities and Towns—water and sewer—capacity use fees—post-statutory amendment—multiple types of charges collected—authority exceeded

In an action by developers (plaintiffs) seeking a refund of capacity use fees collected by the city of Greensboro (defendant) to recover costs associated with the expansion of the city's water and sewer system for new development, the trial court properly granted summary judgment in favor of plaintiffs regarding fees charged by defendant after 1 October 2017, when the legislature amended N.C.G.S. § 160A-314(a) to allow municipalities to charge fees for prospective services and enacted a new law authorizing municipalities to adopt a system development fee. First, defendant exceeded its statutory authority by charging fees for prospective services during the grace period immediately after the amendment (up to 1 July 2018), since the statutory language allowing fee collection during that period only applied to municipalities with local enabling acts, which defendant did not have. Further, defendant was without authority to collect fees after 1 July 2018 for existing development because it was simultaneously charging both the original capacity use fees (for existing development) and system development fees pursuant to the new legislation (for new development).

3. Cities and Towns—water and sewer—capacity use fees—city's motion to strike new affidavits denied—no abuse of discretion

In an action by developers (plaintiffs) seeking a refund of capacity use fees collected by the city of Greensboro (defendant), the trial court did not abuse its discretion by denying defendant's motion to strike portions of two affidavits that were submitted by plaintiffs' employees after giving deposition testimony. Despite defendant's argument that the new affidavits contradicted previous interrogatories and depositions, the affidavits highlighted the central dispute in the case regarding what qualified as water and sewer service by explaining the temporary nature of the water and sewer availability given to plaintiffs until they paid the capacity use fees, at which time they were granted official access to the system.

Appeal by defendant from order entered 24 August 2022 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 18 October 2023.

Scarbrough, Scarbrough & Trilling, PLLC, by John F. Scarbrough; Milberg Coleman Bryson Phillips Grossman, PLLC, by Lucy Inman, James R. DeMay, Daniel K. Bryson, and John Hunter Bryson; and Shipman & Wright, LLP, by William G. Wright and Gary K. Shipman, for plaintiffs-appellees.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan, Stephen M. Russell, Jr., and Tyler D. Nullmeyer, for defendant-appellant.

DILLON, Chief Judge.

In this case, we consider whether the City of Greensboro's charging of capacity use fees exceeded its municipal authority under N.C. Gen. Stat. § 160A-314(a), prior to its 2017 amendment. We also consider whether Greensboro's fees were authorized by subsequent 2017 legislation.

I. Background

In 1988, Greensboro began charging capacity use fees under a city ordinance.[1] Greensboro's ordinance stated these capacity use fees were

1. In the Record, the city ordinance was originally Greensboro, N.C., Code § 22-5.1 (1988) but, by the year 1998, became Greensboro, N.C., Code § 29-53 (1998).

designed to help Greensboro recover the costs associated with expanding the city's water and sewer system to accommodate new development without increasing the costs for existing system users. During the time period relevant to this case, the typical single-family house was charged $1,970 in capacity use fees, which were paid by the companies building the houses.

On 4 March 2019, residential real estate development and home building companies True Homes, LLC, and D.R. Horton ("Developers") brought suit against Greensboro,[2] alleging the City illegally collected its capacity use fees and seeking a refund of fees collected since 4 March 2016. *See Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 74, 813 S.E.2d 218, 228–29 (2018) (*Quality Built Homes II*) (restricting the statute of limitations to three years prior to the lawsuit's commencement). The trial court subsequently granted Developers' motion for class certification under Rule 23 of our Rules of Civil Procedure, defining the class as all natural persons, corporations, or other entities who paid water and sewer capacity use fees to Greensboro since 4 March 2016. The class's capacity use fees paid during that period totaled $5,252,309.06.

The parties filed cross-motions for summary judgment. Greensboro also moved to strike portions of Developers' affidavits.

On 15 July 2022, the trial court granted summary judgment for Developers and denied Greensboro's motion to strike. The following month, on 24 August 2022, the trial court entered its judgment, ordering Greensboro to refund $5,252,309.06, plus pre- and post-judgment interest. Greensboro timely appealed.

II. Analysis

Greensboro makes several arguments regarding the legality of its capacity use fees. Greensboro also argues that the trial court should have granted its motion to strike portions of Developers' affidavits. We address each argument in turn.

A. Fees Collected Prior to 2017 Legislation

[1] Greensboro first argues that the trial court erred in granting Developers' motion for summary judgment and simultaneously denying Greensboro's motion for summary judgment, concerning the fees collected prior to the 2017 legislation.

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2. Eastwood Construction, LLC, and Eastwood Development Corporation were originally plaintiffs as well, but they voluntarily dismissed their claims.

We review a summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

"Since 1982 [our Supreme Court] has cautioned that municipalities may lack the power to charge for prospective services absent the essential 'to be' language." *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 20–21, 789 S.E.2d 454, 458 (2016) (*Quality Built Homes I*) (citing *Town of Spring Hope v. Bissette*, 305 N.C. 248, 251, 287 S.E.2d 851, 853 (1982) (dictum)).[3] Because the pre-2017 statute lacked the "to be" language and only authorized municipalities to "establish and revise . . . rates, fees, charges, and penalties for the use of or the services *furnished* by any public enterprise[,]" N.C. Gen. Stat. § 160A-314(a) (2016) (emphasis added), our Supreme Court concluded the statute only permitted municipalities to charge for *contemporaneous* services. *Quality Built Homes I*, 369 N.C. at 22, 789 S.E.2d at 459.

It is well established that municipalities, absent a local enabling act granted by the General Assembly, were not permitted to charge for prospective services under the previous versions of N.C. Gen. Stat. § 160A-314(a)—doing so would be *ultra vires*. *See id*. at 16, 789 S.E.2d at 455 ("As creations of the legislature, municipalities have only those powers delegated to them by the General Assembly.").

Thus, the present case turns on whether Greensboro's capacity use fees were "prospective" or "contemporaneous."

Greensboro argues their capacity use fees were contemporaneous because water and sewer service was available here when Developers used "jumpers"—temporary pipes that bypass the meter box (before meter installation by Greensboro) and connect the water and sewer system to an under-construction property—to access water during construction *before* the capacity use fees were due. We disagree.

Past decisions have developed binding jurisprudence establishing when fees are considered prospective and, thus, illegal.[4] In the seminal

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3. Many North Carolina municipalities heeded the Supreme Court's warning and sought local acts. *See*, *e.g.*, An Act to Allow the Towns of Knightdale and Zebulon to Impose Water and Wastewater Capacity Charges, ch. 668, § 2, 1987 N.C. Sess. Laws 1235, 1236; An Act to Allow the Town of Rolesville to Impose Impact Fees, ch. 996, § 1, 1987 N.C. Sess. Laws 178, 178; An Act to Allow the Town of Wendell to Impose Water and Wastewater Capacity Charges, ch. 68, § 2, 1987 N.C. Sess. Laws 53, 54.

4. Greensboro used the term "capacity use fee" to describe its charges. Municipalities referred to these fees by a variety of names, such as "impact fee" in *Quality Built Homes* and "capacity fee" in *Kidd* and *Daedalus*.

case, *Quality Built Homes I*, fees were due "[u]pon approval of a subdivision of real property" and had to be paid to receive "final plat approval." *Id.* at 16, 789 S.E.2d at 455–56. If the property was already subdivided, the municipality would refuse to issue building permits until the fees were paid. *Id.* at 17, 789 S.E.2d at 456. The stated purpose for the fees was "to cover the costs of expanding the water and sewer systems." *Id.* at 16, 789 S.E.2d at 456 (cleaned up). Our Supreme Court concluded that the Town had exceeded its delegated authority by adopting ordinances establishing the fees. *Id.* at 22, 789 S.E.2d at 459.

In a subsequent case, *Kidd Construction Group, LLC v. Greenville Utilities Commission*, the defendant had established impact fees which were due "as a precondition to development approval, to the issuance of building permits, and to receiving service." 271 N.C. App. 392, 395, 845 S.E.2d 797, 799 (2020). The defendant had been chartered by our General Assembly with the authority to establish fees for "services rendered." *Id.* at 398, 845 S.E.2d at 801. The stated purpose of the impact fees was to "recover a proportional share of the cost of capital facilities constructed to provide service capacity for new development or new customers connecting to the water/sewer system." *Id.* at 395, 845 S.E.2d at 798–99. Our Court concluded that the impact fees were for future services and, therefore, not authorized under the legislative charter setting for the defendant's powers.

More recently, in *Daedalus, LLC v. City of Charlotte*, our Court considered fees established by the City of Charlotte which were due "at the time property owners appl[ied] for new water and sewer service." 282 N.C. App. 452, 454, 872 S.E.2d 105, 108 (2022). Fee payment was a "mandatory precondition of connecting to [the developer's] existing water and sewer infrastructure." *Id.* at 455, 872 S.E.2d at 108. Unlike the other cases, the municipality in this case did not have a stated purpose for the fees. *Id.* at 454, 872 S.E.2d at 108. Our Court held the fees were not authorized, as they "were charged for future discretionary spending and not for contemporaneous use of the system or for services furnished." *Id.* at 462, 872 S.E.2d at 113.

In this case, when viewed in the light most favorable to Greensboro, the evidence shows that capacity use fees were collected after the following events: plan or development approval; plat approval; installation of water mains and laterals; issuance of building permits; substantial construction progress; issuance of individual trade permits, including plumbing permits; commencement of water and sewer services through jumper connections to the system; and multiple plumbing inspections. Towards the end of the construction process (and after

the aforementioned events), Developers would request that Greensboro install the meter, at which time the capacity use fees were due, the meter was set, and volumetric billing service began. Afterwards, the final plumbing and building inspections occurred, and then a certificate of occupancy was issued.

Despite Greensboro's contentions, we hold its capacity use fees were similar in all material aspects to those other municipalities' fees, which were held to be *ultra vires* and illegal.

Though the fees at issue here were collected later in the construction process than in previous cases, Greensboro's fees were still collected *before* official water and sewer service was available to the properties. The fees were due at the time of meter installation, and official water and sewer service could not begin until the meter was installed and volumetric billing began. Though Greensboro may have been acting in Developers' interests with developer-friendly policies that allowed developers to use the system on a temporary basis during construction, it is clear that Developers were denied *official* use of the system until *after* paying the fees. Further, Greensboro's stated purpose for its capacity use fees is strikingly similar to the stated purposes in the other cases, as they were all used to recover costs associated with *expanding* the systems for *new* development.

Thus, for the foregoing reasons, we affirm the trial court's granting of summary judgment for Developers and denial of summary judgment for Greensboro regarding the capacity use fees charged prior to the 2017 legislation.

B. Fees After 2017 Legislation

[2] In response to *Quality Built Homes I*, the General Assembly amended N.C. Gen. Stat. § 160A-314(a) to confer prospective charging authority upon municipalities, effective 1 October 2017. *See* N.C. Gen. Stat. § 160A-314(a) (2017) (replacing the word "furnished" with the phrase "furnished or to be furnished").

The General Assembly also adopted the Public Water and Sewer System Development Fee Act (the "System Development Fee Act" or the "Act"), N.C. Gen. Stat. § 162A-200, *et seq.*, (also effective 1 October 2017) which authorized municipalities to charge a "system development fee." Essentially the same as Greensboro's capacity use fee, a system development fee is "[a] charge or assessment for service . . . imposed with respect to *new* development to fund costs of capital improvements necessitated by and attributable to such *new* development[.]" N.C. Gen. Stat. § 162A-201(9) (2022) (emphases added).

However, a municipality is not authorized to collect a system development fee until it complies with the "conditions and limitations" of the System Development Fee Act. *Id.* § 162A-203(a) (2022). Among other requirements, Section 162A-205 requires the system development fee be calculated "based on a written analysis . . . prepared by a financial professional or licensed professional engineer" and then "adopted by resolution or ordinance of the local government unit in accordance with G.S. 162A-209." *Id.* § 162A-205(1), (8) (2022). The written analysis must also be posted on the municipality's website "[f]or not less than 45 days" prior to a public hearing to consider its adoption. *Id.* § 162A-209(a), (b) (2022).

Here, Greensboro complied with all requirements necessary to adopt a system development fee under the Act: Greensboro conducted a written analysis, posted the results on the city website on 16 March 2018, and held a public hearing on 15 May 2018; the city council voted to adopt the system development fee on 19 June 2018; and the ordinance went into effect on 1 July 2018.

1. Fees Collected 1 October 2017 to 1 July 2018

The issue is whether Greensboro was authorized to begin charging prospective fees under the System Development Fee Act on 1 October 2017 (when the Act went into effect) or not until 1 July 2018. Greensboro's fees collected between 1 October 2017 and 1 July 2018 totaled $2,008,999.82.

The System Development Fee Act states that

> [a] system development fee adopted by a local governmental unit *under any lawful authority* other than this Article *and in effect on October 1, 2017*, shall be conformed to the requirements of this Article not later than July 1, 2018.

N.C. Gen. Stat. § 162A-203(b) (2022) (emphases added). Greensboro argues that the amended version of Section 160A-314(a) (adding the "to be furnished" language) is the "lawful authority" to which Section 162-203(b) refers, whereas Developers argue the term "lawful authority" refers to municipalities' local acts authorized by the General Assembly on or before 1 October 2017.

Notably, no other municipality cited in our line of jurisprudence has asserted this novel argument when rebutting developers' lawsuits. The municipalities in *Kidd* and *Daedalus* were required to refund their fees collected during the grace period. *See Kidd*, 271 N.C. App. at 396, 845 S.E.2d at 799; *Daedalus*, 282 N.C. App. at 455, 872 S.E.2d at 108.

We review issues of statutory construction *de novo*. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citations omitted). "In resolving issues of statutory construction, we look first to the language of the statute itself." *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996). The Act itself requires a narrow construction "to ensure that system development fees do not unduly burden new development." N.C. Gen. Stat. § 162A-215 (2022).

Here, the General Assembly included the phrases "lawful authority" and "in effect on October 1, 2017." When viewed together, these phrases clearly refer to the local enabling acts authorized by the General Assembly that were legal on 1 October 2017. Greensboro did not have a local enabling act; thus, Greensboro did not fall into this category and did not have authority to charge prospective system development fees during the grace period. We conclude the grace period from 1 October 2017 to 1 July 2018 was intended to give those municipalities with local enabling acts time to conform with the new requirements imposed by the System Development Fee Act, not to allow municipalities who failed to previously heed the Supreme Court's warning to benefit from the nine-month grace period.

2. Fees Collected After 1 July 2018

Greensboro also "occasionally" charged capacity use fees for "existing development" after 1 July 2018, which totaled $14,865.70.

Under the Act, "existing development" refers to "land subdivisions, structures, and land uses in existence at the start of the written analysis process[,]" and "new development" refers to development "occurring after the date a local government beginning the written analysis process[.]" N.C. Gen. Stat. § 162A-201(3), (6) (2022).

Greensboro argues charging fees for existing development is outside the scope of the Act because it requires only that fees for new development conform to the Act's requirements. Developers argue the existing development fees were not allowed because Greensboro was simultaneously charging both the original capacity use fees (for existing development) *and* fees adopted under the System Development Fee Act (for new development) in violation of *Kidd*, 271 N.C. App. at 395, 845 S.E.2d at 799 ("The [Act] grants local government utilities specific authority to assess *one type of upfront charge*—a system development fee—as long as that fee is calculated in accordance with the [Act's] 'written analysis' process."). Because Greensboro was charging multiple types of upfront charges, we conclude the fees collected for existing development starting 1 July 2018 were *ultra vires*, illegal, and must be refunded.

C. Greensboro's Motion to Strike

[3] Finally, Greensboro argues the trial court erred by denying its motion to strike portions of two of Developers' affidavits. Greensboro contends those affidavits sought to materially alter Developers' sworn deposition testimony and interrogatory responses.

We review the trial court's denial of a motion to strike for abuse of discretion. *Blair Concrete Servs., Inc. v. Van-Allen Steel Co., Inc.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002).

"[A] party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit contradicting his prior sworn testimony." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 225, 768 S.E.2d 582, 596 (2015). The trial court should exclude the portions of an affidavit if "[t]he additions and changes appearing in the affidavits are conclusory statements or recharacterizations more favorable" to the party who submitted the affidavit. *Marion Partners, LLC v. Weatherspoon & Voltz, LLP*, 215 N.C. App. 357, 362–63, 716 S.E.2d 29, 33 (2011).

Here, a True Homes employee and a D.R. Horton employee each submitted new affidavits after giving deposition testimony. Both employees' affidavits contained identical language: "At the time the Capacity Use Fees were required to be paid, no water or sewer service was being furnished to the property. The City would not provide water and sewer service until a water meter was installed."

In True Homes's prior interrogatory responses, the company acknowledged that "[w]ith respect to construction activities, the City allowed [True Homes] to bypass the meter box with a straight pipe or jumper on dates prior to a meter being set[,]" and True Homes could "fill and drain tubs for testing purposes prior to a meter being set[.]" However, True Homes also stated it could not access Greensboro's water or sewer service as a "metered customer" until capacity use fees were paid and a meter was set. During previous True Homes employee depositions, employees also acknowledged that (1) mains and laterals were installed and "operational, in the sense that it can be used [ ] for water and sewer service" when True Homes purchased a finished lot and (2) True Homes used water through jumpers during construction to test plumbing.

In D.R. Horton's prior depositions, an employee acknowledged that the water mains were operational when D.R. Horton bought finished lots. He further stated that he was unaware if any construction sites

actually used jumpers but that it "wouldn't surprise [him] a bit" if they were used.

We conclude the new affidavits do not necessarily contradict Developers' previous interrogatories and depositions. Rather, they demonstrate the problem at the heart of this case: Developers and Greensboro fundamentally disagree on what qualifies as water and sewer service. Greensboro believes access to the system via temporary jumpers qualifies; however, we agree with Developers, as discussed *supra*, that only *official* and *permanent* water and sewer service qualifies, which occurs here only after fees are paid and the meter is set.

Developers were not creating new issues of fact with their affidavits. They were simply explaining the temporary nature of the water and sewer availability prior to gaining official access to the system, which occurred only after they paid capacity use fees and received a set meter. Developers' affidavits were not recharacterizations of the evidence in a more favorable light; the affidavits simply further emphasized Developers' consistent point that official and permanent service was not available until later, only after the fees were paid.

Therefore, Greensboro has failed to show that the trial court abused its discretion in denying the motion to strike.

III. Conclusion

We affirm the trial court's order granting summary judgment in favor of Developers and denying Greensboro's motion to strike.

AFFIRMED.

Judges TYSON and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 FEBRUARY 2024)

CASHION v. CASHION No. 23-327	Iredell (22CVS1856)	Dismissed.
CONNETTE v. THE CHARLOTTE-MECKLENBURG HOSP. AUTH. No. 23-460	Mecklenburg (11CVS18175)	Affirmed.
IN RE J.M.M.M. No. 23-540	Rowan (22JT167)	Reversed in part and vacated and remanded in part
IN RE K.J.B.H. No. 23-632	Davie (22JB28)	Affirmed in Part and Remanded in Part
MILLER v. E. BAND OF CHEROKEE INDIANS No. 23-278	Graham (20CVS130)	Dismissed
ODINDO v. KANYI No. 23-794	Wake (21CVD602190) (22CVD1497)	Dismissed
PAYNE v. RAYNOR No. 23-780 (20CVS418)	Chatham	Affirmed
PHILLIPS v. EXTRA SPACE MGMT., INC. No. 23-303	Mecklenburg (19CVS1663)	No Error
PORTER v. GOODYEAR TIRE & RUBBER CO. No. 23-631	N.C. Industrial Commission (17-034676)	Affirmed in Part; Vacated in Part; and Remanded
SANDERS v. N.C. DEP'T OF TRANSP. No. 22-440	Cumberland (18CVS7897)	Affirmed
STATE v. ALVARADO No. 23-385	Durham (18CRS56417) (21CRS795)	No Error
STATE v. ARMSTRONG No. 23-220	Mecklenburg (18CRS242372) (18CRS242373)	No Error

STATE v. BARNES No. 23-239	Wilson (18CRS53149-50) (19CRS358)	No Error
STATE v. BENBOW No. 23-315	Mecklenburg (19CRS246111) (19CRS246113-14)	No Error
STATE v. BOYNTON No. 23-484	New Hanover (19CRS59260)	No Error
STATE v. COOPER No. 22-662	Wake (17CRS219916)	No Error
STATE v. HILL No. 23-264	Brunswick (20CRS53070)	No Error
STATE v. HUNTLEY No. 23-346	Union (21CRS422) (21CRS51670-72)	NO ERROR AT TRIAL, REMANDED FOR RESENTINCING
STATE v. INGRAM No. 23-207	Alamance (20CRS51128) (20CRS587	Affirmed
STATE v. JONES No. 22-981	Mecklenburg (14CRS11612-14) (14CRS11616)	No Error
STATE v. KIRKPATRICK No. 23-449	Avery (20CRS50445)	No error in part; no prejudicial error in part
STATE v. McCANTS No. 23-511	Buncombe (20CRS86132) (21CRS416)	No Error.
STATE v. McCOY No. 23-329	Brunswick (20CRS52125)	Dismissed Without Prejudice
STATE v. McKINNON No. 22-813	Mecklenburg (03CRS233731) (03CRS233733)	Dismissed
STATE v. MERTES No. 23-512	Forsyth (21CRS51796) (21CRS51962-68) (21CRS54948) (21CRS54968) (21CRS55237) (21CRS55368) (21CRS55888) (21CRS805)	Dismissed

STATE v. PRATT No. 23-822	Durham (19CRS54709) (20CRS50022)	Vacated and Remanded
STATE v. ROBERTS No. 23-501	Cabarrus (21CRS51233-34) (22CRS386)	No Error
STATE v. ROEBUCK No. 23-335	Forsyth (20CRS52316)	No Error.
STATE v. SPRUILL No. 23-12	Martin (19CRS50596-98) (21CRS271)	No Error
STATE v. VELASQUEZ No. 23-368	Wake (21CRS201978-80)	No Error
STATE v. VELEZ No. 23-199	Craven (20CRS594)	No Error; Remanded for correction of clerical error.
STATE v. WILLIAMS No. 23-628	Henderson (20CRS53669-70) (21CRS42)	No Error
THE VENABLE GRP., LLC v. SNOW No. 23-483	New Hanover (21CVS4244)	Affirmed
TROUTT v. WATSON No. 23-535	Wake (20CVS8349)	Dismissed
VIRMANI v. PROF'L SEC. INS. CO. No. 23-580	Mecklenburg (21CVS10633)	Reversed

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