292 N.C. App.—No. 5 **Pages 551-672**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 2, 2024

MAILING ADDRESS: The Judicial Department
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THE COURT OF APPEALS

OF

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COURT OF APPEALS

CASES REPORTED

FILED 5 MARCH 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Petition for liquidation—motion for continuance denied—no abuse of discretion—In a liquidation proceeding arising from the insolvency of several insurance companies, the trial court did not abuse its discretion by denying a motion to continue to allow discovery that was filed by a separate entity—which described itself as the sole shareholder or "parent company" of the insolvent companies but, not being a director, was erroneously allowed to intervene in the matter—where the insolvent companies had been making detailed quarterly disclosures since being placed in rehabilitation and where any delay in the parent entity's participation was self-imposed because it waited two weeks after being noticed of the liquidation hearing to file its motion. **Causey v. Southland Nat'l Ins. Corp., 551.**

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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.

CAUSEY v. SOUTHLAND NAT'L INS. CORP.

[292 N.C. App. 551 (2024)]

MIKE CAUSEY, COMMISSIONER OF INSURANCE
OF NORTH CAROLINA, PETITIONER
v.
SOUTHLAND NATIONAL INSURANCE CORPORATION, SOUTHLAND NATIONAL REINSURANCE CORPORATION, BANKERS LIFE INSURANCE COMPANY, COLORADO BANKERS LIFE INSURANCE COMPANY,
NORTH CAROLINA DOMICILED INSURANCE COMPANIES, RESPONDENTS

No. COA23-725

Filed 5 March 2024

1. Insurance—petition for liquidation—non-party motion to intervene—Rules of Civil Procedure not applicable—intervention allowed in error

In liquidation proceedings arising from the insolvency of several insurance companies—in which the petition for liquidation filed by the Commissioner of Insurance was objected to by a separate entity, GBIG Holdings, Inc., which described itself as the sole shareholder or "parent company" of the insolvent companies—the trial court erred by allowing GBIG Holdings, Inc. to intervene in the matter pursuant to Civil Procedure Rule 24(a) and (b). Where the plain language of N.C.G.S. § 58-30-95 provided for a proceeding of a civil nature with its own specialized procedure and evinced the legislature's intent to limit the ability to defend against a liquidation petition to directors only, and where the Rules of Civil Procedure were not specifically engrafted into that statutory provision, Rule 24 did not apply to allow intervention of a non-director.

2. Insurance—petition for liquidation—motion for continuance denied—no abuse of discretion

In a liquidation proceeding arising from the insolvency of several insurance companies, the trial court did not abuse its discretion by denying a motion to continue to allow discovery that was filed by a separate entity—which described itself as the sole shareholder or "parent company" of the insolvent companies but, not being a director, was erroneously allowed to intervene in the matter—where the insolvent companies had been making detailed quarterly disclosures since being placed in rehabilitation and where any delay in the parent entity's participation was self-imposed because it waited two weeks after being noticed of the liquidation hearing to file its motion.

3. Insurance—petition for liquidation—determination of insolvency—sufficiency of evidence

In a liquidation proceeding arising from the insolvency of several insurance companies, the trial court's decision ordering the companies into liquidation was affirmed where ample record evidence supported the court's conclusion that the companies were insolvent under N.C.G.S. § 58-30-10(13) and that liquidation was necessary to protect policyholders. The orders of the trial court were modified to clarify that a separate entity—which described itself as the sole shareholder or "parent company" of the insolvent companies—was erroneously allowed to intervene in the matter to defend against the liquidation petition because it was not a director and therefore was not a proper party to the action.

Appeal by intervenor-appellant from orders entered 30 December 2022 by Judge A. Graham Shirley II in Wake County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Deputy Solicitor General James W. Doggett, Special Deputy Attorney General Daniel S. Johnson, and Special Deputy Attorney General M. Denise Stanford, for petitioner-appellee.

Williams Mullen, by Wes J. Camden, Caitlin M. Poe, and Lauren E. Fussell, for respondents-appellees.

Fox Rothschild LLP, by Matthew Nis Leerberg and Condon Tobin Sladek Thornton Nerenberg PLLC, by Aaron Z. Tobin, for intervenor-appellant.

FLOOD, Judge.

Intervenor-Appellant GBIG Holdings, LLC ("GBIG") appeals from two orders entered 30 December 2022—an order denying GBIG's motion for a continuance to allow discovery and an order of liquidation against Bankers Life Insurance Company ("BLIC") and Colorado Bankers Life Insurance Company ("CBLIC"). Our review of the Record reveals that GBIG should not have been allowed to intervene; nevertheless, the trial court did not err in denying GBIG's motion to continue and ordering BLIC and CBLIC into liquidation. Accordingly, we modify the trial court's orders to clarify GBIG is not a proper party and affirm.

I. Facts and Procedural Background

The case before us is one of many cases stemming from the insolvency of several insurance companies owned by Greg Lindberg ("Lindberg"). Here, we provide only the facts pertinent to this appeal and those relevant facts that have not previously been addressed by this Court in *Southland National Insurance Corporation v. Lindberg*, 289 N.C. App. 378, 889 S.E.2d 512 (2023).

Respondents-Appellees Southland National Insurance Corporation ("Southland"), BLIC, and CBLIC are licensed domestic insurers, owned by GBIG. GBIG is wholly owned by Lindberg. On 18 October 2018, Southland, BLIC, and CBLIC consented to be placed under administrative supervision, following concerns from Petitioner-Appellee Commissioner of Insurance Mike Causey ("Causey"), that the companies would be financially unable to meet outstanding obligations to their policyholders. During the period of administrative supervision, Causey determined that under the current investment structure, Southland, BLIC, and CBLIC lacked the liquidity to pay their policyholders and ultimately placed the companies into rehabilitation.

The Southland Liquidation Hearing

After over two years of supervising Southland, on 21 March 2021, Causey filed a petition for liquidation due to Southland's insolvency. On 14 April 2021, GBIG filed an objection to the petition for liquidation as well as a motion for continuance to allow for discovery, prompting Causey to file a response in which he asserted GBIG lacked standing under N.C. Gen. Stat. § 58-30-95 (2021) to bring an objection to the petition. On 16 April 2021, the petition for liquidation of Southland was heard and the trial court, in granting GBIG's motion to intervene, stated, "I do believe [GBIG] ha[s] the right to contest [the petition]." Following the hearing, an order (the "Southland Order") was entered, in which the trial court found:

> 10. [Causey] contends that GBIG lacks standing to defend against this petition because [he] seeks a liquidation order based solely on 58-30-100—which does not mention any such right to defend. However, the immediately preceding statute, Section 58-30-95, explicitly requires the [c]ourt to "permit the directors of the insurer to take such action as are reasonably necessary to defend against the petition [for liquidation]," at least for petitions arising under that section. The [c]ourt finds it unnecessary to decide whether there is a statutory right to defend against

> a petition arising solely under 58-30-100, because the [c]ourt will exercise its "broad supervisory power" to allow GBIG to contest whether [Southland] is insolvent under the statutory definition of insolvency[.]
>
> 11. [Causey] contends that only "the directors of the insurer," may defend against the petition under Section 58-30-95(a) and therefore, GBIG does not have standing to defend against this petition. GBIG, in contrast, contends that under these circumstances, where [Southland] no longer has active directors, the statutory right of defense vests in GBIG as [Southland's] sole shareholder and owner. [Causey] notes that as Rehabilitator he possesses the statutory power to exercise and enforce all rights, remedies, and powers of the sole shareholder, under Section 58-30-85 (a)(19). Again, the [c]ourt finds it unnecessary to decide whether GBIG may defend against the petition as a matter of statutory right, because the [c]ourt will instead invoke its broad supervisory power to allow GBIG to contest whether [Southland] is insolvent under the statutory definition of insolvency.

Ultimately, as to the Southland liquidation petition, the trial court concluded that GBIG would be allowed to "contest whether [Southland] [was] insolvent under the statutory definition of insolvency" and may conduct limited prehearing discovery, but neglected to rule specifically on whether GBIG had standing to intervene.

On 10 June 2021, Southland, Causey, and GBIG jointly motioned to stay the liquidation proceedings, which the trial court granted, allowing the parties to reschedule for a later date.

A few months later, on 3 November 2021, GBIG filed a motion seeking authority from the trial court to propose a plan of rehabilitation for Southland, BLIC, and CBLIC. In its order denying GBIG's motion, the trial court found:

> Without specifically ruling on the standing issue, this [c]ourt noted that N.C. Gen. Stat. § 58-30-95 permits directors of the insurer to take action to defend against a liquidation petition, and therefore found it unnecessary to determine whether GBIG [ ] had standing to file an objection. Instead this [c]ourt exercised "broad supervisory power" to allow GBIG [ ] to contest whether [Southland]

> is insolvent as defined by statute for the purpose of hearing on that specific determination.

The BLIC and CBLIC Liquidation Hearing

Nearly one year later, on 1 November 2022, Causey filed a verified petition for an order of liquidation against BLIC and CBLIC, asserting that the companies were insolvent within the meaning of Chapter 58 of the North Carolina General Statutes. At the time of filing, BLIC's assets of $253,163,012 did not exceed its liabilities of $345,062,743, and CBLIC's assets of $1,369,052,180 did not exceed its liabilities of $2,508,953,520. Two weeks later, GBIG filed an objection to the petition for liquidation as well as a motion for continuance to allow discovery, asserting that, as the "parent company" of both BLIC and CBLIC, it should be allowed to present evidence showing neither company was insolvent.

On 21 November 2022, a hearing on GBIG's motion for a continuance to allow for discovery came on, during which the trial court engaged in a lengthy colloquy with counsel for GBIG regarding GBIG's participation in the matter. When asked where the directors of BLIC and CBLIC were, counsel for GBIG stated, "[w]ell, Your Honor, the directors were in effect disbanded when they filed liquidation." Unconvinced, the trial court then asked counsel for GBIG to point to a statute that disbands directors of an insurer upon filing of liquidation, which counsel for GBIG could not do. Eventually, counsel for GBIG conceded that, at the time the liquidation petition was filed, both BLIC and CBLIC had directors; therefore, those directors could be in court to defend against the petition.

The trial court continued questioning counsel for GBIG about whether the Rules of Civil Procedure governed this action, asking specifically if "every petition filed in Superior Court [was] governed by the Rules of Civil Procedure," to which counsel for GBIG responded, "I don't know the answer to that question." Answering its own question, the trial court clarified by stating that not all petitions in superior court are governed by the Rules of Civil Procedure. The trial court went on to explain that "the Legislature has recognized that in a liquidation proceeding, [] the directors who owe a fiduciary duty can come in and argue against [the petition]," and again asked, "so why aren't the directors here?" The following exchange then occurred:

> [COUNSEL]: My understanding is that the board, there were some directors that were in place at the time. Then the corporations were placed into rehabilitation. Those directors, I believe some of them, they've done nothing

> essentially since that time and would be surprised to know that they have any obligations at this time.
>
> THE COURT: Well, who are those directors?
>
> [COUNSEL]: I don't know their names right off the top of my head.
>
> THE COURT: You have done absolutely no investigation[.]

After the lengthy back-and-forth, the trial court ultimately concluded from the bench that "when it comes to defending against an order of liquidation, the statute only authorizes directors to do that." The Court further stated that it presumes the Legislature used the word "directors" to mean "directors, not anyone else." Apparently dissatisfied with GBIG's lack of knowledge regarding the whereabouts of BLIC's and CBLIC's directors, the trial court stated "GBIG has made no – apparently no investigation into" where the directors were or who they were. Ultimately, with respect to the BLIC and CLBIC liquidation petitions, the trial court found that "GBIG does not have standing."

Upon holding from the bench that GBIG lacked standing, counsel for GBIG motioned to intervene "both as a matter of right under 24(a) and under permissive intervention under 24(b)." After allowing GBIG's motion, the trial court added, "[y]ou should have made your motion to intervene some time ago."

On 30 December 2022, following the hearing, the trial court entered two orders—one denying GBIG's motion for continuance to allow for discovery (the "Continuance Order") and another, ordering BLIC and CBLIC into liquidation (the "Liquidation Order"). In the Continuance Order, the trial court stated its findings:

> 110. The Court finds the General Assembly's distinction between shareholders and directors is intentional and that the General Assembly conferred no right upon the shareholders of an insurer to defend against a petition for an order of liquidation. The absolute right to defend against a petition to liquidate rest solely with the insurer's board of directors. Unless otherwise ordered by the [c]ourt, the shareholders have no such right to defend against a petition for an order of liquidation and may only defend against such action as the [c]ourt in its discretion allows.
>
> . . . .

> 122. To the extent that there is any ambiguity in the [c]ourt's prior rulings on this issue, for the absence of all doubt, the [c]ourt hereby amends such interlocutory orders pursuant to its inherent authority to conform to this Order holding that GBIG does not have a statutory right to oppose the liquidation of [BLIC and CBLIC].
>
> . . . .
>
> 158. At the hearing, GBIG orally moved to intervene in this matter. In its discretion, the [c]ourt grants GBIG's oral [m]otion to [i]ntervene in this matter. The [c]ourt does not base its ruling on any finding or conclusion that GBIG has carried its burden under Rule 24(a) or (b) of the North Carolina Rules of Civil Procedure assuming that the Rules of Civil Procedure [a]pply. Rather, the [c]ourt allows the intervention in its discretion under Article 30 of Chapter 58 of the North Carolina General Statutes to administer the rehabilitation and liquidation proceedings.

Ultimately, the trial court concluded the Continuance Order by stating that, in its discretion, it would grant GBIG's motion to intervene "as a non-party in this matter for the purposes of informing the [c]ourt through argument and evidence at the hearing on the petition for liquidation." The trial court echoed that statement again in the Liquidation Order, finding: "At the hearing on [the Liquidation Petition] this [c]ourt ruled that GBIG [ ], the sole shareholder of BLIC and CBL[IC] did not have a statutory right to object to or contest the Verified Petition. Nevertheless, the [c]ourt granted GBIG's oral motion to intervene in the action."

GBIG filed timely notice of appeal from both the Continuance Order and Liquidation Order.

II. Jurisdiction

The Continuance Order, while interlocutory, is immediately appealable under N.C. Gen. Stat. § 1-278, which provides this Court may "review any intermediate order involving the merits and necessarily affecting the judgment." N.C. Gen. Stat. § 1-278 (2023). The Liquidation Order constitutes a final judgment in the liquidation proceedings against BLIC and CBLIC and is therefore appealable under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Analysis

On appeal, GBIG argues the trial court erred in denying its motion for a continuance to allow for discovery and ordering BLIC and CBLIC

into liquidation. As a threshold issue, however, we must first consider whether the trial court properly exercised "broad discretionary power" when it allowed GBIG to intervene as a non-party.

A. GBIG's Participation in the BLIC and CBLIC Liquidation Hearing

[1] Causey argues GBIG lacks standing to intervene against the liquidation petition because Chapter 58, Article 30 expressly states that the trial court shall grant "the directors of the insurer to take such action as are reasonably necessary to defend against the petition[.]" On the other hand, GBIG argues it should be allowed to intervene because the trial court had allowed it to intervene in the past, and it has a valuable property interest in both BLIC and CBLIC.

When a trial court's discretionary ruling rests on the interpretation of a statute, constructions of those statutes are reviewed *de novo*. *Myers v. Myers*, 269 N.C. App. 237, 241, 837 S.E.2d 443, 448 (2020). Rule 1 of the North Carolina Rules of Civil Procedure applies "in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1 (2023). Our Supreme Court in *In re Ernst & Young, LLP* held, however, that when "the legislature has prescribed specialized procedures to govern a particular proceeding," the Rules of Civil Procedure "do not apply." 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009). Finally, "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe [it] using its plain meaning." *Burgess v. Your House of Raleigh Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

In *In re Ernst & Young*, our Supreme Court considered facts very similar to the case at bar. Ernst & Young sold several tax shelters to Wal-Mart and then helped Wal-Mart restructure to implement the tax shelters. 363 N.C. at 613, 684 S.E.2d at 152. Pursuant to N.C. Gen. Stat. § 105-258(a)(2), the Secretary of Revenue elected to request Ernst & Young provide testimony and documents relating to Wal-Mart's tax shelters. *Id.* at 613, 684 S.E.2d at 152. Ernst & Young only partially complied, prompting the Secretary to pursue a court order compelling it to comply with the summons. *Id.* at 613, 684 S.E.2d at 152. Wal-Mart then filed both a motion to intervene and a motion to dismiss. *Id.* at 614, 684 S.E.2d at 153. In its motion to intervene, Wal-Mart claimed intervention was "the only way to assert its due process rights under the North Carolina and United States Constitutions." *Id.* at 614–15, 684 S.E.2d at 153. In its motion to dismiss, Wal-Mart claimed the case should be dismissed for failure to comply with the North Carolina Rules of Civil Procedure's

service requirements. *Id.* at 614, 684 S.E.2d at 153. The trial court allowed the motion to intervene but denied the motion to dismiss.

Upon review, our Supreme Court considered, *inter alia*, whether the precise language of N.C. Gen. Stat. § 105-258(a) required the Secretary of Revenue to initiate "a civil action as defined in the General Statutes governing civil procedure." *Id.* at 617, 684 S.E.2d at 154. Ultimately, the Supreme Court held that, because the Secretary of Revenue's initial inquiry under the statute did not explicitly involve filing a civil complaint or initiating a civil action, the statute was a "self-contained, specialized procedure, supplant[ing] the Rules of Civil Procedure." *Id.* at 617, 684 S.E.2d at 155. The Supreme Court further concluded that "although the Court of Appeals erred in holding to the contrary, it correctly affirmed the order of the trial court in denying Wal-Mart's motion to dismiss." *Id.* at 620, 684 S.E.2d at 156. Ultimately, the Supreme Court modified and affirmed the decision of this Court. *Id.* at 620, 684 S.E.2d at 156.

Subsequently, this Court in *In re Simmons* cited to *In re Ernst & Young* to support the conclusion that "[a]lthough our North Carolina Rules of Civil Procedure typically 'apply in all actions and proceedings of a civil nature[,]' the Rules do not apply 'when a differing procedure is prescribed by statute.' " 291 N.C. App. 30, 32, 893 S.E.2d 271, 273 (2023) (alternation in original) (quoting N.C. Gen. Stat. § 1A-1 Rule 1). In *In re Simmons*, this Court considered whether the trial court erred in denying a motion to set aside an order allowing a foreclosure sale. *Id.*, 893 S.E.2d at 272. The grantors argued that the trial court erred in denying their motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. *Id.*, 893 S.E.2d at 272. Ultimately, this Court held that the North Carolina Rules of Civil Procedure do not apply to foreclosure proceedings because the rules were not "specifically engrafted into the [foreclosure] statute." *Id.* at 34–35, 893 S.E.2d at 274.

Following the precedent set in *In re Ernst & Young* and *In re Simmons*, we note that when a statute describes a "proceeding of a civil nature with its own specialized procedure[,]" that statute then "supplants the Rules of Civil Procedure." *In re Ernst & Young*, 363 N.C. at 620, 684 S.E.2d at 156. Further, following this Court's holding in *In re Simmons*, the North Carolina Rules of Civil Procedure apply only when specifically "engrafted" into a statute that describes a proceeding with its own specialized procedure. *See In re Simmons*, 291 N.C. App. at 34–35, 893 S.E.2d at 274.

Here, applying the same tenets of statutory construction, the clear and unambiguous language of N.C. Gen. Stat. § 58-30-95 states that

"[t]he [c]ourt shall permit the directors of the insurer to take such actions as are reasonably necessary to defend against the petition[.]" N.C. Gen. Stat. § 58-30-95. Similar to the optional authority given to the Secretary of Revenue to request documents and testimony in *In re Ernst & Young*, here, the statute does not explicitly require the directors to initiate a civil action or file a complaint. Rather, the statute only confers upon the directors of an insurer the *option* to take necessary actions to defend against a liquidation petition. *See* N.C. Gen. Stat. § 58-30-95. Notably absent from the statute is any directive that directors *shall* file a civil complaint.

For those reasons, we conclude N.C. Gen. Stat. § 58-30-95 is a proceeding of a civil nature with its own specialized procedure, and therefore, it supplants the North Carolina Rules of Civil Procedure. *See In re Ernst & Young*, 363 N.C. at 620, 684 S.E.2d at 156. Having concluded that Section 58-30-95 supplants the Rules of Civil Procedure, it follows that the procedure for defending against a liquidation petition is contained in the express, unambiguous language of the statute, which grants *directors*, and directors alone, the power to take necessary actions to defend against liquidation petitions. To hold otherwise would eviscerate the thrust of our Legislature's intent in enacting N.C. Gen. Stat. § 58-30-95 by allowing any interested parties to participate in liquidation proceedings by asserting standing under N.C. R. Civ. P. 24(a) (allowing a non-party to intervene of right when they have an interest in the property or transaction) or N.C. R. Civ. P. 24(b) (allowing for permissive non-party intervention when the non-party's "claim or defense and the main action have a question of law or fact in common").

Where GBIG is not a director of either BLIC or CBLIC, non-party GBIG did not have standing to intervene, nor should it have been allowed to intervene in the liquidation proceeding simply because the trial court previously exercised its broad discretionary power to allow it to intervene in the Southland liquidation. *See* N.C. Gen. Stat. § 58-30-95.

B. Trial Court's Rulings on the Continuance and Liquidation Orders

Having concluded the trial court erred when it allowed GBIG's motion to intervene, we next consider whether the trial court nevertheless acted properly when entering both the Continuance Order and the Liquidation Order. GBIG argues the denial of its motion for a continuance "prevented it from having a meaningful opportunity to defend against the liquidation petition" and therefore, the trial court erred in denying its motion to continue and entering the liquidation order. We disagree.

1. The Trial Court's Denial of GBIG's Motion to Continue

[2] An order denying a motion for continuance is reviewed for abuse of discretion. *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976). Under an abuse of discretion standard, reversal is appropriate only to correct "gross abuse," such as where a decision "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

A trial court may grant a continuance if the movants have "acted with diligence and in good faith[.]" *May v. City of Durham*, 136 N.C. App. 578, 581, 525 S.E.2d 223, 227 (2000). Accordingly, a movant cannot "use [its own] self-imposed delay to support a request for a continuance." *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 508, 320 S.E.2d 892, 899 (1984).

Here, the trial court correctly determined that GBIG "should have made [its] motion to intervene some time ago," given GBIG waited two weeks after the superior court noticed a hearing to seek a continuance. Further, GBIG's argument that the denial of its motion to continue prevented it from having a meaningful opportunity to defend against liquidation is disingenuous, given both BLIC and CBLIC had been making detailed quarterly disclosures since being placed in rehabilitation.

Considering GBIG waited two weeks after being noticed of the upcoming hearing to file a motion for continuance, it would appear to this Court that GBIG's delay was self-imposed. For that reason, the trial court's decision to deny GBIG's motion can hardly be considered "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

2. The Trial Court's Liquidation Order

[3] Conclusions of law are reviewed *de novo* on appeal. *See State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). Under N.C. Gen. Stat. § 58-30-10(13), an insurer is considered insolvent when it is unable to pay its obligations when they are due or if "its admitted assets do not exceed its liabilities[.]" N.C. Gen. Stat. § 58-30-10(13) (2023).

The Record is replete with evidence to support the trial court's conclusion that both BLIC and CBLIC were insolvent and "in such condition as to render the continuance of its business hazardous, financially, or

otherwise, to its policyholders[.]" At the time of filing the liquidation petition, BLIC's assets of $253,163,012 did not exceed its liabilities of $345,062,743, and CBLIC's assets of $1,369,052,180 did not exceed its liabilities of $2,508,953,520, rendering them both insolvent under N.C. Gen. Stat. § 58-30-10(13). In ordering both BLIC and CBLIC into liquidation, the trial court focused on Article 30's purpose—to protect the interests of thousands of policyholders in the State of North Carolina. *See* N.C. Gen. Stat. § 58-30-1(c) (2023).

For the aforementioned reasons, we affirm both the Continuance Order and the Liquidation Order and modify each order to clarify that GBIG should not have been allowed to intervene pursuant to N.C. Gen. Stat. § 58-30-95 or through the exercise of the trial court's broad discretionary power. *See In re Ernst & Young, LLP*, 363 N.C. at 620, 684 S.E.2d at 156 (concluding that, despite this Court's incorrect conclusion that the Rules of Civil Procedure superseded a statutory requirement, nevertheless the order should be modified, yet affirmed).

IV. Conclusion

In conclusion, we hold that as a shareholder, GBIG should not have been allowed to intervene and defend against the liquidation petition, as only a company's directors are permitted to intervene to defend under N.C. Gen. Stat. § 58-30-95. Where the trial court allowed GBIG to participate, we modify both the Continuance Order and the Liquidation Order to clarify that GBIG is not a proper party to the action and affirm.

MODIFIED AND AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

EMILY HAPPEL, INDIVIDUALLY, TANNER SMITH, A MINOR, AND EMILY HAPPEL ON BEHALF OF TANNER SMITH AS HIS MOTHER, PLAINTIFFS
v.
GUILFORD COUNTY BOARD OF EDUCATION AND OLD NORTH STATE MEDICAL SOCIETY, INC., DEFENDANTS

No. COA23-487

Filed 5 March 2024

Immunity—statutory—public health emergency legislation—broad scope of immunity—administration of COVID-19 vaccine without parental consent

In an action filed by a fourteen-year-old student and his mother (plaintiffs), where the student visited a clinic run by a private medical society inside a high school to get tested for COVID-19 but instead received a COVID-19 vaccine without parental consent, the trial court properly dismissed plaintiffs' complaint against the medical society and the local school board (defendants) because defendants were each shielded from suit as "covered persons" under the federal Public Readiness and Emergency Preparedness Act for harms caused by the administration of any "covered countermeasure" (such as the COVID-19 vaccine) used to address a public health emergency. Further, because the Act's immunity provision applied broadly to "all claims for loss," with "loss" being defined as "any type of loss," defendants were immune from liability for plaintiffs' claims alleging battery and multiple state constitutional violations. Finally, none of plaintiffs' claims fell under the sole exception to immunity under the Act for federal causes of action for death or serious physical injury.

Appeal by Plaintiffs from an order entered 1 March 2023 by Judge Lora C. Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 28 November 2023.

Walker Kiger, PLLC, by David Steven Walker, for Plaintiffs-Appellants.

Tharrington Smith, LLP, by Stephen G. Rawson, for Guilford County Board of Education, Defendants-Appellees.

Rossabi Law Partners, by Gavin J. Reardon and Amiel J. Rossabi, for Old North State Medical Society, Inc., Defendants-Appellees.

WOOD, Judge.

Tanner Smith ("Tanner") and his mother, Emily Happel ("Emily") (collectively, the "Plaintiffs") appeal the trial court's dismissal of their claims against the Guilford County Board of Education (the "Board") and Old North State Medical Society, Inc. ("ONS Medical Society") (collectively, the "Defendants") based on, among other things, statutory immunity under the federal Public Readiness and Emergency Preparedness Act ("PREP Act"). After careful review of the relevant statutes and case law, we affirm the trial court's order.

I. Factual and Procedural History

On 14 August 2021, Tanner was fourteen years old and a football player at Western Guilford High School, a school within the Guilford County Schools system. By letter dated 19 August 2021, Guilford County Schools informed Emily and Brett Happel ("Brett"), Tanner's stepfather, that Tanner may have been affected by a "recent COVID-19 cluster" involving football team members at his school, and that the Guilford County Public Health Department recommended and requested COVID-19 testing for individuals potentially infected, regardless of vaccination status. The letter stated that unless parents allowed their children to be tested, Guilford County Schools would not allow players "to return to practice until cleared by a public health professional." The letter further stated that COVID-19 testing would be available on 20 August 2021 at no cost at Northwest Guilford High School. The letter indicated ONS Medical Society would conduct the testing and "consent for testing is required."

On 20 August 2021, Brett drove Tanner to the testing site at Northwest Guilford High School. Brett remained inside his vehicle while Tanner went into the testing facility, which was also a COVID-19 vaccination site. Inside, clinic workers gave Tanner a form to fill out, which he believed to be something related to the COVID-19 test. Tanner was seated in the facility while a clinic worker tried unsuccessfully to call Emily to obtain consent to administer a COVID-19 vaccine to him. The workers did not attempt to contact Brett. After failing to make contact with Tanner's mother, one of the workers instructed the other worker to "give it to him anyway." Tanner stated he did not want a vaccine and was only expecting a test, but one of the workers administered a Pfizer COVID-19 vaccine to him.

Plaintiffs initiated this lawsuit on 19 August 2022, alleging three causes of action: (1) battery; (2) violations of Emily's constitutional liberty and parental rights and of Tanner's bodily autonomy rights under

N.C. Const. art. I, §§ 1, 13, and 19; and (3) violations of both of Plaintiffs' federal constitutional rights.[1] On 21 November 2022, the Board filed its answer, a motion to dismiss pursuant to Rules 12(b)(1) and (6), and a cross-claim against ONS Medical Society. On 30 December 2022, ONS Medical Society filed its answer and a motion to dismiss pursuant to Rules 12(b)(1) and (6).

The trial court held a hearing on 30 January 2023 and filed its written order on 1 March 2023 dismissing Plaintiffs' complaint as to both Defendants. On 9 March 2023, Plaintiffs filed timely written notice of appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2022).

II. Analysis

Plaintiffs argue the trial court erred in determining that the PREP Act, which is codified at 42 U.S.C. § 247d-6d (addressing liability immunity) is applicable to this case and provides immunity to both Defendants. Due to the sweeping breadth of the federal liability immunity provision in the PREP Act, we are constrained to disagree.

We review "a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of governmental or legislative immunity . . . de novo." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 209, 876 S.E.2d 453, 460 (2022).

Our state law requires that "a health care provider shall obtain written consent from a parent or legal guardian prior to administering any vaccine that has been granted emergency use authorization and is not yet fully approved by the United States Food and Drug Administration to an individual under 18 years of age." N.C. Gen. Stat. § 90-21.5(a1) (2021).

Enacted 30 December 2005, the PREP Act provides that when the Secretary of Health and Human Services (the "Secretary") "makes a determination that a disease or other health condition or other threat to health constitutes a public health emergency, or that there is a credible risk that the disease, condition, or threat may in the future constitute such an emergency," the Secretary may make a "declaration" recommending "the manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures." 42 U.S.C. § 247d-6d(b)(1). Additionally, the Secretary may declare that the provisions of subsection (a) apply "to the activities so recommended." Id. Subsection (a), in turn, provides liability immunity:

1. Plaintiffs abandon their federal constitutional claims on appeal.

> Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to *all claims for loss* caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

42 U.S.C. § 247d-6d(a)(1) (emphasis added).

As for the scope of liability immunity, the PREP Act defines loss in the following manner:

> For purposes of this section, the term "loss" means *any type of loss*, including—
>
> (i) death;
>
> (ii) physical, mental, or emotional injury, illness, disability, or condition;
>
> (iii) fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; and
>
> (iv) loss of or damage to property, including business interruption loss.

42 U.S.C. § 247d-6d(a)(2)(A) (emphasis added). The PREP Act defines the scope of such immunity as follows:

> The immunity . . . applies to *any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure*, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, *administration*, licensing, or use of such countermeasure.

42 U.S.C. § 247d-6d(a)(2)(B) (emphasis added). "[T]he sole exception to the immunity from suit and liability of covered persons set forth in subsection (a) shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct." 42 U.S.C. § 247d-6d(d)(1).

Additionally, we must consider two more definitions under 42 U.S.C. § 247d-6d. The PREP Act defines *covered person*, "when used with respect to the administration or use of a covered countermeasure," as the following:

> (A) the United States; or
>
> (B) a person or entity that is—
>
> (i) a manufacturer of such countermeasure;
>
> (ii) a distributor of such countermeasure;
>
> (iii) a program planner of such countermeasure;
>
> (iv) a qualified person who prescribed, administered, or dispensed such countermeasure; or
>
> (v) an official, agent, or employee of a person or entity described in clause (i), (ii), (iii), or (iv).

42 U.S.C. § 247d-6d(i)(2). A covered countermeasure includes a drug, biological product, or device that is authorized for emergency use. 42 U.S.C. § 247d-6d(i)(1).

Finally, the PREP Act contains a broad provision preempting state law, which states:

> During the effective period of a declaration under subsection (b) of this section, or at any time with respect to conduct undertaken in accordance with such declaration, no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that—
>
> (A) is different from, or is in conflict with, any requirement applicable under this section; and
>
> (B) relates to the design, development, clinical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter.

42 U.S.C. § 247d-6d(b)(8).

On 17 March 2020, in response to COVID-19, the Secretary issued a declaration pursuant to 42 U.S.C. § 247d-6d(b)(1) recommending the use of covered countermeasures, defined as "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to

treat, diagnose, cure, prevent, or mitigate COVID-19." Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198-01, 15,202. The declaration provides guidance on who is a covered person under the PREP Act:

> The PREP Act's liability immunity applies to "Covered Persons" with respect to administration or use of a Covered Countermeasure. The term "Covered Persons" has a specific meaning and is defined in the PREP Act to include manufacturers, distributors, program planners, and qualified persons, and their officials, agents, and employees, and the United States. The PREP Act further defines the terms "manufacturer," "distributor," "program planner," and "qualified person" as described below.
>
> . . .
>
> A program planner means a *state or local government*, including an Indian tribe; a person employed by the state or local government; or other person who supervises or administers a program with respect to the administration, dispensing, distribution, provision, or use of a Covered Countermeasure, including a person who establishes requirements, provides policy guidance, or supplies technical or scientific advice or assistance or *provides a facility to administer or use a Covered Countermeasure* in accordance with the Secretary's Declaration. Under this definition, a *private sector employer or community group* or other "person" can be a program planner when it carries out the described activities.

Id. at 15,199. (Emphasis added.)

Here, the trial court took "judicial notice of the fact that the required declaration by the U.S. Department of Health and Human Services was in place for the Pfizer COVID-19 vaccine at the time of the vaccination at issue in this case." Plaintiffs do not dispute that the Pfizer COVID-19 vaccine was a covered countermeasure.

As for whether Defendants are covered persons under the PREP Act, we hold ONS Medical Society is a covered person as a program planner that administered a vaccine clinic, and individually administered vaccines to individuals, within the meaning of 42 U.S.C. § 247d-6d(i)(2)(B)(iii). The declaration clearly provides that a program planner may be a private

sector employer or community group when it carries out the "described activities" including administration of a covered countermeasure. ONS Medical Society is a community group that did just that. Regarding the Board, Plaintiffs argue "[i]t is unclear under what theory the Board was a covered person under the trial court's reasoning." According to Plaintiff, the "only acceptable theory is that it is because of the Board's involvement in the partnership with ONS [Medical Society] in operating and providing the locations for the vaccine clinics." The Board contends Plaintiffs' argument essentially accepts the trial court's determination that the Board is a covered person, and therefore, it did "not respond further on this point." This Court, however, must determine whether the Board meets the criteria of "a covered person" as defined under the PREP Act. We are convinced by the Secretary's interpretation in the declaration that a covered person under the PREP Act includes a "state or local government . . . [that] provides a facility to administer or use a Covered Countermeasure." Declaration, 85 Fed. Reg. at 15,199. We hold this language includes the Board, which provided a facility—Northwest Guilford High School—for the administration of the COVID-19 vaccines.

Finally, we must determine whether the scope of immunity covers the potential liability at issue in this case. We hold that it does because, as the trial court noted, the immunity provided by the Act is extremely broad. The PREP Act provides immunity "with respect to *all claims for loss* caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure" if a declaration has been issued. 42 U.S.C. § 247d-6d(a)(1) (emphasis added). *Loss* "means any type of loss." 42 U.S.C. § 247d-6d(a)(2)(A). Specifically, the scope of immunity applies to "any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the . . . administration . . . of such countermeasure." 42 U.S.C. § 247d-6d(a)(2)(B). Wisely or not, the plain language of the PREP Act includes claims of battery and violations of state constitutional rights within the scope of its immunity, and it therefore shields Defendants from liability for Plaintiffs' claims.

Plaintiffs argue that the PREP Act does not cover their claims because they do not arise *because* of COVID-19, but merely *happen* to relate to COVID-19. We would be inclined to agree if the PREP Act did not define the scope of immunity so broadly. Because there does not appear to be any Fourth Circuit or North Carolina federal district cases on point, ONS Medical Society draws our attention to three out-of-state cases.

First, in *Parker v. St. Lawrence Cnty. Pub. Health Dep't*, a pre-COVID-19 case, the defendant health department held a vaccination clinic due to the outbreak of the H1N1 influenza virus, and a nurse employed by the health department administered a vaccination to a child without obtaining an executed parental consent form from the plaintiff parent. 102 A.D.3d 140, 141, 954 N.Y.S.2d 259, 260–61 (2012). The plaintiff-parent alleged both negligence and battery. The court in *Parker* held, "[c]onsidering . . . the sweeping language of the statute's immunity provision, . . . Congress intended to preempt all state law tort claims arising from the administration of covered countermeasures . . . including one based upon a defendant's failure to obtain consent." *Id.* at 143–44, 954 N.Y.S.2d at 262. Therefore, the court dismissed the plaintiff's complaint. *Id.* at 144–45, 954 N.Y.S.2d at 263.

Second, in *Cowen v. Walgreen Co.*, the plaintiff alleged that she visited a Walgreens store for a flu vaccination but that a Walgreens employee administered a COVID-19 vaccination to the plaintiff without her knowledge. No. 22-CV-157-TCK-JFJ, 2022 WL 17640208, at *2 (N.D. Okla. Dec. 13, 2022) (N.D. Okla. Dec. 13, 2022). As here, the plaintiff in *Cowen* argued "that her claims should be construed . . . broadly because her injury could have happened whether she received a COVID-19 vaccine or any other vaccine." *Id.* The court in *Cowen* noted that "[i]n the PREP Act, Congress plainly provided immunity under both federal and state law with respect 'to *all* claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure.' " *Id.* at *3. (Quoting 42 U.S.C. § 247d-6d(a)(1)) (emphasis in original). The court in *Cowen* held, "While it is true that other vaccinations or procedures might have also been administered, this does not change the fact that Plaintiff's injuries actually resulted from administration of the COVID-19 vaccine. The PREP Act therefore applies." *Id.*

Finally, in *M.T. v. Walmart Stores, Inc.*, the plaintiff mother sued defendant Walmart after one of its pharmacists administered a COVID-19 vaccine to her minor child without her consent. 63 Kan. App. 2d 401, 402, 528 P.3d 1067, 1070 (2023). The court in *M.T.* noted that the scope of immunity under the PREP Act "is broad and applies to 'any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure.' " *Id.* at 406, 528 P.3d at 1073. (Quoting 42 U.S.C. § 247d-6d(a)(2)(B)). The court held that the PREP Act applied to the plaintiff mother's lawsuit, stating:

> The text of the [PREP] Act is unambiguous: The [PREP] Act applies to all claims causally related to the administration

> by a covered person of a covered countermeasure. The question presented by this interlocutory appeal is thus whether a claim based on the administration of a covered countermeasure without parental consent is causally related to the administration of a covered countermeasure. Reframed this way, the answer is yes.

Id. at 426–27, 528 P.3d at 1084.

We conclude that these cases are instructive persuasive authorities supporting our holding that the broad scope of immunity provided by the PREP Act applies to both Defendants in this case. Although Plaintiffs' claims could arise no matter what type of vaccine Tanner was given without parental consent, the PREP Act provides immunity to Defendants because it shields them from "any claim for loss that has a causal relationship with the administration" of the COVID-19 vaccine. 42 U.S.C. § 247d-6d(a)(2)(B).

We note our General Assembly amended N.C. Gen. Stat. § 90-21.5 in 2021 to add subsection (a1), which requires parental consent before a vaccine granted emergency use authorization may be administered to a minor. Its intent is to prevent the egregious conduct alleged in the case before us, and to safeguard the constitutional rights at issue—Emily's parental right to the care and control of her child, and Tanner's right to individual liberty. *See* N.C. Const. art. I, §§ 1, 19; *Petersen v. Rogers*, 337 N.C. 397, 400–01, 445 S.E.2d 901, 903 (1994). Notwithstanding, the statute remains explicitly subject to "any other provision of law to the contrary" under the broad provision preempting state law in the PREP Act. 42 U.S.C. § 247d-6d(b)(8). The PREP Act provides only one exception for a "Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct." 42 U.S.C. § 247d-6d(d)(1). Because Plaintiffs have not made any such allegations in their complaint, we are constrained to conclude the PREP Act preempts the protections provided pursuant to N.C. Gen. Stat. § 90-21.5(a1).

III. Conclusion

"We are not to question the wisdom or policy of the statute under consideration, but should enforce it as it is written, unless we conclude that there is an unmistakable conflict with the organic law." *Faison v. Bd. of Comm'rs of Duplin Cnty.*, 171 N.C. 411, 415, 88 S.E. 761, 763 (1916). Bound by the broad scope of immunity provided by the PREP Act, we are constrained to hold it shields Defendants, under the facts of this case, from Plaintiffs' claims relating to the administration of the

COVID-19 vaccine. Accordingly, we affirm the trial court's dismissal of Plaintiffs' claims.

AFFIRMED.

Judges COLLINS and CARPENTER concur.

IN THE MATTER OF R.G.

Nos. COA23-625 and COA23-790

Filed 5 March 2024

1. Appeal and Error—initial permanency planning order—reunification efforts ceased in prior order—no basis to appeal current order

A mother's appeal from an initial permanency planning order setting permanent plans for her minor child was dismissed on the basis that she had no right to appeal the order under N.C.G.S. § 7B-1001(a)(5) because that order did not eliminate reunification as a permanent plan; instead, she had a right to appeal from the prior adjudication and disposition order, in which the trial court relieved the department of social services of reunification efforts (after finding aggravating factors under section 7B-901(c)), but she did not do so. Based on recent statutory amendments by the legislature, an initial permanency planning order is no longer presupposed to require reunification.

2. Child Abuse, Dependency, and Neglect—jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—modification of out-of-state custody order—statutory requirements met

The trial court's permanency planning order awarding guardianship of a minor child to the child's maternal grandmother was affirmed where the trial court had subject matter jurisdiction pursuant to the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA). The trial court's initial exercise of temporary emergency jurisdiction was proper where the matter involved allegations of child sexual abuse. Further, after the trial court learned that a prior custody determination had been made in New York, the court properly followed statutory procedures by holding a UCCJEA

conference with the New York judge, during which the New York judge agreed that North Carolina had jurisdiction over the proceeding. The letter from the New York judge had sufficient indicia of veracity and officiality to serve as a trustworthy proxy for a court order to relinquish jurisdiction over the matter.

Consolidated appeals by respondent-mother from orders entered 30 December 2022 and 25 May 2023 by Judges Adam Phillips and Rosalyn Hood in District Court, Cumberland County. Heard in the Court of Appeals 15 February 2024.

Dawn M. Oxendine for petitioner-appellee Cumberland County Department of Social Services.

Matthew D. Wunsche for guardian ad litem.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for respondent-appellant mother.

No brief for respondent-appellee father.

ARROWOOD, Judge.

Respondent-mother ("Mother") appeals from two permanency planning orders which (1) set a primary permanent plan of guardianship with concurrent secondary plans of custody with a relative and reunification with respondent-father ("Father") for her minor child, R.G. ("Riley"),[1] and (2) awarded guardianship of Riley to her maternal grandmother. Mother asserts identical arguments in both appeals that "[t]he trial court lacked [subject matter] jurisdiction to enter anything other than emergency custody orders . . . [because] it violated the UCCJEA." For the reasons below, Mother's first appeal is dismissed and the court's orders that are the subject of Mother's second appeal are affirmed.

I. Background

Mother is Riley's biological aunt, and in November 2018 Mother and Father adopted Riley. Mother and Riley have resided in North Carolina since Riley was adopted, but at some point between Riley's adoption in November 2018 and May 2019 Father relocated to New York. After

1. The juvenile is referred to by a stipulated pseudonym to protect her identity and for ease of reading.

Father relocated to New York a custody dispute arose, and on or about 3 September 2019 the Herkimer County, New York Family Court entered an "Order of Custody and Visitation" ("New York Order") that, *inter alia*,[2] granted Mother and Father joint legal custody and Mother primary physical custody of Riley.

On 22 December 2021, the Cumberland County Department of Social Services ("DSS") took nonsecure custody of Riley and filed a juvenile petition ("Petition") alleging Riley was an abused and neglected juvenile, based on allegations that Riley was sexually abused by a man ("Caretaker")[3] living with Mother. The Petition alleged Riley "consistently disclosed" abuse by Caretaker, and that as a result Caretaker was charged with several felony sex offenses. The Petition further alleged that Caretaker had previously abused another minor child. However, after Mother was made aware of Caretaker's abuse of Riley and the other minor child, Mother made no attempt to protect Riley and continued to cohabitate with Caretaker.

Between January and March 2022, the trial court entered five orders continuing nonsecure custody with DSS. These orders found that DSS placed Riley with her maternal grandmother, Riley was doing well in this placement, that the Petition alleged abuse that necessitated Riley's removal from Mother's home, and that the allegations in the Petition justified DSS retaining nonsecure custody in order to protect Riley.

On 26 April 2022, Mother filed two petitions to register and enforce the New York Order under North Carolina's codification of the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). Mother's petition to enforce the New York Order asserted (1) New York was Riley's home state pursuant to the UCCJEA; (2) the New York Order had not been vacated, stayed, or modified by any court; and (3) the New York Order had been confirmed by the Herkimer County Family Court. Mother requested the court dismiss the Petition because DSS willfully omitted the New York Order from the Petition and took no action to validate the New York Order before filing the Petition; therefore, the Petition was "not properly validated[.]"

On 28 April 2022, based on a 23 March 2022 hearing, the trial court entered another order on nonsecure custody and a pre-adjudication

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2. The New York proceeding also addressed custody of Mother and Father's other children, who were not the subject of this juvenile case.

3. The Petition does not clearly identify the relationship between Mother and this man, other than they lived together in Mother's home. This man is referred to by the same pseudonym used by the trial court.

conference that makes similar findings to the other orders on nonsecure custody. This order does not refer to Mother's petitions to enforce the New York Order.

On 4 May 2022, the trial court stayed Mother's petitions to enforce the New York Order because the court was exercising its exclusive juvenile jurisdiction under Chapter 7B of the General Statutes.

On 18 May 2022, based on a 20 April 2022 hearing, the trial court entered another order on continued nonsecure custody finding Mother had "notified the Court that she contests the Court's subject matter jurisdiction." "The Court informed Respondent Mother that even if jurisdiction was an issue it would be exercising emergency jurisdiction until jurisdiction could be resolved at the appropriate hearing and that, as this was a hearing on the need for continued nonsecure custody, no arguments would be heard[.]"

On 27 May 2022, the trial court filed a letter from the trial court to a Herkimer County, New York judge, Judge Luke, requesting a UCCJEA conference. The letter notified Judge Luke that DSS had filed the Petition and that the trial court was exercising temporary emergency jurisdiction.

On 10 June 2022, based on a 17 May 2022 hearing, the trial court entered an order finding that "[DSS] is exercising emergency jurisdiction until jurisdiction could be resolved at the Judicial Settlement Conference on May 26, 2022." The court then made findings consistent with prior orders, and continued the juvenile case.

On 13 June 2022, the court filed a return letter from Herkimer County Family Court Judge Luke. The letter indicated a UCCJEA conference was held 9 June 2022, and that Judge Luke and the trial court agreed that North Carolina had jurisdiction over the juvenile proceeding. Judge Luke reviewed the court file for the New York custody case and determined (1) that Mother and Riley lived in North Carolina when the New York Order was entered; (2) there were no other New York proceedings as to the New York custody case; and (3) there were "no known connections between the allegations [in the Petition] and New York . . . that would confer jurisdiction to New York." The trial court thereafter entered four more orders on continued nonsecure custody, which found, *inter alia*, that "the subject matter jurisdiction issue was resolved[,]" as confirmed by Judge Luke's letter to the trial court.

On 1 November 2022, the trial court entered an adjudication and initial disposition order ("ADO"). The court found Mother had attempted

to enforce the New York Order, but that per Judge Luke's letter "New York no longer has grounds for continuing exclusive jurisdiction and otherwise declined to exercise jurisdiction." The trial court found all parties were aware of Judge Luke's letter, "and none of the parties presented evidence or arguments to contest jurisdiction when given the opportunity to do so at today's preliminary hearing, nor have they raised the issue at any prior hearing since the communication." The court also found there were no pending proceedings in New York concerning Riley, "North Carolina is a more convenient forum and New York ha[d] declined to exercise jurisdiction, [and] therefore th[e] court ha[d] authority to modify the" New York Order. The trial court then adjudicated Riley abused and neglected for the reasons stated in the Petition, *i.e.*, that Caretaker sexually abused Riley and Mother took no action to protect Riley after becoming aware of the abuse.

The trial court then made dispositional findings that Riley was still living with her maternal grandmother and was doing well in that placement. The trial court also recounted Caretaker's abuse of Riley and Mother's failure to protect Riley, and found Mother had taken no action toward relieving any conditions which led to Riley's removal from the home. Based on these findings, the trial court concluded that "[p]er N.C. Gen. Stat. § 7B-901(c)(1), . . . aggravated circumstances exist because Respondent Mother . . . has allowed the continuation of sexual abuse upon the juvenile and has committed other acts that increased the enormity and added to the injurious consequences of the abuse or neglect." "Pursuant to N.C. Gen. Stat. § 7B-901(c)," the trial court ceased reunification efforts between Mother and Riley.

On 30 December 2022, the trial court entered an initial permanency planning order setting permanent plans for Riley ("Initial PPO"). The court found *inter alia*, that DSS was relieved of reunification efforts with Mother in the ADO due to aggravated circumstances and decreed that "[r]eunification with Respondent Mother remains eliminated from the permanent plans." The court set a primary permanent plan of guardianship with concurrent secondary permanent plans of custody with a relative and reunification with Father. Mother appealed from the Initial PPO.

On 25 May 2023, the trial court entered another permanency planning order which granted guardianship of Riley to Riley's grandmother ("Guardianship PPO"). Mother also appealed from the Guardianship PPO.

On 1 September 2023, Mother filed a Motion to Consolidate Appeals, which this Court allowed on 5 September 2023. On 29 September 2023,

the guardian *ad litem* ("GAL") filed a "Motion to Dismiss Respondent Mother's Interlocutory Appeal" ("Motion to Dismiss"), (capitalization altered), asserting Mother has no right to appeal the Initial PPO. On 10 October 2023, Mother filed a Response to the Motion to Dismiss and a petition for writ of certiorari.

II. Mother's First Appeal (COA23-625)

[1] Mother first appealed from the Initial PPO pursuant to N.C.G.S. § 7B-1001(a)(5), which grants a parent a right to appeal "[a]n order under G.S. 7B-906.2(b) eliminating reunification . . . as a permanent plan" for a juvenile. N.C.G.S. § 7B-1001(a)(5) (2021). The GAL argues that Mother has no right to appeal the Initial PPO "because reunification efforts were ceased in the [ADO] pursuant to N.C. Gen. Stat. § 7B-901(c) (2021), and reunification was, therefore, never part of the permanent plan by operation of N.C. Gen. Stat. § 7B-906.2(b) (2021)."

Mother did not have a right to appeal the Initial PPO pursuant to N.C.G.S. § 7B-1001(a)(5), because N.C.G.S. § 7B-906.2(b) operates to exclude reunification as a permanent plan once the trial court makes findings of aggravated factors under N.C.G.S. § 7B-901(c) at disposition. There is no required delay between the trial court's dispositional order and first permanency planning order for the court to eliminate reunification from the permanent plans for a juvenile after the trial court makes dispositional findings of the specific, statutorily prescribed circumstances under N.C.G.S. § 7B-901(c).

Mother's arguments are in part based on this Court's opinion in *In re C.P. See In re C.P.*, 258 N.C. App. 241 (2018). In *In re C.P.*, the respondent-mother argued the trial court lacked the authority to cease reunification efforts at an initial dispositional hearing; she specifically challenged the trial court's combined hearing and asserted the trial court was required to order reunification as a concurrent plan as part of the initial permanent plans. *See id.* at 244. This Court held the trial court erred by failing to order reunification as one of the initial plans for the juvenile. *See id.* At the time of the hearing, N.C.G.S. § 7B-906.2(b) read " '[a]t any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. *Reunification shall remain* a primary plan or secondary plan unless' certain findings are made." *Id.* at 244–45 (emphasis in original) (quoting N.C.G.S. § 7B-906.2(b) (2015)). The *In re C.P.* Court reasoned "[t]he statutory requirement that 'reunification shall remain' a plan presupposes the existence of a prior concurrent plan which included

reunification. Thus, reunification *must be part of an initial permanent plan*." *Id.* at 245 (emphasis added).[4]

But this Court also concluded reunification efforts were a distinct, independent concept from reunification as a permanent plan. *See id.* The Court based this determination wholly on prior controlling precedent, which held "that a trial court can cease reunification efforts at the first permanency planning hearing if necessary findings of fact were made that showed reunification would be unsuccessful or not in the juvenile's interest." *Id.* (citing *In re H.L.*, 256 N.C. App. 450, 461–62 (2017)); *see also id.* at 245 n.3 (citing *In re Civil Penalty*, 324 N.C. 373, 384 (1989)). Ultimately, the Court's holdings created a two-step process where reunification must be part of an initial plan at an initial permanency planning hearing and can only be eliminated at a subsequent permanency planning hearing, regardless of whether reunification efforts were ceased at the first hearing. *See id.* at 244–45.

This Court later expressed reservations about the holdings in *In re C.P.* in *In re M.T.-L.Y. See In re M.T.-L.Y.*, 265 N.C. App. 454, 464–466 (2019). The *In re M.T.–L.Y.* Court identified a number of "anomalous results and consequences that raise more questions than answers going forward[,]" including the exact contours of a parent's right to appeal pursuant to N.C.G.S. § 7B-1001(a)(5), due to the "dichotomy between 'reunification' and 'reunification efforts' " and expressly "encourage[d] the North Carolina General Assembly to amend these statutes to clarify their limitations." *Id.* at 465–66.

The General Assembly has since amended N.C.G.S. § 7B-906.2(b) twice and clarified the limitations in the statutes governing permanency planning hearings. These changes also significantly undermine the rationale in *In re C.P.* that reunification must be part of the initial permanent plans for a juvenile and that reunification efforts and reunification as a permanent plan are disjoined concepts. First, in 2019, the General Assembly amended N.C.G.S. § 7B-906.2(b) to remove the word "remain." *See* 2019 N.C. Sess. Laws 2019-33, § 11. Where N.C.G.S. § 7B-906.2(b) used to read "[r]eunification *shall remain* a primary or secondary plan unless the court made findings under G.S. 7B-901(c)[,]" N.C.G.S. § 7B-906.2(b) (eff. 1 October 2015 to 30 September 2019), it was amended to read "[r]eunification *shall be* a primary or secondary plan unless the court

4. Notably, the trial court in *In re C.P.* omitted a portion of N.C.G.S. § 7B-906.2 stating those "certain findings" may be findings made under N.C.G.S. § 7B-901(c). *See* N.C.G.S. § 7B-906.2(b) (2015). Regardless, the holding in *In re C.P.* indicates that, in all cases, reunification was to be part of the initial plans for a juvenile. *See In re C.P.*, 258 N.C. App. at 245.

made written findings under G.S. 7B-901(c)[.]" N.C.G.S. § 7B-906.2(b) (eff. 1 October 2019). The Court's reasoning in *In re C.P.* that the statutory language "reunification shall remain . . . presupposes the existence of a prior concurrent plan which included reunification" no longer applies given this change. *In re C.P.*, 258 N.C. App. at 245. The plain language of N.C.G.S. § 7B-906.2(b) now permits trial courts to exclude reunification from the permanent plans for a juvenile at any time, including immediately following disposition, and need not be a permanent plan for a juvenile, at all, *if findings were mad*e under N.C.G.S. § 7B-901(c). *See* N.C.G.S. § 7B-906.2(b).

Second, in 2021, the General Assembly again amended N.C.G.S. § 7B-906.2(b) to clarify the relationship between reunification efforts and reunification as a permanent plan. *See* 2021 N.C. Sess. Laws 2021-100, § 11. The version of N.C.G.S. § 7B-906.2(b) prior to this amendment stated the trial court could eliminate reunification if "the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. The finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health and safety may be made at any permanency planning hearing." N.C.G.S. § 7B-906.2(b) (eff. 1 October 2019 to 30 September 2021). Additional language was added to the statute, and it now reads "[t]he finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety may be made at any permanency planning hearing, *and if made*, *shall eliminate reunification as a plan*." N.C.G.S. § 7B-906.2(b) (eff. 1 October 2021 to present). This change clarifies that reunification efforts and reunification as a permanent plan are not distinct, decoupled concepts; the General Assembly has expressly directed, at least in that context, that the cessation of reunification efforts also eliminates reunification as a permanent plan. There is no two-step process for eliminating reunification, and the trial court may both cease reunification efforts and eliminate reunification as a permanent plan at the initial permanency planning hearing by making a single finding that reunification efforts would be unsuccessful given the facts and circumstances of the case. *See* N.C.G.S. § 7B-906.2(b).

These statutory changes clarify that there is no presupposition that an initial permanency plan must require reunification. Sections 7B-901(c) and 7B-906.2(b) operate together to allow the trial court to (1) cease reunification efforts at disposition, *see* N.C.G.S. § 7B-901(c), and (2) omit reunification from the permanent plans for a juvenile where the court has found aggravating factors under N.C.G.S. § 7B-901(c). *See*

N.C.G.S. § 7B-906.2(b). Here, because the trial court made written findings under N.C.G.S. § 7B-901(c) in the ADO, reunification was excluded and omitted from the permanent plans for Riley beginning at disposition and was never eliminated as a permanent plan at the first permanency planning hearing. Therefore, because Mother only had a right to appeal from "[a]n order under G.S. 7B-906.2(b) *eliminating* reunification . . . as a permanent plan[,]" she did not have a right to appeal the Initial PPO. N.C.G.S. § 7B-1001(a)(5) (emphasis added).

This interpretation is reinforced by the fact that Mother had the opportunity to contest the trial court's decision to cease reunification efforts and omit reunification as a permanent plan, including the court's findings under N.C.G.S. § 7B-901(c), because she had a separate and specific right to appeal the ADO and failed to do so. *See* N.C.G.S. § 7B-1001(a)(3) (granting a right to appeal "[a]ny initial order of disposition and the adjudication order upon which it is based"). We see no reason why the General Assembly would allow Mother to appeal from the ADO and assert error under N.C.G.S. § 7B-901(c) then also appeal the Initial PPO and assert error under § 7B-906.2(b) when any error under § 7B-906.2(b) in this context would be based on the same error Mother would have already had the opportunity to contest. Mother's interpretation of Chapter 7B would grant a respondent a proverbial second bite at the apple to appeal multiple orders and assert substantially the same argument when the court omits reunification as a permanent plan.

For the reasons above, the GAL's Motion to Dismiss is allowed and Mother's first appeal, filed in this Court under No. COA23-625, is dismissed. Furthermore, Mother's petition for a writ of certiorari is denied for the reasons stated in her response to the Motion to Dismiss; Mother's second appeal raises an identical issue to her first appeal and this Court may reach the merits of Mother's argument below.

III. Mother's Second Appeal (COA23-790)

[2] We first note Mother's second appeal is a properly authorized appeal pursuant to N.C.G.S. § 7B-1001(a)(4) from an order changing custody of the juvenile. *See* N.C.G.S. § 7B-1001(a)(4). Mother asserts the trial court lacked jurisdiction under the UCCJEA to enter anything other than emergency custody orders because the court failed to comply with various provisions of the UCCJEA.

A. Standard of Review

North Carolina's codification of the UCCJEA is applicable to juvenile cases and "governs the district court's subject-matter jurisdiction in child

custody disputes. A trial court's jurisdiction pursuant to the UCCJEA is reviewed *de novo*." *In re A.L.L.*, 254 N.C. App. 252, 262 (2017) (citation omitted). This Court "presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise." *In re L.T.*, 374 N.C. 567, 569 (2020).

B. UCCJEA

North Carolina's version of the UCCJEA is codified in Chapter 50A, Article 2 of the General Statutes. "The UCCJEA recognizes four modes of subject-matter jurisdiction: (1) initial child-custody jurisdiction, N.C. Gen. Stat. § 50A-201; (2) exclusive, continuing jurisdiction, N.C. Gen. Stat. § 50A-202; (3) jurisdiction to modify determination, N.C. Gen. Stat. § 50A-203; and (4) temporary emergency jurisdiction, N.C. Gen. Stat. § 50A-204." *In re A.L.L.*, 254 N.C. App. at 262. The trial court has "temporary emergency jurisdiction if the child is present in this State and . . . it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." N.C.G.S. § 50A-204(a) (2021). "A North Carolina court that does not have jurisdiction under N.C. Gen. Stat. §§ 50A-201 or 50A-203 has temporary emergency jurisdiction[.]" *In re A.L.L.*, 254 N.C. App. at 262 (citation and quotation marks omitted). However, upon learning of a custody determination in another state, a court exercising temporary emergency jurisdiction "must communicate with the other state's court to resolve subject matter jurisdiction going forward because the other state exercises exclusive and continuing jurisdiction as a result of its prior order." *Id.* at 263 (citations omitted).

There is no dispute that the trial court had temporary emergency jurisdiction to enter the nonsecure custody orders to protect Riley; DSS sought the orders as a result of alleged child sexual abuse and the trial court made findings that the orders were necessary to protect Riley. *See* N.C.G.S. § 50A-204(a). However, the New York Order set custody of Riley, and therefore the trial court could only modify the New York custody determination if the requirements of the UCCJEA regarding modification of another state's custody determination were met. *See* N.C.G.S. § 50A-203 (2021).

To modify a child custody determination made by a court of another state, a North Carolina court must have "jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2)" and the other state's court must "determine[ ] it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be

a more convenient forum under G.S. 50A-207[.]"[5] N.C.G.S. § 50A-203(1). Section 50A-201(a) in turn provides for initial custody jurisdiction if "[t]his State is the home state of the child on the date of the commencement of the proceeding[.]" N.C.G.S. § 50A-201(a)(1) (2021). The child's home state is "the state in which [the] child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C.G.S. § 50A-102(7) (2021). North Carolina "determine[s] a child's home state jurisdiction based on the physical location of a child and their parent." *In re A.L.L.*, 254 N.C. App. at 263.

Mother asserts the trial court failed to comply with various provisions of the UCCJEA. Mother argues (1) the trial court failed to stay its simultaneous proceeding with New York as required by N.C.G.S. § 50A-206; (2) Mother was denied the right to be heard under N.C.G.S. § 50A-110(b) before the trial court made a determination on jurisdiction; (3) Judge Luke's letter was insufficient to relinquish jurisdiction to North Carolina under N.C.G.S. § 50A-203; and (4) the trial court incorrectly applied the factors under N.C.G.S. § 50A-207 when determining whether New York was an inconvenient forum. The GAL and DSS assert the trial court had jurisdiction because the court "took the action required by" the UCCJEA after the trial court "learned of a 2019 New York custody order, by contacting the New York Court, making a record of that contact, and acting only after receiving the New York court's written determination that North Carolina was a more convenient forum for the abuse and neglect case."

Here, we focus on Mother's third argument, because her remaining arguments are misplaced. As to simultaneous proceedings, the trial court is permitted to enter temporary emergency orders when necessary to protect a juvenile from "mistreatment or abuse." N.C.G.S. § 50A-204(a). Section 50A-206 specifically carves out an exception that allows the trial court to exercise temporary emergency jurisdiction even if there are simultaneous proceedings in two states. *See* N.C.G.S. § 50A-206. As noted above, the trial court was exercising temporary emergency jurisdiction when it entered the nonsecure custody orders and in doing so did not violate N.C.G.S. § 50A-206.

As to Mother's right to be heard, Mother asserts she was entitled to "present facts and legal argument before a decision on jurisdiction [was] made." N.C.G.S. § 50A-110(b). The trial court exercised temporary

5. A court of this State may also obtain jurisdiction to modify a child custody determination of another state if the child and their parents do not "presently reside in the other state." N.C.G.S. § 50A-203(2). However, because Father still lived in New York during this proceeding, this section is inapplicable.

emergency jurisdiction when entering the nonsecure custody orders up until a preliminary adjudicatory hearing, where it needed to make jurisdictional determination to modify New York's custody determination in the ADO. At the preliminary hearing, the trial court gave Mother an opportunity to contest jurisdiction and, although Mother was aware of Judge Luke's letter, she did not "present[ ] evidence or arguments to contest jurisdiction when given the opportunity to do so . . . nor [did] [she] raise[ ] the issue at any prior hearing since [Judge Luke's] communication." Instead, Mother discharged her attorney and abstained from the preliminary hearing "in what appear[ed] to be protest of th[e] Court proceeding." Mother was given an opportunity to present facts and legal arguments before the trial court exercised anything other than temporary emergency jurisdiction but refused to do so. The trial court did not violate N.C.G.S. § 50A-110(b).

As to the factors under N.C.G.S. § 50A-207, Mother's argument is misplaced. Mother argues the *New York* court failed to properly weigh the inconvenient forum factors and that the *North Carolina* trial court should have held an evidentiary hearing to weigh the factors. But under the UCCJEA, "the original decree state is the sole determinant of whether jurisdiction continues[,]" *In re A.L.L.*, 254 N.C. App. at 265, and "nothing in the UCCJEA requires North Carolina's district courts to undertake collateral review of" another state's jurisdictional determination. *In re T.R.*, 250 N.C. App. 386, 391 (2016). To the extent Mother challenges New York's jurisdictional determination, her remedy lies in New York, not North Carolina.

Mother's only remaining argument is that Judge Luke's letter was insufficient, as a matter of law, to confer jurisdiction on the trial court and that the New York court could only relinquish jurisdiction by entry of a court order. This argument is focused on the second requirement of N.C.G.S. § 50A-203. The first requirement of N.C.G.S. § 50A-203 is clearly met because Riley has lived in North Carolina with Mother since 2018. North Carolina is Riley's "home state" within the meaning of the UCCJEA. *See* N.C.G.S. § 50A-102(7).

The UCCJEA and the official commentary to the UCCJEA contemplate the entry of an order from the state relinquishing jurisdiction before our district courts exercise jurisdiction to modify a child custody determination. *See* N.C.G.S. § 50A-204(c) ("[A]ny order issued by a court of this State under this section must specify in the order a period that the court considers adequate *to allow the person seeking an order to obtain an order* from the state having jurisdiction . . . . The order issued in this State remains in effect *until an order is obtained from the other state*[.]" (emphasis added)); N.C.G.S. § 50A-202 cmt. 1 (2021) ("A

party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction."); N.C.G.S. § 50A-204 cmt. But, while the statutory language and commentary of the UCCJEA strongly indicate that a foreign state will be relinquishing jurisdiction via a court order, the UCCJEA does not expressly require that a state do so. Nor does the UCCJEA expressly state our courts can only exercise jurisdiction under N.C.G.S. § 50A-203 when the trial court has a foreign court order relinquishing jurisdiction in hand. The UCCJEA merely requires the foreign state to make a jurisdictional "determination" before our courts can modify that state's custody determination. *See* N.C.G.S. § 50A-203(1).

A review of this Court's precedent similarly indicates that our courts have generally looked for a foreign court order making one of the two determinations under N.C.G.S. § 50A-203 to determine whether the foreign court has relinquished jurisdiction under the UCCJEA. As a general trend, where such an order exists this Court considers jurisdiction to have been relinquished by the other state. *See In re A.L.L.*, 254 N.C. App. at 264 ("We will not disturb the trial court's assertion of jurisdiction based upon a facially valid order from another state ceding jurisdiction to this State."); *In re N.B.*, 240 N.C. App. 353, 358 (2015) ("The remaining jurisdictional requirement for a modification under the UCCJEA is satisfied by the New York Court's order relinquishing jurisdiction to the State of North Carolina." (citation and quotation marks omitted)). Where such orders are missing, this Court has concluded the trial court's orders must be vacated due to a lack of subject matter jurisdiction. *See In re N.R.M.*, 165 N.C. App. 294, 300 (2004) ("In the case before our Court, there is no Arkansas order in the record stating that Arkansas no longer has jurisdiction."). However, this Court has never expressly held that a court order is the only method by which a sister state can relinquish jurisdiction over a child custody proceeding.

Furthermore, the parties note this trend is not absolute, and this Court has accepted a sufficiently trustworthy proxy for a court order relinquishing jurisdiction. In *In re T.R.*, this Court held an Illinois trial court's docket entry "was tantamount to a determination that North Carolina" was a more appropriate forum under N.C.G.S. § 50A-207 to satisfy the second requirement under N.C.G.S. § 50A-203. *In re T.R.*, 250 N.C. App. at 390. The Illinois trial court had not entered an order relinquishing jurisdiction to North Carolina, but the Illinois court did make a docket entry that:

> possesse[d] all of the substantive attributes of a court order. It reache[d] the conclusion that the case should

> be transferred from the courts of Illinois to the courts of North Carolina and fully explain[ed] its rationale for that conclusion. Moreover . . . there [was] no indication in the record . . . that Respondent did not receive a copy of the docket entry from the Illinois court or that Respondent made any effort to appeal [the court's] ruling.

Id. at 391.[6]

Here, Judge Luke's letter is analogous to the court's docket entry in *In re T.R.* Judge Luke wrote:

> As a result of our [UCCJEA] conference yesterday, I concur that Jurisdiction for the alleged child abuse and neglect proceedings is in the State of North Carolina and not in Herkimer County New York. I reviewed the file from a court proceeding in Herkimer County that occurred on August 29, 2019, and at that time [Mother], mother of [Riley] agreed to a Custody Order in which she would have custody of her daughter, [Riley]. This was done with the consent of the child's father, [Father]. Importantly, at the time of the agreement, [Mother] and her daughter lived in the State of North Carolina. There are no other Family Court proceedings in New York in this matter. Assuming [Mother] and her daughter continued to reside in North Carolina from the time [of] the Order until the allegations, it is apparent jurisdiction in North Carolina is proper. Finally, there are no known connections between the allegations and New York, witnesses or otherwise, that have been made known to me that would confer jurisdiction to New York.

Like the docket sheet in *In re T.R.*, Judge Luke's letter "reaches the conclusion that the case should be transferred from the courts of [New York] to the courts of North Carolina and fully explains its rationale for that conclusion." *Id.* Judge Luke laid out salient facts that supported his conclusion that jurisdiction lied in our courts, *i.e.*, that there were no connections between the allegations of the Petition and the previous New York custody case. *See id.* On its face, Judge Luke's letter contains the same "substantive attributes of a court order" identified in *In re T.R.* *Id.* at 391.

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6. This Court's opinion in *In re T.R.* was based, in part, on the fact that "[t]he Illinois Court of Appeals has accepted a docket sheet entry as an order of the court where there was no transcript of the hearing and no written order." *Id.* (citation and quotation marks omitted).

Mother attempts to distinguish the letter as an "unverified document[ ]" and mere informal "correspondence" that falls short of the docket entry in *In re T.R.* But Judge Luke's letter contains sufficient indicia of veracity and officiality that Mother's argument is not persuasive. Judge Luke's letter is in direct response to, and based on, the trial court's requested UCCJEA conference. The letter is on "Family Court of the State of New York . . . County of Herkimer" letterhead. The letter recounts facts of the prior New York custody proceeding that are consistent with the New York Order in the record on appeal. Judge Luke signed the letter himself; it was not drafted by the clerk of court or another clerical employee. Additionally, Judge Luke is the sitting Family Court Judge for Herkimer County, New York, of which this Court takes notice. Finally, the trial court concluded the letter was sufficiently trustworthy that the court filed the letter upon receipt.

Additionally, our courts cannot dictate how a sister state relinquishes jurisdiction, and "[n]othing in the UCCJEA requires North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1)." *In re T.R.*, 250 N.C. App. at 391, 792 S.E.2d at 201. While we acknowledge the better practice may be for a district court to enter a court order relinquishing jurisdiction over a child custody case, on the specific facts of this case we hold Judge Luke's letter was sufficient to relinquish jurisdiction over the child custody determination and allow the trial court to exercise jurisdiction pursuant to N.C.G.S. § 50A-203.

For the reasons above, the trial court complied with the relevant provisions of the UCCJEA and had jurisdiction to enter the ADO and subsequent orders.

IV. Conclusion

Mother's appeal in COA23-625 from the Initial PPO is interlocutory and dismissed. As to Mother's second appeal in COA23-790, based on the specific facts of this case the trial court had subject matter jurisdiction over the Petition and to enter the challenged orders. The trial court's juvenile orders are affirmed.

COA23-625; DISMISSED.

COA23-790; AFFIRMED.

Chief Judge DILLON and Judge GRIFFIN concur.

RENE ROBINSON, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF VELVET FOOTE, PLAINTIFFS

v.

HALIFAX REGIONAL MEDICAL CENTER, DR. JUDE OJIE AND DR. SIMBISO RANGA, INDIVIDUALLY AND AS EMPLOYEES, AGENTS, OF HALIFAX REGIONAL MEDICAL CENTER, DEFENDANTS

No. COA23-641

Filed 5 March 2024

Medical Malpractice—9(j) certification—expert qualification—standard of care—exclusion under Rule 702(b)

The trial court did not misapprehend the law or abuse its discretion when it dismissed plaintiff's medical malpractice action for noncompliance with Civil Procedure Rule 9(j) after determining that plaintiff's expert witness did not meet the requirements under Evidence Rule 702(b) for a standard-of-care expert. Plaintiff's argument that she had a reasonable expectation of her expert's qualification was unavailing because, although her complaint was facially valid regarding her designated medical expert, the ruling to exclude the witness as an expert came after the parties conducted discovery and was based on sufficient findings of fact.

Appeal by plaintiff from order and judgment entered 3 October 2022 by Judge J. Carlton Cole in Halifax County Superior Court. Heard in the Court of Appeals 29 November 2023.

BA Folk, PLLC, by Brice M. Bratcher and Jeremy D. Adams, for plaintiffs-appellants.

Harris Creech Ward & Blackerby, PA, by Christina J. Banfield and C. David Creech, for defendants-appellees.

GORE, Judge.

The question in this appeal is whether the trial court properly dismissed plaintiff's medical malpractice claims pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. Here, the trial court determined that plaintiff's designated medical expert, Dr. Mallory, would not reasonably be expected to testify as to the standard of care under Rule 702(b) of the North Carolina Rules of Evidence and N.C.G.S. § 90-21.12. Upon review, we affirm the trial court's Order.

In *Moore v. Proper*, our Supreme Court "addressed the manner in which a trial court should evaluate compliance with Rule 9(j), as well as the standard of review for a reviewing court on appeal." *Preston v. Movahed*, 374 N.C. 177, 187 (2020) (citing *Moore v. Proper*, 366 N.C. 25 (2012)). The Court observed:

> Rule 9(j) serves as a gatekeeper . . . to prevent frivolous malpractice claims by requiring expert review *before* filing of the action. Rule 9(j) thus operates as a preliminary qualifier to "control pleadings" rather than to act as a general mechanism to exclude expert testimony. Whether an expert will ultimately qualify to testify is controlled by Rule 702. The trial court has wide discretion to allow or exclude testimony under that rule. However, the preliminary, gatekeeping question of whether a proffered expert witness is "reasonably expected to qualify as an expert witness under Rule 702" is a different inquiry from whether the expert *will actuall*y qualify under Rule 702.

Moore, 366 N.C. at 31 (citations omitted). Thus, as addressed in the prior appeal of this case — *Robinson v. Halifax Reg'l Med. Ctr.*, 271 N.C. App. 61 (2020) — we reversed in part the trial court's decision to dismiss this action for noncompliance with Rule 9(j). Specifically, we concluded "that the trial court 'jumped the gun' in determining that [p]laintiffs failed to comply with Rule 9(j)[ ]" of the North Carolina Rules of Civil Procedure because plaintiff's complaint, on its face, *did* satisfy our preliminary pleading requirements. 271 N.C. App. at 66. However, the Court in *Moore* further stated:

> a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable. Therefore, to evaluate whether a party reasonably expected its proffered expert witness to qualify under Rule 702, the trial court must look to all the facts and circumstances that were known or should have been known by the party at the time of filing.
>
> Though the party is not necessarily required to know all the information produced during discovery at the time of filing, the trial court will be able to glean much of what the party knew or should have known from

> subsequent discovery materials. But to the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702. When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination. We note that because the trial court is not generally permitted to make factual findings at the summary judgment stage, a finding that reliance on a fact or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely.

Moore, 366 N.C. at 31–32 (internal citations omitted).

Consistent with our Supreme Court's analysis in *Moore*, our reversal in *Robinson* came with a caveat:

> it may alternatively be that discovery will, indeed, demonstrate that [p]laintiffs should have not reasonably believed that their expert would qualify under Rule 702. Indeed, after deposing Dr. Mallory or conducting other discovery, [d]efendants may be able to show that when [p]laintiffs filed their complaint, they could not have reasonably expected Dr. Mallory to qualify, at which point, dismissal under Rule 9(j) would be appropriate. However, at this point, [d]efendants have simply not met their burden of showing that they are entitled to a dismissal under Rule 9(j).

271 N.C. App. at 69–70.

Accordingly, upon remand of this action to the trial court on 11 May 2020, the parties engaged in discovery. Eventually, defendants filed a renewed and amended Motion to Dismiss and for Summary Judgment on 23 June 2022, attaching supporting affidavits from defendants Dr. Ojie and Dr. Ranga as well as defendant's expert witnesses.

After a hearing on the Motions on 26 August 2022, the trial court ruled in favor of defendants, granting their Motion to Dismiss and for Summary Judgment upon the basis of noncompliance with Rule 9(j), and dismissing all claims in plaintiff's complaint. In an Order filed 3 October 2022, the trial court made the following findings of fact, in relevant part:

> 10. On [17 July 2020], [p]laintiff served her responses to [d]efendants' outstanding discovery requests, including her responses to [d]efendants' Rule 9(j) Interrogatories. Plaintiff identified only one expert witness, Dr. Mallory, in her Rule 9(j) interrogatory responses and other discovery responses, and included an affidavit from Dr. Mallory.
>
> 11. On [17 June 2021], [d]efendants filed a Motion for Discovery Scheduling Order pursuant to Rule 26(f1); after a hearing on [d]efendants' Motion on [19 July 2021], the Honorable Judge Cy Grant entered a Discovery Scheduling Order on [27 July 2021]. Per the Discovery Scheduling Order, [p]laintiff was required to designate all expert witnesses by [1 November 2021], and was required to make a designated expert witness available for deposition by [1 January 2022].
>
> 12. Plaintiff did not designate any expert witnesses other than Dr. Mallory by [1 November 2021].
>
> 13. Upon an agreement by all counsel, Dr. Mallory's deposition was set for [29 December 2021]. On [9 December 2021], [d]efendants' counsel properly noticed Dr. Mallory's deposition for [29 December 2021], to be taken in-person in Cocoa Beach, Florida, where Dr. Mallory resides.
>
> 14. On [27 December 2021], two days before the scheduled deposition on [29 December 2021], [p]laintiff's counsel first informed [d]efendants' counsel that Dr. Mallory would not make himself available for the deposition without being paid a deposit for the deposition at least seven (7) days in advance of the deposition. The deposition was therefore cancelled due to [p]laintiff's inability to make her expert witness available for the scheduled deposition.
>
> 15. Defendants' counsel was never made aware of Dr. Mallory's advance payment requirement prior to [27 December 2021].

16. On [1 January 2022], the deadline passed for [p]laintiff to make her expert witness available for deposition, as set forth in the Discovery Scheduling Order.

17. The deposition of Dr. Mallory did not occur prior to the deadline set forth in the Discovery Scheduling Order.

18. On [15 February 2022], [d]efendants filed a Motion to Strike Plaintiff's Expert Witness and a Motion to Dismiss and for Summary Judgment. On [23 June 2022], [d]efendants filed an Amended Motion to Dismiss and for Summary Judgment.

SPECIFIC FINDINGS OF FACTS REGARDING DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT PURSUANT TO RULE 9(j)

19. Plaintiff's action against the [d]efendants arises out of allegations of medical malpractice, as defined in [N.C.G.S.] § 90-21.11 and § 90-21.12, and [p]laintiff is required to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, by including a certification in her Complaint that the medical care and all medical records in this case have been reviewed by an expert witness who is reasonably expected to qualify as such and who is willing to testify as to the standard of care.

20. Upon the refiling of this action on [16 January 2018], [p]laintiff did include a certification, which on its face met the requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure.

21. The Rule 9(j) expert witness and only expert witness designated by [p]laintiff in this matter pursuant to the Discovery Scheduling Order is Dr. Mallory.

22. Pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, [d]efendants properly pursued written and other discovery to determine whether [p]laintiff did in fact comply with Rule 9(j) by retaining an expert witness who was reasonably expected to qualify as such under Rule 702 of the North Carolina Rules of Evidence; had reviewed the medical care and all medical records relevant to the events at issue; and was willing to testify that the defendants had violated the standard of care.

23. The Court finds that the pleadings, the materials on the record in the case, and the materials submitted by the parties, including affidavits and discovery exchanged, show that Dr. Mallory would not be able to qualify as an expert witness in this case pursuant to Rule 702(b) of the North Carolina Rules of Evidence. The [c]ourt finds that the [p]laintiff has failed and is otherwise unable to show that:

> a. Dr. Mallory practiced as a physician specializing in internal medicine and practicing as a hospitalist during the period of [15 January 2014] through [15 January 2015];
>
> b. Dr. Mallory has experience admitting patients to hospitals, providing long-term treatment to admitted patients, or entering Do Not Resuscitate Orders for patients admitted to hospitals, all of which constitute the substance of [p]laintiff's allegations and claims against [d]efendants;
>
> c. Dr. Mallory has experience treating admitted hospital patients who are similar or have similar medical issues as [the decedent] Ms. Foote;
>
> d. Dr. Mallory is familiar with the resources available to Dr. Jude Ojie, Dr. Simbiso Ranga, and Halifax Regional Medical Care in the county of Halifax, North Carolina during the period of [15 January 2014] through [15 January 2015]; and
>
> e. Dr. Mallory is familiar with the medical training and/or medical background of the [d]efendants Dr. Ojie and Dr. Ranga.

24. The [c]ourt therefore finds that there is nothing in the pleadings, the materials on the record in the case, and the materials submitted by the parties, including the affidavits and discovery exchanged, which prove that Dr. Mallory is or could be familiar with the standard of care for internal medicine physicians practicing as hospitalists in Halifax County or similarly situated communities during the period of [15 January 2014] through [15 January 2015] as required by [N.C.G.S.] § 90-21.12(a).

25. The [c]ourt therefore finds that Dr. Mallory is not qualified under Rule 702(b) of the North Carolina Rules

of Evidence to provide expert witness testimony as to the standard of care applicable to the [d]efendants.

26. Additionally, the [c]ourt finds that Dr. Mallory was unwilling to testify as to standard of care opinions in this action, due to Dr. Mallory's failure to attend his deposition scheduled for [29 December 2021].

27. The time set forth in the Discovery Scheduling Order entered by the Honorable Judge Cy Grant in this case for [p]laintiff to designate any expert witnesses had expired by [1 November 2021].

28. Plaintiff failed to designate any expert witness other than Dr. Mallory prior on or before [1 November 2021].

29. Plaintiff failed to make Dr. Mallory, as her designated expert witness, available by [1 January 2022], the date set forth in the Discovery Scheduling Order entered by the Honorable Judge Cy Grant in this case.

30. Additionally, [p]laintiff failed to move for an amendment of the Discovery Scheduling Order in this action to secure an extension of the time in which to make her designated expert witness available for deposition.

31. Because Dr. Mallory is not qualified to provide expert witness testimony as to the standard of care pursuant to Rule 702(b) of the North Carolina Rules of Civil Procedure and [N.C.G.S.] § 90-21.12(a); because [p]laintiff failed to make her sole expert witness, Dr. Mallory, available for a deposition by the deadline set forth in the Discovery Scheduling Order in this case; and because [p]laintiff has failed to designate any other expert witness in this case, the [c]ourt finds that [p]laintiff has failed to retain an expert witness in compliance with Rule 9(j) of the North Carolina Rules of Civil Procedure, and [p]laintiff's action should be dismissed in its entirety, with prejudice.

Turning to the matter now before us, plaintiff presents the sole issue of whether the trial court erred in granting defendants' Motion to Dismiss and for Summary Judgment and in disqualifying Dr. Malloy as an expert witness. Plaintiff argues the trial court: (1) erroneously applied a heightened standard for compliance with Rule 9(j), and (2) erred in both its application and evaluation of Rule 702.

> Generally, we review a trial court's ruling on a motion to exclude expert testimony for an abuse of discretion. However, when the pertinent inquiry on appeal is based on a question of law — such as whether the trial court properly interpreted and applied the language of a statute — we conduct de novo review. . . . The trial court's determination that proffered expert testimony meets Rule 702[ ]'s requirements of qualification, relevance, and reliability will not be reversed on appeal absent a showing of abuse of discretion. But the trial court's articulation and application of the relevant legal standard is a legal question that is reviewed de novo. And, whatever the standard of review, an error of law is an abuse of discretion.

Miller v. Carolina Coast Emergency Physicians, LLC, 382 N.C. 91, 104 (2022) (cleaned up).

First, plaintiff argues the trial court's "three justifications," as set forth in finding of fact 31 of the Order, "for dismissal under Rule 9(j) are directly at odds with the guidance set forth in *Moore* and *Preston*." Plaintiff asserts "the lower court adds additional requirements not found in Rule 9(j), specifically that the [plaintiff] was required to 'retain an expert witness' and make that expert witness available for deposition. Rule 9(j) contains no such requirements." Plaintiff further argues, "the proper question to ask is whether . . . the [plaintiff] had a reasonable belief or expectation that Dr. Mallory would qualify as an expert witness at the time of filing the complaint, not whether or not he ultimately would qualify."

We discern no such misapprehension of law in the trial court's ruling. Rule 9(j) provides, in pertinent part:

> [a]ny complaint alleging medical malpractice by a health care provider . . . in failing to comply with the applicable standard of care under [N.C.G.S.] 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry *have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702* of the Rules of Evidence *and who is willing to testify* that the medical care did not comply with the applicable standard of care . . . .

N.C.G.S. § 1A-1, Rule 9(j) (2022) (emphasis added). As our Supreme Court stated in *Moore*, "the preliminary, gatekeeping question of whether a proffered expert witness is reasonably expected to qualify as an expert witness under Rule 702 is a different inquiry from whether the expert *will actually* qualify under Rule 702." 366 N.C. at 31 (internal quotation marks and citation omitted). "[A] complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." *Id.* at 31–32 (internal citation omitted). "Whether an expert will ultimately qualify to testify is controlled by Rule 702. The trial court has wide discretion to allow or exclude testimony under that rule." *Id.* at 31 (citation omitted). Plaintiff reiterates her expectation that Dr. Mallory would qualify as an expert witness was *reasonable*, yet the trial court was not, upon remand, engaged in preliminary examination of her pleadings. The trial court's analysis of whether Dr. Mallory *actually* qualified as an expert witness under Rule 702(b) is not a misstatement of the law, but rather, it is inherent to its evaluation of *actual* compliance with Rule 9(j) beyond the preliminary stages of the proceedings.

Moore articulates the three-part test to qualify as an expert witness under Rule 702(b):

> (1) whether, during the year immediately preceding the incident, the proffered expert was in the same health profession as the party against whom or on whose behalf the testimony is offered; (2) whether the expert was engaged in active clinical practice during that time period; and (3) whether the majority of the expert's professional time was devoted to that active clinical practice.

Id. at 33 (citation omitted). The trial court's findings of fact, such as numbers 23(a)–(e) and 24, address the elements of this test. Plaintiff does not argue that the trial court arbitrarily disqualified Dr. Mallory, rather, plaintiff argues the trial court misapplied the law by "apply[ing] a stricter standard in its evaluation than espoused by the appellate courts." Upon review of plaintiff's brief, we discern no fundamental misapprehension or misapplication of Rule 702(b). Rather, plaintiff appears to present an alternative interpretation of the discovery materials and to propose an alternative ruling based on her interpretation. The fact remains, the trial court *did* make findings supporting a basis to exclude and strike Dr. Mallory as an expert witness under Rule 702(b). Plaintiff has not shown an abuse of discretion in that determination.

We discern no abuse of discretion or misapprehension of law in this case. Accordingly, we affirm the trial court's Order.

AFFIRMED.

Chief Judge DILLON and Judge MURPHY concur.

STATE OF NORTH CAROLINA
v.
ALEJANDRO CORDOVA AGUILAR

No. COA23-556

Filed 5 March 2024

1. Appeal and Error—preservation of issues—improper line of questioning—initial objection renewed only once

In a prosecution for sexual battery, assault on a female, and false imprisonment, defendant preserved for appellate review his objection to the lead detective's testimony after the State asked the detective whether she ever questioned the victim's truthfulness while interviewing the victim. The trial court overruled defendant's initial objection to the testimony, which defendant renewed after the State was allowed to repeat the question. Although defendant did not object to each additional question on the same issue, N.C.G.S. § 15A-1446(d)(10) provides litigants the right to challenge subsequent evidence admitted in a specific line of questioning when, as was determined here by the appellate court, "there has been an improperly overruled objection to the admission of evidence involving that line of questioning."

2. Evidence—lay opinion testimony—sexual battery prosecution—vouching for victim's credibility—prejudice

In a prosecution for sexual battery, assault on a female, and false imprisonment, where a teenaged girl testified that defendant grabbed her and kissed her inside a closet at their workplace, the trial court abused its discretion by admitting the lead detective's testimony about how she never questioned the victim's story when interviewing the victim. Although law enforcement officers may testify as to why they made certain choices in the course of an investigation, along with their basis for believing a particular witness, the detective did not make her statements in response to a direct

question about her investigatory decision-making; thus, she improperly vouched for the victim's credibility. Although a party may bolster a witness's credibility under Evidence Rule 608(a) after it has been attacked, that Rule was inapplicable here since defendant had not attacked the victim's credibility using reputation or opinion evidence. Furthermore, the court's error prejudiced defendant where all of the evidence about what happened in the closet came from the victim, making her credibility the central issue in the case.

Appeal by Defendant from Judgments entered 9 January 2023 by Judge Reggie E. McKnight in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Hilary R. Ventura, for the State.

Joseph P. Lattimore for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Alejandro Cordova Aguilar (Defendant) appeals from Judgments entered pursuant to jury verdicts finding Defendant guilty of Sexual Battery, Assault on a Female, and False Imprisonment. The Record before us, including evidence produced at trial, tends to show the following:

The alleged victim in this case is S.S.[1] At the time of the incident at issue in this case, S.S. was fifteen years old, working as a hostess at Azteca Mexican Restaurant in Matthews, North Carolina. Defendant worked as a waiter at the same restaurant. S.S. testified at trial that around 2:00 p.m. on 5 October 2019, she took her break and went to a closet to retrieve her belongings. S.S. stated after picking up her book bag, she turned around and saw Defendant right in front of her, holding the door with one hand. S.S. testified Defendant began kissing her and grabbing her inappropriately. According to S.S., Defendant then abruptly stopped and walked out of the closet. She exited the closet shortly thereafter and encountered two other employees near the closet. S.S. told those employees Defendant had just said "hi" to her.

1. A pseudonym stipulated to by the parties.

S.S.'s cousin testified she was supposed to drive S.S. home after her shift at the restaurant on 5 October; however, S.S. asked her to come inside, and she found S.S. in the bathroom. When her cousin asked S.S. what happened, S.S. began to cry and told her Defendant "put his hands on her and started kissing her forcefully." S.S. and her cousin then told S.S.'s mother about the incident, and they called the police.

Detective Danielle Helms of the Matthews Police Department interviewed S.S., her mother, and her cousin. The statement Detective Helms reported S.S. made was consistent with S.S.'s trial testimony.

At trial, during the State's direct examination of Detective Helms, the following exchange occurred:

> [State's Counsel]: And, Detective Helms, you said you investigated felonies and serious misdemeanors for the better part of 18 years; is that right?
>
> [Detective Helms]: Correct.
>
> [State's Counsel]: At any point in your investigation, did you question the validity of [S.S.]'s sorry? [sic]
>
> [Detective Helms]: I did not.
>
> [Defense Counsel]: Objection.
>
> [Trial Court]: Sustained. If you can rephrase your question.

The State then asked for clarification as to the basis for the trial court's decision and each side was heard. Defense counsel specifically raised the issue of the Detective offering opinion testimony, stating: "So what she's trying to do is invade that providence [sic] of the jury. This is the jury's determination whether someone's telling the truth or not." The trial court then, hearing the State repeat its question, overruled the objection and allowed Detective Helms to answer. The State then continued this line of questioning:

> [State's Counsel]: And why did you feel that you didn't have any reason to question the truthfulness of [S.S.]?
>
> [Detective Helms]: During her-- you know, during the course of the investigation, she came forward immediately with the accusation, as soon as it happened. Her cousin picked her up, and she was obviously very volatile, crying, upset, went home, contacted her mom, told her the story. They immediately contacted the police, came in. I

was able to talk to her. The story stayed the same, consistent with the statement that she gave the first officer, with my interview, and I know we have corroborating evidence of the Aztec video.

[State's Counsel]: And you said that the story stayed the same as far as her statements that she gave to the other officer and to you.

[Detective Helms]: Correct.

[State's Counsel]: Anything about the fact that she mentioned details about talking to those other witnesses after she left the storage closet or any of the other details that she added that are not in State's Exhibit 2 give you any reason to feel differently?

[Detective Helms]: No.

[Defense Counsel]: I'll renew my objection. This is all just opinion.

[Trial Court]: Overruled.

Defendant challenged the veracity of S.S.'s account at various points during the trial by illustrating inconsistencies in prior statements given by S.S., pointing out discrepancies between the video footage and S.S.'s statements, and eliciting an admission from S.S. that she did not report the alleged assault to the coworkers she encountered when she left the closet.

On 9 January 2023, the jury returned verdicts finding Defendant guilty of Sexual Battery, Assault on a Female, and False Imprisonment. The trial court consolidated the convictions for Sexual Battery and Assault on a Female into one Judgment and sentenced Defendant to 75 days of imprisonment, which was suspended with supervised probation for 12 months. The trial court imposed a suspended sentence of 45 days of imprisonment for the False Imprisonment conviction and ordered 12 months of unsupervised probation to run consecutive to the other sentence. Defendant timely filed written Notice of Appeal on 11 January 2023.

Issue

The issue before us is whether the trial court erred by allowing Detective Helms to vouch for the alleged victim's credibility.

Analysis

I. Preservation

[1] As a threshold issue, the State contends Defendant failed to preserve this issue for appeal. The State argues Defendant's objection did not preserve this issue because Defendant did not object to all of the challenged testimony. Thus, in the State's view, Defendant's prior and subsequent objections were waived. *See State v. Walters*, 357 N.C. 68, 104, 588 S.E.2d 344, 365 (2003). Contrary to the State's assertion, pursuant to N.C. Gen. Stat. § 15A-1446(d)(10), even if a party fails to object to the admission of evidence at some point during trial, that party may nevertheless challenge "[s]ubsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning." N.C. Gen. Stat. § 15A-1446(d)(10) (2023); *see also State v. Corbett*, 376 N.C. 799, 826, 855 S.E.2d 228, 248 (2021).

Here, Defendant immediately objected when the State asked Detective Helms whether she had questioned S.S.'s story. The trial court heard the parties' arguments on the objection and Defendant explicitly stated the State's question was asked for a credibility judgment: "So what [the State] is trying to do is invade that providence [sic] of the jury. This is the jury's determination whether someone's telling the truth or not." Thus, Defendant timely objected and gave a proper foundation for the objection, which Defendant argues here. The trial court then overruled Defendant's objection and the State was allowed to ask the question again and proceeded to ask a few follow-up questions. At the conclusion of the follow-up, Defendant renewed his objection, stating: "This is all just opinion." Although Defendant did not object to each additional question on this issue, our Supreme Court has held N.C. Gen. Stat. § 15A-1446(d)(10) provides litigants the right to challenge subsequent evidence admitted in a specific line of questioning "when there has been an improperly overruled objection to the admission of evidence involving that line of questioning." *Corbett*, 376 N.C. at 826, 855 S.E.2d at 248 (quoting N.C. Gen. Stat. § 15A-1446(d)(10) (2019)).

This Court has recently addressed this issue, applying the statute to a similar set of facts in *State v. Graham*, 283 N.C. App. 271, 276-78, 872 S.E.2d 573, 578-79 (2022). There, defense counsel initially objected to an improper question about the defendant's communications with his attorney but failed to renew his objection when the State asked subsequent questions on this issue. *Id.* This Court rejected the State's argument the defendant had failed to preserve the issue for appellate

review, concluding: "Defendant did object to the State's initial question regarding the substance of Defendant's communications with counsel. Accordingly, any further questions regarding the substance of those communications is preserved as a matter of law if the objection was erroneously overruled." *Id.* at 278, 872 S.E.2d at 579. The facts of this case are the same, except that here Defendant did renew his objection after the State's subsequent questions. Thus, Defendant's objection to Detective Helms' testimony as improper opinion testimony is preserved if we conclude Defendant's initial objection was erroneously overruled. Because we so conclude, this issue is properly before this Court.

II. Detective Helms' Testimony

[2] On appeal, "[w]e review a trial court's ruling on the admissibility of lay opinion testimony for abuse of discretion." *State v. Belk*, 201 N.C. App. 412, 417, 689 S.E.2d 439, 442 (2009) (citations omitted). North Carolina Rule of Evidence 701 governs lay opinion testimony. It provides: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2023). Our Courts have consistently held "[i]t is improper for one witness to vouch for the veracity of another." *State v. Bellamy*, 172 N.C. App. 649, 663, 617 S.E.2d 81, 91 (2005) (citing *State v. Robinson*, 355 N.C. 320, 334-35, 561 S.E.2d 245, 255 (2002)); *see also State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (citations omitted) (noting ordinarily the State may not present testimony "to the effect that a prosecuting witness is believable, credible, or telling the truth[.]").

Further, "[t]he admission of opinion testimony intended to bolster or vouch for the credibility of another witness violates N.C. Gen. Stat. § 8C-1, Rule 701." *State v. Harris*, 236 N.C. App. 388, 403, 763 S.E.2d 302, 313 (2014) (citing *Robinson*, 355 N.C. at 334-35, 561 S.E.2d at 255). "[T]he trial court commits a fundamental error when it allows testimony which vouches for the complainant's credibility in a case where the verdict entirely depends upon the jurors' comparative assessment of the complainant's and the defendant's credibility." *State v. Warden*, 376 N.C. 503, 504, 852 S.E.2d 184, 186 (2020). Our Supreme Court has explained the rationale behind the exclusion of lay opinion testimony as follows:

> [T]he truthfulness of a particular witness should be determined by the jury rather than by a witness for one party or the other, as the "jury is the lie detector in the courtroom"

> and "is the only proper entity to perform the ultimate function of every trial—determination of the truth[.]"

State v. Caballero, 383 N.C. 464, 475, 880 S.E.2d 661, 669 (2022) (quoting *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986)).

Considering the Record before us and applicable precedent, we are persuaded the challenged portion of Detective Helms' testimony was inadmissible. We have noted a detective or other law enforcement officer may testify as to why they made certain choices in the course of an investigation, including their basis for believing a particular witness. *See State v. Taylor*, 238 N.C. App. 159, 168-69, 767 S.E.2d 585, 591-92 (2014) (Bryant, J. dissenting), *rev'd*, 368 N.C. 300, 776 S.E.2d 680 (reversing the Court of Appeals opinion "[f]or reasons stated in the dissenting opinion.").

Here, in contrast, the challenged testimony was clearly unrelated to Detective Helms' investigatory decision-making. First, unlike the exchange at issue in *Taylor*, Detective Helms' statement was not made in connection with a direct question about her investigative choices. In *Taylor*, counsel for the State asked the lead investigator on the case, "What made you go forward [with the investigation]?" *Id.* at 165, 767 S.E.2d at 589. The investigator responded she believed the alleged victim was telling her the truth because she had given the investigator "all the information possible[.]" *Id.* Similarly, in *State v. Richardson*, the police department's investigatory decisions were a key issue. 346 N.C. 520, 488 S.E.2d 148 (1997). There, law enforcement had initially investigated a person as the perpetrator and obtained a warrant for his arrest, but then changed course and arrested the defendant instead. *Id.* at 527-28, 488 S.E.2d at 152-53. After interviewing the person the defendant identified as the perpetrator, law enforcement then believed the defendant was the perpetrator. *Id.* at 528, 488 S.E.2d at 152. At trial, the State's questioning asked law enforcement officers to explain that shift and their choice to believe the witness' story instead of the defendant's. *Id.* at 533-34, 488 S.E.2d at 156.

In contrast, here, the State merely asked Detective Helms whether she had questioned the validity of S.S.'s story. Rather than asking the detective to explain her decision-making process in the course of the investigation, the State elicited an evaluation of S.S.'s credibility. The follow-up question after Defendant's objection was overruled asked Detective Helms to explain why she thought S.S. was credible. Again, this question went precisely to the issue of credibility, or as the State put it in the question, "the truthfulness of [S.S.][.]"

Moreover, these questions were not posed in the context of examining law enforcement's decisions made during the course of the investigation. Unlike the law enforcement officers in *Richardson* and *Taylor*, Detective Helms was not asked in this exchange why she made certain decisions or why she did or did not do something; she was merely asked whether she had doubted S.S. and to explain why she believed S.S. was truthful. Although whether an officer believes a witness is telling them the truth certainly may influence his or her decision-making in an investigation, that issue was not raised by the questioning in this case. The challenged testimony came after Detective Helms testified as to what S.S. had told her in the initial interview and stated that she had reviewed the footage from Azteca Restaurant. Immediately preceding the challenged exchange, the State asked: "And, Detective Helms, you said you investigated felonies and serious misdemeanors for the better part of 18 years; is that right?" This underscores that the question was posed for the foundational purpose of reminding the jury of Detective Helms' experience so that they would trust her judgment of S.S.'s credibility rather than making an independent determination based on the evidence presented. Thus, the challenged testimony was not offered for a permissible purpose. Therefore, the testimony impermissibly vouched for another witness' credibility.

The State further contends even if the challenged portion of Detective Helms' testimony had been improperly admitted, Defendant had opened the door to such evidence through the cross-examination of S.S., and thus this testimony was admissible under N.C. R. Evid. 608(a). The State argues Defendant "raised inferences concerning the lead detective's investigation and about S.S.'s credibility" during his cross-examination of S.S. Consequently, in the State's view, the State had the right to offer rebuttal and explanatory testimony on those issues. *See State v. Johnston*, 344 N.C. 596, 605-06, 476 S.E.2d 289, 294 (1996). We disagree.

Rule 608(a) of the North Carolina Rules of Evidence provides:

> The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

N.C. Gen. Stat. § 8C-1, Rule 608(a) (2023). "Put another way, Rule 608(a) allows the party that called a witness to bolster the credibility of that witness' 'character for truthfulness' in the event that the credibility of that witness has been attacked 'by evidence in the form of reputation or opinion.' " *Caballero*, 383 N.C. at 479, 880 S.E.2d at 671. Our Supreme Court in *Caballero* rejected a similar challenge to a police officer's testimony regarding a witness' credibility. *Id.* at 478-79, 880 S.E.2d at 671. In dismissing this argument, the Court characterized the defendant's cross-examination as "pointing out what he believed to be inconsistencies between the information contained in [the victim's] trial testimony and the statements that [the victim] gave to investigating officers." *Id.* at 479, 880 S.E.2d at 671. It continued, "the challenged portion of [the officer]'s testimony constituted a direct assertion that [the victim] had passed the credibility test that he had administered to her rather than 'evidence of truthful character.' " *Id.*

Likewise in this case, Defendant did not attack S.S.'s credibility "by opinion or reputation evidence or otherwise." Instead, Defendant attempted to challenge S.S.'s credibility by pointing out inconsistencies in prior statements given by S.S., showing discrepancies between the video footage and S.S.'s statements, and eliciting an admission from S.S. that she did not report the alleged assault to the coworkers she encountered when she left the closet. These methods are consistent with those our Supreme Court held in *Caballero* do not implicate Rule 608(a). Moreover, just as in *Caballero*, Detective Helms' testimony was a direct assertion S.S. was credible; it cannot be characterized as mere "evidence of truthful character." *Id.*

III. Prejudice

"[E]ven if the admission of [evidence] was error, in order to reverse the trial court, the appellant must establish the error was prejudicial. If the other evidence presented was sufficient to convict the defendant, then no prejudicial error occurred." *State v. James*, 224 N.C. App. 164, 166, 735 S.E.2d 627, 629 (2012) (quoting S*tate v. Bodden*, 190 N.C. App. 505, 510, 661 S.E.2d 23, 26 (2008) (citation omitted)). "The burden of showing such prejudice . . . is upon the defendant." *Bellamy*, 172 N.C. App. at 661, 617 S.E.2d at 90 (citations omitted). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2023).

The State contends there was sufficient evidence beyond Detective Helms' vouching for S.S.'s credibility to convict Defendant. The State points to S.S.'s testimony, video of her interview with Detective Helms and her victim statement, the video of Defendant entering the closet with S.S. at Azteca Restaurant, and testimony from S.S.'s cousin and mother. However, much of that evidence relied on S.S.'s credibility, including her testimony, interview, and witness statement. Further, S.S.'s cousin and mother were not witnesses to the alleged incident; rather, they testified only to their interactions with S.S. after the alleged incident. While the video from Azteca Restaurant does show Defendant entering the closet after S.S., it does not show what happened inside the closet. All of the evidence about what happened in the closet came from S.S. Thus, her credibility was the most significant issue in the case.

Our Supreme Court has stated:

> [C]oncern for the fairness and integrity of criminal proceedings requires trial courts to exclude testimony which purports to answer an essential factual question properly reserved for the jury. When the trial court permits such testimony to be admitted, in a case where the jury's verdict is contingent upon its resolution of that essential factual question, then our precedents establish that the jury's verdict must be overturned.

Warden, 376 N.C. at 510, 852 S.E.2d at 190.

The Court's analysis in *State v. Aguallo* is instructive. 318 N.C. 590, 350 S.E.2d 76 (1986). There, in addition to the victim's testimony, the State offered evidence the victim had consistently told the same story to others. *Id.* at 599, 350 S.E.2d at 82. Although there was some physical evidence, the Court determined "the State's case hinged on the victim's testimony and thus upon her credibility." *Id.* The Court noted cross-examination of the victim "raised some doubts about the victim's credibility" and consequently concluded admission of testimony improperly vouching for the victim's credibility was prejudicial error "[b]ecause it is likely that any doubts the jurors may have had about the victim's credibility were allayed by the pediatrician's testimony that she found the victim to be 'believable[.]' " *Id.* Absent that testimony, the Court concluded there was a "reasonable possibility that a different result would have been reached by the jury." *Id.* at 599-600, 350 S.E.2d at 82.

In the present case, defense counsel likewise worked to undermine S.S.'s credibility by illustrating inconsistencies in prior statements given by S.S., pointing out discrepancies between the video footage and S.S.'s

statements, and eliciting an admission from S.S. that she did not report the alleged assault to the coworkers she encountered when she left the closet. Thus, not only was S.S.'s credibility the central issue of the case but also the other evidence offered was not substantial in the face of doubts raised by Defendant. Considering these circumstances and consistent with our Supreme Court's holding in *State v. Aguallo*, we conclude there is a reasonable possibility the jury would have reached a different result absent Detective Helms' testimony vouching for S.S.'s credibility. Therefore, Defendant was prejudiced by the erroneous admission of Detective Helms' challenged testimony.

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Judgments and remand for a new trial.

NEW TRIAL.

Judges CARPENTER and GORE concur.

STATE OF NORTH CAROLINA
v.
MARCUS D. GEORGE, DEFENDANT

No. COA22-958

Filed 5 March 2024

1. Search and Seizure—traffic stop—extension—denial of motion to suppress—sufficiency of findings

In a prosecution for multiple drug possession and trafficking charges, the trial court entered sufficient findings of fact that were supported by competent evidence in its order denying defendant's motion to suppress, including that: an officer conducting a traffic stop gave defendant a verbal warning for speeding; as he returned defendant's driver's license and registration, the officer asked defendant about the presence of illegal drugs and asked to search his vehicle; defendant denied having illegal drugs inside his vehicle and denied the officer's request to search; and then the officer had his canine (who was already at the scene) conduct a free air sniff of defendant's vehicle, during which the dog positively alerted to the odor of narcotics inside. Contrary to defendant's argument,

the findings that he challenged on appeal were neither unclear nor incomplete and, taken together with the court's unchallenged findings, supported the court's conclusion that the officer did not unconstitutionally prolong the traffic stop.

2. Search and Seizure—traffic stop—extension—reasonable suspicion—based on sight and smell of marijuana—legalization of hemp—irrelevant

In a prosecution for multiple drug trafficking and possession charges arising from a traffic stop, the trial court properly denied defendant's motion to suppress upon concluding that the officer did not unconstitutionally prolong the stop where, after giving defendant a verbal warning for speeding, he asked defendant about the presence of illegal drugs inside the vehicle and then had his canine perform a drug sniff. The officer had sufficient reasonable suspicion of criminal activity to extend the stop after smelling a faint odor of marijuana and seeing marijuana residue on the vehicle's floorboard. Although marijuana smells the same as legalized hemp, binding precedent affirms that, regardless of hemp's legalization, the plain odor of marijuana gives law enforcement probable cause to conduct a search; therefore, the sight and smell of marijuana inside defendant's car was enough to satisfy the less-demanding reasonable suspicion standard.

Appeal by defendant from judgment entered 23 April 2021 by Judge Henry L. Stevens in Sampson County Superior Court. Heard in the Court of Appeals 10 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for the defendant-appellant.

STADING, Judge.

Marcus D. George ("defendant") appeals from a judgment entered after a jury found him guilty of trafficking heroin by possession, trafficking heroin by transport, possession with intent to sell or deliver heroin, possession with intent to sell or deliver cocaine, and resisting a public officer. At sentencing, defendant admitted his habitual felon status. For the reasons below, we hold no error.

I. Background

On 27 July 2017, Lieutenant Bass ("Lt. Bass") of the Sampson County Sheriff's Office observed a vehicle speeding seventy miles per hour in a fifty-five mile per hour zone. Lt. Bass initiated a traffic stop and approached to find defendant in the driver's seat with a passenger in his vehicle. Lt. Bass requested defendant for his license and registration. As defendant searched for his registration, Lt. Bass noticed him "moving around a lot inside the vehicle" and "shaking very nervously." According to Lt. Bass, defendant "would never make eye contact" or "look [his] way." While at the vehicle, Lt. Bass saw "what appeared to be marijuana residue" on the passenger side floorboard and could smell "a faint odor of marijuana coming from the vehicle."

Eventually, the passenger found defendant's registration in the glovebox, a location defendant had previously checked. Lt. Bass returned to his patrol car and called for backup. Deputy Wilkes arrived on the scene while Lt. Bass completed the "registration check." To ensure officer safety, Deputy Wilkes asked defendant to exit the vehicle and conducted a pat-down to check for weapons. During the pat-down, defendant "was moving around" and "kept trying to turn around." Meanwhile, Lt. Bass attempted to produce a printed citation, but his computer and printer lost power. Consequently, defendant received a verbal warning for speeding. Defendant responded to the verbal warning by disputing Lt. Bass's description of the events leading up to the traffic stop.

Upon returning defendant's driver's license and registration, Lt. Bass asked defendant if there were "any illegal drugs inside the vehicle," to which defendant responded, "no." Lt. Bass asked for consent to search the vehicle, but defendant refused. "At that time," Lt. Bass informed defendant that he "would be conducting a free-air sniff with [his canine] around the vehicle" and instructed the passenger to exit the vehicle before performing the search. When the passenger door was opened, Lt. Bass verified the substance on the floorboard was "marijuana stems, residue." Then, the canine alerted to the presence of narcotics at the driver's door. A search of the vehicle led to the discovery of, among other things, marijuana and "a small plastic baggy containing a white powder." During the search, defendant "seemed . . . agitated . . . and . . . was pacing back and forth[.]" Thereafter, Lt. Bass attempted to arrest defendant, but he pulled away, fought, and reached for his waistband. Then, defendant put something in his mouth, which turned out to be a baggie containing an "off-white rock substance." Once defendant was handcuffed, another baggie, which contained a brown powder, was located on the ground nearby.

Defendant was indicted for numerous drug offenses, among them trafficking heroin, possession with intent to sell or deliver heroin, possession with intent to sell or deliver cocaine, maintaining a vehicle for the purpose of keeping or selling cocaine and heroin, and possession of testosterone and marijuana. He also faced charges of destroying evidence and resisting a public officer. Additionally, defendant was indicted for the status offense of habitual felon. On 31 August 2018, defendant filed a pretrial motion to suppress evidence obtained from the traffic stop. His motion alleged that the search was "without a search warrant, probable cause, consent, exigent circumstances or any other exception to the warrant requirement." The trial court conducted a suppression hearing and accepted evidence in the form of testimony from Lt. Bass, a video tendered by the State, and two photographs tendered by defendant. At the conclusion of the hearing, the trial court denied defendant's motion.

Defendant's trial began on 19 April 2021 in Sampson County Superior Court. The State chose not to prosecute defendant for the charges of possession of testosterone, possession of marijuana, possession of marijuana paraphernalia, and destroying evidence. At the close of all evidence, the trial court dismissed the charge of maintaining a vehicle to keep or sell a controlled substance. Following deliberations, the jury found defendant guilty of trafficking heroin, possession with intent to sell or deliver heroin, possession with intent to sell or deliver cocaine, and resisting a public officer. Defendant admitted to his habitual felon status and was sentenced by the trial court. Thereafter, defendant entered his notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction over this appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

Defendant presents two issues on appeal: (1) whether the trial court made findings of fact to support its conclusion of law that the stop was lawfully extended, and (2) whether the trial court erred in denying defendant's motion to suppress. Below, we address each of defendant's arguments.

A. Standard of Review

"A trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. Cobb*, 381 N.C. 161, 164, 872 S.E.2d

21, 25 (2022) (citations omitted). Our review of the trial court's order is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Left unchallenged on appeal, findings of fact are "deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Conclusions of law are reviewed de novo. *See Cobb*, 381 N.C. at 164, 872 S.E.2d at 25; *see also State v. Faulk*, 256 N.C. App. 255, 262, 807 S.E.2d 623, 628–29 (2017).

B. The Trial Court's Order

[1] Defendant argues that the trial court failed to make sufficient findings of fact to support its conclusion of law that the traffic stop was not unconstitutionally prolonged. He erroneously contends that only four findings of fact contained in the trial court's order address the contested conclusion of law:

> [D]efendant stood at the window of [Lt.] Bass's patrol car. [Lt.] Bass told [ ] defendant he would issue a speeding citation and defendant said he was going down a hill and [Lt.] Bass told him he was not.
>
> The power failed on [Lt.] Bass's computer and he returned defendant's license and registration.
>
> [Lt.] Bass requested consent to search and defendant said no.
>
> [Lt.] Bass utilized his [canine] to conduct a free air sniff of defendant's vehicle and the [canine] gave a positive alert for the odor of narcotics to the seam of the driver's door near the handle.

Furthermore, defendant maintains that these findings are incomplete and do not support the challenged conclusion of law.

Defendant does not clearly contest the findings of fact but claims they are incomplete. In an abundance of caution, we first carefully review the record to evaluate those findings of fact. During the suppression hearing, Lt. Bass testified that after returning to his patrol car, he planned to issue defendant a citation for speeding, but the power failed for his computer and printer. Hence, Lt. Bass gave defendant a verbal warning instead, and defendant took this opportunity to explain that he

was traveling downhill. In disagreement, Lt. Bass retorted that defendant was not going downhill when clocked on the radar. As he returned the driver's license and registration, Lt. Bass asked about the presence of illegal drugs and requested to search the vehicle. Defendant denied the presence of illegal drugs and declined the request to search his vehicle. Then the canine, already present on the scene with Lt. Bass, performed a "free-air sniff" around defendant's vehicle. The canine "alerted to the odor of narcotics" at the driver's door. To the extent defendant challenges these findings of fact, we hold that they are sufficiently supported by competent evidence.

Defendant contends that the foregoing findings of fact fail to support the challenged conclusion of law for the reasons that (1) they imply that the stop was not over because Lt. Bass was still taking action related to the purpose of the stop, and (2) they omit the bulk of the events which occurred when the stop was unconstitutionally extended. Therefore, defendant claims that this matter must be remanded for the trial court to clarify its findings of fact and conclusion of law regarding the extension of the traffic stop. As a preliminary matter, we note that since the challenged findings of fact are adequately supported by competent evidence, all of the findings contained in the trial court's order are conclusively binding on appeal. *See State v. Biber*, 365 N.C. at 168, 712 S.E.2d at 878; *see also State v. Byrd*, 287 N.C. App. 276, 279, 882 S.E.2d 438, 440 (2022) (holding that unchallenged findings of fact are binding on appeal). Significant here and discussed in greater detail below, defendant overlooks the unchallenged finding contained in the trial court's order that "[Lt.] Bass observed marijuana residue on the passenger floorboard and could smell the faint odor of marijuana." This observation was made while the mission of the traffic stop was ongoing, during Lt. Bass's initial approach of defendant's vehicle and before returning to his patrol car with defendant's registration. The trial court's order also included an unchallenged finding that Lt. Bass had worked in crime interdiction since 2003. Moreover, several unchallenged findings in the trial court's order described defendant's nervous behavior and peculiar movements. As explained in the following section, our de novo review examining the constitutionality of the traffic stop's extension shows that the challenged legal conclusion is adequately supported by the findings of fact.

C. Extension of the Traffic Stop

[2] Defendant maintains that the trial court erred in both denying his motion to suppress and determining that the traffic stop was not unconstitutionally prolonged. Specifically, defendant challenges the

legal sufficiency of the trial court's conclusion "that the stop was not prolonged and [Lt.] Bass had probable cause to search the defendant's vehicle based on his observation of marijuana residue on the passenger floorboard and faint odor of marijuana." Citing *Rodriguez v. United States*, defendant maintains that the traffic stop ended when his license and registration were returned, and the required reasonable suspicion to extend the stop did not exist. 575 U.S. 348, 135 S. Ct. 1609 (2015).

"Under *Rodriguez*, the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop . . . unless reasonable suspicion of another crime arose before that mission was completed[.]" *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (emphasis added) (citing *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S. Ct. 834, 836 (2005)). And "investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop." *Id.* at 258, 805 S.E.2d 674. In any event, extending a traffic stop is permissible if law enforcement finds a reasonable articulable suspicion of criminal activity that justifies further delay of the stop's conclusion. *See id.* at 257, 805 S.E.2d 673; *see also State v. Heien*, 226 N.C. App. 280, 286, 741 S.E.2d 1, 5 (2013) ("Once the purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay."). The threshold for reasonable articulable suspicion of criminal activity requires only "a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Campbell*, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (internal quotation marks and citation omitted). "A court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion . . . exists." *Id.* at 664, 617 S.E.2d at 14 (internal quotation marks and citation omitted).

While waiting for defendant to produce his registration, Lt. Bass smelled a faint odor of marijuana and saw what he believed to be marijuana residue on the floorboard of the vehicle. Defendant disputes the veracity of this evidence, but upon "examining the trial court's order, we do not 'reweigh the evidence and make our own factual findings on appeal, a task for which an appellate court like this one is not well suited.' " *State v. Rodriguez*, 371 N.C. 295, 319, 814 S.E.2d 11 (2018) (quoting *State v. Corbett*, 376 N.C. 799, 822, 855 S.E.2d 228, 245 (2021)). Invoking this Court's ruling in *State v. Parker*, defendant argues that the scent of marijuana alone cannot "establish criminal activity of another substance" since it smells "indistinguishable" from hemp, which is legal

in North Carolina. 277 N.C. App. 531, 540, 860 S.E.2d 21, 28 (2021); *see also* N.C. Gen. Stat. § 106-568.50 (2023) (The Industrial Hemp Act). While this case is not wholly inapplicable, it does not support defendant's position. In *State v. Parker*, this Court was called on to assess "whether the trial court's order correctly determined that the search of Defendant's vehicle was supported by probable cause." 277 N.C. App. at 538, 860 S.E.2d at 27. In any event, no decision was made as to "whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle" since law enforcement "had more than just the scent of marijuana to indicate that illegal drugs might be present in the car." *Id.* at 541, 860 S.E.2d at 29. Even under the probable cause standard, the United States Supreme Court has noted that it "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 2335 (1983).

Here, the question before us requires not a determination of probable cause but consideration of whether the sight or smell of this substance meets the less demanding standard of reasonable suspicion, required to extend the traffic stop beyond the length of time that is reasonably necessary to accomplish its mission. *See Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609; *see also State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) ("The reasonable suspicion standard is 'a less demanding standard than probable cause' and a 'considerably less [demanding standard] than preponderance of the evidence.' " (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673 (2000)). Extension of the stop must be supported by reasonable suspicion, a determination which "need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277, 122 S. Ct. 744, 753 (2002). And even where "the conduct justifying the stop [is] ambiguous and susceptible of an innocent explanation," "officers [may] detain the individuals to resolve the ambiguity." *Illinois v. Wardlow*, 528 U.S. at 125, 120 S. Ct. at 677.

Defendant posits that the sight or smell of marijuana does not permit the extension of a traffic stop and seeks to analogize this matter with this Court's decision in *State v. Cabbagestalk*, 266 N.C. App. 106, 113-14, 830 S.E.2d 5, 10-11 (2019) (holding that an officer lacked reasonable suspicion to stop the defendant for driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1 (2023), after observing the defendant drinking a beer and driving a car two hours later without any evidence of impairment). However, a comparison of the facts and alleged crimes of each case reveal that defendant's position is

untenable. The driving while impaired statute states, in relevant part: "A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. . . ." N.C. Gen. Stat. § 20-138.1. The facts of *Cabbagestalk* displayed insufficient reasonable suspicion as to one element of the alleged crime. The applicable drug statute states, in relevant part: "Except as authorized . . . it is unlawful for any person . . . [t]o possess a controlled substance." N.C. Gen. Stat. § 90-95 (2023). And marijuana remains a controlled substance under N.C. Gen. Stat. § 90-94 (2023). In contrast to the impaired driving case, the trial court's order contains findings of fact that address all elements of the alleged crime. Thus, we next consider whether the contested conclusion, undergirded by the trial court's findings, survives constitutional demands.

Similar to this Court's decision in *State v. Teague*, we find the analyses of the federal courts of North Carolina instructive. 286 N.C. App. 160, 179, 879 S.E.2d 881, 896 (2022) (discretionary review denied *State v. Teague*, 385 N.C. 311, 891 S.E.2d 281 (2023)). When addressing the higher standard of probable cause, the United States District Court for the Eastern District of North Carolina noted that "the smell of marijuana alone . . . supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' " *United States v. Harris*, No. 4:18-CR-57-FL-1, 2019 U.S. Dist. LEXIS 211633, at *9 (E.D.N.C. Dec. 9, 2019) (quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983)). The United States District Court for the Western District of North Carolina has taken a similar approach when addressing the defendant's claim that "the alleged contraband found in his vehicle could have been legal hemp not marijuana. . . ." *United States v. Brooks*, No. 3:19-CR-00211-FDW-DCK, 2021 U.S. Dist. LEXIS 81027, at *10 (W.D.N.C. Apr. 28, 2021). There, the court concluded that "even with the social acceptance of marijuana seeming to grow daily, precedent on the plain odor of marijuana giving law enforcement probable cause to search has not been overturned." *Id.* at *13. Moreover, when considering an analogous issue, the United States Court of Appeals for the Fourth Circuit held that a glass stem pipe in plain view, which "may be put to innocent uses" provided sufficient probable cause to search a vehicle. *United States v. Runner*, 43 F.4th 417, 423 (4th Cir. 2022). The court held that "[d]espite the increased use of glass pipes to ingest legal substances

such as CBD oil, it is still reasonable that a police officer would reach the belief that a glass pipe was evidence of a crime supporting probable cause." *Id.* at 422.

As this Court determined in *State v. Teague*, "[t]he passage of the Industrial Hemp Act, in and of itself, did not modify the State's burden of proof at the various stages of our criminal proceedings." 286 N.C. App. at 179, 879 S.E.2d at 896. Thus, our de novo review of this matter leads us to conclude that the traffic stop was not unlawfully extended, and the trial court did not err in concluding the same. Considering the totality of the circumstances, there was at least "a minimal level of objective justification, something more than an unparticularized suspicion or hunch" of completed criminal activity—possession of marijuana. *State v. Campbell*, 359 N.C. at 664, 617 S.E.2d at 14. We hold that the stop of defendant was not extended in contravention of his constitutional rights. Therefore, the trial court did not err in denying defendant's motion to suppress, and this assignment of error is overruled.

IV. Conclusion

The trial court properly denied defendant's motion to suppress. For the reasons set forth above, we hold that (1) to the extent defendant challenges the trial court's findings of fact, they are adequately supported by competent evidence, (2) the trial court made sufficient findings of fact to support the challenged conclusion of law, and (3) the trial court did not err in denying defendant's motion to suppress and determining that the traffic stop was not unconstitutionally prolonged.

NO ERROR.

Chief Judge DILLON and Judge COLLINS concur.

STATE v. JACKSON

[292 N.C. App. 616 (2024)]

STATE OF NORTH CAROLINA
v.
CURTIS LEVON JACKSON, DEFENDANT

No. COA22-280

Filed 5 March 2024

1. Constitutional Law—right to autonomy in presentation of defense—criminal case—record unclear regarding absolute impasse—no structural error

In a prosecution for second-degree forcible rape and other related offenses, where defense counsel informed the court that defendant would not introduce any evidence at trial but where defendant told the court during a colloquy that he did want defense counsel to introduce certain documentary evidence, it was impossible to determine from the cold record whether an "absolute impasse" existed between defendant and his counsel such that the trial court—by not instructing defense counsel to conform to defendant's wishes—deprived defendant of his Sixth Amendment right to autonomy in the presentation of his defense. Even so, any error in that regard would not have amounted to structural error under the applicable precedent.

2. Constitutional Law—effective assistance of counsel—criminal case—defense's closing argument—no implied concession of guilt

In a prosecution for second-degree forcible rape and other related offenses, defendant was not deprived of his Sixth Amendment right to effective assistance of counsel, as there was no *Harbison* error during closing arguments where defense counsel mentioned all except one of the charges against defendant when asking the jury to find him not guilty. This omission was not an implied concession of defendant's guilt as to that particular crime, especially where defense counsel had made other statements noting the lack of evidence to support such a charge and otherwise generally asked the jury to find defendant not guilty.

3. Indictment and Information—facial validity—habitual misdemeanor assault—physical injury element—described as "serious" injury

The trial court had jurisdiction to sentence defendant for habitual misdemeanor assault, since the indictment was facially valid where it alleged that, in addition to having two prior assault convictions,

defendant "did assault and strike" his girlfriend in violation of N.C.G.S. § 14-33.2 by "hitting her shoulder, thereby inflicting serious injury." Although the indictment did not precisely state that defendant caused "physical injury," as prescribed in section 14-33.2, the term "serious injury" includes physical injuries; therefore, under recent legal trends moving away from technical pleading requirements, defendant still received sufficient notice of the charge made against him.

Judge MURPHY concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 12 August 2021 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 11 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Joseph P. Lattimore for Defendant.

GRIFFIN, Judge.

Defendant Curtis Levon Jackson appeals from judgment entered upon a jury verdict finding him guilty of second-degree forcible sex offense; second-degree forcible rape; first-degree kidnapping; assault on a female; interfering with emergency communication; assault with a deadly weapon; and assault inflicting serious injury. Defendant contends he was denied protections guaranteed by the Sixth Amendment when he was deprived of both the right to autonomy in the presentation of his defense and the right to effective assistance of counsel. Defendant further contends the trial court lacked jurisdiction to sentence him for habitual misdemeanor assault where the indictment was facially invalid. We hold Defendant was not denied any right guaranteed by the Sixth Amendment. Additionally, we hold the trial court maintained jurisdiction to sentence Defendant for habitual misdemeanor assault as the indictment was not facially invalid.

I. Factual and Procedural Background

This case arises from incidents which occurred 26 April 2020. Evidence at trial tended to show the following:

In March 2020, Defendant met the victim at a grocery store. The two began dating and maintained a tumultuous relationship. On the evening of 25 April 2020, victim attended a party. Defendant became agitated

and repeatedly called victim. When victim finally answered, Defendant told her to bring him food. Defendant threatened to drive to victim's home, where she resided with her children, if she refused. In an effort to keep Defendant away from her children, victim reluctantly agreed to take food to Defendant at his home.

Upon victim's arrival with the food, Defendant turned off victim's phone and took her keys. Throughout the night and into the next morning, 26 April 2020, Defendant continually raped and assaulted victim. Defendant told victim, on the morning of 26 April 2020, she was going to drive him to an appointment. Defendant threatened to tie victim up in his room if she refused.

Victim drove Defendant to the appointment but remained in the car. Throughout Defendant's appointment, victim made several attempts to get help. Eventually, she was able to alert a store clerk nearby to call the police. Defendant was arrested shortly thereafter, and victim was transported to a nearby hospital for treatment of her injuries.

On 4 May 2020, Defendant was indicted on charges of second-degree forcible sex offense, second-degree forcible rape, first-degree kidnapping, assault on a female, habitual misdemeanor assault, interfering with emergency communication, assault with a deadly weapon, and assault inflicting serious injury.

The matter came on for jury trial on 9 August 2021 in Wake County Superior Court. On 12 August 2021, the jury returned a verdict, finding Defendant guilty on all charges. The trial court arrested judgment on the assault inflicting serious injury conviction—the predicate offense for the habitual misdemeanor assault conviction. The court then pronounced judgment and sentenced Defendant on the remaining convictions.

Defendant gave notice of appeal in open court.

II. Analysis

Defendant argues (A) he was denied protections guaranteed by the Sixth Amendment when he was deprived of both the right to autonomy in the presentation of his defense and the right to effective assistance of counsel. Defendant further argues (B) the trial court lacked jurisdiction to sentence him for habitual misdemeanor assault as the indictment was facially invalid. We disagree.

A. The Sixth Amendment

Defendant contends he was denied protections guaranteed by the Sixth Amendment when he was deprived of both the right to autonomy

in the presentation of his defense and the right to effective assistance of counsel.

We review alleged violations of a defendant's constitutional rights de novo. *See State v. Crump*, 273 N.C. App. 336, 342, 848 S.E.2d 501, 505 (2020); s*ee also State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) ("Under a de novo review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." (internal marks, emphasis, and citation omitted)).

1. Defendant's right to autonomy in the presentation of his defense

[1] Defendant contends he was denied his Sixth Amendment right to autonomy in the presentation of his defense as the trial court committed a structural error in failing to instruct Defendant's counsel to conform to Defendant's desire to introduce documentary evidence when the two reached an absolute impasse.

The Sixth Amendment guarantees the accused, in all criminal prosecutions, not only the right to have the assistance of counsel in making his defense, but also the right to make his own defense. *See* U.S. Const. amend. VI; N.C. Const. Art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right to . . . have counsel for defense[.]"); *see also State v. Payne*, 256 N.C. App. 572, 581, 808 S.E.2d 476, 483 (2017) ("Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is [ ] necessarily implied by the structure of the Amendment." (quoting *Faretta v. California*, 422 U.S. 806, 819–20 (1975))). Even where a defendant elects to exercise his right to have the assistance of counsel, he is still entitled to some autonomy over his defense. *See Faretta*, 422 U.S. at 819–20; *see also State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991) ("No person can be compelled to take the advice of his attorney." (internal marks and citations omitted)). This is because the attorney-client relationship is one based in the "principles of agency, [ ] not guardian and ward." *Ali*, 329 N.C. at 403, 407 S.E.2d at 189 (internal marks and citation omitted). Thus, an attorney "is bound to comply with her client's lawful instructions" and may only act within the scope of the authority conferred upon her by the defendant. *Id.* (citation omitted).

Our Courts have previously recognized certain decisions, relating to the conduct of a case, are to be made by the accused, while other strategic and tactical decisions, such as what and how evidence should be introduced, are to be made by defense counsel after consultation with the defendant. *Id.*; *see also* The American Bar Association Criminal

Justice Standards for the Defense Function Standard 4-5.2 (4th ed. 2017). However, where the defendant and his defense counsel reach an absolute impasse and are unable come to an agreement on such tactical decisions, the defendant's wishes must control. *State v. Ward*, 281 N.C. App. 484, 487, 868 S.E.2d 169, 173 (2022) (internal marks and citation omitted). Notably, upon reaching an absolute impasse, "defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189; *see also State v. Floyd*, 369 N.C. 329, 340, 794 S.E.2d 460, 467 (2016).

In *State v. Floyd*, the defendant argued, on appeal, the trial court failed to adequately address an impasse between the defendant and his counsel regarding certain unidentified questions the defendant wanted to be asked of a witness. *Id.* Further, the defendant argued the trial court's failure to instruct his counsel to comply with his wishes amounted to a denial of his constitutional right to control his defense and confront a witness. *Id.* Our Supreme Court stated, while the defendant did tell the court his attorney was not asking the questions the defendant told him to ask, the record did "not shed any light on the nature or the substance" of those questions. *Id.* at 341, 794 S.E.2d at 468. Further, the Court also recognized the defendant was generally disruptive throughout trial and was forced to leave the courtroom, which led him to have a consultation with his attorney, while the witness, to whom he wished to ask the desired questions, was on the witness stand. *Id.* Accordingly, our Supreme Court held it was unable, without engaging in conjecture, to determine whether the defendant had a serious disagreement with his attorney regarding trial strategy and therefore could not determine, from the cold record, whether an absolute impasse existed. *Id.*

Here, defense counsel stated Defendant would not introduce evidence or testify on his own behalf. The trial court then conducted a colloquy to ensure Defendant understood it was his right to testify and was waiving the right upon his own volition:

TRIAL COURT:	All right. Now, you mentioned—I mentioned evidence. You have a right to present evidence through other witnesses and so forth. Do you understand that?
DEFENDANT:	Yes, sir.
TRIAL COURT:	All right. My understanding is you have no intentions of putting on any evidence; is that correct?

DEFENDANT: I have no intention of testifying.

TRIAL COURT: Okay. Are you going to present any evidence?

DEFENDANT: I wanted my attorney to present some evidence.

. . .

TRIAL COURT: All right. Now, are you—in reference to evidence, is it some type of documentation or some type of physical or tangible object that you wanted to present as evidence?

DEFENDANT: Yeah, documentation.

Defendant contends, during this colloquy, the trial court was presented with an absolute impasse, which occurred between Defendant and defense counsel, concerning Defendant's desire to introduce certain documentary evidence. However, while Defendant did announce to the court he wanted his attorney to "present some evidence," the record fails to indicate the substance of such questions. Therefore, just as our Supreme Court held in *Floyd*, we hold we are unable to determine from the cold record whether there was a true disagreement, which would amount to an absolute impasse, between Defendant and defense counsel.

Defendant further contends, upon being presented with what he argued was an absolute impasse, the trial court committed a structural error.

A structural error is a rare constitutional error "resulting from structural defects in the constitution of the trial mechanism[.]" *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (internal marks and citation omitted). These errors "prevent a criminal trial from reliably serving its function as a vehicle for determination of guilt or innocence." *State v. Veney*, 259 N.C. App. 915, 919, 817 S.E.2d 114, 117 (2018) (internal marks and citation omitted); *see also Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 ("Such errors infect the entire trial process and necessarily render a trial fundamentally unfair[.]" (internal marks and citations omitted)). Our Supreme Court has identified six instances of structural error, which include:

> (1) complete deprivation of right to counsel; (2) a biased trial judge; (3) the unlawful exclusion of grand

> jurors of the defendant's race; (4) denial of the right to self-representation at trial; (5) denial of the right to a public trial; and (6) constitutionally deficient jury instructions on reasonable doubt.

State v. Minyard, 289 N.C. App. 436, 448–49, 890 S.E.2d 182, 191 (2023) (internal marks and citations omitted). These structural errors are reversible per se. *See State v. Campbell*, 280 N.C. App. 83, 87–88, 866 S.E.2d 325, 328 (2021) (quoting *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 ("[A] defendant's remedy for structural error is not [dependent] upon harmless error analysis[.]")).

After Defendant stated there was documentary evidence he wanted defense counsel to introduce, the trial court conducted the following colloquy:

> TRIAL COURT: All right. Now, you've talked about this with your attorney, correct?
>
> DEFENDANT: Yes, sir.
>
> TRIAL COURT: All right. Your attorney has addressed with you the legal issues as far as any documentation is concerned?
>
> DEFENDANT: Legal issues as?
>
> TRIAL COURT: About how it could be—if it can be admitted into evidence.
>
> . . .
>
> [discussion of potential foundational issues concerning the introduction of evidence]
>
> . . .
>
> TRIAL COURT: You may not agree with it, but do you understand it?
>
> DEFENDANT: Yeah. Like—like if I wanted to enter some type of evidence, it would totally be up to my attorney? Evidence away from me testifying?
>
> TRIAL COURT: Well, if your attorney has determined that that evidence may not be legally admissible, relevant, pertinent, and a slew of other things, he can make that

> determination. But I will say this also, even if you thought, respectfully, if you were representing yourself and you attempted to put that object in, I cannot guarantee it's going to come into evidence if it's not coming in properly under the evidentiary rules. Because there are rules that would involve whether or not it's admissible or not.

Defendant argues the trial court committed structural error as it failed to properly address the alleged absolute impasse when it did not require defense counsel to comply with Defendant's desire to present evidence.

As stated above, we are unable to determine from the cold record whether there existed an absolute impasse between Defendant and defense counsel. Nonetheless, the error here, which Defendant contends amounted to a structural error, is not one our Supreme Court has previously identified as a structural error. *See Minyard*, 289 N.C. App. at 448–49, 890 S.E.2d at 191. Therefore, Defendant's argument fails.

2. Defendant's right to effective assistance of counsel

[2] Defendant contends he was denied his Sixth Amendment right to effective assistance of counsel as defense counsel committed a *Harbison* error during closing arguments by impliedly conceding Defendant's guilt. Further, Defendant argues the trial court erred as it failed to conduct an inquiry with Defendant to ensure he knowingly consented to defense counsel's concession of guilt.

Again, we note the Sixth Amendment guarantees the accused, in all criminal prosecutions, the right to have the assistance of counsel in making his defense. *See* U.S. Const. amend. VI; N.C. Const. Art. I, § 23. Inherent in the right to the assistance of counsel is the right to have effective assistance of counsel. *See State v. McNeill*, 371 N.C. 198, 217, 813 S.E.2d 797, 812 (2018) (citation omitted). Generally, where a defendant makes an ineffective assistance of counsel claim, arguing he was denied effective assistance of counsel, he must satisfy a two-part test established by the United States Supreme Court in *Strickland v. Washington*. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *see also State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985) ("[W]e expressly adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution."). To meet his burden under *Strickland*, a defendant must show (1) his

counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *See Strickland*, 466 U.S. at 687–88; *see also McNeill*, 371 N.C. at 218, 813 S.E.2d at 812.

While acknowledging the *Strickland* test for claims of ineffective assistance of counsel, our Supreme Court in *State v. Harbison* held ineffective assistance of counsel, per se in violation of the Sixth Amendment, occurs where defense counsel admits a defendant's guilt to the jury without consent. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507–08 (1985). This violation, known as a *Harbison* error, exists where, in viewing the defense counsel's statements in context, the statements " 'cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense[.]' " *State v. Moore*, 286 N.C. App. 341, 345, 880 S.E.2d 710, 714 (2022) (quoting *State v. McAllister*, 375 N.C. 455, 475, 847 S.E.2d 711, 723 (2020)); *see also State v. Mills*, 205 N.C. App. 577, 587, 696 S.E.2d 742, 748–49 (2010) (explaining defense counsel's statements "must be viewed in context to determine whether the statement was, in fact, a concession of [the] defendant's guilt of a crime[.]" (citation omitted)); *McAllister*, 375 N.C. at 473, 847 S.E.2d at 722 (holding *Harbison* errors extended not only to the defense counsel's express admissions of guilt but also to implied admissions of guilt).

A *Harbison* error does not exist where the defendant has consented to his counsel's statement as a trial strategy. *McAllister*, 375 N.C. at 475, 847 S.E.2d at 723. However, even under these circumstances, "the trial court must be satisfied that, prior to any admissions of guilt . . . , the defendant [gave] knowing and informed consent, and the defendant [was] aware of the potential consequences of his decision." *State v. Foreman*, 270 N.C. App. 784, 790, 842 S.E.2d 184, 189 (2020) (internal marks and citation omitted).

In *State v. McAllister*, the defendant was indicted on charges of: habitual misdemeanor assault based on assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape. 375 N.C. at 458–59, 847 S.E.2d at 714. During the State's case in chief, a law enforcement interview with the defendant was entered into evidence and played for the jury. *Id.* at 459, 847 S.E.2d at 714. Then, during closing arguments, the defense counsel referred to the interview stating:

> You heard him admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives. . . .

> . . .
>
> [Y]ou may dislike [the defendant] for injuring [the victim], that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did. He didn't rape this girl. . . .
>
> . . .
>
> Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

Id. at 460–61, 847 S.E.2d at 715. After deliberation, the jury returned a verdict finding the defendant not guilty on all charges except the charge of assault on a female. *Id.* at 461, 847 S.E.2d at 715.

On appeal, our Supreme Court noted the defense counsel's statements were problematic as he: attested to the accuracy of the admissions made by the defendant in his interview; reminded the jury the defendant did wrong and implied there was no justification for the defendant's use of force against the victim; and asked the jury to find the defendant not guilty of all charges while omitting mention of the charge of assault on a female. *Id.* at 474, 847 S.E.2d at 722–23. Thus, our Supreme Court held the defense counsel's statements amounted to an implied admission of guilt and remanded the case to the Superior Court for an evidentiary hearing to determine whether the defendant knowingly consented in advance to the defense counsel's admission of guilt to the assault on a female charge. *Id.* at 477–78, 847 S.E.2d at 725.

Here, in his closing argument, defense counsel stated, in relevant part:

> [Defendant] is charged with some very serious crimes. I mean, kidnapping, forcible rape. Years and years and years in prison.
>
> . . .
>
> When you look at evidence in this case, the credible evidence, . . . not evidence that just comes out of her mouth. She says it, that doesn't make it true. You are the sole judges of credibility in this case. You have to use your common sense. You have to evaluate the witness. And that's your job.

> . . .
>
> I mean, ladies and gentlemen, when a witness gets up here and makes—spits out rhetoric that doesn't make any sense at all, you can't just accept it as true.
>
> . . .
>
> So, when you think about the other witnesses, the nurse . . . that form that was filled out that I believe has been submitted to evidence, you all got to look at it, the checklist, it said no injuries. I mean, we're talking about the neck and we're talking about strangulation, but there's no marks on the neck.
>
> [Victim] testified that she could hardly walk. She had to have somebody help her shower, bathe, and that kind of thing. Think about the body cam when she's running around all over the place.
>
> I mean, the doctor at the stem cell center, she approached him, . . . he said she looked fine. There was nothing wrong with her. And she's alleging these serious injuries. I mean, common sense tells you she's not seriously injured.
>
> Forcible rape, kidnapping, we don't have that here.
>
> . . .
>
> Ladies and gentlemen, [Defendant] is not guilty of kidnapping, and he's not guilty of a sexual offense of any kind. We'd ask that you find him not guilty. Thank you very much for your time.

Undoubtedly, Defense counsel only mentioned Defendant's charges for kidnapping and "sexual offense of any kind," omitting reference to Defendant's charge for assault on a female. Nevertheless, unlike the defendant's counsel in *McAllister*, defense counsel here never implied or mentioned any misconduct on behalf of Defendant. Instead, defense counsel, despite failing to specifically reference Defendant's assault charge, spent ample time making statements explicitly calling the jury's attention to the lack of evidence to support a conviction on such a charge and asked the jury, generally, to find Defendant not guilty. Thus, in viewing the entirety of defense counsel's statements in context, we hold those statements cannot logically be interpreted as an implied concession of Defendant's guilt.

We recognize Defendant further argues the trial court erred as it failed to conduct the required inquiry with Defendant to ensure he knowingly consented to defense counsel's concession of guilt. However, because we hold defense counsel did not concede guilt on behalf of Defendant, we hold the trial court was not required to conduct an inquiry and therefore did not err.

B. Validity of the Indictment and the Trial Court's Jurisdiction

[3] Defendant contends the indictment was facially invalid as to the charge of habitual misdemeanor assault thereby divesting the trial court of jurisdiction. We disagree.

An indictment is a pleading which makes a formal accusation that the defendant has committed a crime. *See State v. Abbott*, 217 N.C. App. 614, 617, 720 S.E.2d 437, 439 (2011). The purpose of an indictment is, among other things, to provide the accused with notice of the offense with which he is charged. *See State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 270–71 (2016); *see also State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). Thus, our North Carolina General Statutes, section 15A-924(a)(5), requires an indictment contain:

> A plain and concise factual statement in each count which, . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2021). Where the indictment fails to do so, there is not a sufficient accusation against the defendant, the trial court acquires no jurisdiction, and any subsequent trial and conviction are a nullity. *See State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) ("There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation." (internal marks and citation omitted)).

Here, Defendant argues the indictment failed to allege every element of the offense of habitual misdemeanor assault because count IV failed to state the assault on a female caused "physical injury." However, habitual misdemeanor assault in violation of N.C. Gen. Stat. § 14-33.2 was sufficiently alleged in counts V and VIII:

> V. And the grand jurors for the state upon their oath present that on or about April 26, 2020, [ ] [D]efendant had been previously convicted of two or more felony or

> misdemeanor assaults, and the earlier of these convictions occurred no more than 15 years prior to the date of the current offense, to wit:
>
> > a. On or about July 31, 2011 [ ] [D]efendant did commit the assault of Assault on a Government Official/Employee in Wake County, North Carolina, and thereafter was convicted and judgment entered on August 22, 2011 in Wake County District Court (File No. 11 CR 217692).
> >
> > b. On or about July 31, 2011 [ ] [D]efendant did commit the assault of Assault on a Female in Wake County, North Carolina, and thereafter was convicted and judgment entered on August 22, 2011 in Wake County District Court (File No. 11 CR 217690).
>
> . . .
>
> VIII. And the grand jurors for the state upon their oath present that on or about April 26, 2020, in Wake County, [ ] [D]efendant named above unlawfully and willfully did assault and strike [victim] [ ], by hitting her shoulder, thereby inflicting serious injury. This act was done in violation of [N.C. Gen. Stat § 14-33.2].

Pursuant to N.C. Gen. Stat. § 14-33.2, a defendant is guilty of habitual misdemeanor assault where he,

> violates any of the provisions of [N.C. Gen. Stat. § 14-33] and causes physical injury, or [N.C. Gen. Stat. §14-34], and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

N.C. Gen. Stat. § 14-33.2 (2021). Accordingly, the essential elements of habitual misdemeanor assault are, the defendant: (1) violates any of the provisions of N.C. Gen. Stat. § 14-33, (2) causes physical injury, and (3) has two or more prior convictions for misdemeanor or felony assault, with the earlier of the two occurring less than 15 years prior to the date of the current violation.

The indictment here included allegations concerning elements (1) and (3) of the offense of habitual misdemeanor assault. Defendant's two prior convictions were alleged in count V, and Defendant having

violated the provisions of N.C. Gen. Stat. § 14-33, was alleged in count VIII (assault inflicting serious injury). Thus, we need only determine whether the indictment was sufficient as to element (2) of the habitual misdemeanor assault charge where count VIII stated Defendant inflicted "serious injury" rather than "physical injury," as prescribed in the statutory language of N.C. Gen. Stat. § 14-33.2.

In drawing an indictment, we recognize the "true and safe rule for prosecutors . . . is to follow strictly the precise wording of the statute." *State v. Sturdivant*, 304 N.C. 293, 310–11, 283 S.E.2d 719, 731 (1981) (internal marks and citations omitted). Nonetheless, our precedent makes clear "it is not the function of an indictment to bind the hands of the State with technical rules of pleading[.]" *Id.* at 311, 283 S.E.2d at 731; *see also In re J.U.*, 384 N.C. 618, 623, 887 S.E.2d 859, 863 (2023); *State v. Jones*, 265 N.C. App. 644, 648, 829 S.E.2d 507, 510–11 (2019); *Williams*, 368 N.C. at 623, 781 S.E.2d at 270–71.

At common law, our courts were bound by strict, highly technical pleading standards which required specific evidentiary allegations to support each element. *See State v. Owen*, 5 N.C. 452, 464 (1810) (holding an indictment for murder, where the death was occasioned by a wound, was insufficient as it failed to describe the dimensions of the wound). However, our General Assembly has since enacted statutes intended to alleviate such technical pleading requirements. *See State v. Rankin*, 371 N.C. 885, 919, 821 S.E.2d 787, 810–11 (2018) (Martin, C.J., dissenting) (thoroughly recounting the history of criminal pleadings in North Carolina). Through such legislative reforms, North Carolina criminal law and procedure has "evolved from requiring elemental specificity to a more simplified requirement that indictments allege facts supporting each essential element of the charged offense." *In re J.U.*, 384 N.C. at 623, 887 S.E.2d at 863 (internal marks and citation omitted).

Today, our General Statutes provide, an indictment "is sufficient in form for all intents and purposes if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner[.]" N.C. Gen. Stat. § 15-153 (2021). Further, section 15-153 states an indictment will 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." *Id.*

In considering the "serious injury" language used in count VIII above, we note, our Court in *State v. Harris* stated, "an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words."

219 N.C. App. at 592–93, 724 S.E.2d at 636 (internal marks and citation omitted); *see also State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987) ("An indictment couched in the language of the statute is generally sufficient to charge the statutory offense." (citation omitted)). Similarly, our Supreme Court most recently stated, "[i]t is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended." *In re J.U.*, 384 N.C. at 624, 887 S.E.2d at 863 (internal marks and citation omitted).

Relevant here, our Courts have repeatedly applied a broad definition of serious injury—including within that definition both physical and mental injuries. *See State v. Everhardt*, 326 N.C. 777, 781, 392 S.E.2d 391, 393 (1990) (holding a mental injury will support the element of serious injury under N.C. Gen. Stat. § 14-32); *State v. Demick*, 288 N.C. App. 415, 436, 886 S.E.2d 602, 618 (2023) (citing N.C. Gen. Stat. § 14-318.4, which defines serious physical injury to include physical and mental injuries). Moreover, we note the purpose of an indictment is, among other things, to provide the defendant with notice of the offense with which he is charged, using language which would allow a person of common understanding to know what is intended, so that he may properly prepare for trial. *See Williams*, 368 N.C. at 623, 781 S.E.2d at 270–71; *see also In re J.U.*, 384 N.C. at 624, 887 S.E.2d at 863. Regardless of whether count VIII of the indictment used the broader, "serious injury" language, it logically follows Defendant was noticed of his need to defend against an allegation that he caused physical injury as "serious injury" is defined to include physical injury. Thus, in using "serious injury" rather than "physical injury" the indictment still served its purpose—to provide Defendant with notice of the offense with which he was charged, N.C. Gen. Stat. § 14-33.2.

North Carolina law shows a consistent trend away from the archaic and technical pleading requirements at common law. Thus, despite the use of the term "serious injury" rather than "physical injury" in the indictment, we hold the indictment was not facially invalid as it sufficiently noticed Defendant of the charges against him. Because the indictment was not facially invalid, the trial court was not deprived of jurisdiction.

III. Conclusion

We hold Defendant was not denied any right guaranteed by the Sixth Amendment. Further, we hold the trial court maintained jurisdiction to sentence Defendant for habitual misdemeanor assault as the indictment was not facially invalid.

NO ERROR.

Judge CARPENTER concurs.

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

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

While I fully concur in the Majority's analysis of Defendant's *Harbison* argument, I respectfully dissent from its holding as to the sufficiency of the indictment. To be valid and thus confer jurisdiction to the trial court, a criminal indictment must allege every essential element of the charged offense. In limited circumstances, when one count in an indictment does not allege all essential elements, those elements may be imputed from a separate count in the indictment. Defendant appeals his conviction of habitual misdemeanor assault under N.C.G.S. § 14-33.2 on jurisdictional grounds on the basis that the indictment failed to allege "physical injury." In my view, Defendant was not properly indicted with habitual misdemeanor assault under N.C.G.S. § 14-33.2 due to the indictment's failure to allege the element of physical injury, either expressly or through supplementation. I would therefore vacate Defendant's habitual misdemeanor assault conviction and remand for a new sentencing hearing on Defendant's conviction for assault inflicting serious injury.

Defendant Curtis Levon Jackson appeals from convictions of second-degree forcible sex offense in violation of N.C.G.S. § 14-27.27, second-degree forcible rape in violation of N.C.G.S. § 14-27.22, first-degree kidnapping in violation of N.C.G.S. § 14-39, habitual misdemeanor assault in violation of N.C.G.S. § 14-33.2, assault with a deadly weapon in violation of N.C.G.S. § 14-33(C)(1), interfering with emergency communication in violation of N.C.G.S. § 14-286.2, and assault inflicting serious injury against Tanya,[1] his ex-partner, in violation of N.C.G.S. § 14-33(C)(2).

In early March 2020, Tanya and Defendant met at a grocery store. Tanya gave Defendant her phone number. Thereafter, they began talking on the phone and spending time together on weekends at Defendant's house. The relationship started off well, but it soured in April 2020 when Tanya became pregnant, informed Defendant, and lost the baby a week

1. I use a pseudonym to protect the identity of the victim and for ease of reading.

and a half later. According to Tanya, things went "downhill real quick [sic]." Defendant exhibited the occasional "tantrum" and would take her belongings to keep her from leaving.

On 24 April 2020, Tanya told Defendant over the phone that she did not want to continue their relationship. That same day, she agreed to meet Defendant at his friend's house to talk. Defendant drove his roommate's car to his friend's house. When she arrived at the house, Defendant joined her in her truck. During their conversation, Defendant "got frustrated" over a phone call she received about an upcoming party. Tanya testified that "[Defendant] didn't want to sit there no more. He wanted to go [to] his place." When she refused to drive him to his place, Defendant grabbed her pocketbook, food, and keys; got back into his roommate's car; and drove away with her belongings.

Using her truck's spare key, Tanya followed Defendant to his house to retrieve her belongings. When she arrived, Defendant got inside of her truck, and the two argued. Defendant took Tanya's spare key out of the truck's ignition, along with her pocketbook, food, phone, and first set of keys, and went into his room. When Tanya followed Defendant into his room for her belongings, Defendant slapped her in the face, berated her, and refused to let her leave.

The next day, on 25 April 2020, Tanya drove Defendant to an appointment. After his appointment, she and Defendant argued because she planned to attend a party later that evening. Defendant, in response, took her keys and grabbed her gun to prevent her from leaving. However, Defendant returned both the keys and gun when Tanya threatened to call the police.

That night, Tanya attended the party. Defendant repeatedly called and texted her while she was at the party, but she had blocked his phone number. Defendant then called Tanya from her son's phone to speak with her. Defendant complained to Tanya about hunger and back pain, threatening to show up at her home if she did not bring food to his house. Eventually, Tanya agreed to take Defendant some food because she did not want Defendant to be around her children at home. When Tanya arrived at Defendant's house, Defendant became agitated and requested that Tanya get off her phone so the two could engage in uninterrupted conversation.

Tanya turned her phone off as Defendant requested without "think[ing] much of it." Defendant then "flipped" and announced he was "going to beat" Tanya. Defendant claimed to have "planned everything all the way up to this." Defendant seized Tanya's keys and phone and started swinging at her, slapping her face, and punching her arms while

calling her names. Defendant also hit her with a broom handle, choked her, and put a pillow over her face. Defendant tried to damage her phone with a hammer but was unsuccessful. Defendant threatened Tanya not to call the police and raped and assaulted her several times from the night of 25 April 2020 until 8:00 am on 26 April 2020. Fearing Defendant would tie her up at his house if she did not join him, Tanya agreed to accompany Defendant to an appointment on the morning of 26 April 2020. After several attempts to get help, she successfully alerted a store clerk to call the police. Defendant was arrested shortly thereafter, and Tanya was transported to a nearby hospital for treatment of her injuries.

On 4 May 2020, Defendant was indicted for second-degree forcible sex offense, second-degree forcible rape, first-degree kidnapping, habitual misdemeanor assault, interfering with emergency communication, and assault with a deadly weapon inflicting serious injury ("AWDWISI"). The indictment alleged, in relevant part:

> IV. [] [T]he grand jurors for the [S]tate upon their oath present that on or about [26 April] 2020, in Wake County, [Defendant] unlawfully and willfully did assault and strike [Tanya], a female person. [Defendant] is a male person and was at least 18 years of age when the assault occurred. This act was done in violation of N.C.G.S. § 14-33(c)(2).
>
> V. And the grand jurors for the [S]tate upon their oath present that on or about [26 April] 2020, [Defendant] had been previously convicted of two or more felony or misdemeanor assaults, and the earlier of these convictions occurred no more than 15 years prior to the date of the current offense, to wit:
>
> > a. On or about [13 July 2011,] [Defendant] did commit the assault of Assault on a Government Official/Employee in Wake County, North Carolina, and thereafter was convicted and judgment entered on [22 August 2011] in Wake County District Court (File No. 11 CR 217692).
> >
> > b. On or about [13 July 2011], [Defendant] did commit the assault of Assault on a Female in Wake County, North Carolina, and thereafter was convicted and judgment entered on [22 August 2011] in Wake County District Court (File No. 11 CR 217690).
>
> . . . .

> VIII. And the grand jurors for the [S]tate upon their oath present that on or about [26 April] 2020, in Wake County, [Defendant] unlawfully and willfully, did assault and strike [Tanya], by hitting her shoulder, thereby inflicting serious injury. This act was done in violation of N.C.G.S. § 14-33.2.

During trial, outside the presence of the jury, Defendant admitted that, prior to the date of his 25 April and 26 April 2020 assault charges against Tanya, he had been convicted of the crimes of assault on a government official and assault on a female on 22 August 2011, as alleged in Count V.

Later in the proceedings, the trial court conducted a colloquy with Defendant, during which it informed Defendant about his rights to present evidence and testify. Defendant affirmed to the trial court that he understood and voluntarily elected not to testify. Defendant, however, noted his interest in presenting documentary evidence through his defense counsel. Defendant communicated some uncertainty about how to get a certain document admitted into evidence. The following conversation occurred:

> [DEFENDANT]: I wanted my attorney to present some evidence.
>
> [COURT]: All right. Now, as far as evidence, I don't want to get into any attorney-client privilege issues, but is it fair to say that you're asking to have someone else testify in this matter?
>
> [DEFENDANT]: Evidence is only someone testifying?
>
> [COURT]: No. But I'm inquiring, are you asking someone else to testify? That's the first question that I have.
>
> [DEFENDANT]: No, sir.
>
> [COURT]: All right. Now, are you – in reference to evidence, is it some type of documentation or some type of physical or tangible object that you wanted to present as evidence?
>
> [DEFENDANT]: Yeah, documentation.
>
> [COURT]: All right. Now, you've talked about this with your attorney, correct?
>
> [DEFENDANT]: Yes, sir.

> [COURT]: All right. Your attorney has addressed with you the legal issues as far as any documentation is concerned?
>
> [DEFENDANT]: Legal issues as?
>
> [COURT]: About how it could be – if it can be admitted into evidence.
>
> [DEFENDANT]: I think –

The trial court clarified the necessary legal steps Defendant could take with the help of his counsel to ensure a document is appropriately admissible. Defendant communicated that he understood the trial court's explanations; however, right before the jury returned, he noted the following:

> [DEFENDANT]: I know we spoke about the evidence. I mean, I just wanted to say that I did have evidence that—I didn't want to testify. I did have evidence that I thought would help prove my innocence, and my attorney didn't think we should enter that evidence.
>
> . . . .
>
> And it wasn't that he didn't think we could get it in the court, he just didn't think we should enter it. And I just wanted to state that on the record.

The trial court acknowledged the statement, and defense counsel did not respond except to affirm that the defense was ready for the jury to return to the courtroom. Defendant did not present any evidence during the trial or make an offer of proof.

After the trial court provided its jury instructions, the State presented its closing argument, explaining every charge in turn, starting with the more severe crimes—second-degree rape, second-degree sex offense, and first-degree kidnapping—and ending with the "litany of assaults." Defense counsel, inter alia, argued in closing that "[Defendant] doesn't have to prove one single thing. . . . [The State] [has] to prove these charges beyond a reasonable doubt." Defense counsel began and ended his argument by discussing the "very serious crimes" that Defendant was charged with, i.e., "kidnapping[] [and] forcible rape." Defense counsel explained to the jury what the State's burden of proof was regarding the charges and challenged them to carefully evaluate the "stor[ies] [they] heard" and testimonies about Defendant's charges for contradictions. Additionally, defense counsel placed emphasis on the "very serious crimes" throughout his closing argument. The pattern of

defense counsel's emphasis on the more serious crimes alleged by the State was as follows:

> [Defendant] is charged with some very serious crimes. I mean, kidnapping, forcible rape. Years and years and years in prison.
>
> . . . .
>
> Forcible rape, kidnapping, we don't have that here. Every element has to be satisfied.
>
> . . . .
>
> Ladies and gentlemen, [Defendant] is not guilty of kidnapping, and he's not guilty of a sexual offense of any kind. We'd ask that you find him not guilty.

The jury found Defendant guilty on all counts. The trial court arrested judgment on the assault inflicting serious injury conviction due to the habitual misdemeanor assault conviction.

Defendant argues that the indictment was facially invalid as to the habitual misdemeanor assault charge because it failed to allege that the charge on which Defendant claims the habitual misdemeanor assault was predicated, assault on a female, "caused physical injury."[2] Defendant contends that, absent the physical injury element, the trial court lacked subject matter jurisdiction to sentence Defendant for habitual misdemeanor assault.

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its [subject matter] jurisdiction, a challenge to that indictment may be made at any time," even for the first time on appeal. *State v. Wallace*, 351 N.C. 481, 503 (2000). We review whether the trial court had subject matter jurisdiction over the habitual misdemeanor assault charge de novo. *State v. Barnett*, 223 N.C. App. 65, 68 (2012).

To be valid and thus confer jurisdiction, N.C.G.S. § 15A-924(a)(5) requires that "an indictment charging a statutory offense must allege all of the essential elements of the charged offense." *Barnett*, 223 N.C. App. at 68 (citing *State v. Snyder*, 343 N.C. 61, 65 (1996)); *see also State v. Kelso*, 187 N.C. App. 718, 722 (2007) ("[A]n indictment must allege every element of an offense in order to confer subject matter

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2. Physical injury is an essential element required for charging habitual misdemeanor assault under N.C.G.S. § 14-33.2. *See* N.C.G.S § 14-33.2 (2021); *see also State v. Garrison*, 225 N.C. App. 170, 172 (2013).

jurisdiction on the court."), *disc. rev. denied*, 362 N.C. 367 (2008). "The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250 (2019).

A defendant is guilty of habitual misdemeanor assault if

> that person violates any of the provisions of [N.C.G.S.] § 14-33 and causes *physical injury*, or [N.C.G.S.] § 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

N.C.G.S. § 14-33.2 (2021) (Emphasis added). Defendant challenges the validity of his indictment with respect to the habitual misdemeanor assault charge because the indictment did not allege that the assault on a female caused physical injury. Count IV of the indictment alleged that

> [Defendant] unlawfully and willfully did assault and strike [Tanya], a female person. [Defendant] is a male person and was at least 18 years of age when the assault occurred. This act was done in violation of N.C.G.S. § 14-33(c)(2).

Count V of the indictment alleged that

> [Defendant] had been previously convicted of two or more felony or misdemeanor assaults, and the earlier of these convictions occurred no more than 15 years prior to the date of the current offense[.]

Neither Count IV nor Count V contain language alleging that Defendant caused physical injury to Tanya. Thus, Defendant argues, the allegations in Count IV, describing the April 2020 offense, and Count V, describing his previous convictions, are insufficient to indict him for habitual misdemeanor assault.

In response, the State argues that the allegation of injury contained in Count VIII satisfies the physical injury element for the habitual misdemeanor assault charge. Count VIII of the indictment alleges that

> [Defendant] unlawfully and willfully, did assault and strike [Tanya], by hitting her shoulder, thereby inflicting *serious injury*. This act was done in violation of N.C.G.S. § 14-33.2.

(Emphasis added).

While I do not constrain my analysis of the sufficiency of Defendant's indictment to Counts IV and V, the allegation of "serious injury" in Count

VIII is insufficient to satisfy the "physical injury" element for Defendant's habitual misdemeanor assault charge.

In *State v. Barnett*, the defendant was indicted for one count of assault on a female under N.C.G.S. § 14-33 and one count of habitual misdemeanor assault under N.C.G.S. § 14-33.2. *State v. Barnett*, 245 N.C. App. 101, 111–12 (2016), *rev'd in part*, 369 N.C. 298 (2016). The defendant's first count, assault on a female, alleged "physical injury" to the victim; however, the allegations contained in his second count,

> which charged [the defendant] with habitual misdemeanor assault and properly referenced [the defendant's] two prior misdemeanor assaults that occurred less than 15 years prior to date of his current violation, did not include any language regarding [the defendant's] current charge of assault on a female resulting in a physical injury, a necessary showing for a [N.C.G.S.] § 14-33.2 violation.

Id. at 112. The defendant did not dispute the validity of his first count, which alleged assault on a female. *Id.* at 110. However, he "argued that the second count of the indictment fail[ed] to properly allege habitual misdemeanor assault because it did not include . . . a physical injury." *Id.* at 111. Although the count of habitual misdemeanor assault did not contain the physical injury element, we held that the defendant's indictment was sufficient. Defendant's first count, alleging assault on a female, alleged physical injury; therefore, we held that count one supplied the missing physical injury element of the count alleging habitual misdemeanor assault. *Id.* at 113–14. Thus, if an allegation of physical injury from the assault was alleged by the grand jury elsewhere in the indictment, we may impute this element to the otherwise defective allegation of habitual misdemeanor assault in Count V.

Defendant correctly observes that, unlike in *Barnett*, Count IV (assault on a female) here did not include an allegation of physical injury. However, since we may supplement the missing element of physical injury from another part of the indictment, I continue my analysis to determine whether another count in the indictment alleged physical injury.

The State argues that "[C]ount VIII of the indictment sufficiently sets out the charge of habitual misdemeanor assault" because it "allege[s] an assault 'inflicting serious injury. . . .' " I disagree. Count VIII of the indictment provides, in pertinent part:

> [Defendant] unlawfully and willfully did assault and strike [Tanya], by hitting her shoulder, thereby *inflicting serious injury*. The act was done in violation of N.C.G.S. § 14-33.2.

(Emphasis added).

Count VIII alleged "serious injury" and not "physical injury" as required by N.C.G.S. § 14-33.2. We have observed that our Supreme Court "has not defined 'serious injury' for purposes of assault prosecutions, other than stating that 'the injury must be serious, but it must fall short of causing death' and that 'further definition seems neither wise nor desirable.' " *State v. McLean*, 211 N.C. App. 321, 325 (2011) (marks and citation omitted). In *State v. Everhardt*, we held that "[t]he term ['serious injury,' under [N.C.G.S.] § 14-32(b), means physical or bodily injury resulting from an assault with a deadly weapon." *State v. Everhardt*, 96 N.C. App. 1, 12 (1989), *aff'd*, 326 N.C. 777 (1990). However, while not supplying a more limited definition, our Supreme Court rejected this more restrictive equivocation. Upon reviewing *Everhardt*, it held that the term "serious injury" may also encompass mental injury. *Everhardt*, 326 N.C. at 781 (holding that "mental injury will support the element of serious injury under N.C.G.S. § 14-32").

While *Everhardt* analyzed only N.C.G.S. § 14-32(b), we have also applied its definition of "serious injury" outside the § 14-32(b) context. *See*, *e.g.*, *State v. Lofton*, 193 N.C. App. 364, 374 (2008) (applying the broader understanding of "serious injury" discussed in *Everhardt* to N.C.G.S. § 14-32.1(e) and holding that "[b]ecause 'serious injury' may include serious mental injury . . . [defendant's] testimony regarding her mental state . . . is [] relevant"). As we have applied *Everhardt*'s broader definition of "serious injury" beyond N.C.G.S. § 14-32(b), we must also apply it here to reject the premise that "serious injury" only means "physical injury."

The State made no argument as to whether "physical injury" can be squarely defined within our caselaw's interpretation of "serious injury," but rather presupposes "serious injury" to be a viable substitute for "physical injury" for the purposes of alleging habitual misdemeanor assault.[3] Without more appearing on the face of the indictment, the State's implication that "physical injury" is *per se* alleged within the use

3. The State also mentions Count VII in its brief, stating that "Count VII of the indictment alleges a charge of [N.C.G.S.] § 14-33(c)(1), assault with a deadly weapon." However, it makes no further arguments about Count VII or how it supplements the "physical injury" element for a habitual misdemeanor assault charge.

of the phrase "serious injury" is not supported by the broader interpretation we must apply.

While our approach to evaluating indictments is to refrain from "hyper technical scrutiny with respect to form[,]" *In re S.R.S.*, 180 N.C. App. 151, 153 (2006), we must not abscond from our charge to apply governing caselaw and relevant statutory provisions where the General Assembly uses unambiguous language. The unambiguous language of N.C.G.S. § 14-33.2 states that "[a] person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of [N.C.G.S.] § 14-33 and causes *physical injury*[.]" N.C.G.S. § 14-33.2 (2021) (emphasis added). The broadening of the definition of "serious injury" to include both mental and physical injury established that serious injury is not synonymous with physical injury. *Everhardt*, 326 N.C. at 781. Count VIII of the indictment provides that Defendant "inflict[ed] serious injury" by striking and hitting Tanya on her shoulder. However, the indictment alone cannot make the leap from "serious injury" to "physical injury."

Here, the essential element of "physical injury" was not sufficiently alleged in the indictment to satisfy a habitual misdemeanor assault charge. The grand jury failed to allege "physical injury" for the purposes of indicting Defendant for habitual misdemeanor assault pursuant to N.C.G.S. § 14-33.2. The defective indictment failed to confer the trial court with subject matter jurisdiction over the charge of habitual misdemeanor assault. Accordingly, I would vacate this conviction and remand for a new sentencing hearing on Defendant's conviction in file number 20 CRS 206791. *See Barnett*, 223 N.C. App. at 68 (marks omitted) (noting that the "[l]ack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority"). I therefore respectfully dissent from that portion of the Majority's opinion.

STATE v. LINDSAY

[292 N.C. App. 641 (2024)]

STATE OF NORTH CAROLINA
v.
NEVIN JAY LINDSAY

No. COA23-563

Filed 5 March 2024

1. Evidence—sexual offense prosecution—bench trial—out-of-court statements by victim and her mother—corroboration of trial testimony

In a bench trial for second-degree forcible sexual offense, sexual battery, and assault on a female, the trial court did not plainly err in admitting out-of-court statements made by the victim and her mother during their interviews with law enforcement, in which they both described an incident of defendant performing cunnilingus on the victim. These statements—which included different details from the ones testified to at trial but did not differ substantially from the witnesses' in-court testimony—did not constitute hearsay because they were not offered for the truth of the matter asserted but, instead, were offered to corroborate the witnesses' in-court testimony and were therefore admissible. Moreover, defendant failed to rebut the presumption that a court in a bench trial ignores any inadmissible evidence, and therefore failed to establish plain error.

2. Criminal Law—bench trial—prosecutor's closing argument—potentially improper expressions of opinion—presumed ignored

In a bench trial for second-degree forcible sexual offense, sexual battery, and assault on a female, the trial court was not required to intervene ex mero motu when the prosecutor stated during closing arguments that the victim had "no reason to lie" about defendant sexually assaulting her, since this and other similar statements made by the prosecutor were merely inferences reasonably drawn from the evidence. Even so, assuming that these statements constituted impermissible expressions of opinion, they were not so grossly improper as to require the trial court's intervention. Furthermore, under the presumption applied to bench trials, the court presumably disregarded any improper statements made during the State's closing argument.

Judge MURPHY dissenting in part and concurring in result only.

Appeal by defendant from judgment entered 20 February 2023 by Judge David A. Phillips in Superior Court, Gaston County. Heard in the Court of Appeals 7 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amanda J. Reeder, for the State.

Sean P. Vitrano, for defendant-appellant.

ARROWOOD, Judge.

Nevin Jay Lindsay ("defendant") appeals from judgment entered upon his conviction for second degree forcible sexual offense, sexual battery, and assault on a female. For the following reasons, we affirm the judgment.

I. Background

Defendant waived his right to a jury trial on 5 January 2023, and the case came on for bench trial on 23 January 2023. The evidence offered at trial tended to show the following facts:

In April 2021, Zara[1] was an eighteen-year-old senior in high school living with her mother and two younger brothers in an apartment. During the latter part of the month, defendant—a close friend of Zara's family—was staying at the apartment while visiting from New York.

On 26 April, defendant picked Zara up from school and drove her back to the apartment. At 7:26 p.m., while Zara's mother was taking a nap in her room, defendant texted Zara that he was "rolling up in the car" to smoke marijuana with Zara. Zara responded via multiple texts, stating:

Zara: Okay

Zara: Coming give me sex[2]

Zara: Sec [laughing emoji]

1. Zara is a pseudonym used to keep the individual's name anonymous in the interest of privacy.

2. Zara testified that she meant to type "sec"—i.e., that she was coming to meet defendant in a second—but the phone auto-corrected to "sex." Zara immediately corrected the error by sending the message, "Sec."

Defendant and Zara smoked marijuana on the front porch around 8:00 p.m.[3] At 8:59 p.m., defendant texted Zara, "Wow ok[,]" and then at 10:28 p.m., he texted her, "Cum get this[.]"[4]

Zara's mother left for work around 9:50 p.m. At approximately 11:00 p.m., while Zara was cleaning the kitchen and her brothers were watching television in their mother's room, defendant went into Zara's bedroom and laid down in her bed. When Zara went to her bedroom around midnight, she discovered defendant sleeping in her bed.[5] Zara testified that she tried getting defendant up so he could move to the living room, but "he was just knocked out cold[,] [s]o I just left him there." Zara placed blankets on her bedroom floor and went to sleep there.

Zara's recollection of what happened next was detailed during direct testimony at trial:

> **Zara**: I remember me getting ready to just doze off. And I definitely felt like a discomfort feeling, so I eventually woke up. And when I woke up I didn't see anybody on the bed, so it made me startled where I seen [defendant], like, at the bottom of me, under my blanket.
>
> **The State**: I'm going to stop you there just a second, okay, Zara? When you said you felt something, I think you used the word uncomfortable ---
>
> **Zara**: Yes.
>
> **The State**: --- what did you feel?
>
> **Zara**: I felt, like, moisture. Like I felt somebody doing something to my private area.
>
> **The State**: Did you feel something inside your private area, like moving around?

---

3. Zara testified that defendant also drank alcohol that evening but that she did not.

4. Zara testified that defendant's 8:59 p.m. text "was in response to [her earlier] sex/sec [text,]" and his 10:28 p.m. text was in reference to the marijuana he was going outside to smoke. Zara did not go outside to smoke with him on this subsequent occasion.

5. Zara testified that when defendant previously stayed with them, he normally slept on the couch in the living room, and Zara always slept in her bedroom.

Zara: No, ma'am.

The State: Okay. When you say you felt moisture in your private area, was it in your vaginal area?

Zara: Yes.

The State: Was it between the labia, or the lips of your vaginal area?

Zara: Yeah.

The State: What were you wearing at the time?

Zara: Leggings.

The State: Where were your leggings at that point, when you felt that?

Zara: It was, like, under, like, my butt cheeks, like, my bottom.

The State: Did you have underwear on?

Zara: No. Just because my bottoms felt like – they fitted me like sweatpants, you know, like baggy. So, no, I didn't.

The State: Baggy leggings?

Zara: Yeah.

The State: Were you – when you woke up, and you felt this on your vaginal area, were you laying on your stomach or on your side or on your back? How were you laying?

Zara*:* On my stomach.

The State: Where was the blanket?

Zara: At that point my blanket was, like, more on my back.

The State: You've described what you felt. Describe what you saw. Were you able to, like, look up?

Zara: Yeah, once I turned around.

The State: What do you mean, turned around, like, look behind you?

Zara: Yes.

The State: What did you see?

Zara: I seen him on all fours.

The State: Who did you see on all fours?

Zara: [Defendant].

The State: What did you do?

Zara: I stood there in shock. And I asked him what he was doing.

The State: When you say you stood there, were you actually standing, or how were you positioned?

Zara: I was still laying on my back. I'm sorry, my stomach. But, you know, for me turning around, like, I was just turned (indicating).

The State: Okay. And you said to him, what are you doing?

Zara: Yes.

The State: What did he say?

Zara: Oh, I'm sorry, I'm sorry, I'm sorry.

The State: What happened next?

Zara: I said, you better get the fuck out. I got up. I ran to the bathroom, I washed myself.

After leaving the bathroom, Zara went straight to her mother's room and locked the door.[6] At that point, defendant had left Zara's bedroom and was in the living room. Zara testified that defendant then came to her mother's door asking Zara to come out and talk to him. According to Zara, defendant sounded scared and was slurring his words. At 2:24 a.m., defendant texted Zara the following messages:

Defendant: You really not coming to talk to me

Defendant: Ok if you feel that way come lock the door

6. While in her mother's room, Zara testified that she attempted to contact her older cousin and best friend, but they did not respond until the following day.

Defendant left the apartment shortly after sending these texts. Zara did not go back to sleep the rest of the night.

In the morning, Zara spoke with her cousin and told her what happened between her and defendant. Specifically, Zara's cousin testified that Zara told her, "I was sleeping and I just felt really moist, so when I woke up I seen [defendant's] head between my legs." Zara's cousin further testified that while Zara was on the phone with her, Zara was "crying, bawling" and "in shock."

Around 6:15 a.m., Zara's mother returned home from work. At some point that day, Zara asked to speak with her mother in Zara's bedroom. Then, while on the phone with her cousin,[7] Zara explained to her mother what defendant did. Zara's mother testified that Zara told her that "she ended up waking up to [defendant] between her legs while she was on her stomach" and that defendant's "face was in between . . . her buttocks, basically."

Zara's mother immediately confronted defendant via video call. Zara's mother testified that, while on the call, defendant denied putting his "mouth on her" but admitted to "bit[ing Zara] on her lower back." Later, defendant sent Zara's mother a text message stating, "First how the hell I get her naked while she sleeping? Second I never licked her I bit her just above lower back she woke, and I told her to take her bed n I'll stay on the floor the next thing I know she jumped in the shower."

Zara's mother also called the police, and Officer Alexis Snyder ("Officer Snyder") from Gastonia Police Department met with Zara and her mother at the apartment. Officer Snyder spoke with Zara's mother first. At trial, Officer Snyder testified[8] that Zara's mother informed her that defendant sexually assaulted Zara; specifically, Zara's mother stated that "her daughter told her that this uncle/friend had used his tongue on her vagina[.]" When interviewing Zara, Officer Snyder testified that Zara told her that while "[s]he was sleeping, . . . she awoke to [defendant] in between her legs, licking her vagina." Defendant did not object to either of these statements by Officer Snyder.

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7. Zara testified that she wanted her cousin on the phone with her while talking to her mother because Zara was afraid of "how her response was just going to be" since defendant "was somebody that we really, like, took in as family."

8. The State called Officer Snyder as a witness for the purpose of corroborating the in-court testimony of Zara and Zara's mother. Additionally, before Officer Snyder testified, the State sought permission from the trial court and defense counsel to call Officer Snyder to the stand prior to Zara's mother testifying because Officer Snyder was in nursing school at the time and needed to "get back to her other school duties." The trial court subsequently permitted it.

While in Zara's bedroom, Officer Snyder "observe[d] the blankets and the pillows on the floor[.]" Officer Snyder advised Zara not to get a sexual assault kit examination because a supervisor had told her that "due to the time frame" and that Zara had showered, it was not recommended. Officer Snyder also collected Zara's leggings as evidence.

Zara and her mother later agreed to recorded interviews with Detective Heather Houser ("Detective Houser") of the Gastonia Police Department. Without objection, portions of the 29 April 2021 interviews were admitted as evidence at trial. During Zara's interview, Zara told Detective Houser that "[defendant] definitely didn't penetrate me. I definitely felt moisture, which was definitely his mouth area, so he was using his tongue. . . . All I felt really were like licks." During the interview with Zara's mother, Zara's mother stated that "[Zara] was sleeping on the floor . . . and when she was awakened, [defendant] was in between her legs with his face, his mouth, down on her, licking her vagina."

Detective Houser tried reaching defendant by phone but never received a call back. Pursuant to search warrant, Detective Houser collected a buccal DNA swab from defendant on 6 July 2021.[9] Detective Houser further testified that Zara's leggings were tested for DNA because, according to Zara, she had put them on "after the incident[.]"[10]

At the close of the State's evidence, defendant moved to dismiss the charges on the basis that the elements had not been met, but the motion was denied. After declining to testify or present evidence, defendant moved again to dismiss the charges, and the motion was denied.

During closing arguments, the State, in relevant part, stated:

> [Zara] has no reason to lie about this. She loved this man as her uncle. He was brought into the home. You heard about the earlier events that day. Absolutely no argument, no animosity, nothing going on for her to make this up. She has nothing against him. She loved him. The defendant wants you to believe, or is pretty much asking you to believe that she made this up. Why would she make this up and put herself and her family through all of this? An entire investigation, talking to not one police officer but then two more detectives, and then actually having to

9. When Detective Houser attempted to obtain defendant's DNA, defendant stated that he was not going to comply without his attorney present. Detective Houser (and other officers) then used force to obtain defendant's saliva sample.

10. At trial, the State did not submit the results of any DNA testing.

come in and testify in a courtroom. She wouldn't do that unless she was telling the truth, and she is, and she did.

In a sexual assault case like this, especially when you are – when it involves a person that is trusted and known to the victim, you have to look at the credibility of the victim, and of the witnesses in the case. You have to look at consistency and corroboration. Your Honor knows that if you believe this victim in this case then you believe this case beyond a reasonable doubt. And that's why consistency and corroboration are important.

[Zara], on this particular date, back in April of 2021, in the middle of the night she texted her cousin [ ]. The next morning is when she finally had the opportunity to speak to [her cousin]. She told [her] what [defendant] had done to her. She then told her mother. She talked to Patrol Officer . . . Snyder. She talked to detectives. And then she testified under oath. And throughout all of it she was consistent. She did not embellish, she didn't change the facts, because she was telling the truth.

And what did she gain from this? She gained nothing but embarrassment. She told this courtroom, including the defendant, had to face him, and other strangers in here, what she had experienced. She benefited in no way at all by coming forward in this case. In fact, this was embarrassing for her. But the defendant still is denying it and saying this was all made up. You could hear, and you could see in her testimony how hard this was for her to talk about. She would stop, she would breathe, at one point she had to blow her nose. Visibly upset.

You heard from . . . her cousin, her big sis, and her mother, that as [Zara] told them what the defendant did to her she cried, he was upset. And then, even in the video interview that you saw of the victim, [Zara], visibly on two separate occasions got upset. [Zara] is not an Academy Award-winning actress, she's a victim, and she was traumatized, and she has no reason to lie about this.

Don't allow that defendant to benefit from assaulting her at a time when there were no witnesses around, when he had the opportunity to be alone with her. The defense is almost saying, like, this is some big conspiracy theory.

> Like, she decided to wake up in the middle of the night and say, hey, I'm going to claim that he did this to me, text [her cousin], lock herself in a bathroom, go to the bedroom, tell two relatives the next day, go to police. For what? It's not just something she thought up to do. She's telling the truth.

The judge found defendant guilty of second-degree forcible sexual offense, assault on a female, and sexual battery. The court consolidated the three offenses into the second-degree forcible sexual offense and sentenced defendant to a minimum of 100 month and a maximum of 180 months in the North Carolina Department of Adult Corrections. The court also ordered that, upon his release from imprisonment, defendant register as a sex offender for thirty years. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant contends that the trial court committed plain error when it admitted Officer Snyder's testimony regarding out-of-court statements as well as statements from the recorded interview. Defendant also contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We take each argument in turn.

A. Out of Court Statements

[1] Defendant contends that the out-of-court statements at issue are inadmissible hearsay evidence because (1) none of the statements corroborated in-court testimony and (2) the hearsay exception for excited utterances was inapplicable to the recorded statements. We disagree.

When an issue is not preserved by objection at trial, appellate courts review the issue for plain error. *State v. Caballero*, 383 N.C. 464, 473 (2022) (citing N.C. R. App. P. 10(a)(4) (2023)). Plain error concerns error that "seriously affects the fairness, integrity, or public reputation of judicial proceedings" and should "be applied cautiously and only in the exceptional case." *State v. Odom*, 307 N.C. 655, 660 (1983) (cleaned up). Proving plain error requires that the defendant show that the error at trial was fundamental—i.e., the error had a probable impact on the jury's finding that the defendant was guilty. *State v. Lawrence*, 365 N.C. 506, 518 (2012) (citation omitted).

However, "in a bench trial, we presume the trial court ignored any inadmissible evidence unless the defendant can show otherwise." *State v. Jones*, 260 N.C. App. 104, 109 (2018) (citation omitted). In other words,

we give the trial court the benefit of the doubt that it adhered to basic rules and procedure when sitting without a jury. *Id.* Therefore, "no prejudice exists simply by virtue of the fact that such evidence was made known to [the trial judge] absent a showing by the defendant of facts tending to rebut this presumption." *State v. Jones*, 248 N.C. App. 418, 424 (2016).

" 'Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.' " *State v. Harrison*, 328 N.C. 678, 682 (1991) (quoting *State v. Rogers*, 299 N.C. 597, 601 (1980)). A prior statement may be used to corroborate a witness's in-court testimony even if the witness has not been impeached. *State v. Harris*, 253 N.C. App. 322, 332 (2017) (citation omitted); *see also State v. Walters*, 357 N.C. 68, 88 (2003) (concluding that both a 911 tape and the witness's out-of-court statement to a detective were admissible to corroborate the witness's earlier in-court testimony). Prior statements admitted for corroborative purposes are not hearsay because they are not offered for the truth of the matter asserted. *State v. Thompson*, 250 N.C. App. 158, 163 (2016) (citations omitted). Consequently, such statements do not implicate the confrontation clause and are not to be admitted as substantive evidence. *Id.* (citations omitted).

To be admissible as corroborative evidence, "prior consistent statements merely must tend to add weight or credibility to the witness's testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates." *State v. Farmer*, 333 N.C. 172, 192 (1993) (citations omitted); *see also Thompson*, 250 N.C. App. at 165 ("[T]he mere fact that a corroborative statement contains additional facts not included in the statement that is being corroborated does not render the corroborative statement inadmissible[.]"); *State v. Barrett*, 228 N.C. App. 655, 664 (2013) (concluding the prior statements were admissible as corroborative evidence despite having minor inconsistencies with the trial testimony); *State v. Martin*, 309 N.C. 465, 476 (1983) ("If the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations only affect the credibility of the statement." (citing *State v. Britt*, 291 N.C. 528 (1977)).

Here, defendant contends that neither Zara nor her mother testified that defendant performed cunnilingus[11] on Zara. Additionally, because the

11. As defendant points out in his brief, our Supreme Court considers cunnilingus to be "the slightest touching by the lips or tongue of another to any part of the woman's genitalia." *State v. Ludlum*, 303 N.C. 666, 674 (1981).

out-of-court statements were that defendant "licked [Zara's] vagina"—i.e., performed cunnilingus on her—defendant contends the statements contradicted the testimony. We disagree as the out-of-court statements at issue were corroborative and not substantially different from the in-court testimony. Specifically, when asked if the moisture she felt was in her "vaginal area[,]" Zara testified, "Yes." Moreover, when asked if the moisture feeling was "between the labia, or the lips of [her] vaginal area[,]" Zara testified, "Yeah." Similarly, Zara's mother testified that Zara had explained to her that she woke "up to [defendant] between her legs while she was on her stomach" and that defendant's "face was in between . . . her buttocks[.]"

Both the out-of-court statements and in-court testimony thus tended to show that defendant pulled Zara's pants down, manipulated her body, and pressed his tongue against her vagina while she was sleeping—i.e., defendant engaged in a sexual act by force and against Zara's will. N.C.G.S. § 14-27.27(a)(1) (2023); *see also* § 14-27.20(4) (including cunnilingus as an example of a "sexual act"). Further, any differences between the out-of-court statements and the in-court testimony do not constitute substantial variance, let alone contradictory information. Accordingly, the out-of-court statements at issue are not hearsay and were admissible for corroboration purposes.[12]

However, even assuming arguendo that the trial court should not have admitted the statements, defendant failed to show that the trial judge did not ignore the statements in making their decision and that the statements were prejudicial. Accordingly, "[w]e do not make assumptions of error where none is shown." *Jones*, 260 N.C. App. at 110 (citation omitted).

In view of the fact that bench trials in North Carolina are a relatively new occurrence and rarely used, *see* N.C. Const. art. I, § 24 (permitting criminal defendants to waive their right to a jury trial in certain cases and request a bench trial as of 2014), there do not appear to be cases that have determined whether a plain error analysis is on point given the longstanding authority that a judge is presumed to have ignored any incompetent evidence. Thus, it does not seem that one can establish plain error in a bench trial despite defendant contending that such error occurred here. Rather, as discussed above, the standard in a bench trial is distinct from plain error review and requires that defendant introduce facts showing the trial judge, in fact, considered inadmissible evidence.

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12. Because the out-of-court statements were admissible as corroborative evidence, we do not need to address whether the recorded statements constitute excited utterances.

B. State's Closing Argument

[2] Defendant contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. Specifically, defendant contends that the State's "repeated statements that [Zara] was telling the truth constituted improper vouching and violated" N.C.G.S. § 15A-1230(a). We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133 (2002) (citation omitted). The standard thus requires determining (1) whether the argument was improper, and if so, (2) whether it "was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179 (2017) (citations omitted).

Section 15A-1230 of the North Carolina General Statutes states that during closing arguments, attorneys may not "express [their] personal belief[s] as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant . . . ." N.C.G.S. § 15A-1230(a). Yet, attorneys "are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Richardson*, 342 N.C. 772, 792–93, *cert. denied*, 519 U.S. 890 (1996).

Here, the statements at issue—e.g., that Zara "ha[d] no reason to lie about this"—were merely inferences reasonably drawn from the evidence, which defense counsel details in its closing. However, even assuming arguendo that some of the State's closing arguments included impermissible statements of opinion, none of it was so "grossly improper" as to have required the trial court to intervene *ex mero motu*. *Jones*, 355 N.C. at 133; *see also State v. Brown*, 320 N.C. 179, 206 (1987) ("Although the prosecutor may have strained the rational connection between evidence and inference, he did not strain it so far as to require *ex mero motu* intervention by the trial court . . . .").

Further, because it is presumed that trial judges "ignore inadmissible evidence when they serve as the finder of fact in a bench trial," it follows that such judges also presumably ignore any personal beliefs of counsel that were included in their closing arguments. *Jones*, 248 N.C. App. at 424. Thus, like in *Jones*, the trial judge presumably disregarded any personal beliefs purportedly inserted into the State's closing argument that pertained to whether Zara was telling the truth. Accordingly,

the trial court did not err by failing to intervene *ex mero motu* during the State's closing argument.

III. Conclusion

For the foregoing reasons, we affirm the trial court's judgment.

AFFIRMED.

Judge HAMPSON concurs.

Judge MURPHY dissents in part and concurs in result only.

MURPHY, Judge, dissenting in part and concurring in result only.

The Majority makes a sweeping expression in dicta that "it does not seem that one can establish plain error in a bench trial[.]" Majority at 651. I cannot join my colleagues in this sentiment as the presumption that the trial court ignores incompetent evidence and improper arguments is merely a *presumption*. *In re M.L.B.*, 377 N.C. 335, 338 (2021) (emphasis added) ("When a judge sits without a jury, [our Supreme] Court *presumes* that the trial court disregards any incompetent evidence and will affirm the judgment or order if the trial court's findings are supported by competent evidence."). In addressing the rebuttal of such a presumption, we have previously held:

> Respondents next argue the trial court erred in admitting in evidence various hearsay statements, as well as medical documents which allegedly were not properly authenticated. The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. *See Best v. Best*, 81 N.C. App. 337, 341[] . . . (1986). "Rather, the appellant must also show that the incompetent evidence caused some prejudice." *Id.* In the context of a bench trial, an appellant "must show that the court relied on the incompetent evidence in making its findings." *Id.* at 342[] . . . (citation omitted).

In re Huff, 140 N.C. App. 288, 301 (2000), *appeal dismissed*, *disc rev. denied*, 353 N.C. 374 (2001); *see also State v. Morales*, 159 N.C. App. 429, 433–34 (2003); *In re A.W.*, 283 N.C. App. 127, 132 (2022) (citing *Morales*, 159 N.C. App. at 433–34). Preservation—or the lack thereof—does not change the concern regarding the trial court's reliance on improper

evidence or arguments; it merely adds to an appellant's burden to show a higher degree of resulting prejudice. The Majority's dicta, especially in a published decision, risks turning this legal fiction into an irrebuttable presumption—or, at least, introducing unnecessary confusion into our caselaw.

With this proviso in mind, I agree that Defendant has not met his burden to overcome the presumption. While it was not required to do so, the trial court included its jury instructions in this matter and read them aloud at the equivalent of a jury trial charge conference, allowing for the parties to be heard at their conclusion. *State v. Cheeks*, 267 N.C. App. 579, 592–95 (2019) ("Here, the trial court elected to follow a hybrid procedure by adopting 'jury instructions' setting forth the law it would apply to the case, as required in a jury trial[.] . . . We appreciate the trial court's attention to detail and effort to provide this Court with a full understanding of the law applied and the facts it determined to be true. . . . [T]he trial court handled it carefully. The additional procedural steps used by the trial court [in a felony criminal bench trial] are fully within the trial court's discretion, but we note they are not required by the North Carolina Rules of Criminal Procedure or Chapter 15A, Article 73 of North Carolina's General Statutes."), *aff'd*, 377 N.C. 528 (2021). These jury instructions included, *inter alia*, the following:

> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of a witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made, and that it conflicts or is consistent with the testimony of a witness at this trial, you may consider this, and all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve the witness' testimony.
>
> . . . .
>
> You have heard the evidence and the arguments of counsel, if your recollection of the evidence differs from that of the attorneys you are to rely solely upon your recollection. Your duty is to remember the evidence whether called to your attention or not. You should consider all of the evidence, the arguments, contentions, and positions urged

> by the attorneys, and any other contention that arises from the evidence.
>
> The law requires that the presiding judge be impartial. You should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be. It is your duty to find the facts and to render a verdict reflecting the truth.

As a result, the record demonstrates that the trial court did not rely on the out-of-court statements for substantive purposes, nor did it improperly consider the State's closing argument. Defendant's only argument that the trial court improperly relied upon these statements for substantive purposes is that the testimony at trial was not otherwise sufficient to establish the act of cunnilingus; however, I concur with the Majority's determination as to the sufficiency of Zara's testimony to establish the act of cunnilingus. Majority at 651. Further, I agree with the Majority's ultimate holding that "the judge presumably disregarded any personal beliefs purportedly inserted into the State's closing argument that pertained to whether Zara was telling the truth." Majority at 652.

On this record, Defendant fails to overcome the presumption that the trial court improperly considered the out-of-court statements for substantive purposes or that the Defendant was prejudiced by the State's closing argument. I respectfully dissent from the Majority's dicta regarding plain error review from a bench trial, but I concur in upholding Defendant's convictions.

STATE OF NORTH CAROLINA
v.
JACK LABRITTAN SMITH, DEFENDANT

No. COA23-575

Filed 5 March 2024

Constitutional Law—right to counsel—forfeiture—six attorney withdrawals—combative in-court conduct—trial significantly delayed

The trial court in a criminal case did not err in finding that defendant had forfeited his right to counsel where: through his insistence that his attorneys pursue unethical legal strategies and his refusal to cooperate when they would not comply with his requests, defendant caused six court-appointed attorneys to withdraw from representing him; defendant was often combative and interruptive in the courtroom, which resulted in the court holding him in contempt for ninety days; and defendant's conduct delayed his case from being tried for two years.

Appeal by defendant from judgment entered 26 July 2022 by Judge Julia Gullett in Stanly County Superior Court. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Isham Faison Hicks, for the State.

Mark Montgomery, for defendant-appellant.

FLOOD, Judge.

Jack Labrittan Smith ("Defendant") appeals from the 26 July 2022 judgment in which the trial court concluded Defendant had forfeited his right to counsel. Our review of the Record reveals the trial court correctly concluded Defendant, by his own actions, forfeited his right to counsel; therefore, we conclude the trial court did not err.

I. Factual and Procedural Background

On 13 December 2017, following events that occurred in May 2016 between Defendant and a woman with whom he had a relationship ("Mary"), Defendant entered a plea of guilty of first degree kidnapping, second degree rape, and second degree burglary. Defendant was then

sentenced to 86 to 116 months' imprisonment. Several years later on 6 July 2020, due to a sentencing issue on the December 2017 judgment regarding "the maximum sentence not corresponding to the minimum," Defendant was brought back before the trial court and was represented by attorney Patrick Currie ("Attorney Currie"). At this hearing, the trial court corrected Defendant's sentence, Defendant asked for his guilty plea to be set aside, and Attorney Currie motioned to withdraw as counsel. The trial court granted Defendant's request to set his guilty plea aside, granted Attorney Currie's request to withdraw, and appointed a new attorney, Andrew Scales ("Attorney Scales") to represent Defendant.

On 10 November 2020, Defendant and Attorney Scales appeared before the trial court to address Defendant's contention that Attorney Scales did not "have [Defendant's] best interest in mind." Defendant requested that he be represented by an attorney who was not a member of the Stanly County Bar. Attorney Scales made a motion to withdraw as counsel due to Defendant making "it clear that he no longer trusted [Attorney Scales] to represent him." The trial court granted Attorney Scales's motion to withdraw and indicated that Defendant would have "another attorney appointed outside of [Stanly] county . . . ." Attorney Butch Jenkins ("Attorney Jenkins") of the Montgomery County Bar was then appointed to represent Defendant.

On 17 March 2021, Defendant and Attorney Jenkins appeared before the trial court for a hearing on Attorney Jenkins's motion to withdraw as counsel. During the hearing, Attorney Jenkins explained to the trial court that Defendant indicated he would like to proceed with his case under a theory that Defendant's former court-appointed counsel had engaged in misconduct. Attorney Jenkins stated that he felt "strongly that [Defendant] ha[d] a right to pursue his defenses" but that Attorney Jenkins had relationships with both Attorney Currie and Attorney Scales and therefore "could not be effective as [Defendant's] counsel . . . ." When asked whether he objected to Attorney Jenkins's motion, Defendant stated he did not and asked that his next court-appointed counsel not be appointed "by you," referring to the presiding judge. Defendant explained he could not trust the trial judge because Defendant had told the trial judge that Attorney Currie "destroyed [his] client file" and nothing was done. After a combative back and forth, the trial judge stated he would "recuse [himself] from any other matters" concerning Defendant.

On 13 April 2021, attorney Richard Roose ("Attorney Roose") was appointed to Defendant's case. Defendant's arraignment hearing was scheduled for 12 July 2021, at which Defendant made a motion for new counsel, alleging Attorney Roose committed legal malpractice.

When asked to speak on Defendant's motion for new counsel, Attorney Roose stated:

> There are issues, and I think that I see the same issues that caused [Attorney] Jenkins to withdraw, appear to be arising in this case in that, you know, I have a – a plan on how to proceed with this case, but it's not enough for [Defendant]. He wants me to do other things that I can't do involving the previous attorneys here. And I see that coming. I don't see us resolving that matter.

After hearing from both Attorney Roose and Defendant, the trial court concluded that Attorney Roose would remain as counsel for Defendant, to which Defendant, referring to Attorney Roose, responded, "[l]ook at his face, Your Honor. He is – I will represent myself before he is my attorney."

On 14 October 2021, Attorney Roose made a motion to withdraw as counsel for Defendant. In his presentation to the trial court, Attorney Roose stated that, pursuant to Rule 1.16 of the Rules of Professional Conduct, "a lawyer shall not represent a client who insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer[,] [a]nd that is exactly the situation that we have here."

In responding to Attorney Roose's motion, Defendant reiterated previous complaints about legal malpractice, ineffective assistance of counsel, and ethical code violations. Ultimately, the trial court granted Attorney Roose's motion to withdraw and appointed Indigent Defense Services to represent Defendant.

Attorney Charles B. Brooks ("Attorney Brooks") was appointed to represent Defendant, but after just three months of working with Defendant, Attorney Brooks filed a motion to withdraw as counsel, citing a "breakdown in communications" such that representation would not be possible. The motion to withdraw was heard on 18 January 2022, during which the assistant district attorney argued that Defendant's "efforts to continually change lawyers is, at minimum, an effort to obstruct and delay the trial." When the trial judge questioned Defendant about Attorney Brooks's motion, Defendant repeatedly interrupted the trial court and asserted that his previous attorneys "flagrantly violated the rules of criminal procedure" and that he sought to hold Attorney Brooks "accountable." Several times throughout the hearing, the trial judge asked Defendant not to interrupt and warned Defendant that his inability to work with his appointed counsel could result in forfeiture

of the right to an attorney. Eventually, the presiding judge, Attorney Brooks, and Defendant had an *in camera* conference in the judge's chambers, after which the trial court allowed Attorney Brooks to withdraw as counsel and appointed attorney Randolph Lee ("Attorney Lee") to represent Defendant. After the trial court announced the appointment of Attorney Lee, Defendant objected to the appointment and made a motion for the trial judge to recuse himself. The objection was overruled, and the motion was denied.

On 9 May 2022, Defendant appeared *pro se* with Attorney Lee as standby counsel. During the hearing, Defendant became combative and asserted that all of his motions were "going to be denied, but, yeah, let's – let's – let's play." The trial court warned Defendant he could be held in contempt for his behavior to which Defendant replied, "I've been locked up 2100 days. Been brought back from prison. Contempt me, Your Honor, if that's what you want to do." Defendant continued, "I ain't scared of nothing. . . . I trust God and that's it. Okay. Don't ever call yourself honorable. There's only one righteous judge." The trial court then held Defendant in contempt and sentenced him to ninety After being held in contempt, the hearing continued, during which Defendant stated, "I've been focusing on God these last five weeks, so I haven't really done much work on this case." When the trial court urged Defendant to present his arguments, Defendant mocked the trial court and questioned its ability to be honest and impartial, which prompted the trial court to warn Defendant he could be held in contempt for another ninety days.

Finally, on 19 July 2022, Defendant's case came on for trial, during which Defendant proceeded *pro se* with Attorney Lee as standby counsel. At the outset of the trial, Defendant confirmed he wished to proceed *pro se*. Defendant then made a motion for the trial judge to recuse herself for prejudice, which the trial court denied. The trial court again asked Defendant if he would like an appointed lawyer, to which Defendant replied "yes[,]" and Attorney Lee was reappointed as full counsel.

On the final day of trial, after the State rested its case, Defendant stated that Attorney Lee's cross examination of Mary put Defendant in "quite a predicament." Defendant told the trial court that he wanted to introduce allegedly exculpatory text messages sent by Mary into evidence and have Attorney Lee question Mary about the texts. During the questioning of Mary, Attorney Lee paused in between each question to confer with Defendant. Eventually, Attorney Lee asked the trial court for an *ex parte* conference, during which Attorney Lee motioned to withdraw as counsel because Defendant was of the opinion that [Attorney

Lee] had thrown him "under the bus[,]" and there was now an "irreconcilable conflict" between them. After Attorney Lee made his motion, the trial court excused the prosecutors and police officers from the courtroom. Defendant then addressed the trial court and stated that, in his opinion, Attorney Lee was "helping" Mary by "doctoring up" what she said in the texts and asking her easy questions. Defendant went on to accuse Attorney Lee of lying under oath. The trial court then emphasized that six different attorneys had been appointed to represent Defendant, before asking him whether he wanted to release Attorney Lee from the case. Defendant refused to answer the question directly, instead saying, "I want him to ask [Mary] the questions that I would like to ask that are not . . . against the ethical rules."

From the bench, the trial court began making findings of fact, while Defendant continuously interrupted, causing the trial court to threaten to remove him from the courtroom. The trial court's findings of fact summarized the history of Defendant's case, the tenuous relationship between Defendant and his appointed counselors, and Defendant's insistence on pursuing legal strategies that were improper. After making the factual findings, the trial court ruled that "[Defendant] by his own actions has . . . forfeited his right to a court-appointed lawyer and that the relationship between he and [Attorney] Lee has gotten so bad that [Attorney] Lee finds that he cannot continue." Defendant appealed.

II. Jurisdiction

This case is properly before this Court as an appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, Defendant argues the trial court erred in finding that he forfeited his constitutional right to counsel. We disagree.

"The right to counsel in a criminal proceeding is protected by both the federal and state constitutions," and therefore, "[o]ur review is *de novo* . . . ." *State v. Simpkins*, 373 N.C. 530, 533, 838 S.E.2d 439, 444 (2020). "A finding that a defendant has forfeited the right to counsel requires egregious[,] dilatory[,] or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel . . . ." *Id.* at 541, 838 S.E.2d at 449. Egregious conduct

> may take the form of "a criminal defendant's display of aggressive, profane, or threatening behavior," but . . . can also result where a defendant remains polite and apparently cooperative if the defendant's "obstreperous actions"

> are so severe as to . . . completely prevent a trial court from proceeding in the case.

State v. Atwell, 383 N.C. 437, 449, 881 S.E.2d 124, 132 (2022) (citations omitted). "Examples of such obstreperous actions include, *inter alia*, a defendant's 'refus[al] to obtain counsel after multiple opportunities to do so . . . or [the] continual hir[ing] and fir[ing of] counsel and significantly delay[ing] the proceedings.' " *Id.* at 449, 881 S.E.2d at 132 (quoting *State v. Harvin*, 382 N.C. 566, 587, 879 S.E.2d 147, 161 (2022)) (alterations in original). "[E]ven if a '[defendant]'s conduct [is] highly frustrating,' " however, "forfeiture is not constitutional where any difficulties or delays are 'not so egregious that [they] frustrated the purposes of the right to counsel itself.' " *Id.* at 449, 881 S.E.2d at 132 (quoting *Simpkins*, 373 N.C. at 539, 838 S.E.2d at 448).

While Defendant concedes his conduct may have "been irritating to the learned attorneys and judges," he argues his conduct fell far short of conduct in cases where this Court has previously concluded a defendant had lost their right to counsel. *See State v. Montgomery*, 138 N.C. App. 521, 523, 530 S.E.2d 66, 68 (2000) (where the defendant threw water in his attorney's face and was subsequently held in contempt of court); *see also State v. Joiner*, 237 N.C. App. 513, 515–16, 767 S.E.2d 557, 559 (2014) (where the defendant refused to answer the trial court's questions, threatened to punch the judge in the face, and smeared feces on the walls of his holding cell); *see also State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896, 901 (2015) (where the defendant "repeatedly and vigorously objected to the trial court's authority to proceed," thus willfully obstructing and delaying the trial proceedings).

Here, while Defendant never physically assaulted an officer of the court, our *de novo* review of the Record reveals Defendant's inability to work with court-appointed counsel and insistence that the trial court could not be impartial amount to obstreperous conduct. *See Atwell*, 383 N.C. at 449, 881 S.E.2d at 132. Similar to the defendant's conduct in *Montgomery*, Defendant's conduct in the courtroom was egregious enough to warrant his being held in contempt for ninety days. *See Montgomery*, 138 N.C. App. at 523, 530 S.E.2d at 68.

Additionally, Defendant's insistence that his attorneys pursue defenses that were barred by ethical rules and his refusal to cooperate when they would not comply with his requests resulted in the withdrawal of six different attorneys. Further, our review of the trial transcripts shows that Defendant was combative and interruptive during the majority of his appearances in court, sometimes going so far that

the trial judge threatened removal. Finally, Defendant's conduct delayed his case from being tried for two years, causing a significant delay of the proceedings. *See Atwell*, 383 N.C. at 449, 881 S.E.2d at 132.

As our Supreme Court concluded in *Simpkins* and *Atwell*, a defendant forfeits their right to counsel if their conduct is so egregious, dilatory, or abusive that it prevents the trial court from proceeding in a case. *See Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449; *see also Atwell* 383 N.C. at 449, 881 S.E.2d at 132. Given Defendant was held in contempt and caused six different attorneys to withdraw, resulting in a two-year delay in the proceedings, we conclude the trial court was correct in finding Defendant, by his own actions, forfeited his right to counsel.

IV. Conclusion

Defendant's egregious and dilatory conduct undermined the purpose of the right to counsel; therefore, the trial court did not err when finding Defendant had forfeited that right.

NO ERROR.

Chief Judge DILLON and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DWIGHT DOUGLAS SMITH

No. COA23-645

Filed 5 March 2024

1. Appeal and Error—notice of appeal—given prematurely—prior to sentencing—certiorari granted

Where defendant's notice of appeal from his conviction of driving while impaired was defective because it was given prematurely—prior to sentencing and entry of judgment—the appellate court granted defendant's petition for writ of certiorari to reach the merits of defendant's appeal.

2. Appeal and Error—preservation of issues—impaired driving—failure to renew motion to dismiss at the close of the evidence

In defendant's trial for driving while impaired, where defense counsel did not renew defendant's motion to dismiss the charge for

lack of sufficient evidence at the close of all the evidence, defendant failed to preserve for appellate review the issue of whether his motion to dismiss should have been allowed.

3. Constitutional Law—effective assistance of counsel—failure to renew motion to dismiss—substantial evidence of charged offense

Defendant did not receive ineffective assistance of counsel in his trial for driving while impaired where, although defense counsel failed to renew defendant's motion to dismiss for lack of sufficient evidence at the close of all the evidence—and therefore failed to preserve the issue for appellate review—the State presented substantial evidence of each element of the offense, including an officer's direct observation of defendant's demeanor, the results of two tests administered to defendant which indicated alcohol impairment, and defendant's admission to having driven his vehicle after he consumed alcohol. Therefore, there was no reasonable possibility that the trial court would have allowed the motion had it been renewed.

Appeal by Defendant from judgment entered 27 October 2022 by Judge Henry L. Stevens in Robeson County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Liliana R. Lopez, for the State-Appellee.

John W. Moss for Defendant-Appellant.

COLLINS, Judge.

Defendant Dwight Smith appeals from judgment entered upon a guilty verdict of driving while impaired. Defendant argues that the trial court erred by denying his motion to dismiss, and that he received ineffective assistance of counsel because defense counsel did not renew his motion to dismiss at the close of all of the evidence. Because defense counsel did not renew Defendant's motion to dismiss at the close of all of the evidence, Defendant's argument that the trial court erred by denying his motion to dismiss is not properly before us, and we therefore dismiss in part. Defendant did not receive ineffective assistance of counsel, and we therefore find no error in part.

I. Background

The evidence at trial tended to show the following: On 1 April 2019 at approximately 9:00 p.m., Trooper Justin Waldrop with the North Carolina Highway Patrol was advised of a collision on Boone Road. Waldrop arrived on the scene and observed Defendant standing outside a pickup truck that was pulling a trailer. Defendant's two sons were also at the scene. Defendant told Waldrop that there was a "small collision" between his truck and another vehicle, and that he was driving the truck at the time of the collision.

Waldrop observed that Defendant had red, glassy eyes, slurred speech, and a strong odor of alcohol. Defendant was walking in a "zig-zag pattern" and stumbling, and Waldrop had to keep him from falling at one point. Thereafter, Waldrop asked Defendant to perform field sobriety tests. Waldrop administered the horizontal gaze nystagmus test to Defendant to measure the "involuntary jerking of [his] eyes." The test revealed that Defendant exhibited six out of the six clues indicating impairment. Waldrop then administered a portable breath test, known as the Alco-Sensor, at 9:10 p.m. and again at 9:22 p.m., which confirmed the presence of alcohol in Defendant's system. At that point, Waldrop formed the opinion that Defendant had consumed a sufficient amount of alcohol to appreciably impair his mental and physical faculties.

Waldrop arrested Defendant for driving while impaired and transported him to the Robeson County Detention Center to read him his *Miranda* rights and administer an Intoximeter breath test, which uses a "deep lung sample" to determine the "percent of alcohol in the defendant's body." Upon arriving at the detention center, Waldrop asked Defendant a series of questions. Waldrop asked Defendant whether he had been operating a vehicle, and Defendant responded "yes." When asked what time he began drinking and how many drinks he had, Defendant stated that he had one drink at 4:00 p.m. Waldrop asked Defendant what size the drink was and Defendant responded, "Not sure." Waldrop then asked, "On a scale of zero to ten, zero being completely sober and ten being completely drunk, where do you see yourself?" Defendant responded, "One." Waldrop asked, "In your opinion, should you have been operating a vehicle[,]" to which Defendant responded, "Yes." Waldrop read Defendant his rights concerning the Intoximeter at 9:58 p.m. Thereafter, Defendant refused to provide a breath sample for the Intoximeter.

Defendant was found guilty in district court of driving while impaired and subsequently appealed to superior court. The matter came on for trial on 26 October 2022. Defendant moved to dismiss the charge for insufficient evidence at the close of the State's evidence, and the

trial court denied the motion. Defendant then put on evidence but did not renew his motion to dismiss. The jury returned a guilty verdict of driving while impaired. The trial court sentenced Defendant to 60 days of imprisonment, suspended for 12 months of supervised probation. Defendant appealed.

II. Discussion

A. Appellate Jurisdiction

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

N.C. Gen. Stat. § 15A-1448(b) states, "Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2023). Rule 4(a) of the North Carolina Rules of Appellate Procedure provides that an appeal in a criminal case may be taken by either "giving oral notice of appeal at trial" or by filing a written notice of appeal within 14 days after entry of judgment. N.C. R. App. P. 4(a). When a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005).

Prior to sentencing, defense counsel stated, "Judge, I've never done this, but I don't know at what point in this process I do, but Mr. Smith wants to give notice of appeal." The trial court responded, "Okay. We can do that once we get the judgment in." After entry of the final judgment, defense counsel did not enter oral notice of appeal, but the trial court "note[d] the [prior] appeal and . . . [ap]pointed the appellate defender to represent [Defendant]." As Defendant prematurely entered oral notice of appeal before entry of the final judgment in violation of Rule 4, this Court does not have jurisdiction to hear Defendant's direct appeal. *See State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019).

Acknowledging that his notice of appeal was defective, Defendant filed a petition for writ of certiorari. This Court may issue a writ of certiorari "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). In our discretion, we grant Defendant's petition for writ of certiorari and reach the merits of his appeal.

B. Motion to Dismiss

[2] Defendant argues that the trial court erred by denying his motion to dismiss. Defendant concedes that defense counsel failed to renew

his motion to dismiss at the close of all of the evidence, but nonetheless argues that the denial of his motion to dismiss was error.

A defendant in a criminal case may not challenge the sufficiency of the evidence on appeal unless a motion to dismiss is made at trial. N.C. R. App. P. 10(a)(3). "If a defendant makes such a motion after the State has presented all its evidence . . . and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal . . . made at the close of State's evidence is waived." *Id.* If a defendant subsequently fails to renew his motion to dismiss at the close of all of the evidence, the defendant "may not challenge on appeal the sufficiency of the evidence to prove the crime charged." *Id.*

Here, Defendant moved to dismiss at the close of the State's evidence, and the trial court denied the motion. Defendant then presented his own evidence but did not renew his motion to dismiss at the close of all of the evidence. Consequently, Defendant's argument that the trial court erred by denying his motion to dismiss is not properly before us, and that portion of his appeal is dismissed.

C. Ineffective Assistance of Counsel

[3] Defendant also argues that he received ineffective assistance of counsel because defense counsel failed to renew his motion to dismiss at the close of all of the evidence.

We review whether a defendant was denied effective assistance of counsel de novo. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted). To show ineffective assistance of counsel, a defendant must show that his counsel's conduct fell below an objective standard of reasonableness. *State v. Anthony*, 271 N.C. App. 749, 754, 845 S.E.2d 452, 456 (2020). A defendant must satisfy a two-part test to meet this burden:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This

> requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). Thus, to prevail on an ineffective assistance of counsel claim in which the defendant argues that his counsel failed to renew his motion to dismiss, the defendant must show that there is a reasonable probability that the trial court would have allowed the renewed motion. *See State v. Blackmon*, 208 N.C. App. 397, 401, 702 S.E.2d 833, 836 (2010).

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Lopez*, 274 N.C. App. 439, 446, 852 S.E.2d 658, 662 (2020). "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. Austin*, 279 N.C. App. 377, 382, 865 S.E.2d 350, 354 (2021) (quotation marks and citation omitted). "Contradictions and discrepancies in the evidence are for the jury to decide." *State v. Wynn*, 276 N.C. App. 411, 416, 856 S.E.2d 919, 923 (2021).

Under N.C. Gen. Stat. § 20-138.1(a)(1), a person commits the offense of driving while impaired if "he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance[.]" N.C. Gen. Stat. § 20-138.1(a)(1) (2023). A person is under the influence if "his physical or mental faculties, or both, [are] appreciably impaired by an impairing substance." *Id.* § 20-4.01(48b) (2023). "An officer's opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer's personal observation of an odor of alcohol and of faulty driving or other evidence of impairment." *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) (citations omitted). "The refusal to submit to an intoxilyzer test also is admissible as substantive evidence of guilt on a DWI charge." *Id.* (citation omitted); *see also* N.C. Gen. Stat. § 20-139.1(f) (2023) ("If any person charged with

an implied-consent offense refuses to submit to a chemical analysis or to perform field sobriety tests at the request of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative action against the person.").

Defendant argues that "there [was] no direct evidence that [he] was impaired at the same time that he was driving" because "the State presented no evidence regarding the lapse of time between the accident and [Defendant's] call to law enforcement or between [Defendant's] call and Trooper Waldrop's arrival on scene." However, when viewing the evidence in the light most favorable to the State, there was substantial evidence that Defendant was driving while impaired.

Waldrop testified that he was advised of a collision on Boone Road at approximately 9:00 p.m. When Waldrop arrived on the scene, he observed Defendant standing outside a pickup truck that was pulling a trailer. Defendant told Waldrop that there had been a "small collision" between his truck and another vehicle, and that he was driving the truck at the time of the collision. Defendant had red, glassy eyes, slurred speech, and a strong odor of alcohol. Defendant was walking in a "zig-zag" pattern and stumbling, and Waldrop had to keep him from falling at one point. Waldrop administered the horizontal gaze nystagmus test, and Defendant exhibited six out of the six clues indicating impairment. An Alco-Sensor breath test was administered at 9:10 p.m. and again at 9:22 p.m., which confirmed the presence of alcohol in Defendant's system. At that point, Waldrop formed the opinion that Defendant had consumed a sufficient amount of alcohol to appreciably impair his mental and physical faculties.

Waldrop arrested Defendant for driving while impaired and transported him to the Robeson County Detention Center to read him his *Miranda* rights and administer an Intoximeter breath test. At the detention center, Defendant admitted that he was driving the truck and that he had consumed alcohol prior to driving. Waldrop read Defendant his rights concerning the Intoximeter at 9:58 p.m., and Defendant subsequently refused to provide a breath sample. As this was relevant evidence that a reasonable mind might accept as adequate to support a conclusion that Defendant was driving while impaired, Defendant has failed to show that there is a reasonable probability that, but for defense counsel's failure to renew his motion to dismiss, the trial court would have allowed the motion. *See Blackmon*, 208 N.C. App. at 403, 702 S.E.2d at 837 (holding that defendant did not receive ineffective assistance of counsel based on defense counsel's failure to renew his motion to

dismiss because "a second motion to dismiss would not have altered the result in [the] case").

Accordingly, Defendant did not receive ineffective assistance of counsel.

III. Conclusion

Defendant's argument that the trial court erred by denying his motion to dismiss is not properly before us, and we therefore dismiss in part. Furthermore, Defendant did not receive ineffective assistance of counsel, and we therefore find no error in part.

DISMISSED IN PART; NO ERROR IN PART.

Judges ZACHARY and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MARCH 2024)

BLACKWELL v. N.C. DEP'T OF PUB. INSTRUCTION/BUNCOMBE CNTY. SCHS. No. 23-418	N.C. Industrial Commission (13-719914)	Affirmed
C.J. CHADWICK & ASSOCS., LLC v. CHADWICK No. 23-515	Carteret (22CVS504)	Affirmed
CURLINGS v. IRELAND No. 23-767	Beaufort (20CVS1024)	No Error
FENTY v. WAKE CNTY. PUB. SCH. SYS./N.C. DEP'T OF PUB. INSTRUCTION No. 23-696	N.C. Industrial Commission (20-009966)	Affirmed
HEIJMEN v. HEIJMEN No. 23-509	Durham (18CVD4282)	Affirmed
IN RE A.A.G. No. 23-766	Columbus (21JT84)	Affirmed
IN RE A.W. No. 23-455	Person (20JT26)	Vacated and Remanded
IN RE B.L.J. No. 23-582	Polk (21JT27)	Affirmed
IN RE D.J.W. No. 23-347	Robeson (20JT152)	Reversed
IN RE E.C. No. 23-143	Bladen (20JA35) (22CVD534)	Vacated In Part; Remanded.
IN RE K.E. No. 23-570	Greene (19JT15) (19JT16)	Affirmed
IN RE L.E. No. 23-191	Sampson (20JA74) (20JA75) (20JA76) (20JA77) (20JA78)	Vacated and Remanded

IN RE R.V.D. No. 23-613	Guilford (21JT553)	Affirmed
IN RE V.W. No. 23-649	Mecklenburg (19JT287)	Affirmed
KEENAN v. FED. EXPRESS CORP. No. 23-723	N.C. Industrial Commission (17-022057)	Affirmed
MILLER v. SOUDRETTE No. 23-493	Guilford (22CVS6698)	Affirmed
STATE v. BENNETT No. 23-502	Guilford (19CRS78790) (19CRS78792)	No Plain Error
STATE v. CORPENING No. 23-707	Dare (23CRS29)	Affirmed
STATE v. FREEMAN No. 23-731	Wilson (21CRS51996)	No Error
STATE v. HUDSON No. 23-336	Pitt (20CRS55228)	No Error
STATE v. LAWSON No. 23-611	Davidson (19CRS1000) (19CRS50961) (19CRS50972)	No Error
STATE v. McDOWELL No. 23-277	Bladen (17CRS51779)	No Error
STATE v. McKINLEY No. 23-442	Mecklenburg (20CRS231606) (20CRS231607)	No Error
STATE v. OSPINA No. 23-454	Union (20CRS52472)	No Error
STRICKLAND v. STRICKLAND No. 23-353	Mecklenburg (20CVD7321)	VACATED AND REMANDED.
WEBSTER v. DEVANE-WEBSTER No. 22-975	Wake (19CVD15723)	Affirmed
WEBSTER v. DEVANE-WEBSTER No. 22-977	Wake (19CVD15723)	Affirmed

WEBSTER v. DEVANE-WEBSTER No. 22-976	Wake (19CVD15723)	Affirmed

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