292 N.C. App.—No. 4 Pages 374-550

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 19, 2024

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

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OF

NORTH CAROLINA

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COURT OF APPEALS

CASES REPORTED

FILED 20 FEBRUARY 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Ineffective assistance of counsel—criminal case—trial record insufficient to permit appellate review—In an appeal from multiple convictions arising from a domestic violence incident, where defense counsel asked the jury during closing argument to find defendant not guilty of the felony assault and kidnapping charges but to find him guilty of related misdemeanor charges because defendant had "admitted" to committing those crimes, the Court of Appeals declined to address defendant's ineffective assistance of counsel claim and dismissed it without prejudice, because the trial record was not sufficiently developed to permit review of the matter on direct appeal. **State v. Martin, 505.**

Interlocutory order—denial of motion to intervene—failure to establish substantial right—An appeal from an order denying proposed intervenor-defendant's motion to intervene in a pending declaratory judgment action (regarding property rights in a residential subdivision) was dismissed for lack of appellate jurisdiction because proposed intervenor-defendant failed to include in its opening brief

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Discipline—false statements to another attorney—during professional dispute—Rule 8.4(c)—fitness as a lawyer—In a disciplinary matter, where defendant lawyer emailed an ex-associate from his law firm and falsely asserted that he had not discussed the ex-associate's divorce with a mutual client (who had just obtained a legal settlement, resulting in defendant and the ex-associate disputing the division of attorney fees for her case), an order of discipline by the State Bar Disciplinary Hearing Commission (DHC) was reversed because the DHC erred in finding that defendant had violated Rule 8.4(c) of the Rules of Professional Conduct. Although the findings in the order showed that defendant's statements in the email were false, the order neither found that defendant's misstatements reflected adversely on his fitness as a lawyer nor provided any rationale for why a lawyer's misstatement—whether made knowingly or not—during a professional dispute with another attorney would have justified discipline under Rule 8.4(c). **N.C. State Bar v. DeMayo, 435.**

Discipline—false statements to another attorney—knowingly made—sufficiency of evidence—An order of discipline by the State Bar Disciplinary Hearing Commission (DHC) was reversed where the record did not support a finding by clear, cogent, and convincing evidence that defendant knowingly made false statements to an ex-associate from his law firm in an email, in which he denied commenting on the ex-associate's divorce to a mutual client (who had just obtained a legal settlement, resulting in defendant and the ex-associate disputing the division of attorney fees for her case). Although the evidence showed that defendant's statements in the email were incorrect, it did not establish that defendant knew that they were incorrect at the time that he wrote them, and such a finding would require stacking too many inferences upon each other. **N.C. State Bar v. DeMayo, 435.**

CHILD CUSTODY AND SUPPORT

Custody modification order—ongoing conflict—no findings linking conflict to children's welfare—no substantial change in circumstances—An order modifying child custody—from granting the parents joint custody to granting the mother primary physical custody and final decision-making authority on major parenting decisions—was reversed where the trial court's findings of fact did not support its conclusion that a substantial change in circumstances affecting the children's welfare had occurred. The court's findings showed a high degree of conflict between the parties, which the court described as "ongoing" since the initial custody order and which was largely characterized by the father's hostile communications

with one of the parenting coordinators assigned to the case, along with his frequent refusal to cooperate with the mother or the parenting coordinator in managing the children's medical care. However, it could not be presumed from the mere existence of an ongoing conflict that the conflict adversely affected the children, especially where the court made no specific findings linking the conflict to the children's welfare and where, in fact, the court's findings suggested that the children—both of whom were teenagers approaching adulthood—were relatively insulated from the conflict. **Durbin v. Durbin, 381.**

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North Carolina—right to properly constituted jury—alternate juror—substituted after deliberations began—new trial granted—Defendant's convictions for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury were vacated and a new trial granted where his right under the North Carolina Constitution to a properly constituted jury was violated when the trial court substituted a juror for an alternate juror after the jury deliberations had commenced. Although the trial court instructed the newly constituted jury to begin its deliberations anew in accordance with a 2021 statutory amendment (N.C.G.S. § 15A-1215(a)), a prior decision of the Supreme Court of North Carolina interpreting the state constitution was controlling on this issue. **State v. Chambers, 459.**

Right to counsel—criminal trial—waiver—forfeiture—In defendant's trial for felony fleeing to elude arrest, defendant knowingly and voluntarily waived his right to counsel where, although the record did not contain a signed waiver and certification by the trial court, the transcript showed that while the trial court attempted to conduct the colloquy required by N.C.G.S. § 15A-1242—by asking defendant whether he wanted to waive counsel, addressing the seriousness of the charges and the maximum possible punishment, and informing defendant of the complexity of handling a jury trial and that he would have to comply with any rules of evidence or procedure—defendant refused to answer any questions and instead challenged the trial court's jurisdiction and demanded the trial judge's oath of office. Even assuming the waiver was not voluntary, defendant forfeited his right to counsel by committing serious misconduct, including by using tactics to delay the trial for over two years, being twice found to be in direct criminal contempt, and continuing to frivolously challenge the trial court's jurisdiction. **State v. Jones, 493.**

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Promissory notes—no specified interest accrual date—statutory provision applied—from time notes became due—In an action by plaintiffs to collect on two overdue promissory notes—which secured loans totaling $330,000 from plaintiffs to defendant with interest set at thirty percent per annum—where the notes stated that "[a]ll accrued interest and unpaid principal shall be paid in full on or before" one year after the notes were executed, the trial court did not err by determining that interest started accruing not when the funds were disbursed but a year later. Although the notes did not contain a specified accrual date, the terms of the notes were not ambiguous; therefore, in the absence of an explicit accrual date, the trial court properly applied the statutory guidance in N.C.G.S. § 24-3(1), under which interest accrued from the time the notes became due. **Longphre v. KT Fin., LLC, 428.**

distributed to defendant had already been liquidated to pay off marital debt; although plaintiff wife lived in the marital home for over three months post-separation, defendant continued to pay the expenses related to the home, and after plaintiff moved out, defendant moved back in and continued to pay all related expenses; and, while plaintiff did not contribute any of her own monies toward the marital residence, defendant sold his inherited stocks and took out a loan on his separate real property to pay for the residence. **Smith v. Smith, 443.**

Equitable distribution—unequal division of marital property—no abuse of discretion—The trial court in an equitable distribution matter did not abuse its discretion in: failing to enter an order setting aside a written stipulation by the parties, in which they agreed to classify certain real property as marital; not using verbatim statutory language in its finding that an equal division of marital property was not equitable; and finding that three distributional factors supported the need for an unequal distribution of marital property. Thus, the court did not abuse its discretion in ordering an unequal division of the parties' marital estate. **Smith v. Smith, 443.**

Equitable distribution—unequal division of marital property—required finding—not using verbatim statutory language—The trial court in an equitable distribution matter did not abuse its discretion where, in ordering an unequal division of the parties' marital property, the court wrote in its order that "an unequal division . . . is equitable" rather than using verbatim language from N.C.G.S. § 50-20(c), which required the court to find that an "equal division is not equitable" and to explain why. The court was not required to quote the exact language from section 50-20(c) in entering the finding required therein, and the court did provide explanations supporting the unequal distribution of the marital property at issue. **Smith v. Smith, 443.**

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Trafficking in opium by possession—jury instructions—opioids included in "opium or opiate" definition—accurate statement of law—The trial court did not err by instructing the jury in defendant's trial for trafficking in opium by possession—based on the discovery of hydrocodone, an opioid, during a lawful search of defendant's home—that opioids were included in the definition of "opium or opiate" pursuant to N.C.G.S. § 90-95(h)(4), which was an accurate statement of law according to a prior judicial interpretation of "opium or opiate" under that statute. **State v. Miller, 519.**

Trafficking in opium by possession—statutory definition of "opium or opiate"—inclusive of opioids—stare decisis—The State presented substantial evidence that defendant committed the offense of trafficking in opium by possession in violation of N.C.G.S. § 90-95(h)(4) where hydrocodone, an opioid, was found during a lawful search of his home. Under principles of stare decisis, where a prior appellate decision interpreted the 2016 version of the statute to include opioids in the definition of "opium or opiate" for purposes of the offense, since the 2017 version of the same statute, under which defendant was charged, kept the same language, the same interpretation applied. The legislature's addition in 2017 of a new, separate definition of "opioids" in N.C.G.S. § 90-87(18a) did not materially alter the meaning of section 90-95(h)(4) where there was no explicit change to the latter statute or to the definition of "opiate." **State v. Miller, 519.**

EVIDENCE

Expert testimony—defining "sovereign citizen"—no plain error—There was no plain error in defendant's trial for felony fleeing to elude arrest by the admission of expert testimony from a police officer who defined "sovereign citizen" during his testimony. The officer stated that he had received over 1,000 hours of instruction, including training on sovereign citizens, and there was no indication that the admission had a probable impact on the jury's finding that defendant was guilty of the offense. **State v. Jones, 493.**

Expert witness—general testimony—concepts relevant to the case—In a prosecution for multiple sexual offenses with a child, the trial court did not commit plain error by allowing the State's expert to testify generally about the clinical meaning of the term "grooming," common grooming practices, and delayed reporting of abuse rather than apply her expertise to the specific facts of the case. The expert testified about concepts that were relevant to the case and gave the jury necessary information to evaluate the other testimony offered at trial, especially given how the victim repeatedly described defendant's abusive behaviors toward her as "grooming" and how defense counsel cross-examined the victim regarding her delay in reporting defendant. **State v. Cox, 473.**

Expert witness—qualification—areas not stipulated to by defendant—no improper opinion expressed by court—In a prosecution for multiple sexual offenses with a child, where the State tendered a witness as an expert in multiple areas—including how to interpret interviews of children who are suspected victims of sexual abuse, delayed reporting of sexual abuse, and what constitutes grooming—but where defendant stipulated to the witness being an expert solely in forensic interviewing, the trial court did not express an impermissible opinion to the jury when it qualified the witness as an expert in forensic interviewing and all of the other areas that the State had listed. Firstly, the court, in its gatekeeping role, was making an ordinary ruling during the course of the trial and had discretion to qualify the expert in any of the areas defendant did not stipulate to. Secondly, while the expert was qualified in areas relevant to the case, her expertise did not determine the ultimate question for the jury—whether defendant had sexually abused his minor stepdaughter. In fact, the expert's testimony—which did not include opinions regarding the victim's credibility or whether she was abused—demonstrated that its purpose was to give the jury context for evaluating the victim's account in the case, not to suggest what the jury should find. **State v. Cox, 473.**

Hearsay—murder and robbery trial—cell phone records—geo-tracking data—no plain error—There was no plain error in defendant's trial for first-degree murder and robbery with a dangerous weapon by the admission of cell phone records and geo-tracking evidence—which defendant contended did not fall within an applicable hearsay exception—where there was other evidence from two different witnesses linking defendant to the murder and robbery of the victim. **State v. Hair, 484.**

Prior bad acts—prosecution for assault and kidnapping—prior assaults of same victim—intent, motive, manner, and common scheme—In a prosecution for multiple assault charges, first-degree kidnapping, and other crimes arising from a domestic violence incident, during which defendant used physical force and threats to confine his girlfriend to their trailer and then repeatedly assaulted her, the trial court did not err in admitting—under Evidence Rules 403 and 404(b)—evidence of defendant's alleged prior assaults against his girlfriend. The prior assaults showed

a pattern of defendant engaging in violent, threatening, and controlling behavior toward his girlfriend whenever she made him feel jealous or angry; thus, evidence of those assaults was admissible as proof of intent and motive. Further, the prior assaults illustrated the manner and common scheme defendant used to confine and abuse his girlfriend, and they negated any inference that defendant acted in self-defense or that his girlfriend somehow caused her own injuries. **State v. Martin, 505.**

Prior bad acts—prosecution for sexual offenses with a child—inappropriate behavior toward victim's cousin—plain error analysis—In a prosecution for multiple sexual offenses with a child, where defendant was accused of sexually abusing his minor stepdaughter over a span of five years, the trial court did not commit plain error by failing to exclude testimony from the victim's cousin, who described two incidents where, when she was fourteen years old, defendant moved her clothing aside to comment on her "nice tan line." Even if the cousin's testimony had been inadmissible under Evidence Rule 404(b)(on the ground that the incidents she described were not sufficiently similar to the conduct alleged in the case), because of the substantial evidence of defendant's guilt—including the victim's detailed testimony regarding the alleged abuse and the corroborative testimonies of other witnesses—defendant could not show that the jury probably would have reached a different verdict had the cousin's testimony been excluded. **State v. Cox, 473.**

IMMUNITY

Sovereign—waiver—Tort Claims Act—school bus accident—emergency management exception—The Industrial Commission erred by denying a county school board of education's motion for summary judgment on plaintiff's property-damages claim under the Tort Claims Act (TCA) after determining that the board had waived sovereign immunity. Although the TCA waived immunity for school-bus accidents, in the instant case, where a school bus driver was delivering food to students learning remotely during the Covid-19 pandemic when he accidentally crashed his bus into plaintiff's parked car, the driver's use of the bus fell within the "emergency management" exception created by the Emergency Management Act and, therefore, the board was immune from suit. **Williams v. Charlotte-Mecklenburg Schs. Bd. of Educ., 542.**

INDICTMENT AND INFORMATION

Sufficiency—common law obstruction of justice—falsification of records—not done to impede legal proceeding—In a matter in which defendant, a deputy sheriff, was alleged to have committed felony common law obstruction of justice based on his falsification of documents, in which he falsely verified firearm qualifications for two members of law enforcement who had not met their mandatory annual requirements, the indictments charging common law obstruction of justice were fatally defective for failing to allege facts to support the essential element that defendant's acts were done for the purpose of obstructing justice, whether to impede or subvert a legal proceeding or potential subsequent investigation. **State v. Coffey, 463.**

JURY

Request for transcript of witness testimony—trial court's discretion—In defendant's murder and robbery trial, the trial court did not abuse its discretion by

evidence from which a jury could conclude that defendant was the driver of a vehicle that law enforcement discovered wrecked in the middle of a road and that defendant was impaired at the time he drove it, including that defendant was found hiding behind a building about thirty yards away from the vehicle with no other individuals nearby; the wreck appeared to be recent based on "fresh" rut marks in the road and damage to a nearby tree; defendant smelled of alcohol, had red and glassy eyes, slurred his speech, and was unsteady on his feet when officers approached; defendant had a bump and cut on his forehead consistent with a car crash; and the keys to the vehicle were found in defendant's pocket. **State v. Simpson, 532.**

OBSTRUCTION OF JUSTICE

Common law—cognizable offense in North Carolina—falsification of firearm qualifications by deputy sheriff—In a matter in which defendant, a deputy sheriff, was alleged to have committed felony common law obstruction of justice based on his falsification of documents, in which he falsely verified firearm qualifications for two members of law enforcement who had not met their mandatory annual requirements, the Court of Appeals reaffirmed that common law obstruction of justice is a cognizable offense in North Carolina. **State v. Coffey, 463.**

SENTENCING

Drug trafficking—consideration of improper factors—rejection of plea offer—additional drug activity—statements not attributed to trial court— After a jury convicted defendant of trafficking in methamphetamine by possession and trafficking in opium by possession and the trial court imposed a sentence of two consecutive terms of imprisonment, defendant failed to rebut the presumption that the sentence was valid. There was no evidence in the record that the trial court considered irrelevant or improper factors during sentencing where, although the State mentioned defendant's failure to accept a plea offer as well as additional drug activity committed by defendant, the trial court did not specifically comment on those events except to ask a clarifying question about when the alleged drug activity took place. **State v. Miller, 519.**

Two misdemeanor charges—sentence exceeded maximum allowable combined—Defendant was entitled to resentencing on two misdemeanor charges of resisting a public officer and being intoxicated and disruptive, for which the trial court's imposed period of confinement—120 days—exceeded the maximum, combined allowable sentence under law of 80 days. **State v. Simpson, 532.**

SEXUAL OFFENDERS

Registration—out-of-state conviction—registration required in state of conviction—The trial court did not err by requiring petitioner to register as a sex offender in this state based on his 1993 conviction in New York of attempted first-degree rape, for which petitioner was required to register as a sex offender under New York law. Despite petitioner's argument that the offense was not substantially similar to a North Carolina offense, his registration in this state was mandatory pursuant to N.C.G.S. § 14-208.6(4)(b) based on his registration requirement in New York independent of any determination of substantial similarity. **In re Laliveres, 422.**

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.

CAPE HOMEOWNERS ASSOCIATION, INC., DESMOND P. McHUGH AND WIFE, GERALDINE McHUGH, MICHAEL L. BODNAR AND WIFE, PATRICIA L. BODNAR, DONNA J. MARTIN AND SPOUSE, PETER MARTIN, PLAINTIFFS
v.
SOUTHERN DESTINY, LLC, DEFENDANT

No. COA23-593

Filed 20 February 2024

Appeal and Error—interlocutory order—denial of motion to intervene—failure to establish substantial right

An appeal from an order denying proposed intervenor-defendant's motion to intervene in a pending declaratory judgment action (regarding property rights in a residential subdivision) was dismissed for lack of appellate jurisdiction because proposed intervenor-defendant failed to include in its opening brief sufficient facts and arguments demonstrating that the order affected a substantial right, and its attempts to rectify the deficiencies in a reply brief were unavailing.

Appeal by Proposed Intervenor-Defendant from order entered 16 February 2023 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 10 January 2024.

Shipman & Wright, LLP, by Gary K. Shipman, for Plaintiffs-Appellees.

Adams, Howell, Sizemore & Adams, P.A., by Jeremy Jackson and Ryan J. Adams, for Defendant-Appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Lindsey S. Barber, Daniel F. E. Smith, and Walter L. Tippett, Jr., for Proposed Intervenor-Defendant-Appellant.

COLLINS, Judge.

Proposed Intervenor-Defendant Bill Clark Homes of Wilmington, LLC, ("BC Homes") appeals from the trial court's interlocutory order denying its motion to intervene in the above-captioned pending action. Because BC Homes has failed to demonstrate in its opening brief that the challenged order affects a substantial right, we dismiss this appeal for lack of appellate jurisdiction.

I. Background

The underlying case concerns property rights in the Cape Subdivision, a residential development, and an adjacent property which has been historically used as a golf course ("Subject Property"). Plaintiffs are the Cape Homeowners Association, Inc., and owners of individual lots within the Cape Subdivision. Defendant Southern Destiny, LLC, is the current owner of the Subject Property. Defendant ceased operating a golf course on the Subject Property in 2018 and sought to develop portions of it into residential subdivisions.

Plaintiffs filed suit against Defendant on 6 May 2019. Plaintiffs sought a declaratory judgment that Defendant had no right to use the private streets and roads of the Cape Subdivision to develop the Subject Property; that the individual plaintiffs "acquired a right to have the [Subject Property] or any portion thereof kept open for their reasonable use"; and that the individual plaintiffs acquired an easement appurtenant over the Subject Property.[1] Plaintiffs also sought injunctive relief and asserted claims for interference with an easement and nuisance; the Cape Homeowners Association also separately asserted a claim for trespass. On 18 July 2019, Defendant filed an answer and asserted a counterclaim for a declaratory judgment that it held an express easement, easement implied by prior use, prescriptive easement, easement by necessity, or easement by estoppel to use the private streets and roads of the Cape Subdivision to develop the Subject Property. Plaintiffs filed a motion to dismiss and an answer on 22 August 2019. Thereafter, the parties filed cross-motions for judgment on the pleadings; the trial court denied both motions.

On 20 September 2019, Defendant and BC Homes entered into a contract for the purchase of the Subject Property. The contract stated, in part, that "[Defendant] will make all reasonable efforts to resolve [the pending action]" and if Defendant does not prevail, the contract "shall terminate and thereafter . . . shall be null and void[.]"

Plaintiffs and Defendant attended mediation on 19 February 2020; a representative from BC Homes also attended the mediation. Plaintiffs issued a subpoena to BC Homes on 27 February 2020 to obtain all contracts and correspondence between BC Homes and Defendant relating to the Subject Property. BC Homes objected to the subpoena on the grounds that "the information sought is proprietary in nature, is subject

1. Plaintiffs also sought a declaratory judgment on other property rights, none of which are relevant to this appeal.

to the terms of a Nondisclosure Agreement, and is, upon information and belief, wholly irrelevant to the issues in this litigation."

On 2 April 2020, Plaintiffs filed a motion to join BC Homes as an additional defendant, alleging that, by virtue of the contract between Defendant and BC Homes for the purchase of the Subject Property, BC Homes "is united in interest with the Defendant, and the interest of [BC Homes], who has not consented to be joined as a party Defendant in this matter, is such that a complete determination of the claims before this Court cannot be made without the presence of [BC Homes]."

Plaintiffs noticed a hearing on their motion to join BC Homes as an additional defendant for 28 July 2020. BC Homes' counsel sent Plaintiffs' counsel a letter on 24 July 2020 stating, "When we talked on Wednesday afternoon, you agreed to withdraw your motion in the above-referenced action if [BC Homes] would agree to be bound by the final judgment in this case as it relates to the use of the subdivision roads and the property now owned by [Defendant]." The letter further stated, "In the event [BC Homes] acquires title to the Property, [BC Homes] agrees that it will be bound by the courts' final determinations . . . . I trust that this letter is sufficient and will enable you to withdraw your motion to add [BC Homes] as a party to this lawsuit." Plaintiffs' motion to add BC Homes as an additional defendant was not heard on 28 July 2020.

Plaintiffs and Defendant filed cross-motions for summary judgment. On 3 December 2020, the trial court entered an order granting Defendant summary judgment based on its conclusions that Defendant had an express easement to use the private streets and roads of the Cape Subdivision, and that Plaintiffs did not have an easement implied by plat requiring Defendant's property be kept open for Plaintiffs' reasonable use. Plaintiffs appealed to this Court.

We affirmed the portion of the trial court's order concluding that Plaintiffs had no easement implied by plat over the Subject Property. *Cape Homeowners Ass'n v. S. Destiny, LLC*, 284 N.C. App. 237, 250, 876 S.E.2d 568, 576 (2022). However, we reversed the trial court's entry of summary judgment in Defendant's favor based on its conclusion that Defendant had an express easement to use the private streets and roads of the Cape Subdivision. *Id.* at 249, 876 S.E.2d at 576. We remanded the case to the trial court to enter summary judgment in Plaintiff's favor on the express easement claim and to address Defendant's alternative claims for an easement implied by prior use, prescriptive easement, easement by necessity, and easement by estoppel in the private streets and roads of the Cape Subdivision. *Id.* at 249-50, 876 S.E.2d at 576.

In the fall of 2022, Defendant's ownership changed. Disputes have now arisen between BC Homes and Defendant's new owner. BC Homes filed a breach of contract action against Defendant in New Hanover County Superior Court on 23 November 2022 and filed a motion to intervene in this matter on 7 December 2022. In its motion to intervene, BC Homes alleged that it had entered into a contract with Defendant to purchase the Subject Property, and that Defendant had failed to make reasonable efforts to obtain an easement to use the private streets and roads of the Cape Subdivision to develop the Subject Property. After a hearing on 31 January 2023, the trial court entered an order on 16 February 2023 denying BC Homes' motion to intervene. The trial court made the following relevant findings of fact and conclusions of law in its order:

> 18. All discovery has been completed, mediation has been completed, and all material which the [c]ourt needs to consider on the motion for summary judgment for the existence of implied easements is before this [c]ourt.
>
> 19. [BC Homes] contractually obligated itself to the very condition that it now complains of; namely that Defendant would be responsible for pursuing all litigation in this matter. The Defendant's obligations are set out in the contract signed by the parties and for Defendant's alleged failure to comply with its obligations under the contract, [BC Homes] has a remedy, namely damages in the breach of contract action presently pending in New Hanover County.
>
> 20. The interest of [BC Homes] is a contingent interest, not a direct or immediate interest in the property that is the subject of this action.
>
> . . . .
>
> 23. [BC Homes] is not entitled to Intervention as of Right pursuant to Rule 24(a) of the North Carolina Rules of Civil Procedure.
>
> 24. Intervention would delay these proceedings which, at this point, are in a position to be resolved on Defendant's claims for easement by implication.
>
> 25. [BC Homes] is not entitled to permissive joinder pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure.

BC Homes appealed to this Court.

II. Discussion

A. Appellate Jurisdiction

As a threshold issue, we must determine whether we have jurisdiction to hear this appeal.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (quotation marks and citations omitted). An order denying a motion to intervene is interlocutory in nature. *See Stockton v. Estate of Thompson*, 165 N.C. App. 899, 900, 600 S.E.2d 13, 15 (2004). "As a general rule, there is no right of appeal from an interlocutory order." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015) (citation omitted). "The reason for this rule is to prevent fragmentary, premature[,] and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Id.* (quotation marks and citation omitted).

"There is a statutory exception to this general rule when the challenged order affects a substantial right." *Denney v. Wardson Constr., LLC*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019) (citing N.C. Gen. Stat. § 7A-27(b)(3)(a)). "An interlocutory order affects a substantial right if the order deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Suarez v. Am. Ramp Co.*, 266 N.C. App. 604, 608, 831 S.E.2d 885, 889 (2019) (quotation marks, brackets, and citations omitted). A substantial right is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right." *Hanesbrands*, 369 N.C at 219, 794 S.E.2d at 499-500 (quotation marks, brackets, and citations omitted).

"To confer appellate jurisdiction based on a substantial right, the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020) (quotation marks and citation omitted); *see also* N.C. R. App. P. 28(b)(4). "The appellant[] must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hanesbrands*, 369 N.C. at 219, 794 S.E.2d at 499 (quotation marks and citations omitted).

"Importantly, this Court will not construct arguments for or find support for appellant's right to appeal from an interlocutory order on our own initiative." *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438 (quotation marks and citation omitted). "That burden falls solely on the appellant." *Id.* (citation omitted). Accordingly, "if the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction." *Id.* (citation omitted).

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

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

Here, in the statement of the grounds for appellate review in its opening brief, BC Homes asserts, essentially as a matter of law, that the

> [d]enial of a motion to intervene is an interlocutory order that "affects a substantial right and is therefore immediately appealable." *Anderson v. Seascape at Holden Plantation, LLC*, 232 N.C. App. 1, 6—7, 753 S.E.2d 691, 696 (2014); *see also Alford* [*v. Davis*, 131 N.C. App. 214, 216, 505 S.E.2d 917, 919 (1998)] (providing that denial of a motion to intervene affects "substantial rights which might be lost if the order is not reviewed prior to final judgment"). Accordingly, the Court has jurisdiction to hear this appeal pursuant to N.C.G.S. §§ 7A-27(b)(3)(a), 1-277(a), as denial of BC Homes's Motion to Intervene affects a substantial right.

However, unlike a trial court's ruling on sovereign immunity, the denial of a motion to intervene does not affect a substantial right essentially as a matter of law. *See*, *e.g.*, *Nicholson v. F. Hoffmann-Laroche*, *Ltd.*, 156 N.C. App. 206, 208-09, 576 S.E.2d 363, 365 (2003) (holding that the denial of a motion to intervene in a class action did not affect a substantial right); *Howell v. Howell*, 89 N.C. App. 115, 117-18, 365 S.E.2d 181, 182-83 (1988) (holding that the denial of a motion to intervene in a divorce action did not affect a substantial right). Accordingly, BC Homes was required to explain, in the statement of the grounds for appellate review in its opening brief, why the facts of this particular case demonstrated that the order denying its motion to intervene affects a substantial right. BC Homes failed to do so.

Plaintiffs argue in their brief that BC Homes' appeal should be dismissed because it failed to show that the challenged order affects a substantial right that will be lost if the order is not immediately appealable. In response, BC Homes significantly augments its analysis in its reply brief as to why the trial court's order denying its motion to intervene affects a substantial right in this particular case. However, BC Homes may "not . . . use their reply brief to independently establish grounds for appellate review" as "a reply brief does not serve as a way to correct deficiencies in the principal brief." *Larsen*, 241 N.C. App. at 78, 772 S.E.2d at 96 (quotation marks, brackets, and citations omitted).

In its reply brief, BC Homes additionally cites cases from this Court that, in its view, support the proposition that an order denying a motion to intervene is immediately appealable "even without stating reasoning or an analysis of the facts to reach such a conclusion." Although the Court in those cases permitted an immediate appeal from an order denying a motion to intervene, none of those cases established a bright-line rule that an order denying a motion to intervene is immediately appealable. Instead, the Court simply held that, based on the facts of each particular case, the appeal was permissible. *See Alford v. Davis*, 131 N.C. App. 214, 216, 505 S.E.2d 917, 919 (1998) ("We believe appellants' motion to intervene claims substantial rights which might be lost if the order is not reviewed prior to final judgment; therefore we consider their appeal." (citation omitted)); *United Servs. Auto. Ass'n v. Simpson*, 126 N.C. App. 393, 395, 485 S.E.2d 337, 339 (1997) ("Applying this test to the present case, we conclude that the order affects the [appellants'] substantial rights and, consequently, the appeal is properly before us."); *Anderson v. Seascape at Holden Plantation*, *LLC*, 232 N.C. App. 1, 7, 753 S.E.2d 691, 696 (2014) ("Under the facts presented here, we conclude that the trial court's order affects a substantial right of the [appellant].").

Because BC Homes has not presented "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right[,]" we dismiss this appeal for lack of appellate jurisdiction. *Doe*, 273 N.C. App. at 21, 848 S.E.2d at 9.

III. Conclusion

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

DISMISSED.

Judges HAMPSON and THOMPSON concur.

JENNIFER C. DURBIN, Plaintiff
v.
MATTHEW L. DURBIN, Defendant

No. COA23-308

Filed 20 February 2024

Child Custody and Support—custody modification order—ongoing conflict—no findings linking conflict to children's welfare—no substantial change in circumstances

An order modifying child custody—from granting the parents joint custody to granting the mother primary physical custody and final decision-making authority on major parenting decisions—was reversed where the trial court's findings of fact did not support its conclusion that a substantial change in circumstances affecting the children's welfare had occurred. The court's findings showed a high degree of conflict between the parties, which the court described as "ongoing" since the initial custody order and which was largely characterized by the father's hostile communications with one of the parenting coordinators assigned to the case, along with his frequent refusal to cooperate with the mother or the parenting coordinator in managing the children's medical care. However, it could not be presumed from the mere existence of an ongoing conflict that the conflict adversely affected the children, especially where the court made no specific findings linking the conflict to the children's welfare and where, in fact, the court's findings suggested that the children—both of whom were teenagers approaching adulthood—were relatively insulated from the conflict.

Judge COLLINS dissenting.

Appeal by Defendant from order entered 8 July 2022 by Judge Julie Bell in Wake County District Court. Heard in the Court of Appeals 1 November 2023.

Jackson Family Law, by Jill Schnabel Jackson, for plaintiff-appellee.

Fox Rothschild LLP, by Kip D. Nelson and Jonathan L. Taggart, for defendant-appellant.

MURPHY, Judge.

When ruling on a motion for the modification of child custody, the existence of an ongoing conflict or propensity for conflict between the parties that has persisted since the original custody order does not preclude a conclusion on behalf of the trial court that the ongoing conflict constitutes, or contributes to, a substantial change in circumstances affecting the welfare of the children. However, it is also not presumed from the mere existence of an ongoing conflict that the conflict adversely affects the children, especially where, as here, the trial court's findings of fact actually suggest the children were relatively insulated from the conflict. As the trial court's findings of fact in this case did not support its conclusion of law that a substantial change in circumstances affecting the welfare of the children had occurred, we reverse the trial court's modification order.

BACKGROUND

This case arises from an 8 July 2022 order of the trial court modifying child custody shared between Plaintiff, Jennifer Durbin, and Defendant, Matthew Durbin, in response to Plaintiff's 8 October 2021 motion. The order, which substantially rendered permanent the terms of two temporary child custody orders entered 12 January 2022 and 9 February 2022, replaced the previously effective *Consent Order for Child Custody and Child Support* entered 30 October 2020. The original order provided, in relevant part, that Plaintiff and Defendant shared joint legal custody, shared physical custody in roughly equal measures, shared a responsibility for communicating information pertaining to the children's health, and expressly contemplated the children having routine medication. The original order further established an obligation to act in good faith to "enhance and nourish the relationship between each other and the children" and to avoid scheduling activities for the children during the other party's custodial time.

In addition to the original order, the parties entered into an *Order Appointing Parenting Coordinator by Consent* on 10 December 2020 appointing Tiffany Lesnik as the replacement for their original parenting coordinator, Dr. Kari Lenox. In the wake of her appointment, Defendant and Lesnik developed a contentious relationship, with Defendant moving on 30 April 2021 for the termination of Lesnik's appointment and for review of her decision as to the reallocation of custody in the summer of 2021 to accommodate Plaintiff's vacation plans. The trial court denied both motions, and conflict between Lesnik and Defendant seemingly continued through October of the same year, with Defendant continually alleging Lesnik's preferential treatment of Mother.

On 8 October 2021, Plaintiff made a *Motion to Modify Child Custody*, citing, *inter alia*, Defendant's interference with the children's therapy appointments and insufficient attentiveness to the children's medical needs as the basis for modification. After entering the two aforementioned temporary orders on 12 January 2022 and 9 February 2022, the trial court entered its *Order Modifying Child Custody* on 8 July 2022, which severely decreased Defendant's time with the children and delegated "final decision-making authority" on all major parenting decisions to Plaintiff:

> FINDINGS OF FACT
>
> 1. Plaintiff is a resident of Wake County, North Carolina.
>
> 2. Defendant is a resident of Wake County, North Carolina.
>
> 3. [] Plaintiff and [] Defendant were married to each other on [26 May] 2007 and separated from each other on or about [23 September] 2016.
>
> 4. There were two children born of the marriage, . . . born [10 December] 2008[] and . . . [8 September] 2010.
>
> 5. A permanent custody order was entered on [30 October] 2020.
>
> 6. The parties' first parent coordinator was Dr. Kari Lenox.
>
> 7. Tiffany Lesnik was appointed the Parent Coordinator on [15 December] 2020. Her term expired on [15 December] 2021.
>
> 8. On [24 September] 2021, the PC filed a report to the Court detailing numerous problems with the current custody order and requesting an expedited hearing.

9. After a hearing on [27 October] 2021, the Court entered a temporary custody order giving [] Plaintiff sole legal custody and primary physical custody, with [] Defendant exercising alternate-weekend visitation.

10. A second Parent Coordinator report was filed on [8 December] 2021.

11. After a hearing on [10 January] 2022, the Court entered a new temporary custody order and appointed Lisa LeFante as the new Parent Coordinator on [9 February] 2022.

12. There is an ongoing conflict between the parties that is interfering with important decisions being made that affect the health, education and welfare of the minor children.

13. The case continues to be a high-conflict and the parties have had three different parent coordinators.

14. [] Defendant at times will refuse to respond to Plaintiff's requests for information in a timely manner.

15. During Ms. Lesnick's tenure as PC, [] Defendant refused or delayed providing information that the PC requested, and he was hostile and behaved inappropriately in his responses to the PC. Specifically:

a. On or about [9 April] 2021, the PC contacted [] Defendant and asked for some basic information about his positive COVID test, including when he tested positive, whether anyone else lived with him, and if anyone in his home had tested positive. The PC's questions were reasonable under the circumstances.

b. Defendant reacted with hostility, refusing to respond to the questions, demanding to know why she needed medical information, accusing the PC of breaching his trust, calling her questions "bizarre," and accusing the PC of colluding in a "witch hunt" with Plaintiff.

c. Defendant ultimately provided answers to the PC's questions after several days, but his delay in responding was unreasonable and his hostile response was inappropriate.

d. On [23 September] 2021, [] Defendant contacted [] Plaintiff claiming he was dealing with a "behavioral issue" with [the parties' elder son] and wanting to review the phone and text logs for [that son's] phone.

e. When the PC contacted the parties and asked Mr. Durbin to provide some information on what the "behavioral issue" was so that the parties could address it in a uniform manner, Defendant refused to provide any information. Further, Defendant's response on [24 September] 2021, at 9:40 a.m., was hostile, telling the PC neither she [n]or Plaintiff were "ready for co-parenting," accusing the PC of lying, and threatening to "limit or cease [his elder son's] cell phone usage" if he didn't get what he wanted.

16. Both minor children attend therapy. [The parties' elder son] sees Dr. Brian Mackey and [the parties' younger son] sees Dr. Jennifer Hayden. Both children have good relationships with their therapists.

17. There were substantial problems with scheduling regular therapy for the minor children for several months in 2020. Defendant was uncooperative with both Dr. Lenox and Ms. Lesnick in the PC's attempts to ensure that [the parties' elder son] was receiving regular therapy.

18. The current PC, Lisa LeFante, did not testify that problems continued under her tenure with Defendant making sure that [the parties' elder son] attended regular therapy.

19. Both Dr. Mackey and Dr. Hayden testified that the scheduling problems were resolved and that [] Defendant now brings both children to therapy and seems supportive of their treatment.

20. Over Plaintiff's objections, [] Defendant began requiring the children to speak with Plaintiff's estranged mother, who lives in California and suffers from severe mental illness.

21. There has been an ongoing dispute between the parties about the children's medical conditions and the consistent administration of prescribed medications. Specifically:

a. [The parties' elder son] has asthma and serious allergies requiring him to use inhalers on a regular basis and to carry an EpiPen and emergency inhaler at all times. [The elder son's] medication is kept in a blue bag that he carries with him at all times.

b. [] Plaintiff and her husband testified that they have been in [the elder son's] presence when he was with

[] Defendant on several occasions and they did not see the medication bag, so they presumed that it was not with [him]. Defendant testified that the bag was always there, but sometimes it was in a backpack. The Court does not have sufficient information to determine whether the medication was present or not.

c. [] Plaintiff had contacted the PC on more than one occasion to voice concerns about Defendant's failure to administer the child's medication as prescribed.

d. Plaintiff and her husband testified that on at least 4 occasions, when [the parties' elder son] returned from visits with Defendant, that the count on his inhaler (which has a dosage counter on the medication) was inconsistent with the number of doses he should have taken while in Defendant's custody.

e. [] Defendant offered no explanation, but it appears to the Court that he takes a "hands off" approach and lets [the parties' elder son] regulate his own medication.

f. The Court finds that, in light of [the elder son's] medical condition, it is in the child's best interest for both parents to take responsibility for making sure that he takes his medicine consistent with the doctor's recommendations and not leave it to the child to be responsible for his own medications.

g. On [29 July] 2021, the PC issued a directive on the medication issue. The email said, in relevant part, "I am going to ask you both to keep a medication administration chart while [your elder son] is with you that will indicate: The medication administered, the amount, the date and the time."

h. Despite [the elder son's] diagnosed medical problems, and the PC's directive, the conflict over the child's medication continued. Defendant did not maintain the medication log, made the child maintain the medication log, told Plaintiff and the PC that the child (who is 12) was responsible for his own medication, and argued with both Plaintiff and PC in multiple emails rather than simply make sure [the elder son] received his medication and maintaining the log so that both parents could make sure that they were consistent and coordinated in their administration of medication for [him].

i. [The parties' younger son] broke his arm while zip-lining.

22. Defendant did not cooperate with Ms. Lesnik's directives regarding [his elder son's] medication.

23. Plaintiff wanted to get the children vaccinated for Covid 19. [] Defendant disagreed and wanted to speak to the children's pediatrician and allergist.

24. Defendant received recommendations from the pediatrician (Dr. Fennell) regarding the Covid vaccine. Defendant's recollection of the doctor's recommendations, and what he told Plaintiff about it, were different from what the doctor had actually said and provided in correspondence to Defendant. This caused further conflict between the parties and substantially delayed Plaintiff's ability to get the kids vaccinated.

25. Defendant schedules extracurricular activities during Plaintiff's custodial time without her consent.

26. Plaintiff frequently presumes any delay of information or mistake in providing information is intentional on the part of [] Defendant. While the Court believes that delays and mistakes by Defendant in providing information to Plaintiff creates more conflict between the parties, so does Plaintiff's presumption.

27. The amount of conflict between the parties is not in the children's best interest, but neither party seems capable of reducing the conflict.

28. Since the entry of the [12 January] 2022, temporary order, there have been fewer custodial exchanges between the parties. The reduction in exchanges has helped reduce some of the conflict between the parties.

29. Defendant and his mother both testified that the boys seem "sad" to him. However, [the parties' elder son] is doing so well in therapy that he can decrease the frequency of his appointments.

30. Plaintiff and her husband testified to very positive relationships with the children.

31. [] Plaintiff has remarried . . . . Her new husband has a very positive and close relationship with the children.

32. The Court finds that the above listed findings constitute a substantial change in circumstances warranting the entry of a temporary custody order modifying the terms of the October 2020 Permanent Custody Order.

CONCLUSIONS OF LAW

1. The parties are properly before the Court and that the Court has jurisdiction over the parties and the subject matter herein and there exist facts justifying this Court to assume jurisdiction to determine the custody of the minor children.

2. North Carolina is the home state of the minor children.

3. Pursuant to N.C.G.S. § 50-13.7, since the entry of the last custody order there has been a substantial change in circumstances that adversely affects the minor children and a modification of the permanent custody order is warranted.

4. This Order is in the best interests of the minor children.

5. Both parties have the ability to comply with the terms and conditions contained herein.

6. Findings of Facts that are more appropriately considered Conclusions of Law are incorporated by reference as if fully set forth herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The permanent custody order is modified as follows:

    a. The parties shall continue to share joint legal custody, The parties shall in good faith confer and attempt to mutually agree on major decisions affecting the children's health, education and welfare. In the event the parties are unable to reach mutual agreement on a major decision, [] Plaintiff shall have final decision-making authority. Day-to-day decisions shall be made by the custodial parent.

    b. [] Plaintiff shall exercise primary physical custody and [] Defendant shall have visitation as follows:

        i. Defendant shall have custody of the minor children on alternate weekends from the end

of school Friday until the beginning of school Monday morning.

ii. In the event one child does not have school on a custodial exchange day (either Friday or Monday), the parties shall exchange custody of both children—the child who is in school and the child who is not in school—at 5 p.m. on that regular exchange day.

c. Therapy: The minor children shall continue in therapy at 3C Family Services until such time as their individual therapists release each child from therapy. Neither parent shall take any action to terminate or interfere in the therapeutic relationship. In addition:

i. The parents may participate in the children's therapy as directed by the individual therapist.

ii. The children's individual therapists shall recommend the frequency and duration of appointments for each child and the parties shall comply with the recommendation.

iii. Appointments shall be scheduled for each child to comply with the therapist's recommendations, regardless of whose custodial time the appointment may fall on. The custodial parent shall transport the child to and from the therapy appointment as scheduled. In the event there is a dispute between the parties on the day or time a therapy appointment is to be scheduled, the Parent Coordinator shall determine the time and date of the appointment.

d. Medication: The parties shall comply with the Parent Coordinator's directive on medication for the children. Specifically, the parties shall maintain a medication log for [the parties' elder son] as outlined in the [24 August] 2021, directive issued by the Parent Coordinator. Neither parent shall make the child complete the log, or make the child responsible for maintaining his own medication schedule. Both parents shall ensure that the children take any and all medication as prescribed by their respective medical providers, including but not limited to making sure that Epipens and inhalers are available to the child as directed by the physician(s).

e. The parents shall subscribe to Our Family Wizard within 5 days of entry of this order. All communication

between the parties shall be through Our Family Wizard and all medical appointments and extracurricular activities shall be placed on the OFW calendar. In the event of an emergency involving a child, the parties may text one another.

f. [] Defendant shall not threaten, insult or harass the Parent Coordinator, and shall not use abusive language in his communication with her (i.e., calling her a liar). Neither party shall record the Parent Coordinator.

2. Holiday Custodial Schedule. The holiday/summer custodial schedule as outlined herein shall supersede the regular custodial schedule listed above. After the holiday/summer schedule concludes, the regular custodial schedule listed above shall continue as if the holiday/summer schedule never occurred. While [the parties' younger son] remains enrolled at The Raleigh School, the parties shall use [] The Raleigh School calendar to determine the dates of the holidays referenced in provisions (3a) to (3f), below. Once [the parties' younger son] is no longer attending The Raleigh School, the parties shall use the WCPSS calendar to determine the dates of holidays and school breaks.

. . . .

3. Transportation. Each parent will be responsible for picking up the children at school, the residence of the other parent, or child's activity to begin his or her custodial time with the children.

4. Lisa LeFante shall remain the parent coordinator until the expiration of her term. Either party may ask for the reappointment of Ms. LeFante or another parent coordinator at the expiration of her term.

5. Medical Emergencies. In the event of a medical emergency, the party who is with the minor child shall promptly notify the other parent as soon as it is practicable to do so. If any injury, accident or health-related problem arises which necessitates the hospitalization of the child, both parties shall have the right to visit the child at reasonable times for reasonable periods of time. Defendant and Plaintiff shall promptly notify the other of any serious illness and/or injury to the child which requires medical attention. Each party shall inform the other of any medical or

health problems which arose while the child is in the physical custody of one of the parents.

6. Both parents shall provide each other with any medication which the child is taking at the time of the transfer of physical custody of the child and they shall provide each other with sufficient information to allow the other party to obtain refills of that medication, if appropriate.

7. Non-disparagement. [] Defendant and Plaintiff each will endeavor, in good faith, to enhance and nourish the relationship between each other and the children. Each party will attempt to foster feelings of affection between the child(ren) and the other party, and neither party shall do anything to estrange the child(ren) from the other party or to injure the child(ren)'s opinion of the other party in any manner. Neither party shall disparage the other parent within hearing of the minor children or allow any third party to do so. Neither party shall discuss the litigation with the children.

8. Child-Related Activities and Appointments. Each party shall provide to the other party information concerning a child's activities and each shall encourage participation by the other parent. Neither party shall schedule activities for a child during the other party's custodial time without prior consent, and any programs or enrollments by a child which may involve significant time commitments by the other parent shall be agreed upon in advance. If one parent schedules an appointment (medical, therapy, school conference, etc.) for a child, that parent shall immediately notify the other parent so that parent may attend.

9. Access to Information. Both parents shall have equal access to all personnel at the school and shall be permitted to communicate directly with those persons without interference by the other parent. It is the responsibility of each parent to obtain report cards and interim grade reports directly from the school and not rely on the other parent. For any written documents for which there cannot be duplication (school work, progress chart, weekly folders, and the like) the parent in possession shall make copies for the other parent of any and all important documents and/or documents with deadlines. Both parents shall have equal access to all opportunities for field trips,

chaperoning, parent participation at school functions, PTA and the like, and no parent shall interfere with the other parent's right or ability to participate.

10. Telephone and Electronic Contact. Each parent shall be entitled to communicate with the children via telephone, email, text, IM, Skype, twitter, Facebook or any other age-appropriate electronic means. All such communication shall be at reasonable times and at reasonable periods of the day.

11. Records. Each parent shall be entitled to immediate access to any third-party records and information pertaining to the child including, but not limited to, medical, dental health, school or educational records.

12. Travel. Should either parent plan to take the child out of North Carolina, that parent shall inform the other forty-eight (48) hours in advance of the planned travel and shall inform the other of the destination, address and telephone number; in the event such travel is not planned in the 48-hour time frame, the traveling parent shall inform the other immediately at the time the plans are made. Should cither parent wish to take a child out of the country, that parent shall inform the other 30 days in advance of the planned travel and shall fully inform the other parent of the complete itinerary of the travel and provide contact information, including telephone numbers. Both parents shall cooperate in obtaining passports for the children. At the request of the traveling parent, the non-traveling parent shall execute any consent forms or other written documents necessary.

13. Relocation. Should either party decide to relocate outside of Wake County or more than 20 miles from his or her current residence, that party shall notify the other at least 90 days in advance of such a move, or if relocation is likely to occur in less than 90 days, the party wishing to relocate shall notify the other within twenty-four hours of being informed (or making a decision) that relocation must or is likely to occur. If the relocation takes a parent thirty (30) or more miles from his or her current residence, the children shall remain in the physical custody of the non-relocating parent pending further agreement of the parties or entry of a court order. Both parties

> will discuss changes in the custodial schedule that will benefit the children. In the event the parties cannot agree upon changes to the custodial schedule, the parties shall participate in mediation as soon as practicable after the notice, but within 30 days from the notice of relocation. In the event no agreement is reached in mediation, but as soon as practicable following the declaration of an impasse, but within thirty (30) days, the parties shall participate in arbitration regarding the custody issue, as set out herein.
>
> 14. All PC Directives previously issued and not otherwise modified by the provisions of this order shall remain in effect.
>
> 15. This cause is retained by the Court for entry of further Orders.

Defendant timely appeals from the 8 July 2022 order.

ANALYSIS

Defendant argues the trial court erred in entering its 8 July 2022 order because no substantial change in circumstances affecting the children's wellbeing existed, because modification was not in the best interests of the children, and because the order improperly delegated *de facto* sole custody to Plaintiff. As we agree the order was not entered pursuant to a substantial change in circumstances affecting the children's wellbeing, we reverse.

When reviewing the modification of a child custody order, we "must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474 (2003) (citations omitted). Unopposed findings of fact "are presumed to be supported by the evidence and are binding on appeal," *James v. Pretlow*, 242 N.C. 102, 104 (1955) (marks and citations omitted), while conclusions of law are reviewed de novo. *In re C.B.C*, 373 N.C. 16, 19 (2019). Whether a substantial change in circumstances has occurred and whether that change affected the minor children are conclusions of law and must be supported by the trial court's findings of fact. *Shipman*, 357 N.C. at 475; *see also Cox v. Cox*, 238 N.C. App. 22, 26 (2014) ("The trial court's conclusions of law must be supported by adequate findings of fact.").

Here, the trial court's findings of fact begin with general observations that this case is, and continues to be, high-conflict. The order then notes that a variety of conflicts and developments have occurred since

the entry of the 2020 order: the management of the case shifting between three separate parenting coordinators; defendant responding slowly to requests for information by Plaintiff and one of the parenting coordinators; "hostile" behavior by Defendant toward the same parenting coordinator; Defendant exposing the children to Plaintiff's estranged mother, the boys' maternal grandmother; an ongoing dispute as to the administration of the eldest child's asthma medication; the parties' younger son having broken his arm; Defendant having scheduled activities during Plaintiff's custodial time; Defendant and Plaintiff disagreeing as to the appropriateness of the children receiving Covid vaccines; Plaintiff remarrying; and Plaintiff assuming bad faith on the part of Defendant.[1] The order then notes that the decreased reduction in custodial changes since the entry of the 12 January 2022 temporary order "has helped reduce some of the conflict between the parties," concludes as a matter of law that a substantial change in circumstances affecting the children had occurred, and orders, *inter alia*, that Defendant's custodial time be permanently reduced to alternate weekends and that Plaintiff have "final decision-making authority" on "major decisions affecting the children's health, education and welfare."

Accepting, as we must, the trial court's unchallenged finding of fact, *see James*, 242 N.C. at 104, we do not believe the trial court's findings of fact actually demonstrated a substantial change in circumstances affecting the welfare of the children. At the threshold, we note that the absence of meaningful findings as to the circumstances as they existed at the time of the 30 October 2020 consent order makes our review difficult, as we cannot determine with certainty what the circumstances, as the trial court determined them to be, were *at the time of that order*. *Cf. Benedict v. Coe*, 117 N.C. App. 369, 377 (1994) ("[T]he [modified order] contains no findings as to the existing circumstances [at previous points in time]. It contains no findings of changed circumstances since these dates."), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616 (1998); *see also Woodring v. Woodring*, 227 N.C. App. 638, 645 (2013) (marks and citations omitted) ("[W]hen evaluating whether there has been a substantial change in circumstances, courts may only consider events which occurred after the entry of the previous order, unless the events were previously undisclosed to the court."). Nonetheless, our review of the record and the findings in the modified order present us with information sufficient to make a determination on the question of

1. The order also notes that Defendant was "uncooperative" with the parenting coordinator's requests that the eldest child regularly attended therapy. However, further findings of fact clarify that this problem had been resolved at the time of the order's entry.

whether a substantial change in circumstances affecting the welfare of the children occurred.

In determining whether the trial court's findings of fact support a substantial change in circumstances affecting the welfare of the children, we review two of our recent custody modification cases, *Smith v. Dressler*, 291 N.C. App. 197 (2023), and *Conroy v. Conroy*, 291 N.C. App. 145 (2023), which are particularly instructive, as both cases turned on the issue of whether a substantial change in circumstances had occurred. In *Smith*, the trial court had entered a modified custody order concerning the parties' minor child, citing among the purportedly changed circumstances that the plaintiff had "married, given birth to a child, been honorably discharged from the Air Force, returned to North Carolina, acquired a home in Wilson, gained proximity to and more support from her family, and been re-employed by Pfizer," as well as that the defendant did not schedule visitation time with some members of the plaintiff's family. *Smith*, 291 N.C. App. at 209. The trial court also noted that the minor child had received a number of injuries while under the defendant's supervision—injuries the plaintiff alleged indicated abuse or neglect on the part of the defendant—and that the defendant had not disclosed a potential Covid infection. *Id.* at 211. We also noted that "CPS [] found no evidence of abuse after investigating [the] [f]ather at [the] [m]other's behest," which was a factor the trial court had used when deciding whether a substantial change in circumstances had occurred. *Id.*

We vacated and remanded the order on the basis that no substantial change of circumstances existed. *Id.* at 213. The plaintiff's marriage, new child, discharge from the Air Force, and changes in living arrangements and employment had already been disclosed to the trial court prior to the entry of the previously-effective custody order; therefore, they did not qualify as substantially changed circumstances since the entry of the prior order. *Id.* at 209-10 ("[T]he trial court erred when it considered and re-evaluated events which were disclosed to and considered by the trial court prior to the entry of the First Custody Order.") (citing, *inter alia*, *Woodring*, 227 N.C. App. at 645, and *Ford v. Wright*, 170 N.C. App. 89, 96 (2005)). Considering only the remaining changes in circumstances—the injuries to the child alleged to constitute abuse or neglect—we rejected the plaintiff's argument that a substantial change in circumstances affecting the welfare of the child had occurred, noting the absence of evidence that the injuries to the child were the product of abuse or neglect. *Id.* at 213. Moreover, we further remarked that, even if we considered the evidence previously disclosed and addressed in the prior order, that information would not have been sufficient to

constitute a substantial change in circumstances affecting the welfare of the child. *Id.* at 212.

By contrast, in *Conroy v. Conroy*, the trial court's findings of fact supporting a substantial change in circumstances included an escalating pattern of the plaintiff's increasingly erratic behavior. While the trial court found that the plaintiff "expressed significant disdain and contempt for [any] person that she apparently perceived to be 'against' her," *Conroy*, 291 N.C. App. at 153, the primary thrust of the trial court's order concerned her extreme behaviors toward her children and the defendant. These behaviors included blaming her thirteen-year-old daughter for issues raised to the trial court; speaking about the defendant in expletives in the presence of the children; preventing the children going on a pre-planned trip with the defendant by locking them inside the home; threatening to call the police on the defendant while her daughter was riding to soccer practice with the defendant; attempting, in bad faith, to have the defendant ejected from one of their children's basketball games; cursing at, and taking the call phone of, one of her children's friends for remarks made in the wake of the November 2020 presidential election[2]; destroying the children's electronics in front of them as a means of punishment; *choking her daughter*; encouraging the children to bully one another; and engaging in otherwise excessive corporal punishment. *Id.* at 153-57.

Although the plaintiff in *Conroy* argued that these behaviors did not constitute a substantial change in circumstances because her interpersonal relationships had always been poor and her behavior toward the defendant had been "erratic and unpredictable" since at least the entry of the original custody order, *id.* at 162, we held that the parties'

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2. For more complete context, the entirety of the trial court's finding of fact with respect to this incident was as follows:

> Following the election of Joe Biden in November 2020, [the plaintiff] became offended by a comment made by one of [her son]'s friends. [The plaintiff] responded by telling the child in the presence of her own minor children that he had "no friends;" by calling him names, including a "little shit;" and by confiscating and keeping the child's cell phone. Bizarrely, [the plaintiff] brought this child's mother[] . . . in to testify on her behalf. [The mother] testified that her son was so afraid of [the plaintiff] after the [i]ncident that her husband had to go to [the plaintiff's] home to retrieve their son's cell phone on their son's behalf. Throughout her own and [the other mother's] testimony, [the plaintiff] completely failed to recognize any problem with her own behavior (directed at a child) and, instead, blamed said child for "provoking" her.

Conroy, 291 N.C. App. at 154-55.

"continued communication problems and their failure or inability to cooperate and co-parent constituted a substantial change." *Id.* at 164. In doing so, we relied primarily on the following excerpt from *Laprade v. Barry*:

> It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's findings abundantly demonstrate these communication problems *and* the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are *presently* having a negative impact on [the minor child's] welfare that constitutes a change of circumstances. In fact, it is foreseeable the communication problems are likely to affect [the minor child] more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody.

Laprade v. Barry, 253 N.C. App. 296, 303-04 (2017) (emphasis in original) (citing *Shipman*, 357 N.C. at 473-75); *id.* at 163.

To be sure, the facts of this case fall in a gray area between *Smith* and *Conroy*. Like the plaintiff in *Smith*, Plaintiff's arguments to the trial court included a range of allegations that Defendant had mishandled the health of one of the children, including allegedly unsafe conduct during the height of the pandemic. *Smith*, 291 N.C. App. 211. And, also as in *Smith*, a contributing factor in the trial court's conclusion that a substantial change affecting the welfare of the children had occurred was Plaintiff's remarriage. *Id.* at 209. However, these circumstances alone, especially in the absence of a finding of the remarriage's impact on the minor children's wellbeing, does not constitute a substantial change in circumstances.[3] *See id.* at 212; *see also Hassell v. Means*, 42 N.C. App.

3. We also note that the Plaintiff's remarriage had occurred in March 2019, well before the entry of the October 2020 consent order.

524, 531 ("Remarriage in and of itself is not a sufficient change of circumstance to justify modification of a child custody order."), *disc. rev. denied*, 298 N.C. 568 (1979); *Kelly v. Kelly*, 77 N.C. App. 632, 636 (1985) ("Remarriage without a finding of fact indicating the effect of remarriage on a child is not a sufficient change of circumstance to justify modification of a child custody order."). Moreover, like in *Smith*, ordinary injury and response to common illness are not themselves sufficient to constitute a substantial change in circumstances affecting the wellbeing of the children. *Smith*, 291 N.C. App. at 211-13.

Meanwhile, this case also shares a number of salient features with *Conroy*, most notably in the trial court's observation of deteriorating communication between the parties. Defendant, like the plaintiff in *Conroy*, has, according to the trial court's findings, developed a contentious relationship with, and wariness of, other participants in the case,[4] *see Conroy*, 291 N.C. App. 153, and has reacted negatively toward them on a number of occasions. Similar to the findings of fact in *Conroy*, the trial court described decision-making conflicts over major parenting decisions between the parties as "ongoing" and noted the "case continue[d] to be high-conflict"; however, unlike in *Conroy*, a significant portion of the negative communications noted by the trial court in its findings of fact were directed at, or involved, the parenting coordinator. Also unlike in *Conroy*, no specific findings linked the parties' negative communication to the wellbeing of the children; and, in fact, the instances of conflict actually discussed by the trial court all appear to have been communications to which the children were not privy. *But see Conroy*, 291 N.C. App. at 153 (noting among the trial court's findings of fact that the plaintiff's "significant disdain and contempt for" others, including that voiced in front of the minor children, involved in the case resulted in direct distress to—and, at times, punishment of—the minor children); *Laprade*, 253 N.C. App. at 301 (noting among the trial court's findings of fact that the defendant's behavior toward

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4. Including, perhaps, the trial court:

> [DEFENDANT'S COUNSEL:] . . . I'm going to implore you to please, you know, give Mr. -- give what Mr. Durbin says a fair shake. I know that he's been in front of you several times and you've been very displeased with him in past hearings, but I'm asking for you to let that go for a little bit, listen to what he says, and take it seriously. Thank you.
>
> THE COURT: For the record, the Court will note that the court listens to all parties in every hearing, takes everything seriously, and makes decisions upon the evidence. So the Court will take exception to the statement otherwise.

the child with relation to the parties' conflicts led to high anxiety in the parties' minor child).

Indeed, the only findings directly concerning the children's wellbeing with relation to the parties' conflicts were the broad observations in findings 27 through 29.[5] These findings, however, relate to the reduction in conflict between the parties and not to any specific impact on the wellbeing of the children, limiting the relation between the two to a cursory note about conflict not being in the children's best interest. The only finding of the three involving the wellbeing of the children pertains to the eldest son's progress in therapy—treatment which, by the trial court's own findings, was supported without conflict by both parties as of the time of the order's entry.

While it may be "obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect [the] child," *see Laprade*, 253 N.C. App. at 303, it is also not to be presumed from the mere existence of an ongoing conflict that the conflict adversely affects the child, especially where the trial court's findings of fact actually suggest the children were relatively insulated from the conflict. This is especially true where, as here, both boys are active teenagers approaching adulthood, can articulate their preferences for themselves, and can take far more responsibility for their activities and schedules than a younger child could.

Nor is it the case that conflict between a party and a prior parenting coordinator necessarily constitutes a substantial change in circumstances affecting the welfare of the child. Parenting coordinators serve an important function on behalf of our courts, *see generally* N.C.G.S. § 50-92 (2023), but they are, ultimately, susceptible to human error and bias, especially when their station requires involving themselves in their assignees' emotionally-charged conflicts. Such susceptibility

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5. These findings read, in full, as follows:

> 27. The amount of conflict between the parties is not in the children's best interest, but neither party seems capable of reducing the conflict.
>
> 28. Since the entry of the [12 January] 2022, temporary order, there have been fewer custodial exchanges between the parties. The reduction in exchanges has helped reduce some of the conflict between the parties.
>
> 29. Defendant and his mother both testified that the boys seem "sad" to him. However, [the parties' elder son] is doing so well in therapy that he can decrease the frequency of his appointments.

is especially present when a disparity exists in the parents' ability to manage the optics of the communications to which the parenting coordinator is exposed and advantageously leverage the necessary, yet inorganic, rules of engagement presented by court-ordered custodial arrangements. For this reason, conflict between a party and a parenting coordinator is not *per se* evidence of impact on minor children whose custody is involved in that case. Were it otherwise, a trial court may be tempted to modify a custody order out of mere logistical convenience to itself and its coordinator appointees, rather than acting with due concern for a disfavored parent's "fundamental right to make decisions concerning the care, custody, and control of his or her children . . . ." *Adams v. Tessener*, 354 N.C. 57, 60 (2001) (marks omitted) (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

The trial court's conclusion that "there has been a substantial change in circumstances that adversely affects the minor children" is not supported by its findings of fact; we therefore reverse the trial court's modification order. *Ford*, 170 N.C. App. at 96. Having so held, Defendant's arguments as to the best interests of the children and the legal status of the custodial arrangement ordered by the trial court are moot. *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99 (1996) (marks and citations omitted) ("A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

CONCLUSION

The trial court's modification of child custody was not supported by a substantial change in circumstances affecting the children's wellbeing, and we therefore reverse the order of the trial court. *Ford*, 170 N.C. App. at 96.

REVERSED.

Judge TYSON concurs.

Judge COLLINS dissents by separate opinion.

COLLINS, Judge, dissenting.

I would affirm the trial court's order granting primary decision-making authority and primary physical custody to Plaintiff. I therefore respectfully dissent.

I. Background

Plaintiff and Defendant were married on 26 May 2007. They had two children together, Charles, born in 2008, and Timothy, born in 2010.[1] On 23 September 2016, the parties separated. They entered into a consent order for child custody and child support on 9 February 2017 ("Initial Consent Order") wherein they agreed to share legal and physical custody of the children and to various other custody terms.

Plaintiff filed a motion to modify child custody on or around 27 October 2020. The trial court entered a consent order on 30 October 2020 ("Permanent Custody Order") maintaining all the terms of the Initial Consent Order but adding a term specifically providing for the appointment of a parenting coordinator. The parties entered into a consent order on 15 December 2020 appointing Tiffany Lesnik ("PC" or "Parenting Coordinator") as their parenting coordinator for a one-year term. The parties gave the PC authority over the following: transition time/pickup/delivery; sharing of vacations and holidays; method of pickup and delivery; transportation to and from visitation; participation in child care/daycare and baby-sitting; bed time; diet; clothing; recreation; before and after school activities; extracurricular activities; discipline; health care management; alterations in schedule which do not substantially interfere with the basic time share agreement; participation in visitation, including significant others and relatives; telephone contact; alterations to appearance, including tattoos or piercings; the children's passports; and education.

Defendant filed motions on 30 April 2021 to modify or terminate the PC's appointment as their parenting coordinator and for an expedited review of two of the PC's decisions concerning the parties' summer 2021 custodial schedule. In June 2021, Defendant filed a motion for attorney's fees and for apportionment of the PC's fees between the parties. Defendant's motions came on for hearing on 8 July 2021. The trial court entered an order on 2 August 2021 finding, in pertinent part:

> 10. Defendant testified that approximately eight (8) parenting coordinator decisions made between January 14, 2021 and April 13, 2021 created unnecessary confusion and conflict between the parties. Additionally, the decisions concerning the 2021 summer schedule created an unequal distribution of days between the parties which

1. We use pseudonyms to protect the identities of the minor children. *See* N.C. R. App. P. 42.

> Defendant testified was not the intent of the Custody Order because the Custody Order intends the parties to share equal physical custody of their minor children.
>
> . . . .
>
> 13. The Parent Coordinator's decisions were based on rational and reasonable consideration of the children's best interests, and the Parent Coordinator communicated with the children's school, both parents, and the minor child's therapist in reaching her decisions.
>
> 14. The Parent Coordinator's decisions did not substantially alter the time-sharing arrangement set forth in the custody order.
>
> 15. The Court finds the parenting coordinator's March 1, 2021 decision concerning Father's Day weekend and the alterations to the custodial schedule during the summer of 2021 were reasonable.
>
> 16. The parties are high conflict.
>
> 17. The parties will benefit from the continued services of a parenting coordinator. . . .

The trial court thus declined to modify the PC's decisions, denied Defendant's motion to modify or terminate the PC's appointment, dismissed Defendant's motion for attorney's fees, and held Defendant responsible for the PC's fees related to the hearing.

The PC filed a Parenting Coordinator's report[2] ("first report") on 24 September 2021,[3] alleging problems with the current custody arrangement, requesting a change in custody, suggesting that Defendant undergo a psychological evaluation, and requesting an expedited hearing. A hearing on the report was set for 27 October 2021.

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2. "The parenting coordinator may file a report with the court regarding any of the following: (1) The parenting coordinator's belief that the existing custody order is not in the best interests of the child. (2) The parenting coordinator's determination that the parenting coordinator is not qualified to address or resolve certain issues in the case. (3) A party's noncompliance with a decision of the parenting coordinator or the terms of the custody order. (4) The parenting coordinator's fees as set forth in G.S. 50-95. (5) The parenting coordinator's request that the parenting coordinator's appointment be modified or terminated." N.C. Gen. Stat. § 50-97(a) (2021).

3. The PC's first report is not in the record.

On 8 October 2021, Plaintiff filed a motion to modify child custody, seeking to modify the Permanent Custody Order.

Defendant filed a Motion for Psychological Evaluation on 19 October 2021, moving for an order requiring Plaintiff to submit to a psychological evaluation. Defendant alleged that the PC had filed a report "suggest[ing] Defendant should undergo a psychological evaluation" but that "Plaintiff exhibits many behaviors that are to the detriment of the minor children, and Defendant's ability to co-parent with her" and the "[PC] is, for some reason, hyper focused on Defendant, and refuses to hold Plaintiff accountable for any of her erratic and harmful behavior."

The PC's first report came on for hearing on 27 October 2021. On 8 December 2021, the PC filed a second Parenting Coordinator's report ("second report") with the court detailing problems with the Permanent Custody Order and requesting an expedited hearing.[4] The PC's appointment as the parties' Parenting Coordinator expired on 15 December 2021. The second report came on for hearing on 10 January 2022.

By order entered 11 January 2022, the trial court appointed Lisa Lefante as the parties' parenting coordinator for a term of two years. The order noted that the parties had not consented to the appointment of a parenting coordinator, that the matter was a high-conflict case, and that the appointment of the parenting coordinator was in the best interests of the children. The second parenting coordinator had the same scope of authority as the PC, with the addition of authority over the minor children's therapy.

The following day, 12 January 2022, the trial court entered a Temporary Order for Child Custody ("First Temporary Order") based upon its hearing of the PC's first report. The trial court found, in relevant part, as follows:

> 8. There is an ongoing conflict between the parties that is interfering with important decisions being made that affect the health, education and welfare of the minor children.
>
> 9. On or about April 9, 2021, the PC contacted the Defendant and asked for some basic information about his positive COVID test, including when he tested positive, whether anyone else lived with him, and if anyone in his home had tested positive. The PC's questions were reasonable under the circumstances.

4. The PC's second report is not in the record.

10. Defendant reacted with hostility, refusing to respond to the questions, demanding to know why she needed medical information, accusing the PC of breaching his trust, calling her questions "bizarre," and accusing the PC of colluding in a "witch hunt" with Plaintiff.

11. Defendant ultimately provided answers to the PC's questions after several days, but his delay in responding was unreasonable and his hostile response was inappropriate.

12. On September 23, 2021, the Defendant contacted the Plaintiff claiming he was dealing with a "behavioral issue" with [Charles] and wanting to review the phone and text logs for [Charles's] phone.

13. When the PC contacted the parties and asked Mr. Durbin to provide some information on what the "behavioral issue" was so that the parties could address it in a uniform manner, Defendant refused to provide any information. Further, Defendant's response on September 24, 2021, at 9:40 a.m., was hostile, telling the PC neither she [n]or Plaintiff were "ready for co-parenting," accusing the PC of lying, and threatening to "limit or cease [Charles's] cell phone usage" if he didn't get what he wanted.

14. Defendant's response was unproductive and hostile and the Court has serious concerns about his ability to coparent with the Plaintiff.

15. There are issues with the children attending therapy as recommended. Specifically:

a. The minor children are both in therapy at 3C Family Services. [Charles's] therapist is Brian Mackey. [Timothy's] therapist is Jennifer Hayden. Both children have attended therapy regularly for over a year and both children have a good rapport with their individual therapists.

b. Dr. Mackey, [Charles's] therapist, had recommended that [Charles] attend therapy weekly. [Charles] suffers from anxiety.

c.

d. There have been ongoing problems scheduling appointments for [Charles] during the Defendant's

custodial time going back to October 2020. The Defendant complained about appointments being scheduled during his custodial time or scheduled during school hours.

e. As a result of the conflict, [Charles] had numerous cancelled therapy appointments during 2021 and as of the hearing date, half of all remaining therapy appointments were cancelled for the rest of the year.

f. Defendant was previously held in contempt for interfering with the children's therapy.

g. The Court finds that it is immaterial whose custodial time the children's therapy appointments are scheduled on, so long as the children are receiving therapy as directed by the therapists.

16. There has been an ongoing dispute between the parties about the children's medical conditions and the consistent administration of prescribed medications. Specifically:

a. [Charles] has asthma and serious allergies requiring him to use inhalers on a regular basis and to carry an Epipen at all times.

b. The Plaintiff had contacted the PC on more than one occasion to voice concerns about Defendant's failure to administer the child's medication as prescribed.

c. On July 29, 2021, the PC issued a directive on the medication issue. The email said, in relevant part, "I am going to ask you both to keep a medication administration chart while [Charles] is with you that will indicate: The medication administered, the amount, the date and the time."

d. Despite [Charles's] diagnosed medical problems, and the PC's directive, the conflict over the child's medication continued. Defendant did not maintain the medication log, made the child maintain the medication log, told Plaintiff and the PC that the child (who is 12) was responsible for his own medication, and argued with both Plaintiff and PC in multiple emails rather than simply make sure [Charles] received his medication and maintaining the log so that both

parents could make sure that they were consistent and coordinated in their administration of medication for [Charles].

e. Defendant's refusal to comply with the PC's directive had an adverse effect on [Charles's] health and was not in the child's best interest.

17. The minor children attend two different schools. [Charles] attends Oberlin Middle School while [Timothy] attends The Raleigh School. The schools operate on two slightly different schedules when it comes to teacher workdays and holidays so that there are instances when one child does have school and the other does not on a specific day or days.

18. While the order is clear that the Raleigh School calendar controls for determining holiday and vacation days for the children, there have been repeated disputes and problems with determining custodial exchange times and days. This conflict over the school schedules has served to increase the conflict between the parties.

19. The Defendant has been hostile to the Parent Coordinator. He has frequently resorted to calling her a liar, threatened to file grievances with the State Bar, has responded to the PC's questions about mundane issues with transcripts of prior court hearings and claims that the PC has lied, misled the court, colluded with Plaintiff and Plaintiff's counsel.

20. Defendant's aggressive and hostile responses to the PC are inappropriate. The Court previously found that the PC was acting appropriately and was to remain in place until the end of her appointed term. The PC is due cooperation and respect from both parties, and the appropriate response of a party to a disagreement with the PC is to bring it to the Court, not to attempt to threaten and intimidate the Parent Coordinator.

21. The parties[']inability to communicate with one another effectively make it appropriate to require them to utilize Our Family Wizard for all non-emergency communications.

22. The Court finds that the above listed findings constitute a substantial change in circumstances warranting the

> entry of a temporary custody order modifying the terms of the October 2020 Permanent Custody Order.

Upon these findings, the trial court concluded that "it is appropriate and in the best interests of the minor children to enter a temporary custody order."[5] The trial court thus ordered, in pertinent part, as follows: the parties continue to share joint legal custody but Plaintiff shall have final decision-making authority; Plaintiff have primary physical custody and Defendant have visitation "on alternate weekends from the end of school Friday until the beginning of school Monday morning"; the parties comply with the PC's directive on the children's medication; and Defendant not to threaten, insult, or harass the PC, and not to use abusive language in his communication with her. Any provisions of the Permanent Custody Order and PC directives not modified by the First Temporary Order remained in effect.

The trial court entered another Temporary Order for Child Custody ("Second Temporary Order") on 9 February 2022, based on the 10 January 2022 hearing on the PC's second report. The trial court found, in relevant part, as follows:

> 9. At the prior hearing on the Parent Coordinator'[s] first report to the Court, the Court found that the Defendant was aggressive and threatening toward the Parent Coordinator and ordered him to stop using hostile language and threatening the PC.
>
> 10. Following the hearing on the first PC report the Defendant took the following actions:
>
> > a. Defendant filed a bar grievance against the Parent Coordinator[.]
> >
> > b. Defendant, through counsel, undertook extensive discovery including requests for production of documents requiring the Parent Coordinator to spend more than 10 hours producing hundreds of pages of emails, including all her emails with the Defendant.
> >
> > c. Defendant's counsel noticed the Parent Coordinator to appear and testify at a deposition. Counsel would

5. *See* N.C. Gen. Stat. § 50-97(d) (2021) ("The court, after a hearing on the parenting coordinator's report, shall be authorized to issue temporary custody orders as may be required for a child's best interests.").

not provide the Parent Coordinator, whose term had expired, why having her sit for a deposition would be productive.

d. Defendant threatened to file a motion for sanctions against the Parent Coordinator.

e. Immediately after the last hearing, the Defendant informed the minor children of changes in the custodial schedule prior to any order having been submitted, causing distress to the children. He did not inform the Plaintiff in advance that he was going to tell the children about the litigation.

11. The Defendant has been intent on getting the Parent Coordinator removed, beginning with his Motion to Modify or Terminate Parent Coordinator's Appointment filed on April 30, 2021.

12. The Defendant's actions, including those actions by and through counsel, directed at the Parent Coordinator are, in the Court's view, retaliatory.

13. While the Parent Coordinator has done an excellent job in her role, the Court is concerned that because of the Defendant's tactics and animosity, she cannot be effective in her role going forward. The Court also does not want to expose the Parent Coordinator to further retaliatory actions by the Defendant.

. . . .

20. There is an ongoing conflict between the parties that is interfering with important decisions being made that affect the health, education and welfare of the minor children.

21. The Court finds that the above listed findings constitute a substantial change in circumstances warranting the entry of a temporary custody order modifying the terms of the October 2020 Permanent Custody Order.

Based upon its findings, the trial court concluded that it was appropriate and in the best interests of the minor children to enter a temporary custody order. The trial court maintained the custody provisions from the First Temporary Order but modified the parenting coordinator.

Plaintiff's motion to modify the Permanent Custody Order came on for hearing on 3 March 2022. By order entered 8 July 2022 ("Order on Appeal"), the trial court concluded that there had been a substantial change in circumstances that adversely affected the minor children since entry of the Permanent Custody Order, and that modification of the Permanent Custody Order was warranted.

The trial court made 32 findings of fact, some with sub-findings; the relevant findings of fact are recited above by the majority. Upon its conclusion that there had been a substantial change in circumstances adversely affecting the minor children since entry of the Permanent Custody Order, and that a modification of the permanent custody order was warranted, the trial court essentially ordered the custody terms of the First Temporary Order and the Second Temporary Order become permanent.

Defendant appealed.

II. Analysis

Defendant argues that the trial court erred by concluding that there was a substantial change of circumstances affecting the welfare of the children and that modification was in the best interest of the children, and by awarding primary decision-making authority to Plaintiff.

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.
>
> . . . .
>
> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that

> a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.
>
> When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> . . . .
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003) (quotation marks, brackets, and citations omitted).

A. Change of Circumstances

When considering a party's request to modify a custody order, "courts must consider and weigh all evidence of changed circumstances

which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances." *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998). Where "the effects of the change on the welfare of the child are not self-evident," it "necessitate[s] a showing of evidence directly linking the change to the welfare of the child[,]" and requires that "the trial court make findings of fact regarding that connection." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255, 256 (emphasis omitted).

Defendant argues that no evidence was presented and no findings of fact were made to establish the circumstances that existed in October 2020 when the Initial Custody Order was entered. I agree with the majority that "the Record and the findings in the [Order on Appeal] present us with information sufficient to make a determination on the question of whether a substantial change in circumstances affecting the welfare of the child occurred." Therefore, I too reject Defendant's argument.

Defendant next argues that there was no substantial change in circumstances. I disagree with Defendant's argument and the majority's analysis on this issue.

The trial court's findings show a high level of conflict between the parties, primarily caused by Defendant, that has interfered with important actions being taken and important decisions being made, which has negatively affected the health and welfare of the minor children. Defendant has been uncooperative and hostile toward Plaintiff: Defendant refused to timely respond to Plaintiff's request for information; Defendant began having the children speak with Plaintiff's estranged mother, over Plaintiff's objections; Defendant failed to timely administer Charles's asthma medication and then refused to keep a medication chart detailing the amount, the date, and the time of Charles's medication administration to ensure Charles received his medication; Defendant misrepresented to Plaintiff what the doctor's recommendation was regarding the children's COVID vaccines, delaying them getting vaccinated; and Defendant failed to communicate with Plaintiff before scheduling the children's activities during Plaintiff's custodial time.

Similarly, Defendant was uncooperative and hostile toward the PC: Defendant refused or delayed in responding to the PC's request for information, including refusing to respond to the PC's request for basic information regarding his positive COVID test; Defendant refused to provide the PC with information regarding his son's alleged "behavior issue" and instead told her that neither she nor Plaintiff were "ready

for co-parenting"; Defendant was uncooperative with the PC's attempts to ensure that Charles was receiving regular therapy; and Defendant refused the PC's directive to keep a medication chart to ensure that Charles timely and consistently received his asthma medication.

The findings show that Defendant's uncooperative and hostile behavior has negatively affected the children: Charles did not appropriately receive his asthma medication when with Defendant; Defendant's refusal to keep a medication chart to help ensure that Charles consistently received his medication put Charles's health at risk; the children were delayed in receiving their COVID vaccinations; both children are in therapy; and there were difficulties scheduling Charles's therapy. Furthermore, as noted in prior cases, conflict between parents affect children differently as they become older, involved in more activities, and are more aware of the conflicts:

> It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's findings abundantly demonstrate these communication problems and the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are presently having a negative impact on Reagan's welfare that constitutes a change of circumstances. In fact, it is foreseeable the communication problems are likely to affect Reagan more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody. This argument is overruled.

Laprade v. Barry, 253 N.C. App. 296, 303-04, 800 S.E.2d 112, 117 (2017) (emphasis and citation omitted); *see also Shell v. Shell*, 261 N.C. App. 30, 37, 819 S.E.2d 566, 572 (2018) ("Here, the trial court specifically noted the changes in communication and cooperation since the 2012 order. Although the parties had always had trouble communicating, Father had become even less willing to cooperate with Mother.").

There is no support for the majority's assertion that "the trial court's findings of fact actually suggest the children were relatively insulated from the conflict" and it is naïve to think that the children have been or could be insulated from this conflict. Joint decision making and shared custody–with the children frequently going back and forth between parents–requires a high level of parental cooperation. Just as in *Laprade*, "it is beyond obvious" here that the high level of conflict caused by Defendant has taken its toll on the children's welfare, including directly impeding Plaintiff's ability to parent and co-parent the children. *Laprade*, 253 N.C. App. at 303-04, 800 S.E.2d at 117. Furthermore, just as in *Laprade*, it is foreseeable that the conflict is likely to continue to affect the children more and more as they become older. *Id.* at 304, 800 S.E.2d at 117.

The trial court also made findings of fact regarding circumstances that positively affected the children. Since the entry of the First Temporary Order, wherein Plaintiff was given primary custody of the children and Defendant given alternate weekend visitation, "there have been fewer custodial exchanges between the parties. The reduction in exchanges has helped reduce some of the conflict between the parties." Furthermore, Charles "is doing so well in therapy that he can decrease the frequency of his appointments." Additionally, Plaintiff has remarried, and her new husband has "very positive relationships with the children." These findings show the "changed circumstances which [had] salutary effects" on the children. *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899.

The findings of fact are amply supported by the record evidence, including: the hearing testimony; court filings included in the record on appeal, including the Initial Consent Agreement, Permanent Custody Order, First Temporary Order, and Second Temporary Order; and the documentary exhibits, including numerous emails between the parties and between parties and the PC.

The majority suggests that the conflict between the Defendant and the PC may have been a result of the PC's "error and bias" and that Plaintiff manipulated the communications with the PC to Plaintiff's advantage.[6] Essentially, the majority lays the blame for Defendant's

6. The majority writes, "Parenting coordinators serve an important function on behalf of our courts, *see generally* N.C.G.S. § 50-92 (2021), but they are, ultimately, susceptible to human error and bias, especially when their station requires involving themselves in their assignees' emotionally-charged conflicts. Such susceptibility is especially present when a disparity exists in the parents' ability to manage the optics of the communications to which the parenting coordinator is exposed and advantageously leverage the necessary yet inorganic rules of engagement presented by court-ordered custodial arrangements."

conduct on Plaintiff. There is no basis in the record to support the majority's position and the majority's conjecture was soundly rejected by the trial court in its intermediate orders, none of which are challenged on appeal.

"[I]n custody cases, the trial court sees the parties in person and listens to all the witnesses." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). With this perspective, the trial court is able "to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Yurek v. Shaffer*, 198 N.C. App. 67, 80, 678 S.E.2d 738, 747 (2009) (citations omitted). This opportunity of observation "allows the trial court to detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (quotation marks and citations omitted).

The record in this case includes evidence of Defendant's disruptive litigiousness and the trial court's orders consistently rejecting Defendant's claims. Defendant filed a motion on 30 April 2021 to review two of the PC's decisions. Defendant also filed a motion to modify or terminate the PC's appointment. Defendant then filed a motion for attorney's fees and to apportion the PC's fees between the parties. At the hearing on his motions, "Defendant testified that approximately eight (8) parenting coordinator decisions made between January 14, 2021 and April 13, 2021 created unnecessary confusion and conflict between the parties. Additionally, the decisions concerning the 2021 summer schedule created an unequal distribution of days between the parties . . . ." The trial court, in denying Defendant's motions, found that the PC's decisions were "based on rational and reasonable consideration of the children's best interests" and "did not substantially alter the time-sharing arrangement set forth in the custody order," and that the parties would continue to benefit from the continuing services of a parenting coordinator.

The PC filed a report on 24 September 2021 detailing numerous problems with the permanent custody order and suggesting that Defendant receive a psychological evaluation. In response, Defendant moved the trial court to order Plaintiff to undergo a psychological evaluation, alleging that "Plaintiff exhibits many behaviors that are to the detriment of the minor children, and Defendant's ability to co-parent with her," and that "[a]n evaluation of Plaintiff would substantially assist the Court in its determination of whether Plaintiff is a fit and proper person to parent the minor children."

After a hearing on 27 October 2021 on the PC's first report, Defendant engaged in the following litigation, characterized as "retaliatory" by the trial court: Defendant filed a bar grievance against the PC; Defendant undertook extensive discovery requiring the PC to spend more than 10 hours producing hundreds of pages of emails, including all her emails with the Defendant; Defendant noticed the PC to appear and testify at a deposition; and Defendant threatened to file a motion for sanctions against the PC. Also, immediately following that hearing, Defendant unilaterally informed the minor children of changes in the custodial schedule prior to any order having been submitted, causing distress to the children. The trial court found that Defendant "was aggressive and threatening toward the Parent Coordinator" and "ordered [Defendant] to stop using hostile language and threatening the PC."

The trial court's First Temporary Order, issued after a hearing on the PC's first report, made numerous findings regarding Defendant's hostile and disruptive behavior which negatively affected the children's physical and mental health, most of which were included in the Order on Appeal.

These intermediate orders, none of which are challenged on appeal, establish that Defendant's pattern of litigious, uncooperative, and hostile conduct, and Defendant's refusal to cooperate with the PC, adversely affected the children's health, and that Defendant's involvement of the children in the litigation caused distress to the children.

Furthermore, the findings of fact supported the trial court's conclusions of law that since the entry of the last custody order there has been a substantial change in circumstances that adversely affects the minor children and a modification of the permanent custody order is warranted.

Defendant argues essentially that because this case has always been high conflict and because he has always been difficult, there has been no substantial change in circumstances. However, the findings of fact do not evidence a mere continuation of conflict and Defendant's poor behavior; the findings show an increase in both, starting after entry of the Permanent Custody Order and continuing to escalate until the entry of the First Temporary Order changing the terms of the custody. Moreover, even if this case presented merely a sustained high level of conflict caused by Defendant's continuous difficult behavior over a period of time, the effect of the conflict and behavior has led to a substantial change in the parenting coordinator's and Plaintiff's ability to deflect and absorb such conflict and ensure the health and

well-being of the children. This substantial change has negatively affected the children.

B. Best Interests

"Upon determining that a substantial change in circumstances affecting the welfare of the minor child occurred, a trial court must then determine whether modification would serve to promote the child's best interests." *Shipman*, 357 N.C. at 481, 586 S.E.2d at 257 (citation omitted). Trial courts are "vested with broad discretion in custody cases and will not be overturned absent an abuse of discretion." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 903 (2008) (citation omitted).

As detailed above, the trial court's findings of fact are supported by substantial record evidence. Moreover, the findings of fact amply support its conclusion of law that modification of the Permanent Custody Order would serve the children's best interests.

C. Primary Decision Making

"[North Carolina] trial courts have wide latitude in distributing decision-making authority between the parties based on the specifics of a case." *Peters v. Pennington*, 210 N.C. App. 1, 17, 707 S.E.2d 724, 736 (2011) (citation omitted). The trial court's deviation from pure joint legal custody is reviewed on appeal for abuse of discretion, but "a trial court's findings of fact must support the court's exercise of this discretion." *Id*.

Here, the trial court ordered as follows:

> The parties shall continue to share joint legal custody. The parties shall in good faith confer and attempt to mutually agree on major decisions affecting the children's health, education and welfare. In the event the parties are unable to reach mutual agreement on a major decision, the Plaintiff shall have final decision-making authority. Day-to-day decisions shall be made by the custodial parent.

This decision was supported by sufficient findings of fact to show that such a decision was warranted, namely, Defendant's extensive history of misconduct and refusal to cooperate with Plaintiff and the PC. As discussed above, the trial court made findings of fact detailing past conflict between the parties which illustrate Defendant's hostility and refusal to cooperate and the effect Defendant's misconduct had on the minor children.

Defendant has failed to show that the trial court's decision giving final decision-making authority to Plaintiff on major issues involving the

children was manifestly unsupported by reason or that it could not have been the result of a reasoned decision. Accordingly, I would hold that the trial court did not err.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY GEORGE JONES DATED JULY 20, 2017 AND RECORDED IN BOOK 5574 AT PAGE 273 IN THE BUNCOMBE COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA23-594

Filed 20 February 2024

Mortgages and Deeds of Trust—nonjudicial power of sale foreclosure—reverse mortgage—validity of debt—competency of mortgagor—equitable versus legal defenses

In determining whether a reverse mortgage lender had the right to a nonjudicial power of sale foreclosure pursuant to a deed of trust, the trial court erred by determining that the lender failed to comply with statutorily mandated credit counseling provisions and, as a result, that the note on the subject property did not constitute a valid debt as required by N.C.G.S. § 45-21.16(d) (listing six mandatory elements for foreclosure). Where it was undisputed that the mortgagor received loan counseling by phone and that the counselor certified the session prior to the loan closing, the lender met the conditions precedent to foreclosure. Further, where the trial court based its decision on its concern about the mortgagor's mental capacity, rather than constituting a legal defense appropriate for the hearing held under section 45-21.16, that concern raised a potential equitable defense to the foreclosure that should have been asserted in an action to enjoin the foreclosure sale under section 45-21.34; thus, the matter was remanded for further proceedings.

Appeal by petitioner from order entered 14 March 2023 by Judge Daniel A. Kuehnert in Buncombe County Superior Court. Heard in the Court of Appeals 28 November 2023.

Alexander Ricks, PLLC, by Amy P. Hunt, for petitioner-appellant.

Deutsch & Gottschalk, P.A., by Tikkun A.S. Gottschalk, for respondents-appellees.

ZACHARY, Judge.

Petitioner American Advisors Group (hereinafter "AAG") appeals from the superior court's order denying its "right to a [nonjudicial] power of sale foreclosure" on the ground that AAG, as reverse mortgage lender, failed to comply with the statutorily required credit counseling provisions, and therefore the Note did not evidence a valid debt. After careful review, we reverse and remand for further proceedings.

BACKGROUND

In 2017, 83-year-old George Jones qualified for a reverse mortgage on his home. A reverse mortgage is a loan that is marketed to people 62 years of age and older and that is secured by a first mortgage or first deed of trust on the mortgagor's principal residence. This type of mortgage requires no repayment until a future time, upon the earliest occurrence of one or more events specified in the reverse mortgage loan contract; the debt often becomes payable upon death or when the encumbered property is no longer the homeowner's primary residence. *See* N.C. Gen. Stat. § 53-257(6) (2023).

In the present case, Jones received the statutorily required loan counseling on 19 May 2017, which AAG notes was "conducted by a third-party unrelated to the lender and approved by HUD." The court found that the loan counseling "took place via telephone and lasted 75 minutes." When the counseling was completed, the counselor input the following to the HUD database: "Certificate issued. Client appeared to understand reverse mortgage concepts and responded appropriately to most questions."

On 20 July 2017, a "traveling notary" came to Jones's house and notarized his signature on the loan closing documents, including an adjustable rate home-equity conversion note (the "Note") and deed of trust ("Deed of Trust"). Jones agreed to repay all sums advanced to him by AAG, not to exceed $211,500.00, and secured the debt with the Deed of Trust on his home in Asheville, North Carolina (the "Property"). The Deed of Trust was recorded at Book 5574, page 273 of the Buncombe County Registry. AAG paid the loan proceeds into Jones's bank account.

Jones died on 25 December 2019, and the entire debt immediately became due pursuant to the terms of the Note. Shortly after his death, AAG notified one of Jones's sons, who was serving as the administrator of Jones's estate, that the "death was an event of default under the Deed of Trust" and "that the loan balance of $105,393.23 was due and owing."

On 4 May 2021, the substitute trustee on the Deed of Trust initiated the instant nonjudicial power-of-sale foreclosure before the Buncombe County Clerk of Superior Court. On 12 April 2022, this matter came on for hearing before the assistant clerk, who subsequently entered an order "denying authorization to sell real property" under the power-of-sale provision in the Deed of Trust. AAG timely appealed to superior court.

On 14 November 2022, AAG's appeal came on for hearing de novo in Buncombe County Superior Court. On 14 March 2023, the superior court entered an order denying AAG's right to proceed with the nonjudicial foreclosure. The court concluded that 1) the proper persons were served; 2) AAG was the holder of the debt; 3) the "[p]ayments [on the debt were] in default under the Note and Deed of Trust"; 4) the debt, as a reverse mortgage, did not qualify as a "home loan"; 5) the respondents (Jones's heirs) were "not in a period of protected military status"; and 6) the Deed of Trust contained a power-of-sale provision.

However, the court also concluded that the loan counseling that Jones received prior to the loan closing failed to "satisfy the requirements of N.C. Gen. Stat. §[§] 53-269 and 270 because the notes input by the counselor to the electronic HUD system indicated [that Jones] responded appropriately to 'most' questions, and the lender did not follow up on this note." According to the trial court, "This note required further inquiry on the part of the lender [AAG]. Therefore, the Note is not a valid debt."

AAG timely appealed to this Court.

DISCUSSION

On appeal, AAG argues that "the trial court erred in concluding that [AAG] could not proceed with foreclosure, because [AAG] presented evidence to satisfy all elements of N.C. Gen. Stat. § 45-21.16[,]" including the validity of the debt. We agree.

"When the trial court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *In re Bradburn*, 199 N.C. App. 549, 551, 681 S.E.2d 828, 830 (2009) (cleaned up), *disc. review denied*, 363 N.C. 803, 690 S.E.2d 531 (2010). We review de novo "[t]he trial court's conclusions of law[.]" *Id.*

Section 45-21.16(d) provides that the clerk of superior court may authorize a nonjudicial power-of-sale foreclosure upon evidence supporting six findings: "(i) a valid debt, (ii) default, (iii) the right to foreclose [under the instrument], (iv) notice, . . . (v) 'home loan' classification . . . ,

and (vi) that the sale is not barred by the debtor's military service." *In re Clayton*, 254 N.C. App. 661, 665, 802 S.E.2d 920, 923–24 (2017) (citation omitted), *disc. review and cert. denied*, 370 N.C. 223, 809 S.E.2d 866 (2018). On review from the clerk of court's determination, the superior "court's de novo hearing is limited to making a determination on the same issues as the clerk of court." *Id.* (citation omitted).

As our Supreme Court has explained, legal defenses to any of the findings may be properly advanced and considered at a nonjudicial foreclosure hearing under section 45-21.16; however, equitable defenses may not. *In re Goforth Props., Inc.*, 334 N.C. 369, 374–75, 432 S.E.2d 855, 859 (1993). Instead, equitable defenses must be raised in a separate action to enjoin the foreclosure sale. *Id.*

In the instant case, it is undisputed that, as the superior court concluded, AAG satisfied each of the six requirements, except for the existence of a valid debt. The parties contest the validity of the debt.

Generally, "introduction of a promissory note along with evidence of execution and delivery . . . , in the absence of probative evidence to the contrary, will support the finding of a valid debt in a proceeding to foreclose under a power of sale." *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804 (1978). Here, although AAG possessed the Note, endorsed in blank, the court found that "the notes input by the [loan] counselor to the electronic HUD system indicated [that Jones] responded appropriately to 'most' questions, and [AAG] did not follow up on this note." Thus, the trial court concluded that the debt was not a "valid debt" subject to foreclosure under Chapter 45 because the loan counseling "did not satisfy the requirements of N.C. Gen. Stat. §[§] 53-269 and 270." During the foreclosure hearing, the court expressed its concern regarding Jones's mental capacity, stating, "I believe [Jones] signed it. . . . [T]he sole issue in my mind has to do with the fact that the counseling session . . . raised a question which should have halted the [loan] process; and it goes to the . . . capacity of [Jones]."

This issue is similarly raised on appeal by Respondents, who maintain that "[t]here is substantial evidence that Mr. Jones, who was 83 years old at the time, lacked the mental capacity to understand what he was doing when he spoke with the credit counselor, or later, when he signed the mortgage documents." Thus, they agree with the trial court that the reverse mortgage agreement violated the counseling provisions of the Reverse Mortgage Act and is unenforceable. Because it is unenforceable, Respondents contend that there is no valid debt and AAG may not foreclose on the Property.

Our General Assembly enacted the Reverse Mortgage Act to protect older homeowners from abusive practices associated with reverse mortgages. *See* N.C. Gen. Stat. §§ 53-255–56. As relevant to the case at bar, section 53-270 of the Reverse Mortgage Act provides that "[r]everse mortgage lenders are prohibited from . . . [c]losing a reverse mortgage loan without receiving certification from a person who is certified as a reverse mortgage counselor by the State that the borrower has received counseling on the advisability of a reverse mortgage loan[.]" *Id.* § 53-270(6). It further requires that the borrower receive counseling regarding "the various types of reverse mortgage loans and the availability of other financial options and resources for the borrower as well as potential tax consequences." *Id.* Relatedly, section 53-269 provides that "[t]he North Carolina Housing Finance Agency shall adopt rules governing the training of counselors and necessary standards for counselor training" and shall "maintain a list of counselors who have satisfied training requirements[.]" *Id.* § 53-269(a)–(b).

Here, it is undisputed that Jones received loan counseling, which the court found "took place via telephone and lasted 75 minutes[,]" and that the counselor certified the counseling prior to the loan closing. Thus, AAG complied with the statutory counseling provision.

Hence, the crux of the matter presented is whether a borrower's possible diminished mental capacity, as evinced in a loan counselor's notes, may be properly raised as a defense in a nonjudicial power-of-sale foreclosure. Indeed, "[a] deed executed by an incompetent grantor may be set aside by a suit in equity[.]" *In re Godwin*, 121 N.C. App. 703, 705, 468 S.E.2d 811, 813 (1996). Nonetheless, it is well settled that "the incompetency of a mortgagor is an equitable rather than a legal defense to a foreclosure and may not be raised in a hearing under" N.C. Gen. Stat. § 45-21.16. *Id.*

Accordingly, the trial court erred in concluding that there was no valid debt. "[B]ecause the foreclosure by power[-]of[-]sale statute is designed to provide a less timely and expensive procedure than foreclosure by action, it does not resolve all matters in controversy between mortgagor and mortgagee." *In re Gray*, 225 N.C. App. 46, 49, 741 S.E.2d 888, 890 (2013) (cleaned up). Thus, "equitable defenses to the foreclosure . . . should be asserted in an action to enjoin the foreclosure sale under" N.C. Gen. Stat. § 45-21.34. *Id.* (citation omitted).

CONCLUSION

For the reasons stated herein, we reverse the trial court's order denying AAG's right to proceed under Chapter 45 with a nonjudicial power-of-sale foreclosure, and remand for further proceedings.

REVERSED AND REMANDED.

Judges TYSON and FLOOD concur.

IN THE MATTER OF RASHID LALIVERES

No. COA23-742

Filed 20 February 2024

Sexual Offenders—registration—out-of-state conviction—registration required in state of conviction

The trial court did not err by requiring petitioner to register as a sex offender in this state based on his 1993 conviction in New York of attempted first-degree rape, for which petitioner was required to register as a sex offender under New York law. Despite petitioner's argument that the offense was not substantially similar to a North Carolina offense, his registration in this state was mandatory pursuant to N.C.G.S. § 14-208.6(4)(b) based on his registration requirement in New York independent of any determination of substantial similarity.

Appeal by Petitioner from judgment entered 2 December 2022 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 24 January 2024.

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

Jason Christopher Yoder, for Petitioner-Appellant.

WOOD, Judge.

Rashid Laliveres ("Petitioner") appeals from a judgment requiring him to register as a sex offender upon his relocation to North Carolina,

arguing his out-of-state conviction from New York is not substantially similar to a reportable North Carolina offense. After careful review of applicable law, we affirm the trial court.

I. Factual and Procedural Background

On 10 September 1993, Petitioner was convicted of attempted first-degree rape in New York pursuant to N.Y. Penal § 130.35(1). On 16 March 2022, after Petitioner moved to North Carolina, the Wake County Sheriff's Office notified Petitioner that he was required to register as a sex offender based upon his out-of-state conviction. On this same day, Petitioner filed a petition for judicial determination on this registration requirement.

On 2 December 2022, the trial court held a hearing on Petitioner's petition. At the hearing, the State presented evidence Petitioner had been convicted on 10 September 1993 under N.Y. Penal § 130.35 for attempted first-degree rape and that Petitioner had been convicted under the first section of the New York statute whereby Petitioner was found guilty of attempted "rape in the first degree when he or she engages in sexual intercourse with another person . . . by forcible compulsion." N.Y. Penal § 130.35(1). The prosecutor argued that N.Y. Penal § 130.35 was substantially similar to N.C. Gen. Stat. § 14-27.22, governing second-degree forcible rape because the North Carolina statute "involves the same type of behavior, by force and against the will of another person" as the New York statute.

The State submitted copies of the relevant New York penal code section, the North Carolina statue, and Petitioner's DCI (Department of Criminal Information) reflecting the underlying out-of-state conviction at trial. Both the State and defense counsel acknowledged that the conviction under N.Y. Penal § 130.35 was for attempted first-degree rape. On 2 December 2022, the trial court concluded N.Y. Penal § 130.35 was substantially similar to N.C. Gen. Stat. § 14-27.22, a reportable offense, and entered an order requiring Petitioner to register as a sex offender in North Carolina. On 6 December 2022, Petitioner filed written notice of appeal.

II. Appellate Jurisdiction

In conjunction with his brief, Petitioner has filed a petition for *writ of certiorari* requesting that this Court utilize Rule 21 of the North Carolina Rules of Appellate Procedure to review the merits of his appeal. The record indicates that Petitioner's trial counsel filed written notice of appeal on 6 December 2022, but there is neither a certificate of

service indicating the notice of appeal was served on the State nor any form of evidence indicating the filed notice of appeal was served on the State. Petitioner's petition recognizes that if this Court determine that his "written notice of appeal was technically defective because it does not include a certificate of service, he will have lost his appeal of right, as the time for filing a valid notice of appeal has expired" pursuant to Rule 3 of our Rules of Appellate Procedure. However, Petitioner argues that the record demonstrates his desire to appeal the order in this case; the record was settled without any objection by the State during the issuance of appellate entries, extension on the proposed record, production of transcripts delivered to the State, and service of the proposed record; and he has a statutory right to counsel in this proceeding based on having the right to effective counsel. N.C. Gen. Stat. § 7A-451(19).

An order for sex offender registration is a civil order. Therefore, a petitioner is required to file a written notice of appeal under Rule 3. Under Rule 3,

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

N.C. R. App. P. Rule 3 (a). In response, the State argues Petitioner's failure to indicate that the State was properly served with Petitioner's notice of appeal divests this Court of jurisdiction. *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011).

The State and Petitioner acknowledge this Court's authority to grant, in its discretion, a petition for *writ of certiorari* under Rule 21 to reach the merits on appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). Pursuant to Rule 21(a), we may issue a *writ of certiorari* in appropriate circumstances when the right to appeal was lost by a failure to take timely action. In the exercise of our discretion, we allow Petitioner's petition for *writ of certiorari* and address the merits of his appeal. *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010).

III. Analysis

A. Petitioner's Out-of-state Reportable Conviction and North Carolina's Sex Offender Registration.

Petitioner argues the trial court erred in ordering him to register as a sex offender "based on substantial similarity for an 'attempt' offense

that occurred in New York because attempts are not included in the definition of a reportable conviction based on an out-of-state offense that is substantially similar to an offense against a minor or a sexually violent offense." Petitioner reasons that based on these grounds, "the order should be reversed." We disagree.

The question of "whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law." *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (citation omitted). Questions of law are reviewed by an appellate court *de novo*. *Id.* at 669, 687 S.E.2d at 524. Under a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). The trial court determines whether the statutes are substantially similar by "compar[ing] the elements of the out-of-state . . . offense to those purportedly similar to a North Carolina offense." N.C. Gen. Stat. § 14-208.12B(c) (2023).

North Carolina's "Sex Offender and Public Protection Registration Program" requires that certain individuals residing in North Carolina "register" for the program with the sheriff of the county where they reside if they have a "reportable conviction." N.C. Gen. Stat. § 14-208.7(a).

N.C. Gen. Stat. § 14-208.6(4)(b) provides a "reportable conviction" is

> [a] final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, *or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.*

N.C. Gen. Stat. § 14-208.6(4)(b) (2023) (emphasis added). The State contends the emphasized portion of the statute

> became effective December 1, 2006, and applies to all offenses committed prior to, on, or after that date and to all individuals who move into this State prior to, on, or after that date as later amended effective October 1, 2010. S.L. 2006-247 §§ 19(a) 19(e) [Amended by S.L. 2010-174, § 16(a), eff. Oct. 1, 2010].

Accordingly, if Petitioner's "conviction in New York requires him to register as a sex offender there, which the State contends it does, then he is required to register as a sex offender in North Carolina." In short, the State argues Petitioner is subject to North Carolina sex offender registration

requirements because his out-of-state conviction required registration under New York's sex offender registration statute. Therefore, the fact that his out-of-state conviction was an attempt offense is irrelevant and Petitioner's registration is mandatory. The State contends the requirement to register is not premised upon a theory of "substantial similarity" between the North Carolina and New York statutes. We agree.

The State of New York's Sex Offender Registration Act creates a duty for any sex offender to register. N.Y. CORRECT. § 168-f. New York defines a "sex offender" as any person who is convicted of any of the offenses set forth in the subdivisions of "sex offense" or "sexually violent offense." N.Y. CORRECT. § 168-a(1). Petitioner was convicted of attempted rape under N.Y. PENAL § 130.35. The Sex Offender Registration Act defines N.Y. PENAL § 130.35 as a "sexually violent offense." N.Y. CORRECT. § 168-a(3). Under the penal code, a "sexually violent offense" includes a conviction of an attempt to commit any of the provisions of sections 130.35, 130.50, 130.65, 130.66, 130.67, 130.70, 130.75, 130.80, 130.95 and 130.96 of the penal law. N.Y. CORRECT. § 168-a(3)(a).

Under the Sex Offender Registration Act of New York, Petitioner's prior conviction for attempted first-degree rape mandates that he register as a sexual offender in New York. N.Y. CORRECT. §§ 168-a(1)–(3), 168-f. Because Petitioner's out-of-state conviction is a final conviction requiring registration under the Sex Offender Registration Act of New York, pursuant to N.C. Gen. Stat. § 14-208.6(4)(b), Petitioner has a reportable conviction in North Carolina and is required to register here. N.C. Gen. Stat. § 14-208.6(4)(b) (2023).

The State aptly notes, "N.C. Gen. Stat. § 14-208.12B has erroneously been relied upon in these proceedings as it only applies to out-of-state reportable convictions which are solely based upon substantial similarity of offenses." In fact, all of Petitioner's arguments on appeal assert the trial court erred in ordering Petitioner's registration as a sex offender based on the "substantial similarity between convictions."

N.C. Gen. Stat. § 14-208.12B provides, in part:

> (a) When a person is notified by a sheriff that the person may be required to register based on an out-of-state conviction as provided in G.S. 14-208.6(4)(b), or a federal conviction as provided in G.S. 14-208.6(4)(c), that is substantially similar to a North Carolina sexually violent offense, or an offense against a minor, the sheriff shall notify the person of the right to petition the court for a judicial determination of the requirement to register.

> Notification shall be served on the person and the district attorney, as provided in G.S. 1A-1, Rule 4(j), or delivery by any other means that the person consented to in writing. The person may petition the court to contest the requirement to register by filing a petition to obtain a judicial determination as to whether the person is required to register under this Article. The judicial review shall be by a superior court judge presiding in the district where the petition is filed. The review under this section is limited to determine whether or not the person's out-of-state or federal conviction is substantially similar to a reportable conviction, as defined in G.S. 14-208.6(4)(a).

N.C. Gen. Stat. § 14-208.12B (2023). However, we conclude that the requirement for Petitioner to register "as a sex offender is not solely based upon substantial similarity between convictions." Our statute makes it clear: a reportable conviction requiring registration as a sex offender includes "a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state." N.C. Gen. Stat. § 14-208.6(4)(b) (2023). Our statutes do not provide "any discretion in placing an individual on the sex offender registry" because the portion of our statutes which require Petitioner's registration are mandatory. *Bunch v. Britton*, 253 N.C. App. 659, 677-78, 802 S.E.2d 462, 475 (2017) (citing N.C. Gen. Stat. § 14-208.7(a) and N.C. Gen. Stat. § 14-208.6(4)(b)).

Because Petitioner's out-of-state final conviction required him to register as a sex offender under New York's registration statutes, he is required to register as an offender under North Carolina law independent of any substantial similarity analysis. N.Y. Correct. § 168; N.C. Gen. Stat. § 14-208.6(4)(b) (2023). Therefore, we hold that Petitioner is mandated to register as a sex offender in North Carolina due to his previous out of state conviction which required him to register under the laws of New York. Pursuant to N.C. Gen. Stat. §§ 14-208.7(a) and 14-208.6(4)(b), the trial court correctly concluded Petitioner is required to comply and register as a sex offender. Thus, Petitioner's arguments are overruled.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order requiring Petitioner to register as a sex offender in this State.

AFFIRMED.

Judges TYSON and STADING concur.

LONGPHRE v. KT FIN., LLC

[292 N.C. App. 428 (2024)]

JOHN LONGPHRE AND KAORI LONGPHRE, PLAINTIFFS
v.
KT FINANCIAL, LLC, DEFENDANT

No. COA23-660

Filed 20 February 2024

1. Contracts—promissory notes—no specified interest accrual date—statutory provision applied—from time notes became due

In an action by plaintiffs to collect on two overdue promissory notes—which secured loans totaling $330,000 from plaintiffs to defendant with interest set at thirty percent per annum—where the notes stated that "[a]ll accrued interest and unpaid principal shall be paid in full on or before" one year after the notes were executed, the trial court did not err by determining that interest started accruing not when the funds were disbursed but a year later. Although the notes did not contain a specified accrual date, the terms of the notes were not ambiguous; therefore, in the absence of an explicit accrual date, the trial court properly applied the statutory guidance in N.C.G.S. § 24-3(1), under which interest accrued from the time the notes became due.

2. Attorney Fees—promissory notes—collection—statutory percentage rate—notice requirements met

In an action by plaintiffs to collect on two overdue promissory notes—which secured loans totaling $330,000 from plaintiffs to defendant with interest set at thirty percent per annum and included an attorney fees provision in the event collection became necessary—the trial court did not err by awarding attorney fees to plaintiffs in accordance with N.C.G.S. § 6-21.2(2), where plaintiffs complied with the notice requirements of section 6-21.2(5). The trial court's award of fifteen percent attorney fees, which was calculated as a percentage of the reduced outstanding balance defendant owed to plaintiffs (as determined by the trial court after applying a statutory interest accrual provision), did not exceed the statutory basis for attorney fees.

Appeal by defendant from judgment entered 24 January 2023 by Judge Lora C. Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 24 January 2024.

Fox Rothschild LLP, by Troy D. Shelton, for the plaintiffs-cross-appellants/appellees.

Vann Attorneys, PLLC, by James R. Vann, and Ian S. Richardson, for the plaintiffs-cross-appellants/appellees.

Rossabi Law Partners, by Gavin J. Reardon, and Amiel J. Rossabi, for the defendant-appellant/cross-appellee.

TYSON, Judge.

John Longphre and Kaori Longphre (collectively "Longphres") loaned KT Financial, LLC ("KT Financial") $330,000 secured by two separate promissory notes. KT Financial appeals the portion of the trial court's order granting the Longphres attorney's fees for legal services incurred while collecting on KT Financial's outstanding debt. The Longphres cross appeal the portion of the trial court's order, which reduced the interest KT Financial owed the Longphres. We affirm.

I. Background

The Longphres loaned KT Financial $230,000 secured by a promissory note ("Note One") executed on 7 April 2020. Approximately one month later, the Longphres loaned an additional $100,000 to KT Financial on 1 May 2020 ("Note Two"). KT Financial also pledged two properties as collateral for both loans.

The terms of both promissory notes are the same. The interest due for both promissory notes was thirty percent (30%) per annum, and the notes specified "[a]ll accrued interest and unpaid principal" was due one year after the notes were executed. The notes also empowered the Longphres to collect attorney's fees if legal proceedings were instituted to collect on the accounts.

KT Financial failed to make any payments on the balances of either loan by their respective due dates. The Longphres sent a letter to KT Financial on 24 June 2022 and demanded $382,556.16 for the principal amount plus accrued interest on Note One and $164,356.16 for the principal amount plus accrued interest on Note Two. The letter provided: "Unless you pay within five (5) days from the date of this letter, you will be liable for attorneys' fees pursuant to North Carolina General Statute § 6-21.2." The letter explained the Longphres would seek attorney's fees of $57,383.42 for Note One and $24,753.42 for Note Two.

KT Financial failed to make any payments to the Longphres for either note. The Longphres filed a complaint against KT Financial on 18 July 2022, seeking collection of both promissory notes with interest

and attorney's fees. The Longphres filed a Rule 12(c) Motion for Judgment on Pleadings on 30 September 2022.

A hearing was held on 9 January 2023. The Longphres' motion was "granted in part and denied in part" on 24 January 2023. At the hearing, KT Financial argued both notes were interest free for the first year, which was supported by several provisions in the promissory notes. The trial court agreed with KT Financial and recalculated the interest for both notes as accruing after 1 May 2021. The interest KT Financial owed was reduced to $120,156.16, which was a $96,756.16 reduction from the $216,912.32 interest quoted in the demand letter the Longphres had sent to KT Financial. The trial court also awarded the Longphres $67,523.42 in attorney's fees pursuant to the fifteen percent rate established in N.C. Gen. Stat. § 6-21.2 (2023).

KT Financial entered a notice of appeal from the trial court's award of attorney's fees on 20 February 2023. The Longphres filed a notice of cross-appeal on 21 February 2023 regarding the portions of the order outlining the interest calculations.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Issues

The Longphres argue the trial court erred by calculating interest beginning on 1 May 2021 instead of from the day both notes were issued. KT Financial appeals the trial court's award of attorney's fees to the Longphres pursuant to N.C. Gen. Stat. § 6-21.2 (2023).

IV. Contract Interpretation – Interest Calculation

[1] The Longphres argue the trial court erred by holding interest began to accrue for each note one year after proceeds were disbursed. They assert the language in the contract providing "[a]ll accrued interest and unpaid principal shall be paid in full on or before" one year after the funds were disbursed indicate interest began accruing the day the loan proceeds were disbursed.

KT Financial argues the contract, when read as a whole, and the Longphres' actions after the funds were disbursed indicate the loan was interest free for one year. More specifically, KT Financial cites the following characteristics as proof the parties intended for interest to accrue one year after the funds were disbursed: (1) neither of the promissory notes provided a date on which interest shall begin to accrue;

(2) no periodic payments were required before the note was due in full; (3) the notes included an acceleration clause; (4) neither note provided interest was due until the note was paid in full; (5) neither note provided any variation in the interest rate depending upon when the loan reached the maturity date or if payment on the notes defaulted; (6) the notes were each secured by multiple parcels of real property; and, (7) a thirty percent interest rate is astronomical unless the first year is interest free. Essentially, KT Financial argues each party gambled on time and certain outcomes. KT Financial gambled they could repay both notes in the first year before the thirty percent interest rate began to accrue. The Longphres gambled KT Financial would be unable to repay the loan in the first year, and the thirty percent interest rate would accrue.

A. Standard of Review

"We review de novo the trial court's order granting judgment on the pleadings." *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 507, 797 S.E.2d 264, 269 (2017) (citation omitted).

B. Analysis

"A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court." *Dept. of Transportation v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994) (citation omitted).

"A contract term is ambiguous only when, 'in the opinion of the court, the language of the [contract] is fairly and reasonably susceptible to either of the constructions for which the parties contend.' " *State v. Philip Morris USA Inc.*, 363 N.C. 623, 641, 685 S.E.2d 85, 96 (2009) (first quoting *Wachovia Bank & Tr.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citation omitted); then citing *Walton v. City of Raleigh*, 342 N.C. 879, 881-82, 467 S.E.2d 410, 412 (1996) ("Parties can differ as to the interpretation of language without its being ambiguous . . . .")).

"If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton*, 342 N.C. at 881, 467 S.E.2d at 411 (citation omitted).

"[R]ules of construction are used to interpret ambiguities in contracts. They are not used to rewrite provisions to fit the needs of a litigant. Where a provision in an agreement . . . is clear and unambiguous on its face, there is no need to apply rules of construction." *Beachcrete, Inc. v. Water St. Ctr. Assocs., L.L.C.*, 172 N.C. App. 156, 160, 615 S.E.2d 719, 722 (2005) (citation omitted).

Our general statutes provide guidance for the time from which interest accrues, if a promissory note is silent regarding when interest commences: "(1) All bonds, bills, notes, bills of exchange, liquidated and settled accounts shall bear interest *from the time they become due* . . . unless it is specially expressed that interest is not to accrue until a time mentioned in the said writings or securities." N.C. Gen. Stat. § 24-3(1) (2023) (emphasis supplied).

While the Longphres argue the default rules of the Uniform Commercial Code ("UCC") should apply, the record is devoid of any information indicating whether the contract involved the sale of goods, nor does either promissory note mention the UCC. See N.C. Gen. Stat. § 25-2-102 (2023) (explaining the UCC only applies "to transactions in goods"); *Haywood Street Redevelopment Corp. v. Peterson Co.*, 120 N.C. App. 832, 837, 463 S.E.2d 564, 567 (1995) (explaining "[t]his case is not, however, governed by the UCC" and then quoting N.C. Gen. Stat. § 25-2-102). Further, the Longphres failed to raise or argue at trial that the UCC applied, and any argument that the UCC applies is not preserved for appeal. N.C. R. App. P. 10(a).

Here, the trial court found, and we agree, the terms of the contract are not ambiguous. *See Philip Morris*, 363 N.C. at 641, 685 S.E.2d at 96; *Walton*, 342 N.C. at 881, 467 S.E.2d at 411; *Beachcrete*, 172 N.C. App. at 160, 615 S.E.2d at 722.

KT Financial asserted before the trial court: "It says accruing interest, but it does not say when the accruing interest actually starts. The word is 'accruing interest,' and you have to say accruing interest from this date or from thirty days from now or whenever." In the absence of any specified accrual date, N.C. Gen. Stat. § 24-3(1) applies and interest accrues "*from the time they become due*." N.C. Gen. Stat. § 24-3(1).

This reading of the contract is further supported by the Longphres' failure to seek repayment until 24 June 2022, approximately two years after the funds were disbursed and one year after payment was due. Further, both promissory notes explain the due dates for each loan occur one year *after* the funds were disbursed, providing "[a]ll accrued interest and unpaid principal shall be paid in full on or before [one year]."

If the Longphres intended for interest to accrue immediately after the loan was disbursed, i.e., throughout the year before payments were due, the notes should have specified the date interest would begin to accrue. *See* N.C. Gen. Stat. § 24-3(1). The trial court did not err as a matter of law by failing to include interest for each note for the first year before repayment was due. *See Idol*, 114 N.C. App. at 100, 440 S.E.2d at 864. The trial court's order on this issue is affirmed.

V. Attorney's Fees

[2] KT Financial argues the trial court erred by awarding the Longphres fifteen percent in attorney's fees based upon the newly calculated outstanding balance.

A. Standard of Review

"[R]easonableness is the key factor under all attorney's fees statutes." *Institution Food House v. Circus Hall of Cream*, 107 N.C. App. 552, 558, 421 S.E.2d 370, 374 (1992) (citation omitted).

B. Analysis

"A formal credit agreement executed by the parties prior to the establishment of an open account is evidence of indebtedness; and if such an agreement contains a provision for attorney's fees it will be legally enforceable pursuant to G.S. 6-21.2." *W.S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 422, 360 S.E.2d 814, 816 (1987) (citation omitted).

N.C. Gen. Stat. § 6-21.2 provides guidance for assessing attorney's fees, in addition to interest, on uncollected notes:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, . . . subject to the following provisions:
>
> . . .
>
> > (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2 (2023).

The statute further provides five days' prior notice must be provided to the "party sought to be held on said obligation." N.C. Gen. Stat. § 6-21.2(5) (2023). The notice must include the outstanding balance and explain the "party sought to be held on said obligation has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees." *Id.*

Here, the Longphres sent the required five days' prior notice to KT Financial regarding their outstanding balances, complying with N.C. Gen. Stat. § 6-21.2(5). The Longphres' trial attorney also prepared and submitted before the trial court an affidavit listing his attorney's fees and citing the fifteen percent statutorily-based attorney's fee set out in N.C. Gen. Stat. § 6-21.2(2). The fifteen percent attorney's fees the trial court assessed do not exceed the statutory basis for attorney's fees and were calculated as a percentage of the reduced outstanding balance KT Financial owed to the Longphres. N.C. Gen. Stat. § 6-21.2(2)–(3). KT Financial's argument is without merit and overruled.

VI. Conclusion

The trial court properly applied N.C. Gen. Stat. § 24-3(1) regarding the interest accrual date for the notes. The trial court properly assessed attorney's fees against KT Financial according to N.C. Gen. Stat. § 6-21.2(2), after the Longphres had provided the requisite prior statutory notice, and properly calculated the attorney's fees as fifteen percent of the reduced outstanding balance KT Financial owed to the Longphres. N.C. Gen. Stat. § 24-3(1)–(2). The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges WOOD and STADING concur.

N.C. STATE BAR v. DeMAYO

[292 N.C. App. 435 (2024)]

THE NORTH CAROLINA STATE BAR, Plaintiff
v.
MICHAEL A. DeMAYO, Attorney, Defendant

No. COA23-391

Filed 20 February 2024

1. Attorneys—discipline—false statements to another attorney—knowingly made—sufficiency of evidence

An order of discipline by the State Bar Disciplinary Hearing Commission (DHC) was reversed where the record did not support a finding by clear, cogent, and convincing evidence that defendant knowingly made false statements to an ex-associate from his law firm in an email, in which he denied commenting on the ex-associate's divorce to a mutual client (who had just obtained a legal settlement, resulting in defendant and the ex-associate disputing the division of attorney fees for her case). Although the evidence showed that defendant's statements in the email were incorrect, it did not establish that defendant knew that they were incorrect at the time that he wrote them, and such a finding would require stacking too many inferences upon each other.

2. Attorneys—discipline—false statements to another attorney—during professional dispute—Rule 8.4(c)—fitness as a lawyer

In a disciplinary matter, where defendant lawyer emailed an ex-associate from his law firm and falsely asserted that he had not discussed the ex-associate's divorce with a mutual client (who had just obtained a legal settlement, resulting in defendant and the ex-associate disputing the division of attorney fees for her case), an order of discipline by the State Bar Disciplinary Hearing Commission (DHC) was reversed because the DHC erred in finding that defendant had violated Rule 8.4(c) of the Rules of Professional Conduct. Although the findings in the order showed that defendant's statements in the email were false, the order neither found that defendant's misstatements reflected adversely on his fitness as a lawyer nor provided any rationale for why a lawyer's misstatement—whether made knowingly or not—during a professional dispute with another attorney would have justified discipline under Rule 8.4(c).

Appeal by Defendant from Order entered 20 January 2023 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 25 October 2023.

The North Carolina State Bar, by Deputy Counsel Kathryn H. Shields and Katherine Jean, for Plaintiff-Appellee.

Womble Bond Dickinson LLP, by Raymond M. Bennett, James P. Cooney III and Jonathon D. Townsend, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Michael A. DeMayo (Defendant) appeals from an Order of Discipline by a Disciplinary Hearing Panel of the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar (State Bar) entered on 20 January 2023. The Record before us tends to reflect the following:

Defendant, an attorney licensed by the State Bar, employed Ryan Valente (Valente) as an associate attorney at Defendant's law firm, DeMayo Law Offices. On 20 April 2020, Valente submitted his resignation from DeMayo Law Offices, effective 20 May 2020. Shortly after Valente's resignation became effective, on 22 May 2020, one of the firm's clients, K.D.,[1] sent an email to DeMayo Law Offices requesting that her file be transferred to Valente. Defendant emailed K.D. to arrange a Webex meeting to discuss this request. In this email, dated 22 May 2020, Defendant wrote, in part:

> I must discuss a few items related and unrelated to your inquiries and will potentially have a negative impact on the outcome of your case. I am ultimately responsible for every client represented by our firm it's very important to me to have a very transparent and honest conversation with any client since my ultimate desire is not only trust and professionalism but that every client obtain the best economic results. Understand that I have no desire to sway or impact who ultimately represents you and any fee splits are already contractually confirmed but I do have an ethical and professional obligation to communicate a few items about your case.

1. The client is referred to by initials to protect the privacy of non-parties who were parties to the underlying legal proceedings.

A Webex meeting was arranged between Defendant and K.D. on 26 May 2020. K.D. recorded the meeting without Defendant's knowledge. During the recorded Webex meeting, Defendant stated:

> I'm not really sure what happened with him. I don't want to get into his personal life, but there was a divorce. There was a custody. There was a remarriage. There was a ex-wife dating one of the defense lawyers we go against all the time. So I'm sure all of that had some impact on his productivity, but notwithstanding, I'm not insensitive to my staff.

Following the meeting, K.D. decided to have her case transferred to Valente. On or about 19 January 2021, K.D. settled her claim for $589,000.00. The attorney fees were $196,313.68. Following the settlement, Defendant and Valente disagreed on the division of attorney fees. Defendant informed Valente the DeMayo Law Firm would be pursuing a contractual claim to the attorney fees based on the client's contract and Valente's employment contract with the DeMayo Law Firm. Defendant claimed that the DeMayo Law Firm was entitled to 85% of the total attorney fees based on the contract. He then stated via email:

> For Settlement Purposes only, DLAW offers a time sensitive offer to resolve the division of attorney fees at a reduced rate of 75% of the total collected attorney's fees. The amount of $147,235,26 [sic] would be accepted in lieu of the total amount owed. To resolve this matter, please notify DLAW in three business days and all monies must be received by DLAW on 2-12-2021 by 5:00 pm. Failure to resolve this dispute at this stage will result in an immediate referral to outside counsel who will [sic] a Declaratory Judgment Action. In addition DLAW will ask outside counsel and Ethics Counsel to determine if sufficient grounds exist to refer this matter to the North Carolina State Bar, for taking over a case without the sufficient knowledge, skill and qualifications to properly handle same. DLAW seeks an amicable and quick resolution of this matter but will take all necessary steps to insure [sic] that a fair and equitable result occurs. DLAW has no immediate plans to pursue or include the client in any necessary subsequent legal actions. DLAW hopes you will accept this offer in the spirit in which it is offered. We look forward to your response.

In response, Valente informed Defendant via email dated 7 February 2021, he would invoke the doctrine of unclean hands to any claim pursued by Defendant citing various factors, including:

> Attorney Michael DeMayo made false and untrue statements to [K.D.] after she made clear her intention to terminate representation and retain Ryan Valente as counsel by telling [K.D.] he was professionally and ethically required to have a conversation with her about items related and unrelated to her case that may negatively impact the outcome, in violation of the Rules of Professional Conduct.

On 8 February 2021, Defendant responded to Valente's allegation Defendant made false statements to K.D.:

> As to mentioning your personal circumstances to this or any client, you are sadly mistaken. I personally was not aware of the severity and complexity of your personal struggles but they would have never been fodder or a topic of discussion with anyone much less a client.

On 9 February 2021, Valente filed a grievance with the State Bar. On 3 January 2022, the State Bar filed a Complaint against Defendant alleging two violations of Rule 8.4(d) and one violation of Rule 8.4(c).

On 20 January 2023, the DHC issued a written Order of Discipline against Defendant. The DHC found Defendant knew the statements he made to Valente in his email dated 8 February 2021, were false and concluded Defendant "engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the Defendant's fitness as a lawyer in violation of Rule 8.4[ ](c)." The Order suspended Defendant's law license for one year with the suspension stayed for two years. On 3 February 2023, Defendant timely filed written Notice of Appeal.

Issues

The dispositive issues on appeal are whether the DHC erred in: (I) finding Defendant knowingly made false statements of fact; and (II) concluding Defendant's statements to Valente violate Rule 8.4(c) of the North Carolina Rules of Professional Conduct.

Analysis

Appeals from a decision of the DHC are reviewed pursuant to the "whole record test." *N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576

S.E.2d 305, 309 (2003) (citation and quotation marks omitted). The whole-record test

> requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.] Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear[, cogent,] and convincing. Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision of the lower body, e.g., the DHC, has a rational basis in the evidence.

Id. at 632, 576 S.E.2d at 309-10 (alterations in original) (footnotes, citations, and quotation marks omitted). "However, the mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the committee." *N.C. State Bar v. Key*, 189 N.C. App. 80, 84, 658 S.E.2d 493, 497 (2008) (citations omitted). Thus, "[t]he 'whole record' test does not allow the reviewing court to replace the [Committee's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 421 S.E.2d 163, 166 (1992) (alteration in original) (citations and quotation marks omitted), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

I. Challenged Finding

[1] First, Defendant argues the Record does not support a finding by clear, cogent, and convincing evidence Defendant *knowingly* made false statements to Valente in his email dated 8 February 2021. We agree.

The DHC, in its Order of Discipline, found, in relevant part:

> 23. During the 26 May 2020 call, Defendant stated:
>
> > "I'm not really sure what happened with him. Uh, I don't want to get into his personal life, but there was a

> divorce, there was a custody, there was a remarriage, uh, there was a ex-wife dating one of the defense lawyers we go against all the time, so I'm sure all of that had some impact on his productivity."
>
> 24. In February 2021, Defendant and Valente were in a dispute over what portion of the legal fee from K.D.'s case Defendant was entitled to collect.
>
> 25. During email communications related to this dispute, Valente told Defendant that K.D. informed him that Defendant made comments to K.D. about Valente's divorce.
>
> 26. On 8 February 2021, Defendant told Valente in an email that he did not mention Valente's personal circumstances to K.D.
>
> 27. Defendant also told Valente he was not aware of the "severity and complexity" of Valente's "personal struggles but they would never have been fodder or topic of discussion with anyone much less a client."
>
> 28. Defendant's statements to Valente about his WebEx discussion with K.D. were false.
>
> 29. Defendant knew these statements were false at the time he made them to Valente.

In making these Findings, the State Bar relied on Defendant's 8 February 2021 email and the 26 May 2020 Webex recording and transcript. These documents reflect Defendant's 8 February 2021 statements were incorrect; however, they do not establish Defendant *knew* these statements were incorrect. The State Bar contends "[t]he DHC can make reasonable inferences from the evidence concerning knowledge and intent." Indeed, our Court has previously concluded "it is axiomatic that one's state of mind is rarely shown by direct evidence and must often be inferred from the circumstances." *N.C. State Bar v. Sutton*, 250 N.C. App. 85, 112, 791 S.E.2d 881, 901 (2016) (citation omitted). However, "[a] basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference." *Lane v. Bryan*, 246 N.C. 108, 112, 97 S.E.2d 411, 413 (1957). "Every inference must stand upon some clear and direct evidence, and not upon some inference or presumption." *Id.* (citations omitted).

On appeal, the State Bar argues it can be inferred from the evidence, including the recording of the discussion, that Defendant "thought carefully" before he made his initial statement to K.D. about Valente's

personal circumstances in May 2020. From this, the State Bar posits, it might then be inferred Defendant recalled making this statement when he wrote the email to Valente in February 2021. First, there are no findings by the DHC making either inference. This merely constitutes the State Bar's speculation on what the DHC might have inferred.

Moreover, even the rationale advanced by the State Bar on appeal infers Defendant's knowing misstatement from an inference that he must have recalled the prior statement about Valente because of an inference Defendant "thought carefully" before making the statement about Valente. This does not constitute circumstantial evidence of Defendant's knowledge at the time he emailed Valente. To the contrary, it is mere speculation built upon inference from inference from inference. *See Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000) (citing *Lane*, 246 N.C. at 112, 97 S.E.2d at 413) ("inferences must be based on established facts, not upon other inferences. In other words, a jury may draw an inference from a set of facts, but may not then use that inference to draw another inference.").

Applying the whole-record test, there is not clear, cogent, and convincing evidence to support the Order's Finding of Fact Defendant *knew* his statements were false at the time Defendant made those statements in his email to Valente on 8 February 2021. Thus, the trial court erred in finding "Defendant knew these statements were false at the time he made them to Valente." Therefore, this Finding does not support the DHC's Conclusions of Law.

II. The DHC's Conclusion of Law

[2] Next, Defendant argues the DHC erred in concluding Defendant's statements to Valente in the email dated 8 February 2021 violated Rule 8.4(c) of the North Carolina Rules of Professional Conduct. Rule 8.4(c) provides it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer." N.C. R. Prof. Conduct 8.4(c).

Here, the State Bar contends Defendant's "false statement adversely reflects on his fitness as an attorney." The DHC's Order found: Defendant made statements to K.D. concerning some of Valente's personal struggles during a Webex call on 26 May 2020; on 8 February 2021, Defendant denied making these statements in an email to Valente; and Defendant's statements to Valente about his Webex discussion with K.D. were false. The Order does not, however, find that Defendant's statements to K.D. regarding Valente reflected on Defendant's fitness as a lawyer. Further, nothing in the Order indicates any rationale for why such a

misstatement—knowing or not—would justify discipline under Rule 8.4(c) in this particular case. Moreover, the State Bar on appeal offers no support for its contention that a misstatement in the midst of a professional dispute with another lawyer necessarily constitutes conduct reflecting adversely on a lawyer's fitness as a lawyer.

Thus, the DHC's Findings do not support its Conclusion Defendant violated Rule 8.4(c) of the North Carolina Rules of Professional Responsibility. Therefore, the DHC erred in concluding grounds existed to discipline Defendant under N.C. Gen. Stat. § 84-28(b)(2). Consequently, we reverse the Order of Discipline entered by the DHC.[2]

Conclusion

Accordingly, for the foregoing reasons, the Order of Discipline entered by the DHC of the North Carolina State Bar is reversed.

REVERSED.

Judges GORE and GRIFFIN concur.

2. As we reverse the Order of Discipline and conclude the sole ground for discipline is not supported by the evidence or Findings of Fact, we do not reach Defendant's argument as to the discipline imposed.

SMITH v. SMITH

[292 N.C. App. 443 (2024)]

CAROL SPERRY SMITH, PLAINTIFF
v.
DALE PRESTON SMITH, DEFENDANT

No. COA23-339

Filed 20 February 2024

1. Divorce—equitable distribution—classification of property—stipulation—consideration by trial court

The trial court in an equitable distribution matter did not err in distributing certain real property to defendant husband upon classifying it as his separate property without first entering an order setting aside a prior written agreement in which the parties stipulated that the property was marital. The court properly considered a pre-trial order in which the parties entered into an additional set of stipulations, one of which stated that the parties disagreed about how to classify the real property at issue but agreed as to its value and that the property should be distributed to defendant. Further, the court's final equitable distribution order accurately reflected the property value listed in both of the parties' written stipulations.

2. Divorce—equitable distribution—unequal division of marital property—required finding—not using verbatim statutory language

The trial court in an equitable distribution matter did not abuse its discretion where, in ordering an unequal division of the parties' marital property, the court wrote in its order that "an unequal division . . . is equitable" rather than using verbatim language from N.C.G.S. § 50-20(c), which required the court to find that an "equal division is not equitable" and to explain why. The court was not required to quote the exact language from section 50-20(c) in entering the finding required therein, and the court did provide explanations supporting the unequal distribution of the marital property at issue.

3. Divorce—equitable distribution—statutory distributional factors—findings of fact—evidentiary support

In an equitable distribution matter where the trial court ordered an unequal division of the parties' marital property to the advantage of defendant husband, to whom the court distributed the marital residence, competent evidence supported the court's findings pertaining to the distributional factors listed in N.C.G.S. § 50-20(c),

including that: the marital residence as non-liquid property was the parties' biggest asset, while other more liquid assets that were to be distributed to defendant had already been liquidated to pay off marital debt; although plaintiff wife lived in the marital home for over three months post-separation, defendant continued to pay the expenses related to the home, and after plaintiff moved out, defendant moved back in and continued to pay all related expenses; and, while plaintiff did not contribute any of her own monies toward the marital residence, defendant sold his inherited stocks and took out a loan on his separate real property to pay for the residence.

4. Divorce—equitable distribution—unequal division of marital property—no abuse of discretion

The trial court in an equitable distribution matter did not abuse its discretion in: failing to enter an order setting aside a written stipulation by the parties, in which they agreed to classify certain real property as marital; not using verbatim statutory language in its finding that an equal division of marital property was not equitable; and finding that three distributional factors supported the need for an unequal distribution of marital property. Thus, the court did not abuse its discretion in ordering an unequal division of the parties' marital estate.

Judge ARROWOOD dissenting.

Appeal by Plaintiff from an equitable distribution judgment and order entered 31 August 2022 by Judge Lee F. Teague in Pitt County District Court. Heard in the Court of Appeals 14 November 2023.

W. Gregory Duke, for Plaintiff-Appellant.

The Graham Nuckolls Conner Law Firm, PLLC, by Jon G. Nuckolls, for Defendant-Appellee.

WOOD, Judge.

Carol Smith ("Plaintiff") appeals the trial court's judgment and order of equitable distribution awarding an unequal distribution of the marital estate. For the reasons discussed herein, we affirm the trial court's decision.

I. Factual and Procedural Background

Plaintiff and Dale Smith ("Defendant") were married on 1 June 2002, separated on 28 January 2018, and granted a divorce on 28 May 2019. The parties have no children together.

During the marriage and until 2016, Plaintiff worked part-time as an adjunct professor at Pitt Community College in Greenville, North Carolina. A month before separation, Plaintiff began a new job working as a part-time caregiver. Plaintiff is currently unemployed but receives $378.00 per week in unemployment benefits and $611.00 in Social Security benefits. Plaintiff is alleged to have suffered a medical condition which prevents her from lifting anything greater than 25 pounds. During the marriage, Defendant started a business, Dale's Heating and Air Conditioning, which he incorporated in 2004. Defendant paid himself an annual salary of approximately $30,000.00. He currently has pension benefits of $450.46 and $103,044.85 in a 401(k)-retirement plan. Defendant continues to work in a limited capacity since suffering a heart attack in 2019.

While the parties were married, they purchased property together on 17 November 2005, and the property was jointly deeded in both parties' names as tenants by the entirety. The parties later constructed a home on the property ("former marital residence"), located at 2323 Persnickety Lane in Grifton, North Carolina, and lived there together until their separation in 2018. To pay for the purchase of the former marital residence lot, Defendant liquidated personal property, namely stock inherited from his grandmother. Later, Defendant obtained a $70,000.00 line of equity secured by his separate property located at 4080 Racetrack Road ("Racetrack Road") in Grifton, North Carolina, in order to construct a barn and home on the former marital residence lot. The property at Racetrack Road was purchased by Defendant before his marriage to Plaintiff. A shop building was later constructed on the former marital residence lot. The cost of its construction was funded by the further liquidation of Defendant's inherited stock. Additionally, Defendant entered into a personal $10,050.00 promissory note on 9 May 2008 to complete the building of the former marital residence. The note was paid off on 15 September 2016, prior to the parties' separation.

During their marriage, Defendant paid the expenses on the former marital residence, including the homeowners' insurance, mortgage, utilities, and taxes. Defendant also paid the parties' automobile insurance. Plaintiff paid the cable bill and bought groceries.

On 21 September 2016, the parties obtained an equity line of credit ("HELOC") in the amount of $49,000.00 secured by the former marital residence. However, the parties did not borrow money from the HELOC at the time it was created. In December 2017, Defendant withdrew $49,000.00 from the HELOC and deposited the funds into his personal bank account. Defendant testified that he accessed the line of credit in case the marriage failed and to prevent Plaintiff from taking the money and disappearing with it.

When the parties separated on 28 January 2018, Defendant left the former marital residence while Plaintiff remained in the home. On 23 February 2018, Plaintiff filed a complaint against Defendant for Divorce from Bed and Board, Post-Separation Support, Alimony, Equitable Distribution, and Attorney's Fees. Defendant filed a response and counterclaims for Divorce from Bed and Board, Equitable Distribution, and Motion to Return Separate Property on 4 May 2018.

From 28 January 2018 until 15 May 2018, Plaintiff lived at the former marital residence. During this period of time, Defendant continued to pay expenses on the former marital residence, including insurance, mortgage, utilities, payments on the line of credit, and taxes. After Plaintiff moved out, Defendant returned to the former marital residence.

On 14 January 2019, both parties made stipulations addressing the two mentioned properties in a written and filed agreement. First, the parties stipulated that the former marital residence at Persnickety Lane be classified as marital property with a property value of $247,011.00. Second, the parties stipulated that "Plaintiff and Defendant own marital property located at . . . 4080 Racetrack Road, Grifton, North Carolina," and that the "value of the marital property . . . is valued at $46,563.00."

On 2 August 2022, Defendant filed a motion to strike and set aside the 14 January 2019 stipulation. In his motion, Defendant alleged that at all relevant times, (1) he was the sole owner of the 4080 Racetrack Road, Grifton, North Carolina property; (2) he owned the property prior to his marriage to Plaintiff; (3) the parties mortgaged the Racetrack Road property during the marriage in order to finance the purchase of the former marital residence; (4) he "at no time ever conveyed any part of said Racetrack Road to Plaintiff"; (5) he "mistakenly signed a stipulation on January 14, 2019" stating Racetrack Road was marital property; and (6) "it would be inequitable to allow the mistaken stipulations of Defendant's separate property to be classified as marital."

On 29 August 2022, before the hearing on equitable distribution, the parties entered a set of stipulations via a pre-trial order, which the parties

then filed with the trial court. In the pre-trial order, the parties stipulated to their disagreement as to the classification of the Racetrack Road property, but agreed the property should be distributed to Defendant. Furthermore, the parties disagreed as to the classification of the HELOC debt on the Racetrack Road property. Plaintiff contends the debt should be classified as mixed and assigned to Defendant; Defendant contends the debt should be classified as marital and be assigned to him. During opening statements at the hearing, Plaintiff's attorney explained that Defendant's trial counsel "recently filed a motion to strike and set aside the stipulations" and stated counsel was "fine with the Court just hearing the evidence and considering those motions or that motion in relation to those stipulations during this trial."

In the judgment and order for equitable distribution entered 31 August 2022, the trial court incorporated by reference the parties' pre-trial order and noted that the parties had made stipulations regarding their property in the pre-trial order. The trial court classified the Racetrack Road property as the separate property of Defendant. However, the trial court found the parties incurred marital debt when the Racetrack Road property was used as collateral for an equity line of credit to pay for the construction of the former marital residence. The trial court assigned the HELOC debt taken out on the Racetrack Road property to Defendant.

The trial court also found the parties agreed to marital debt in the form of a HELOC taken out on the former marital residence in 2016. The court found that Defendant withdrew "all $49,000 just a few months before the parties separated," so that the debt is classified as marital debt, "but there would [not] have been any debt but for the action of Defendant at the time of the impending separation." As such, while Defendant used proceeds from the sale of the Racetrack Road home to "pay back the loan postseparation, he will receive no credit for these payments because he unnecessarily created the marital debt."

The trial court determined Defendant had separate property valued at $179,239.27, and Plaintiff had separate property valued at -$195.00. The trial court determined that the total net value of the marital estate was $209,690.24. The trial court distributed the Persnickety Lane former marital residence to Defendant after finding that Defendant had paid for the residence with his separate property and a loan taken out on his separate property while Plaintiff had contributed none of her own monies towards the marital home and that Defendant had preserved the estate after the parties separated. After consideration of the relevant equitable distribution factors, the trial court determined an unequal division of marital property, marital debt, and divisible property would be

equitable. The trial court further found that "[i]f the former marital residence is removed, then both parties have a negative estate." The trial court based its determination for unequal distribution on several factors including: (1) the former marital residence as non-liquid real property is "the biggest asset" and the "other more liquid accounts that are being distributed to Defendant have been liquidated to pay off marital debt"; (2) while Plaintiff lived in the former marital home for approximately three and a half months post-separation, Defendant continued to pay the expenses related to the home, and after Plaintiff moved out, Defendant moved back in and continued to pay all related expenses; (3) Defendant sold his inherited stocks to pay for the former marital residence, took out a HELOC on his separate property at Racetrack Road to pay for the marital home, and eventually sold that property to pay off the loan, and Plaintiff did not contribute her own monies towards the marital residence.

The trial court awarded Defendant marital property and debt in the net amount of $217,189.44 and Plaintiff was awarded a net amount of -$7,499.20. The trial court distributed all the property and debt as was stipulated by the parties in the pre-trial order but did not make any other distributive award. Other than finding the parties had entered into stipulations in the pre-trial order, the trial court did not otherwise make a ruling concerning whether to grant Defendant's motion to strike the stipulation entered into by the parties in January 2019. On 28 September 2022, Plaintiff filed a notice of appeal with this Court from the equitable distribution judgment and order.

II. Analysis

On appeal, Plaintiff contests a number of issues. We address each in turn.

A. Stipulation regarding the classification of the Racetrack Road property.

[1] First, Plaintiff argues that the trial court erred in disregarding the parties' stipulation on 14 January 2019 classifying the property at Racetrack Road as marital property and assessing its value at $46,563.00 because the stipulation was never set aside by the trial court. Plaintiff further argues the trial court failed to make findings of fact in its order setting aside the 2019 stipulation order, so that the stipulation remained binding on the parties and the trial court.

In response, Defendant contends the trial court properly addressed the three statements made in the stipulation and did not need to set

aside any stipulation. Additionally, Defendant argues that Plaintiff "focuses solely on the stipulation made in 2019 and completely disregards the later stipulation made in the Pre-Trial Order that displayed disagreement between the parties regarding classification of the Racetrack Rd. property."

As a general rule, this Court has noted that "[a]ny material fact that has been in controversy between the parties may be established by stipulation." *Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 678, 599 S.E.2d 581, 584 (2004). We analyze stipulations between parties as if they were contracts and consider the intent of the parties at the time of contracting. *Stovall v. Stovall*, 205 N.C. App. 405, 409–10, 698 S.E.2d 680, 684 (2010). Additionally, stipulations must be written in terms that are "definite and certain." *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961).

Pursuant to a 29 August 2022 pre-trial order, the parties entered into an additional set of stipulations days before the equitable distribution hearing which the parties then filed with the trial court. The trial court correctly stated in its Judgment and Order that "[o]n Schedule E of the Pre-trial Order, the parties disagree as to the classification of this item [Racetrack Road property] but agree on the value and distribution." This subsequent stipulation reflects that the parties do not agree the Racetrack Road property is marital. In the pre-trial order, Plaintiff contends the said property is a mixed (not marital) asset while Defendant contends it is his separate property. Both stipulations, however, reflect the parties' intent to stipulate the value of the Racetrack Road property. In fact, the trial court's order lists the value of the Racetrack Road property as the value amount listed in the parties' January 2019 stipulation and in the pre-trial order. Therefore, the trial court properly applied all stipulations to its equitable distribution judgment.

B. Trial court's finding that an equal division of marital property was not equitable.

[2] Plaintiff next argues that the trial court's findings of fact do not support an unequal division of the marital assets and specifically contests conclusion of law 4. Conclusion of law 4 states: "Based on the consideration of the distributional factors in Equitable Distribution as described in the above Findings of Fact and arising from the evidence, an unequal division of marital property, marital debt, and divisible property is equitable." Specifically, Plaintiff contends the trial court erred in failing to include specific language pursuant to N.C. Gen. Stat. § 50-20(c), which states, "There shall be an equal division by using net value of marital

property and net value of divisible property *unless the court determines that an equal division is not equitable.*" (Emphasis added). We disagree.

"Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992). In an equitable distribution order, the findings of fact "must support the determination that the marital property has been equitably divided." *McIver v. McIver*, 92 N.C. App. 116, 127, 374 S.E.2d 144, 151 (1988) (quotation marks omitted).

By law, there must be an "equal division" of marital property in an equitable distribution proceeding "unless the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c); *White v. White*, 312 N.C. 770, 775, 324 S.E.2d 829, 832 (1985). "[T]he statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* 'unless the court determines that an equal division is not equitable.' " *White*, 312 N.C. at 776, 324 S.E.2d at 832 (citing N.C. Gen. Stat. § 50-20(c)) (emphasis in original).

Thus, if the trial court makes the determination "to divide a marital estate other than equally, the trial court must first find that an equal division is not equitable and explain why." *Lucas v. Lucas*, 209 N.C. App. 492, 504, 706 S.E.2d 270, 278 (2011). This Court has made clear, however, that "there is no case law requiring a trial court to use 'magic words' indicating that an equal distribution is not equitable." *Carpenter v. Carpenter*, 245 N.C. App. 1, 14, 781 S.E.2d 828, 838 (2016).

In the present case, although the trial court did not use verbatim language from N.C. Gen. Stat. § 50-20(c) to indicate that an equal division of the marital property is not equitable, the trial court addressed and applied the factors from N.C. Gen. Stat. § 50-20(c) to the evidence presented. The trial court found eight factors did not support unequal distribution, then determined that three factors indicated the need for an unequal distribution. Therefore, the trial court abided by the provisions of N.C. Gen. Stat. § 50-20(c) in providing explanations for the court's unequitable division of marital property and liabilities.

C. Trial court's findings related to the evidence of distributional factors presented at the hearing.

[3] Next, Plaintiff argues the trial court erred in several findings of fact relating to the evidence presented at the hearing of the distributional factors pursuant to N.C. Gen. Stat. § 50-20(c). Plaintiff contends competent

evidence was not presented at the hearing to support the trial court's findings of fact 30, 33, and 34. We address each finding in turn.

Pursuant to N.C. Gen. Stat. § 50-20(c), the trial court is to distribute the property equally unless the court determines that an equal division is not equitable. *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 249, 502 S.E.2d 662, 664 (1998). The distributional factors are:

> (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
>
> (2) Any obligation for support arising out of a prior marriage.
>
> (3) The duration of the marriage and the age and physical and mental health of both parties.
>
> (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.
>
> (5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.
>
> (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.
>
> (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.
>
> (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.
>
> (9) The liquid or nonliquid character of all marital property and divisible property.
>
> (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.
>
> (11) The tax consequences to each party, including those federal and State tax consequences that would have been

> incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.
>
> (11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.
>
> (11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:
>
> > a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.
> >
> > b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.
> >
> > c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.
> >
> > d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.
>
> (12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c). Only one of those factors is required for a final judgment and order of unequal distribution. *Judkins v. Judkins*, 113 N.C. App. 734, 741, 441 S.E.2d 139, 143 (1994). Further, a trial court must make written findings of fact as to the evidence used in support of each distributional factor. *Daetwyler*, 130 N.C. App. at 249, 502 S.E.2d at 665. The trial court's findings need not be "exhaustive," and simply must include the "ultimate" facts considered. *Id.*

The standard of review is whether there is competent evidence to support the findings of fact and, subsequently, whether the conclusions of law are supported by the findings. *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 352, 754 S.E.2d 831, 834 (2014). "[O]n appeal, findings of fact supported by competent evidence are binding." *Glaspy v. Glaspy*, 143 N.C. App. 435, 443 (2001). Further, we give great discretion to the trial court's consideration of facts, as the trial court is the fact finder in equitable distribution cases and has the "right to believe all, none, or some of a witness' testimony." *Zurosky v. Shaffer*, 236 N.C. App. 219, 240, 763 S.E.2d 755, 768 (2014).

First, Plaintiff challenges the court's finding of fact 30 which states:

> NCGS 50-20(c)(9) - . . . [T]he evidence shows that the biggest asset is non-liquid real property, the former marital residence. The other more liquid accounts that are being distributed to Defendant have been liquidated to pay off marital debt. Therefore, the Court finds this factor indicates the need for an unequal distribution.

Plaintiff argues that no evidence was presented at the hearing that the "more liquid accounts" distributed to Defendant "had been liquidated to pay off marital debt." We disagree.

The evidence shows that Defendant contributed large sums of his separate property to benefit the marriage and to obtain the former marital residence. The trial court found that during the course of the parties' marriage, Defendant sold his inherited stock, took out a personal loan, and took out a HELOC on his separate property in order to purchase and pay for the upkeep of the former marital residence. These resources were continually accessed in order to pay off the marital debt accrued by the parties. Therefore, the trial court's finding of fact 30 is sufficiently supported by evidence.

Next, Plaintiff challenges finding of fact 33 which states:

> NCGS 50-20(c)(11a) - Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue, or convert the marital property or divisible, or both, during the period after separation of the parties and before the time of distribution. The Plaintiff lived in the marital home for about three and one-half months after separation. During that time Defendant paid all the taxes, mortgage payments, insurance, utility bills, and all other expenses related to the home while Plaintiff lived in the home. In May 2018, Plaintiff moved out of the home and Defendant

> moved in. Defendant has resided in the home to present and has paid all related expenses. The Court finds this factor indicates the need for an unequal distribution.

Plaintiff contends the only indebtedness on the property was a $49,000 advance on the HELOC taken out by Defendant in December 2017. Further, Plaintiff argues "no evidence was presented that [Defendant] paid" all the expenses associated with the former marital residence for the three and a half months Plaintiff lived in the residence after the parties separated.

Plaintiff objects to the trial court's determination that Defendant paid "all other expenses related to the home." However, the trial court heard evidence that Defendant paid the necessary expenses to upkeep the former marital residence including paying the home's mortgage, insurance, taxes, and utilities even while he was not living there. In fact, Plaintiff testified that Defendant paid the mortgage, line of credit, insurance, "and those types of things" on the former marital residence. Defendant argues that Plaintiff's contention that the entire application of the (11a) distributional factor should be disregarded "simply because there was not enough evidence to support *all* expenses were paid by [Defendant] ignores the fact that there was evidence of the large, necessary expenses required to keep the property from being taken or foreclosed." We agree. The trial court compiled a list from the evidence presented of the necessary expenses for the property sufficient to support its finding of distributional factor (c)(11a).

Next, Plaintiff challenges finding of fact 34 which states:

> NCGS 50-20(c)(12) - Any other factor which the court finds to be just and proper. Defendant inherited stock from his grandmother when she died. Shortly after the marriage, he sold this stock to pay for the marital home. It is clear to the Court that this was a gift to the marriage and the marital residence and is marital property. Defendant also took out a HELOC on his separate property to help pay for the marital home and eventually had to sell that property to pay off the loan. Plaintiff contributed none of her own monies toward the marital home. The Court finds this factor indicates the need for an unequal distribution.

Plaintiff argues the evidence established "that the parties contributed substantial marital monies towards the marital residence and the shop" and that in this finding, the court "attributed the HELOC loan used for the construction of the house and shop as being [Defendant's] contribution

of his separate monies but then classified it as a marital debt." In short, Plaintiff suggests the trial court erred in finding the Racetrack Road home to be Defendant's separate property while classifying the equity loan taken on the home to be marital debt.

N.C. Gen. Stat. § 50-20(b)(2) defines separate property as all real or personal property acquired by a spouse prior to marriage. Because Defendant acquired the Racetrack Road property prior to marriage, it is separate property. Additionally, the evidence shows that Defendant never placed Plaintiff's name on the deed to the property during their marriage and never transferred any interest in the property to her, so that Defendant continued to be the sole owner of the property. Marital property is defined as all real or personal property acquired by either or both spouses during the marriage and prior to the date of separation. N.C. Gen. Stat. § 50-20(b)(1). Additionally, a marital debt is one incurred during the marriage and before the date of separation, by either spouse or both spouses, for the joint benefit of the parties. *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). Here, the parties used the Racetrack Road property as a means of collateral to acquire a loan and incur debt during the marriage and prior to separation for the benefit of both parties, thus making the debt marital. Furthermore, the loan was acquired in order to make improvements to the parties' former marital residence. Therefore, it was not error for the trial court to find that Defendant used his separate property as collateral to obtain marital debt.

Furthermore, the evidence presented during the hearing shows that Defendant used much of his separate property to pay for the construction of and improvements to the former marital residence: (1) the separate property of stocks gifted to him by his grandparent, and (2) the separate Racetrack Road property as collateral for a loan to be used to construct the \former marital residence and property. There was no evidence presented that Plaintiff contributed her own money towards the former marital residence. Thus, there was evidence to support the trial court's finding of fact 34, and the trial court properly determined unequal distribution of property was equitable through consideration of the distribution factors in N.C. Gen. Stat. § 50-20(c).

D. Trial court's distribution of the parties' marital property.

[4] Finally, Plaintiff contends the trial court abused its discretion in making an unequal distribution of the parties' marital estate and points us to aforementioned arguments. Plaintiff acknowledges that equitable distribution of property is an area of law in which the trial court has

"sound discretion," and appellate courts give great deference to the trial court's findings and conclusions. *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005). After careful consideration of Plaintiff's arguments, we conclude the trial court did not abuse its discretion in (1) failing to enter an order to set aside the 2019 stipulation; (2) not using verbatim statutory language in its finding that equal distribution is not equitable; and (3) finding three distributional factors supported the need for an unequal distribution of the parties' marital estate. We conclude the evidence supported the trial court's findings of fact and conclusions of law, and the trial court's unequal distribution is supported by sound and logical reasoning.

III. Conclusion

For the reasons set forth above, we affirm the trial court's equitable distribution judgment and order.

AFFIRMED.

Judge THOMPSON concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

For the reasons set forth below, I dissent from the majority's opinion because I believe the parties and the trial court are bound by the 14 January 2019 stipulations, which established the Racetrack Road property as marital property. This stipulation undercuts the reasons given by the trial court with respect to the basis for an unequal distribution and necessitates the reversal of the trial court's order. Thus, I would reverse the trial court's order and remand for further proceedings.

"Parties may establish by stipulation any material fact that has been in controversy between them. Where the stipulations of plaintiff and defendant have been entered of record . . . the parties are bound and cannot take a position inconsistent with the stipulations." *Thomas v. Poole*, 54 N.C. App. 239, 241 (1981) (citations omitted). "Where facts are stipulated, they are deemed established as fully as if determined by a jury verdict." *Id.* In other words, a stipulation is "binding in every sense" and prevents the party who agreed to it "from introducing evidence to dispute it and relieving the other party of the necessity of producing

evidence to establish [it]." *Id.* Although a party may wish to have a stipulation set aside, they must " 'do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation . . . .' " *Moore v. Richard W. Farms, Inc.*, 113 N.C. App. 137, 141 (1993) (quoting *Norfolk Southern Railway Co. v. Horton*, 3 N.C. App. 383, 389 (1969)).

"While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision[.]" *Id.* (cleaned up). When construing stipulated facts, this Court "must attempt to effectuate the intention of the party making the stipulation as to what facts were to be stipulated without making a construction giving the stipulation the effect of admitting a fact the party intended to contest." *In re I.S.*, 170 N.C. App. 78, 87 (2005) (citation omitted).

Here, defendant and plaintiff made a clear and definite agreement regarding the classification of the Racetrack Road property in their 14 January 2019 stipulations filed with the trial court. Specifically, the first stipulation plainly stated, "*Plaintiff and Defendant own marital property located at* 2323 Persnickety Lane, Grifton, North Carolina *and 4080 Racetrack Road, Grifton[,] North Carolina*." (emphasis added). This statement clearly shows that the Racetrack Road property was, in fact, marital property as stipulated. The third stipulation in the filing further reinforces this agreement as to the property's classification by stating that "the value of *the marital property located at 4080 Racetrack Road* . . . is valued at $46,563.00"—thus again referring to it expressly as marital property. (emphasis added).

In my view, the subsequent pre-trial order stipulations were in direct conflict with the 14 January 2023 stipulations. The pre-trial order's Schedule E indicates that the parties disagreed on the classification of the Racetrack Road property, with plaintiff contending that it was marital property and defendant claiming it was his separate property. Such a statement directly conflicts with the 14 January 2019 stipulation that, as discussed above, indisputably classified the property as marital.

Although defendant later moved to set aside the 14 January 2019 stipulations on 2 August 2022, the trial court never entered an order ruling on the motion, nor did the trial court make any findings or conclusions regarding the motion in its 31 August 2022 judgment and order. Had the trial court ruled on this motion and set aside the earlier stipulations, the latter stipulations could have appropriately been considered competent evidence. However, without such a ruling, I cannot agree with the majority that the trial court properly applied all stipulations

when it, in fact, disregarded one. *See Despathy v. Despathy*, 149 N.C. App. 660, 662 (2002) (explaining that stipulations are considered judicial admissions and that judicial admissions are binding on the court); *Crowder v. Jenkins*, 11 N.C. App. 57, 63 (1971) ("[Stipulations] are conclusive and binding upon the parties and the trial judge." (citations omitted)). I am concerned this result undercuts our case law with respect to setting aside stipulations through a "direct proceeding" and permits lower courts to relieve parties of binding stipulations without following proper procedures. *See Moore*, 113 N.C. App. at 141.

Further, because the parties stipulated that the Racetrack Road property was marital, I also agree with plaintiff's contention that there was no competent evidence to support the trial court's Finding of Fact 34. Specifically, Finding of Fact 34 states that

> Defendant also took out a HELOC *on his separate property* to help pay for the marital home and eventually had to sell that property to pay off that loan. *Plaintiff contributed none of her own monies toward the marital home*. The Court finds this factor indicates the need for an unequal distribution. (emphasis added).

Such a finding substantially conflicts with the evidence. As stipulated in the 14 January 2019 filing, the HELOC was taken out on marital property—not defendant's separate property—to help pay for the marital home. Additionally, the Racetrack Road property was later sold to help pay off the marital home; thus, marital property was again used to help pay for the marital home. Consequently, the trial court's finding that plaintiff contributed none of her own money to the marital home is not supported by competent evidence.

Even assuming that the trial court would have still concluded an unequal division of the marital property was equitable in favor of defendant, *see Mugno v. Mugno*, 205 N.C. App. 273, 288 (2010) ("A single distributional factor may support an unequal division."), I believe the trial court's calculation of the division of marital property is incorrect due to the failure to account for the Racetrack Road property as marital property. Accordingly, I would reverse the trial court's order and remand for re-hearing on equitable distribution.

STATE OF NORTH CAROLINA
v.
ERIC RAMOND CHAMBERS, DEFENDANT

No. COA22-1063

Filed 20 February 2024

Constitutional Law—North Carolina—right to properly constituted jury—alternate juror—substituted after deliberations began—new trial granted

Defendant's convictions for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury were vacated and a new trial granted where his right under the North Carolina Constitution to a properly constituted jury was violated when the trial court substituted a juror for an alternate juror after the jury deliberations had commenced. Although the trial court instructed the newly constituted jury to begin its deliberations anew in accordance with a 2021 statutory amendment (N.C.G.S. § 15A-1215(a)), a prior decision of the Supreme Court of North Carolina interpreting the state constitution was controlling on this issue.

Appeal by defendant from judgment entered 8 April 2022 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 10 January 2024.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant-appellant.

DILLON, Chief Judge.

Defendant Eric Ramond Chambers appeals from judgments entered following jury verdicts convicting him of certain felonies. Based on precedent from our Supreme Court, we conclude that Defendant's right under our state constitution to a properly constituted jury was violated. Therefore, we vacate Defendant's convictions and remand this case for a new trial.

I. Background

Defendant was tried for various crimes in connection with a 21 August 2018 shooting at a Raleigh motel which left a man dead and a woman injured. Defendant represented himself at trial.

After jury deliberations began, Juror #5 informed the trial judge that he could not return the next day because of a scheduled doctor's appointment. The trial court dismissed Juror #5, replaced him with an alternate juror, and instructed the jury to begin its deliberations anew with the alternate juror. Defendant was not in the courtroom at the time of the substitution.

The jury found Defendant guilty of first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. He was sentenced to life in prison without the possibility of parole for the murder conviction and 110 to 144 months for the assault conviction.

II. Appellate Jurisdiction

Defendant filed a petition for writ of *certiorari*. The State filed a motion to dismiss the appeal. In our discretion, we allow Defendant's petition for writ of *certiorari* to consider the merits of the case and deny the State's motion to dismiss.

III. Analysis

Defendant makes several arguments on appeal. We, however, address only his argument that his right to a properly constituted jury was violated, as our resolution of that issue is dispositive. Specifically, for the reasoning below, we agree with Defendant's argument that the trial court's substitution of an alternate juror after jury deliberations had begun constitutes reversible error.

Our North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I, § 24. Our Supreme Court has interpreted this provision to preclude juror substitution during a trial after the commencement of jury deliberations. *State v. Bunning*, 346 N.C. 253, 255–57, 485 S.E.2d 290, 291–93 (1997).

In *Bunning*, shortly after jury deliberations had begun, a juror informed the court that she could not continue with jury deliberations due to a medical issue; she was, therefore, excused and replaced with an alternate juror. *Id.* at 255, 485 S.E.2d at 291. The trial court then instructed the jury to begin deliberations anew. *Id.* On appeal, our Supreme Court held that the defendant's right under our state constitution to a properly constituted jury was violated by this substitution:

> In this case, the jury verdict was reached by more than twelve persons. The juror who was excused participated in the deliberations for half a day. We cannot say what influence she had on the other jurors, but we have to assume she made some contribution to the verdict. The alternate juror did not have the benefit of the discussion by the other jurors which occurred before he was put on the jury. We cannot say he fully participated in reaching a verdict. In this case, eleven jurors fully participated in reaching a verdict, and two jurors participated partially in reaching a verdict. This is not the twelve jurors required to reach a valid verdict in a criminal case.

Id. at 256, 485 S.E.2d at 292.

The present case is strikingly similar to *Bunning*. Here, like in *Bunning*, a juror was excused and replaced with an alternate, after which the trial court instructed the jury to restart its deliberations. Consequently, following the reasoning in *Bunning*, the verdict here was also impermissibly reached by thirteen people.

The State argues, though, that Defendant failed to preserve any argument concerning the constitutional deficiency, as he failed to object when the juror substitution occurred. But we are bound by a 2003 case in which our Court held that a defendant's failure to object to the alternate juror's substitution after the commencement of jury deliberations does not preclude appellate review, as this error is not waivable. *State v. Hardin*, 161 N.C. App. 530, 533, 588 S.E.2d 569, 571 (2003).[1] This holding is consistent with our Supreme Court's holding in *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971). In that case, the defendant consented to be tried by only eleven jurors after one of the jurors could not continue, and the defendant made no argument regarding this deficiency on appeal. *Id.* at 78, 185 S.E.2d at 192. Notwithstanding, our Supreme Court ordered a new trial *ex mero motu*, stating:

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1. We note that our Court recently held that a defendant who fails to object on state constitutional grounds to a juror substitution after the beginning of deliberations fails to preserve the issue for appellate review. *State v. Lynn*, 290 N.C. App. 532, 536–37, 892 S.E.2d 883, 886 (2023). Notwithstanding, we are bound to follow *Hardin*, as it is older than *Lynn* and was not referenced in *Lynn*. *See State v. Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d 886, 889 (2019) (relying on *In re R.T.W.*, 359 N.C. 539, 542, n.3, 614 S.E.2d 489, 491, n.3 (2005) to hold that, where there are two irreconcilable precedents which "develop independently[,]" we must " 'follow[ ] … the older of the two cases' and reject the more recent precedent").

> It is elementary that the jury provided by law for the trial of indictments is composed of twelve persons; a less number is not a jury. It is equally rudimentary that a trial in a criminal action cannot be waived by the accused in the Superior Court as long as his plea remains "not guilty."

Id. at 79, 185 S.E.2d at 192.

We note that, in 2021, our General Assembly amended a statute to provide that "[i]f an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. In no event shall more than 12 jurors participate in the jury's deliberations." N.C. Gen. Stat. § 15A-1215(a). However, where a statute conflicts with our state constitution, we must follow our state constitution. *Bayard v. Singleton*, 1 N.C. 5 (1787). Our General Assembly cannot overrule a decision by our Supreme Court which interprets our state constitution. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) ("[I]ssues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by [our Supreme] Court.").[2]

IV. Conclusion

Under existing precedent, we are compelled to conclude that Defendant's right to a properly constituted jury under our state constitution was violated and that this issue is preserved, notwithstanding Defendant's failure to object at trial. Accordingly, Defendant is entitled to a new trial. We need not address Defendant's remaining arguments.

NEW TRIAL.

Judges MURPHY and CARPENTER concur.

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2. Although not raised by Defendant, we note that federal courts have held that substitution of a juror with an instruction for the jury to begin deliberations anew does not violate the *federal* constitution. *See Claudio v. Snyder*, 68 F.3d 1573, 1575–76 (3d Cir. 1995) (collecting cases). However, our Supreme Court is free to construe our state constitution in a manner which affords rights greater than those afforded under the federal constitution. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101,103–104 (1998) ("States remain free to interpret their own constitutions in any way they see fit, including constructions which grant citizen rights where none exist under the federal Constitution.").

STATE OF NORTH CAROLINA
v.
CHAD COFFEY

No. COA22-883

Filed 20 February 2024

1. Obstruction of Justice—common law—cognizable offense in North Carolina—falsification of firearm qualifications by deputy sheriff

In a matter in which defendant, a deputy sheriff, was alleged to have committed felony common law obstruction of justice based on his falsification of documents, in which he falsely verified firearm qualifications for two members of law enforcement who had not met their mandatory annual requirements, the Court of Appeals reaffirmed that common law obstruction of justice is a cognizable offense in North Carolina.

2. Indictment and Information—sufficiency—common law obstruction of justice—falsification of records—not done to impede legal proceeding

In a matter in which defendant, a deputy sheriff, was alleged to have committed felony common law obstruction of justice based on his falsification of documents, in which he falsely verified firearm qualifications for two members of law enforcement who had not met their mandatory annual requirements, the indictments charging common law obstruction of justice were fatally defective for failing to allege facts to support the essential element that defendant's acts were done for the purpose of obstructing justice, whether to impede or subvert a legal proceeding or potential subsequent investigation.

Chief Judge DILLON concurring in separate opinion.

Judge STADING joins in this separate concurring opinion.

Appeal by Defendant from Judgments rendered 10 February 2022 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 September 2023.

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

Cheshire Parker Schneider, PLLC, by Elliot S. Abrams, for Defendant-Appellant.

Samuel J. Davis, Daniel K. Siegel and Kristi L. Graunke, for amicus curiae American Civil Liberties Union of North Carolina Legal Foundation.

Essex Richards, P.A., by Norris A. Adams, II, for amicus curiae North Carolina Fraternal Order of Police.

HAMPSON, Judge.

Factual and Procedural Background

Chad Coffey (Defendant) appeals from Judgments rendered pursuant to jury verdicts finding Defendant guilty of twelve counts of felony obstruction of justice. The Record before us, including the evidence presented at trial, tends to show the following:

Defendant was a deputy sheriff in Granville County, North Carolina for over two decades. In 2007, Defendant received his firearm instructor certification and obtained additional specialized instructor certifications. These instructor certifications allowed Defendant to teach in-service courses for law enforcement officers to satisfy requirements set by the North Carolina Sheriffs' Education and Training Standards Commission (the Commission). The Commission establishes minimum education and training standards for justice officers, monitors compliance, and certifies all justice officers have satisfied those standards, including firearm training. N.C. Gen. Stat. § 17E-4(a) (2023). All active deputies who carry a firearm must annually complete in-service training, including a classroom portion and firearm qualification to maintain their law enforcement certification.

At the urging of Sheriff Brindel Wilkins and Chief Deputy Sherwood Boyd, Defendant certified Wilkins' and Boyd's attendance at mandated trainings neither had attended. Although neither Wilkins nor Boyd qualified at a shooting range, Defendant filled out forms indicating firearms scores neither had attained. Defendant acknowledged at trial he had falsified these documents.

On 26 October 2021, Defendant was indicted on fourteen counts of felony common law obstruction of justice, two of which were later dismissed, and fourteen counts of felony obtaining property by false pretenses, two of which were also later dismissed. Each of the

indictments for obstruction of justice alleged Defendant had "unlawfully, willfully and feloniously with deceit and intent to defraud, did commit the infamous offense of obstruction of justice by knowingly providing false and misleading information in training records[.]" The indictments then specified Defendant had indicated in documents mandatory in-service training and firearm qualifications had been completed by Sheriff Wilkins and Chief Deputy Boyd "knowing that [the trainings] had in fact not been completed, and knowing that these records and/or the information contained in these records would be and were submitted to [the Commission] thereby allowing" Wilkins and Boyd to maintain their law enforcement certifications when they had failed to meet the requirements.

Defendant's trial began on 7 February 2022. On 10 February 2022, the jury delivered its verdict finding Defendant guilty of all twelve counts of obstruction of justice and not guilty of each count of obtaining property by false pretenses. The trial court sentenced Defendant to five to fifteen months of imprisonment on the first count of obstruction of justice. The remaining counts were consolidated into two class H felony Judgments with suspended sentences of five to fifteen months of imprisonment. Defendant timely filed written Notice of Appeal on 14 February 2022.

Appellate Jurisdiction

The trial court rendered Judgment and sentenced Defendant on 10 February 2022. The Record also reflects written Judgments signed by the trial court on 10 February 2022, but these Judgments are neither file-stamped nor certified by the Clerk. Rule 4 of the North Carolina Rules of Appellate Procedure provides appeal from a judgment *rendered* in a criminal case must be given either orally at trial or by filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment. N.C. R. App. P. 4 (2023). Here, the Record reflects the written Judgments were signed by Judge R. Allen Baddour, Jr. on 10 February 2022, and Defendant's written Notice of Appeal was file-stamped on 14 February 2022. There is no dispute between the parties that Judgments were in fact entered and Defendant's written Notice of Appeal was timely. Therefore, this Court has appellate jurisdiction over this appeal.

Issue

The dispositive issues before us are whether: (I) obstruction of justice is a cognizable common law offense in North Carolina; and (II) the indictments in this case were sufficient to allege common law obstruction of justice.

Analysis

I. Common Law Obstruction of Justice

[1] As a threshold matter, Defendant contends obstruction of justice is not an offense at common law in North Carolina. Thus, Defendant asserts the indictments fail to allege a valid offense. We disagree.

Our legislature adopted the common law by statute, providing: "All such parts of the common law as were heretofore in force and use within this State . . . are hereby declared to be in full force within this State." N.C. Gen. Stat. § 4-1 (2023). Contrary to Defendant's assertions, obstruction of justice was historically an offense at common law, and our courts have consistently recognized it as a common law offense. Blackstone described a series of "offenses against public justice" in his treatise on English common law. 4 William Blackstone, *Commentaries on the Laws of England* 127-41.

Moreover, our courts have consistently recognized common law obstruction of justice as a cognizable offense. *See, e.g.*, *State v. Bradsher*, 382 N.C. 656, 659, 879 S.E.2d 567, 570 (2022); *State v. Ditenhafer*, 373 N.C. 116, 128, 834 S.E.2d 392, 400 (2019); *State v. Mitchell*, 259 N.C. App. 866, 878, 817 S.E.2d 455, 462-63, *disc. review denied*, 371 N.C. 478, 818 S.E.2d 278 (2018). Our Supreme Court has even expressed that the existence of statutory forms of obstruction of justice did not serve to abrogate the common law offense. *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) ("Obstruction of justice is a common law offense in North Carolina. Article 30 of Chapter 14 of the General Statutes does not abrogate this offense."). Thus, common law obstruction of justice is a cognizable offense in North Carolina.

II. Sufficiency of the Indictments to Allege Common Law Obstruction of Justice

[2] Defendant further argues the trial court erred by denying his Motion to Dismiss the indictments because they fail to allege facts supporting the elements of obstruction of justice. In particular, Defendant contends, among other things, that while the indictments allege Defendant committed "the infamous offense of obstruction of justice" they do not allege facts to support the element that Defendant acted to obstruct justice. The State contends this is "a mere semantic complaint[.]" The State argues there is no material difference between the essential element of the offense and the description of the alleged misconduct in the indictment.

"An indictment need not conform to any technical rules of pleading but instead must satisfy both statutory strictures and the constitutional purposes for which indictments are designed to satisfy, i.e., notice sufficient to prepare a defense and to protect against double jeopardy." *State v. Lancaster*, 385 N.C. 459, 462, 895 S.E.2d 337, 340 (2023) (quoting *In re J.U.*, 384 N.C. 618, 623, 887 S.E.2d 859, 863 (2023) (citations omitted)). A recent decision of our Supreme Court chronicles the General Assembly's adoption of the Criminal Procedure Act and the consequent shift away "from the highly technical, archaic common law pleading requirements which promoted form over substance." *Lancaster*, 385 N.C. at 462, 895 S.E.2d at 340 (quoting *In re J.U.*, 384 N.C. at 622, 887 S.E.2d at 863). Rather, indictments and other criminal pleadings are:

> sufficient in form for all intents and purposes if [they] express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C. Gen. Stat. § 15-153 (2023).

Still, an indictment must, however, contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2023). "The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019) (citation omitted).

Here, the indictments allege:

> [Defendant] unlawfully, willfully and feloniously with deceit and intent to defraud, did commit the infamous offense of obstruction of justice by knowingly providing false and misleading information in training records indicating that mandatory in-service training and annual firearm qualification had been completed by [Sheriff Wilkins/Chief Deputy Boyd] . . . knowing that it had in fact not been completed, and knowing that these records and/or the information contained in these records would be and were submitted to the North Carolina Sheriffs' Education and Training Standards Division thereby allowing [Sheriff

> Wilkins/Chief Deputy Boyd] to maintain his law enforcement certification when he had failed to meet the mandated requirements.

Our Supreme Court has held the elements of felony common law obstruction of justice are: "(1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud." *Ditenhafer*, 373 N.C. at 128, 834 S.E.2d at 400 (quoting *State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342-43 (2014)).[1] Our courts have defined common law obstruction of justice as "any act which prevents, obstructs, impedes or hinders public or legal justice." *Kivett*, 309 N.C. at 670, 309 S.E.2d at 462 (citation and quotation marks omitted).

The issue arises in determining what constitutes an "act which prevents, obstructs, impedes or hinders public or legal justice." It seems clear in our case law that false statements made in the course of a criminal investigation for the purpose of misleading or hindering law enforcement fall within the ambit of obstruction of justice. *E.g.*, *State v. Bradsher*, 382 N.C. 656, 669, 879 S.E.2d 567, 575-76 (2022) (false statements to State Bureau of Investigation in course of investigation); *Ditenhafer*, 373 N.C. at 123, 834 S.E.2d at 397 (indictment alleged "defendant . . . unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud and obstruct an investigation into the sexual abuse of a minor to wit: the defendant denied Wake County Sheriff's Department and Child Protective Services access to her daughter . . . throughout the course of the investigation."); *Cousin*, 233 N.C. App. at 531, 757 S.E.2d at 339 (false statements to law enforcement in a murder investigation resulting in a "significant burden imposed on the investigation . . . resulting from Defendant's various conflicting statements.").

Likewise, obstructing a judicial proceeding would also fall within obstruction of justice. *See Kivett*, 309 N.C. at 670, 309 S.E.2d at 462 ("Respondent's conduct with respect to the attempt to prevent the convening of the grand jury would support a charge of common law obstruction of justice."); *Preston*, 73 N.C. App. at 176, 325 S.E.2d at 688 (concluding indictment was sufficient to allege common law misdemeanor obstruction of justice based on a scheme to pay court costs and

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1. At common law, obstruction of justice was a misdemeanor. *State v. Preston*, 73 N.C. App. 174, 175, 325 S.E.2d 686, 688 (1985). N.C. Gen. Stat. § 14-3(b) provides, however, "a misdemeanor offense as to which no specific punishment is prescribed to be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony." N.C. Gen. Stat. § 14-3(b) (2023). Here, the State proceeded on a felony indictment alleging Defendant acted with deceit or intent to defraud.

fine for a person impersonating a defendant to hide the real defendant's identity but failed to include allegations sufficient to support the felony charge); *Mitchell*, 259 N.C. App. at 876-77, 817 S.E.2d at 462 (sending falsified letters purporting to be defendant's victim recanting prior statements and making bomb threats to courthouses).

In addition to impeding criminal investigations and judicial proceedings, common law obstruction of justice has also been applied in the civil context. For example, in *Burgess v. Busby*, this Court held a complaint alleged a claim for common law obstruction of justice based on allegations "(1) defendant alerted health care providers to the names of the jurors in retaliation for their verdict; (2) this retaliation was designed to harass plaintiffs; and (3) defendant's conduct was meant to obstruct the administration of justice in Rowan County." 142 N.C. App. 393, 409, 544 S.E.2d 4, 13 (2001). Similarly, in *Grant v. High Point Regional Health System*, we also held a complaint stated a civil common law obstruction of justice claim, where medical defendants destroyed documents after being placed on notice of a potential malpractice claim based on allegations defendants "obstructed, impeded and hindered public or legal justice [ ] in that the failure of . . . Defendant . . . to preserve, keep and maintain the x-ray film described above has effectively precluded . . . Plaintiff from being able to successfully prosecute a medical malpractice action against . . . Defendant . . . and others." 184 N.C. App. 250, 255, 645 S.E.2d 851, 855 (2007). This was true even though no investigation or lawsuit was actually pending. *Id.* at 256-57, 645 S.E.2d at 856.

As the State aptly notes, obstruction of justice is not limited to just criminal and civil judicial proceedings. For example, in *State v. Wright*, the defendant, a member of the North Carolina House of Representatives, was convicted of common law obstruction of justice based on his failure to disclose contributions and transfers from his campaign accounts to his personal accounts to the State Board of Elections in violation of campaign finance disclosure laws. 206 N.C. App. 239, 240, 696 S.E.2d 832, 834 (2010). This Court held the defendant's false reports "deliberately hindered the ability of the SBOE and the public to investigate and uncover information to which they were entitled by law: whether defendant was complying with campaign finance laws, the sources of his contributions, and the nature of his expenditures. Further, his false reports concealed illegal campaign activity from public exposure and possible investigation." *Id.* at 243, 696 S.E.2d at 835-36. Additionally, the court in *Wright* relied on our Supreme Court's precedent holding "that '[w]here, as alleged here, a party deliberately destroys, alters or creates a false document *to subvert an adverse party's investigation* of his right to

seek a legal remedy,' a claim for obstruction of justice arises." *Id*. at 242, 696 S.E.2d at 835 (quoting *Henry v. Deen*, 310 N.C. 75, 88, 310 S.E.2d 326, 334-35 (1984)) (emphasis added). Central to the analysis in *Wright* was that the State Board of Elections had a statutory obligation to investigate campaign finance reports. *Id*. at 243, 696 S.E.2d at 836. "Thus, when defendant filed his reports with the SBOE, he knew that his misinformation was blocking the SBOE and the public from uncovering and further investigating any improper campaign activity[.]" *Id*.

Our case law in both the civil and criminal contexts also makes clear, however, that not every misstatement or fabrication arises to an act obstructing, impeding or hindering public or legal justice. For example, in *State v. Eastman*, this Court acknowledged:

> At common law, it is an obstruction of justice to suppress, fabricate, or destroy physical evidence. *Wharton's Criminal Law* § 588 (14th ed. 1981). *Wharton* illustrates the elements of the crime by citing various states' statutory definitions. All these statutes reflect the common law principal that when a person, "believing that an official proceeding is pending or about to be instituted and acting without legal right or authority . . . alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its veracity or availability in such proceeding," he is guilty of obstruction of justice. *Wharton*, *supra*, quoting Colo.Rev.Stat. § 18-8-610(1) and Conn.Gen. Stat.Ann. § 53a-155(a).

113 N.C. App. 347, 353, 438 S.E.2d 460, 463 (1994). There, we held there was insufficient evidence the defendant had intentionally destroyed documents detailing an alleged sexual assault at a school or that the documents had been destroyed prior to an SBI investigation "in order to obstruct a criminal investigation[.]" *Id*. at 353, 438 S.E.2d at 464. In the civil context, we have likewise observed: "Simply put, we are not aware of any authority establishing that a mere witness . . . could be held liable for common law obstruction of justice on the basis of a failure to provide an accurate report or a failure to correct an allegedly inaccurate report requested by a party to litigation." *Blackburn v. Carbone*, 208 N.C. App. 519, 529, 703 S.E.2d 788, 796 (2010). We further determined summary judgment for the defendant was proper where:

> Plaintiff has neither alleged nor forecast any factual basis for believing that the alleged error in the report that [the defendant] provided to Plaintiff's counsel or any failure

> on the part of [the defendant] to correct that error at the request of Plaintiff's counsel represented an intentional act on the part of [the defendant] *undertaken for the purpose of deliberately obstructing, impeding or hindering* the prosecution of Plaintiff's automobile accident case.

Id. (emphasis added).

The consistent and clear teaching of these cases is that for an act to meet the elements of obstruction of justice—that is, an "act which prevents, obstructs, impedes or hinders public or legal justice"—the act—even one done intentionally, knowingly, or fraudulently—must nevertheless be one that is done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation, which might lead to a judicial or official proceeding. *Cf. Eastman*, 113 N.C. App. at 353-54, 438 S.E.2d at 463-64 (where documentary evidence of sexual assault was discarded or destroyed, evidence was insufficient to show obstruction of justice where evidence did not support finding defendant acted to subvert an SBI investigation).

Here, the indictments allege Defendant willfully and knowingly provided false and misleading information in training records knowing those records would be submitted to the North Carolina Sheriffs' Education and Training Standards Division for the purpose of allowing Sheriff Wilkins and Chief Deputy Boyd to maintain their law enforcement certification. While these alleged actions are wrongful, there are no facts asserted in the indictment to support the assertion Defendant's actions were done to subvert a potential subsequent investigation or legal proceeding.[2] For example, there is no indication in the indictment that Defendant acted purposely to hinder any investigation by the Education and Training Standards Division or to attempt to impair their ability to seek any injunctive relief against Sheriff Wilkins or Chief Deputy Boyd under N.C. Gen. Stat. § 17C-11(c). To the contrary, the indictments assert Defendant's acts were allegedly done for the sole purpose of allowing his supervisors to maintain their certifications.

As such, the indictments in this case fail to allege facts supporting an element of the offense: that Defendant obstructed justice defined as an act obstructing, impeding or hindering public or legal justice. *Kivett*, 309 N.C. at 670, 309 S.E.2d at 462; N.C. Gen. Stat. § 15A-924(a)(5) (2023). "A criminal pleading . . . is fatally defective if it 'fails to state some

2. This is also not to suggest Defendant's actions might not constitute some other offense under our common or statutory law. We do not decide that issue here.

essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Brice*, 370 N.C. 244, 249, 806 S.E.2d 32, 36 (2017) (quoting *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (citations omitted)).

Thus, here, the indictments were insufficient by failing to state an essential and necessary element of the offense of common law obstruction of justice. Therefore, the indictments were fatally defective. Consequently, the trial court erred in denying Defendant's Motion to Dismiss the indictments in this case.[3]

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Judgments.[4]

VACATED.

Chief Judge DILLON concurs in separate opinion.

Judge STADING joins in the concurring opinion.

DILLON, Chief Judge, concurring.

I fully concur with the majority opinion. The actions of Defendant as alleged and proven do not constitute obstructions of justice. I write separately to note that Defendant's actions *may have* constituted another crime recognized under England's common law, such as "misconduct in public office." *See Clayton v. Willis*, 489 So.2d 813, 818 (1986) (Florida court recognizing "misconduct in public office" as an offense under the common law of England); *People v. Thomas*, 475 N.W.2d 288, 293 (1991) (defining common law misconduct in office as "corrupt behavior by an

3. As an additional matter, it is unclear whether the Judgments could stand with respect to the charges based on falsifying records as they relate to Sheriff Wilkins. The article establishing the Commission explicitly states: "Nothing in this Article shall apply to the sheriff elected by the people." N.C. Gen. Stat. § 17E-11(a) (2023). Further, at trial, the director of the Commission testified the Commission does not have the authority to revoke a sheriff's law enforcement certification. Thus, it is not clear Defendant could have obstructed justice by falsely verifying Sheriff Wilkins' qualifications.

4. Because of our determination on this issue, we do not reach the remaining issues asserted by Defendant in his briefing to this Court.

officer in the exercise of the duties of his office") (Michigan Supreme Court Justice concurring, contrasting common law misconduct in office with common law obstruction of justice). It may be that the common law offense has been abrogated by N.C. Gen. Stat. § 14-232, which is part Article 31 of Chapter 14, entitled "Misconduct in Public Office," and which makes it a misdemeanor for any "county officer" from "willfully swear[ing] falsely to any report or statement required by law to be made or filed, concerning or touching the county[.]" In any event, the indictments in the present case fail to allege that Defendant is a public officer or that he "swore" to any false information that he may have provided.

STATE OF NORTH CAROLINA
v.
DAVID NEAL COX

No. COA23-260

Filed 20 February 2024

1. **Evidence—prior bad acts—prosecution for sexual offenses with a child—inappropriate behavior toward victim's cousin—plain error analysis**

   In a prosecution for multiple sexual offenses with a child, where defendant was accused of sexually abusing his minor stepdaughter over a span of five years, the trial court did not commit plain error by failing to exclude testimony from the victim's cousin, who described two incidents where, when she was fourteen years old, defendant moved her clothing aside to comment on her "nice tan line." Even if the cousin's testimony had been inadmissible under Evidence Rule 404(b)(on the ground that the incidents she described were not sufficiently similar to the conduct alleged in the case), because of the substantial evidence of defendant's guilt—including the victim's detailed testimony regarding the alleged abuse and the corroborative testimonies of other witnesses—defendant could not show that the jury probably would have reached a different verdict had the cousin's testimony been excluded.

2. **Evidence—expert witness—qualification—areas not stipulated to by defendant—no improper opinion expressed by court**

   In a prosecution for multiple sexual offenses with a child, where the State tendered a witness as an expert in multiple areas—including

how to interpret interviews of children who are suspected victims of sexual abuse, delayed reporting of sexual abuse, and what constitutes grooming—but where defendant stipulated to the witness being an expert solely in forensic interviewing, the trial court did not express an impermissible opinion to the jury when it qualified the witness as an expert in forensic interviewing and all of the other areas that the State had listed. Firstly, the court, in its gatekeeping role, was making an ordinary ruling during the course of the trial and had discretion to qualify the expert in any of the areas defendant did not stipulate to. Secondly, while the expert was qualified in areas relevant to the case, her expertise did not determine the ultimate question for the jury—whether defendant had sexually abused his minor stepdaughter. In fact, the expert's testimony—which did not include opinions regarding the victim's credibility or whether she was abused—demonstrated that its purpose was to give the jury context for evaluating the victim's account in the case, not to suggest what the jury should find.

3. Evidence—expert witness—general testimony—concepts relevant to the case

In a prosecution for multiple sexual offenses with a child, the trial court did not commit plain error by allowing the State's expert to testify generally about the clinical meaning of the term "grooming," common grooming practices, and delayed reporting of abuse rather than apply her expertise to the specific facts of the case. The expert testified about concepts that were relevant to the case and gave the jury necessary information to evaluate the other testimony offered at trial, especially given how the victim repeatedly described defendant's abusive behaviors toward her as "grooming" and how defense counsel cross-examined the victim regarding her delay in reporting defendant.

4. Criminal Law—defense counsel—closing argument—mention of possible punishment—improper framing

In a prosecution for multiple sexual offenses with a child, the trial court did not abuse its discretion in sustaining the State's objection when defense counsel told the jury during closing argument that a conviction on any of defendant's charges would "practically be a life sentence." Rather than inform the jury of the precise statutory sentence ranges associated with each charge, defense counsel framed defendant's potential punishment in terms of how severe its overall impact on defendant would be in an attempt to sway the jury's sympathies. In doing so, defense counsel improperly asked

the jury to consider the potential punishment as part of its substantive deliberations.

Appeal by Defendant from Judgments rendered 15 July 2022 by Judge L. Lamont Wiggins in Edgecombe County Superior Court. Heard in the Court of Appeals 29 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State.

Thomas, Ferguson & Beskind, LLP, by Kellie Mannette, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

David Cox (Defendant) appeals from Judgments rendered upon convictions for three counts of statutory sex offense with a child under 15, five counts of sex offense by a parent, and two counts of statutory sex offense with a child by an adult. The Record before us, including evidence presented at trial, shows the following:

The alleged victim in this case is Margaret.[1] Defendant moved in with Margaret's mother in 2007. They married in 2008. At that time, Margaret was eight years old, and her four siblings also resided in the house. At trial, Margaret testified Defendant sexually abused her on numerous occasions between 2011 and 2016, when she was between the ages of eleven and sixteen years old. According to Margaret, when she was sixteen years old and began dating, Defendant stopped sexually abusing her, but he continued to molest and grope her until she was 19. Throughout this time, Margaret did not report the abuse to anyone.

Margaret's grandmother testified she was suspicious of Defendant's behavior when Margaret was young based on her observations of Defendant with Margaret at the grandmother's pool. After observing Defendant forcibly kiss Margaret several times, her grandmother privately brought up the incident and asked her if everything was alright. Margaret responded that everything was alright.

At trial, Margaret testified she first reported Defendant's abuse after witnessing what she believed was grooming behavior by Defendant

1. A pseudonym chosen by the parties pursuant to N.C. R. App. P. 42(b).

toward Defendant's granddaughter who was three or four years old at the time. At that point, it had been eight years since Defendant's abuse began. Margaret testified she first disclosed Defendant's abuse to her grandmother, grandfather, and then-boyfriend. Margaret's grandmother then called the police. The following day, Margaret reported the abuse to her mother. To corroborate her account, Margaret then showed her mother where Defendant kept a penis pump and lubricant, which only he and Margaret knew about.

On 26 September 2019, Defendant was indicted for three counts of statutory sex offense with a child under fifteen, five counts of sex offense by a parent, and two counts of statutory sex offense with a child by an adult. Defendant's trial began 11 July 2022. In addition to Margaret's testimony, Margaret's cousin, Reagan,[2] testified about two prior encounters she had with Defendant. According to Reagan, when she was approximately fourteen years old, Defendant had stopped her from going up the stairs at Margaret's house. Defendant then moved her tank top and told Reagan she had a "nice tan line." Reagan did not report this incident at the time. A few months later, Reagan was swimming at Margaret's grandmother's house and was wearing a two-piece bathing suit. Reagan testified she was on her way to the bathroom when Defendant blocked her from entering. Defendant then moved Reagan's swimsuit bottom to a point where she felt uncomfortable and again commented she had a "nice tan line." According to Reagan's testimony, she reported this incident and the previous one to her parents later that day.

The State presented Beth Bruder Dagenhart, the Children's Advocacy Center Program Director at Southmountain Children and Family Services, as an expert witness. The State asked to tender Dagenhart as an expert in the following fields:

> "[i]nterpretations of interviews of children who are suspected victims of sexual abuse. Profiles of sexually abused children. . . delayed reporting or delayed disclosure. What those reasons are based on her knowledge, training, and experience for a delay in disclosure. . . Denials of sexual abuse. And then finally common grooming practices, what constitutes grooming, and common grooming practices employed by child abusers.

Defendant responded, "That's a complicated tender but we will go ahead and stipulate, Your Honor, to her being an expert in forensic

2. A pseudonym chosen by the parties.

interviewing." The trial court then ordered the witness tendered "in the areas as stated by counsel for the State and upon stipulation of the defendant." Dagenhart's testimony explained generally what constitutes grooming, common grooming practices, denials of abuse, triggering events for disclosure, and delayed disclosure. Dagenhart did not testify about Margaret or offer any opinion about the present case.

On 15 July 2022, the jury returned verdicts finding Defendant guilty on all counts. The trial court sentenced Defendant to 1176 to 1471 months of imprisonment. Defendant gave oral Notice of Appeal in open court.

Appellate Jurisdiction

The trial court rendered Judgment and sentenced Defendant on 15 July 2022. The Record also reflects written Judgments signed by the trial court on 15 July 2022, but these Judgments are neither file-stamped nor certified by the Clerk. Rule 4 of the North Carolina Rules of Appellate Procedure provides appeal from a judgment *rendered* in a criminal case must be given either orally at trial or by filing written notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of judgment. N.C. R. App. P. 4 (2023). Here, the Record reflects the written Judgments were signed by Judge L. Lamont Wiggins on 15 July 2022, and Defendant gave oral Notice of Appeal in open court on 15 July 2022. There is no dispute between the parties that Judgments were in fact entered and Defendant's oral Notice of Appeal was timely. Therefore, this Court has appellate jurisdiction over this appeal.[3]

Issues Presented

The issues are whether the trial court (I) plainly erred by failing to exclude evidence of Defendant's prior conduct; (II) expressed an impermissible opinion in its qualification of Dagenhart as an expert witness; (III) plainly erred by admitting Dagenhart's expert testimony; and (IV) erred by precluding defense counsel from arguing the possible penalty Defendant faced if convicted.

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3. Nevertheless, we urge all parties in future to comply with Rule 9(b)(3) of the North Carolina Rules of Appellate Procedure, which provides: "Every pleading, motion, affidavit, or other document included in the printed record should show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination should show the date on which it was entered." N.C. R. App. P. 9(b)(3) (2023).

Analysis

I. Evidence of Prior Acts

[1] Defendant contends the trial court committed plain error by failing to exclude Reagan's testimony under Rule 404(b) because the incidents Reagan described were not sufficiently similar to the conduct alleged in this case. Because Defendant did not object to the challenged testimony at trial, our review is limited to plain error. N.C. R. App. P. 10(a)(4) (2023) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"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). Further, "[t]o 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.* (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

Here, even if we were to assume without deciding the trial court's admission of evidence regarding Defendant's prior conduct was error, in light of the substantial evidence of Defendant's guilt, Defendant failed to establish the jury would probably have reached a different result had the evidence not been admitted. Thus, any such error would not amount to plain error.

In this case, it was undisputed Defendant was Margaret's stepfather, they were not married, Defendant was in a parental role with respect to Margaret, and they lived in the same home at all relevant times in this case. Thus, the only element in dispute for each charge was the sexual act. At trial, Margaret testified with specificity about multiple instances of sexual abuse by Defendant from the time she was eleven to sixteen years old. Margaret's testimony recounted specific details about the time, place, and manner in which Defendant abused her.

Further, several witnesses corroborated Margaret's testimony, including Margaret's grandmother and boyfriend, both of whom offered specific instances of concerning behavior Defendant exhibited toward Margaret. Finally, Margaret recounted revealing Defendant's penis pump and lubricant hidden beneath a ceiling tile in the bathroom to her mother, which she testified only she and Defendant knew about. This too corroborated her testimony. Based on this substantial evidence, we cannot conclude the jury would have probably reached a different result absent the challenged testimony. As such, Defendant has failed to meet his burden under the plain error standard. Consequently, the trial court did not commit plain error by failing to exclude the challenged evidence in the absence of an objection by Defendant.

II. Expert Witness Qualification

[2] Defendant contends the trial court erred by expressing an impermissible opinion during its qualification of Dagenhart as an expert witness. "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2023). Further, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2023). "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Jones*, 347 N.C. 193, 207, 491 S.E.2d 641, 649 (1997) (quoting *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995)). "[A] trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial." *State v. Jones*, 358 N.C. 330, 355, 595 S.E.2d 124, 140 (2004) (citation omitted). Additionally, "[t]rial courts act as a gatekeeper in determining admissibility of expert testimony[.]" *State v. Walston*, 369 N.C. 547, 551, 798 S.E.2d 741, 745 (2017).

Here, the State questioned Dagenhart regarding her background and qualifications before tendering her as an expert witness. The State offered Dagenhart as an expert in interpretation of interviews of children who are suspected victims of sexual abuse, profiles of sexually abused children, delayed reporting or delayed disclosure, denials of sexual abuse, common grooming practices, and what constitutes grooming. Defense counsel responded: "That's a complicated tender but we will go ahead and stipulate, Your Honor, to her being an expert in forensic interviewing." The trial court ordered the witness "tendered in the areas as stated by counsel for the State and upon stipulation of the defendant."

Contrary to the State's assertion, Defendant did not stipulate to Dagenhart's qualification as an expert in the full list of areas recited by the State. Defendant specified he stipulated only to Dagenhart's expertise in forensic interviewing. However, the trial court was still within its discretion to qualify Dagenhart as an expert in the remaining areas listed by the State. *See State v. King*, 366 N.C. 68, 74-75, 733 S.E.2d 535, 539-40 (2012). Still, the trial court made an ordinary ruling in the course of the trial in its gatekeeping role. *Walston*, 369 N.C. at 551, 798 S.E.2d at 745. The trial court made no extraneous statements or comments with respect to Dagenhart's qualifications.

We have distinguished between cases in which the defendant is herself qualified as an expert in the jury's presence, *Galloway v. Lawrence*, 266 N.C. 245, 250-51, 145 S.E.2d 861, 865-66 (1966), from cases in which the person tendered as an expert was not the defendant and the expert's testimony did not address the ultimate question to be decided by the factfinder. *In re Lee*, 69 N.C. App. 277, 289-91, 317 S.E.2d 75, 82-83 (1984). Here, Dagenhart was qualified in areas relevant to the case, but her expertise did not determine the ultimate question for the jury—whether Defendant had abused Margaret. Further, Dagenhart never testified as to her opinion on Margaret's credibility or whether Margaret had been abused. In fact, the State clarified at the outset of its direct examination of Dagenhart that she had not spoken with Margaret.

> [Counsel for the State]: Now, Ms. Dagenhart, this is a case where you didn't do a forensic interview in this case; is that correct?
>
> [Dagenhart]: That's correct.
>
> [Counsel for the State]: And you've never interviewed [Margaret] or talked to her or anything about this; right?
>
> [Dagenhart]: No. I have not.

This exchange underscores the purpose of Dagenhart's testimony was provided to give the jury context to understand and evaluate Margaret's account, not to suggest what the jury should find. Thus, the trial court did not express an impermissible opinion by qualifying the expert witness in the areas listed by the State. Accordingly, we conclude the trial court did not err.

III. Admission of Expert Witness Testimony

[3] Defendant contends the trial court plainly erred by allowing Dagenhart to testify generally rather than applying her expertise to the

facts of the case. The admission of expert testimony is governed by N.C. Gen. Stat. § 8C-1, Rule 702. In 2011, our General Assembly amended Rule 702(a) to mirror Federal Rule of Evidence 702(a) as amended at that time. *State v. Hunt*, 250 N.C. App. 238, 244, 792 S.E.2d 552, 558 (2016). "It follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule." *Id.* (quoting *State v. McGrady*, 368 N.C. 880, 884, 787 S.E.2d 1, 5 (2016)). "And when the General Assembly adopts language or statutes from another jurisdiction, 'constructions placed on such language or statutes are presumed to be adopted as well.' " *McGrady*, 368 N.C. at 887, 787 S.E.2d at 7 (quoting *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981)).

Rule 702(a) provides:

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

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2023). Federal and state jurisdictions alike allow an expert to testify generally. On this issue, the 2000 Advisory Committee Notes to Federal Rule of Evidence 702 state:

> Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. . . The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

Fed. R. Evid. 702 (2000 Advisory Committee Notes).

Here, the expert witness Dagenhart testified generally about the clinical meaning of the term "grooming" in the abuse process, delayed reporting of abuse, and common grooming practices, all of which were relevant to the jury's understanding of issues in the case. Under the above criteria in the 2000 Advisory Committee Notes, Dagenhart's general testimony on each of these issues was appropriate to give the jury necessary information to understand the testimony and evaluate it. First, Dagenhart was qualified by the trial court as an expert in grooming practices, delayed reporting, and forensic interviewing, among other things. These areas are outside of common knowledge, thus expertise can assist the factfinder. Based on the Record before us, there is no evidence Dagenhart's testimony was not reliable. Moreover, the Defendant did not object or call into question Dagenhart's testimony at trial. Finally, Dagenhart's testimony clearly fits the facts of the case. During the State's case in chief, Margaret repeatedly used the term "grooming" to describe Defendant's abusive behaviors toward her and identified specific behaviors she believed were grooming. She further testified she had learned about the term grooming and how to identify potential grooming when she was training to be a lifeguard, and that knowledge had helped her understand Defendant's abuse. Defendant questioned Margaret on cross-examination regarding her delay in disclosing the abuse. Thus, Dagenhart's testimony explained important general concepts of abuse to the jury that were relevant to the case. Therefore, consistent with Federal Rule of Evidence 702, Dagenhart's general testimony was admissible under N.C. Rule of Evidence 702(a). Consequently, the trial court did not err by admitting Dagenhart's testimony.

IV. Possible Penalty Argument

[4] Defendant argues the trial court erred by sustaining the State's objection to defense counsel stating a guilty verdict on any of the charges would be a life sentence for Defendant during closing argument. "Ordinarily, the control of jury arguments is left to the sound discretion of the trial court and the trial court's rulings thereon will not be disturbed on appeal absent a showing of abuse of discretion." *State v. Jones*, 339 N.C. 114, 158-59, 451 S.E.2d 826, 850 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873 (1995) (citations omitted). Abuse of discretion may be found "only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Jones*, 347 N.C. at 213, 491 S.E.2d at 653 (citation omitted).

"In jury trials the whole case as well of law as of fact may be argued to the jury." N.C. Gen. Stat. § 7A-97 (2023). Our Supreme Court has interpreted this provision to mean "[c]ounsel may. . . read or state

to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged." *State v. Lopez*, 363 N.C. 535, 539, 681 S.E.2d 271, 274 (2009) (quoting *State v. Britt*, 285 N.C. 256, 273, 204 S.E.2d 817, 829 (1974)). However, counsel may not do so in a way that asks the jury "to consider the punishment as part of its substantive deliberations[.]" *State v. Wilson*, 293 N.C. 47, 57, 235 S.E.2d 219, 225 (1977). These rules "are meant to assure that the evidence a jury hears and considers is reliable." *Lopez*, 363 N.C. at 541, 681 S.E.2d at 275.

Here, during closing argument, defense counsel told the jury "conviction of any of these charges will practically be a life sentence. . . You know, the judge can't give probation. These sentences are all—[.]" At that point, the State objected, and the trial court sustained the objection and struck the argument. Unlike the cases above and those relied on in the parties' briefs, in this case defense counsel did not read the statute nor attempt to give a precise sentence range for each offense for which Defendant was charged. In fact, defense counsel did not frame the potential punishment in terms of years, but rather in terms of its impact on Defendant—that, based on Defendant's age, a conviction on any of the charges would effectively mean he would spend the rest of his life in prison.

Rather than merely informing the jury of the statutory penalties associated with the charges, defense counsel implied Defendant should not be convicted because the punishment would be severe—in other words, "counsel was asking the jury to consider the punishment as part of its substantive deliberations and this he may not do." *Wilson*, 293 N.C. at 57, 235 S.E.2d at 225. Thus, defense counsel's statement improperly commented upon the statutory punishment to sway the jury's sympathies in its substantive deliberations. Therefore, the trial court did not abuse its discretion by sustaining the State's objection to the statement.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial.

NO ERROR.

Judges ARROWOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
ALKEEM HAIR, DEFENDANT

No. COA22-987

Filed 20 February 2024

1. Jury—request for transcript of witness testimony—trial court's discretion

In defendant's murder and robbery trial, the trial court did not abuse its discretion by denying the jury's request to review transcripts of witness testimony without asking for more details about the request. The trial court complied with the requirements in N.C.G.S. § 15A-1233(a) by conducting all the jurors into the courtroom and exercising its discretion to consider and deny the request, as evidenced by the court's explanation to the jury of the reason for the denial.

2. Criminal Law—joinder—murder and robbery—witness intimidation—transactional connection—discretionary decision

The trial court did not abuse its discretion by granting the State's motion to join defendant's charges for murder and robbery with a witness intimidation charge based on multiple factors, including that, despite defendant's argument that the intimidation charge was not transactionally related to the murder and robbery charges, defendant assaulted the witness because he knew the witness was likely to testify against him on those charges and he was trying to prevent him from doing so. Further, evidence of the intimidation would have been admissible in the murder and robbery trial, and vice versa, if the charges had been tried separately. Similarly, the trial court did not abuse its discretion by denying defendant's motions to sever the charges where defendant failed to demonstrate that severance was required for a fair determination of his guilt or innocence of each offense.

3. Evidence—hearsay—murder and robbery trial—cell phone records—geo-tracking data—no plain error

There was no plain error in defendant's trial for first-degree murder and robbery with a dangerous weapon by the admission of cell phone records and geo-tracking evidence—which defendant contended did not fall within an applicable hearsay exception—where there was other evidence from two different witnesses linking defendant to the murder and robbery of the victim.

Appeal by defendant from judgment entered 24 March 2022 by Judge Claire V. Hill in Superior Court, Cumberland County. Heard in the Court of Appeals 9 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

STROUD, Judge.

Defendant appeals from a judgment for first-degree murder, robbery with a dangerous weapon, and intimidating a witness. Defendant alleges (1) the trial court abused its discretion in denying a jury request to review the trial transcript; (2) the trial court abused its discretion in joining the witness intimidation charge with his other two offenses; and (3) the trial court plainly erred in admitting cell phone and geo-tracking data evidence without proper authentication. We conclude there was no error.

I. Background

The State's evidence tended to show that on 16 July 2018, Ms. McArthur was outside when she heard gunshots. Ms. McArthur saw two men outside her daughter's house: Defendant, whom she had seen at her daughter's house before, and another man, Mr. McIver. Ms. McArthur saw Defendant going in and out of her daughter's house, wrapping something in a bandana, and Mr. McIver standing in the yard. Ms. McArthur heard Defendant tell Mr. McIver to "hurry up" because he thought she would call the police. Ms. McArthur then saw the men get into a white Charger driven by Mr. Johnson.

Ms. McArthur found her daughter dead on the sidewalk. Ms. McArthur knew her daughter sold drugs and kept marijuana in a glass mason jar, a plastic bag, and a little black and white purse. Ms. McArthur went into her daughter's house and took the plastic bag and the black and white purse containing drugs. Ms. McArthur also looked for, but did not see, her daughter's new iPhone bought two weeks earlier.

On 6 August 2019, Defendant was indicted for first-degree murder and robbery with a dangerous weapon. On 9 July 2021, Defendant and Mr. Johnson were both in custody and being transported. Mr. Johnson was in handcuffs and leg irons, but Defendant did not have handcuffs.

Defendant hit Mr. Johnson once in the jaw. When Defendant was questioned about hitting Mr. Johnson, he answered, "that's my co-defendant. He trying to testify on me and give me life in prison." On 11 October 2021, a superseding indictment combined a witness intimidation charge with the murder and robbery charges.[1]

Thereafter, the State made a motion to consolidate the witness intimidation charge with the murder and robbery charges. Defendant opposed the State's motion and made a motion to sever. The trial court ultimately granted the State's motion to join the charges and denied Defendant's motion to sever. Defendant renewed his motion to sever at the start of and during the trial.

During Defendant's trial, Mr. Johnson testified against Defendant as to all three charges. Mr. Johnson stated he drove Defendant and Mr. McIver to the victim's home to buy marijuana. Mr. Johnson said he heard gunshots about five minutes after Defendant entered the victim's house. Mr. Johnson testified that while in the car he saw Defendant pass a gun and a glass mason jar of marijuana to Mr. McIver. According to Mr. Johnson, after Defendant and Mr. McIver ran out of the victim's home, Mr. Johnson drove them to Defendant's girlfriend's trailer. Further, once at Defendant's girlfriend's trailer, Mr. Johnson shot at a dog with the same gun that Defendant had passed to Mr. McIver. The shell casings from the two shooting scenes matched.

A jury found Defendant guilty of all offenses, and the trial court sentenced him to life imprisonment without the possibility of parole for the robbery and murder charges and 14-26 months for witness intimidation to run at the end of his life sentence. Defendant appeals.

II. Defendant's Arguments

Defendant contends (1) the trial court abused its discretion in denying a jury request to review the trial transcript; (2) the trial court abused its discretion in joining a witness intimidation charge to his remaining offenses; and (3) the trial court plainly erred in admitting cell phone and geo-tracking data evidence that was improperly authenticated. We analyze each of these arguments in turn.

A. Jury Request to Review the Trial Transcript

[1] During deliberations, the jury asked for transcripts of testimony from the case. The trial court denied the request. Defendant contends

1. Ultimately, Mr. Johnson was not Defendant's co-defendant at trial as he pled guilty to accessory after the fact to first-degree murder and robbery with a dangerous weapon.

the trial court did not have the "knowledge and understanding of the material circumstances surrounding the jury's request" as the trial court did not ask which witness the jury was concerned about nor how long it would take to produce the transcript. Defendant further contends the trial court failed to realize how important the testimony may have been to the jury because there was only testimony from two witnesses.

Defendant provides no case law to support any specific requirement for the trial court to ask about details or the importance of the jury's request before deciding how to rule on the jury's request. Indeed, "[a] trial court's ruling in response to a request by the jury to review testimony or other evidence is a discretionary decision, ordinarily reviewable only for an abuse thereof." *State v. Long*, 196 N.C. App. 22, 27, 674 S.E.2d 696, 699 (2009) (citation omitted). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Walters*, 209 N.C. App. 158, 163, 703 S.E.2d 493, 496 (2011) (citation omitted).

North Carolina General Statute Section 15A-1233(a) sets the procedure for the trial court's handling of requests from the jury to review "certain testimony or other evidence." N.C. Gen. Stat. § 15A-1233(a) (2021). Section 15A-1233(a) states:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

Id.

In *State v. Ashe*, 314 N.C. 28, 33-34, 331 S.E.2d 652, 656 (1985), our Supreme Court summarized the duties of the trial judge when faced with this type of request from the jury:

> This statute imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be

> read to or examined by the jury together with other evidence relating to the same factual issue.

Id.

Here, the trial court satisfied both of its duties under North Carolina General Statute Section 15A-1233(a) by bringing all jurors into the courtroom and using its discretion to deny the request. *See* N.C. Gen. Stat. § 15A-1233(a). When the jury made a request to review testimony, the judge brought the jury into the courtroom, answered the request, and explained the reason for her decision by saying:

> The jury has the responsibility of recalling all of the evidence. To begin rehearing particular parts of the testimony would tend to emphasize part of the evidence without it giving equal time to other parts of evidence in this case and for that reason it's best to not have one part of the evidence repeated for you.

We conclude the trial court did not abuse its discretion in denying the request.

B. Consolidation of Charges

[2] Defendant next contends that joining the witness intimidation charge with the murder and robbery charges for trial was improper because the witness intimidation charge is not transactionally related to the robbery or murder charges, and he suffered prejudice because of the joinder and the trial court's denial of his motion to sever.

1. Motion to Join

We review the issue of joinder in two steps. *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250 (2000). "First, the two offenses must have some sort of transactional connection. Whether such a connection exists is a question of law, fully reviewable on appeal." *Id.* (citation omitted). If, after *de novo* review, we determine the trial court did not err in finding a transactional connection between the charges, then in the second step we consider whether the trial court abused its discretion in consolidating the charges for trial. *See id.* In this step, we consider "whether the accused can receive a fair hearing on more than one charge at the same trial, i.e., whether consolidation hinders or deprives the accused of his ability to present his defense." *Id.* (citation and quotation marks omitted).

North Carolina General Statute Section 15A-926 allows the trial court to join offenses when they "are based on the same act or transaction

or on a series of acts *or* transactions connected together *or* constituting parts of a single scheme or plan." (emphasis added). N.C. Gen. Stat. § 15A-926(a) (2021). Courts favor consolidation because it "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once." *State v. Boykin*, 307 N.C. 87, 91-92, 296 S.E.2d 258, 261 (1982). *State v. Montford* identifies four factors a court may consider in deciding whether the charges to be consolidated for trial are transactionally related:

> [S]imilarity of crimes alone is insufficient to create the requisite transactional connection. Rather, consideration must be given to several factors, no one of which is dispositive. These factors include: (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case.

Montford, 137 N.C. App at 498-99, 529 S.E.2d at 250.

As to the first factor, "the nature of . . . [Defendant's] offense" was allegedly intimidating a witness in his robbery and murder trial. The intimidation was directly linked to the robbery and murder charges and Defendant was aware Mr. Johnson may testify against him on those charges. *Id.* at 498, 529 S.E.2d at 250. On the second factor, the "commonality of [the] facts[,]" the facts of the crimes are different, but Mr. Johnson testified about the robbery and murder and Defendant had assaulted him because Defendant did not want him to provide this testimony. *Id.* at 499, 529 S.E.2d at 250. As to the third factor, "the lapse of time[,]" about two years had elapsed between the initial charges and the intimidation of a witness charge. *Id.* As to the fourth factor, the "unique circumstances of each case[,]" Defendant's own words linked the intimidation of a witness charge to the robbery and murder charges. Defendant stated he struck Mr. Johnson because he believed him to be his co-defendant in the robbery and murder trial who would testify against him. *See id.* Ultimately, we conclude the charges were transactionally related as the intimidating a witness charge is predicated on Defendant's beliefs about his robbery and murder trial.

We must next consider whether the trial court abused its discretion in consolidating the charges for trial. *Id.* at 498, 529 S.E.2d at 250. Defendant contends that "[t]he witness intimidation charge caused the

jury to presume . . . [his] guilt as to the other offenses and gave Mr. Johnson's testimony significantly more weight." However, the evidence of Defendant's intimidation of Mr. Johnson would have been admissible in the murder and robbery trial even if the charges had been separately tried. *See generally State v. Brockett*, 185 N.C. App. 18, 26, 647 S.E.2d 628, 635 (2007) ("Generally, an attempt by a defendant to intimidate a witness to affect the witness's testimony is relevant and admissible to show the defendant's awareness of his guilt.").

In *State v. Brockett*, the State presented evidence of the defendant's statement to his brother about a witness who may testify against him. *See id.* at 26-27, 647 S.E.2d at 635. The

> Defendant told his brother that some things the witness had written "will almost f*** me. man[,]" and that his brother should "smack" the potential witness. Defendant's brother warned him not to "talk greasy on the phone" because their conversation was likely "tapped up." Finally, Defendant and his brother also discussed other individuals who were "trying to talk against" Defendant.

Id. This Court determined the evidence was admissible because the defendant's "suggestion that his brother should 'smack' a certain witness to deter him from testifying tend[ed] to show [the d]efendant's awareness of his guilt and [was] thus relevant and admissible." *Id.* The Court further determined "the probative value of the statements outweighed any prejudicial effect the profane language included on the tape may have had." *Id.* at 27, 647 S.E.2d at 636. Although the defendant's objections in *Brockett* were based on different legal arguments than here, *see id.* at 26, 647 S.E.2d at 635, the admissibility of evidence of threats to a witness regarding his testimony undercuts Defendant's arguments regarding prejudice or an abuse of discretion. The evidence of Defendant's assault upon Mr. Johnson and his own statement about the reason for this assault would have been admissible in his murder and robbery trial even if the intimidation of a witness charge had been tried separately, thus obviating Defendant's rationale for his argument against joinder of the charges for trial. *See generally Brockett*, 185 N.C. App. at 26, 647 S.E.2d at 635.

2. Motion to Sever

Once the charges were joined for trial, Defendant made a motion to sever the charges and the trial court denied this motion. As to Defendant's motion to sever, North Carolina General Statute Section 15A-927 requires the court to grant a severance motion before trial if "it

is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense;" or "[i]f during trial . . . it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." N.C. Gen. Stat. § 15A-927(b) (2021). "The question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial." *State v. Bracey*, 303 N.C. 112, 117, 277 S.E.2d 390, 394 (1981). "The court must determine whether in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." *Id.* The trial court's ruling on a motion to sever "will be overturned only upon a showing that [it] abused [its] discretion." *Id.* Here, Defendant makes no argument that the case was so complex that the witness intimidation charge made the evidence indistinguishable or that the jury could not intelligently apply the law.

Likewise, Defendant has not demonstrated that severance of the charges would be required for a "fair determination of . . . [his] guilt or innocence of each offense" since evidence of the intimidation would be admissible in a separate trial for the murder and robbery charges, and evidence of the murder and robbery charges would be admissible in a separate trial of the intimidation charges, since Defendant's stated reason for hitting Mr. Johnson was his potential testimony against Defendant on the murder and robbery changes. *See generally Brockett*, 185 N.C. App. at 26, 647 S.E.2d at 635. Thus, for similar reasons as we determined the joinder of charges was not an abuse of discretion, we conclude the trial court did not abuse its discretion in denying Defendant's motions to sever.

C. Hearsay

[3] Finally, Defendant contends the trial court erred in admitting "cell phone records, geo tracking evidence, and Investigator Potter's testimony about the tracking location of [the victim's] cell phone[.]" Specifically, Defendant argues the "State failed to lay any foundation demonstrating the records fell under an applicable hearsay exception."

Defendant admits he didn't object at trial, and thus is subject to plain error review. Under the "plain error rule"

> the defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result. This Court has often noted that the plain error rule is always to be applied

> cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice.

State v. Rourke, 143 N.C. App. 672, 675-76, 548 S.E.2d 188, 190 (2001) (emphasis in original) (citations, quotation marks, and alterations omitted).

Even generously assuming the trial court erred by allowing in the cell phone and geo-tracking evidence, Defendant has not shown plain error. *See id.* Ms. McArthur, a witness familiar with Defendant, heard gunshots and saw her daughter deceased on the ground. Ms. McArthur saw Defendant at the scene of the murder, and placing Defendant at the scene of the murder was the main purpose of the cell phone and geo-tracking data. Further, Mr. Johnson testified he drove Defendant to the victim's house, saw Defendant with a gun, and smoked marijuana from a jar that matched Ms. McArthur's description of a jar missing from her daughter's home. In addition, the shell casings at the victim's home and the residence where Defendant shot the dog matched. We conclude the trial court did not commit plain error in allowing the cell phone and geo-tracking evidence.

III. Conclusion

We conclude there was no error.

NO ERROR.

Judges WOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
MOSE COLEMAN JONES

No. COA23-647

Filed 20 February 2024

1. Constitutional Law—right to counsel—criminal trial—waiver—forfeiture

In defendant's trial for felony fleeing to elude arrest, defendant knowingly and voluntarily waived his right to counsel where, although the record did not contain a signed waiver and certification by the trial court, the transcript showed that while the trial court attempted to conduct the colloquy required by N.C.G.S. § 15A-1242—by asking defendant whether he wanted to waive counsel, addressing the seriousness of the charges and the maximum possible punishment, and informing defendant of the complexity of handling a jury trial and that he would have to comply with any rules of evidence or procedure—defendant refused to answer any questions and instead challenged the trial court's jurisdiction and demanded the trial judge's oath of office. Even assuming the waiver was not voluntary, defendant forfeited his right to counsel by committing serious misconduct, including by using tactics to delay the trial for over two years, being twice found to be in direct criminal contempt, and continuing to frivolously challenge the trial court's jurisdiction.

2. Evidence—expert testimony—defining "sovereign citizen"—no plain error

There was no plain error in defendant's trial for felony fleeing to elude arrest by the admission of expert testimony from a police officer who defined "sovereign citizen" during his testimony. The officer stated that he had received over 1,000 hours of instruction, including training on sovereign citizens, and there was no indication that the admission had a probable impact on the jury's finding that defendant was guilty of the offense.

Appeal by defendant from judgment entered 3 November 2022 by Judge Carla Archie in Davidson County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jodi P. Carpenter for the State.

Phoebe W. Dee for the defendant-appellant.

TYSON, Judge.

Mose Coleman Jones ("Defendant") appeals from judgment entered upon a jury's verdict of guilty of felony fleeing to elude arrest. Our review discerns no error.

I. Background

Thomasville Police Officer Ryan Amos was routinely patrolling in a marked patrol car while wearing his police uniform. Officer Amos observed Defendant driving a motorcycle and turning onto James Avenue. The motorcycle did not display a license plate.

Officer Amos activated his lights and siren and attempted to conduct a traffic stop. Instead of stopping, Defendant motioned with his hand for Officer Amos to pass him. Officer Amos stayed behind Defendant with his lights and siren activated. Defendant crossed the center line and attempted to speak with Officer Amos about going around him. When Defendant slowed to approximately five to ten miles per hour, Officer Amos rolled his window down and told Defendant to pull over. Defendant repeatedly asserted his "right of a traveler" to Officer Amos, and claimed he was not required to display a license plate.

When Defendant stopped at a stop sign, Officer Amos attempted to exit his patrol car and remove Defendant from the motorcycle. Defendant drove off before Officer Amos could stop him. Officer Jonathan Caldwell joined Officer Amos in pursuit. Officers Caldwell and Amos attempted a rolling roadblock, but Defendant went into the opposite lane of travel to avoid the roadblock. Defendant drove his motorcycle through a residential property on Pineywood Road. Officer Caldwell exited his vehicle and tried to restrain Defendant around his head and neck, but Defendant accelerated the motorcycle and sped off, knocking Officer Caldwell to the ground.

Sergeant Rusty Fritz joined the pursuit while Officer Amos attended to Officer Caldwell. Sergeant Fritz observed Defendant make a right hand turn at too great a speed, lose control, and flip the motorcycle. Following a struggle, officers handcuffed Defendant. Defendant was charged with felony fleeing to elude a law enforcement officer, assault on a law enforcement officer causing physical injury, and possession with intent to sell or deliver a schedule VI-controlled substance. The State dismissed the possession with intent to sell or deliver a schedule VI-controlled substance prior to trial.

Defendant was convicted of felony fleeing to elude arrest and was acquitted of assault on a law enforcement officer causing injury. Defendant was sentenced to an active sentence of 5 to 15 months of imprisonment. Defendant appeals.

II. Jurisdiction

Defendant gave his oral notice of appeal during the sentencing hearing prior to the trial court imposing sentence. Appellate entries were filed, and the Appellate Defender was appointed to represent Defendant on appeal.

Rule 4 of the North Carolina Rules of Appellate Procedure provides that notice of appeal from a criminal action may be taken by: "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C. R. App. P. 4(a). Defendant prematurely entered an oral notice of appeal before entry of the final judgment, in violation of Rule 4 of our Rules of Appellate Procedure. *See State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019). Defendant recognizes this error and has filed a petition for writ of *certiorari*. In the exercise of our discretion, we allow Defendant's petition for writ of *certiorari* to reach the merits of his appeal.

III. Issues

Defendant argues the trial court erred by finding he had waived or forfeited his right to counsel and committed plain error by allowing the State to introduce foundationless expert testimony.

IV. Waiver of Counsel

[1] Defendant argues the trial court erred by finding Defendant had waived his right to counsel. This Court previously articulated two means by which a defendant may lose his right to be represented by counsel: (1) a knowing and voluntary waiver after being fully advised under N.C. Gen. Stat. § 15A-1242; and, (2) forfeiture of the right by serious misconduct in *State v. Blakeney*, 245 N.C. App. 452, 459-61, 782 S.E.2d 88, 93-94 (2016), holding:

> First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether

> the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242.
>
> . . . .
>
> The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, in some situations a defendant may lose this right:
>
> > Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A defendant who is abusive toward his attorney may forfeit his right to counsel.

Id. (internal citations, ellipses, alterations, and quotation marks omitted).

This Court in *Blakeney* also describes a third manner, a mixture of waiver and forfeiture, in which a defendant may lose the right to counsel:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver

> by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Id. at 464-65, 782 S.E.2d at 96 (citation, ellipses, and quotation marks omitted).

A. Standard of Review

This Court "reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted); *see State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) ("Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We . . . review this ruling *de novo*.") (citations omitted)).

Whether a defendant was entitled to, waived, or forfeited counsel is also reviewed *de novo*. *State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 341-42 (1982) (citations omitted); *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93.

B. Waiver of Counsel

Both the Constitution of the United States and the North Carolina Constitution expressly recognize criminal defendants have a right to assistance of counsel. U.S. Const. Amend. VI.; N.C. Const. Art I, §§ 19, 23; *see also Powell v. Alabama*, 287 U.S. 45, 66, 77 L. Ed. 158, 169 (1932); *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977) (citations omitted); *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000).

Criminal defendants also have the absolute right to waive counsel, represent themselves, and make trial strategy decisions without the assistance of counsel. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972).

Before a defendant is allowed to waive counsel, a trial court must conduct a statutorily-required colloquy to determine that "constitutional and statutory safeguards are satisfied." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (citation omitted). Courts "must determine whether the defendant knowingly, intelligently and voluntarily waives the right to in-court representation by counsel." *Id.* (citation omitted).

The statutory procedure to waive counsel is codified in N.C. Gen. Stat. § 15A-1242 (2023). Courts may only enter an order to allow defendants to waive their right to counsel after being satisfied the movant: (1) has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled; (2) understands and appreciates the consequences of the decision; and, (3) comprehends the nature of the charges and proceedings and the range of permissible punishments. *Id.* (citation omitted). A "trial court must obtain a written waiver of the right to counsel." *State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992) (citation omitted).

The record does not contain a signed waiver and certification by the superior court judge, which should provide whether a proper inquiry and disclosure was made to Defendant in compliance with N.C. Gen. Stat. § 15A-1242 (2023). This absence in the record does not *per se* invalidate Defendant's waiver. *See State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996) (holding *inter alia* the lack of a written waiver neither alters the conclusion that the waiver was knowing and voluntary, nor invalidates the defendant's waiver of counsel); *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002) (re-affirming the holding in *Heatwole* "that a waiver was not invalid simply because there was no written record of the waiver." (citation and internal quotation marks omitted)).

The transcript shows the trial court attempted to conduct a colloquy with Defendant to determine whether he desired or waived his right to counsel. Defendant refused to answer the questions presented to him and instead attempted to challenge the jurisdiction of the court, sought the oath of office for the presiding judge, and he refused to answer other questions regarding his level of education and age.

The trial court attempted to counsel Defendant on the complexity of handling his own jury trial and warned that she, as the judge, would neither offer legal advice to Defendant nor excuse non-compliance with any rules of evidence or procedure.

The transcript also shows the trial court addressed the seriousness of the charges and apprised him of the maximum possible punishment. Defendant clearly waived his right to further court-appointed counsel. *Blakeney*, 245 N.C. App. at 464-65, 782 S.E.2d at 96. Defendant's argument is overruled.

C. Forfeiture of Counsel

Presuming, without deciding, Defendant did not give a knowing and voluntary waiver of his right to counsel, we examine whether Defendant forfeited his right to counsel.

Our Supreme Court has long held "the right to be defended by chosen counsel is not absolute." *McFadden*, 292 N.C. at 612, 234 S.E.2d at 745 (citation omitted). "[A]n indigent defendant does not have the right to have counsel *of his choice* to represent him." *State v. Anderson*, 350 N.C. 152, 167, 513 S.E.2d 296, 305 (1999) (citing *State v. Thacker*, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980)).

"Forfeiture of counsel is separate from waiver because waiver requires a knowing and intentional relinquishment of a known right[,] whereas forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *State v. Schumann*, 257 N.C. App. 866, 879, 810 S.E.2d 379, 388 (2018) (citation and quotation marks omitted).

This Court has held when a defendant has forfeited their right to counsel, then a "trial court is not required to determine, pursuant to N.C. Gen. Stat. § 15A-1242, that [the] defendant knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*." *State v. Leyshon*, 211 N.C. App. 511, 518, 710 S.E.2d 282, 288 (2011) (citation omitted).

In *Montgomery*, this Court examined the issue of a criminal defendant forfeiting their right to counsel as an issue of first impression. *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 ("Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture."). This Court held, *inter alia*, "a defendant who is abusive toward his attorney may forfeit his right to counsel." *Id.* at 525, 530 S.E.2d at 69 (citing *U.S. v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995)).

This Court further held "[a] forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[ ] to justify a forfeiture of defendant's right to counsel[.]" *Id.* at 524, 530 S.E.2d at 69 (citing LaFave, Israel, & King *Criminal Procedure*, § 11.3(c) at 548 (1999) (quotation marks omitted)). The defendant had been afforded "ample opportunity" to obtain counsel over a period of over a year; had twice fired appointed counsel and had retained a private attorney; had been disruptive in the courtroom, causing the trial to be delayed; had refused to cooperate with his counsel when his counsel was not allowed to withdraw; and, had physically assaulted his counsel. *Id.* at 525, 530 S.E.2d at 69. This Court ultimately held the defendant had forfeited his right to counsel and the trial court did not have to follow the waiver procedures outlined in N.C. Gen. Stat. § 15A-1242. *Id.*

Since the decision in *Montgomery*, this Court has upheld a forfeiture only in "situations involving egregious conduct by a defendant." *See Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. The Supreme Court of North Carolina first examined and recognized a defendant's forfeiture of counsel in *State v. Simpkins*, 373 N.C. 530, 535, 838 S.E.2d 439, 445-46 (2020) ("We have never previously held that a criminal defendant in North Carolina can forfeit the right to counsel."). Our Supreme Court recognized a defendant's forfeiture, holding: "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel." *Id.* at 535, 838 S.E.2d at 446.

While the Supreme Court's opinion in *Simpkins* recognized the ability of a criminal defendant to forfeit the right to counsel by "egregious misconduct," the Court held the defendant's conduct under the facts in that case did not rise to a forfeiture. *Id.* at 539, 838 S.E.2d at 448. The defendant did not employ counsel before appearing at trial and put forth "frivolous legal arguments about jurisdiction throughout the proceedings." *Id.* at 540, 838 S.E.2d at 448. The defendant had different counsels representing him previously during the pre-trial proceedings. *Id.*

The trial court did not conduct a colloquy to determine if the defendant was waiving his right to counsel under N.C. Gen. Stat. § 15A-1242. Our Supreme Court held this was error to fail to determine if the defendant desired to waive his right to counsel using the proper procedure and further held, under the facts in *Simpkins*, this defendant did not forfeit his right to counsel at trial. *Id.* at 540, 838 S.E.2d at 449. The record did not lead our Supreme Court to "conclude that h[is] failure to retain counsel was an attempt to delay the proceedings, and certainly not an attempt so egregious as to justify forfeiture of the right to counsel." *Id.*

In 2022, the Supreme Court of North Carolina further examined the forfeiture of counsel in both *State v. Harvin*, 382 N.C. 566, 879 S.E.2d 147 (2022) and *State v. Atwell*, 383 N.C. 437, 881 S.E.2d 124 (2022).

In *Harvin*, our Supreme Court analyzed over two decades of persuasive and consistent Court of Appeals' precedents and found two circumstances where forfeiture of counsel could occur:

> The first category includes a criminal defendant's display of aggressive, profane, or threatening behavior. *See, e.g.*, *id.* at 536-39 (first citing *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000) (finding forfeiture where a defendant, *inter alia*, disrupted court proceedings with profanity and assaulted his attorney in court); then citing *State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896

> (2015) (finding forfeiture where a defendant "refus[ed] to answer whether he wanted assistance of counsel at three separate pretrial hearings [and] repeatedly and vigorously objected to the trial court's authority to proceed"); then citing *State v. Joiner*, 237 N.C. App. 513, 767 S.E.2d 557 (2014) (finding forfeiture where a defendant, *inter alia*, yelled obscenities in court, threatened the trial judge and a law enforcement officer, and otherwise behaved in a belligerent fashion); then citing *United States v. Leggett*, 162 F.3d 237 (3d Cir. 1998) (finding forfeiture where a defendant physically attacked and tried to seriously injure his counsel); and then citing *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001) (same)). . . .
>
> The second broad type of behavior which can result in a criminal defendant's forfeiture of the constitutional right to counsel is an accused's display of conduct which constitutes a "[s]erious obstruction of the proceedings." *Simpkins*, 373 N.C. at 538. Examples of obstreperous actions which may justify a trial court's determination that a criminal defendant has forfeited the constitutional right to counsel include the alleged offender's refusal to permit a trial court to comply with the mandatory waiver colloquy set forth in N.C.G.S. § 15A-1242, "refus[al] to obtain counsel after multiple opportunities to do so, refus[al] to say whether he or she wishes to proceed with counsel, refus[al] to participate in the proceedings, or [the] continual hir[ing] and fir[ing of] counsel and significantly delay[ing] the proceedings." *Id.* at 538. In *Simpkins*, we further cited the decisions of the Court of Appeals in *Montgomery* and *Brown*, *inter alia*, as additional illustrations of this second mode of misconduct which can result in the forfeiture of counsel.

Id. at 587, 879 S.E.2d at 161.

In *Harvin*, the court had appointed five attorneys to represent Defendant prior to trial. *Id.* at 590, 879 S.E.2d at 163. Two of the defendant's attorneys withdrew due to no fault of the defendant, and two others withdrew as a result of "respective incompatible attorney-client relationships with [the] defendant [and] did so *not* because of [the] defendant's willful tactics of obstruction and delay" but "due to differences related to the *preparation* of [the] [d]efendant's defense" not a "refus[al] to *participate* in preparing a defense." *Id.* (citation omitted).

The defendant in *Harvin*, at a hearing held approximately one month before trial, had indicated his intent to not represent himself at trial. *Id.* at 574, 879 S.E.2d at 154. At a pre-trial hearing held three weeks prior to trial, the defendant's stand-by-counsel stated he was prepared to serve as standby counsel, but counsel was not prepared to assume full representation of the defendant. *Id.* On the morning of trial, the defendant also indicated his intent to not represent himself during a colloquy with the court to comply with N.C. Gen. Stat. § 15A-1242. *Id.* at 575, 879 S.E.2d at 154. The trial court took a recess and attempted to locate any of the prior counsel who could come in to represent him, but none could. *Id.* at 579, 879 S.E.2d at 156.

The Supreme Court of North Carolina held the trial court erred by finding the defendant had forfeited his right to counsel and requiring the defendant to proceed *pro se*. *Id.* at 592, 879 S.E.2d at 164. The Supreme Court further held the defendant's behavior in requesting two of his counsel to be removed, seeking to proceed *pro se*, and then deciding he needed the help of counsel before proceeding at trial, while remaining polite, cooperative, and constructively engaged in the proceedings, was not "the type or level of obstructive and dilatory behavior which [would] allow[ ] the trial court . . . to permissibly conclude that [the] defendant had forfeited the right to counsel." *Id.*

The Supreme Court further examined forfeiture of counsel and applied reasonings from both *Simpkins* and *Harwin* in *State v. Atwell*. During a pretrial hearing, the State had requested the case to proceed, after previously agreeing to a continuance to allow more time for the defendant to hire a private attorney. *Atwell*, 383 N.C. at 448-54, 881 S.E.2d at 132-35. The defendant, appearing *pro se*, told the trial court "she had made payments to a private attorney," but could not afford to continue to make payments and wanted another court-appointed attorney. *Id.* at 440, 881 S.E.2d at 127. The trial court then responded with a history of her firing two prior attorneys, signing four waivers of appointed counsel, and asking why she now wanted another continuance to hire yet another attorney. *Id.*

The trial court, in *Atwell*, did not conduct an N.C. Gen. Stat. § 15A-1242 colloquy and entered an order stating the defendant had forfeited her right to counsel through her delay tactics prior to trial. *Id.* at 454, 881 S.E.2d at 135. The Supreme Court held this was reversible error.

Relying on the analysis of *Harvin*, the Supreme Court of North Carolina held "the record likewise does not permit an inference, much less a legal conclusion, by the trial court or a reviewing court that defendant engage[d] in the type of egregious misconduct that would permit

the trial court to deprive defendant of [her] constitutional right to counsel." *Id.* at 453, 881 S.E.2d at 135 (internal quotation marks omitted). The defendant had not forfeited her right because she had "ongoing, nonfrivolous concerns about her case." *Id.* at 454, 881 S.E.2d at 135. The defendant could not waive her right to counsel without expressing "*the express*[ ] *desire to proceed without counsel*" through the statutory colloquy of N.C. Gen. Stat. § 15A-1242. *Id.*

A defendant may also forfeit their right to counsel by engaging in "serious misconduct." *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. This Court has recognized forfeiture by misconduct when a defendant (1) engages in "flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys"; (2) employs "offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court"; or (3) "refus[es] to acknowledge the trial court's jurisdiction or participate in the judicial process, or insist[s] on nonsensical and nonexistent legal 'rights.' " *Id.* at 461-62, 782 S.E.2d at 94.

This Court recently examined this issue and held a defendant's conduct before trial and during trial to threaten his attorney with harm, intimidating his attorney and the district attorneys prosecuting the case with filing frivolous bar complaints, and dilatory conduct to delay proceedings constituted both a waiver and forfeiture of counsel. *State v. Moore*, 290 N.C. App. 610, 649, 893 S.E.2d 231, 256 (2023).

Here, Defendant engaged in serious delaying tactics to stall the trial for over two years. Defendant was twice found by the court to be in direct criminal contempt. Defendant continued to frivolously challenge the trial court's jurisdiction over him. Defendant's conduct attempted to delay, disrupt, and obstruct the proceedings. In addition to a waiver, Defendant forfeited his right to counsel. *Id.* Defendant's argument is overruled.

V. Expert Testimony

[2] Defendant argues the trial court committed plain error in admitting the testimony of Officer Amos defining a "sovereign citizen" in violation of Rule 702. N.C. Gen. Stat. § 8B-1, Rule 702 (2023). Defendant failed to object at trial.

A. Standard of Review

"Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). In order for a defendant to prove plain error, he must show a fundamental error occurred and establish prejudice. *Id.* at 518, 723 S.E.2d at 334.

Defendant bears the burden of showing that the unpreserved error "rises to the level of plain error." *Id.* at 516, 723 S.E.2d at 333. Defendant must show "the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citations and quotation marks omitted).

B. Analysis

Officer Amos testified he had received over 1,000 hours of instruction including handling alleged sovereign citizens. The State asked Officer Amos to define a sovereign citizen:

> THE STATE: You mentioned sovereign citizen training. What is a sovereign citizen, to your knowledge.
>
> OFFICER AMOS: Brief description is they kind of believe laws don't apply to them. They have an idea that there's another set of laws out there they can abide by.

In the absence of an objection and preservation, Defendant alleges the admission of this testimony constitutes plain error. Presuming error, Defendant has failed to show "the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* Defendant's argument is overruled.

VI. Conclusion

Defendant knowingly and voluntarily waived his right to counsel by his answers and conduct before trial after being repeatedly advised and informed of the consequences of this decision. Defendant's conduct during pre-trial and throughout trial also supports a finding and conclusion he forfeited his right to counsel.

Defendant failed to show the trial court plainly erred in allowing Officer Amos to define "sovereign citizen." Defendant received a fair trial, free from preserved or prejudicial errors. We discern no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges WOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
MITCHELL JOSEPH MARTIN

No. COA23-190

Filed 20 February 2024

1. Assault—motion to dismiss—multiple assault charges—distinct interruption between assaults—sufficiency of evidence

In a prosecution for assault by strangulation inflicting serious bodily injury, assault with a deadly weapon inflicting serious bodily injury, and assault on a female, the trial court properly denied defendant's motion to dismiss, in which he argued that he should have only been charged with one continuous assault instead of three separate ones. The evidence showed that, over a twelve-hour period, defendant assaulted his girlfriend inside their trailer by hitting her in the head with a metal flashlight, punching her under the chin, and strangling her with his hands until she blacked out. All three assaults occurred at different locations inside the trailer and were separated by distinct interruptions of time, with the second assault happening about four hours after the first and the third assault happening about three hours after the second.

2. Assault—with a deadly weapon—serious bodily injury—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious bodily injury, where the State presented sufficient evidence that defendant's girlfriend suffered a serious bodily injury after defendant hit her in the head with a metal flashlight in their living room. Specifically, the evidence showed that the victim began to feel "woozy" and bleed profusely after defendant hit her with the flashlight; the blood from her head soaked through a t-shirt and heavily stained the carpet where she stood; while speaking to law enforcement hours after the assault, the victim was unsteady on her feet and her forehead was swelling; and the symptoms observed by one of the police officers were severe enough for the officer to send the victim to the hospital for treatment.

3. Assault—by strangulation—nature of injuries—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of assault by strangulation inflicting serious bodily injury,

where the State presented sufficient evidence showing that the victim's physical injuries were caused by strangulation. Notably, the victim—defendant's girlfriend—testified that defendant wrapped his hands around her neck, choked her at least twice, and strangled her until she began losing vision and eventually lost consciousness. Further, law enforcement officers at the scene documented injuries consistent with strangulation (such as throat pain, and bruising around the victim's neck and ears), with one officer testifying that the victim was in so much pain that she could barely open her mouth and had trouble swallowing.

4. Kidnapping—first-degree—confinement—for the purpose of facilitating a felony—assaults—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of first-degree kidnapping where substantial evidence showed that defendant confined, restrained, and removed his girlfriend for the purpose of facilitating two felony assaults. Specifically, the evidence showed that defendant confined his girlfriend to their trailer with the back and front doors "screwed shut" and used both physical violence and threats to keep her inside the trailer, where he hit her with a metal flashlight in the living room, moved her to the bathroom stall and struck her with his fist, and then moved her back to the living room and strangled her.

5. Appeal and Error—ineffective assistance of counsel—criminal case—trial record insufficient to permit appellate review

In an appeal from multiple convictions arising from a domestic violence incident, where defense counsel asked the jury during closing argument to find defendant not guilty of the felony assault and kidnapping charges but to find him guilty of related misdemeanor charges because defendant had "admitted" to committing those crimes, the Court of Appeals declined to address defendant's ineffective assistance of counsel claim and dismissed it without prejudice, because the trial record was not sufficiently developed to permit review of the matter on direct appeal.

6. Criminal Law—prosecutor—opening statement—closing argument—not grossly improper

In a prosecution for multiple crimes arising from a domestic violence incident, the trial court did not err by failing to intervene ex mero motu during the State's opening statement and closing argument, during which the prosecutor spoke passionately but neither disparaged defendant personally nor spoke to matters or events unrelated to the trial.

7. Evidence—prior bad acts—prosecution for assault and kidnapping—prior assaults of same victim—intent, motive, manner, and common scheme

In a prosecution for multiple assault charges, first-degree kidnapping, and other crimes arising from a domestic violence incident, during which defendant used physical force and threats to confine his girlfriend to their trailer and then repeatedly assaulted her, the trial court did not err in admitting—under Evidence Rules 403 and 404(b)—evidence of defendant's alleged prior assaults against his girlfriend. The prior assaults showed a pattern of defendant engaging in violent, threatening, and controlling behavior toward his girlfriend whenever she made him feel jealous or angry; thus, evidence of those assaults was admissible as proof of intent and motive. Further, the prior assaults illustrated the manner and common scheme defendant used to confine and abuse his girlfriend, and they negated any inference that defendant acted in self-defense or that his girlfriend somehow caused her own injuries.

Appeal by Defendant from judgments entered 10 June 2022 by Judge Forrest D. Bridges in Rutherford County Superior Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Chris D. Agosto Carreiro, for the State-Appellee.

Blass Law, PLLC, by Danielle Blass, for Defendant-Appellant.

COLLINS, Judge.

Defendant Mitchell Joseph Martin appeals from judgments entered on jury verdicts of guilty of assault by strangulation inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury, assault on a female, first-degree kidnapping, five counts of obstructing justice, and eight violations of a domestic violence protective order, and on Defendant's guilty plea to having attained habitual felon status. Defendant argues that the trial court erred by failing to dismiss certain charges for insufficient evidence, admitting certain evidence, and failing to intervene ex mero motu in the State's opening statement and closing argument. Defendant also argues that he received ineffective assistance of counsel. We dismiss Defendant's ineffective assistance of counsel claim without prejudice and find no merit in his remaining arguments.

I. Background

Defendant and Brandy Humphries started dating in November of 2019. Defendant picked up Brandy from her grandmother's house at around 8:30 p.m. or 9:00 p.m. on 13 January 2021 and took her to the trailer that they were fixing up. Shortly after returning to the trailer and smoking methamphetamine, at around 10 p.m., Defendant began "hearing somebody talking" and accused Brandy of wearing a wire to "get him in trouble" and of hiding someone under the couch.

Defendant tried to rip her hoodie off to see if she was wired. When this was unsuccessful, he used a DeWalt Sawzall to cut it off. Brandy was "scared to death[.]" Defendant had a look in his eye like "a demon" and hit Brandy in the head with a medium-sized metal flashlight. The flashlight "busted [her] head open" and she "started bleeding everywhere . . . ."

Brandy's head began to swell and she "was real woozy feeling" as "it was a lot of blood that was coming out of [her] head." Defendant told her she had "better not be getting any blood on the carpet" and attempted to stop the bleeding from her head using a white t-shirt. Because there was "a lot of blood . . . coming out of [Brandy's] head," the blood soaked "right through" the t-shirt. Defendant began berating Brandy because her blood was on the carpet and the couch. Defendant tried to clean the blood off the carpet with the white t-shirt. When the t-shirt became saturated, Defendant ripped the sleeve from his hoodie and tried to use it to clean the blood.

After trying to clean the blood from the carpet, Defendant turned back to Brandy. He grabbed her and dragged her by the arm into the bathroom. He threw her into the freezing cold shower and sprayed her with water to clean the blood off. This occurred around 2:00 a.m. on 14 January 2021, several hours after he assaulted her with the metal flashlight.

While forcing Brandy to take a shower, Defendant hit her with the showerhead. Defendant dropped his cell phone. He blamed Brandy and punched her underneath her chin, in an upward motion, causing her tooth to cut through her lip.

Defendant pulled Brandy from the shower and forced her to sit naked in the middle of the living room floor. When she moved to try and warm herself with the blanket on the floor, Defendant kicked her and hit her with a metal chain.

Defendant thought she was trying to hide something with the blanket, so he got on top of her, wrapped his hand around her neck, and choked her. When she fought back by kicking him, he kicked her "with

his boots on in the head and in the shoulder" and swung at her with his fists. At some point, Defendant choked Brandy until she passed out.

At around 9:30 a.m. or 10:00 a.m., Brandy's best friend, who was also Defendant's cousin, came to the house. Defendant let her in and left. The friend took Brandy to the courthouse to get a protective order and then to the hospital.

A domestic violence protective order was put in place on 21 January 2021 and was extended for a year to 10 February 2022. While Defendant was in custody and the protective order was in place, Brandy contacted Defendant's sister to get half of Defendant's stimulus check, which amounted to $300. On 10 May 2021, while Brandy was at Defendant's sister's house getting the stimulus money, Defendant called and she spoke on the phone with him; she took the money, decided not to come to court, and apologized to him. They told each other they loved each other. However, she later accused him of violating the protective order based on their 10 May 2021 phone call as well as a letter sent to her on 1 July 2021. Defendant was also accused of violating the order (and in some cases, obstructing justice) by sending letters to other people, including his own mother, expressing fear of being imprisoned for the rest of his life and asking for help.

The jury found Defendant guilty of assault by strangulation inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury, assault on a female, first-degree kidnapping, five counts of obstructing justice, and eight violations of a domestic violence protective order. He subsequently admitted to having attained the status of habitual felon.

He was sentenced to 105 to 138 months' imprisonment for assault by strangulation and assault on a female. He was also sentenced to the following two consecutive sentences: 140 to 180 months' imprisonment for assault with a deadly weapon inflicting serious injury with habitual felon status, and 140 to 180 months' imprisonment for first-degree kidnapping. Lastly, he was sentenced to 105 to 138 months' imprisonment for obstructing justice and violation of a domestic violence protective order with habitual felon status, with all remaining convictions consolidated into that sentence.

Defendant gave oral notice of appeal on 10 June 2022.

II. Discussion

A. Motions to Dismiss

Defendant argues that the trial court erred by failing to dismiss the various charges of which he was found guilty. In his brief, Defendant

presents the evidence not in the light most favorable to the State, as required, but instead in the light most favorable to him. Based on our review of the evidence under the proper standard, we find no merit in his contentions. We will address each charge in turn.

A trial court's denial of a motion to dismiss is reviewed de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Upon a defendant's motion to dismiss, the question for the trial court is whether there is substantial evidence of each essential element of the offense charged and whether defendant was the perpetrator of the charged offense. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted). Where substantial evidence exists, the trial court must deny a motion to dismiss. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982).

1. Assault

[1] The jury found Defendant guilty of three assault charges: assault by strangulation, for use of his hands around Brandy's throat; assault with a deadly weapon inflicting serious injury, for use of a metal flashlight; and assault on a female, for use of his open and closed fists. Defendant argues that all but one of these assault charges should have been dismissed because there was insufficient evidence of a distinct interruption between the assaults.

The common law offense of assault is defined as

> an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Dew, 379 N.C. 64, 70, 864 S.E.2d 268, 273-74 (2021) (quotation marks and citation omitted). "[A]ssault is a broad concept that can include more than one contact with another person." *Id.* at 70, 864 S.E.2d at 274. "[T]he State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred

between assaults." *Id.* at 72, 864 S.E.2d at 275. Examples of a distinct interruption include "an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.*

Here, Defendant abused and terrorized Brandy over a twelve-hour period. During that time, Defendant (1) hit her in the head with a metal flashlight in the living room around 10:00 p.m., (2) punched her under the chin in the bathroom shower stall close to 2:00 a.m., and (3) put his hands on her neck and strangled her until she blacked out in the living room before dawn at approximately 5:30 a.m.

Each of these assaults is separated by distinct interruptions of time and location. The first assault at 10:00 p.m. and the second assault at 2:00 a.m. were separated by approximately four hours. The third assault occurred approximately three hours later, around 5:30 a.m. While all three assaults occurred in the trailer, they were at different and distinct locations: in the living room near the couch, in the bathroom shower stall, and finally pinned down on the living room floor.

This evidence, viewed in the light most favorable to the State, shows a "distinct interruption" between the three assaults. Thus, the trial court did not err by denying Defendant's motion to dismiss.

2. Assault with a deadly weapon inflicting serious injury

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury as there was insufficient evidence of a serious injury being caused by a metal flashlight.

The elements of assault with a deadly weapon inflicting serious injury "are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990); *see also* N.C. Gen. Stat. § 14-32(b) (2021). This Court has defined "serious injury" as an injury which is serious but falls short of causing death. *State v. Carpenter*, 155 N.C. App. 35, 42, 573 S.E.2d 668, 673 (2002). "Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (citation omitted). "Pertinent factors for jury consideration include hospitalization, pain, blood loss, and time lost at work." *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997) (citation omitted).

Here, the evidence, including testimony and photographs taken by law enforcement, showed that when Defendant hit Brandy in the head with the metal flashlight, she began to bleed profusely and to feel "woozy" while standing. The blood from her head soaked through a t-shirt and required additional fabric to clean it from the carpet. When Brandy was speaking with law enforcement officers several hours after she was struck, she had swelling on her forehead and was unsteady on her feet. Furthermore, the symptoms observed by one of the officers were severe enough for the officer to send Brandy to the hospital for treatment.

This evidence, viewed in the light most favorable to the State, was sufficient evidence of a serious injury. Thus, the trial court did not err by denying Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury.

3. Assault by strangulation inflicting serious bodily injury

[3] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of assault by strangulation inflicting serious bodily injury.

"[T]he offense of assault by strangulation requires only that an individual assault another person and inflict physical injury by strangulation." *State v. Brunson*, 187 N.C. App. 472, 478, 653 S.E.2d 552, 556 (2007) (citations omitted); *see also* N.C. Gen. Stat. § 14-32.4(b) (2021).

Here, Brandy testified that Defendant wrapped his hands around her neck and choked her at least twice. She further testified that Defendant strangled her until she began losing her vision and lost consciousness. Law enforcement officers at the scene documented injuries consistent with strangulation, including bruising on Brandy's neck, pain around her throat, and bruising around her ears. Subsequently, a detective observed bruising and marks on Brandy's neck and ears, and the detective testified that Brandy could "barely open her mouth very far because of the significant pain that she was experiencing from" the strangulation. Brandy also told that detective that "she was having trouble swallowing and a tender throat as a result of the strangulation."

This evidence was sufficient to establish physical injury caused by strangulation. *See State v. Little*, 188 N.C. App. 152, 157, 654 S.E.2d 760, 764 (2008) (holding that "cuts and bruises on [the victim's] neck" confirmed by photographic evidence was sufficient evidence to satisfy the physical injury element of assault by strangulation); *State v. Braxton*, 183 N.C. App. 36, 43, 643 S.E.2d 637, 642 (2007) (holding that "evidence that

defendant applied sufficient pressure to [the victim's] throat such that she had difficulty breathing" was sufficient to constitute strangulation).

Accordingly, the trial court did not err by denying Defendant's motion to dismiss the charge of assault by strangulation inflicting serious bodily injury.

4. First-degree kidnapping

[4] Defendant argues that the charge of first-degree kidnapping should have been dismissed because the State failed to offer sufficient evidence that Defendant confined Brandy or that he did so for the purpose of facilitating a felony.

The elements of kidnapping are: (1) confining, restraining, or removing from one place to another; (2) any person sixteen years or older; (3) without such person's consent; (4) if such act was for the purpose of facilitating the commission of a felony. *See* N.C. Gen. Stat. § 14-39(a)(2) (2021). Kidnapping in the first-degree occurs when, among other things, the victim is seriously injured. *See id.* § 14-39(b) (2021). Confining, restraining, or removing someone need not be accomplished through the use of "actual physical force or violence[;] . . . [t]hreats and intimidation are equivalent to the use of actual force or violence." *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 901 (1994) (quotation marks and citations omitted).

In this case, there is substantial evidence that Defendant confined, restrained, and removed Brandy for the purpose of assaulting her with a deadly weapon inflicting serious injury and assaulting her by strangulation inflicting serious bodily injury. During the evening of 13 January 2021 and into the morning of 14 January 2021, Defendant physically confined and restrained Brandy to the trailer. Brandy testified that the back and front doors were both "screwed shut." She was terrified of Defendant based upon the physical abuse and threatening behavior he exhibited throughout the night. Within the closed trailer, Defendant first assaulted her with a metal flashlight inflicting serious injury. He then removed Brandy from the living room to the bathroom shower stall, where he assaulted her with his fist, and then removed her from the bathroom shower stall to the living room floor where he assaulted her by strangulation. Defendant then confined Brandy to sitting naked on the floor. Defendant used actual physical force and violence, as well as threats and intimidation, to restrain and confine Brandy inside the trailer.

Accordingly, the State presented substantial evidence to support the conclusion that Defendant confined, restrained, and removed Brandy

by use of physical violence and threats for the purpose of facilitating a felony. The trial court thus properly denied Defendant's motion to dismiss the charge of first-degree kidnapping.

5. Ineffective assistance of counsel

[5] Defendant contends that he was deprived of his Sixth Amendment right to effective assistance of counsel because, during closing argument, his trial counsel conceded Defendant's guilt. Defendant specifically contends that his defense counsel's remarks amounted to per se ineffective assistance of counsel under *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985) (holding that a defendant receives per se ineffective assistance of counsel when "the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent").

We review de novo whether a defendant was denied effective assistance of counsel. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

> Generally, th[e] Court indulges the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct, giving counsel wide latitude in matters of strategy. To prevail on an ineffective assistance of counsel claim, a defendant must show that trial counsel's conduct fell below an objective standard of reasonableness. This requires a showing that, first, trial counsel's performance was so deficient that he or she was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, and second, this deficient performance prejudiced the defense, such that the errors committed by trial counsel deprived the defendant of a fair trial.

State v. Goss, 361 N.C. 610, 623, 651 S.E.2d 867, 875 (2007) (quotation marks and internal citations omitted). However, under *Harbison*, "a defendant receives ineffective assistance of counsel *per se* when counsel concedes the defendant's guilt to the offense or a lesser included offense without the defendant's consent." *State v. Berry*, 356 N.C. 490, 512, 573 S.E.2d 132, 147 (2002) (citing *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08).

Here, Defendant testified in his defense and admitted to various actions. During closing argument, Defendant's trial counsel stated:

> We ask that you find him not guilty on all the felonies, the first-degree kidnapping, the assault with a deadly weapon

> inflicting serious injury, the assault with a deadly weapon, and assault by strangulations. He's admitted to doing the other stuff.
>
> We ask you to find him guilty on the misdemeanor assault on a female, misdemeanor Domestic Violence Protective Order violation, and misdemeanor obstruction of justice. Thank you.

Because the record is insufficiently developed to consider Defendant's ineffective assistance of counsel claim on this direct appeal, we decline to address this claim and dismiss it without prejudice. *See State v. Al-Bayyinah*, 359 N.C. 741, 753, 616 S.E.2d 500, 509-10 (2005) (dismissing ineffective assistance of counsel claim brought on direct appeal without prejudice to pursue collateral relief where "[t]rial counsel's strategy and the reasons therefor[e] are not readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test"); *see also State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) (dismissing *Harbison* claim brought on direct appeal without prejudice to pursue collateral relief where record was "silent as to whether defendant did or did not consent to his attorney's concession of guilt").

6. Opening statement and closing argument

[6] Defendant argues that the trial court erred by failing to intervene ex mero motu during the State's opening statement and closing argument. Specifically, Defendant argues that intervention was required because the "State was deliberately appealing to the jurors' sense of passion and prejudice, in an improper attempt to lead them away from the evidence towards facts outside the record."

"Counsel are entitled to wide latitude during jury arguments; however, the scope of that latitude is within the discretion of the court." *State v. Trull*, 349 N.C. 428, 452, 509 S.E.2d 178, 194 (1998) (citation omitted). The standard of review is whether the statements made by the prosecution were so grossly improper that the judge is expected to intervene ex mero motu. *Id.* at 451, 509 S.E.2d at 193.

Defendant challenges as "grossly improper" several statements made by the State in both the opening statement and closing argument. We disagree with Defendant's characterization of the challenged statements. While the State argued passionately, it was within the bounds of decorum and propriety. The statements did not disparage Defendant personally nor did they speak to matters or events outside of the trial.

Accordingly, the trial court did not err by not intervening ex mero motu.

7. Admission of 404(b) evidence

[7] Defendant finally argues that the trial court erred by improperly admitting evidence of alleged prior assaults against Brandy under Rules of Evidence 404(b) and 403.

This Court reviews a trial court's decision to admit evidence under Rules 404(b) and 403 by conducting distinct inquiries with different standards of review. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). The trial court's Rule 404(b) determination is reviewed de novo. *Id.* The trial court's Rule 403 determination is reviewed for abuse of discretion. *Id.*

Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* This list "is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995) (citation omitted). Rule 404(b) is "a clear general rule of inclusion . . . ." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Additionally:

> [e]vidence of prior assaults against the victim hold a special place in the context of domestic violence:
>
> > In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of the defendant's feelings. Specifically, evidence of frequent quarrels, separations, reconciliations, and ill-treatment is admissible as bearing on intent, malice, motive, premeditation, and deliberation.

State v. Latham, 157 N.C. App. 480, 484, 579 S.E.2d 443, 447 (2003) (quotation marks, brackets, and citations omitted).

Defendant challenges the admission of Brandy's testimony regarding the following acts:

On 1 July 2020, Defendant accused her of cheating on him while they were at his aunt's home. He beat her up "real bad"; he punched her so hard in the face that he broke her eye socket. He threw her in the shower because she was bleeding from where he had been beating her. She locked herself in the bathroom until his aunt arrived. The incident lasted from about 5:30 p.m. until about 10:00 p.m.

At the end of July 2020, Brandy and Defendant argued with each other in front of his mother, and his mother called the police. The police approached them as they were walking down the side of a road; Brandy lied and told them she was fine. After the police left, Defendant and Brandy resumed arguing. He told her to sit on a log and threatened to cut her arms off with a hatchet he was holding. When she accidentally caused a motion-activated light to illuminate, he hit her because he thought she did it on purpose.

In October 2020, while Defendant was trying to fix his aunt's truck, he accused Brandy of trying to get his cousin's phone number so she could cheat on him. They got in the truck together and drove off, but the truck broke down. He then dragged her through a field by her hair. They drove to a friend's house where he threw a coke bottle at her; the friend made him leave. When Defendant came back the next day, he accused Brandy of cheating with the friend because she was charging her phone in his truck. Defendant threw a phone at her face, hitting her, which caused the side of her face to turn black.

Brandy further testified that just before Christmas in 2020, Defendant beat her up again right after they got back together after having taken a break.

Defendant was charged with assault, which requires a "show of force or menace of violence . . . sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *Dew*, 379 N.C. at 70, 864 S.E.2d at 274 (quotation marks and citation omitted). Defendant was also charged with first-degree kidnapping, which requires "confining, restraining, or removing [a person] from one place to another," N.C. Gen. Stat. § 14-39(a)(2), which can be accomplished through "[t]hreats and intimidation[,]" *Sexton*, 336 N.C. at 361, 444 S.E.2d at 901 (citation omitted). The prior bad acts illustrate that, over the course of roughly seven months, Defendant engaged in a pattern of violent, threatening, and controlling behavior when Brandy made him feel jealous or angry.

Defendant argues that "while intent is an element of each assault, [Defendant] did not argue that he did not intend to assault her[.]" However, it was the State's burden to show intent and the State's

evidence of Defendant's prior bad acts is directly relevant to this element. The prior bad acts also illustrate the manner and common scheme Defendant used to confine and abuse Brandy, and they negate any inference that Defendant acted in self-defense or that Brandy was somehow responsible for her own injuries based on Defendant's testimony that "it was both of us fighting." Because Defendant's conduct was admissible as proof of motive, intent, manner, and common scheme, Brandy's testimony was relevant for a purpose other than showing Defendant's propensity for violence. *See State v. Scott*, 343 N.C. 313, 331, 471 S.E.2d 605, 616 (1996) (holding that testimony regarding prior violent acts towards wife was admissible under Rule 404(b) to prove issues in dispute such as malice, intent, premeditation, and deliberation). Accordingly, the trial court did not err by admitting the evidence under Rule 404(b).

Furthermore, the trial court did not abuse its discretion by admitting the evidence under Rule 403. The record shows that the trial court carefully deliberated and made a well-reasoned decision. The 404(b) evidence was proffered outside of the jury's presence. The judge also asked to hear the evidence of the pending charges first before deciding the admissibility of the prior acts. The trial court gave a detailed explanation of how the 404(b) evidence would be admitted to show that all of the assaults were between Defendant and Brandy, a pattern of escalating behavior, intent, and to rebut Defendant's self-defense claim.

Accordingly, the trial court properly admitted the challenged evidence under Rules 404(b) and 403.

III. Conclusion

The trial court did not err by failing to dismiss certain charges for insufficient evidence, admitting certain 404(b) evidence, and failing to intervene ex mero motu in the State's opening statement and closing argument. We dismiss Defendant's ineffective assistance of counsel claim without prejudice.

NO ERROR IN PART; DISMISSED IN PART.

Judges CARPENTER and WOOD concur.

STATE v. MILLER

[292 N.C. App. 519 (2024)]

STATE OF NORTH CAROLINA
v.
MARK ALAN MILLER, DEFENDANT

No. COA22-689

Filed 20 February 2024

1. Drugs—trafficking in opium by possession—statutory definition of "opium or opiate"—inclusive of opioids—stare decisis

The State presented substantial evidence that defendant committed the offense of trafficking in opium by possession in violation of N.C.G.S. § 90-95(h)(4) where hydrocodone, an opioid, was found during a lawful search of his home. Under principles of stare decisis, where a prior appellate decision interpreted the 2016 version of the statute to include opioids in the definition of "opium or opiate" for purposes of the offense, since the 2017 version of the same statute, under which defendant was charged, kept the same language, the same interpretation applied. The legislature's addition in 2017 of a new, separate definition of "opioids" in N.C.G.S. § 90-87(18a) did not materially alter the meaning of section 90-95(h)(4) where there was no explicit change to the latter statute or to the definition of "opiate."

2. Drugs—trafficking in opium by possession—jury instructions—opioids included in "opium or opiate" definition—accurate statement of law

The trial court did not err by instructing the jury in defendant's trial for trafficking in opium by possession—based on the discovery of hydrocodone, an opioid, during a lawful search of defendant's home—that opioids were included in the definition of "opium or opiate" pursuant to N.C.G.S. § 90-95(h)(4), which was an accurate statement of law according to a prior judicial interpretation of "opium or opiate" under that statute.

3. Sentencing—drug trafficking—consideration of improper factors—rejection of plea offer—additional drug activity—statements not attributed to trial court

After a jury convicted defendant of trafficking in methamphetamine by possession and trafficking in opium by possession and the trial court imposed a sentence of two consecutive terms of imprisonment, defendant failed to rebut the presumption that the sentence was valid. There was no evidence in the record that the trial court considered irrelevant or improper factors during sentencing where, although the State mentioned defendant's failure to accept a plea

offer as well as additional drug activity committed by defendant, the trial court did not specifically comment on those events except to ask a clarifying question about when the alleged drug activity took place.

Judge MURPHY dissenting.

Appeal by Defendant from judgment entered 19 November 2021 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 11 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jodi Privette Carpenter, for the State.

Carolina Law Group, by Kirby H. Smith, III, for Defendant-Appellant.

CARPENTER, Judge.

Mark Alan Miller ("Defendant") appeals from judgment entered after a Henderson County jury convicted him of trafficking in methamphetamine by possession, in violation of subsection 90-95(h)(3b), and trafficking in opium by possession, in violation of subsection 90-95(h)(4). *See* N.C. Gen. Stat. § 90-95(h)(3b), (4). On appeal, Defendant argues the trial court erred by: (1) denying his motion to dismiss the subsection 90-95(h)(4) charge; (2) instructing the jury that opioids were included in the definition of "opium or opiate" at the time of the offense; and (3) considering evidence of improper factors at sentencing. After careful review, we disagree and discern no error.

I. Factual & Procedural Background

On 16 September 2019, a Henderson County grand jury indicted Defendant for, among other crimes, "trafficking opium/heroin" under subsection 90-95(h)(4). On 8 November 2021, the State tried Defendant in Henderson County Superior Court.

Trial evidence relevant to this appeal tended to show the following. On 7 November 2018, the Henderson County Sheriff's Drug Enforcement Unit executed a valid search warrant at Defendant's home, where they found a pill bottle containing thirteen white pills. Miguel Cruz-Quinones, a forensic scientist with the North Carolina State Crime Lab, tested the pills and found that they contained hydrocodone.

At the close of the State's case, Defendant moved to dismiss all the charges, which the trial court denied. Defendant elected not to put on any evidence, but he renewed his motion to dismiss the charges, which the trial court again denied. During its jury instructions, the trial court explained, over Defendant's objection, that opioids were included in the definition of "opium or opiate" under subsection 90-95(h)(4).

On 19 November 2021, the jury found Defendant guilty of "trafficking in methamphetamine by possession," in violation of subsection 90-95(h)(3b), and "trafficking in opium by possession," in violation of subsection 90-95(h)(4). The trial court then conducted a sentencing hearing, where the State mentioned Defendant's rejection of a plea deal and additional drug activity at Defendant's home. The trial court sentenced Defendant to two consecutive sentences of imprisonment, both for between seventy and ninety-three months. Also on 19 November 2021, Defendant gave timely notice of appeal.

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) denying Defendant's motion to dismiss his subsection 90-95(h)(4) charge; (2) instructing the jury that opioids were included in the definition of "opium or opiate" at the time of the offense; and (3) considering evidence of improper factors at sentencing.

IV. Analysis

A. Motion to Dismiss

[1] First, Defendant argues the trial court erred in denying his motion to dismiss the subsection 90-95(h)(4) charge because hydrocodone is an opioid and was not prohibited by subsection 90-95(h)(4) at the time of the offense. We disagree.

We review a denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of

the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In reviewing Defendant's motion to dismiss, we must interpret subsection 90-95(h)(4). *See* N.C. Gen. Stat. § 90-95(h)(4). And when interpreting statutes, we must "take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420, 77 L. Ed. 1004, 1010 (1933). This is because "a law is the best expositor of itself." *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52, 2 L. Ed. 199, 205 (1804).

But our greatest guiding principle is stare decisis. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Stare decisis means once a principle of law has been settled, "it is binding on the courts and should be followed in similar cases." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949). Stare decisis stands for the age-old axiom: "the law must be characterized by stability if men are to resort to it for rules of conduct." *Id.* at 767, 51 S.E.2d at 733. We are bound by previous cases decided by this Court, "unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). And we must adhere to stare decisis—even if the prior decision is not faithful to the text of a statute. *See id.* at 384, 379 S.E.2d at 37.

In *State v. Garrett*, we interpreted the 2016 version of subsection 90-95(h)(4) and determined whether the subsection proscribed the transportation or possession of "opioids." 277 N.C. App. 493, 497, 860 S.E.2d 282, 286 (2021). As we said then, subsection 90-95(h)(4) "made it unlawful to possess or transport 'four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate . . . , including heroin, or any mixture containing such substance.' " *Id.* at 497, 860 S.E.2d at 286 (quoting N.C. Gen. Stat. § 90-95(h)(4) (2016)).

Recognizing the word "opioid" was not included in the text of the subsection, we nonetheless concluded that opioids, like fentanyl, "indeed qualify as an opiate within the meaning of the statute." *Id.* at 497–98, 860 S.E.2d at 286. We reasoned that an opioid is "a highly addictive substance that produces effects that are similar to those of morphine by acting on the opiate cell receptors in the brain." *Id.* at 499–500, 860 S.E.2d at 287. In other words, we held that possession of opioids violates subsection 90-95(h)(4). *See id.* at 500, 860 S.E.2d at 288; N.C. Gen. Stat. § 90-95(h)(4).

The 2017 version of subsection 90-95(h)(4) preserved the same language as the 2016 version: The 2017 version prohibited the possession or transportation of "four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate . . . , including heroin, or any mixture containing such substance." N.C. Gen. Stat. § 90-95(h)(4) (2017) (applying to possession occurring on 8 November 2018, the date of Defendant's alleged possession). Because the 2017 statute is the same statute interpreted by the *Garrett* Court, the 2017 statute includes opioids. *See Garrett*, 277 N.C. App. at 499–500, 860 S.E.2d at 287; *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

Here, the State charged Defendant with violating the 2017 version of subsection 90-95(h)(4), and the State provided expert testimony that Defendant possessed hydrocodone, an opioid. This evidence is substantial because it "is such relevant evidence as a reasonable mind might accept as adequate" to show that Defendant possessed opioids. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Because opioids like hydrocodone "qualify as an opiate within the meaning of the statute," *see Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286, the State presented "substantial evidence (1) of each essential element of the offense charged . . . , and (2) of defendant's being the perpetrator of such offense." *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455; N.C. Gen. Stat. § 90-95(h)(4). Therefore, the trial court did not err in denying Defendant's motion to dismiss concerning subsection 90-95(h)(4).

The Dissent, however, argues that we are not bound by *Garrett* because there, we interpreted the 2016 version of subsection 90-95(h)(4), and here, Defendant was convicted under the 2017 version of subsection 90-95(h)(4). Accordingly, the Dissent states that "additional consideration of legislative intent would be inappropriate."

First, we agree with the Dissent concerning legislative intent, and we do not consider it. *See Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S. Ct. 1562, 1567, 123 L. Ed. 2d 229, 238 (1993) (Scalia, J., concurring) ("We are governed by laws, not by the intentions of legislators.").

But we disagree with the Dissent's position on *Garrett* and stare decisis. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. According to the Dissent, we are not bound by *Garrett* because we have yet to interpret the 2017 version of subsection 90-95(h)(4). Not so. The date of the statute is not dispositive because, as the Dissent notes, the 2016 language of subsection 90-95(h)(4) is identical to the 2017 language of subsection 90-95(h)(4). And when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the

same language in a new statute indicates" that the same interpretation applies. *See Bragdon v. Abbott*, 524 U.S. 624, 645, 118 S. Ct. 2196, 2208, 141 L. Ed. 2d 540, 562 (1998).

Nonetheless, the Dissent would hold contrary to *Garrett* because other statutes "read in concert with N.C.G.S. § 90-95(h)(4), materially alter the meaning of the 2017 statute from the 2016 statute." If this was a case of first impression, we could agree. *See W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100, 111 S. Ct. 1138, 1148, 113 L. Ed. 2d 68, 84 (1991) ("Where a statutory term *presented to us for the first time* is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.") (emphasis added). But this is not a case of first impression. *See Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286.

We could also agree with the Dissent if the General Assembly changed the actual language of subsection 90-95(h)(4), or if the General Assembly changed the definition of opiate to include language like "does not include opioids" or "does not include hydrocodone." The General Assembly did neither. So instead, we follow the lead of Scalia and Garner:

> A clear, authoritative judicial holding on the meaning of a particular provision should not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent provision is adopted in the same statute or even in an affiliated statute. Legislative revision of law clearly established by judicial opinion ought to be by express language or by unavoidably implied contradiction.

Antonin Scalia & Bryan A. Garner, Reading Law 331 (2012).

There is no express revision of subsection 90-95(h)(4). *See* N.C. Gen. Stat. § 90-95(h)(4). And while the *Garrett* Court's interpretation of subsection 90-95(h)(4) is broad, it does not create an unavoidable contradiction with the added definition of opioid. *See* N.C. Gen. Stat. § 90-87(18a) (defining "opioid" in 2017). Under *Garrett*, "opiate" includes opioids, *see Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286, and the only difference between 2016 and 2017 is that the General Assembly defined opioid, *see* N.C. Gen. Stat. § 90-87(18a). But the General Assembly did not change, let alone narrow, the definition of opiate. *See id.* § 90-87(18). Therefore, "opiate" continues to encompass opioids, *see Garrett*, 277 N.C. App. at 499–500, 860 S.E.2d at 287; only now, opioids are statutorily defined, *see* N.C. Gen. Stat. § 90-87(18a).

We echo the Dissent's proposition: "additional consideration of legislative intent would be inappropriate." The Dissent, however, proceeds to consider the legislature's intent. The Dissent argues that by defining "opioid," the General Assembly *intended* for "opiate" to no longer encompass opioids. If we were operating on a clean slate, maybe so. But again, we are not. *See Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286. In our view, if the General Assembly wanted to override the *Garrett* Court's interpretation of subsection 90-95(h)(4), it needed to do so explicitly. *See* Scalia & Garner, *supra*. Otherwise, we are merely grasping for legislative intent—and ignoring binding precedent. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37; *Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286.

If we follow the Dissent's approach, each year is a clean slate for statutory interpretation—even if a statute's language remains the same. *See* N.C. Gen. Stat. § 90-95(h)(4). This would reduce stare decisis to a nullity. We think that until the General Assembly explicitly amends subsection 90-95(h)(4) or the definition of opiate, or until our state Supreme Court overrules *Garrett*, we are bound by *Garrett*. Accordingly, the trial court did not err in denying Defendant's motion to dismiss concerning subsection 90-95(h)(4).

B. Jury Instruction

[2] Defendant next argues the trial court erred when, over Defendant's objection, it instructed the jury that opioids were included in the definition of "opium or opiate" under subsection 90-95(h)(4). We disagree.

This Court reviews the legality of jury instructions de novo. *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). Again, under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. at 647, 576 S.E.2d at 319). And concerning jury instructions, "[i]t is the duty of the trial court to instruct the jury on the law applicable to the substantive features of the case arising on the evidence . . . ." *State v. Robbins*, 309 N.C. 771, 776–77, 309 S.E.2d 188, 191 (1983).

Here, the trial court did not err by instructing the jury that opioids were included in the definition of "opium or opiates" because, as detailed above, this Court has so held. *See Garrett*, 277 N.C. App. at 497, 860 S.E.2d at 286; N.C. Gen. Stat. § 90-95(h)(4). Accordingly, the trial court did not err in its jury instruction because it accurately instructed the

jury on the applicable law. *See Robbins*, 309 N.C. at 776–77, 309 S.E.2d at 191.

C. Sentencing

[3] Lastly, Defendant argues the trial court improperly considered his rejection of the State's plea offer and additional drug activity during sentencing, violating his constitutional rights. Again, we disagree.

" '[A]n error at sentencing is not considered an error for the purpose of N.C. Rule 10 (b)(1) of the North Carolina Rules of Appellate Procedure' and therefore no objection is required to preserve the issue for appellate review." *State v. Jeffrey*, 167 N.C. App 575, 579, 605 S.E.2d 672, 674 (2004) (quoting *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003)). So, we review constitutional sentencing issues de novo, regardless of whether the defendant objected at trial. *See State v. Harris*, 242 N.C. App. 162, 164, 775 S.E.2d 31, 33 (2015). And under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. at 647, 576 S.E.2d at 319).

"A sentence within the statutory limit will be presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). This presumption, however, is not conclusive. *Id.* at 712, 239 S.E.2d at 465. "If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *Id.* at 712, 239 S.E.2d at 465.

In *Boone*, the trial court "indicated that the sentence imposed was in part induced by defendant's exercise of his constitutional right to plead not guilty and demand a trial by jury." *Id.* at 712, 239 S.E.2d at 465. And as a result, the *Boone* Court "remanded for entry of a proper judgment, without consideration of defendant's refusal to plead guilty to a lesser offense." *Id.* at 713, 239 S.E.2d at 465. Similarly, this Court has held that a sentence violates a defendant's rights if the trial court specifically comments on the refusal of a plea deal. *See, e.g.*, *State v. Cannon*, 326 N.C. 37, 39–40, 387 S.E.2d 450, 451 (1990) (reversing the trial court's sentence because "the trial judge stated his intended sentence even before the evidence was presented to the jury on the issue of guilt").

By contrast, if "the record reveals no such express indication of improper motivation," and the trial court instead "merely prefaced its pronouncement of defendant's sentences with the statement, routinely

made at sentencing, that it had, *inter alia*, considered the arguments of counsel," then the sentence imposed will not violate a defendant's rights. *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987).

Here, Defendant failed to overcome the presumption of regularity and validity in the trial court's sentencing. *See Boone*, 293 N.C. at 712, 239 S.E.2d at 465. Although the State mentioned Defendant's failure to accept a plea offer, there is no evidence in the record that the trial court specifically commented on or considered the refusal. Accordingly, there is no evidence that the trial court improperly considered Defendant's rejection of the plea offer, so the trial court's sentencing was valid. *See Johnson*, 320 N.C. at 753, 360 S.E.2d at 681.

Moreover, the record reflects the trial court's comment concerning the additional drug activity during sentencing was only in immediate response to the State, which mentioned the event. The trial court's only comment on the additional drug activity was a clarifying question about the date of the alleged activity.

This exchange does not support Defendant's argument that the trial court considered irrelevant and improper matter in determining the severity of the sentence. *See id.* at 753, 360 S.E.2d at 681. As no evidence suggests that the trial court considered the additional drug activity when it sentenced Defendant, the trial court did not err in sentencing Defendant to two consecutive sentences for his multiple offenses. *See id.* at 753, 360 S.E.2d at 681.

V. Conclusion

We hold that the trial court did not err by denying Defendant's motion to dismiss his charge under subsection 90-95(h)(4), instructing the jury that opioids were included in the definition of "opium or opiate" at the time of the offense, or by considering evidence of improper factors at sentencing.

NO ERROR.

Judge ZACHARY concurs.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

I dissent from the Majority's holding that our interpretation of N.C.G.S. § 90-95(h)(4) (2017) is bound by our earlier interpretation of N.C.G.S. § 90-95(h)(4) (2016) in *State v. Garrett*.

The Majority holds that "the 2017 statute is the same statute interpreted by *Garrett* Court," and, accordingly, "the 2017 statute includes opioids." It is true that both N.C.G.S. § 90-95(h)(4) (2016) and N.C.G.S. § 90-95(h)(4) (2017) read, in pertinent part, as follows:

> Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin. . . ."

N.C.G.S. § 90-95(h)(4) (2017). However, the 2016 and 2017 versions of the statute differ substantially in meaning, as a plain reading of N.C.G.S. § 90-87 (2017), defining terms "[a]s used in this Article[,]" provides different definitions for "opiates" and "opioids," which are not present in N.C.G.S. § 90-87 (2016).

"Where . . . the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219 (1974). Despite the clear application of the "definitions" in N.C.G.S. § 90-87 to the whole Article, and despite the clear change between the 2016 and 2017 statutes' definitions, the Majority characterizes the 2017 statute as nothing more than a "repetition of the same language" used in the 2016 statute.

For the purposes of the 2016 statute, the following definition applied to the term "opiate":

> (18) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under G.S. 90-88, the dextrorotatory isomer of

> 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

N.C.G.S. § 90-87(18) (2016).

However, for the purposes of the 2017 statute, the following definitions applied to the terms "opiate" and "opioid":

> (18) "Opiate" means any substance having an addiction-orming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under G.S. 90-88, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.
>
> (18a) "Opioid" means any synthetic narcotic drug having opiate-like activities but is not derived from opium.

N.C.G.S. § 90-87(18), (18a) (2017).

These definitions, read in concert with N.C.G.S. § 90-95(h)(4), materially alter the meaning of the 2017 statute from the 2016 statute. As we have not yet interpreted how the altered definitions which apply to the 2017 version of the statute may impact the meaning of that statute, *stare decisis* does not apply to our decision in *Garrett*, and we must give effect to the statute's plain meaning. *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 18 (2017) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required."); *see also State v. Camp*, 286 N.C. 148, 152 (1974).

Unlike the 2017 statute, the 2016 statute, which governed the meaning of "opiate" in *Garrett*, did *not* distinguish between the definitions of "opiates" and "opioids." *See* N.C.G.S. §§ 90-87(17)-(19) (2016). In fact, the statute in effect on the date of the commission of the offense in *Garrett* did not mention the word "opioids" at all. *Id.* In the absence of any mention of "opioids" in the statute defining categories of controlled substances, it was unclear whether the term "opiate" in N.C.G.S. § 90-95(h)(4) was intended to be inclusive of "opioids." Consequently, we determined that the statute was ambiguous as to the meaning of "opiate." *Garrett*, 277 N.C. App. at 500 ("Here, the meaning of the term 'opiate' as used in [N.C.G.S.] § 90-95(h)(4) in 2016 was ambiguous, as it

was susceptible to more than one reasonable interpretation."). When interpreting an ambiguous statute, we look not only to the language, but also to the "purpose of the statute and the intent of the legislature in its enactment" to give the statute its appropriate meaning. *Fid. Bank*, 370 N.C. at 18. In *Garrett*, we looked outside of the statutory text to determine the General Assembly's intended meaning of the term "opiate" and ultimately concluded that fentanyl qualified as an opiate, despite being a synthetic opi*oid* within the meaning of N.C.G.S. § 90-95(h)(4) (2016), because the General Assembly intended for the definition of "opiate" to be construed broadly. *Garrett*, 277 N.C. App. at 497-500.

Here, however, two distinct definitions unambiguously separate "opioids" from "opiates," and additional consideration of legislative intent would be inappropriate. According to the plain language of N.C.G.S. § 90-87 and N.C.G.S. § 90-95 in 2017, it is unambiguous that Defendant's alleged conduct did not constitute a violation of the trafficking statute under which he was charged and convicted. Our General Assembly's distinction in N.C.G.S. § 90-87 between these two categories of substances indicates that "opioids" such as the hydrocodone tablets are not synonymous with the "opiates" or "opium" then encompassed by N.C.G.S. § 90-95(h)(4).

When the "plain reading of [a] statute creates a [perceived] loophole" that seems to contradict the legislature's intended purpose, it is not this Court's role to remedy this loophole. *Wake Radiology Diagnostic Imaging LLC v. N.C. Dep't of Health & Human Servs.*, 279 N.C. App. 673, 675 (2021). In *Wake Radiology*, we held such a loophole "is not a concern for this Court. We interpret the law as it [was] written. If that interpretation results in an unintended loophole, it is the legislature's role to address it." *Id.*

The 2016 statute we interpreted in *Garrett* is not identical to the 2017 statute which we are called upon to interpret in this case. Accordingly, the principle of *stare decisis* does not apply, and our holding in *Garrett* does not bind our holding here. It is clear from the plain statutory language in the 2017 statute that "opioids" were to be differentiated from "opiates." Although the State does not raise any argument as to the public policy impact of interpreting N.C.G.S. § 90-95(h)(4) not to encompass Defendant's conduct between 1 December 2017 and 30 November 2018, to the extent that such impact might be present, it is not our role to remedy this loophole.

I would reverse the trial court's denial of Defendant's motion to dismiss the trafficking in opium by possession charge and vacate

Defendant's conviction for this offense based on the State's failure to provide substantial evidence that the acetaminophen-hydrocodone tablets seized from Defendant's house constituted "opium" or "opiates." Accordingly, I would dismiss Defendant's argument regarding the trial court's jury instruction on the trafficking in opium by possession charge as moot. *See State v. Angram*, 270 N.C. App. 82, 88 (2020) ("Because we must reverse the judgment, we need not address [the] defendant's other issue on appeal.").

Finally, Defendant only raises prejudicial concerns regarding the trial court's alleged consideration of improper sentencing factors based on its decision not to consolidate Defendant's trafficking judgments and to run Defendant's sentences consecutively rather than concurrently. Defendant does not claim to have suffered any other prejudice at sentencing. Reversal of Defendant's conviction for trafficking in opium by possession would resolve any alleged prejudice caused by running his sentences consecutively or by declining to consolidate his judgments, as Defendant would remain sentenced on a single conviction. Therefore, I would dismiss this argument as moot. *Cf. State v. Wright*, 342 N.C. 179, 181 (1995) (holding that a defendant sentenced to life imprisonment could not have been prejudiced by any alleged errors for which the only prejudicial impact would be to render capital punishment inappropriate).

I respectfully dissent.

STATE OF NORTH CAROLINA
v.
TIMOTHY LEE SIMPSON, II

No. COA23-562

Filed 20 February 2024

1. Jury—selection—excusal for cause—concerns about law enforcement—trial court's discretion

In defendant's trial for driving while impaired, resisting a public officer, and being intoxicated and disruptive, the trial court did not err by excusing two prospective jurors for cause after each juror reported having strong negative opinions about law enforcement based on personal experiences, where the individuals' responses to voir dire indicated a bias that would affect their ability to render a fair and impartial verdict. Notably, defendant did not object to the dismissals, he had every opportunity to question and challenge the prospective jurors, he did not use all of his available peremptory challenges, and he expressed satisfaction with the empaneled jury to the trial court.

2. Motor Vehicles—driving while impaired—impairment at time of vehicle operation—defendant as driver—circumstantial evidence

The State presented substantial evidence from which a jury could conclude that defendant was the driver of a vehicle that law enforcement discovered wrecked in the middle of a road and that defendant was impaired at the time he drove it, including that defendant was found hiding behind a building about thirty yards away from the vehicle with no other individuals nearby; the wreck appeared to be recent based on "fresh" rut marks in the road and damage to a nearby tree; defendant smelled of alcohol, had red and glassy eyes, slurred his speech, and was unsteady on his feet when officers approached; defendant had a bump and cut on his forehead consistent with a car crash; and the keys to the vehicle were found in defendant's pocket.

3. Sentencing—two misdemeanor charges—sentence exceeded maximum allowable combined

Defendant was entitled to resentencing on two misdemeanor charges of resisting a public officer and being intoxicated and disruptive, for which the trial court's imposed period of confinement—

120 days—exceeded the maximum, combined allowable sentence under law of 80 days.

Appeal by Defendant from judgment entered 1 November 2022 by Judge Andrew Hanford in Alamance County Superior Court. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Jackie Willingham, for Defendant.

WOOD, Judge.

Timothy Simpson ("Defendant") appeals a judgment entered against him for convictions of driving while impaired ("DWI"), resisting a public officer, and being intoxicated and disruptive. After careful review, we hold the trial court committed no error in excusing potential jurors for cause and in denying Defendant's motion to dismiss his DWI charge. However, the trial court miscalculated Defendant's sentence for the resisting a public officer and intoxicated and disruptive offenses. We remand only for re-sentencing on those two charges.

I. Factual and Procedural Background

At 2:30 a.m., on the morning of 18 April 2021, Corporals Strader and Acosta of the Graham Police Department observed Defendant ducking behind a building as they patrolled Main Street. The Officers noticed a wrecked vehicle in the middle of the road, about thirty yards from where Defendant was attempting to hide. The officers approached the vehicle and found the car abandoned with no one inside. The car appeared to have significant damage to the front left quarter panel. After observing a damaged tree in a nearby McDonald's parking lot and noting dirt and fresh gouges in the road, Officers deduced the vehicle had hit the tree and the driver had attempted to drive away after the collision. During their investigation, they observed Defendant quickly walking away from the crash site and noted that there was no one else in the vicinity other than Defendant. Believing Defendant was involved in the collision, Corporal Dunnigan followed Defendant.

Corporal Dunnigan pulled up to Cook Out as Defendant waited in the walk-up line to order. Before approaching Defendant, Corporal Dunnigan determined the registered owner of the crashed vehicle was Kelvin Washington. Corporal Dunnigan approached Defendant and said

the name of the registered owner aloud, to which Defendant replied that was not his name. While speaking with Corporal Dunnigan, Defendant denied driving the wrecked vehicle and shouted profanities at the officer. When other officers approached Defendant, they noticed he smelled of alcohol, he slurred his words, his eyes were red and glassy, and he was unsteady on his feet. Officers also noticed Defendant had a bump and cut on his forehead which they believed to be consistent with the car crash. After Defendant became uncooperative and would not provide information about his movements, the officers placed him under arrest. Defendant resisted being placed in the patrol car and it required several officers to make him comply. At the jail, Defendant refused to exit the patrol car for several minutes and was ultimately found in contempt by the magistrate.

While searching Defendant at the jail, officers located a car key fob in his pocket. Officer Pollock took the key, went back to the damaged vehicle, used the fob to open the vehicle doors, and determined that the key belonged to the wrecked vehicle. At the police station, Defendant refused to submit to a breathalyzer.

On 18 April 2021 Defendant was charged with driving while impaired, resisting a public officer, being intoxicated and disruptive, and hit and run from the scene of an accident. On 2 June 2022, Defendant was found guilty during a District Court bench trial. Defendant entered a notice of appeal to superior court where he requested a jury trial.

On 31 October 2022, jury selection began. The trial court, on its own initiative, excused two jurors for cause during *voir dire*.

In the first *voir dire*, the following exchange occurred:

> [Prosecutor]: Okay. And Ms. Hornbuckle, you raised your hand. What can you tell me about your interactions you've had with law enforcement?
>
> PROSPECTIVE JUROR HORNBUCKLE: Just recently, two weeks ago maybe, we had to call the Sheriff's Department out there because where we live is in -- it's basically nowhere in Snow Camp. The neighbor across the street, he has a lot of mental issues going on. He threw a hammer at the neighbor and was threatening to kill her. So, of course, me and my husband, we run up there to kind of protect her from him. And in turn, this guy threatens to kill all of us, including our families and our small children. Grandkids. So instead of the sheriff arresting this guy,

> even though there's like four witnesses to this incident, they told us that they couldn't do anything about it. They left this man in his trailer. Who also -- we had to call the sheriffs back out there a second time that night because we didn't have video of the incident. So I'm not real partial to the Sheriff's Department.
>
> [Prosecutor]: Okay. Do you feel that -- now, the case here involves the Graham Police Department. Do you feel that your feelings with the Sheriff's Department are going to effect [*sic*] the way you feel about all police?
>
> PROSPECTIVE JUROR HORNBUCKLE: Honesty, sadly, yes, I do. MS. JENNINGS: Can you tell me –
>
> PROSPECTIVE JUROR HORNBUCKLE: Because this man threatened to kill my entire family that night, along with my elderly neighbor who we are all on guard now there where we live. All the time.
>
> THE COURT: Ms. Hornbuckle, with the thanks of the Court, in my discretion I'm going to excuse you from this case and you're free to go.
>
> PROSPECTIVE JUROR HORNBUCKLE: Sorry. That is how I feel.
>
> THE COURT: It's okay. This is exactly the purpose of this process and you have done nothing wrong and thank you for telling us how you feel.

Later, the prosecutor asked potential jurors to consider if they had ever "had a close friend or relative that has been charged with a driving while impaired" and whether they felt the individual "was treated fairly through that process." Prospective Juror Diggs raised his hand to answer the questions and the following *voir dire* took place:

> PROSPECTIVE JUROR DIGGS: Yeah. I had a couple of friends get DUIs. We all played football and we go to the stadium on the weekend and tail gate. So one got a DUI one week. One got a DUI on the next week. Not saying that he was drunk but I wasn't there. I didn't do a test on him. But at the same time, where I live in Alamance County you see it from two different perspectives. All right. You going to one neighborhood every weekend but you're not going to the other neighborhood. So, you know -- and

I've always told my kids when they were growing up and they were in high school, if you driving back in Alamance County, if you outside Alamance County after 11:00 or 12:00, stay where you at. Because nine times out of ten you going to get pulled over. Whether you're doing something right or wrong, stay w[h]ere you at. Call me and let me know. So I got a different perspective on it.

[Prosecutor]: Okay.

PROSPECTIVE JUROR DIGGS: And I see it every weekend where I live at.

[Prosecutor]: So where do you live? You don't have to tell me exact address but what part of the county?

PROSPECTIVE JUROR DIGGS: I live in Burlington.

[Prosecutor]: In Burlington. Okay. And it seems that you have some pretty strong feelings with that.

PROSPECTIVE JUROR DIGGS: I got strong feelings because I work on the job for 18 and a half years. I had perfect attendance for 16 years. I go to work at 3:00 in the morning. My supervisor said, oh, Billy, we don't need you. Come back at 7:00. So I'm coming back through Graham and I get pulled over. I didn't do anything. I just went to work, on the way back home. Got to be back at 7:00. So, you know, I asked the officer, what did I do wrong. I didn't rape, rob, shoot anybody. What is the problem?

[Prosecutor]: If you don't mind my asking how –

PROSPECTIVE JUROR DIGGS: Come to find out, he gonna tell me my license plate light was out. I stopped going to work. That was the extra money for me and my family. I stopped going to work at 3:00 in the morning because I didn't want to be harassed anymore.

[Prosecutor]: So it sounds like you have some strong feelings towards law enforcement?

PROSPECTIVE JUROR DIGGS: Oh, yeah.

[Prosecutor]: So it sounds like, would you find it difficult to be fair and impartial to –

PROSPECTIVE JUROR DIGGS: I got strong feelings because where I live at the law is not applied equally.

> THE COURT: Mr. Diggs, with the thanks of the Court, I appreciate your willingness to share that with us and I'm going to excuse you off this jury. You're free to go.

Defendant's trial counsel did not object to either one of these dismissals during jury selection. Neither Defendant nor the State used all of their peremptory challenges, and both parties were satisfied with the empaneled jury.

Prior to the jury trial, Defendant pleaded guilty to the charges of resisting an officer and being intoxicated and disruptive. Sentencing for those charges was deferred until after the jury trial. At the close of the State's evidence, the trial court dismissed the charge of hit and run for insufficient evidence. On 1 November 2022, the jury found Defendant guilty of driving while impaired. The trial court sentenced Defendant to an aggravated Level I DWI for a term of 36 months' imprisonment and imposed a 120-day active sentence for the resisting an officer and intoxicated and disruptive charges which were to run concurrently with the DWI sentence. Defendant filed a notice of appeal on 9 November 2022.

II. Analysis

Defendant raises three issues on appeal. Each will be addressed in turn.

A. Jury Selection

[1] Defendant first argues the trial court erred by excusing two jurors who "expressed concerns about police activity without cause when potential jurors did not say they could not be fair and impartial, without a challenge for cause by either party, or without giving either party the opportunity to rehabilitate the jurors." Defendant concedes his trial counsel did not object to the trial court's dismissal of the jurors or their answers to the prosecutor's questions concerning law enforcement. Defendant requests this Court to exercise its inherent authority pursuant to N.C. R. App. P. 2. Under Rule 2 this Court can suspend the rules of Appellate Procedure "[t]o prevent manifest injustice to a party, or to expedite decision in the public interests." N.C. R. App. P. 2. Defendant directs our attention to *State v. Campbell* where our Supreme Court invoked Rule 2 to review issues arising during *voir dire*. 280 N.C. App. 83, 87, 866 S.E.2d 325, 328 (2021). We are persuaded by this argument and invoke Rule 2 to review the merits of this issue.

"Under both the Federal Constitution and the North Carolina Constitution, every criminal defendant has the right to be tried by a fair and impartial jury." *State v. Crump*, 376 N.C. 375, 381, 851 S.E.2d 904,

910 (2020); U.S. Const. amend VI; N.C. Const. art. I, § 24. A right to a fair trial protects the rights of an accused person to be "entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951). "The responsibility for enforcing this right necessarily rests upon the trial judge. He should conduct himself with the utmost caution in order that the right of the accused to a fair trial may not be nullified by an act of his." *Id.*

"The trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980) (citation omitted). An abuse of discretion is established upon a showing that the trial court's actions were "manifestly unsupported by reason" and "so arbitrary that [they] could not have been the result of a reasoned decision." *State v. Cummings*, 361 N.C. 438, 490, 648 S.E.2d 788, 794 (2007). "The duty of the appellate court is not to micromanage the jury selection process. Indeed, an appellate court should reverse only in the event that the decision of the trial court is so arbitrary that it is void of reason." *Cummings*, 361 N.C. at 449, 648 S.E.2d at 795. Furthermore, "[d]eterminations of whether a juror would follow the law as instructed are best left to the trial judge, who is actually present during *voir dire* and has an opportunity to question the prospective juror." *Id.* at 450, 648 S.E.2d at 796. On this issue, our United States Supreme Court noted "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown*, 551 U.S. 1, 9, 127 S. Ct. 2218, 2224 (2007) (citations omitted).

A trial court, in exercising its discretion, "may excuse a juror without challenge by any party if he determines that grounds for challenge for cause are present." N.C. Gen. Stat. § 15A-1211(d). As such, a trial court may excuse for cause any prospective juror who the court believes "is unable to render a fair and impartial verdict" regardless of whether one of the parties challenges the juror. S*tate v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 165 (1994); *see also* N.C. Gen. Stat. § 15A-1212(9).

According to Defendant, the trial court erred in dismissing the two jurors during *voir dire* because by their dismissals, the trial court "set a tone of intolerance for jurors to express and hold their own beliefs." Defendant argues while both jurors' answers may have "demonstrated negative feelings about prior interactions with law enforcement," there

was no indication their prior negative experiences with law enforcement would have prevented or substantially impaired the performance of their duties as jurors. Furthermore, Defendant argues the court sheltered the jurors "who had positive, personal relationships with or expressed positive opinions of law enforcement officers" by asking rehabilitating questions and allowing "the district attorney to rehabilitate these jurors, whereas the defense was not allowed to question prospective jurors regarding their ability to set aside any prior negative experiences or opinions of law enforcement." We disagree.

During questioning, prospective jurors Hornbuckle and Diggs both expressed strong emotions against law enforcement based upon their personal experiences with officers. When asked by the prosecutor if prospective juror Hornbuckle's negative interaction with a Sheriff's department would affect her feelings "about all police," Juror Hornbuckle responded "[h]onesty, sadly, yes, I do." Similarly, when Prospective Juror Diggs was asked about prior experiences regarding driving while impaired, he discussed his negative prior experience with local law enforcement and stated he had strong feelings towards law enforcement. When asked by the prosecutor if it would be difficult to be fair and impartial in the case, Prospective Juror Diggs interjected in the middle of her question, "I got strong feelings because where I live at the law is not applied equally." After *voir dire*, the trial court, in its discretion, excused for cause the two individuals because of strong feelings and bias against law enforcement which would affect their ability "to render a fair and impartial verdict." *Carter*, 338 N.C. at 583, 451 S.E.2d at 165.

We also agree with the State that Defendant "fails to show that an unfair jury was empaneled in this case." As it is the right and duty of the court to see that a fair and impartial jury is empaneled, "even the erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case." *State v. Harris*, 283 N.C. 46, 48, 194 S.E.2d 796, 798 (1973) (citation omitted).

Here, Defendant expressed his satisfaction with the empaneled jury to the trial court. Both Defendant and the State were granted every opportunity to *voir dire* the prospective jurors and exercise peremptory challenges. Defendant used four of his six peremptory challenges, while the State used two of its six peremptory challenges. Because Defendant did not use all of his peremptory challenges, "he cannot say he was forced to accept an undesirable juror." *State v. Hood*, 273 N.C. App. 348, 352, 848 S.E.2d 515, 519 (2020). The trial court did not abuse its

discretion in excusing the two prospective jurors for cause. Defendant's argument is overruled.

B. Motion to Dismiss

[2] Next, Defendant argues the trial court erred in denying his motion to dismiss the DWI charge. According to Defendant, there is insufficient evidence to support the DWI conviction because "there is no evidence when the car was operated or that [he] operated the vehicle." We are unpersuaded by Defendant's argument.

The denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Upon a motion to dismiss, the question for the Court is whether "there is substantial evidence (1) of each element of the offense charged, and (2) that defendant is the perpetrator of the offense." *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In ruling on a motion to dismiss, the trial court considers all admitted evidence, whether competent or incompetent, "in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). It is immaterial whether the evidence is direct, circumstantial, or both. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). If substantial evidence exists supporting a finding that the offense charged was committed by the defendant, the case must be left for the jury. *State v. Davis*, 325 N.C. 693, 696–97, 386 S.E.2d 187, 189 (1989).

To be found guilty of DWI, the State must produce proof beyond a reasonable doubt of three elements: (1) that an individual drove a vehicle (2) upon any highway, street or public vehicular area, (3) while under the influence of an impairing substance. *See* N.C. Gen. Stat. § 20-138.1(a)(1). The issue in this matter is whether the State provided substantial evidence that Defendant drove the vehicle in question while under the influence of an impairing substance.

Although there was no eyewitness testimony that Defendant was seen driving the vehicle at 2:30 a.m. on the day in question, there was circumstantial evidence that Defendant was the driver of the vehicle. Officers came upon Defendant hiding behind a building about thirty yards away from the crashed vehicle. No other individuals were located by police near the collision scene. Officers also observed that the vehicle

had been abandoned in the middle of the road and determined that the crash had occurred recently since the damage to the nearby tree and the rut marks in the road were described as "fresh." The State argues "[i]t is certainly reasonable to infer that a vehicle sitting in the middle of the road was recently wrecked as it would impede traffic or law enforcement would have otherwise been informed." We agree.

Additionally, circumstantial evidence indicates Defendant was impaired at the time the vehicle crashed. Suspecting his involvement, officers followed Defendant as he walked away from the wrecked vehicle. Defendant was approached at Cook Out and spoke with several officers who observed that he smelled of alcohol, had red glassy eyes, had slurred speech, was unsteady on his feet, and became combative and belligerent during their exchange. Furthermore, Defendant continued to be disruptive as he was being placed into the patrol vehicle and later was held in contempt by the magistrate due to his belligerent behavior.

Finally, there was evidence that Defendant drove the wrecked vehicle as officers discovered the keys to the car in his pocket when he was searched at the jail. Although Defendant denied driving the vehicle, the keys to the wrecked vehicle were found in his pocket; Defendant was the only person located near the vehicle when officers discovered the wreckage at 2:30 a.m.; officers noted Defendant was trying to avoid being seen; officers observed a fresh cut on his forehead; and officers observed Defendant exhibiting symptoms of intoxication. Considered in the light most favorable to the State, there was substantial evidence to support the trial court's denial of Defendant's motion to dismiss the DWI charge.

C. Sentencing

[3] Defendant argues the trial court erred in sentencing Defendant to 120 days' confinement on the (1) resisting a public officer and (2) intoxicated and disruptive charges when the maximum, combined sentence allowed by law is 80 days. The State concedes the trial court erred and that Defendant should have been sentenced to 80 days for the two misdemeanor charges.

Resisting a public officer is a class 2 misdemeanor and carries a maximum possible sentence of 60 days active. N.C. Gen. Stat. § 15A-1340.23(c). Intoxicated and disruptive behavior is a class 3 misdemeanor with a maximum possible sentence of 20 days active. N.C. Gen. Stat. § 14-444; § 15A-1340.23(c). Together, the maximum combined sentence for both charges is 80 days. Additionally, Defendant's plea transcript acknowledges the maximum sentence for the charges

is 80 days. During sentencing, the trial court miscalculated the maximum sentence and mistakenly sentenced Defendant to 120 days to run concurrently with the 36-month active sentence for the DWI charge. Therefore, we remand to the trial court for resentencing on the two misdemeanor charges.

III. Conclusion

For the foregoing reasons, we hold the trial court did not err in excusing potential jurors for cause and in denying Defendant's motion to dismiss the DWI charge. We remand to the trial court for the sole purpose of resentencing on the two misdemeanor charges.

NO ERROR; REMANDED FOR RESENTENCING.

Judges FLOOD and STADING concur.

JERMOND WILLIAMS, PLAINTIFF
v.
CHARLOTTE-MECKLENBURG SCHOOLS BOARD OF EDUCATION, DEFENDANT

No. COA22-893-2

Filed 20 February 2024

1. Appeal and Error—interlocutory order—substantial right—denial of summary judgment—Tort Claims Act—sovereign immunity

In a Tort Claims Act involving a school bus accident, the Industrial Commission's interlocutory order denying a county board of education's motion for summary judgment based on sovereign immunity was immediately appealable as affecting a substantial right.

2. Immunity—sovereign—waiver—Tort Claims Act—school bus accident—emergency management exception

The Industrial Commission erred by denying a county school board of education's motion for summary judgment on plaintiff's property-damages claim under the Tort Claims Act (TCA) after determining that the board had waived sovereign immunity. Although the TCA waived immunity for school-bus accidents, in the instant case, where a school bus driver was delivering food to students learning remotely during the Covid-19 pandemic when he accidentally crashed his bus into plaintiff's parked car, the driver's use of the bus

fell within the "emergency management" exception created by the Emergency Management Act and, therefore, the board was immune from suit.

Appeal by Defendant from order entered 14 July 2022 by the North Carolina Industrial Commission. Originally heard in the Court of Appeals 11 April 2023. Petition for rehearing granted 18 December 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for Defendant-Appellant.

Jermond Williams, Pro Se Plaintiff-Appellee.

CARPENTER, Judge.

The Charlotte-Mecklenburg Schools Board of Education (the "Board") appealed from the North Carolina Industrial Commission's (the "Commission's") denial of the Board's motion for summary judgment. On appeal, the Board argued that the Commission erred by finding waiver of sovereign immunity and denying the Board's motion for summary judgment. In a published opinion, we affirmed the Commission's denial of summary judgment. After granting the Board's petition for rehearing and upon additional review, we agree with the Board. Accordingly, we reverse the Commission's denial of summary judgment.

I. Factual & Procedural Background

On 10 March 2020, Governor Roy Cooper issued Executive Order 116 and declared a state of emergency because of the Covid-19 pandemic. On 14 March 2020, Governor Cooper issued Executive Order 117, which closed North Carolina schools and ordered "the North Carolina Department of Public Instruction . . . to implement measures to provide for the health, nutrition, safety, educational needs and well-being of children during the school closure period." Governor Cooper then issued Executive Order 169, which extended these provisions through 23 October 2020.

On 22 October 2020, Gerald Rand, a bus driver for the Board, drove a public-school bus for the sole purpose of delivering meals to remote-learning students. That day, Rand's school bus collided with Jermond Williams' ("Plaintiff's") parked car in Charlotte, North Carolina. On 7 January 2021, under North Carolina's Tort Claims Act (the "TCA"), Plaintiff filed a property-damage claim before the Commission against the Board. After discovery, the Board moved for summary judgment

based on sovereign or governmental immunity.[1] Specifically, the Board argued that it maintained immunity because Rand, under the North Carolina Emergency Management Act (the "EMA"), was performing an emergency-management activity during the incident. The Board argued the EMA explicitly maintains immunity for such incidents. In other words, the Board acknowledged that the TCA and the EMA conflict concerning waiver of immunity, but the Board argued that the EMA controls.

A deputy commissioner denied the Board's motion for summary judgment, and the Board timely appealed to the full Commission. On 14 July 2022, the full Commission panel agreed that the EMA conflicts with the TCA concerning waiver of sovereign immunity for school-bus claims. Nevertheless, the full Commission denied the Board's request for a full-panel review because the Board did not meet "its burden of showing that it would be deprived of a substantial right." On 15 August 2022, the Board timely appealed to this Court.

On 17 October 2023, we issued an opinion, *Williams v. Charlotte-Mecklenburg Schools Board of Education*, 291 N.C. App. 126, 129–33, 893 S.E.2d 885, 888–90 (2023), affirming the Commission's denial of summary judgment because a material question of fact remained. On 21 November 2023, the Board filed a petition for rehearing, arguing that we should reconsider our holding. On 18 December 2023, we granted the Board's petition for rehearing.

II. Jurisdiction

[1] As an initial matter, we must consider whether this Court has jurisdiction over an interlocutory order from the Commission. Under section 143-293, we conclude that we do. *See* N.C. Gen. Stat. § 143-293 (2021); *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 44, 881 S.E.2d 558, 568–69 (2022) (acknowledging appellate jurisdiction of an interlocutory appeal from the Commission's denial of a motion to dismiss a TCA claim because the appeal involved a substantial right). As we typically lack jurisdiction to address interlocutory appeals from the Commission, we will detail why we have jurisdiction over this case.

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1. Here, the Board is a county agency. Therefore, the applicable immunity is more precisely labeled "governmental immunity." *See Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016). The distinction, though, is immaterial, as "this claim implicates sovereign immunity because the State is financially responsible for the payment of judgments against local boards of education for claims brought pursuant to the Tort Claims Act . . . ." *See id.* at 611, 781 S.E.2d at 284.

Appeals from the Commission are made "under the same terms and conditions as govern ordinary appeals in civil actions." N.C. Gen. Stat. § 143-293. Therefore, our analysis begins with the premise that, as in ordinary civil appeals, there generally 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). Similarly, this Court lacks jurisdiction over interlocutory appeals from the Commission. *See* N.C. Gen. Stat. § 7A-29 (2021); *Vaughn v. N.C. Dep't of Hum. Res.*, 37 N.C. App. 86, 89, 245 S.E.2d 892, 894 (1978) (citing N.C. Gen. Stat. § 7A-29) ("No appeal lies from an interlocutory order of the Industrial Commission.").

There is an exception to this rule, however, when an interlocutory appeal affects a "substantial right." *Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (stating that North Carolina's appellate courts have jurisdiction over interlocutory appeals that affect a substantial right). A "[d]enial of a summary judgment motion is interlocutory and ordinarily cannot be immediately appealed." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). But "the denial of summary judgment on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right . . . ." *Id.* at 338, 678 S.E.2d at 354.

Here, this case involves a TCA claim, and the Board appeals from the denial of summary judgment based on sovereign immunity. Because "the denial of summary judgment on grounds of sovereign immunity" affects a "substantial right," this Court has jurisdiction. *See id.* at 338, 678 S.E.2d at 354; N.C. Gen. Stat. § 143-293; *Cedarbrook Residential*, 383 N.C. at 44, 881 S.E.2d at 568–69. Thus, despite our general rule against hearing interlocutory appeals, this Court has jurisdiction in this case under section 143-293.

III. Issue

The issue is whether the Commission erred in denying the Board's motion for summary judgment.

IV. Standard of Review

We review summary judgment denials de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

V. Analysis

[2] The Board argues that the Commission erred in finding waiver of sovereign immunity and denying the Board's motion for summary judgment. After careful review, we agree.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). Concerning summary judgment, courts "must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Indeed, "[s]ince this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

Generally, "[u]nder the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citing *Gammons v. N.C. Dep't of Hum. Res.*, 344 N.C. 51, 54, 472 S.E.2d 722, 723 (1996)). "The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a plain, unmistakable mandate of the [General Assembly]." *Orange Cnty. v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972). Further, "statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983); *see also Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 610–11, 781 S.E.2d 282, 283–84 (2016) (holding that, although the TCA applies to school buses, activity buses are "not incorporated into the waiver of immunity contemplated by the [TCA]").

The TCA "provides a limited waiver of immunity and authorizes recovery against the State for negligent acts of its 'officer[s], employee[s], involuntary servant[s] or agent[s].' " *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (quoting N.C. Gen. Stat. § 143-291(a)). Specifically, the State has waived immunity for claims that are the "result of any alleged negligent act or omission of the driver" of a public-school bus. N.C. Gen. Stat. § 143-300.1(a) (2021).

Under the EMA, however, "[n]either the State nor any political subdivision thereof . . . shall be liable for the death of or injury to persons, or for damage to property as a result of any [emergency-management] activity." N.C. Gen. Stat. § 166A-19.60(a) (2021). "Emergency management" includes "[t]hose measures taken by the populace and governments at

federal, State, and local levels to minimize the adverse effects of any type of emergency, which includes the never-ending preparedness cycle of planning, prevention, mitigation, warning, movement, shelter, emergency assistance, and recovery." *Id.* § 166A-19.3(8). School buses may be used for "emergency management" purposes. N.C. Gen. Stat. § 115C-242(6) (2021).

Here, Rand, as a state employee during a state of emergency, drove a public-school bus to deliver food to students during the Covid-19 pandemic. During his delivery route, Rand collided with Plaintiff's parked vehicle, and under the TCA, Plaintiff sued the Board, the owner of the school bus. These are the material facts, and the parties do not dispute them. Therefore, either Plaintiff or the Board is entitled to judgment as a matter of law.[2] *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

School buses may be used for "emergency management" purposes, and delivering meals to remote students during the pandemic was such a purpose because doing so "minimize[d] the adverse effects" of the emergency by providing food to students who might otherwise go hungry. *See* N.C. Gen. Stat. § 166A-19.3(8).

The question now before us is whether the Board is immune to suits stemming from Rand's alleged negligence during the emergency-management activity. We start with the premise that, generally, the Board is immune. *See Meyer*, 347 N.C. at 104, 489 S.E.2d at 884. And we acknowledge that the TCA clearly waived immunity for school-bus accidents. *See* N.C. Gen. Stat. § 143-300.1(a). That clarity, however, faded with the passage of the EMA. *See* N.C. Gen. Stat. § 166A-19.60(a) (conflicting with the TCA by stating that "[n]either the State nor any political subdivision thereof . . . shall be liable for the death of or injury to persons, or for damage to property as a result of any [emergency-management] activity").

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2. In our initial opinion, we affirmed the Commission's denial of summary judgment because a material question of fact remained: whether the "bus" driven by Rand was actually a "school bus." *See Williams*, 291 N.C. App. at 130–33, 893 S.E.2d at 888–89. Upon further review, we conclude that "there is no genuine issue as to" whether Rand's bus was a school bus. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). Any dispute over the label of the bus is immaterial because if the bus was something other than a school bus, like an activity bus, the Commission lacked jurisdiction to hear this case. *See Irving*, 368 N.C. at 610–11, 781 S.E.2d at 283–84. Therefore, either the Commission had jurisdiction, and the Board was immune to suit, *see Heath*, 282 N.C. at 296, 192 S.E.2d at 310; N.C. Gen. Stat. § 166A-19.60(a), or the Commission lacked jurisdiction, *see Irving*, 368 N.C. at 610–11, 781 S.E.2d at 283–84. Either way, summary judgment was appropriate. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

The TCA waived sovereign immunity, *see Heath*, 282 N.C. at 296, 192 S.E.2d at 310, but the EMA created a caveat concerning emergency-management activity, *see* N.C. Gen. Stat. § 166A-19.60(a). In other words, school boards may be sued in tort concerning school-bus accidents, generally, but school boards may not be sued concerning school-bus accidents if the bus is being used for an emergency-management purpose at the time of the accident. *See Heath*, 282 N.C. at 296, 192 S.E.2d at 310; *Guthrie*, 307 N.C. at 537–38, 299 S.E.2d at 627; N.C. Gen. Stat. § 166A-19.60(a). We so hold because waiver of sovereign immunity requires an "unmistakable mandate," and the EMA erases such a mandate in cases like this. *See Heath*, 282 N.C. at 296, 192 S.E.2d at 310; *Guthrie*, 307 N.C. at 537–38, 299 S.E.2d at 627; N.C. Gen. Stat. § 166A-19.60(a).

Therefore, the Commission erred by denying the Board's motion for summary judgment because the Board is immune from suit in this case. *See Heath*, 282 N.C. at 296, 192 S.E.2d at 310; *Guthrie*, 307 N.C. at 537–38, 299 S.E.2d at 627; N.C. Gen. Stat. § 166A-19.60(a).

VI. Conclusion

We hold the Commission erred in denying the Board's motion for summary judgment because the Board is immune from suit from school-bus accidents when the bus is used for emergency-management purposes. *See* N.C. Gen. Stat. § 166A-19.60(a). Accordingly, we reverse.

REVERSED.

Judges ZACHARY and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 FEBRUARY 2024)

C.P. v. PARKER No. 23-170	Mecklenburg (22CVD601209)	Affirmed
DAVIS v. CREWS No. 23-571	Lenoir (17SP195)	Reversed and Remanded
GLINSKY v. KUESTER MGMT. GRP., LLC No. 23-208	Pender (21CVS503)	Dismissed
IN RE I.S. No. 23-519	Beaufort (20JT57) (20JT58) (20JT59)	Affirmed
IN RE N.L.N. No. 23-630	Buncombe (07JT299) (17JT85) (17JT86)	Affirmed
JHANG v. TEMPLETON UNIV. No. 22-869	Gaston (21CVS4269)	Affirmed
MAYMEAD, INC. v. ALEXANDER CNTY. BD. OF EDUC. No. 22-953-2	N.C. Industrial Commission (TA-29127)	Reversed
MILEVIEW LLC v. RSRV. II AT SUGAR MOUNTAIN CONDO. OWNER'S ASS'N No. 23-603	Avery (21CVS256)	Affirmed in Part; Vacated and Remanded in Part.
NELSON v. OAKLEY No. 23-840	Wake (19CVS7484)	Affirmed
PHILLIPS v. PHILLIPS No. 23-504	Durham (19CVD901)	Affirmed
STATE v. BLACKSHEARE No. 23-572	Johnston (20CRS50130-31)	No Error
STATE v. CALDWELL No. 23-126	Johnston (21CRS52611)	No Error
STATE v. CLINTON No. 23-463	Mecklenburg (21CRS209113-14)	NO ERROR IN PART; REMANDED IN PART.

STATE v. DAVIS No. 23-557,	Vance (13CRS52640-43)	Affirmed in Part Reversed in Part, and Remanded
STATE v. HARRIS No. 23-607	Beaufort (16CRS260)	No Error
STATE v. HOLMES No. 23-601	Forsyth (20CRS60488-89)	No Error in Part; Remanded for Resentencing.
STATE v. LIPSCOMB No. 23-407	Mecklenburg (20CRS3904) (20CRS3906)	No Error
STATE v. LOCKETT No. 23-713	Cleveland (21CRS54097)	No Error
STATE v. MARROQUIN No. 23-111	Forsyth (20CRS57269-72) (20CRS57330)	No Error
STATE v. MARTIN No. 23-47	Mecklenburg (18CRS232462) (18CRS232464)	No Error
STATE v. MOORE No. 23-380	Mecklenburg (19CRS229733) (19CRS229735)	No Error.
STATE v. PERRY No. 23-375	Cabarrus (21CRS412) (21CRS51890)	Reversed
STATE v. STEWART No. 23-291	Moore (20CRS51858)	No Error
STATE v. TATE No. 23-11	Randolph (20CRS53445)	No Error
STATE v. WALKER No. 23-585	New Hanover (20CRS55384-87) (22CRS1397)	No Error
TORRES v. KIDD No. 23-209	Wake (19CVD14937)	Affirmed in Part, Vacated in Part, and Remanded

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