293 N.C. App.—No. 5 Pages 650-827

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 24, 2024

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

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[1] Died 9 April 2024.

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COURT OF APPEALS

CASES REPORTED

FILED 7 MAY 2024 (SECOND HALF)

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Final agency decision—applicable standards of judicial review exceeded—adoption assistance benefits—In a proceeding regarding eligibility for federally funded adoption assistance benefits provided under Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 as administered by the Department of Health and Human Services (DHHS), the superior court exceeded its limited authority upon judicial review in reversing the final agency decision of DHHS to deny benefits to a child's adoptive parents. The superior court's conclusion that the final agency

decision was arbitrary, capricious, and an abuse of discretion rested on its reasoning that the adoptive parents' 2021 benefits application was denied only because respondents (DHHS and the child-placement agency) failed to adequately advise the adoptive parents about the availability of, and requirements for, those benefits at the time of the child's adoption in 2014. However, appellate review of the whole record revealed that the child never met the program's eligibility requirements, either at the time of his adoption or when the application was made seven years later, and that ineligibility was unrelated to any failure by respondents to advise the adoptive parents about the adoption assistance program. Accordingly, the superior court's reversal of the final agency decision was reversed. **White v. N.C. Dep't of Health & Hum. Servs., 797.**

ANIMALS

Felony cruelty to animals—elements—cruelly beat—single kick in dog's stomach—sufficient—After an incident where defendant kicked his neighbor's dog in the stomach so hard that the dog suffered severe internal bleeding, the trial court in defendant's criminal prosecution properly denied his motion to dismiss a charge of felony cruelty to animals because the State presented substantial evidence that defendant "cruelly beat" the dog. Under the plain meaning of the statute defining the charged crime—and in accordance with the legislature's intent to protect animals from malicious cruelty—the term "cruelly beat" applies to "any act" that causes unjustifiable pain, suffering, or death to an animal, even if it is just one strike rather than repeated strikes. Therefore, defendant's single kick to the dog met this definition, especially given the life-threatening nature of the dog's resulting injuries. **State v. Doherty, 685.**

APPEAL AND ERROR

Preservation of issues—assault with deadly weapon—failure to move to arrest judgment—Defendant failed to preserve for appellate review his argument that the trial court erred by not arresting judgment on a charge of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI)—because, according to defendant, he could not be convicted of both that offense and felony hit and run with serious injury—where he did not move the court to arrest his AWDWIKISI judgment. **State v. Buck, 671.**

Preservation of issues—equitable distribution order—challenge to findings—specific arguments required—In an appeal from an equitable distribution order, in which the trial court distributed to plaintiff's ex-wife (defendant) a sum of money equal to one-half of the value of plaintiff's law firm, plaintiff's generalized assertion that numerous of the court's findings of fact were unsupported by the evidence was insufficient—standing alone and in the absence of specific arguments as to each finding's deficiency—to preserve for appellate review his challenge to those findings. **Sneed v. Johnston, 650.**

Preservation of issues—exclusion of evidence—no offer of proof—In a prosecution for second-degree sexual offense and second-degree rape, defendant failed to preserve for appellate review his argument that the trial court erred by sustaining an objection during the cross-examination of a detective about whether defendant had admitted to the alleged sexual assault where, although defense counsel noted his exception to the exclusion of that testimony, he did not make an offer of proof

closing argument that the victim's eating disorder, self-harm, and nightmares were consistent and credible responses to having been raped. The statements were not asserted as fact but constituted reasonable inferences based on the facts in evidence and, even had the statements been improper, they amounted to a small portion of the State's closing argument and were not prejudicial to defendant. **State v. Heyne, 724.**

Jury instruction—felony cruelty to animals—lesser included offense—plain error review not waived—In a prosecution for felony cruelty to animals, where defendant told the trial court during the charge conference that he did not object to the court's jury instructions, his affirmative non-objection was insufficient on its own to waive plain error review of his argument on appeal—that the court erred by failing to instruct the jury on the lesser included offense of misdemeanor cruelty to animals. Nevertheless, the court did not plainly err by deciding not to instruct the jury on the lesser offense, since the State presented substantial evidence that defendant committed the greater offense when he kicked his neighbor's dog in the stomach so hard that, absent emergency care, the dog likely would have died from severe internal bleeding. **State v. Doherty, 685.**

Jury instructions—felony hit and run—assault with deadly weapon—plain error analysis—In defendant's trial for multiple charges arising from an incident in which he pursued and hit the victim (who was on foot) with his car, the trial court did not plainly err by instructing the jury on both assault with a deadly weapon with intent to kill inflicting serious injury and felony hit and run with serious injury. The two offenses were not mutually exclusive and, therefore, the jury could be instructed on both offenses and defendant could be convicted of both. **State v. Buck, 671.**

Jury's request to revisit evidence—no instruction by court to consider all other evidence—no abuse of discretion—In a prosecution for possession of a firearm by a felon and possession of methamphetamine, where the State played recordings for the jury of phone calls that defendant made from jail on the day of his arrest, the trial court did not abuse its discretion under N.C.G.S. § 15A-1233(a) when, in allowing the jury's request to replay one of the recordings during deliberations, it did not explicitly instruct the jury that it must also consider the rest of the evidence from trial. Even if the court had erred, defendant failed to show that such an error prejudiced him. Further, the court properly instructed the jury during the jury charge to consider all of the evidence, and the court scrupulously followed the requirements of section 15A-1233(a) during the replay of the recording. **State v. Montgomery, 736.**

Motion to sever—no abuse of discretion—transactional connection and fair hearing—The trial court did not abuse its discretion in denying defendant's motion to sever a first-degree murder charge from a charge of possession of a stolen vehicle where there was a transactional connection between the two crimes as reflected by evidence that defendant came into possession of the stolen car about three hours before the murder, was in the stolen vehicle when he fatally shot the victim, and possessed the murder weapon during both crimes. Further, joinder of the offenses did not prevent defendant from receiving a fair trial in light of other substantial evidence demonstrating defendant's premeditation and deliberation in committing the murder charged, including that he possessed the gun immediately before (and after) the fatal shooting, told his girlfriend to turn away just before the victim was shot, and had attempted another armed robbery just prior to the fatal shooting. **State v. Fernanders, 695.**

Possession—actual and constructive—firearm by a felon—methamphetamine—defendant directing third party to hide the items—The trial court properly

denied defendant's motion to dismiss charges for possession of a firearm by a felon and possession of methamphetamine, where the State presented evidence that, on the day of his arrest, defendant made multiple phone calls from jail to a woman asking her to remove certain items—including the gun and drugs at issue—from the place where he was arrested. Defendant's phone calls reflected his intent to control the disposition and use of both the gun and the drugs, and therefore the calls constituted sufficient evidence that defendant constructively possessed the items. Additionally, given the location of the items at the scene of defendant's arrest, defendant's awareness of each item's specific location, and his efforts to conceal them, a jury could have also concluded that defendant actually possessed the items prior to his arrest. **State v. Montgomery, 736.**

Possession—firearm by a felon—methamphetamine—jury instructions—attempt—no plain error—In a prosecution for possession of a firearm by a felon and possession of methamphetamine, the trial court did not commit plain error by declining to instruct the jury on theories of attempt with respect to both charges. The State presented sufficient evidence to support convictions for both offenses under theories of actual and constructive possession, including recordings of multiple phone calls that defendant made from jail to a woman asking her to remove certain items—including the gun and drugs at issue—from the scene of his arrest. Furthermore, the State's evidence showed that the women had, in fact, moved the items by the time law enforcement approached her, and therefore there was no evidence suggesting that defendant merely attempted to constructively possess the items. **State v. Montgomery, 736.**

Rape and sex offense—multiple counts—jury instructions—separate and distinct incidents—In defendant's prosecution for three counts of second-degree forcible rape and one count of sex offense in a parental role, in which one date range was given for each offense, the trial court did not plainly err by failing to instruct the jury to determine specific dates for each alleged act, since the State was not required to allege or prove specific dates for each offense. Further, the court expressly instructed the jury to consider each count separately, and defendant could not demonstrate prejudice because the victim testified to two separate instances of abuse along with a long pattern of being abused multiple times per week for several months. **State v. Gibbs, 707.**

DIVORCE

Equitable distribution—calculation of award—ability to pay—In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court did not err in calculating the amount of the award where it had properly classified plaintiff's personal goodwill in the law firm as marital property and where no credible evidence was submitted of a decrease in value of the law firm as of the date of distribution. Further, the court's determination of plaintiff's ability to pay the distributive award was supported by evidence regarding plaintiff's employment, income, expenses, and assets. **Sneed v. Johnston, 650.**

Equitable distribution—credit for overpayment of child support—separate issue—In an equitable distribution matter, plaintiff's argument that the trial court failed to credit him for overpayment of child support when making a distributive award to his ex-wife (defendant) was more properly addressed in a separate child support proceeding in district court. **Sneed v. Johnston, 650.**

Equitable distribution—law firm—goodwill—classification as marital property—In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court's decision to classify the law firm, including goodwill, as entirely marital property, was supported by its findings of fact, which in turn were supported by competent evidence such as the testimony and a report of the appraiser who had been appointed by the trial court to provide a valuation of the firm as of the date of separation. **Sneed v. Johnston, 650.**

Equitable distribution—law firm—valuation at time of distribution—decrease in value—abuse of discretion analysis—In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court did not abuse its discretion by failing to distribute the decrease in value of the law firm—as generally alleged by plaintiff—where neither party offered credible evidence of a specific valuation of the business at the date of distribution or any evidence to counter the valuation provided by the business appraiser who had been appointed by the court to value the firm as of the date of separation. **Sneed v. Johnston, 650.**

Equitable distribution—marital property—valuation of law firm—appraisal evidence—In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court's determination of the value of the law firm was based on its findings, which in turn were based not only on the testimony and report of the business appraiser that the court had appointed to value the business as of the date of separation, but also on plaintiff's testimony and various other exhibits submitted into evidence. Plaintiff had ample opportunity to contest the appraiser's valuation methods, but repeatedly ignored the appraiser's communications, and provided no evidence demonstrating a clear legal error in the court's determination. **Sneed v. Johnston, 650.**

Equitable distribution—motion to re-open evidence—trial court's discretion—The trial court did not abuse its discretion in an equitable distribution matter by denying plaintiff's motion to re-open the evidence after resting his case, where, although plaintiff argued that he was entitled to submit additional evidence due to the nearly seven-month delay between the close of the evidence and entry of judgment, plaintiff did not identify any prejudice to him that resulted from the delay. **Sneed v. Johnston, 650.**

EVIDENCE

Expert opinion testimony—ballistics analysis—scientific reliability—no abuse of discretion—In a murder prosecution, the trial court did not abuse its discretion in allowing expert opinion testimony under Rule of Evidence 702 that the gun seized during defendant's arrest was the weapon that fired the fatal shot killing a truck driver who defendant encountered on the roadside. The expert's testimony met all three prongs of the *Daubert* reliability test in that the expert: (1) explained the applicable scientific standards and procedures involved in matching a weapon to used casings and bullets fired, (2) testified that she followed those standards and procedures in the instant case in matching the gun seized from defendant to the cartridge casing found at the scene of the fatal shooting and the bullet recovered from the victim's body, and (3) described the facts and data she relied upon, including

a comparison between results obtained from the investigation and those obtained from the test fires. **State v. Fernanders, 695.**

Lay opinion testimony—evidence excluded—no abuse of discretion—In a prosecution for second-degree sexual offense and second-degree rape, any error by the trial court in prohibiting defense counsel from asking a detective whether he found defendant truthful during their conversation was not prejudicial in light of the overwhelming evidence against defendant, including that: the victim awakened in her apartment after arriving home in an intoxicated state to find defendant engaged in vaginal intercourse with her; he later inserted his penis into the victim's mouth; multiple DNA samples taken from the victim's body as part of a sexual assault kit matched defendant; the victim's credit and debit cards were discovered in a search of defendant's car; and defendant's cellphone contained video, photo, and location data placing him at the victim's apartment with her when the assaults occurred. **State v. Ramirez, 757.**

Lay opinion testimony—prejudice analysis—overwhelming evidence—Even assuming, without deciding, that in defendant's trial for first-degree murder and possession of a stolen vehicle, the trial court abused its discretion by allowing defendant's girlfriend to give lay opinion testimony pursuant to Rule of Evidence 701 identifying the gun depicted in video and photographic exhibits as the murder weapon, defendant failed to demonstrate prejudice—a reasonable possibility that, absent the error, the jury would have reached a different verdict (N.C.G.S. § 15A-1443(a))—where the State presented other evidence of premeditation and deliberation, including that defendant possessed the murder weapon immediately before (and after) the fatal shooting, told his girlfriend to turn away just before the victim was shot, and had attempted an armed robbery just prior to the fatal shooting. **State v. Fernanders, 695.**

Lay witness testimony—rape trial—repressed memories—victim's recall—expert support not required—In a trial for first-degree rape involving an incident that took place years earlier when the victim was a minor, the trial court did not plainly err by allowing the victim to testify regarding her memories of the incident where, despite defendant's characterization of the victim's testimony as involving repressed memories—for which supporting expert testimony would be required—the victim did not testify that she had repressed memories or that she had recovered repressed memories but, instead, recalled certain parts of the incident as "really clear." **State v. Heyne, 724.**

Lay witness testimony—rape trial—repressed memory—admitted for corroborative purposes—In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not plainly err when it admitted testimony, without expert support, of a friend of the victim's family stating that the victim had repressed her memory of the incident, since the family friend's testimony was not admitted for substantive purposes but, rather, as corroboration of the victim's substantive testimony, a distinction that the trial court made clear to the jury during instructions. **State v. Heyne, 724.**

Lay witness testimony—rape trial—victim's advocate—calling memory loss "normal"—based on rational perception—In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not abuse its discretion by allowing the testimony of a domestic violence victim's advocate who described taking the victim to be interviewed by law enforcement

EVIDENCE—Continued

and, after relating that the victim did not remember a lot of details, stated that the lack of details was "normal because it happened so long ago." Despite defendant's argument that there was no basis for this opinion, the trial court could have reasoned that the testimony was based on the rational perception that memories fade over time. **State v. Heyne, 724.**

Prior bad acts—uncharged offenses—prejudice analysis—overwhelming evidence—Even assuming, without deciding, that in defendant's trial for first-degree murder and possession of a stolen vehicle, the trial court erred by allowing defendant's girlfriend to give Rule of Evidence 404(b) testimony regarding an uncharged robbery and kidnapping committed by defendant, defendant failed to demonstrate prejudice—a reasonable possibility that, absent the error, the jury would have reached a different verdict (N.C.G.S. § 15A-1443(a))—where the other evidence of his guilt was overwhelming, including testimony that defendant had been agitated and aggressive with the victim just before she was fatally shot, told his girlfriend to turn away just before the victim was shot, had the murder weapon in his hand just after the shooting, fled once he realized the victim had been killed, had attempted an armed robbery just before the fatal shooting, and afterward stated "if we get caught, it is going to be a shoot-out." **State v. Fernanders, 695.**

Repetitive video and photographic exhibits—unfair prejudice versus probative value—no abuse of discretion—In defendant's trial for first-degree murder and possession of a stolen vehicle, the trial court did not abuse its discretion under Rule of Evidence 403 by admitting ten videos and five photographs of defendant's theft of a vehicle, because the probative value of this evidence was not outweighed by the danger of unfair prejudice where these exhibits were not unnecessarily repetitive but rather gave a full picture of defendant's role in the vehicle theft, assisted a witness's identification testimony, and connected defendant to evidence discovered during his arrest, namely, the murder weapon. **State v. Fernanders, 695.**

HOMICIDE

Jury instruction—self-defense—section 14-51.4—defense of habitation—causal nexus required—no evidentiary support for instruction—In a prosecution for first-degree murder, the trial court erred in concluding that defendant's possession of a weapon of mass death and destruction—a sawed-off shotgun—categorically disqualified him under N.C.G.S. § 14-51.4(1) from a jury instruction on the defense of habitation (as codified in N.C.G.S. § 14-51.2) but nonetheless did not err by failing to instruct the jury on that defense because the evidence at defendant's trial did not support it. Specifically, while section 14-51.2 states that that the defense of habitation applies only where deadly force is used against a person who has, or is in the process of, unlawfully and forcefully entering a home—including its curtilage—the evidence here was that defendant, the victim, and the victim's mother were sitting in a car in the driveway—and thus within the curtilage—of defendant's home when the victim's mother gave defendant a notice to vacate. Because the victim had entered defendant's home lawfully and without force before he was killed, the defense of habitation was inapplicable. **State v. Vaughn, 770.**

Jury instruction—self-defense—section 14-51.4—stand-your-ground provision—causal nexus required—In a prosecution for first-degree murder, the trial court erred in concluding that defendant's possession of a weapon of mass death and destruction—a sawed-off shotgun—categorically disqualified him under N.C.G.S. § 14-51.4(1) from a jury instruction on the statute's stand-your-ground provision (as

codified in N.C.G.S. § 14-51.3(a)(1)) and by failing to instead instruct the jury that, for such disqualification to apply, the State must prove the existence of an immediate causal nexus between defendant's possession of the shotgun and the confrontation during which he used deadly force. Further, there was a reasonable possibility that, had the court properly instructed the jury, it would have reached a different result at trial, given that: (1) the State explicitly (and erroneously) argued that the stand-your-ground provision was categorically inapplicable during closing arguments, and (2) the evidence—viewed in the light most favorable to defendant—tended to show that after being told to vacate his home, defendant: went inside the trailer, locked the door, and attempted unsuccessfully to contact 911; retrieved the shotgun because he could not locate other potential means of protection; went onto his porch and told the victim and his mother to leave; and eventually insulted the victim's mother twice, at which point the victim took off his shirt, yelled "Let's end this," and rushed defendant, coming within five feet at the point defendant shot and killed him. This showing of prejudicial error entitled defendant to a new trial on first-degree murder. **State v. Vaughn, 770.**

INDICTMENT AND INFORMATION

Multiple indictments—identical counts of rape—date range—sufficiency of notice—In a prosecution for rape and sex offense in a parental role, the indictments charging defendant with three identical counts of second-degree forcible rape over a nearly six-month time span were not constitutionally defective because they provided sufficient notice to defendant of the charges against him. Where the incidents had taken place many years earlier against a minor victim and where time was not of the essence or a required element of the offense, any lack of specificity in the dates of each offense did not prejudice defendant and did not require dismissal. Further, there was sufficient evidence at trial to support the date range given in the indictments, based on the victim's testimony that defendant repeatedly abused her multiple times per week for months. Finally, the trial court expressly instructed the jury to assess whether the charged offense occurred three separate and distinct times within the date range. **State v. Gibbs, 707.**

Sufficiency—short-form indictment—second-degree forcible sexual offense —mens rea element—The trial court had jurisdiction to try defendant for second-degree forcible sexual offense, where the indictment alleged that defendant "unlawfully, willfully and feloniously" engaged in a sexual act with the victim, "who was at the time physically helpless." The indictment was not defective, since its language matched the language required by N.C.G.S. § 15-144.2(c) for short-form indictments alleging a sexual offense and was therefore sufficient to inform defendant of the mens rea element of the crime he was charged with—specifically, that he was aware of the victim's incapacity during the sexual act. **State v. Crowder, 682.**

JUDGMENTS

Criminal—clerical error—inclusion of term "forcible" on judgments—The erroneous inclusion of the term "forcible" on criminal judgments entered upon defendant's convictions for second-degree sexual offense and second-degree rape were mere clerical errors where the indictment, jury instructions, and verdict sheet for each charge correctly identified the offense for which defendant was tried and found guilty; accordingly, the matter was remanded for correction of the errors. **State v. Ramirez, 757.**

felony hit and run with serious injury pursuant to N.C.G.S. § 20-166(a) to survive defendant's motion to dismiss, including of defendant's intent to hit the victim with his car, based on testimony at trial that: at a planned drug transaction, after the victim took defendant's marijuana and ran away on foot, defendant accelerated his car, pursued the victim, and hit him with his car; defendant then got out of his car, searched the victim's pockets, took the marijuana and the victim's phone, and drove away. Despite defendant's argument that the event did not qualify as a "crash" under the statute, the second element of the offense—that defendant knew or reasonably should have known that the vehicle was involved in a crash—was satisfied. **State v. Buck, 671.**

Felony hit and run—motion to arrest judgment—meaning of "crash"—intent irrelevant—In defendant's trial for multiple charges arising from an incident in which he pursued and hit the victim (who was on foot) with his car, although defendant argued that he could not be convicted of both assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and felony hit and run with serious injury, the trial court was not required to arrest judgment on the felony hit and run charge where the use of the word "crash" in the charging statute (N.C.G.S. § 20-166(a)) did not denote an unintentional act but was defined in the statute as any event resulting in injury caused by a vehicle and, therefore, did not depend on the driver's intent. Further, because the statute was unambiguous, the rule of lenity did not apply. **State v. Buck, 671.**

PARTIES

Failure to join—necessary party—revocable trust—owner of property up for equitable distribution—In an equitable distribution action, where the parties had previously stipulated that certain assets were titled to a revocable trust, and where the trial court declined to distribute the trust property after correctly determining that it lacked jurisdiction to do so—because the property's true owner, the trust, was not a party to the action—the court's equitable distribution order was vacated as null and void because the court erred in failing to join the trust ex mero motu as a necessary party to the action, pursuant to Civil Procedure Rule 19. **Wenninger v. Wenninger, 791.**

RAPE

Second-degree forcible rape—sex offense in a parental role—constructive force—sufficiency of evidence—The State presented substantial evidence of each element of second-degree forcible rape and sex offense in a parental role sufficient to survive defendant's motion to dismiss for lack of evidence, including that defendant committed the offenses and used constructive force. Despite the lack of physical evidence, the victim testified that defendant—who was her stepfather at the time of the incidents—assaulted her multiple times per week for several months, that during the assaults she couldn't go anywhere because defendant would be on top of her and was larger in size, and that she felt intimidated and feared repercussions if she did not comply. **State v. Gibbs, 707.**

SEARCH AND SEIZURE

Anticipatory search warrant—probable cause—nexus between drug activity and residence—totality of the circumstances—In a drug trafficking case, the

trial court properly denied defendant's motion to suppress drugs and drug paraphernalia found at his residence where an investigator's affidavit and application for an anticipatory search warrant contained facts giving rise to a reasonable inference that defendant was involved in criminal activity and establishing a nexus between that activity and the residence, including information law enforcement obtained from a confidential informant, controlled buys, and vehicle surveillance. Based on the totality of the circumstances and giving deference to the magistrate, issuance of the warrant to search defendant's property was supported by probable cause. **State v. Boyd, 665.**

Search warrant—probable cause—store burglary—video surveillance—unique vehicle characteristics—In a prosecution for multiple charges arising from the theft from a convenience store of cartons of cigarettes, cases of alcohol, twenty-six packs of state lottery tickets, along with the theft of cash from an ATM located there, the trial court properly denied defendant's motion to suppress evidence seized from his vehicle where sufficient other evidence supported issuance of a search warrant based on probable cause. After the burglary was reported to law enforcement, the investigating detective viewed relevant video surveillance footage and, as he was driving in the area, he spotted the same vehicle—based on its make and model, black rims, and missing bumper—that appeared to be associated with the burglary, and discovered that the vehicle displayed a fictitious out-of-state license plate. Despite defendant's argument that law enforcement officers remained in the curtilage of the residence where the vehicle was parked beyond an allowable period of time after an unsuccessful knock and talk, the officers were lawfully securing the vehicle and the scene after probable cause had already been acquired based on the totality of the circumstances, which established a fair probability that contraband related to the burglary would be found in the vehicle. **State v. Norman, 744**.

SENTENCING

Rape and sex offense—consecutive sentences—no abuse of discretion—The trial court did not abuse its discretion by imposing consecutive sentences on defendant after he was convicted of three counts of second-degree forcible rape and one count of sex offense in a parental role where the court sentenced defendant in the presumptive range for each offense and, therefore, was not required to take into account mitigating evidence, and where there was no evidence in the record that the sentences were arbitrary or that they amounted to cruel or unusual punishment. **State v. Gibbs, 707.**

UNFAIR TRADE PRACTICES

Summary judgment—one-year limitation of liability clause—In an action brought by homeowners against a company hired to remediate damage from a water heater leak, the trial court erred in granting summary judgment in favor of the company on the homeowners' Unfair and Deceptive Trade Practices Act (UDTPA) claim because the one-year clause of limitations included in the work authorization contract had to yield to the applicable statutorily proscribed limits for UDTPA claims. Accordingly, the trial court's order was vacated and the matter was remanded for further proceedings. **Warren v. Cielo Ventures, Inc., 784.**

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.

JASON M. SNEED, PLAINTIFF
v.
CHARITY A. JOHNSTON (SNEED), DEFENDANT

No. COA23-446

Filed 7 May 2024

1. Appeal and Error—preservation of issues—equitable distribution order—challenge to findings—specific arguments required

In an appeal from an equitable distribution order, in which the trial court distributed to plaintiff's ex-wife (defendant) a sum of money equal to one-half of the value of plaintiff's law firm, plaintiff's generalized assertion that numerous of the court's findings of fact were unsupported by the evidence was insufficient—standing alone and in the absence of specific arguments as to each finding's deficiency—to preserve for appellate review his challenge to those findings.

2. Divorce—equitable distribution—marital property—valuation of law firm—appraisal evidence

In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court's determination of the value of the law firm was based on its findings, which in turn were based not only on the testimony and report of the business appraiser that the court had appointed to value the business as of the date of separation, but also on plaintiff's testimony and various other exhibits submitted into evidence. Plaintiff had ample opportunity to contest the appraiser's valuation methods, but repeatedly ignored the appraiser's communications, and provided no evidence demonstrating a clear legal error in the court's determination.

3. Divorce—equitable distribution—law firm—goodwill—classification as marital property

In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court's decision to classify the law firm, including goodwill, as entirely marital property, was supported by its findings of fact, which in turn were supported by competent evidence such as the testimony and a report of the appraiser who had been appointed by the trial court to provide a valuation of the firm as of the date of separation.

4. Divorce—equitable distribution—law firm—valuation at time of distribution—decrease in value—abuse of discretion analysis

In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court did not abuse its discretion by failing to distribute the decrease in value of the law firm—as generally alleged by plaintiff—where neither party offered credible evidence of a specific valuation of the business at the date of distribution or any evidence to counter the valuation provided by the business appraiser who had been appointed by the court to value the firm as of the date of separation.

5. Divorce—equitable distribution—motion to re-open evidence—trial court's discretion

The trial court did not abuse its discretion in an equitable distribution matter by denying plaintiff's motion to re-open the evidence after resting his case, where, although plaintiff argued that he was entitled to submit additional evidence due to the nearly seven-month delay between the close of the evidence and entry of judgment, plaintiff did not identify any prejudice to him that resulted from the delay.

6. Divorce—equitable distribution—credit for overpayment of child support—separate issue

In an equitable distribution matter, plaintiff's argument that the trial court failed to credit him for overpayment of child support when making a distributive award to his ex-wife (defendant) was more properly addressed in a separate child support proceeding in district court.

7. Divorce—equitable distribution—calculation of award—ability to pay

In an equitable distribution matter, in which the trial court awarded to plaintiff's ex-wife (defendant) a sum of money equal to one-half the value of plaintiff's law firm, the trial court did not err in calculating the amount of the award where it had properly classified plaintiff's personal goodwill in the law firm as marital property and where no credible evidence was submitted of a decrease in value of the law firm as of the date of distribution. Further, the court's determination of plaintiff's ability to pay the distributive award was supported by evidence regarding plaintiff's employment, income, expenses, and assets.

Appeal by Plaintiff from Orders entered 30 September 2022 and 17 October 2022 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 24 January 2024.

Miller Bowles Cushing, PLLC, by Nicholas L. Cushing, for Plaintiff-Appellant.

Connell & Gelb PLLC, by Michelle D. Connell, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Jason M. Sneed (Plaintiff) appeals from an Equitable Distribution Order and Judgment awarding Charity A. Johnston (Defendant) a distributive award of $1,550,000 representing one-half the value of Plaintiff's law firm, as well as requiring Plaintiff to reimburse Defendant for certain costs of a business appraiser, and an Order Denying Plaintiff/Husband's Motion to Strike and Motion to Reopen Evidence. The Record before us tends to reflect the following:

The parties in this case were formerly husband and wife. The parties married on 17 August 1996, separated on 5 January 2015, and divorced on 8 March 2016. In 2011, during the marriage, Plaintiff started a law firm, Sneed, PLLC. On 2 May 2019, the trial court entered a Consent Order Re Business Appraiser, appointing Greg Reagan of Reagan FV, LLC to value Sneed, PLLC at the date of separation. On 26 July 2019, the parties subsequently entered into a Consent Order, which resolved all issues related to equitable distribution except for "the classification, valuation, and distribution of Sneed, PLLC and all assets owned by Sneed, PLLC[.]"[1]

Initially, in the summer of 2019, Plaintiff communicated with Reagan and provided him with financial documents concerning Sneed, PLLC. On 25 September 2019, Reagan provided both parties with a draft valuation of Sneed, PLLC, which indicated its value as of the date

1. The parties have not included this Consent Order in the Record on Appeal. As such, we are unable to discern whether the trial court ordered an equal or unequal distribution of marital and divisible property, the factors considered, or how the division of the value of the law firm at issue in this case fits into the equitable distribution of the totality of the parties' marital estate. Instead, the parties appear to have agreed to carve out the law firm from other assets and liabilities, and simply sought the trial court to classify the firm, value the firm, and divide it. As such, this is the limited lens through which we analyze this case.

of separation was $3,220,000. From September 2019 to January 2020, Reagan attempted to contact Plaintiff numerous times to obtain financial documents and get his assistance in valuing Sneed, PLLC. Plaintiff, however, repeatedly ignored Reagan, declined to send him information, and refused to pay his portion of Reagan's fee. Instead, Defendant paid the balance owed to Reagan.

On 6 March 2020, Reagan provided both parties with a final Calculation of Value of Sneed, PLLC. Reagan provided the parties with a final invoice for the valuation services on 10 April 2020. Over the following three months, Reagan sent monthly correspondence to Plaintiff regarding his final invoice, all of which went unanswered. Counsel for Defendant also sent a letter to Plaintiff regarding the appraisal and outstanding balance. Although Plaintiff acknowledged receiving this letter, he did not respond to any of the issues raised in the letter. Finally, on 14 October 2020, Defendant paid the outstanding balance for Reagan's service. On 14 December 2020, Defendant hired Reagan to perform a Valuation of Sneed, PLLC as of 5 January 2015—the date of separation.

The trial court heard this matter over two days in December 2021. At trial, Plaintiff testified that at the time of trial the value of Sneed, PLLC was either negative or zero due to an outstanding credit line. Reagan testified as an expert witness for Defendant. Reagan valued Sneed, PLLC at $3,100,000 as of the date of separation. He testified ten percent of Sneed, PLLC's goodwill value was enterprise goodwill, while the remaining ninety percent was personal goodwill attributable to Plaintiff.

On 30 September 2022, the trial court entered an Equitable Distribution Order and Judgment (the Equitable Distribution Order). The Order included 75 Findings of Fact detailing the trial court's valuation and distribution process. Ultimately, the trial court accepted Reagan's date of separation value of Sneed, PLLC of $3,100,000. The trial court further found its value included a valuation of the goodwill of Sneed, PLLC of $302,436 enterprise goodwill and $2,688,321 personal goodwill. The trial court did not find a date of distribution value of the firm. Instead, it expressly found Plaintiff "has failed to provide the [c]ourt with any credible value of Sneed, PLLC as of the date of separation or as of the date of trial."

The trial court ordered Plaintiff to pay a distributive award to Defendant of $1,550,000—representing one-half of the date of separation value of Sneed, PLLC—payable in monthly installments of $8,611.11 per month over a fifteen-year period. Additionally, the trial court ordered Plaintiff to pay $8,520.64 to reimburse Defendant for payments Defendant made to Reagan under the initial appointment order.

On 12 January 2022, Plaintiff filed a Motion to Strike Testimony and Reports of Court-Appointed Expert Greg Reagan. On 27 July 2022, Plaintiff filed a Motion to Reopen Evidence. The trial court entered an Order denying both Motions on 17 October 2022. Plaintiff timely filed Notice of Appeal on 25 October 2022 from both the 30 September 2022 Equitable Distribution Order and the 17 October 2022 Order Denying the Motion to Strike and Motion to Reopen Evidence.

Issues

The issues are whether: (I) the trial court's Findings of Fact were supported by competent evidence; and whether the trial court erred by (II) valuing Sneed, PLLC at $3,100,000; (III) classifying Sneed, PLLC as marital property; (IV) failing to distribute the decrease in the value of Sneed, PLLC; (V) denying Plaintiff's Motion to Reopen Evidence; (VI) failing to credit Plaintiff for his child support overpayment; and (VII) ordering Plaintiff to pay a distributive award of $1,550,000.

Analysis

I. Trial Court's Findings of Fact

[1] Plaintiff challenges the trial court's Findings of Fact 23, 30, 31, 37, 40-47, 50, 52-54, 56-65, 67, 69, and 72-74 in the Equitable Distribution Order. However, Plaintiff fails to make any specific argument as to each challenged Finding or to explain how or why he believes the challenged Findings to be deficient.

This Court considered a similar challenge to findings of fact—made in the context of a ruling by an Administrative Law Judge—in *Rittelmeyer v. University of North Carolina at Chapel Hill*, 252 N.C. App. 340, 799 S.E.2d 378 (2017). There, we determined:

> Because petitioner has failed to specifically raise an argument on appeal to any particular finding of fact, has failed to direct us to any particular portion of the record to consider a challenge to even one finding of fact, has failed to address any particular finding of fact as not supported by the evidence, and has failed to raise any issues with the findings of fact which she contends are material, we conclude that petitioner has abandoned her argument challenging the findings of fact.

Id. at 351, 799 S.E.2d at 385.

This Court has also considered a similar failure to explain the basis for a challenge to findings of fact in *Wall v. Wall*, 140 N.C. App. 303,

312, 536 S.E.2d 647, 653 (2000). The defendant in *Wall* argued the trial court did not consider adverse tax consequences in its equitable distribution order. *Id.* This Court held "[defendant] does not direct us to any evidence in the voluminous transcript which relates to the tax consequences he discusses in his brief. . . Defendant has the burden of showing that the tax consequences of the distribution were not properly considered, and he has failed to carry that burden." *Id.*

Similarly, here, Plaintiff's brief merely states: "For the reasons further discussed below, [Plaintiff] specifically challenges the trial court's findings of fact . . . Additionally, [Plaintiff] challenges the trial court's conclusions of law 2, 3, 4, 6, 7, 8, 9 and 11." Although Plaintiff alludes to arguments regarding these Findings and Conclusions, he does not make specific arguments in support of each. A generalized assertion the Findings "lack competent evidentiary support," standing alone, is not sufficient to preserve this argument for appellate review. *See Rittelmeyer*, 252 N.C. App. at 351, 799 S.E.2d at 385. Consequently, we reject this argument, except to the extent specific Findings are challenged within other arguments.

II. Valuation of Sneed PLLC

[2] "The task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the partnership interest. If it does, the valuation will not be disturbed." *Stowe v. Stowe*, 272 N.C. App. 423, 428, 846 S.E.2d 511, 516 (2020) (quoting *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270 (1985) (citation omitted)). This Court in *Poore* noted "[t]he valuation of each individual practice will depend on its particular facts and circumstances[,]" and directed trial courts to consider the following components of a practice: "(a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities." *Poore*, 75 N.C. App. at 419, 331 S.E.2d at 270. "[T]he requirements and standard of review set forth [in *Poore*] apply to valuation of other business entities as well, and we have extended the *Poore* standards to the valuation of a marital interest in a closely held corporation." *Offerman v. Offerman*, 137 N.C. App. 289, 293, 527 S.E.2d 684, 686 (2000) (alterations in original) (citations and quotation marks omitted).

Further, this Court held: "In ordering a distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations

are based, preferably noting the valuation method or methods on which it relied." *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272. Our Supreme Court has cautioned, however, that trial courts should "value goodwill with great care, for the individual practitioner will be forced to pay the ex-spouse tangible dollars for an intangible asset at a value concededly arrived at on the basis of some uncertain elements." *McLean v. McLean*, 323 N.C. 543, 558, 374 S.E.2d 376, 385 (1988) (citations and quotation marks omitted).

"The trial court determines the credibility and weight of the evidence." *Watson v. Watson*, 261 N.C. App. 94, 101, 819 S.E.2d 595, 601 (2018) (citation omitted). The fact finder has "a right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it." *Brown v. Brown*, 264 N.C. 485, 488, 141 S.E.2d 875, 877 (1965); *see also Fox v. Fox*, 114 N.C. App. 125, 134, 441 S.E.2d 613, 619 (1994) (trial court is the "sole arbiter of credibility and may reject the testimony of any witness in whole or in part.").

In this case, Plaintiff contends the trial court erred in its valuation of Sneed, PLLC by allowing Reagan to testify and accepting his reports into evidence; denying Plaintiff's Motion to Strike Testimony and Reports; and finding Reagan's calculations to be credible and relying on his testimony and report to value Sneed PLLC. Plaintiff's argument, however, ignores substantial evidence showing he repeatedly refused to cooperate with Reagan in his capacity as the court-appointed business appraiser. Based on the evidence presented at trial, the trial court made numerous Findings of Fact regarding Plaintiff's refusals to cooperate with Reagan and his violations of court orders, including the following:

> 51. At trial, [Plaintiff] objected to Mr. Reagan testifying in this matter on the grounds that Mr. Reagan was initially appointed as an expert by the Court, and then subsequently retained by [Defendant] as her expert to value Sneed, PLLC as of the parties' date of separation. The [c]ourt heard arguments from [Plaintiff] and [Defendant's] attorney on this point. Additionally, the [c]ourt received testimony from Mr. Reagan on this matter as well.
>
> 52. The [c]ourt does not find any bad faith or improper behavior on the part of [Defendant] or Mr. Reagan by virtue of [Defendant] hiring Mr. Reagan in December of 2020 to perform a Valuation of Sneed, PLLC. By December of 2020, [Plaintiff] had refused to communicate with Mr. Reagan

> *for over fifteen (15) months despite repeated efforts from Mr. Reagan to communicate with [Plaintiff]*, and despite numerous attempts from [Defendant's] attorney to facilitate communication between [Plaintiff] and Mr. Reagan.
>
> 53. The [c]ourt appointed a neutral appraisal [sic] to value the business and provide helpful information to the court regarding the January 5, 2015 date of separation value and the present day value of Sneed, PLLC. [Plaintiff], by his actions, prohibited Mr. Reagan from providing a present-day valuation of Sneed, PLLC. In fact, had [Defendant] not paid Mr. Reagan's invoice in February of 2020, the [c]ourt finds that it is unlikely that any appraisal—be it a Calculation of Value or Valuation—would have been completed with respect to Sneed, PLLC.
>
> 54. The [c]ourt finds that [Plaintiff] has unclean hands as it relates to his dealings with Mr. Reagan, specifically, [Plaintiff's] interference with Mr. Reagan's ability to produce a present date valuation of Sneed, PLLC.
>
> . . . .
>
> 56. The [c]ourt finds that [Plaintiff] has not been prejudiced by [Defendant] hiring Mr. Reagan to perform a Valuation of Sneed, PLLC. [Plaintiff] had several opportunities to speak with Mr. Reagan regarding his company. [Plaintiff] provided Mr. Reagan with the underlying financials supporting Mr. Reagan's Valuation of Sneed, PLLC. [Plaintiff] was provided with a copy of Mr. Reagan's Valuation of Sneed, PLLC over four months prior to the trial of this matter.

These Findings were supported by evidence including emails and testimony documenting Plaintiff's repeated failures to respond to Reagan's attempts to contact him, pay Reagan's invoices as ordered by the trial court, or cooperate with Reagan in a timely manner. Together, these Findings make clear Plaintiff was a significant impediment to Reagan's timely and accurate valuation of Sneed, PLLC. Given this evidence, the trial court was within its discretion to accept Reagan's testimony and valuation. Therefore, we conclude the trial court did not err in allowing Reagan to testify, accepting his reports into evidence, and denying Plaintiff's Motion to Strike.

Plaintiff also challenges the methodology Reagan used in making his valuation of Sneed, PLLC. "[T]he trial court must determine whether the

methodology underlying the testimony offered in support of the value of a marital asset is sufficiently valid and whether that methodology can be properly applied to the facts in issue." *Robertson v. Robertson*, 174 N.C. App. 784, 785-86, 625 S.E.2d 117, 119 (2005) (quoting *Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.E.2d 571, 577-78 (2002)). "There is no single best method for assessing that value, but the approach utilized must be sound[.]" *Walter*, 149 N.C. App. at 733, 561 S.E.2d at 577 (citations and quotation marks omitted). This Court has stated when valuing a business, a trial court should consider: "(a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities." *Poore*, 75 N.C. App. at 419, 331 S.E.2d at 270.

At trial, Plaintiff did not object to Reagan being tendered as an expert witness in accounting, forensic accounting, and business valuation. Reagan testified in detail about the process he undertook to value Sneed, PLLC, including his analysis of revenue trends, cash flow, discount rates, goodwill, and depreciation expenses. He also testified to his consideration of various methodologies and his reasoning for using the income approach and applying the capitalization of cash flows method to value Sneed, PLLC. Based on Reagan's testimony, his report, Plaintiff's testimony, and various exhibits submitted into evidence, the trial court made thorough Findings to support its valuation of Sneed, PLLC at $3,100,000.

"Absent a clear showing of legal error in utilizing [an] approach, this Court is not inclined to second guess the expert and the trial court, which accepted and approved this determination." *Sharp v. Sharp*, 116 N.C. App. 513, 529, 449 S.E.2d 39, 47 (1994). Plaintiff has not provided evidence or pointed to anything in the Record rising to the level of "a clear showing of legal error" that would cast doubt upon the trial court's determination. Moreover, Plaintiff had ample opportunity to work with Reagan and raise any concerns he had with the valuation. Instead, Plaintiff ignored Reagan's repeated attempts at communication. The alleged flaws with Reagan's chosen approach do not rise to the level of clear legal error. Therefore, we conclude the trial court did not err in finding Reagan's calculations to be credible and relying upon them in determining the value of Sneed, PLLC.

III. Classification of Sneed PLLC

[3] Plaintiff contends the trial court erred by classifying Sneed, PLLC as entirely marital property. Specifically, Plaintiff argues the trial court should have concluded that at least 89.9% of the value of Sneed PLLC was his personal goodwill, and at most 10.1% was enterprise goodwill.

Thus, he contends his personal goodwill should be treated as his own separate property.

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Blair v. Blair*, 260 N.C. App. 474, 478, 818 S.E.2d 413, 417 (2018) (quoting *Peltzer v. Peltzer*, 222 N.C. App. 784, 786, 732 S.E.2d 357, 359 (2012) (citation omitted)). "The determination of the existence and value of goodwill is a question of fact and not of law[.]" *Poore*, 75 N.C. App. at 421, 331 S.E.2d at 271. "The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary. The trial court's findings need only be supported by substantial evidence to be binding on appeal." *Peltzer*, 222 N.C. App. at 786, 732 S.E.2d at 359 (citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted).

As an initial matter, under our statutes, "[i]t is presumed that all property acquired after the date of marriage and before the date of separation is marital property[.]" N.C. Gen. Stat. § 50-20(b)(1) (2021). Contrary to Plaintiff's assertion, our courts have consistently declined to draw a distinction between personal and enterprise goodwill. This Court addressed goodwill in a closely held corporation in *Poore*, 75 N.C. App. 414, 331 S.E.2d 266. In *Poore*, this Court addressed whether the trial court erred in valuing a defendant's professional association—a private, solo dental practice he had incorporated—including goodwill. There, the Court stated that although goodwill is "controversial and difficult to value," it is clear "that goodwill exists, that it has value, and that it has limited marketability." *Id.* at 420, 331 S.E.2d at 271 (citations omitted). There, this Court held "[i]n valuing the professional association, the court should clearly state whether it finds the practice to have any goodwill, and if so, its value, and how it arrived at that value." *Id.* at 422, 331 S.E.2d at 272. Further, "We agree that goodwill is an asset that must be valued and considered in determining the value of a professional practice for purposes of equitable distribution." *Id.* at 420-21, 331 S.E.2d at 271. Thus, goodwill may constitute part of the value of a marital asset, which is, in turn, subject to equitable distribution.

Here, the trial court made the following relevant Findings of Fact:

> 45. In arriving at the value of Sneed, PLLC, the [c]ourt considered evidence concerning the goodwill of the

> business. The [c]ourt made its determination of the existence of goodwill using the assistance of Mr. Reagan's expert testimony.
>
> 46. Mr. Reagan testified to using the Multi-Attribute Utility Method to assess goodwill existing in Sneed, PLLC, and after applying this methodology, Mr. Reagan testified to his conclusions of personal and business goodwill existing in Sneed, PLLC. The [c]ourt has accepted this testimony and methodology and determines that the value of Sneed, PLLC's goodwill as of January 5, 2015 was $2,990,757 with $302,436 representing enterprise good will [sic] of Sneed, PLLC and $2,688,321 representing personal goodwill.
>
> 47. The [c]ourt heard from both parties during the trial, and the [c]ourt finds that the testimony of the parties supports the goodwill calculations as made by Mr. Reagan and accepted by this [c]ourt.

These Findings are supported by competent evidence, including Reagan's report. Under the equitable distribution framework, these Findings support the trial court's Conclusion that Defendant was entitled to a distributive award of $1,550,000 representing her share of Sneed, PLLC.[2] The trial court, in line with our precedent, properly acknowledged the goodwill in Sneed, PLLC constituted marital property subject to distribution. We, therefore, affirm the trial court's classification.

IV. Decrease in Value of Sneed PLLC

[4] "The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Blair*, 260 N.C. App. at 478, 818 S.E.2d at 417 (citation omitted). This Court applies an abuse of discretion

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2. Plaintiff's argument regarding the value of goodwill attributable to himself would properly have been an argument made for unequal distribution. Under N.C. Gen. Stat. § 50-20(c), if a trial court determines an equal division of marital property is not equitable, then it shall consider various factors, including, among others, "[t]he difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party." N.C. Gen. Stat. § 50-20(c)(10) (2021). Moreover, the parties expressly agreed to a process whereby all of the marital property apart from the law firm would be distributed through equitable distribution, while the classification and valuation of Sneed, PLLC would be addressed by the trial court in this proceeding. Plaintiff makes no argument here that an equal distribution of the law firm (or the entirety of the marital and divisible estates) was not equitable.

standard, upholding the trial court's valuation if it "is a sound valuation method, based on competent evidence, and is consistent with section 50-21(b)." *Ubertaccio v. Ubertaccio*, 161 N.C. App. 352, 357, 588 S.E.2d 905, 909 (2003).

Under our statutes, "[d]ivisble property and divisible debt shall be valued as of the date of distribution." N.C. Gen. Stat. § 50-21(b) (2021). However,

> [t]he requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property, necessarily exist *only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution.*

Miller v. Miller, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990). This Court in *Miller* noted the parties had "ample opportunity to present evidence and have failed to do so[,]" and reasoned that "remanding the matter for the taking of new evidence, in essence granting the party a second opportunity to present evidence, would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing." *Id.*

Here, neither party offered a specific valuation of Sneed, PLLC at the date of distribution based on credible evidence. Defendant offered no evidence of divisible property nor of the value of the law firm. For his part, Plaintiff testified the present value of the law firm as of the date of trial was "a negative value." However, the trial court expressly stated: "I found Mr. Reagan and his evaluations to be credible and I do not find Plaintiff's offer on the value or negative value of [Sneed, PLLC] to be credible. . . I do not find that Plaintiff has provided the [c]ourt with any credible option for the value of the business." Accordingly, in its Order, the trial court made the following Finding of Fact:

> 40. [Plaintiff] testified that Sneed, PLLC held little value over and above the personal reputation and efforts of [Plaintiff]. The [c]ourt received evidence from [Plaintiff] concerning the performance of Sneed, PLLC from its inception in 2011 through the date of trial. While the court can see a decline in income of Sneed, PLLC since the date of separation, [Plaintiff] has failed to provide the [c]ourt with any credible value of Sneed, PLLC as of the date of separation or as of the date of trial. . .

In the absence of credible evidence supporting the value of an asset, the trial court is not obligated to make specific findings as to value. *Gratsy v. Gratsy*, 125 N.C. App. 736, 739, 482 S.E.2d 752, 754, *rev. denied*, 346 N.C. 278, 487 S.E.2d 545 (1997). Thus, without credible evidence from either party as to the value of Sneed, PLLC after the date of separation, the trial court properly valued the law firm based on the competent evidence before it. Therefore, the trial court did not abuse its discretion in valuing Sneed, PLLC.

V. Motion to Reopen Evidence

[5] "The trial court has discretionary power to permit the introduction of additional evidence after a party has rested." *State v. Jackson*, 306 N.C. 642, 653, 295 S.E.2d 383, 389 (1982) (citations omitted). "Whether the case should be reopened and additional evidence admitted [is] discretionary with the presiding judge." *McCurry v. Painter*, 146 N.C. App. 547, 553, 553 S.E.2d 698, 703 (2001) (quoting *Smith Builders Supply, Inc. v. Dixon*, 246 N.C. 136, 140, 97 S.E.2d 767, 770 (1957) (citations omitted)). "Because it is discretionary, the trial judge's decision to allow the introduction of additional evidence after a party has rested will not be overturned absent an abuse of that discretion." *Id.* An abuse of discretion is found "only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Manning v. Anagnost*, 225 N.C. App. 576, 579, 739 S.E.2d 859, 861 (2013) (quoting *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006)).

Plaintiff argues when there is a delay between the close of evidence and entry of judgment in an equitable distribution case that is "an extensive delay . . . it would be consistent with the goals of the Equitable Distribution Act that the trial court allow the parties to offer additional evidence as to any substantial changes in their respective conditions or post-trial changes, if any, in the value of items of marital property." *Wall*, 140 N.C. App. at 314, 536 S.E.2d at 654. Plaintiff contends the delay here was prejudicial, and consequently the trial court erred by denying his Motion to Reopen Evidence. We disagree.

Here, the close of evidence in the equitable distribution matter occurred 10 December 2021. The trial court issued its ruling on 13 July 2022, approximately seven months later. Since *Wall*, this Court has addressed delays and concluded reopening the evidence was not warranted, even in some cases of extensive delays. *See*, *e.g.*, *White v. Davis*, 163 N.C. App. 21, 26, 592 S.E.2d 265, 269, *disc. review denied*, 358 N.C. 739, 603 S.E.2d 127 (2004) (concluding a four-month delay was not prejudicial); *Britt v. Britt*, 168 N.C. App. 198, 202-03, 606 S.E.2d 910, 912-13

(2005) (sixteen-month delay did not necessitate a new trial); *Nicks v. Nicks*, 241 N.C. App. 487, 510-11, 774 S.E.2d 365, 381-82 (2015) (four and a half-month delay did not warrant a new trial).

In *Britt*, this Court articulated three factors to consider in determining whether a delay was prejudicial: (1) whether the delay was more than *de minimis*; (2) whether there were "potential changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order"; and (3) whether "potential changes in the relative circumstances of the parties warranted additional consideration by the trial court." 168 N.C. App. at 202, 606 S.E.2d at 912-13.

Plaintiff's Motion to Reopen the Evidence alleged his business was negatively affected by the Covid-19 pandemic, changes in "current market conditions" and the loss of "key personnel"; he suffered an "involuntary decrease in the revenue, income and/or profitability of his business"; and "involuntary changes" occurring after trial resulted in the decrease in value of Sneed, PLLC. However, Plaintiff's arguments ignore both the fact the equitable distribution trial was heard in December 2021, months after the onset of the Covid-19 pandemic, and none of the changes to his business bore any relation to the delay in entering the Equitable Distribution Order. The consistent teaching of our precedent is there is no abuse of discretion in denying a motion to reopen evidence where a party fails to "identify any way that the delay resulted in any prejudice to him." *Nicks*, 241 N.C. App. at 511, 774 S.E.2d at 381. Accordingly, we conclude the trial court did not abuse its discretion in denying Plaintiff's Motion to Reopen Evidence.

VI. Child Support Credit

[6] Plaintiff contends the trial court erred by failing to credit him for overpayment of child support. On 1 July 2020, the trial court entered an Order Re: Motion to Modify Child Support. That Order provided Plaintiff had overpaid in child support by $10,000 since August 2019 and stated the matter "shall be addressed at further court proceedings and court orders."

The issues in this case, and the underlying Orders from which Plaintiff appeals, are solely related to the distribution of the marital estate. Child support is a separate issue which is properly addressed in a child support proceeding in district court.

VII. Distributive Award

[7] Plaintiff contends the trial court erred in calculating the distributive award to Defendant. Plaintiff relies entirely on his previous arguments,

asserting the distributive award was incorrect because it improperly determined Plaintiff's personal goodwill in Sneed, PLLC was marital property and failed to include the decrease in the value of Sneed, PLLC occurring after the date of separation. For the reasons above, we have already rejected these arguments.

Plaintiff's contention is the trial court's Finding that he could afford distributive award payments of $8,611.11 per month was not supported by competent evidence. We disagree.

As the trial court noted, it received and reviewed "numerous admitted exhibits concerning [Plaintiff's] employment, income, and expenses, including but not limited to, [Plaintiff's] employee earnings records and his personal and business bank account statements." This evidence is sufficient to support the trial court's Finding that Plaintiff can afford the distributive award. Thus, the trial court did not err by distributing Defendant's share of Sneed, PLLC in the form of a distributive award. Therefore, Defendant was entitled to a distributive award of $1,550,000 payable in monthly installments of $8,611.11. Consequently, the trial court did not err in entering its equitable distribution of Sneed, PLLC.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Equitable Distribution Order and Judgment and Order Denying Plaintiff/Husband's Motion to Strike and Motion to Reopen Evidence.

AFFIRMED.

Judges CARPENTER and GORE concur.

STATE v. BOYD

[293 N.C. App. 665 (2024)]

STATE OF NORTH CAROLINA
v.
PHILLIP EUGENE BOYD

No. COA23-984

Filed 7 May 2024

Search and Seizure—anticipatory search warrant—probable cause—nexus between drug activity and residence—totality of the circumstances

In a drug trafficking case, the trial court properly denied defendant's motion to suppress drugs and drug paraphernalia found at his residence where an investigator's affidavit and application for an anticipatory search warrant contained facts giving rise to a reasonable inference that defendant was involved in criminal activity and establishing a nexus between that activity and the residence, including information law enforcement obtained from a confidential informant, controlled buys, and vehicle surveillance. Based on the totality of the circumstances and giving deference to the magistrate, issuance of the warrant to search defendant's property was supported by probable cause.

Appeal by defendant from order entered 6 March 2023 by Judge Josephine Kerr Davis in Durham County Superior Court. Heard in the Court of Appeals 2 April 2024.

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

Grace, Tisdale & Clifton, P.A., by Michael A. Grace, for the defendant-appellant.

TYSON, Judge.

Phillip Eugene Boyd ("Defendant") pleaded guilty to two counts of attempted drug trafficking, one for cocaine and for marijuana, reserving his right to appeal denial of his motion to suppress from a judgment entered upon a plea of guilty. We affirm the trial court's ruling on Defendant's motion to suppress.

I. Background

Durham Police Investigator C.B. Franklin applied for and received an anticipatory search warrant on 10 April 2019, authorizing the search of property located at 3712 Lucknam Lane, Durham, N.C. 27707 ("Lucknam Lane"). Investigator Franklin's application and affidavit laid out the following:

In August 2018, Durham Vice and Narcotics Unit Investigators received information from a confidential informant ("CI"), asserting he had purchased trafficking-level quantities of cocaine from a man named "Pete" and from "Pete's" brother. Investigators later determined "Pete" was a man named Frederick Earl Smith ("Smith") and Defendant is his brother. The CI asserted Smith had acted as a middleman. The CI would contact Smith to request drugs. Smith would obtain the drugs from Defendant. Smith would schedule a meeting at a predetermined location, often a gas station, with the CI. Smith would often arrive in either a Ford F-150 pick-up truck or a Lexus Sedan vehicle, with Defendant driving the vehicle. Smith was the only individual to exit the vehicle to perform the transaction. While the CI only interacted with Smith, he claimed to have seen Defendant present on multiple occasions during the transactions, and asserted he would be able to visually identify him.

In October 2018, Durham Police Investigators performed a controlled buy, wherein officers directed the CI to contact Smith and arrange a buy. Smith arrived at the buy site in a newer model white Ford F-150 with the North Carolina license plate PCM-****. Smith exited the passenger side of the vehicle, approached the CI, and conducted the cocaine sale before returning to the vehicle. Investigators identified the vehicle as registered to Marietta Poole Boyd, Defendant's wife, with the registered address listed as 3712 Lucknam Lane. Investigator Franklin also confirmed the Ford F-150 pick-up truck was being parked and kept at Lucknam Lane.

On 12 March 2019, investigators applied for and received a tracking tag order to be installed on the Ford F-150 pick-up registered to Defendant's wife. The transmitted information indicated the Ford pick-up made frequent short stops at gas stations, often located in high crime and high narcotic areas, throughout Durham. This activity was consistent with the CI's previous statements regarding the use of gas stations as drug sales and delivery meeting sites. Additionally, the Ford pickup would often return to Lucknam Lane for notably short periods of time between stops before leaving again.

On 5 April 2019, investigators conducted direct surveillance of the Ford pickup using four two-man teams in unmarked police vehicles. Investigators were able to identify Defendant as the driver of the Ford F-150 pickup as he left Lucknam Lane. Investigators followed Defendant while he performed numerous short stops, often at gas stations, throughout the Durham area. Despite close surveillance, investigators did not directly witness any drug sales, but they confirmed much of the "short stay traffic" appeared to be drug related.

Investigators contacted the CI to direct the setup of another controlled buy. The CI arranged a meeting with Smith to purchase 9 ounces of cocaine for $8,700. Smith agreed to the sale and told the CI he would call on 10 April 2019 when he was ready to deliver and complete the sale.

Based upon the facts above, investigators believed controlled substances were being stored at Lucknam Lane. Officers applied for an anticipatory search warrant to search the property located at Lucknam Lane, if either Defendant or Smith completed the controlled buy expected to occur on 10 April 2019.

The arranged meeting with Smith occurred on 10 April 2019. Investigators were able to confirm Defendant was present and driving the white Ford F-150 pickup. Investigators executed the search warrant and law enforcement seized large amounts of U.S. currency, a currency counter, cocaine, marijuana, and assorted drug paraphernalia. Defendant was subsequently indicted on trafficking in cocaine and marijuana.

On 13 November 2019, Defendant moved to suppress evidence deriving from the anticipatory search warrant issued for the property located at Lucknam Lane. The trial court informed the parties of its denial of Defendant's motion to suppress on 8 December 2022 and filed the order 6 March 2023. Defendant preserved his right to appeal by objecting to the trial court's denial of his motion to suppress and entered a plea of guilty on 5 April 2023. Defendant gave an oral notice of appeal the same day and filed a written notice of appeal on 14 April 2023.

II. Jurisdiction

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2023). Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Motion to Suppress

Defendant argues the trial court erred by denying his motion to suppress evidence obtained from an anticipatory search warrant and asserts the search warrant lacked probable cause to support the warrant to search his residence.

A. Standard of Review

This Court's review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

"[C]onclusions of law are reviewed *de novo* and must be legally correct." *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724, (2008) (citations omitted). "We review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant." *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017).

B. Analysis

Defendant argues Investigator Franklin's affidavit and application failed to support a finding of probable cause to authorize the search of Defendant's residence, located at Lucknam Lane. We disagree.

Both the State and Federal Constitutions protect against unreasonable searches and seizures and require that warrants only be issued upon a showing of probable cause. *See* U.S. Const. amend. IV; N.C. Const. art. I, § 20. To determine whether probable cause existed, courts examine the totality of the circumstances known to the magistrate at the time the search warrant was issued. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984).

Under the "totality of the circumstances" test, an affidavit is sufficient to support probable cause "if it supplies reasonable cause to believe [ ] the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Howard*, 259 N.C. App. 848, 851, 817 S.E.2d 232, 235 (2018) (citing *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256).

Further, "this Court must pay great deference and sustain the magistrate's determination [of probable cause] if there exist[s] a substantial basis . . . to conclude [the] articles searched for were probably present."

State v. Hunt, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002). Lastly, a finding of probable cause does not require certainty, but rather only a substantial chance of criminal activity. *State v. McKinney*, 368 N.C. 161, 165, 775 S.E.2d 821, 825 (2015).

As is required for when an officer seeks a search warrant of a residence in connection to illegal activity observed outside the residence, "the facts set out in the supporting affidavit must show some connection or nexus linking the residence to illegal activity. Such a connection need not be direct, but it cannot be purely conclusory." *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020).

The Supreme Court of North Carolina recently determined a search warrant authorizing the search of a residence was supported by probable cause, even though the officer's affidavit only alleged an occupant of the residence participated in a sale of illegal drugs earlier in the day in another location. *Id.*, 374 N.C. at 338, 841 S.E.2d at 282. In *Bailey*, a detective witnessed the driver of a Jeep vehicle, the occupants of which he was familiar with due to previous drug activity, pull into an isolated parking lot. *Id.* at 333, 841 S.E.2d at 279. A woman exited another vehicle and entered the Jeep for roughly 30 seconds before returning to her vehicle. *Id.* Based upon his training, the detective believed a narcotics transaction had occurred. *Id.*

The detective followed the woman's vehicle and pulled her over after several traffic violations. *Id.* The woman admitted she had purchased and possessed heroin. *Id.* While this was occurring, another detective followed the Jeep back to, what the detectives knew to be, the occupant's residence. *Id.* Based on the information above, the detectives obtained a search warrant for the property. *Id.*

The key factor, which supported the search of the residence in *Bailey*, was the detectives' ability to demonstrate some nexus between the residence and the criminal activity. *Id.* at 338-39, 841 S.E.2d at 282. The Court explained it is not necessary for the officers to show direct criminal activity at the residence, but officers do need to demonstrate more than simply asserting the defendant visits or resides at the property. *Id.*

Here, Investigator Franklin's affidavit and application supports the conclusion of a substantial chance of evidence related to drug trafficking being present at Defendant's residence, located at Lucknam Lane. Investigator Franklin's application contains several key pieces of information:

1) Investigators identified the white Ford F-150 pickup used in an illegal drug sale with the CI as being owned by Defendant's wife and registered at Lucknam Lane;

2) Investigators confirmed cocaine was being trafficked and sold out of the Ford F-150 pickup;

3) The Ford F-150 pickup was kept at Lucknam Lane;

4) Both Defendant and Marietta Poole Boyd, Defendant's wife, resided at Lucknam Lane;

5) The Ford F-150 pickup made frequent, short stops at gas stations and convenience stores throughout the Durham area, often located in high drug trafficking areas, and often left from and returned to Lucknam Lane in between said stops;

6) Defendant was observed living and operating out of the residence located at Lucknam Lane and in the manner described above;

7) Defendant had a known history of dealing drugs; and,

8) The CI's statements were consistent with the evidence independently collected by the investigators.

As in *Bailey*, these facts support a reasonable inference that Defendant was engaged in drug trafficking and establishes a nexus between the drug trafficking and Defendant's residence. *Id.* Defendant's frequent and short-in-time returns to Lucknam Lane in between his other stops throughout Durham, which inspectors believed were drug related, supplied a connection or nexus between the illegal activity committed outside of Lucknam Lane by Defendant and at the residence itself. This reasonable inference and nexus supports the conclusion that a substantial chance existed of evidence of drug trafficking being present at Defendant's residence. *Id.* Defendant's arguments are overruled.

IV. Conclusion

Under the totality of the circumstances and with deference given to the magistrate's determination of probable cause, we hold the trial court properly denied Defendant's motion to suppress. Defendant presented no prejudicial errors in his arguments on appeal. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges STROUD and GORE concur.

STATE OF NORTH CAROLINA
v.
WILLIAM LOGAN BUCK, DEFENDANT

No. COA23-606

Filed 7 May 2024

1. Motor Vehicles—felony hit and run—motion to arrest judgment—meaning of "crash"—intent irrelevant

In defendant's trial for multiple charges arising from an incident in which he pursued and hit the victim (who was on foot) with his car, although defendant argued that he could not be convicted of both assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and felony hit and run with serious injury, the trial court was not required to arrest judgment on the felony hit and run charge where the use of the word "crash" in the charging statute (N.C.G.S. § 20-166(a)) did not denote an unintentional act but was defined in the statute as any event resulting in injury caused by a vehicle and, therefore, did not depend on the driver's intent. Further, because the statute was unambiguous, the rule of lenity did not apply.

2. Appeal and Error—preservation of issues—assault with deadly weapon—failure to move to arrest judgment

Defendant failed to preserve for appellate review his argument that the trial court erred by not arresting judgment on a charge of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI)—because, according to defendant, he could not be convicted of both that offense and felony hit and run with serious injury—where he did not move the court to arrest his AWDWIKISI judgment.

3. Motor Vehicles—felony hit and run with serious injury—"crash"—evidence of intent to hit victim with car

The State presented substantial evidence of each element of felony hit and run with serious injury pursuant to N.C.G.S. § 20-166(a) to survive defendant's motion to dismiss, including of defendant's intent to hit the victim with his car, based on testimony at trial that: at a planned drug transaction, after the victim took defendant's marijuana and ran away on foot, defendant accelerated his car, pursued the victim, and hit him with his car; defendant then got out of his car, searched the victim's pockets, took the marijuana and the victim's phone, and drove away. Despite defendant's argument that

the event did not qualify as a "crash" under the statute, the second element of the offense—that defendant knew or reasonably should have known that the vehicle was involved in a crash—was satisfied.

4. Assault—with deadly weapon with intent to kill inflicting serious injury—vehicle crash—felony hit and run a separate offense

The trial court properly denied defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI)—based on an incident in which defendant pursued and hit the victim (who was on foot) with his car—where defendant did not contest the sufficiency of the evidence concerning the elements of that offense but, rather, argued that he could not be convicted of both AWDWIKISI and felony hit and run with serious injury. However, the two offenses were not mutually exclusive and, thus, defendant could be convicted of both.

5. Criminal Law—jury instructions—felony hit and run—assault with deadly weapon—plain error analysis

In defendant's trial for multiple charges arising from an incident in which he pursued and hit the victim (who was on foot) with his car, the trial court did not plainly err by instructing the jury on both assault with a deadly weapon with intent to kill inflicting serious injury and felony hit and run with serious injury. The two offenses were not mutually exclusive and, therefore, the jury could be instructed on both offenses and defendant could be convicted of both.

6. Judgments—criminal—clerical error—wrong statutory subsection

After defendant was convicted of multiple offenses arising from an incident in which he pursued and hit the victim (who was on foot) with his car, where the judgment for felony hit and run with serious injury referenced the wrong statutory subsection, the matter was remanded for correction of the clerical error.

Appeal by Defendant from judgment entered 24 January 2023 by Judge G. Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander Hiram Ward, for the State.

Carolina Appeal, by Andrew Nelson, for Defendant-Appellant.

CARPENTER, Judge.

William Logan Buck ("Defendant") appeals from judgment after a jury convicted him of assault with a deadly weapon with the intent to kill inflicting serious injury ("AWDWIKISI"), felony hit and run with serious injury, and robbery with a dangerous weapon. On appeal, Defendant argues the trial court erred by: (1) denying his motion to arrest judgment concerning his felony hit-and-run verdict; (2) failing to arrest judgment concerning his AWDWIKISI verdict; (3) denying his motion to dismiss his felony hit-and-run charge; (4) denying his motion to dismiss his AWDWIKISI charge; (5) instructing the jury that it could convict him for AWDWIKISI and felony hit and run; and (6) making a clerical error in his felony hit-and-run judgment. After careful review, we disagree with Defendant concerning his first five arguments, but we agree with Defendant concerning his final argument. Accordingly, we remand this case for the trial court to correct a clerical error. Otherwise, we discern no error.

I. Factual & Procedural Background

On 19 April 2021, a New Hanover County grand jury indicted Defendant with one count of each of the following: AWDWIKISI, felony hit and run with serious injury, and robbery with a dangerous weapon. The State began trying Defendant on 17 January 2023 in New Hanover County Superior Court.

Trial evidence tended to show the following. On 11 January 2021, Demetrius Moss ("Victim") met Defendant in the Martin Luther King Center parking lot in Wilmington, North Carolina. Defendant intended to sell marijuana to Victim. Defendant was seated in his car when Victim approached. Instead of purchasing marijuana from Defendant, Victim grabbed Defendant's marijuana and ran.

Defendant then accelerated his car, pursued Victim, and hit Victim with his car. The crash-data recorder from Defendant's car showed that directly before the collision with Victim, Defendant's "accelerator percentage" was 99%, which investigating officer Eric Lippert described as "pedal to the medal" and "probably as high as it goes."

After Defendant struck Victim with his car, Defendant exited his car, went through Victim's pockets, removed the marijuana and Victim's phone, and drove away. After twelve surgeries, Victim spent over two months in the hospital recovering from a broken tibia, fibula, and pelvis.

At the close of the State's evidence and again at the close of all evidence, Defendant moved to dismiss all charges. The trial court

denied both motions. The trial court instructed the jury on all charges; Defendant did not object to the instructions.

The jury convicted Defendant of each charge. Following the jury's guilty verdicts, Defendant moved to arrest judgment concerning only the felony hit-and-run verdict. The trial court denied the motion.

The trial court then entered three judgments. In the first judgment, the trial court sentenced Defendant to a term of between seventy-three and one hundred months of imprisonment for AWDWIKISI. In the second judgment, the trial court sentenced Defendant to a term of between thirteen and twenty-five months of imprisonment for felony hit and run with serious injury. The second judgment, however, noted that the jury found Defendant guilty of subsection "20-166(E)." In the third judgment, the trial court sentenced Defendant to a term of between sixty-four and eighty-nine months of imprisonment for robbery with a dangerous weapon. The trial court set the second and third judgments to run concurrently with the first. On 3 February 2023, Defendant filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

The issues on appeal are whether the trial court erred by: (1) denying Defendant's motion to arrest judgment concerning his felony hit-and-run verdict; (2) failing to arrest judgment concerning his AWDWIKISI verdict; (3) denying Defendant's motion to dismiss his felony hit-and-run charge; (4) denying Defendant's motion to dismiss his AWDWIKISI charge; (5) instructing the jury that it could convict Defendant for AWDWIKISI and felony hit and run with serious injury; and (6) making a clerical error in Defendant's felony hit-and-run judgment.

IV. Analysis

A. Arrest of Judgment

[1] Defendant argues that the trial court erred by failing to arrest judgment concerning his convictions for felony hit and run with serious injury and AWDWIKISI. After careful review, we disagree.

"Whether to arrest judgment is a question of law, and '[q]uestions of law are reviewed *de novo* on appeal.' " *State v. Curry*, 203 N.C. App. 375, 378, 692 S.E.2d 129, 134 (2010) (quoting *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 635, 684 S.E.2d 709, 720 (2009)) (alteration in original). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal."

State v. Williams, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

A trial court must arrest a judgment when:

> it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, [or] (5) the judgment.

State v. Perry, 291 N.C. 586, 589, 231 S.E.2d 262, 265 (1977).

1. Felony Hit and Run with Serious Injury

Concerning his motion to arrest judgment for his felony hit-and-run conviction, Defendant argues that, under subsection 20-166(a), a "crash" cannot be intentional. *See* N.C. Gen. Stat. § 20-166(a) (2021). Therefore, according to Defendant, it was erroneous for the jury to convict him of AWDWIKISI, an intentional crime, and to also find that he crashed into Victim, because a "crash" is unintentional. We disagree with Defendant.

The meaning of "crash" requires us to interpret section 20-166. *See id.* In statutory interpretation, "[w]e take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420, 77 L. Ed. 1004, 1010 (1933). This is because "a law is the best expositor of itself." *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52, 2 L. Ed. 199, 205 (1804). And when a statute "contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974).

Under subsection 20-166(a), it is a felony for a driver of a vehicle "involved in a crash" that causes serious bodily injury to leave the scene of the crash. S*ee* N.C. Gen. Stat. § 20-166(a). A "crash" is "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident, and crash and their cognates are synonymous." *Id.* § 20-4.01(4c).

The General Assembly has not defined "any," so it keeps its ordinary meaning: comprehensive. *See id.*; *Reg'l Acceptance Corp. v. Powers*, 327 N.C. 274, 278, 394 S.E.2d 147, 149 (1990) ("Where words of a statute are not defined, the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used."); *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (stating

that we look to dictionaries to discern a word's common meaning); *Any*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (defining "any" as "one or some indiscriminately of whatever kind").

Here, Defendant's car caused Victim's injuries. The only dispute is about the relevance of Defendant's intent while driving his car. The statutory definition is clear: A crash is "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load." *See* N.C. Gen. Stat. § 20-4.01(4c). The General Assembly chose not to discriminate between intended events and unintended events; therefore, so long as there is injury caused by a motor vehicle—intent is irrelevant. *See id.*; MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra*.

Defendant argues to the contrary. He asserts that because the General Assembly equates crashes to accidents, *see* N.C. Gen. Stat. § 20-4.01(4c), crashes must be unintentional. In other words, Defendant argues that because accidents are unintentional, crashes must be unintentional, too.

The General Assembly, however, defined crash—then equated accident to crash. *See id.* Whether the equation complies with the common understanding of accident is irrelevant because when a statute "contains a definition of a word used therein, *that definition controls*, however contrary to the ordinary meaning of the word it may be." *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 203 (emphasis added). So when the General Assembly equated accident to crash, it gave accident the same legislative definition as crash, despite the commonly understood meaning of accident. *See id.* at 219, 210 S.E.2d at 203.

Accordingly, crash means "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load"—regardless of intent. *See* N.C. Gen. Stat. § 20-4.01(4c).

Defendant also asserts that the rule of lenity requires us to read crash more narrowly. Again, we disagree.

The rule of lenity "forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985). But "[t]he rule of lenity only applies when the applicable criminal statute is ambiguous." *State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 210 (2002). Indeed, the "rule comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan v. United States*, 364 U.S. 587, 596, 81 S. Ct. 321, 326, 5 L. Ed. 2d 312, 319 (1961).

As detailed above, section 20-166 is clear; therefore, the rule of lenity does not apply. *See Cates*, 154 N.C. App. at 740, 573 S.E.2d at 210; *Callanan*, 364 U.S. at 596, 81 S. Ct. at 326, 5 L. Ed. 2d at 319. The trial court did not err by declining to arrest Defendant's felony hit-and-run judgment because a driver's intent is irrelevant concerning "crash." *See* N.C. Gen. Stat. § 20-166(a). Accordingly, there was no fatal error requiring the trial court to arrest Defendant's judgment. *See Perry*, 291 N.C. at 589, 231 S.E.2d at 265.

2. AWDWIKISI

[2] Standing on his misconception of "crash," Defendant asserts that if the trial court did not err by declining to arrest his felony hit-and-run judgment, the trial court must have erred in failing to arrest his AWDWIKISI judgment. We disagree.

"Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury" is guilty of AWDWIKISI. N.C. Gen. Stat. § 14-32(a) (2021).

Unlike his felony hit-and-run judgment, Defendant failed to move the trial court to arrest his AWDWIKISI judgment. And generally, "[i]n order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)).

In criminal cases, certain unpreserved issues qualify for "plain error" review, but issues regarding arresting judgments do not. *See State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citing *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)) (noting that we "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence"). Accordingly, we need not review Defendant's motion-to-arrest argument concerning his AWDWIKISI judgment because his argument is unpreserved and does not involve jury instructions or admissibility of evidence. *See id.*

Defendant, however, asks us to use Rule 2 to address his AWDWIKISI argument. *See* N.C. R. App. P. 2. Under Rule 2, we may "suspend or vary the requirements or provisions of" our Rules of Appellate Procedure. *See id.* But we only invoke Rule 2 "to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d

298, 299–300 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)).

Here, as detailed above, Defendant's intent argument fails: Convictions of AWDWIKISI and felony hit and run with serious injury are not mutually exclusive because assault is intentional, and a "crash" can also be intentional. *See* N.C. Gen. Stat. §§ 14-32(a), 20-4.01(4c), 20-166(a). This case is not the "exceptional circumstance" required to invoke Rule 2. *See Steingress*, 350 N.C. at 66, 511 S.E.2d at 299–300. Therefore, we dismiss Defendant's motion-to-arrest argument concerning his AWDWIKISI conviction.

B. Motions to Dismiss Charges

Next, Defendant argues that the trial court erred by denying his motions to dismiss. We review a denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). And under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. at 647, 576 S.E.2d at 319).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In evaluating the sufficiency of the evidence concerning a motion to dismiss, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *State v. Winkler*, 368 N.C. 572, 574–75, 780 S.E.2d 824, 826 (2015) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)).

1. Felony Hit and Run with Serious Injury

[3] Defendant does not contest the sufficiency of the evidence concerning every element of felony hit and run with serious injury. Rather, Defendant echoes his motion-to-arrest argument: That the second element of felony hit and run with serious injury is not satisfied because "the event would not qualify as a 'crash' under section 20-166."

Felony hit and run with serious injury requires the State to prove that:

> (1) Defendant was driving a vehicle; (2) Defendant knew or reasonably should have known that the vehicle was involved in a crash; (3) Defendant knew or reasonably should have known that the crash resulted in serious bodily injury to or the death of another; (4) Defendant did not immediately stop his vehicle at the scene of the crash; and (5) Defendant's failure to stop was willful.

State v. Gibson, 276 N.C. App. 230, 240, 855 S.E.2d 533, 540 (2021) (citing N.C. Gen. Stat. § 20-166(a)).

As detailed above, Defendant's act qualifies as a crash. Further, the State satisfied the second element of felony hit-and-run by offering testimony that Defendant intentionally pursued and struck Victim with his car. *See id.* at 240, 855 S.E.2d at 540. Trial testimony about this event is substantial evidence because it is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Defendant intentionally hit Victim with his car. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Concerning the remaining felony hit-and-run elements, "[i]t is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal." *Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) (citing N.C. R. App. P. 28(b)(6)); *State v. Evans*, 251 N.C. App. 610, 625, 795 S.E.2d 444, 455 (2017) (deeming an argument abandoned because the appellant did "not set forth any legal argument or citation to authority"). Because Defendant makes no argument concerning the sufficiency of evidence supporting the other elements of felony hit and run, all such arguments are abandoned. *See Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394. Thus, the trial court did not err in denying Defendant's motion to dismiss his felony hit-and-run charge. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

2. AWDWIKISI

[4] Again, Defendant does not contest the sufficiency of the evidence concerning every element of AWDWIKISI. Defendant merely stands

on his same motion-to-arrest argument. He argues that if he committed felony hit and run with serious injury, he could not have committed AWDWIKISI. We disagree.

AWDWIKISI requires: "(1) [a]n assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) *not resulting in death*." *State v. Meadows*, 272 N.C. 327, 331, 158 S.E.2d 638, 640 (1968) (citing N.C. Gen. Stat. § 14-32).

As explained above, AWDWIKISI and felony hit and run with serious injury are not mutually exclusive. *See* N.C. Gen. Stat. §§ 14-32(a), 20-4.01(4c), 20-166(a). The State satisfied the assault prong of AWDWIKISI by offering testimony that Defendant purposefully pursued Victim and hit him with his car. *See Meadows*, 272 N.C. at 331, 158 S.E.2d at 640. Trial testimony about this event is substantial evidence because it is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Defendant intentionally hit Victim with his car. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Because this is the only argument offered by Defendant, we will not address the remaining elements of AWDWIKISI. *See Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394. Thus, we discern no error concerning the trial court's denial to dismiss Defendant's AWDWIKISI charge. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

C. Jury Instructions

[5] Next, Defendant argues that the trial court erred by giving jury instructions on felony hit and run and AWDWIKISI because it is impossible to be convicted of both crimes. We disagree.

Defendant did not object to the trial court's jury instructions, so he failed to preserve his jury-instruction argument for appeal. *See Regions Bank*, 206 N.C. App. at 298–99, 697 S.E.2d at 421. But because this issue involves jury instructions in a criminal case, we will review for plain error. *See Gregory*, 342 N.C. at 584, 467 S.E.2d at 31.

To find plain error, this Court must first determine that an error occurred at trial. *See State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, Defendant must demonstrate the error was "fundamental," which means the error probably caused a guilty verdict and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (quoting *State v. Lawrence*, 365 N.C. 506, 518–19, 723 S.E.2d 326, 334–35 (2012)). Notably, the "plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *State v. Odom*, 307 N.C.

655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Concerning jury instructions, the trial court must accurately "instruct the jury on the law applicable to the substantive features of the case arising on the evidence." *State v. Robbins*, 309 N.C. 771, 776, 309 S.E.2d 188, 191 (1983).

Once again, AWDWIKISI and felony hit and run with serious injury are not mutually exclusive. *See* N.C. Gen. Stat. §§ 14-32(a), 20-4.01(4c), 20-166(a). Accordingly, the trial court did not err in giving jury instructions on both and allowing the jury to convict Defendant of both. *See Robbins*, 309 N.C. at 776, 309 S.E.2d at 191. Because the trial court did not err, it certainly did not plainly err. *See Towe*, 366 N.C. at 62, 732 S.E.2d at 568.

D. Clerical Error

[6] Finally, Defendant argues that the trial court erred because the second judgment contains a clerical error. We agree.

When we discern a clerical error in a judgment, we remand so the trial court can comply with its "duty to make its records speak the truth." *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999) (quoting *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956)). A clerical correction on remand "does not constitute a new conviction or judgment." *Id.* at 738, 522 S.E.2d at 784.

Here, the second judgment noted that the jury found Defendant guilty of subsection "20-166(E)," rather than the appropriate subsection, (a). *See* N.C. Gen. Stat. § 20-166(a). Therefore, we remand for the trial court to correct the judgment to show a conviction under subsection 20-166(a). *See id.*; *Linemann*, 135 N.C. App. at 738, 522 S.E.2d at 784.

V. Conclusion

We conclude that the trial court did not err by declining to arrest Defendant's judgments, declining to grant his motions to dismiss, or by instructing the jury on both felony hit and run with serious injury and AWDWIKISI. But the trial court did commit a clerical error in its felony hit-and-run judgment. Accordingly, we remand only for the trial court to correct the clerical error.

REMANDED.

Judges HAMPSON and GORE concur.

STATE OF NORTH CAROLINA
v.
JOHN WESLEY CROWDER, JR., DEFENDANT

No. COA23-833

Filed 7 May 2024

Indictment and Information—sufficiency—short-form indictment—second-degree forcible sexual offense—mens rea element

The trial court had jurisdiction to try defendant for second-degree forcible sexual offense, where the indictment alleged that defendant "unlawfully, willfully and feloniously" engaged in a sexual act with the victim, "who was at the time physically helpless." The indictment was not defective, since its language matched the language required by N.C.G.S. § 15-144.2(c) for short-form indictments alleging a sexual offense and was therefore sufficient to inform defendant of the mens rea element of the crime he was charged with—specifically, that he was aware of the victim's incapacity during the sexual act.

Appeal by defendant from judgment entered 6 June 2023 by Judge Gary M. Gavenus in Yancey County Superior Court. Heard in the Court of Appeals 16 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.

Melrose Law, PLLC, by Adam R. Melrose, for defendant-appellant.

DILLON, Chief Judge.

Defendant John Wesley Crowder, Jr., was convicted by a jury of second-degree forcible sex offense and other crimes. For the second-degree forcible sex offense conviction, Defendant was sentenced to 83 to 160 months of imprisonment.

Defendant appeals, contesting the trial court's jurisdiction over the second-degree forcible sex offense charge due to allegedly defective language in the indictment. For the reasoning below, we disagree and hold that the trial court properly exercised jurisdiction.

"The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019).

Section 14-27.27 of our General Statutes states that

> (a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:
>
> …
>
> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.27(a)(2) (2023).

Our General Statutes allow the use of a short-form indictment in charging a sexual offense crime, as follows:

> . . . it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a person who . . . was mentally incapacitated or physically helpless, naming the victim, and concluding as required by law.

N.C. Gen. Stat. § 15-144.2(c) (2023).

Here, the indictment alleges that Defendant "unlawfully, willfully and feloniously did engage in a sex offense with [A.P.], who was at the time physically helpless." This language essentially matches the language required by N.C. Gen. Stat. § 15-144.2(c).

Defendant, though, attempts to compare this indictment for second-degree *sexual assault* to an indictment for second-degree *rape* that our Court held to be insufficient in *State v. Singleton*, 285 N.C. App. 630, 632–34, 878 S.E.2d 653, 655–56 (2022), *writ of supersedeas allowed and disc. review granted*, 384 N.C. 37, 883 S.E.2d 445 (2023). In *Singleton*, we held the indictment was insufficient because it failed to comply with the language required by the second-degree rape short-form indictment statute. 285 N.C. App. at 634, 878 S.E.2d at 656.

The statute allowing for use of short-form indictments asserting a *rape* charge where the rape is based on an act occurring when the defendant knew the victim to be incapacitated, differs slightly from its counterpart statute allowing a short-form indictment to be used to charge a *sexual offense* charge where the sexual offense is based on an act when the defendant knew the victim to be incapacitated. Specifically,

N.C. Gen. Stat. § 15-144.1(c), which allows for a short-form indictment to be used for a rape charge, requires allegations that the defendant did *both* "carnally know" *and* "abuse" the victim. We held in *Singleton* that an indictment which merely alleged the defendant had engaged "in vaginal intercourse" with an incapacitated victim was sufficient to comply with the statutory requirement to include language that the defendant did "carnally know" the victim, but the language was otherwise deficient because it had failed to contain language charging the defendant did "abuse" the victim as well. *Singleton*, 285 N.C. App. at 634, 878 S.E.2d at 656.

However, N.C. Gen. Stat. § 15-144.2(c), which allows for a short-form indictment for sexual offense, merely requires language charging the defendant "did engage in a sexual offense" with an incapacitated victim. Unlike N.C. Gen. Stat. § 15-144.1(c), N.C. Gen. Stat. § 15-144.2(c) does not require language stating the defendant did "abuse" the victim.

We note N.C. Gen. Stat. § 15-144.1(c) and N.C. Gen. Stat. § 15-144.2(c) each require allegations that the defendant had acted "unlawfully, willfully, and feloniously" when he engaged in the assault. This language was included in the indictment charging Defendant. We conclude this statutory language used in the indictment in this case was sufficient to apprise Defendant of the *mens rea* element of the sexual offense charge for which he was convicted, namely, that he was aware of the victim's incapacitated state during the act. We, therefore, hold the trial court had jurisdiction to try him for that charge.

NO ERROR.

Judges TYSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
JAMES CAMPBELL DOHERTY, DEFENDANT

No. COA23-820

Filed 7 May 2024

1. Animals—felony cruelty to animals—elements—cruelly beat—single kick in dog's stomach—sufficient

After an incident where defendant kicked his neighbor's dog in the stomach so hard that the dog suffered severe internal bleeding, the trial court in defendant's criminal prosecution properly denied his motion to dismiss a charge of felony cruelty to animals because the State presented substantial evidence that defendant "cruelly beat" the dog. Under the plain meaning of the statute defining the charged crime—and in accordance with the legislature's intent to protect animals from malicious cruelty—the term "cruelly beat" applies to "any act" that causes unjustifiable pain, suffering, or death to an animal, even if it is just one strike rather than repeated strikes. Therefore, defendant's single kick to the dog met this definition, especially given the life-threatening nature of the dog's resulting injuries.

2. Criminal Law—jury instruction—felony cruelty to animals—lesser included offense—plain error review not waived

In a prosecution for felony cruelty to animals, where defendant told the trial court during the charge conference that he did not object to the court's jury instructions, his affirmative non-objection was insufficient on its own to waive plain error review of his argument on appeal—that the court erred by failing to instruct the jury on the lesser included offense of misdemeanor cruelty to animals. Nevertheless, the court did not plainly err by deciding not to instruct the jury on the lesser offense, since the State presented substantial evidence that defendant committed the greater offense when he kicked his neighbor's dog in the stomach so hard that, absent emergency care, the dog likely would have died from severe internal bleeding.

Appeal by defendant from judgment entered 8 March 2023 by Judge Tonia A. Cutchin in Davie County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Haley Ann Cooper, for the State.

Reece & Reece, by Mary McCullers Reece, for defendant-appellant.

FLOOD, Judge.

Defendant James Campbell Doherty appeals from judgment entered 8 March 2023, arguing the trial court erred by (A) denying his motion to dismiss because a single kick to the dog was insufficient evidence to show a "cruel beating," and (B) failing to instruct the jury on the lesser included offense of misdemeanor animal cruelty. After careful review, we conclude a single kick was sufficient to show Defendant "cruelly beat" the dog because this interpretation of the statute adheres to the plain language and furthers the Legislature's intent to protect animals from malicious cruelty. We further conclude the trial court did not plainly err in failing to instruct on misdemeanor cruelty to animals because the State presented substantial evidence of each element of felony cruelty to animals.

I. Factual and Procedural Background

Glenda Wolff lived across the street from Defendant in a neighborhood in Advance, North Carolina. Ms. Wolff would typically walk her fourteen-year-old dachshund-beagle mix, Davis, "two to three times per day" around the cul de sac on which Ms. Wolff and Defendant lived. Ms. Wolff would typically walk Davis in a circle around the cul de sac, passing in front of Defendant's home. "Any time" Ms. Wolff or anybody else with a dog walked by Defendant's home, Defendant would activate the sprinklers in the yard.

On 13 November 2019, Ms. Wolff was walking Davis around the cul de sac and saw her neighbors, Mr. and Mrs. Einstein, driving towards her. Ms. Wolff stepped out of the road to let the Einsteins' car pass by. At the time their car was approaching, Ms. Wolff was standing directly in front of Defendant's yard. There are no sidewalks or curbs in the neighborhood, only a single lane road, and the yards bordering the road. Instead of driving by Ms. Wolff, the Einsteins stopped to talk to her and inquire about her husband who had recently had some health issues. While Ms. Wolff was talking to the Einsteins, the sprinklers came on in Defendant's yard. Then, Ms. Wolff noticed Defendant "run[] out of his house and across his lawn," approach Davis, and proceed to kick him in the stomach. After Defendant kicked Davis, he turned around and went back into his house.

Ms. Wolff called the police, who encouraged her to take Davis to the emergency veterinarian. After being kicked, Davis became "lifeless . . . limp . . . [and] couldn't walk [or] stand." Ms. Wolff took Davis to the emergency veterinarian where he was characterized as being in "shock" and diagnosed with internal bleeding. Davis was given an IV fluid resuscitation to restore blood tissue, a blood transfusion, and pain medication. Davis remained at the veterinary hospital for the night.

After Davis's diagnosis, Deputy Clayton Whittington with the Davie County Sheriff's Office took out charges against Defendant for felonious cruelty to animals.

On 6 January 2020, a Davie County Grand Jury indicted Defendant for felonious cruelty to animals. The matter came on for trial on 7 March 2023 in Davie County Superior Court. The State presented testimony of Ms. Wolff, Deputy Whittington, and Dr. Simmerson—the veterinarian who provided care for Davis.

Ms. Wolff testified to the above-described events that occurred on 13 November 2019. When asked about Defendant's actions that evening, Ms. Wolff testified that Defendant ran out of his house at a fast pace and said to her, "I told you to keep your dog off my property." At the time of the incident, Ms. Wolff was standing right at the end of Defendant's property, "half on the road and half on the grass." According to Ms. Wolff, Defendant kicked Davis so hard Davis "went up in the air and came down and yelped."

Ms. Wolff also testified to Davis's capabilities following the incident, representing to the trial court that, prior to Defendant kicking Davis, Davis could jump on the bed or the couch, but he was unable to jump after his injury and had to be lifted onto the bed or couch.

Deputy Whittington testified that, when he questioned Defendant about kicking Davis, Defendant said he "popped the dog with his toe." Defendant further told Deputy Whittington he had a "bad history with dogs" and had told Ms. Wolff to "stay off his property."

Dr. Simmerson testified that she performed an abdominal ultrasound on Davis the day after the incident. The ultrasound showed a large amount of blood in his abdominal cavity, a mass in his central liver, sludge in his gall bladder, and chronic kidney damage in both kidneys. Dr. Simmerson testified that she had concluded the bleeding in Davis's abdominal cavity was the result of blunt force trauma and consistent with being kicked in the stomach. Davis's remaining maladies were common in a dog of Davis's age and not attributed to any external

factors. When asked if, in her opinion, the injuries could have been life threatening had Davis not received emergency care, Dr. Simmerson responded, "definitely."

At the close of the State's evidence, Defendant made a motion to dismiss, arguing the State failed to present substantial evidence that Defendant "cruelly beat" Davis. The trial court denied the motion.

The sole evidence presented by Defendant was his own testimony. Defendant testified that he had repeatedly asked Ms. Wolff to keep Davis off his property. Defendant represented that he had "been attacked seven times by dogs" and had an extreme fear as a result. He further stated that he does not want "anything to do with [dogs] . . . I just stay away from them. If a dog is near when I'm outside, I go inside. . . I want no interaction with them because I'm afraid of being attacked again."

When asked to describe what happened on 13 November 2019, Defendant testified that he turned the sprinklers on in an attempt to prompt Ms. Wolff to move away from his property. When this did not work, Defendant stood on the front porch and twice asked Ms. Wolff to leave his yard. After Ms. Wolff did not heed this request, Defendant made a "feint charge" at Ms. Wolff and Davis to scare them away. This attempt likewise was unsuccessful and Defendant then found himself two feet away from Davis, and he "panicked and kicked [his] foot out to get the dog away." According to Defendant, Davis did not go into the air as Ms. Wolff testified, but retreated back from Defendant's yard to stand at Ms. Wolff's feet.

At the conclusion of Defendant's testimony, Defendant, through counsel, renewed his motion to dismiss for insufficient evidence that he "cruelly beat" Davis, which the trial court again denied.

On 8 March 2023, Defendant was found guilty of felony cruelty to animals and sentenced to five to fifteen months' imprisonment, suspended for twenty-four months' supervised probation. Defendant orally noticed his appeal at the conclusion of his trial.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final superior court judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

Defendant presents two issues on appeal: whether the trial court erred in failing to (A) dismiss the charge of felonious cruelty to animals because a single kick was insufficient to show Defendant "cruelly beat"

Davis, and (B) instruct the jury on the lesser included offense of misdemeanor cruelty to animals.

A. Motion to Dismiss

[1] Our standard of review for an appeal of a motion to dismiss a criminal charge is whether, when considering the evidence in the light most favorable to the State, "the State presented substantial evidence of each element of the offense charged and of the defendant's guilt." *State v. Allred*, 131 N.C. 11, 19, 505 S.E.2d 153, 158 (1998). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Schmieder*, 265 N.C. App. 95, 101, 827 S.E.2d 322, 327–28 (2019) (citation omitted). "[T]he State is entitled to every reasonable intendment and every reasonable inference to be drawn from this evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Coble*, 163 N.C. App. 335, 337, 539 S.E.2d 109, 111 (2004).

Defendant argues the State did not present substantial evidence that Defendant "cruelly beat" Davis because one single kick is insufficient to meet the dictionary definition of "beat," which is "to strike something repeatedly." The State argues the term "beat" should not be derived from its standalone interpretation as the statutorily defined "cruelly" modifies and characterizes "beat."

"In order to prove the offense of felony cruelty to animals, the State must present substantial evidence that a defendant did 'maliciously, torture, mutilate, maim, cruelly beat, disfigure, poison, or kill' an animal." *State v. Gerding*, 237 N.C. App. 502, 506–07, 767 S.E.2d 334, 337 (2014) (quoting N.C. Gen. Stat. § 14-360(b)). The statute defines "cruelly" as "*any* act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death." N.C. Gen. Stat. § 14-360(c) (emphasis added). The statute does not define "beat," and the term has likewise not been defined by the appellate courts of this State. This presents an issue of statutory interpretation that is one of first impression as to the definition of "cruelly beat."

"When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself. If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Fletcher*, 370 N.C. 313, 326, 807 S.E.2d 528, 538 (2017). "Although courts often consult dictionaries for the purpose of determining the plain meaning of statutory terms," *id.* at 327, 807 S.E.2d at 538,

> [t]he definition of words in isolation [] is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. U.S. Postal Servs., 546 U.S. 481, 486, 126 S. Ct. 1252, 1257, 163 L. E. 2d 1079, 1087–88 (2006). If the statute is not clear and unambiguous, "[t]he intent of the Legislature controls the interpretation of the statute." *Fletcher*, 370 N.C. at 327, 807 S.E.2d at 539 (alteration in original) (citation omitted). "In ascertaining such intent, a court may consider the purpose of the statute and the evils it was designed to remedy, the effect of the proposed interpretations of the statute, and the traditionally accepted rules of statutory construction." *Id.* at 327, 807 S.E.2d at 539 (citation omitted).

Thus, we first look to the plain meaning of "beat" to determine how the statute is to be applied. Defendant is correct in his assertion that The Merriam-Webster Dictionary defines beat as "to strike repeatedly." *See Beat*, The Merriam-Webster Dictionary (11th ed. 2022). There are, however, other definitions of beat that indicate a person can "beat" something even if they only apply one strike or blow. *See Beat*, Collins Dictionary ("if you beat someone or something you hit them very hard" and "to beat on, at, or against something means to hit it hard");[1] *see also Beat*, Dictionary.com ("a stroke or blow").[2] The Merriam-Webster Dictionary entry for "beat" includes a list of synonyms, one of which, "bash," is defined as "to strike violently." *See Bash*, The Merriam-Webster Dictionary.[3] The plain meaning of "beat," therefore, could be understood to mean both a hard hit or strike, or repeated strikes. "Beat" has not been exclusively defined as requiring repeated strikes.

Accordingly, "cruelly beat," can be applied to any act, such as a kick, that causes "unjustifiable pain, suffering, or death to an animal." *See* N.C. Gen. Stat. § 14-360(c). Further, this plain meaning comports

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1. *Beat*, Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/beat (last visited 4 April 2024).

2. *Beat*, Dictionary.com, https://www.dictionary.com/browse/beat (last visited 4 April 2024).

3. *Bash*, The Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/bash (last visited 4 April 2024).

with the Legislature's clear intent in enacting this statute, which was to protect animals from *any* intentional and malicious act that may lead to "unjustifiable pain, suffering, or death." *See id.* The single act of kicking a dog so hard as to cause internal bleeding is certainly the type of behavior the statute intended to prevent and would meet the definition of "cruelly beat."

We therefore hold, under the plain meaning of the words, "cruelly beat" can apply to any act that causes the unjustifiable pain, suffering, or death to an animal, even if it is just one single act. To hold otherwise would allow a person to kick a dog so hard they suffer life-threatening injuries—such as the case here—but not be subject to felonious cruelty to animals because it was "just" one kick.

Defendant objects to this conclusion by arguing a single kick cannot support a conviction for felony cruelty to animals because a review of North Carolina case law "yields no convictions for acts comparable to a single kick." While not physically comparable to a single kick, this Court has, in an unpublished opinion, held that one single act was sufficient to show felony cruelty to animals where the defendant was alleged to have tortured a cat. *See State v. Ford*, 292 N.C. App. 111, 896 S.E.2d. 67 (2024) (unpublished); *see also* N.C. Gen. Stat. § 14-360(b) (2023) (a person is guilty of animal cruelty if they "maliciously, torture . . . cruelly beat, disfigure, poison, or kill an animal").

In *Ford*, the defendant was convicted for felony cruelty to animals based on torture after he intentionally ran over with his pickup truck the stroller in which a cat was sitting. *Id.* at *2. On appeal, the defendant argued the trial court erred in failing to grant his motion to dismiss because the legal definition of "torture" requires a course of conduct and "a single malicious act" was insufficient. *Id.* at *3. This Court disagreed, holding the Legislature, in the context of the animal cruelty statute, defined torture in the singular, and this definition—the same definition provided for "cruelly"—could clearly be applied to "any act," and the statute did not require a "course of conduct." *Id.* at *5–4.

Here, Defendant appears to be minimizing the effects of a "single kick" compared to, for example, being run over with a pickup truck. If the comparison was merely a kick versus being run over with a pickup truck, it would seem on its face that running over a cat is the more egregious offense. The cat in *Ford*, however, miraculously suffered no physical injuries but appeared to have lasting "emotional" injuries. *See id.* at *2. Here, Defendant's single kick to Davis caused severe, life-threatening injuries that would have likely resulted in Davis's death had Ms. Wolff not sought emergency care. As explained above, the Legislature clearly

intended to protect animals from unjustified pain, suffering, or death. The means of inflicting such injury seem to be less important than the actual injury itself.

Accordingly, the trial court did not err in denying Defendant's motion to dismiss because, under the plain meaning of the statute and in furtherance of the Legislature's intent, the State presented substantial evidence that Defendant "cruelly beat" Davis when he kicked Davis so hard as to cause internal bleeding. *See Fletcher*, 370 N.C. at 327, 807 S.E.2d at 539.

B. Lesser Included Offense

[2] As a threshold matter, while Defendant concedes he did not object to the jury instructions, he argues that the trial court's failure to instruct on misdemeanor animal cruelty as a lesser included offense amounted to plain error. On the other hand, the State argues Defendant's affirmative non-objection to the instructions was invited error. We disagree with the State as to invited error. We further disagree with Defendant that the jury instructions were plain error.

"[U]nder the doctrine of invited error, a party cannot complain of a charge given at his request, or which is in substance the same as one asked by him[.]" *State v. Miller*, 289 N.C. App. 429, 432–33, 889 S.E.2d 231, 234 (2023) (citation and internal quotation marks omitted). "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *Id.* at 433, 889 S.E.2d at 234. Our appellate courts, however, have consistently held that failure to object to jury instructions *alone* is insufficient to waive plain error review. *See State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (holding the defendant's failure to object to the trial court's instructions waived appellate review of the issue except for plain error review); *see also State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000) (applying plain error where the defendant failed to object to the instructions even though he had "ample opportunity" to do so); *State v McLymore*, 279 N.C. App. 34, 36, 863 S.E.2d 807, 809 (2021) (applying plain error review where the defendant failed to object to jury instructions despite having "at least three opportunities to do so"); *State v. Harding*, 258 N.C. App. 306, 311, 813 S.E.2d 254, 259 (2018) (applying plain error review where the defendant "failed to object, actively participated in crafting the challenged instructions, and affirmed it was 'fine' "); *but cf. State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998) (holding a defendant invited error when he failed to submit instructions in writing

as required by statute *and* did not object despite being given the opportunity to do so); *State v. Thompson*, 359 N.C. 77, 103–04, 604 S.E.2d 850, 869–70 (2004) (invoking invited error where the trial court amended the defendant's proposed instructions with the defendant's consent *and* the defendant did not object when the instructions were read to the jury).

Here, Defendant did not object to the instructions on felonious cruelty to animals during the charge conference. Prior to the trial court reading the instructions to the jury, it asked if defense counsel had any objections to the verdict sheet or the jury instructions, to which defense counsel stated, "[n]o Your Honor. Thank you." This affirmative non-objection, on its own, is insufficient to show Defendant invited error. *See Hooks*, 353 N.C. at 633, 548 S.E.2d at 505. We therefore review for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted). Having determined the appropriate standard of review to apply to this issue, we now turn to the merits of Defendant's argument.

"It is well settled that the trial court must submit and instruct the jury on a lesser included offense when . . . there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Wright*, 240 N.C. App. 270, 272, 770 S.E.2d 757, 759 (2015) (citation omitted). "The trial court is not[, however,] obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention." *State v. Lucas*, 234 N.C. App. 247, 256, 758 S.E.2d 672, 679 (2014) (citation omitted).

Here, the trial court instructed the jury that, to find Defendant guilty of felony cruelty to animals, it must find three elements:

> First, [D]efendant cruelly beat Davis, a dog. Cruelly is an act, omission or neglect causing or permitting unjustifiable pain[,] [s]uffering or death.

> Second, [D]efendant acted intentionally; that is, knowingly.
>
> And, third, that [D]efendant acted maliciously. To act maliciously means to act intentionally and with malice or bad motive. As used herein, to act with malice or bad motive is to possess a sense of personal ill will to activate or incite [D]efendant to act in a way to cause harm to the animal. It also means the condition of mind that prompts a person to intentionally inflict serious harm or injury to an animal, which proximally results in injury to the animal.
>
> . . . .
>
> If you find from the evidence, beyond a reasonable doubt, that one or about the alleged date, [D]efendant intentionally, maliciously and cruelly beat Davis, a dog, it would be your duty to return a verdict of guilty.

As explained above, there was sufficient evidence to support the jury's finding that Defendant was guilty of felonious cruelty to animals. The State presented substantial evidence that Defendant maliciously and intentionally kicked Davis, and Defendant presents no argument on appeal contesting this element. Further, the State also presented substantial evidence that one single kick showed Defendant "cruelly beat" Davis as defined by the statute. Finally, it is undisputed that Davis suffered severe, life-threatening injuries. Given the substantial evidence presented by the State, Defendant has not, and cannot, show that the jury likely would have found Defendant not guilty of felony cruelty to animals, and convicted Defendant for misdemeanor cruelty to animals had that instruction been submitted.

Accordingly, the trial court did not err, let alone plainly err, in failing to instruct on misdemeanor cruelty to animals where there was no dispute as to the evidence supporting felony cruelty to animals. *See Lucas*, 234 N.C. App. at 256, 758 S.E.2d at 679.

IV. Conclusion

We conclude the State presented substantial evidence that Defendant "cruelly beat" Davis, a dog, because one single kick does constitute "any act" that resulted in serious injuries or suffering, and the term "beat" does not require repeated strikes. We further conclude the trial court did not plainly err in failing to instruct on misdemeanor cruelty to animals.

NO ERROR.

Judges ARROWOOD and WOOD concur.

STATE OF NORTH CAROLINA
v.
KWAME FERNANDERS, DEFENDANT

No. COA23-837

Filed 7 May 2024

1. Evidence—prior bad acts—uncharged offenses—prejudice analysis—overwhelming evidence

Even assuming, without deciding, that in defendant's trial for first-degree murder and possession of a stolen vehicle, the trial court erred by allowing defendant's girlfriend to give Rule of Evidence 404(b) testimony regarding an uncharged robbery and kidnapping committed by defendant, defendant failed to demonstrate prejudice—a reasonable possibility that, absent the error, the jury would have reached a different verdict (N.C.G.S. § 15A-1443(a))—where the other evidence of his guilt was overwhelming, including testimony that defendant had been agitated and aggressive with the victim just before she was fatally shot, told his girlfriend to turn away just before the victim was shot, had the murder weapon in his hand just after the shooting, fled once he realized the victim had been killed, had attempted an armed robbery just before the fatal shooting, and afterward stated "if we get caught, it is going to be a shoot-out."

2. Evidence—lay opinion testimony—prejudice analysis—overwhelming evidence

Even assuming, without deciding, that in defendant's trial for first-degree murder and possession of a stolen vehicle, the trial court abused its discretion by allowing defendant's girlfriend to give lay opinion testimony pursuant to Rule of Evidence 701 identifying the gun depicted in video and photographic exhibits as the murder weapon, defendant failed to demonstrate prejudice—a reasonable possibility that, absent the error, the jury would have reached a different verdict (N.C.G.S. § 15A-1443(a))—where the State presented other evidence of premeditation and deliberation, including that defendant possessed the murder weapon immediately before (and after) the fatal shooting, told his girlfriend to turn away just before the victim was shot, and had attempted an armed robbery just prior to the fatal shooting.

3. Evidence—repetitive video and photographic exhibits—unfair prejudice versus probative value—no abuse of discretion

In defendant's trial for first-degree murder and possession of a stolen vehicle, the trial court did not abuse its discretion under Rule of Evidence 403 by admitting ten videos and five photographs of defendant's theft of a vehicle, because the probative value of this evidence was not outweighed by the danger of unfair prejudice where these exhibits were not unnecessarily repetitive but rather gave a full picture of defendant's role in the vehicle theft, assisted a witness's identification testimony, and connected defendant to evidence discovered during his arrest, namely, the murder weapon.

4. Criminal Law—motion to sever—no abuse of discretion—transactional connection and fair hearing

The trial court did not abuse its discretion in denying defendant's motion to sever a first-degree murder charge from a charge of possession of a stolen vehicle where there was a transactional connection between the two crimes as reflected by evidence that defendant came into possession of the stolen car about three hours before the murder, was in the stolen vehicle when he fatally shot the victim, and possessed the murder weapon during both crimes. Further, joinder of the offenses did not prevent defendant from receiving a fair trial in light of other substantial evidence demonstrating defendant's premeditation and deliberation in committing the murder charged, including that he possessed the gun immediately before (and after) the fatal shooting, told his girlfriend to turn away just before the victim was shot, and had attempted another armed robbery just prior to the fatal shooting.

5. Evidence—expert opinion testimony—ballistics analysis—scientific reliability—no abuse of discretion

In a murder prosecution, the trial court did not abuse its discretion in allowing expert opinion testimony under Rule of Evidence 702 that the gun seized during defendant's arrest was the weapon that fired the fatal shot killing a truck driver who defendant encountered on the roadside. The expert's testimony met all three prongs of the *Daubert* reliability test in that the expert: (1) explained the applicable scientific standards and procedures involved in matching a weapon to used casings and bullets fired, (2) testified that she followed those standards and procedures in the instant case in matching the gun seized from defendant to the cartridge casing found at the scene of the fatal shooting and the bullet recovered from the victim's body, and (3) described the facts and data she relied upon, including a comparison between results obtained from the investigation and those obtained from the test fires.

Judge STROUD concurring in result.

Appeal by defendant from judgment entered 8 September 2022 by Judge Martin B. McGee in Polk County Superior Court. Heard in the Court of Appeals 2 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

GORE, Judge.

Defendant, Kwame Fernanders, appeals his conviction for first-degree murder and possession of a stolen vehicle. Defendant was sentenced to life imprisonment without possibility of parole for first-degree murder and the trial court arrested judgment for the conviction of possession of a stolen vehicle. Defendant seeks review of the trial court's multiple evidentiary rulings and its denial of his motion to sever the charges. Upon review of the briefs, the record, and case law, we conclude the trial court did not err.

I.

Defendant, his girlfriend Kayla Black, and his friend Quintae Edwards met and began driving in defendant's car from Greenville, South Carolina, late on 30 March 2016. Early in the morning on 31 March 2016, they stopped at a gas station. Defendant and Edwards left Black but soon returned driving a red Ford Mustang. They left defendant's car and drove off in the red Ford Mustang headed toward North Carolina. Different angles of video footage and still shots of the footage, admitted during trial, revealed defendant and Edwards had broken into Reliable Rides and stolen the red Ford Mustang from the facility. In the videos, defendant and Edwards were wearing the same clothes they were later sighted in just prior to the shooting; defendant was also seen with a gun and wearing a pair of brown and yellow work gloves.

At approximately 5:00 a.m., they stopped at a BP gas station in Polk County, North Carolina. The gas station was not open at the time, so they waited for it to open. Prior to the gas attendant opening the station, Black testified, and the gas attendant testified, that defendant wanted to rob the attendant, but Black had held him back from doing so. After

buying gas, Black drove the Ford Mustang towards the interstate with defendant seated in the front seat and Edwards seated in the back seat.

As they drove onto the ramp, they saw a "box truck" parked on the side of the ramp and stopped by it to get directions. Destry Horne was the driver of the truck and had stopped while in the middle of making a furniture delivery. Black testified she was trying to fix her GPS while defendant pulled down his window and began talking to Horne. Black testified Horne was polite and defendant was also talking politely, but defendant quickly became aggressive. Black heard Edwards say, "Do it, bro" from the back seat and defendant told Black to turn her head away.

Immediately after she turned her head, Black heard a gunshot and looked in time to see defendant pulling his arm with the gun in his hand back into the car. Black drove away quickly, and not long after, Horne was discovered unresponsive and bleeding in the truck. He was later pronounced dead from a gunshot wound. A police officer, who testified at trial, had seen the box truck and the Mustang parked around 5:40 a.m. as he drove by, but he did not investigate because it was common to see vehicles stopped at the on ramp. He was called to the scene approximately ten to fifteen minutes later. The police officer discovered a spent .40 caliber cartridge casing on the ground near the truck.

Police obtained the video footage from the BP gas station of the Mustang, defendant, Edwards, and Black, and issued images to the public to identify them. The police department's surveillance camera caught the Mustang driving by just after the shooting, headed towards South Carolina. Defendant, Black, and Edwards were recognized in a couple different locations as they drove south, and they evaded arrest while in Landrum, South Carolina, and Gainesville, Florida. While in South Carolina, they abandoned the Mustang and were later seen driving in a maroon Subaru. Prior to the arrest, Black testified at trial that she, defendant, and Edwards had broken into a college apartment and robbed college students. According to Black's testimony, one student was taken with her and defendant to an ATM to withdraw money. Black testified that defendant used the same gun during this break in and robbery that he used in the shooting.

Defendant, Edwards, and Black were later apprehended and arrested at a Best Western in Tallahassee, Florida on 4 April 2016. Police officers recovered a gun (located beside defendant at the time of arrest), the keys to the maroon Subaru, and recovered yellow and brown work gloves and twenty-seven .40 caliber Smith & Wesson Aguila rounds in the Subaru.

Defendant was charged with first-degree murder and possession of a stolen motor vehicle. Defendant filed a pre-trial motion to sever the charges for trial. The trial court denied defendant's motion and granted the State's motion to join the charges. Defendant renewed his motion to sever the charges at the close of the State's evidence and at the close of all the evidence. During trial, defendant made multiple specific objections: to the admission of video footage and still shots from the footage at Reliable Rides; to Black identifying defendant and his gun in the video footage and still shots from Reliable Rides; to Black's testimony of the robbery in Gainesville, Florida; to the State's tender of their expert, Coudriet, as a ballistics expert; and to Coudriet's opinion that the .40 caliber cartridge casing recovered from the scene was fired from the gun retrieved at defendant's arrest. The jury returned guilty verdicts for both charges. The trial court arrested judgment on the possession of a stolen motor vehicle conviction and sentenced defendant to life imprisonment without possibility of parole for the first-degree murder conviction. Defendant timely appealed the judgment.

II.

Defendant appeals of right pursuant to N.C.G.S §§ 7A-27(b) and 15A-1444(a). Defendant challenges multiple evidentiary rulings made by the trial court. Defendant argues the trial court erred with the following evidentiary rulings: (1) by admitting evidence of the Gainesville robbery through Kayla Black's testimony; (2) by allowing Kayla Black to identify the gun displayed in the video footage and photographs of the break in at Reliable Rides; (3) by admitting ten videos and five photographs from the break in at Reliable Rides; (4) by denying defendant's motion to sever the first-degree murder charge from the possession of a stolen motor vehicle charge; (5) by allowing the State's expert witness to testify the used .40 caliber cartridge casing, retrieved by the truck, was fired from the gun seized in defendant's hotel room; and (6) through the cumulative errors committed by the trial court. Defense counsel objected to and preserved each issue for review.

A.

[1] Defendant first argues the trial court erred by allowing Kayla Black to testify about the Gainesville robbery and kidnapping under Rule 404(b). Specifically, defendant argues the trial court erred by allowing the testimony as proof of defendant's identity and to show the chain of events that took place. "We review de novo the legal conclusion that the evidence is . . . within the coverage of Rule 404(b)." *State v. Pabon*, 380 N.C. 241, 257 (2022) (citation omitted). "[I]f an appellate court reviewing

a trial court's Rule 404(b) ruling determines . . . that the admission . . . was erroneous, it must then determine whether that error was prejudicial." *Id.* at 260.

Rule 404(b) is a rule of inclusion that "lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *State v. Beckelheimer*, 366 N.C. 127, 130 (2012) (quoting N.C. R. Evid. 404(b)) (internal quotation marks omitted). The list is broader than the specified purposes when the evidence "is relevant to any fact or issue other than the defendant's propensity to commit the crime." *Id.* Courts constrain the inclusive nature of Rule 404(b) by balancing it with similarity and proximity. *Id.* at 131.

We presume, *arguendo*, the trial court erred by admitting the testimony about the robbery and kidnapping in Gainesville under Rule 404(b) and consider whether the error was prejudicial. Defendant has the burden to demonstrate "whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *Pabon*, 380 N.C. at 260 (quoting N.C.G.S. § 15A-1443(a) (2021)).

In the present case, defendant fails to demonstrate "there is a reasonable possibility . . . a different result would have been reached at trial." *Id.* In fact, defendant articulates there is other evidence available to "directly tie [defendant] to the weapon both in North Carolina and Florida." The other evidence properly admitted includes: Black's testimony that defendant kept the gun on him and had the gun in his hand right after shooting Horne; the testimony of defendant's agitation and aggression prior to shooting Horne; testimony defendant had attempted to rob the gas attendant at the gas station just prior to the shooting; testimony that defendant had told Black to turn her head prior to shooting Horne; Black's testimony that they fled once they found out the shooting victim had died; the gun seized in the hotel where defendant was arrested; and Black's testimony defendant stated, "if we get caught, it is going to be a shoot-out." Accordingly, this other overwhelming evidence altogether suggests a reasonable jury could still come to the same conclusion without this Rule 404(b) evidence.

B.

[2] Next, defendant argues the trial court erred by allowing Black to identify the gun in the Reliable Rides video footage and photographs as a lay witness under Rule 701. She identified the gun in Reliable Rides footage as the same gun defendant used in the shooting of Horne. We

review challenges to Rule 701 for abuse of discretion. *State v. Thomas*, 281 N.C. App. 159, 177 (2021), *rev. denied*, 878 S.E.2d 808 (2022) (Mem.); *see State v. Williams*, 363 N.C. 689, 701 (2009) (cleaned up) ("We review for abuse of discretion, looking to whether the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision."). If we determine the trial court erred by allowing the lay opinion testimony, we must then consider whether the error was prejudicial. *State v. Belk*, 201 N.C. App. 412, 418 (2009), *writ denied*, *rev. denied*, 364 N.C. 129 (2010) (Mem.).

Lay opinion testimony is acceptable when two factors are present. *Id.* at 414. The testimony must be "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 [her] testimony or the determination of a fact in issue." *Id.* (quoting N.C. R. Evid. 701). This Court previously stated various factors to weigh when determining whether lay opinion testimony is proper. *Thomas*, 281 N.C. App. at 178–79 (quoting *Belk*, 201 N.C. App. at 415–16) (listing factors such as the "witness's familiarity," with what she is identifying, and her familiarity at the time the identified object was photographed; any "disguised" appearance in the images or during the incident; and the quality of the images or videos shown to the jury).

We do not weigh in on what factors support defendant's argument as opposed to the factors that support the State's argument, because even if there was an abuse of discretion, it was not prejudicial to the jury's verdict. Defendant does not carry his burden to demonstrate prejudice, by simply suggesting that without the opinion testimony, the jury could have "possibly" reached a different verdict for lack of premeditation and deliberation. The evidence in the record demonstrates Black saw defendant with the gun leading up to and immediately after the shooting. Black testified defendant told her to turn her head prior to shooting Horne, and that defendant had also attempted to rob a gas attendant just prior to the murder. Accordingly, we disagree with defendant's analysis asserting little evidence in the record supports the State's argument that defendant had "violence on his mind," and determine despite any presumed error under Rule 701, it was not prejudicial.

C.

[3] Next, defendant argues the trial court erred by allowing the State to admit ten videos and five photographs from Reliable Rides of defendant stealing the red Mustang. Defendant argues under Rule 403 that the probative value of the videos and images were substantially outweighed

by undue prejudice and cumulative evidence. We review challenges to a Rule 403 determination for abuse of discretion. *Beckelheimer*, 366 N.C. at 133. Under Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." N.C. R. Evid. 403.

Defendant argues the repetition of the videos and the photographs were "unnecessarily repetitive" and "added nothing." He also argues the State's closing argument had the effect of causing the jury "to hold [defendant] accountable for being a person with violence on his mind." We disagree.

"Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs . . . lies within the discretion of the trial court." *State v. Hennis*, 323 N.C. 279, 285 (1988). "Unfair prejudice means an undue tendency to suggest a decision on an improper basis, usually an emotional one." *Id.* at 283.

> Evidence which is offered solely for the purpose of creating sympathy for the accused . . . should be excluded. However, evidence which is otherwise competent and material should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible.

State v. Hudson, 218 N.C. 219, 231 (1940).

In the present case, defendant was indicted for possession of a stolen motor vehicle. The State called a manager from Reliable Rides to testify. Part of her testimony was to explain the various locations revealed in the videos, because the videos each displayed different angles of the business. The videos and photographs revealed who had stolen the vehicle and highlighted the gun and the gloves used during the incident. These items were later seized when defendant was arrested. The photographs were used by the State to capture moments from the videos and to question Black for identification purposes.

Having reviewed the exhibits admitted by the State, we determine they were not excessive nor unduly prejudicial when compared to their probative value. These exhibits gave a full picture of the incident as each video provided a different angle of the business and connected the evidence discovered during defendant's arrest. We determine any prejudicial nature or repetition did not substantially outweigh the probative value of the videos and photographs. The trial court did not abuse its discretion by admitting the exhibits over defendant's objections.

D.

[4] Defendant argues the trial court erred by denying his motion to sever the murder charge from the possession of a stolen vehicle charge. Defendant argues the joinder prevented him from having a fair trial on the murder charge, and now seeks a new trial. We review the trial court's denial of the motion to sever the charges for abuse of discretion. *State v. Knight*, 262 N.C. App. 121, 124 (2018).

The trial court considers whether the charges defendant seeks to sever have a "transactional connection" and "whether the defendant can receive a fair hearing" should the charges remain consolidated for trial. *State v. Larkin*, 237 N.C. App. 335, 349 (2014). To determine whether there is a transactional connection, we consider the following factors: "(1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case." *State v. Perry*, 142 N.C. App. 177, 181 (2001) (citation omitted).

In the present case, we disagree with defendant's assertion the charges lacked a transactional connection. Defendant came into possession of the Mustang around 2:30 a.m. and committed the shooting around 5:45 a.m the same morning. Defendant was in possession of a gun in the videos at Reliable Rides that looked similar to the gun discovered upon his arrest. Additionally, defendant was in possession of the stolen Mustang when he shot Horne. While it is possible to distinguish aspects of the charges, defendant has failed to show the trial court abused its discretion by denying the motion to sever.

Further, we disagree with defendant's assertion that the joinder of the charges prevented him from obtaining a fair trial. Defendant once again argues without this joinder the jury might not have found defendant premediated or deliberated the shooting. As previously discussed, other substantial evidence leading up to the shooting allows the jury to find the existence of premeditation and deliberation. Accordingly, the trial court did not abuse its discretion and defendant was not prevented from obtaining a fair trial by the joinder of charges.

E.

[5] Defendant argues the trial court abused its discretion by allowing the State's expert opinion under Rule 702. Specifically, defendant argues the expert's testimony was not based upon reliable methods and principles nor sufficient facts or data under Rule 702(a)(1) and 702(a)(3). These arguments are in opposition to the expert's testimony that the

.40 caliber cartridge casing found at the scene of the shooting was fired from the same gun seized during defendant's arrest in Florida. We review challenges to Rule 702 for abuse of discretion. *State v. Godwin*, 369 N.C. 604, 610–11 (2017). The ruling must be "manifestly unsupported by reason and . . . not . . . the result of a reasoned decision" for us to determine the trial court abused its discretion. *State v. Miller*, 275 N.C. App. 843, 848 (2020), *rev. denied*, *dismissed by* 377 N.C. 211 (2021) (Mem.).

North Carolina Rules of Evidence 702(a) states the requirements to admit an expert and admit their opinion:

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

N.C. R. Evid. 702(a).

Also known as the *Daubert* reliability test, subsections (a)(1)–(a)(3) must all be demonstrated in the expert's testimony to be admissible. *State v. McGrady*, 368 N.C. 880, 890 (2016) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). "The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate." *Id.* (cleaned up). If there is "too great an analytical gap between the data and the opinion proffered, the court is not required to admit opinion evidence that is connected to existing data . . . ." *Id.* (cleaned up).

Defendant argues the expert's testimony did not meet prongs (a)(1) and (a)(3). Defendant points to the portion of the expert's testimony in which she concluded the field test cartridge casings matched the .40 caliber cartridge casing found at the scene of the shooting. Defendant relies upon *State v. McPhaul* to support his contention that the expert failed to explain how the cartridges matched. 256 N.C. App. 303, 314–16

(2017). Having reviewed *McPhaul* and compared it to the transcripts in this case, we disagree with defendant's argument.

The State's expert not only explained the standards she had followed, but also explained how she had applied these standards within the context of the cartridges in the present case. Whereas, in *McPhaul*, the expert explained her procedures but then provided sparse answers to the basis for her conclusion. *Id.* at 315–16. In fact, the prosecutor provided more detail in his questions than the expert with her answers in *McPhaul*. *Id.* This amounted to the expert "implicitly ask[ing] the jury to accept her expert opinion." *Id.* at 316. Accordingly, the trial court did not abuse its discretion by determining the expert "applied the principles and methods reliably to the facts of the case, as required by Rule 702(a)(3)." *Id.*

Further, the trial court did not abuse its discretion by determining the expert's testimony was "based upon sufficient facts or data." N.C. R. Evid. 702(a)(1). The expert had a .40 caliber casing from the site of the shooting, the gun seized during defendant's arrest, and the bullet removed from Horne's body. The expert used the gun to conduct test fires and compare the test casings with the casing and bullet from the shooting scene and victim. The expert discussed the instruments and tests conducted with the evidence. Defendant argues about the expert's statement asserting there is no error rate in this type of ballistics testing, but defendant was given opportunity to discredit the expert during cross-examination on this very topic.

Additionally, defendant argues against the admission of the expert's opinion because it is "inherently subjective" and there were recent studies airing concerns with definitive statements from experts in the ballistic field due to its subjective basis. In support of this argument, defendant points to non-binding federal case law and a dissent in the *Miller* case. *See United States v. Ashburn*, 88 F. Supp. 3d 239, 243–44 (E.D.N.Y. 2015); *Miller*, 275 N.C. App. at 856–57 (2020) (Zachary, J., concurring in part and dissenting in part). However, defendant's argument is unpersuasive to this Court given his ability to vigorously cross-examine the expert witness and challenge her credibility on those very grounds. Indeed, on cross-examination, defendant exposed the inconsistencies in the ballistics field by further unpacking the expert's statement that there is no known error rate. Instead of an "impression of definitiveness," defendant cast doubt on the validity of the expert's opinion. That aside, it was within the purview of the jury to determine the weight and credibility of the expert's opinion. Defendant points to no North Carolina

case law to demonstrate that the purported lack of an error rate in the ballistics field negates the expert's opinion in this case.

When we consider the trial court's consideration of the evidence, multiple arguments, case law, and reports prior to making its determination, we cannot say its decision was "manifestly unsupported by reason." *Miller*, 275 N.C. App. at 848. The trial court allowed extensive voir dire of the expert by counsel; the trial court considered reports challenging the validity of the expert's approach to firearm tracing; the trial court limited the expert's testimony to not use the word "unique" or compare the tracing of the cartridges to fingerprints and signatures; and defendant was able to cross-examine the expert regarding the reliability of her methods and principles as applied to the evidence. These steps taken together demonstrate that the trial court properly determined threshold knowledge and qualifying admissibility and did not abuse its discretion by allowing admission of the expert's opinion.

Having considered defendant's multiple arguments, and having determined the combination of the trial court's decisions were not demonstrated to be abuses of discretion nor prejudicial, we disagree with defendant's argument of cumulative error. The trial court overruled multiple objections by discretionary means. Accordingly, defendant was not deprived of a fair trial.

III.

For the foregoing reasons, the trial court did not err nor prejudicially err.

NO ERROR.

Judge TYSON concurs.

Judge STROUD concurs in result.

STATE OF NORTH CAROLINA
v.
TODD GIBBS

No. COA23-566

Filed 7 May 2024

1. Indictment and Information—multiple indictments—identical counts of rape—date range—sufficiency of notice

In a prosecution for rape and sex offense in a parental role, the indictments charging defendant with three identical counts of second-degree forcible rape over a nearly six-month time span were not constitutionally defective because they provided sufficient notice to defendant of the charges against him. Where the incidents had taken place many years earlier against a minor victim and where time was not of the essence or a required element of the offense, any lack of specificity in the dates of each offense did not prejudice defendant and did not require dismissal. Further, there was sufficient evidence at trial to support the date range given in the indictments, based on the victim's testimony that defendant repeatedly abused her multiple times per week for months. Finally, the trial court expressly instructed the jury to assess whether the charged offense occurred three separate and distinct times within the date range.

2. Rape—second-degree forcible rape—sex offense in a parental role—constructive force—sufficiency of evidence

The State presented substantial evidence of each element of second-degree forcible rape and sex offense in a parental role sufficient to survive defendant's motion to dismiss for lack of evidence, including that defendant committed the offenses and used constructive force. Despite the lack of physical evidence, the victim testified that defendant—who was her stepfather at the time of the incidents—assaulted her multiple times per week for several months, that during the assaults she couldn't go anywhere because defendant would be on top of her and was larger in size, and that she felt intimidated and feared repercussions if she did not comply.

3. Criminal Law—rape and sex offense—multiple counts—jury instructions—separate and distinct incidents

In defendant's prosecution for three counts of second-degree forcible rape and one count of sex offense in a parental role, in

which one date range was given for each offense, the trial court did not plainly err by failing to instruct the jury to determine specific dates for each alleged act, since the State was not required to allege or prove specific dates for each offense. Further, the court expressly instructed the jury to consider each count separately, and defendant could not demonstrate prejudice because the victim testified to two separate instances of abuse along with a long pattern of being abused multiple times per week for several months.

4. Sentencing—rape and sex offense—consecutive sentences—no abuse of discretion

The trial court did not abuse its discretion by imposing consecutive sentences on defendant after he was convicted of three counts of second-degree forcible rape and one count of sex offense in a parental role where the court sentenced defendant in the presumptive range for each offense and, therefore, was not required to take into account mitigating evidence, and where there was no evidence in the record that the sentences were arbitrary or that they amounted to cruel or unusual punishment.

Appeal by Defendant from Judgments entered 11 January 2023 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 19 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.

Arnold & Smith, PLLC, by Ashley A. Crowder, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Todd Gibbs (Defendant) appeals from Judgments entered pursuant to jury verdicts finding Defendant guilty of three counts of Second-Degree Rape and one count of Sex Offense in a Parental Role. The Record before us, including evidence presented at trial, tends to reflect the following:

In November of 2004, Beth Berry, a social worker with the Watauga County Department of Social Services (DSS), received a report alleging Defendant was abusing his stepchildren. This report was made by the

ex-husband of Defendant's then-wife. Berry testified she contacted J.H.[1] in the course of her investigation of the alleged abuse, during which it became known there were allegations Defendant had previously abused J.H. Berry testified J.H. confided in her that Defendant had repeatedly sexually abused her when he was her stepfather over an extended period of time. Her report indicated the abuse had occurred approximately eight years prior. After their conversation, Berry reported to the Sheriff's Office that J.H. had confirmed her own sexual abuse as a child, but she did not wish to press charges against Defendant at that time.

In the fall of 2020, Sergeant Lucas Smith with the Watauga County Sheriff's Office contacted J.H. after finding the 2004 report during an investigation of Defendant. On 26 October 2020, Sergeant Smith interviewed J.H. about the incidents documented in the report. Sergeant Smith testified J.H. had described the first two major incidents she could recall. The first involved Defendant performing oral sex on her after her seventh-grade science fair. The second involved Defendant forcibly raping her in a car after a visit to a Blockbuster Video store. J.H. also reported a subsequent pattern of abuse in which Defendant sexually abused her two to three times per week for an extended period of time. After this interview, Defendant was indicted for three counts of Second-Degree Rape and one count of Sex Offense in a Parental Role on or about 6 December 2021.

Defendant's case came on for trial on 9 January 2023. At trial, J.H. testified, consistent with her statement to Sergeant Smith, to two distinct instances of abuse: one involving oral sex when Defendant picked her up from a science fair when she was in the seventh grade and another in which Defendant sexually assaulted her in a car in the garage of their house after renting a movie from Blockbuster Video. J.H. testified that after these incidents, Defendant sexually abused her three to four times per week over the course of several months until sometime when she was fifteen years old and threatened Defendant if he "ever touched [her] again." This account was consistent with her interview with Sergeant Smith.

At the close of the State's evidence, Defendant renewed "all previous motions and objections made up and until this point" and moved to dismiss the case. The trial court denied these motions. At the conclusion of all evidence, Defendant again moved to dismiss the case. The trial court denied Defendant's motion. During the charge conference, Defendant made no objection to the jury instructions.

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1. Although J.H. was an adult at the time of trial, she was a minor when the alleged offenses occurred, thus we refer to her using initials.

On 11 January 2023, the jury returned verdicts finding Defendant guilty on all four charges. The trial court sentenced Defendant to consecutive sentences of 63 to 85 months of imprisonment for each of the three Second-Degree Rape convictions and a consecutive term of 25 to 39 months of imprisonment for the Sex Offense in a Parental Role conviction. The trial court also ordered Defendant to pay a fine of $10,000 and recommended he receive psychiatric and psychological counseling. Defendant orally entered Notice of Appeal in open court on 11 January 2023.

Issues

The issues on appeal are whether the trial court erred by: (I) denying Defendant's Motion to Dismiss the Indictments; (II) denying Defendant's Motion to Dismiss for insufficiency of the evidence; (III) not instructing the jury that specific alleged acts must correspond to specific alleged dates; and (IV) sentencing Defendant to consecutive terms of imprisonment.

Analysis

I. Motion to Dismiss the Indictments

[1] Defendant contends the indictments were constitutionally deficient because they did not state "with certainty the acts that give rise to the offense with which Defendant is being charged." Specifically, Defendant contends the indictments did not give Defendant sufficient notice on which particular days within the date range alleged in the indictments the offenses occurred. Additionally, Defendant argues the indictments were fatally defective because the three counts of Second-Degree Rape were identical, such that a juror could not know what evidence pertained to which count.

"It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Locklear*, 259 N.C. App. 374, 380, 816 S.E.2d 197, 202 (2018) (quotation marks omitted) (quoting *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016)). "The purpose of the indictment is to put the defendant on 'notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense.' " *State v. Collins*, 245 N.C. App. 478, 486, 783 S.E.2d 9, 15 (2016) (quoting *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985)). "Thus, '[i]f the indictment's allegations do not conform to the equivalent material aspects of the jury charge, this discrepancy is considered a fatal variance.' " *Locklear*, 259 N.C. App. at 380, 816 S.E.2d at

202-03 (alteration in original) (quoting *State v. Ross*, 249 N.C. App. 672, 676, 792 S.E.2d 155, 158 (2016) (citation and quotation marks omitted)).

"Generally, an indictment must include a designated date or period within which the offense occurred." *Collins*, 245 N.C. App. at 486, 783 S.E.2d at 15 (citation omitted). However, our Supreme Court has repeatedly stated "the date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date." *State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 382 (1984); *see also State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961). "[V]ariance between allegation and proof as to time is not material where no statute of limitations is involved." *State v. Burton*, 114 N.C. App. 610, 612, 442 S.E.2d 384, 385 (1994) (citations and quotation marks omitted).

In cases involving sexual assaults of children, our Supreme Court has relaxed the temporal specificity requirements the State must allege in the indictment. *Id.* at 613, 442 S.E.2d at 386.

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

State v. Wood, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (citations omitted). "Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where . . . the allegations concern instances of child sex abuse occurring years before." *Burton*, 114 N.C. App. at 613, 442 S.E.2d at 386. Thus, "[u]nless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs." *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991) (citations omitted).

Our statutes support this "policy of leniency" by expressly providing no stay or reversal of a judgment on an indictment when time is not of the essence of the offense: "No judgment upon any indictment . . . shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved . . . nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly[.]" N.C. Gen. Stat.

§ 15-155 (2021). Further, "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." N.C. Gen. Stat. § 15A-924(a)(4) (2021).

In this case, Defendant was indicted for three counts of Second-Degree Forcible Rape pursuant to N.C. Gen. Stat. § 14-27.22. Our statutes provide: "A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person . . . [b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.22(a)(1) (2021).[2] The indictments for these offenses alleged a date range of 2 October 1994 to 25 March 1995. Time is not of the essence nor a required element for Second-Degree Forcible Rape. Further, each count was charged as a felony, and "[i]n [North Carolina] no statute of limitations bars the prosecution of a felony." *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969). Defendant does not argue to the contrary.

Moreover, there was sufficient evidence presented at trial to support the indictment date range. At trial, J.H. testified about multiple specific incidents of forcible vaginal intercourse that occurred within the date range listed on the indictments. J.H. also testified to a pattern of abuse that continued two to three times per week for months. Such testimony is sufficient to support a conviction. This is consistent with our precedent rejecting similar arguments in cases where a victim testifies to a "long history of repeated acts of sexual abuse over a period of time, but does not give testimony identifying specific events surrounding each sexual act." *State v. Bullock*, 178 N.C. App. 460, 471, 631 S.E.2d 868, 876 (2006), *disc. review denied*, 361 N.C. 222, 642 S.E.2d 708 (2007); *see also State v. Bates*, 172 N.C. App. 27, 35, 616 S.E.2d 280, 286 (2005).

Additionally, the trial court expressly instructed the jury to consider whether second-degree rape occurred three separate times within the date range, as well as whether the separate offense of sexual abuse in a parental role occurred. The trial court instructed the jury: "You will consider each charge or count separately. To differentiate the charge or count you are considering, you shall determine whether the alleged occurrence of one offense is at a time or date different from the other two alleged offenses." Thus, the instructions clarified the jury must find separate, distinct incidents of rape for each count. Therefore, we conclude the trial court did not err by denying Defendant's Motion to Dismiss the Indictments.

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2. Formerly codified as N.C. Gen. Stat. § 14-27(a) (1994).

II. Motion to Dismiss

[2] We review the trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). However, "[u]pon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fields*, 265 N.C. App. 69, 71, 827 S.E.2d 120, 122 (2019) (citation and quotation marks omitted), *review allowed*, *writ allowed*, 372 N.C. 705, 830 S.E.2d 816 (2019), *and aff'd as modified*, 374 N.C. 629, 843 S.E.2d 186 (2020). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). Evidence "need not be irrefutable or uncontroverted" to be substantial. *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

Defendant contends the trial court erred in denying his Motion to Dismiss for insufficient evidence. For the charge of Second-Degree Forcible Rape, our statutes provide: "A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person . . . [b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.22(a)(1) (2021). With respect to Sex Offense in a Parental Role, our statutes provide a person is guilty "[i]f a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home[.]" N.C. Gen. Stat. § 14-27.31(a) (2021).

Defendant argues as to the Second-Degree Rape charges that the State did not present sufficient evidence that the alleged incidents occurred or that they were perpetrated by force. Defendant argues as to the Sex Offense in a Parental Role charge that the State did not present sufficient evidence that the alleged incidents occurred. Defendant was J.H.'s stepfather at the time of the alleged incidents; therefore, it was uncontested he was in a parental role with respect to J.H.

Defendant points to the lack of physical evidence and the fact J.H. had previously declined to prosecute these incidents. Our courts have repeatedly held victim statements and testimony alone are sufficient

evidence to support a conviction. *See*, *e.g.*, *Bates*, 172 N.C. App. at 35, 616 S.E.2d at 286; *Bullock*, 178 N.C. App. at 472, 631 S.E.2d at 876. In one such case, this Court held there is sufficient evidence to withstand a defendant's motion to dismiss in cases involving a long period of abuse "where a victim recounts a long history of repeated acts of sexual abuse over a period of time, but does not give testimony identifying specific events surrounding each sexual act." *Bullock*, 178 N.C. App. at 471, 631 S.E.2d at 877. There, this Court further acknowledged "the realities of a continuous course of repeated sexual abuse. While the first instance of abuse may stand out starkly in the mind of the victim, each succeeding act . . . becomes more routine, with the latter acts blurring together and eventually becoming indistinguishable." *Id.* at 473, 631 S.E.2d at 877. Here, J.H. testified in detail about the first two incidents of sexual assault by Defendant. She then described a pattern of sexual abuse occurring "three to four" times per week for several months. This testimony is sufficient, consistent with our precedent, to survive a motion to dismiss.

As to the issue of force, Defendant acknowledges force may be constructive.

> Constructive force in the form of fear, fright, or coercion suffices to establish the element of force in second-degree rape and may be demonstrated by proof of a defendant's acts which, in the totality of the circumstances, create the reasonable inference that the purpose of such acts was to compel the victim's submission to sexual intercourse.

State v. Parks, 96 N.C. App. 589, 593, 386 S.E.2d 748, 751 (1989). Our Supreme Court has noted "[t]he youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987). "[W]here explicit threats or displays of force are absent, constructive force may nevertheless be inferred from the 'unique situation of dominance and control' which inheres in the parent-child relationship." *Parks*, 96 N.C. App. at 593, 386 S.E.2d at 751 (quoting *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681).

Contrary to Defendant's assertions, J.H.'s testimony was sufficient to establish constructive force. J.H. testified that during the alleged sexual assaults, Defendant "would be on top of [her] so [she] really didn't have really anywhere to go." She testified to feeling "intimidation" and stated she "definitely feared repercussions" if she did not comply. J.H. also testified to Defendant's size relative to her at that time, when

she was "smaller than average[.]" This testimony is in accord with our Supreme Court's recognition of the "unique situation of dominance and control" inherent in the relationship between a parent and child. *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681. Further, this Court has consistently concluded there was sufficient evidence to support finding constructive force in cases in which juveniles testified to fear of retribution or control and manipulation on the part of the abuser. *See*, *e.g.*, *Locklear*, 172 N.C. App. at 254-55, 616 S.E.2d at 338; *State v. Strickland*, 318 N.C. 653, 656-57, 351 S.E.2d 281, 283 (1987); *State v. Morrison*, 94 N.C. App. 517, 522-24, 380 S.E.2d 608, 611-12 (1989). Thus, the State presented sufficient evidence to establish Defendant committed the acts alleged and used constructive force. Therefore, the trial court did not err in denying Defendant's Motion to Dismiss for insufficient evidence.

III. Jury Instructions

[3] Defendant acknowledges he did not object to the jury instructions at trial. Therefore, our review is limited to plain error. *See State v. Golder*, 374 N.C. 238, 244, 839 S.E.2d 782, 788 ("[A]n appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." (citation and quotation marks omitted)). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

Defendant contends the trial court's jury instructions were prejudicial because there was no instruction "regarding the necessity for specific alleged date incidents for the alleged acts of vaginal intercourse." As we have already concluded, however, the State was not required to allege or prove specific dates for each instance of abuse.

Further, the trial court appropriately instructed the jury that it must find the State met its burden for each count of Second-Degree Rape charged. The trial court instructed the jury as follows:

> Now, the defendant has been charged with three counts of second-degree forcible rape. Each count alleges that the offense occurred on or about a date between October 2nd of 1994, and March 25th, 1995. You will consider each charge or count separately. To differentiate the charge or count you are considering, you shall determine whether the alleged occurrence of one offense is at a time or date different from the occurrence of the other two alleged offenses. That is, you must find beyond a reasonable doubt that each separate count was a separate occurrence of the alleged offense and that it occurred within the alleged time period. Again I remind you that you will consider each offense or count separately.

The jury was given clear, specific instructions that it must consider each count separately, and whether each alleged occurrence happened at different times or days from each other. Based on the instructions and J.H.'s testimony regarding two separate instances and a long pattern of abuse over the course of several months, we cannot conclude Defendant was prejudiced by the jury instructions or, consequently, that the trial court plainly erred in issuing its instructions.

IV. Consecutive Sentences

[4] When a defendant challenges the sentence imposed by the trial court, "our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1)). "It is well established that the decision to impose consecutive or concurrent sentences is within the discretion of the trial judge and will not be overturned absent a showing of abuse of discretion." *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 497, 692 S.E.2d 145, 154 (2010). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation omitted).

"This Court has held the trial court is required to take 'into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing.' " *State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) (quoting *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997)) (emphasis in original). Thus, when the trial court imposes presumptive sentences, it is not required to take into account mitigating evidence. *Id.*

Here, as Defendant acknowledges, the trial court imposed sentences within the presumptive range. It was thus within the trial court's discretion to impose concurrent or consecutive sentences. *Espinoza-Valenzuela*, 203 N.C. App. at 497, 692 S.E.2d at 154. There is nothing in the Record supporting the proposition that imposing consecutive sentences was arbitrary or could not have been the result of a reasoned decision. Moreover, "sentences that are within the statutory limits and impose consecutive sentences do not constitute cruel and unusual punishment." *State v. Handsome*, 300 N.C. 313, 317, 266 S.E.2d 670, 674 (1980) (citations omitted). Where a defendant is sentenced within the relevant statutory limits, "[t]here is . . . no merit to his contention that the [consecutive] sentences constitute cruel or unusual punishment." *State v. O'Neal*, 108 N.C. App. 661, 667, 424 S.E.2d 680, 683 (1993). Thus, Defendant has failed to show the trial court's decision to impose consecutive sentences was arbitrary or without reason, or that his consecutive sentences amounted to cruel or unusual punishment. Therefore, the trial court did not err in sentencing Defendant to consecutive terms of imprisonment. Consequently, the trial court, in turn, did not err in entering judgment against Defendant.

Conclusion

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

NO ERROR.

Judges GRIFFIN and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
KENNETH DAVID GROAT, DEFENDANT

No. COA23-703

Filed 7 May 2024

1. Appeal and Error—waiver—motion to sever denied—failure to renew motion at trial

Defendant waived appellate review of the trial court's joinder for trial of one count of attempted first-degree kidnapping and multiple counts of sex offenses against juveniles where the court had denied defendant's motion to sever the charges, which he filed pretrial as required by N.C.G.S. § 15A-927(a)(1), but defendant then failed to renew his severance motion at the close of all evidence as required by N.C.G.S. § 15A-927(a)(2).

2. Kidnapping—sufficiency of evidence—attempt in the first degree

The trial court did not err in denying defendant's motion to dismiss a charge of attempted first-degree kidnapping where the State produced evidence that defendant—who had sexually abused and impregnated his stepdaughter when she was a minor—had threatened to kidnap his stepdaughter to a motel so they could "commit suicide together" and was arrested as he waited outside the now-adult daughter's workplace with duct tape, a handgun, and a knife in his car after the stepdaughter contacted law enforcement regarding defendant's unwanted text contact with her. In the light most favorable to the State, this was substantial evidence of an overt act by defendant—driving to and waiting outside the stepdaughter's workplace—with the intent to restrain and/or remove her without her consent to facilitate the felony of killing her.

Appeal by Defendant from judgment entered 18 October 2022 by Judge William H. Coward in Jackson County Superior Court. Heard in the Court of Appeals 20 March 2024.

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

New Hanover County Public Defender, by Assistant Public Defender Max E. Ashworth, III, for Defendant-Appellant.

CARPENTER, Judge.

Kenneth David Groat ("Defendant") appeals from judgment after a jury convicted him of one count of attempted first-degree kidnapping, one count of statutory sex offense with a child fifteen years of age or younger, three counts of indecent liberties with a child, and three counts of statutory rape of a child fifteen years of age or younger. On appeal, Defendant argues the trial court erred by: (1) joining his charges for one trial; and (2) denying his motion to dismiss his attempted first-degree kidnapping charge. After careful review, we discern no error.

I. Factual & Procedural Background

On 18 June 2020, a grand jury indicted Defendant with two counts of indecent liberties with a child, one count of statutory sex offense with a child fifteen years of age or younger, and one count of statutory rape of a child fifteen years of age or younger. On 28 January 2021, a grand jury indicted Defendant with attempted first-degree kidnapping. On 15 March 2021, a grand jury indicted Defendant with one count of statutory rape of a child fifteen years of age or younger and one count of indecent liberties with a child. And lastly, on 15 November 2021, a grand jury indicted Defendant with an additional count of statutory rape of a child fifteen years of age or younger.

Before trial, the State filed a motion to join all of Defendant's charges for one trial, and Defendant filed a motion to sever, objecting to the joinder of his charges. The trial court granted the State's motion and denied Defendant's. Defendant did not renew his joinder objection at trial.

Trial evidence tended to show the following. In 2011, Defendant began dating the mother of A.C. and T.Q.[1] Defendant moved in with, and eventually married, A.C. and T.Q.'s mother.

A.C. was in the fifth grade during the following events. One night, Defendant laid "next to [A.C.]" and put "his hands in [A.C.'s pants]." Defendant asked A.C. to "get on top of [Defendant] and jump." On several other occasions, Defendant would "stick his hands in [A.C.'s] bra" and put his "mouth . . . on [A.C.'s] boobs" while she was sleeping. Defendant also digitally penetrated A.C.

T.Q. was twelve years old during the following events. One night, Defendant touched T.Q. "up [her] leg and . . . on [her] stomach and [her] arms. And then [she] saw him pull out his phone, and he lifted [her] pants

1. We use pseudonyms to protect the identity of the juveniles. *See* N.C. R. App. P. 42(b).

and underwear and took a photo of [her]." Days later, Defendant again "touch[ed T.Q.'s] arms, touch[ed her] legs[,] and . . . touch[ed her] breasts[,] lifting up [her] pants and underwear to look at everything." Defendant eventually started "try[ing] to have penetrative sex with [T.Q.]"

When T.Q. was thirteen years old, Defendant impregnated her. To cover up the abuse, Defendant convinced T.Q. to say that she "snuck off and had sex with some guy at [a] football game, and then [she] just became pregnant." T.Q. aborted the unborn child. Undeterred, Defendant continued to have sex with T.Q.

Defendant threatened to kill himself if T.Q. reported the abuse. He also threatened to kill T.Q. "so [they could] be together forever." Defendant also told T.Q. that if she said anything, "he would kidnap [T.Q.,] . . . go to a motel room, and then . . . commit suicide together."

On 20 January 2020, police arrested Defendant for the above abuse. Defendant posted bond and was released. As a condition of his bond, Defendant had to avoid any "contact w[ith] any minor under [the] age of sixteen" and "reside with [his] parents in Michigan while on release." Nonetheless, on 21 May 2020, Defendant texted T.Q. after his release, and T.Q. notified the police. The police then instructed T.Q. to ask Defendant to meet her at a Sonic restaurant near T.Q.'s work, in Sylva, North Carolina.

On 22 May 2020, police officers observed Defendant, in his car, parked "in the middle of the [Sonic] drive area facing [T.Q.'s workplace.]" The officers arrested Defendant. During the subsequent search of Defendant's car, officers found the following: binoculars, two rolls of duct tape, pepper spray, a pocketknife, two cell phones, a .22-caliber pistol, .22-caliber ammunition, a 40-pack of bottled water, a 15-pack of granola bars, two five-gallon jugs of gasoline, and a recent receipt for cable ties.

On 18 October 2022, the jury convicted Defendant of one count of attempted first-degree kidnapping, one count of statutory sex offense with a child fifteen years of age or younger, three counts of indecent liberties with a child, and three counts of statutory rape of a child fifteen years of age or younger. The trial court sentenced Defendant to between 1,072 and 1,616 months of imprisonment. On 1 November 2022, Defendant filed a written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

The issues on appeal are whether the trial court erred by: (1) joining Defendant's charges for a single trial; and (2) denying Defendant's motion to dismiss his attempted first-degree kidnapping charge.

IV. Analysis

A. Joinder of Charges for One Trial

[1] Defendant first argues that the trial court erred by joining his charges for one trial. We conclude that Defendant waived this argument.

In a criminal case, the State may join multiple charges to be adjudicated in one trial. *See State v. Bracey*, 303 N.C. 112, 116–17, 277 S.E.2d 390, 393–94 (1981). If the defendant believes the joinder is unfair, however, he may move to sever the charges. *See* N.C. Gen. Stat. § 15A-927(a)(1) (2023).

As a general rule concerning appellate review, the appellant must raise the issue at trial before we can consider it. *See, e.g.*, *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)). But motions to sever have a higher preservation hurdle: A motion to sever offenses must be made before trial, N.C. Gen. Stat. § 15A-927(a)(1), and if the trial court denies the motion, the "right to severance is waived by failure to renew the motion" at trial, *id.* § 15A-927(a)(2).

Concerning waiver of severance arguments, some of our caselaw appears to conflict with decisions of the North Carolina Supreme Court. *Compare State v. Silva*, 304 N.C. 122, 128, 282 S.E.2d 449, 453 (1981) ("Defendant here moved to sever prior to trial but did not renew that motion at the close of all evidence; therefore, he has waived any right to severance, [N.C. Gen. Stat.] § 15A-927(a)(2).") *with State v. Wood*, 185 N.C. App. 227, 231, 647 S.E.2d 679, 683 (2007) (reviewing the trial court's severance denial for abuse of discretion, despite the defendant's failure to renew his severance motion at trial).

We, however, cannot overrule our state's highest court. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Accordingly, we follow *Silva*, not *Wood*. *See Dunn*, 334 N.C. at 118, 431 S.E.2d at 180. And tracking nicely with the text of section 15A-927, the Court in *Silva* held that a defendant waives his severance arguments by failing to renew his severance motion at trial. *Silva*, 304 N.C. at 128, 282 S.E.2d at 453.

Here, Defendant moved pretrial to sever his charges, but he failed to renew his severance argument at trial. Therefore, Defendant waived his severance argument, and we decline to review the trial court's decision

to join Defendant's charges. *See* N.C. Gen. Stat. § 15A-927(a)(2); *Silva*, 304 N.C. at 128, 282 S.E.2d at 453.

B. Motion to Dismiss

[2] Next, Defendant argues that the trial court erred by denying his motion to dismiss his attempted first-degree kidnapping charge. After careful review, we disagree.

We review a denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In evaluating the sufficiency of the evidence concerning a motion to dismiss, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *State v. Winkler*, 368 N.C. 572, 574–75, 780 S.E.2d 824, 826 (2015) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). "Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Agustin*, 229 N.C. App. 240, 242, 747 S.E.2d 316, 318 (2013) (quoting *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990)).

"An attempted crime is an intentional 'overt act' done for the purpose of committing a crime but falling short of the completed crime." *State v. Broome*, 136 N.C. App. 82, 87, 523 S.E.2d 448, 453 (1999) (citing *State v. Collins*, 334 N.C. 54, 60, 431 S.E.2d 188, 192 (1982)). First-degree kidnapping requires: (1) confining, restraining, or removing from one place to another; (2) a nonconsenting person who is sixteen years or older; (3) to facilitate a felony; and (4) not releasing the person in a safe

place, seriously injuring the person, or sexually assaulting the person. *See State v. Oxendine*, 150 N.C. App. 670, 675, 564 S.E.2d 561, 565 (2002).

Here, the State offered the following trial testimony. Defendant threatened to kill T.Q. "so [they could] be together forever." Defendant also told T.Q. that if she said anything, "he would kidnap [T.Q.,] . . . go to a motel room, and then . . . commit suicide together."

Further, police officers arrested Defendant outside of T.Q.'s workplace. And during the subsequent search of Defendant's car, officers found binoculars, two rolls of duct tape, pepper spray, a pocketknife, two cell phones, a .22-caliber pistol, .22-caliber ammunition, a 40-pack of bottled water, a 15-pack of granola bars, two five-gallon jugs of gasoline, and a recent receipt for cable ties.

First, Defendant does not contest T.Q.'s age as of 22 May 2020, and testimony shows that T.Q. did not consent to go anywhere with Defendant, as she cooperated with police to apprehend him. Second, testimony that Defendant parked and waited outside of T.Q.'s workplace is evidence that Defendant targeted T.Q. Third, the duct tape found in Defendant's vehicle is evidence that Defendant intended to confine or restrain T.Q. Fourth, testimony that Defendant previously stated he wanted to kidnap T.Q. so they could "commit suicide together"—coupled with the seizure of, among other things, a handgun and a knife from Defendant's car—is evidence that Defendant intended to commit a felony by killing T.Q. And finally, testimony that Defendant parked and waited outside of T.Q.'s workplace is evidence of an " 'overt act' done for the purpose of" kidnapping T.Q. *See Broome*, 136 N.C. App. at 87, 523 S.E.2d at 453.

In sum, the above-mentioned evidence is substantial concerning each element of attempted first-degree kidnapping because a reasonable jury could accept it as "adequate to support a conclusion" that Defendant attempted to kidnap T.Q. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169; *Oxendine*, 150 N.C. App. at 675, 564 S.E.2d at 565; *Broome*, 136 N.C. App. at 87, 523 S.E.2d at 453. Accordingly, the trial court did not err by denying Defendant's motion to dismiss his attempted first-degree kidnapping charge. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

V. Conclusion

We conclude that Defendant waived his severance argument by failing to renew it at trial, and the trial court did not err by declining to dismiss Defendant's attempted first-degree kidnapping charge.

NO ERROR.

Judges TYSON and STADING concur.

STATE OF NORTH CAROLINA
v.
PHIL JAY HEYNE

No. COA23-224

Filed 7 May 2024

1. Evidence—lay witness testimony—rape trial—repressed memories—victim's recall—expert support not required

In a trial for first-degree rape involving an incident that took place years earlier when the victim was a minor, the trial court did not plainly err by allowing the victim to testify regarding her memories of the incident where, despite defendant's characterization of the victim's testimony as involving repressed memories—for which supporting expert testimony would be required—the victim did not testify that she had repressed memories or that she had recovered repressed memories but, instead, recalled certain parts of the incident as "really clear."

2. Evidence—lay witness testimony—rape trial—repressed memory—admitted for corroborative purposes

In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not plainly err when it admitted testimony, without expert support, of a friend of the victim's family stating that the victim had repressed her memory of the incident, since the family friend's testimony was not admitted for substantive purposes but, rather, as corroboration of the victim's substantive testimony, a distinction that the trial court made clear to the jury during instructions.

3. Evidence—lay witness testimony—rape trial—victim's advocate—calling memory loss "normal"—based on rational perception

In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not abuse its discretion by allowing the testimony of a domestic violence victim's advocate who described taking the victim to be interviewed by law enforcement and, after relating that the victim did not remember a lot of details, stated that the lack of details was "normal because it happened so long ago." Despite defendant's argument that there was no basis for this opinion, the trial court could have reasoned that the testimony was based on the rational perception that memories fade over time.

4. Criminal Law—first-degree rape trial—prosecutor's closing argument—victim's behaviors as responses to rape—reasonable inference

In a trial for first-degree rape based on an incident that took place years earlier when the victim was a minor, the trial court did not abuse its discretion by allowing the prosecutor to comment during closing argument that the victim's eating disorder, self-harm, and nightmares were consistent and credible responses to having been raped. The statements were not asserted as fact but constituted reasonable inferences based on the facts in evidence and, even had the statements been improper, they amounted to a small portion of the State's closing argument and were not prejudicial to defendant.

Appeal by Defendant from judgment entered 30 August 2022 by Judge Lori I. Hamilton in Davie County Superior Court. Heard in the Court of Appeals 10 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kristin J. Uicker, for the State-Appellee.

Mark Hayes for Defendant-Appellant.

COLLINS, Judge.

Defendant Phil Jay Heyne appeals from a judgment entered upon a jury verdict finding him guilty of first-degree rape. Defendant argues that the trial court plainly erred by admitting lay witness testimony of repressed memories without expert support, that the trial court erred by allowing certain lay witness opinion testimony, and that the trial court erred by allowing the prosecutor to make improper and prejudicial remarks during the State's closing argument. We hold that Defendant received a fair trial free from prejudicial error.

I. Background

In August 2017, Amber[1] contacted law enforcement to report that Defendant had sexually assaulted her in 2003 while she was at a sleepover with Defendant's daughter at Defendant's house. Defendant was indicted for first-degree rape in May 2019 and tried in August 2022.

1. A pseudonym is used to identify the prosecuting witness. *See* N.C. R. App. P. 42(b)(3).

Amber testified at trial to the following: When Amber was in the sixth grade, Defendant's daughter invited her to sleep over at her house. Amber's family had dinner with Defendant's family before the sleepover and then Amber's parents gave her a cell phone before leaving her at Defendant's house. Amber and Defendant's daughter played in the basement until Defendant's wife came downstairs and told them that it was time for bed. On their way up the stairs, Defendant's daughter informed Amber that they would be sleeping in separate rooms, which made Amber uncomfortable.

At some point during the night, Amber heard the bedroom door open and felt "a presence of somebody inside" the room. The person checked if Amber was asleep and then got into bed with her. The person began touching Amber's thigh and hip area, then turned her onto her back, got on top of her, and put his hand over her mouth. Amber opened her eyes and recognized that the person on top of her was Defendant. Defendant removed Amber's shorts and underwear and "put his penis in [her] vagina." Amber described feeling "a lot of pain" in her vaginal area and wanting to scream, but she "couldn't find a way to say anything." After Defendant stopped, he sat on the edge of the bed and told Amber that nobody would believe her and that "he would never do this to his own daughters because they were better than [she] was."

The next morning, Amber noticed blood on her sheets, which confused her. Defendant's wife then came into the room and insisted that Amber take a shower before returning home, but Amber "didn't want to be alone in that house anymore," so she refused. Defendant's wife attempted several more times that morning to convince Amber to shower before Amber's mother arrived and Amber left the house. Amber did not tell her parents the extent of what had happened at Defendant's house, mentioning only that she wanted to come home early because she had been uncomfortable sleeping in a bedroom by herself.

Amber testified that she developed disordered eating behaviors beginning in seventh grade, for which she sought treatment from a partial hospitalization program at UNC during the summer of 2009 before beginning college. During her first year of college, Amber attended an eating disorder support group and engaged in individual therapy with the counselor who led the support group. That spring, Amber told the counselor about the incident at Defendant's house after having seen Defendant's family in Walmart. Amber also told her parents and several other women about the incident, several of whom testified at trial about what Amber had told them.

Defendant testified that he had "zero recollection" of hosting Amber's family for dinner or Amber ever spending the night at his house. His wife and daughters also testified that Amber had never spent the night. Three other witnesses who had known Defendant for over 25 years each testified that Defendant had a reputation for being a truthful, law-abiding citizen.

The jury returned a verdict finding Defendant guilty of first-degree rape, and the trial court sentenced Defendant to 192 to 240 months' imprisonment. Defendant gave oral notice of appeal.

II. Discussion

A. Repressed Memory Testimony

[1] Defendant first argues that the trial court plainly erred by admitting lay witness testimony of repressed memories without expert support.

1. Standard of review

In criminal cases, an unpreserved error "may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice —that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted).

2. Analysis

Defendant argues that pursuant to this Court's holding in *Barrett v. Hyldburg*, 127 N.C. App. 95, 487 S.E.2d 803 (1997), a party may not present lay witness testimony of repressed memories without accompanying expert testimony explaining the phenomenon of memory repression.

In *Barrett*, the plaintiff claimed that she had spontaneously recovered memories of sexual abuse that had occurred over 40 years earlier. 127 N.C. App. at 97, 487 S.E.2d at 804. This Court held that the "plaintiff may not express the opinion [that] she herself has experienced repressed memory[,]" and added that, "even assuming plaintiff were not to use the term 'repressed memory' and simply testified she suddenly . . . remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony on the subject of memory repression . . . ." *Id.* at 101, 487 S.E.2d at 806.

Our Supreme Court modified this rule in *State v. King*, 366 N.C. 68, 733 S.E.2d 535 (2012). In *King*, the defendant's teenage daughter was referred to therapy after she began suffering panic attacks and pseudoseizures. 366 N.C. at 69, 733 S.E.2d at 536. In therapy, the daughter initially denied having experienced any sexual abuse. *Id.* About three weeks later, the daughter experienced a "flashback" to an incident that had occurred when she was seven years old: she recalled getting out of the bathtub when the defendant "entered the bathroom, lifted her up against the wall, threw her on the floor, put his arm across her chest to hold her down, and raped her." *Id.* The daughter reported this memory to her therapist, which triggered an investigation resulting in criminal charges against the defendant. *Id.* at 70, 733 S.E.2d at 536.

The defendant filed a pretrial motion to exclude testimony about " 'repressed memory,' 'recovered memory,' 'traumatic amnesia,' 'dissociative amnesia,' 'psychogenic amnesia' or any other synonymous terms the witnesses may adopt." *Id.* at 70, 733 S.E.2d at 536-37. The trial court conducted an evidentiary hearing on the motion where the defendant and the State each presented expert testimony concerning the theory of repressed memory. *Id.* at 71, 733 S.E.2d at 537. After hearing the parties' arguments, the trial court determined that, although the expert testimony was admissible under North Carolina Evidence Rule 702, the evidence must be excluded under North Carolina Evidence Rule 403 because its probative value was outweighed by its prejudicial effect. *Id.* at 71-73, 733 S.E.2d at 538.

The State appealed, arguing that under *Barrett*, the trial court's decision to exclude the expert testimony would prevent the victim from testifying about the incident that had occurred when she was seven years old. *Id.* at 73, 733 S.E.2d at 539. On appeal, our Supreme Court disavowed the notion that all testimony based on repressed memory must be excluded unless it is accompanied by expert testimony. *Id.* at 78, 733 S.E.2d at 542. Explaining that *Barrett* "went too far," the Court clarified that, "if a witness is tendered to present lay evidence of sexual abuse, expert testimony is not an automatic prerequisite to admission of such evidence, so long as the lay evidence does not otherwise violate the statutes of North Carolina or the Rules of Evidence." *Id.* at 78, 733 S.E.2d at 541-42 (citation omitted).

The Court announced that a witness may testify as to their recollection of an incident, and "to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident," without expert support. *Id.* at 78, 733 S.E.2d at 542. However, unless qualified as an expert or supported by admissible expert testimony, a

witness "may not testify that the memories were repressed or recovered." *Id.*

In the instant case, Defendant argues that under *Barrett*, the entirety of Amber's testimony related to repressed and recovered memories, and therefore required expert testimony for support. However, in *King*, our Supreme Court relaxed the strict rule articulated in *Barrett*. Accordingly, we review the testimony presented at Defendant's trial to determine whether it required expert support under *King*.

At Defendant's trial, Amber testified as to her recollection of the night she spent at Defendant's house and that she did not immediately report the incident. When asked why she had not said anything for so long, Amber responded:

> I think there's several reasons. I think partially because I didn't have the words to say anything. I didn't know how to articulate what had happened. I think partially because once that first hour passed where I hadn't said anything, how could I possibly bring it up now? Once that first day passed, how do you bring it up? That first month, that first year. It felt like if I hadn't said anything that first moment when I saw my mom, then how could I ever say it to her? Like who could believe me?

Amber also explained the impetus behind her decision to come forward when she did:

> [STATE]. What caused you to finally come forward?
>
> [AMBER]. Well, I think understanding how eating disorders work now, my brain was really foggy from not eating for so long. And at some point in the spring of my freshman year of college when I was in a much healthier place, it all like flooded back. I remembered the rape and so I spoke with my therap[ist] about it first.
>
> [STATE]. When you say it all flooded back to you, was there a moment that this happened? Was there an accumulation? What was that?
>
> [AMBER]. Yes, I was actually in Wal[m]art. I had seen [Defendant's] family in Wal[m]art at some point. I hadn't seen them pretty much since sixth grade because they had not -- I don't know where they went. I don't know what school they ended up going to or anything like that. But

> I did see them. I don't know if it was that day or if it was after that day, but I was walking down the frozen food aisle with my mom and it just, all the sensations kind of came back and his face above me came back. I felt like I was kind of there in that moment.

Amber recounted what she said to her therapist after seeing Defendant's family in Walmart:

> [STATE]. You said at that time that you told [your therapist] the pieces of this incident that you recall. Do you remember here on the stand today what you told her happened that night.
>
> [AMBER]. I was really clear that there were pieces that I always remembered. Especially the night before and the morning after. Those pieces never left my brain. Those were the pieces that I was pretty open about always; that I had slept in the room by myself, that her mom had made me really uncomfortable by asking me to take a shower so many times. But the piece that I remember specifically was him above me and looking at the pink curtains and the sensations of my body. That kind of went with that.

Amber also described how she processed her memories of the incident:

> [STATE]. So you talked to your therapist about some other trauma-based approaches to help you process this?
>
> [AMBER]. Yes.
>
> [STATE]. Did you end up engaging in those things?
>
> [AMBER]. I did. I tried a couple of different things.
>
> [STATE]. And in doing those things, were you able to solidify more of your memory?
>
> [AMBER]. The best way I've solidified my memory is through talking. And the more I've shared the experience, the more some of those pieces that weren't connected, connected back. I did participate in a therapy called EMDR. And it did not really help me -- the goal of that therapy is not necessarily to remember the pieces. It's more to process the pieces.
>
> So in that moment -- I did that early in college, and that part didn't -- I don't know how to explain it. It didn't help

> me remember pieces, it helped me process the things I already remembered.

As Defendant concedes, at no point did Amber testify that she had repressed memories or that she had recovered repressed memories. Instead, Amber testified as to her recollection of the incident, and that she was "really clear that there were pieces that [she] always remembered." Under *King*, this type of testimony did not require expert support. *See id.*

[2] Defendant also argues that a portion of the State's evidence offered to corroborate Amber's substantive testimony referenced a repressed memory and was therefore inadmissible without expert support.

At trial, Barbara Layman, a family friend, testified about what Amber had told her about the incident:

> And she told me that in therapy she had remembered going to this family's house to spend the night with the daughter, and during the night the dad had come in and raped her. That she remembered that in therapy. And she told me details, like she remembered the time on the clock, the fact that they did not sleep -- the parents did not let the daughter and her sleep in the same room. She had to sleep in a separate room. That the dad told her that there was no point in her telling anybody because nobody would ever believe her. The mom really pushed for them to shower the next morning before she went home. And she said she remembered at the time, like, thinking all this stuff is really strange.

Layman added:

> And as it came back to her, more and more of it made sense, and she was just -- in one way, I think she was relieved because she finally had some answers. And then she was just terrified at how this had happened to her and how her memory had -- her subconscious had been so strong at protecting her that she had repressed this memory. But she was incredibly upset and had some really clear memories once it started coming back.

Even assuming arguendo that Layman's remark that Amber "had repressed this memory" was erroneously admitted, Defendant has failed to show "that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty."

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks and citations omitted).

Layman's testimony was not admitted as substantive evidence of Defendant's guilt but rather as corroboration for Amber's substantive testimony. The trial court explained this to the jury when Layman testified:

> Ladies and gentlemen, 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 the 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 the witness at this trial, you may consider this and all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony.

Defendant reiterated the trial court's instruction in his closing argument:

> And the State has presented multiple witnesses and they say that [Amber] told them that she was raped by [Defendant]. Now, there's a special jury instruction on this, because you need a special warning about these prior consistent statements, because the judge is going to tell you you are not to take those prior statements as truth, because they were not under oath. They're just something for your consideration, but not for the truth of what was said. So listen carefully.

Thus, the jury was properly instructed not to consider Layman's testimony as substantive evidence that Amber had experienced repressed memory. As jurors are presumed to follow the trial court's instructions, *State v. Parker*, 377 N.C. 466, 474, 858 S.E.2d 595, 600 (2021), we cannot say that the erroneous remark had a probable impact on the jury's verdict. Accordingly, admitting Layman's testimony did not amount to plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

B. Lay Witness Opinion Testimony

[3] Defendant next argues that the trial court abused its discretion by allowing a lay witness to give certain opinion testimony.

"We review the trial court's decision to admit [lay opinion testimony] evidence for abuse of discretion, looking to whether the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Delau*, 381 N.C. 226, 236-37, 872 S.E.2d 41, 48 (2022) (alteration in original) (citation omitted). A lay witness may testify in the form of "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [their] testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2022).

At trial, Jordan Hemmings, a domestic violence victim's advocate, testified about accompanying Amber to law enforcement:

> [STATE]. And so when you got to the police department, if you could walk the jury through what happened when you got there.
>
> [HEMMINGS]. So when we got there, we explained that we wanted to talk to an officer about the sexual assault that she -- that [Amber] wanted to report. Once we got there, we talked to an officer. I remember it was Logan Fox. We talked to her. [Amber] disclosed the sexual assault. I remember then she stated that it was -- it happened when she was twelve and she was brought in -- or she went to her friend's house for a sleep-over. And when she was asleep, she had been asleep for a short time and the friend's dad came in and took her clothes off and sexual assaulted her or raped her.
>
> And then she was very tearful. She was upset, obviously. She said she never went back to that home again. She didn't remember a lot of the details, which is normal because it happened so long ago.

Defendant argues that "Hemmings had no basis, personal or professional, for drawing any conclusions about what was 'normal.' "

Here, Hemmings described her experience with Amber at the police station and expressed her opinion that Amber's lack of detailed memory was normal because it happened so long ago. The trial court could reasonably have considered Hemmings' opinion was based on her rational perception that memories fade with time. Thus, the trial court did not abuse its discretion by admitting Hemmings' lay opinion testimony. *See id.*

C. Closing Argument

[4] Defendant finally argues that the trial court abused its discretion by overruling his objection to the prosecutor's remarks during the State's closing argument that Amber's eating disorder, issues with picking and cutting, and nightmares were consistent and credible responses to being raped.[2]

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). "When applying the abuse of discretion standard to closing arguments, this Court first determines if the remarks were improper." *Id.* "Next we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* (citations omitted).

"Generally, prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (quotation marks and citation omitted). A prosecutor may not, however, argue "facts which are not supported by the evidence." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted).

Defendant objected after the following statement:

> What do we know about [Amber]? We know she had the eating disorder. We know she had extreme issues with excessive picking, with cutting, with nightmares. Are these consistent and credible responses to a 12-year-old being raped? Yes, absolutely they are.

Defendant argues that the prosecutor argued facts which are not supported by the evidence because no evidence was presented that

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2. Defendant also argues in passing that the prosecutor improperly referenced repressed memories during the State's closing argument. However, Defendant did not timely object to the reference, and he does not argue on appeal that the trial court failed to intervene ex mero motu. *See State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) ("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." (citation omitted)). Thus, any argument based on the prosecutor's reference to repressed memories during closing argument is deemed abandoned. *See* N.C. R. App. P. 28(a).

Amber's behaviors were responses to rape. However, the prosecutor did not assert as fact that Amber's behaviors were responses to rape. The prosecutor recounted facts that were admitted into evidence: that Amber had an eating disorder, issues with picking and cutting, and nightmares. The prosecutor then argued a reasonable inference from these facts that Amber's behaviors may have been responses to a rape. Accordingly, the trial court did not abuse its discretion by overruling Defendant's objection.

Furthermore, even if the prosecutor's argument had been improper, the challenged statements comprised only two sentences of a closing argument that spanned 23 transcribed pages. The majority of the State's closing argument focused on bolstering Amber's credibility by highlighting the consistent version of events told by several of the State's witnesses at trial. Given the small role the challenged statements played in the State's closing argument, the remarks were not of such magnitude that their inclusion prejudiced Defendant. *See Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

III. Conclusion

For the foregoing reasons, Defendant received a fair trial free from prejudicial error.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judges HAMPSON and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
NELSON EMUEL MONTGOMERY, JR., DEFENDANT

No. COA23-720

Filed 7 May 2024

1. Criminal Law—possession—actual and constructive—firearm by a felon—methamphetamine—defendant directing third party to hide the items

The trial court properly denied defendant's motion to dismiss charges for possession of a firearm by a felon and possession of methamphetamine, where the State presented evidence that, on the day of his arrest, defendant made multiple phone calls from jail to a woman asking her to remove certain items—including the gun and drugs at issue—from the place where he was arrested. Defendant's phone calls reflected his intent to control the disposition and use of both the gun and the drugs, and therefore the calls constituted sufficient evidence that defendant constructively possessed the items. Additionally, given the location of the items at the scene of defendant's arrest, defendant's awareness of each item's specific location, and his efforts to conceal them, a jury could have also concluded that defendant actually possessed the items prior to his arrest.

2. Criminal Law—possession—firearm by a felon—methamphetamine—jury instructions—attempt—no plain error

In a prosecution for possession of a firearm by a felon and possession of methamphetamine, the trial court did not commit plain error by declining to instruct the jury on theories of attempt with respect to both charges. The State presented sufficient evidence to support convictions for both offenses under theories of actual and constructive possession, including recordings of multiple phone calls that defendant made from jail to a woman asking her to remove certain items—including the gun and drugs at issue—from the scene of his arrest. Furthermore, the State's evidence showed that the women had, in fact, moved the items by the time law enforcement approached her, and therefore there was no evidence suggesting that defendant merely attempted to constructively possess the items.

3. Criminal Law—jury's request to revisit evidence—no instruction by court to consider all other evidence—no abuse of discretion

In a prosecution for possession of a firearm by a felon and possession of methamphetamine, where the State played recordings for the jury of phone calls that defendant made from jail on the day of his arrest, the trial court did not abuse its discretion under N.C.G.S. § 15A-1233(a) when, in allowing the jury's request to replay one of the recordings during deliberations, it did not explicitly instruct the jury that it must also consider the rest of the evidence from trial. Even if the court had erred, defendant failed to show that such an error prejudiced him. Further, the court properly instructed the jury during the jury charge to consider all of the evidence, and the court scrupulously followed the requirements of section 15A-1233(a) during the replay of the recording.

Appeal by Defendant from judgment entered 31 January 2023 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Miranda Shanice Holley, for the State.

Stanley F. Hammer for defendant-appellant.

MURPHY, Judge.

Actual possession occurs when the accused has physical or personal custody of the item. Constructive possession occurs when the accused has both the power and intent to control its disposition or use. Where, as here, a defendant directs a third party to hide items at a location where he was arrested, the evidence is sufficient to show both that Defendant actually possessed the items at issue prior to his arrest and that he constructively possessed the items through the direction of the third party. And, with such evidence present, a trial court does not plainly err in omitting an unrequested instruction on attempt in its jury instructions.

Finally, a trial court does not abuse its discretion in allowing a jury's request to revisit evidence during deliberations simply because it did not explicitly and extemporaneously remind the jury that it must consider evidence outside the scope of its request. Here, where the jury was appropriately instructed that it should consider all the evidence during the jury charge and the trial court observed all statutory requirements associated with a replay of Defendant's recorded phone calls, no abuse of discretion occurred.

BACKGROUND

On 9 March 2020, Defendant was indicted for possession of a firearm by felon, possession of methamphetamine, and attaining habitual felon status. Defendant stood trial starting on 28 November 2022, during which the State presented testimony from a lieutenant of the Rutherfordton Police Department that he was present at the time of Defendant's arrest and was informed that Defendant had made a phone call from jail indicating he had left items behind at the location where he was arrested. Specifically, the officer noted that Defendant "made a few phone calls to a woman he referred to as Nikki, later determined to be Amy Nichole Hall. During those phone calls, he was adamant about picking up some belongings from the house he [was] arrested at, even describing where the items were and what they were on the back porch of the house."

For the purposes of illustrating and explaining the lieutenant's testimony, the State also presented recordings of the calls Defendant made from jail, all of which took place on the same day as the arrest. The calls, only portions of which were played for the jury, contained, *inter alia*, the following:

- Instructions from Defendant to Hall to "get my coat and that thing and some stuff in my coat."
- Defendant's statements that the location he was describing was where he was arrested.
- An expression of Defendant's belief that the police "don't even know I came on the back porch."
- A specific representation by Defendant that something was in the sleeve of the jacket.
- A conversation in which Defendant requested that Hall sell something with the intent that he get it back later.

After the calls were played for the jury, the lieutenant further testified that, after listening to the recorded calls, law enforcement obtained from Hall Defendant's jacket that he had left at the site of his arrest, and two clear bags were obtained from the left sleeve of the jacket. At the time Hall met with law enforcement, she had come from a nearby residence belonging to Glenesa Causby—an acquaintance of Defendant's referenced in the jail calls—and that another acquaintance of Defendant referenced in the calls, Paul Green, had stowed a firearm there. Finally, the lieutenant testified that a holster was discovered on the back porch of the house where Defendant was arrested.

Thereafter, a forensic chemist with the State Crime Lab testified that the plastic bag obtained from the sleeve of Defendant's jacket was found to contain methamphetamine.

Defendant moved to dismiss all charges at the close of the State's evidence, and the trial court denied the motion. At the close of all evidence, Defendant renewed his motion to dismiss, which the trial court again denied. Defendant did not request, nor did the trial court provide, instruction to the jury on any offenses beyond those with which Defendant was charged. During deliberations, the jury asked to rehear one of the recordings of Defendant's phone calls from jail, which the trial court allowed over Defendant's objection.

Defendant was convicted on all charges and appealed in open court.

ANALYSIS

On appeal, Defendant argues the trial court (A) erred in denying his motion to dismiss with respect to the two possession charges, (B) plainly erred in failing to instruct the jury on theories of attempt with respect to both possession charges, and (C) abused its discretion in permitting the jury to hear the recordings of Defendant in jail a second time. The trial court did not err in any respect.

A. Motion to Dismiss

[1] We review the trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. McKinnon*, 306 N.C. 288, 298 (1982). In evaluating the trial court's ruling, we must consider "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant[] being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98 (1980), *cert. denied*, 464 U.S. 865 (1983). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79 (1980). The evidence must be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences therefrom. *State v. Garcia*, 358 N.C. 382, 412-13 (2004), *cert. denied*, 543 U.S. 1156 (2005).

Defendant has challenged the sufficiency of the evidence with respect to both his possession of a firearm by felon charge and his possession of methamphetamine charge. Possession of a firearm by felon is governed by N.C.G.S. § 14-415.1, which provides that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm . . . ." N.C.G.S.

§ 14-415.1(a) (2023). Similarly, Defendant's methamphetamine possession was charged under N.C.G.S. § 90-95(a)(3), which provides that, "[e]xcept as authorized by this Article, it is unlawful for any person[]. . . [t]o possess a controlled substance." N.C.G.S. § 90-95(a)(3) (2023).

> Possession of any item may be actual or constructive. Actual possession occurs when the party has physical or personal custody of the item. Constructive possession occurs when the accused has both the power and intent to control its disposition or use. Circumstances which are sufficient to support a finding of constructive possession include close proximity to the [item] and conduct indicating an awareness of the [item], such as efforts at concealment or behavior suggesting a fear of discovery[.]

State v. Bradley, 282 N.C. App. 292, 296-97 (2022) (marks and citations omitted), *modified on other grounds and aff'd*, 384 N.C. 652 (2023).

Defendant argues that evidence of his possession of both a firearm[1] and methamphetamine were insufficient. However, evidence that he possessed both was present on the record. Defendant's jail calls reflect that he sought to control the disposition and use of both the gun and the methamphetamine by directing Hall to remove them from the scene of his arrest. The fact that Defendant used thinly veiled rhetoric—referring to the gun and drugs as the "thing" and the "stuff"—does not render the evidence of his awareness of the items any less valid, especially in light of his demonstrable cognizance of what and where they were through his specifically directing Hall to the sleeve containing the drugs. This was sufficient evidence from which a jury could have concluded Defendant constructively possessed both items. Furthermore, the location of the items at the point where Defendant was arrested, Defendant's cognizance of them, and his specific attempts to conceal them by removing them from the site of his arrest was sufficient evidence from which a jury could have concluded Defendant actually possessed the items prior to his arrest. The trial court did not err in denying Defendant's motion to dismiss.

B. Plain Error

[2] Defendant next contends the trial court plainly erred in failing to instruct the jury on theories of attempt with respect to both possession charges.

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1. Defendant does not meaningfully contest his having been a felon at the time of the offense.

> The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660 (1983) (marks omitted). Our Supreme Court has said the following of entitlement to jury instructions:

> It is well settled that a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts. On the other hand, the trial court need not submit lesser included degrees of a crime to the jury when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.

State v. Millsaps, 356 N.C. 556, 562 (2002) (marks, citations, and emphasis omitted).

There is nothing exceptional or lacking in fundamental fairness about this case, where the trial court did not put forth unrequested instructions for attempt with respect to the two possession offenses. Sufficient evidence existed on the record for both offenses, and the evidence could have supported a conviction on theories of either actual or constructive possession. While Defendant argues attempt instructions were warranted because he was "frustrated" in his direction of Hall's activity and therefore did not constructively possess anything through her, the State's evidence actually demonstrated that Hall had, in fact, moved the items by the time she was approached by law enforcement. There was therefore no evidence tending to show an attempted possession, and the trial court did not plainly err in omitting such an instruction.

C. Abuse of Discretion

[3] Finally, Defendant argues the trial court improperly allowed the jury to review one of the recordings of Defendant's calls during deliberations.

The statute governing a jury's requested review of evidence is N.C.G.S. § 15A-1233(a), which commits the determination to the discretion of the trial court:

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

N.C.G.S. § 15A-1233(a) (2023). Accordingly, "a court's ruling under [N.C.G.S.] § 15A-1233(a) . . . will be reviewed only for an abuse of discretion." *State v. McVay*, 174 N.C. App. 335, 340 (2005). "An abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citations omitted).

Here, the only basis on which Defendant meaningfully contests the trial court's decision is the following excerpt from our Supreme Court's holding in *State v. Weddington*:

> When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that the trial court did so in accordance with N.C.G.S. § 15A-1233. *State v. Benson*, 323 N.C. 318[] . . . (1988). In addition, the trial court must instruct the jury that it must remember and consider the rest of the evidence. *State v. Watkins*, 89 N.C. App. 599[] . . . *disc. rev. denied*, 323 N.C. 179[] . . . (1988).

State v. Weddington, 329 N.C. 202, 208 (1991), *cert. denied*, *Weddington v. Dixon*, 508 U.S. 924 (1993). He argues that, because the trial court failed to independently instruct the jury that it was to consider the rest of the evidence, this omission *per se* constitutes an abuse of discretion.

However, this excerpt from *Weddington* was dicta. The issue in that case did not involve the absence of an instruction that the jury remember all of the evidence; and, in fact, the record on appeal made clear that such an instruction *was* given by the trial court. *Id.*; *see Berens v. Berens*, 284 N.C. App. 595, 601 (2022) ("The mandate itself is limited

to holdings made . . . in response to issues presented on appeal; any other discussions made within the opinion is *obiter dicta*."). This reading is reinforced by the fact that *State v. Watkins*, the case cited in *Weddington* alongside the aforementioned dicta, also contains no such holding.[2] Further, in the more than three decades since *Weddington*, no published decision has repeated such a proposition.

Finally, even if this portion of *Weddington* were not dicta, our caselaw subjects alleged abuses of discretion arising under N.C.G.S. § 15A-1233 to a prejudice analysis. *State v. Cannon*, 341 N.C. 79, 85 (1995) (holding that, even where the trial court violated the express statutory requirements of N.C.G.S. § 15A-1233(b), a defendant must show "a reasonable possibility that had the jury not been allowed to review [the evidence], a different result would have been reached"). Here, even if we were to accept that the trial court had erred by failing to instruct the jury to remember all previous evidence at trial, there is no reasonable possibility that the jury would have reached a different decision with the addition of such an instruction.

The jury was appropriately instructed that it should consider all the evidence during the jury charge, and the trial court scrupulously observed the requirements of N.C.G.S. § 15A-1233(a) during the replay. Without any further reason for a contrary conclusion, we hold the trial court did not abuse its discretion.

CONCLUSION

The trial court correctly denied Defendant's motion to dismiss, and Defendant has not established that the trial court plainly erred in omitting instructions on attempt or abused its discretion by allowing the jury to replay recordings of Defendant.

NO ERROR.

Judges ZACHARY and COLLINS concur.

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2. *Watkins* held that such an instruction was *sufficient* to show no abuse of discretion, not that it was necessary. *State v. Watkins*, 89 N.C. App. 599, 605, *disc. rev. denied*, 323 N.C. 179 (1988) ("Defendant contends that by reading only Ms. Myers's testimony, the trial judge gave undue weight to her testimony and prejudiced his right to a fair trial. We do not agree. Immediately after the court reporter read Ms. Myers's testimony, the trial judge instructed the jury that they 'must consider and deliberate on all of the evidence and remember what the rest of the evidence was concerning that conversation.' Based on these instructions, we hold that the trial judge properly exercised his discretion in having the requested testimony read to the jury and that defendant's argument has no merit.").

STATE OF NORTH CAROLINA
v.
DEMETRIA L. NORMAN

No. COA23-471

Filed 7 May 2024

Search and Seizure—search warrant—probable cause—store burglary—video surveillance—unique vehicle characteristics

In a prosecution for multiple charges arising from the theft from a convenience store of cartons of cigarettes, cases of alcohol, twenty-six packs of state lottery tickets, along with the theft of cash from an ATM located there, the trial court properly denied defendant's motion to suppress evidence seized from his vehicle where sufficient other evidence supported issuance of a search warrant based on probable cause. After the burglary was reported to law enforcement, the investigating detective viewed relevant video surveillance footage and, as he was driving in the area, he spotted the same vehicle—based on its make and model, black rims, and missing bumper—that appeared to be associated with the burglary, and discovered that the vehicle displayed a fictitious out-of-state license plate. Despite defendant's argument that law enforcement officers remained in the curtilage of the residence where the vehicle was parked beyond an allowable period of time after an unsuccessful knock and talk, the officers were lawfully securing the vehicle and the scene after probable cause had already been acquired based on the totality of the circumstances, which established a fair probability that contraband related to the burglary would be found in the vehicle.

Judge WOOD dissenting.

Appeal by defendant from judgment entered 20 September 2022 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 14 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General, Robert P. Brackett, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender, Michele A. Goldman, for the defendant-appellant.

TYSON, Judge.

Demetria L. Norman ("Defendant") appeals from judgments entered upon his guilty pleas to injury to real property, safecracking, felony breaking and entering, two counts of felony larceny after breaking and entering possession of burglary tools, and injury to personal property. We affirm.

I. Background

Fletcher Police Detectives Ron Diaz and Zach Tatham responded to a report of an Automatic Teller Machine (ATM) having been pried open at Mr. Pete's Market at 3:51 am on 12 February 2021. Mindy Messer, the store manager, also reported ten cartons of Marlboro Gold cigarettes, sixteen cases of alcohol, fifty dollars in quarters and twenty-six packs of North Carolina Lottery tickets were missing. Nate Hembre, an employee of Mr. Pete's Market, reported the store's ATM machine had contained approximately $2,600 in currency and was empty.

George Banks, an employee of the North Carolina State Lottery Commission, notified Detective Diaz on 17 February 2021 that someone had attempted to redeem one of the lottery tickets stolen from Mr. Pete's Market at the Edneyville General Store at 1:09 pm the previous day. Detective Diaz went to the Edneyville General Store, spoke to the manager on duty, and reviewed surveillance footage of the individual, who had attempted to redeem the stolen lottery ticket.

The surveillance video showed a black Dodge Durango vehicle with black rims and a missing front bumper pull into the Edneyville General Store parking lot. A female exited the vehicle, entered the station, and attempted to redeem the stolen lottery ticket. When the scratch-off ticket was rejected for payment, the woman exited the store, got back into the Durango, which left the parking lot and headed down Chimney Rock Road towards Hendersonville.

Detective Diaz left the Edneyville General Store traveling in the same direction on Chimney Rock Road as the Durango had traveled the day before. After travelling a short distance, he spotted a black Durango vehicle with black rims and a missing front bumper parked in the driveway of a residence located at 58 Stepp Acres Lane in Hendersonville. He parked his vehicle across the street and called his department for backup to perform a knock and talk at the residence. Detective Diaz ran the license plate displayed on the black Durango and learned the plate was issued in Maryland and was registered to a 2019 Dodge Ram pickup

truck, owned by EAN Holdings, a holding company for Enterprise Alamo National, the car rental company.

Detective Diaz called Fletcher Police Lieutenant, Daniel Barale and the Henderson County Sheriff's Office for assistance in conducting a knock and talk at 58 Stepp Acres Lane. Henderson County Sheriff's Deputies Jake Staggs and Josh Hopper were dispatched to the scene.

Detective Diaz planned to conduct a knock and talk to "see if [the occupants of 58 Stepp Acres Lane] could tell [him] anything about" the theft from Mr. Pete's Market. Detective Diaz walked in front of the black Durango parked in the driveway to the front door. Detective Diaz knocked on the door but no one answered. Detective Diaz testified he sensed the residence was occupied.

As Detective Diaz left the front porch, he walked back to his car around the rear of the Durango to re-confirm the Maryland license plate number displayed was consistent with his earlier view. Detective Diaz contacted Henderson County Communications to run another check on the license plate.

Detective Diaz waited for more than a minute to get a response from Henderson County Communications and walked around the Durango and looked into the driver's side window. He observed a pack of Marlboro Gold cigarettes on the dashboard and a 100X The Cash scratch-off lottery ticket on the front seat. He did not touch the vehicle nor attempt to open the door.

Detective Diaz returned to his office in Fletcher to draft a search warrant. Other officers remained on the scene to secure the Dodge Durango vehicle. Detective Sergeant Diaz spent more than one hour drafting application and affidavit for a search warrant. While drafting the application, Detective Diaz called one of the officers on the scene securing the Durango to read the Vehicle Identification Number ("VIN") through the windshield.

The officers on the scene ran the VIN from the Durango and determined the vehicle was registered to Defendant. Once Detective Diaz completed drafting the application and affidavit for the warrant, he drove to the magistrate's office in Hendersonville.

Lt. Barale ran Defendant's name through the Criminal Justice Law Enforcement Automated Data Services ("CJLEADS") and determined he was currently on supervised probation. Lt. Barale contacted Defendant's probation officer and received Defendant's telephone number. Lt. Barale called the telephone number and spoke with a woman, who identified

herself as April Atkinson. Atkinson would not put Defendant the phone or provide Defendant's location to Lt. Barale.

Lt. Barale believed both Atkinson and Defendant were present inside the residence. The Henderson County Communications Center received a call reporting an alleged assault at Griffin's Store at approximately 4:21 p.m., while the officers remained present on the scene. Griffin's Store is located approximately three miles from the scene at 58 Stepp Acres Lane.

Detective Tatham and Deputy Staggs responded to what was determined to be a fictitious assault report. Lt. Barale and Deputy Hopper remained continuously at 58 Stepp Acres Lane securing the Black Durango vehicle. At 4:32 p.m. a female, later identified as April Atkinson, emerged from the back door of the residence. She refused to speak with Lt. Barale and Deputy Hopper. Lt. Barale heard sounds from the front of the residence and saw a male he believed to be Defendant grabbing items from inside of the Durango. The individual fled on foot attempting to elude Lt. Barale. Lt. Barale noticed a prybar was located inside the bag removed from the Durango.

Lt. Barale returned toward the residence and found the pack of Marlboro Gold cigarettes and the 100X The Cash scratch off lottery ticket on the ground. Lt. Barale seized the pack of Marlboro Gold cigarettes and the 100X The Cash scratch off ticket. Lt. Barale and Deputy Hopper then performed a security sweep of the residence and located Defendant in the living room. Defendant's probation officer was contacted and a search was performed based upon Defendant's supervised probation status. The search yielded a stack of power tool boxes and a cutoff tool.

Lt. Barale notified Detective Diaz about what had occurred at the scene and Detective Diaz was granted arrest warrants for Defendant and Atkinson for felony conspiracy to break and enter a building to commit larceny and a search warrant for the Black Durango vehicle.

The search warrant for the Durango was executed on 18 February 2021. Officers located "multiple packs of Marlboro Gold cigarettes, cut-off metal wheel blades, ski masks, a pry-bar, a 'Jaws of Life' rechargeable battery, and other items."

Detective Diaz sought and obtained a search warrant seeking data from Cellco Partnership d/b/a Verizon Wireless for Defendant's cell phone number based upon information used to obtain the search warrant of the Durango and the arrest warrants for Defendant and Atkinson.

Detective Diaz received a letter from a confidential source on 9 March 2021, providing information related to multiple breaking and entering offenses allegedly committed by Defendant and Atkinson in North Carolina, South Carolina, and Georgia. Detective Diaz met with the confidential source, who alleged Defendant and Atkinson had broken into a store, cut into an ATM machine, and had removed $2,500 in currency. The source stated only one cut was required to open the ATM, and also asserted cigarettes and lottery tickets were stolen from the store.

The confidential source also provided information regarding how Defendant had completed the robbery, Defendant's identity as the suspect removing items from the Durango, and additional evidence of the crimes was stashed in the attic of the residence located at 58 Stepp Acres Lane.

Based upon this information Detective Sergeant Diaz applied for and was granted a third search warrant on 10 March 2021. The third search warrant was executed the same day and officers recovered in the attic: (1) six "Jaws of Life" devices of various sizes; (2) eighteen rechargeable batteries for "Jaws of Life" devices; (3) five cartons of Marlboro Gold and two cartons of Marlboro Gold 100s cigarettes; (4) twenty five packs of assorted lottery tickets; (5) an ATM cover panel; (6) two DVR systems with cut wires; (7) an endoscope; (8) a magnetic box with controlled substances inside; and, (9) other assorted items used in the preparation for burglaries. Every lottery ticket stolen from Mr. Pete's Market, except for the one that was attempted to be redeemed at the Edneyville General Store were also located in and recovered from the attic.

Defendant was indicted for injury to real property, safecracking, felony breaking and entering, two counts of felony larceny after breaking and entering, possession of burglary tools, and injury to personal property on 17 May 2021. Defendant filed a motion to suppress all evidence on 19 October 2021. The trial court denied Defendant's motion following a hearing by order filed 31 August 2022. Defendant filed an objection to the order on 2 September 2022.

Defendant pleaded guilty to all charges, while reserving his right to appeal the denial of his suppression motion, and was sentenced to two active consecutive 8 to 18 month sentences.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§§ 7A-27(b), 15A-1444(e), and 15A-979(b) (2023).

III. Issues

Defendant argues the trial court erred in denying his motion to suppress because officers had remained in and around the curtilage of his residence for too long after an unsuccessful knock and talk.

IV. Standard of Review

The scope of this Court's review of a trial court's order denying a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (citation omitted).

"In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010) (citation omitted). The trial court's conclusions of law are reviewed *de novo* on appeal. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted).

V. Analysis

Defendant argues the trial court erred in denying his motion to suppress. He asserts officers had unduly remained in and around the curtilage of his residence after an unanswered and unsuccessful knock and talk. Defendant challenges Detective Diaz's conduct in and around the black Dodge Durango vehicle after leaving the front porch following the unanswered knock and talk.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the pace to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fourth Amendment to the Constitution of the United States requires probable cause must be shown before a search warrant may be issued. *Id.* A reviewing court looks to the "totality of the circumstances" to determine whether probable cause existed to issue a search warrant. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984).

A. Probable Cause

Probable cause exists if:

> reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty.

Id. at 636, 319 S.E.2d at 256 (citations omitted).

An officer's application for a search warrant must be supported by an affidavit detailing "the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched." N.C. Gen. Stat. § 15A-244(3) (2023). The information contained in the affidavit "must establish a nexus between the objects sought and the place to be searched." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citation omitted). A magistrate must "make a practical, common-sense decision," based upon the totality of the circumstances, whether "there is a fair probability that contraband" will be found in the place to be searched. *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983).

Detective Diaz had probable cause to request a search warrant prior to observing in plain view a pack of Marlboro Gold cigarettes on the vehicle's dashboard and a 100X The Cash scratch off ticket on the front seat. Detective Diaz had located what he had reasonable suspicion to believe the vehicle used in attempting to redeem an identified lottery ticket stolen from Mr. Pete's Market.

This vehicle had been identified and recorded in the surveillance video from nearby Edneyville General Store the prior day. Detective Diaz had noticed the black Dodge Durango at the scene was missing a bumper and had black rims as depicted in the videos. This vehicle was located in the immediate area of the General Store in the same direction it had travelled after leaving the store. Detective Diaz also confirmed the Durango was displaying a fictitious out of state license tag.

B. Knock and Talk

Contrary to Defendant's arguments asserting Detective Diaz and the other officers had unduly lingered on the scene, our Supreme Court and this Court allows officers to secure a scene "to prevent any evidence located in the residence from being removed or destroyed[.]" *State*

*v. Treec*e, 129 N.C. App. 93, 94, 497 S.E.2d 124, 125 (1998); *see State v. McKinney*, 361 N.C. 53, 637 S.E.2d 86 (2006); *State v. Williams*, 116 N.C. App. 225, 447 S.E.2d 817 (1994).

This narrative and evidence was contained in the affidavit, which provided probable cause to issue the search warrant for the black Durango. A substantial basis, between the unique characteristics of: (1) the Durango being used in a crime in the nearby area the day before; (2) displaying an out-of-state and fictitious license plate; and, (3) its close proximity at the scene, exists both in time and location to the possession and attempted redemption of the stolen lottery ticket. Probable cause existed for the magistrate to issue the search warrant for the Durango, while officers secured and maintained the integrity of the scene. *Id.* Defendant's argument is overruled.

C. Inevitable Discovery

Presuming, without deciding, the evidence discovered by officers was obtained through illegal searches, as argued by Defendant, the State also argues the trial court correctly denied Defendant's motion to suppress based upon the "inevitable discovery" doctrine. Were we to agree Detective Diaz had no grounds to peer into the vehicle as he left the property to plainly view the Marlboro Gold cigarette pack or Lottery ticket inside the car, or to obtain the vehicle VIN number visible through the windshield from outside the car, officers had already acquired probable cause to search the vehicle. Probable cause was based upon the vehicle transporting the woman the prior day in the immediate vicinity to attempt to cash in a known stolen lottery ticket, and from the unique characteristics of the black Dodge Durango, viewed om the store's video. This vehicle also displayed a fictitious out-of-state license plate visible to officers from the public street in front of Defendant's residence.

Defendant argues *Collins v. Virginia*, 584 U.S. 586, 201 L. Ed. 2d 9 (2018) held the automobile exception to the warrant requirement did not apply where the automobile was parked within the curtilage of Defendant's home. The State counters, all incriminating items discovered in Defendant's vehicle and residence would have been discovered anyway if the officers had obtained the warrant earlier.

North Carolina has adopted the "inevitable discovery" rule which does not subject items discovered during a presumably illegal search to the exclusionary rule where the preponderance of the evidence shows law enforcement officers would have inevitably discovered the evidence by lawful means. *See State v. Garner*, 331 N.C. 491, 500, 417 S.E.2d 502, 506-07 (1992). With or without a warrant in hand, officers discovered

the black Durango vehicle with unique characteristics, that was shown in the store's video the previous day and displaying a false license plate, actually belonged to Defendant. He was also currently on probation and subject to warrantless searches. In addition, the items inside of the vehicle and residence directly associated with the break-in and robbery would have eventually been discovered and recovered in a unbroken sequence of events. Defendant's reliance on *Collins* is inapposite and overruled.

VI. Conclusion

Detective Diaz had acquired probable cause to seek the search warrant of the black Durango prior to the knock and talk based upon: (1) the vehicle's unique characteristics of the black rims and a missing front bumper; (2) its location in close proximity to where the stolen ticket was attempted to be redeemed; (3) the display of a fictious out of state plate on the vehicle; and, (4) the recentness of the attempted redemption of the stolen ticket to be granted a search warrant for the vehicle. The officers correctly and lawfully secured the vehicle and scene while the warrant was being sought and obtained.

Presuming, without deciding, the evidence discovered by officers was obtained through illegal searches, the trial court also correctly denied Defendant's motion to suppress based upon "inevitable discovery." Defendant was present at all times, while officers were securing the Durango vehicle and scene, awaiting the warrant, and he attempted to flee. Defendant was under active probationary supervision and subject to warrantless searches. The denial of Defendant's motion to suppress and the judgments entered upon Defendant's guilty pleas are affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge DILLON concurs.

Judge WOOD dissents.

WOOD, Judge, dissenting.

"At the [Fourth] Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409,

1414, 185 L. Ed. 2d 495, 501 (2013) (citation and internal quotations omitted). The United States Supreme Court, and subsequent recognition by our Court, has established a line of precedent which emphasizes the importance of this constitutional protection. Consistent with the history and application of this principle, I respectfully dissent from the majority opinion finding the trial court properly denied Defendant's motion to suppress. For the reasons articulated below, I believe the officer violated Defendant's rights under the Fourth Amendment when he exceeded the scope of the knock-and-talk and performed a search of Defendant's curtilage, which contained his vehicle, without a warrant. Accordingly, I would hold the trial court erred in denying Defendant's motion to suppress.

I. Analysis

A. Probable Cause Pre-Knock-and-Talk

The majority holds that Detective Diaz had probable cause to request the search warrant of Defendant's vehicle even prior to seeing the Marlboro Gold cigarettes on the dashboard and a 100X The Cash scratch off ticket on the front seat. Prior to looking into the vehicle, the only evidence Detective Diaz had upon which to base probable cause to request a search warrant was a surveillance video showing a female who had attempted to redeem a stolen lottery ticket getting into the passenger seat of a black Durango with black rims and a missing front bumper, observation of a black Durango with black rims and a missing front bumper in a driveway the following day, the vehicle's proximity to the General Store where the attempted ticket redemption took place, and a fictitious license plate on the vehicle. The majority contends this evidence was sufficient for probable cause to obtain a search warrant of the vehicle for evidence of the burglary committed in another town. I disagree.

To establish probable cause for a search warrant, the supporting affidavit "must establish a nexus between the objects sought and the place to be searched." *State v. Oates*, 224 N.C. App. 634, 641, 736 S.E.2d 228, 234 (2012). "Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990). Here, without the illegally obtained evidence, the "nexus" is greatly attenuated. The attempted redemption of a stolen lottery ticket by a passenger in a vehicle that had a fictitious license plate was insufficient to link the Durango to the burglary. The burglary occurred in a

different town almost a week prior. Based on the totality of the circumstances at that point, "common sense" would require additional inquiry prior to the issuance of a search warrant. It was not reasonable to infer that evidence from the burglary would be found in the Durango simply because a passenger in the vehicle attempted to cash a stolen lottery ticket the day prior. Therefore, Detective Diaz did not have probable cause to request a search warrant prior to the knock-and-talk.

B. The Knock-and-Talk

Generally, "the fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents." *State v. Ellis*, 266 N.C. App. 115, 119, 829 S.E.2d 912, 915-16 (2019) (citations omitted). "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Jardines*, 569 U.S. at 5, 133 S. Ct. at 1414 (citation and internal quotations omitted). Included in this principle is the protection of a citizen's curtilage, "[w]e therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes. That principle has ancient and durable roots." *Id.* at 6, 133 S. Ct. at 1414 (citation and internal quotations omitted). It is undisputed that Detective Diaz and four other officers entered the curtilage of Defendant's home. Thus, the officers entered a constitutionally protected area where "privacy expectations are most heightened" and their subsequent actions must be lawfully justified. *Id.* at 7, 133 S. Ct. at 1415.

Among such justifications is the knock-and-talk exception. This exception recognizes that "no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as the front door of a house." *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011). "This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8, 133 S. Ct. at 1415. "[L]aw enforcement may not use a knock and talk as a pretext to search the home's curtilage[,]" as "[t]his limitation is necessary to prevent . . . from swallowing the core Fourth Amendment protection of a home's curtilage." *State v. Huddy*, 253 N.C. App. 148, 152, 799 S.E.2d 650, 654 (2017) (citation omitted).

Here, Detective Diaz and another officer walked to the front door of the residence and knocked, but no one answered. Detective Diaz then left the front door, walked to the rear of the Durango to observe the

license plate, ran the plate number on the vehicle, and waited at the back of the vehicle for a response from dispatch. Detective Diaz then went to the driver's side of the vehicle, peered through the window, and observed a lottery ticket and a pack of cigarettes, which were similar to items stolen from Mr. Pete's Market. After these observations, Detective Diaz left the premises, returned to his office, and used this information to draft a search warrant. While at the office, Detective Diaz called one of the officers he left at the residence to secure the Durango and asked him to obtain the Vehicle Identification Number ("VIN") from it. The VIN was used to obtain the name of the registered owner, Defendant. Thereafter, Detective Diaz obtained a search warrant for the Durango.

Detective Diaz and the other officers undoubtedly exceeded the scope of the knock-and-talk. After no one answered the door, Detective Diaz and the other officers were required to leave the property. A "reasonably respectful citizen" would not find it appropriate to linger on the property and look through the window of a parked vehicle. *Huddy*, 253 N.C. App. at 152, 799 S.E.2d at 654. Therefore, absent a duly authorized search warrant, Detective Diaz unlawfully remained in the curtilage of Defendant's home and the evidence observed thereafter was improper.

Because the items were able to be viewed from outside of the vehicle, the trial court concluded, "[Detective Diaz] observed the '100 times cash' lottery ticket and the pack of Marlboro Gold cigarettes in plain view. The Defendant did not have any expectation of privacy for items in plain view from the window." The trial court's conclusion is contrary to well-established precedent. "In order for the plain view doctrine to apply, the officer must have been in a place where he had a right to be when the evidence was discovered." *Lupek*, 214 N.C. App. at 150, 712 S.E.2d at 918. "The plain view doctrine does not apply here because [the officer] was not in a place he was entitled to be when he discovered [the contraband]." *Ellis*, 266 N.C. App. at 123, 829 S.E.2d at 918. Similarly, the plain view doctrine is inapplicable here because Detective Diaz was not in a place where he was entitled to be when he observed the lottery ticket and cigarettes. The items were observable only after he unlawfully lingered on the curtilage of Defendant's home and peered into Defendant's vehicle.

Furthermore, while still unlawfully remaining on the property, an officer located the VIN by looking through the vehicles window, which enabled Detective Diaz to identify Defendant as the registered owner of the Durango. Similarly, in *Collins v. Virginia*, an officer walked to the top of defendant's driveway, removed a tarp that covered a motorcycle, ran the license plate and VIN numbers to determine if it was stolen, and

returned to his vehicle. *Collins v. Virginia*, 584 U.S. 586, 138 S. Ct. 1663, 201 L. Ed. 2d 9 (2018). The Supreme Court held, "[t]he ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible." *Id.* at 600, 138 S. Ct. at 1675. Further, "[the Fourth Amendment] certainly does not permit an officer physically to intrude on the curtilage, remove a tarp to reveal license plate and vehicle identification numbers, and use those numbers to confirm that the defendant committed a crime." *Id.* at 614 n.3, 138 S. Ct. at 1683 n.3. Consistent with such holding, the Fourth Amendment certainly did not permit the officer to remain on Defendant's curtilage, look through the window of the Durango to obtain the VIN, and use that information to identify Defendant. *Id.*

C. Inevitable Discovery

As an alternative basis for upholding the trial court's suppression order, the majority relies on the "inevitable discovery" rule. Under this rule, the question is whether the evidence associated with the break-in would have eventually been discovered through independent lawful means. *State v. Wells*, 225 N.C. App. 487, 491, 737 S.E.2d 179, 182 (2013). As a threshold matter, given that Detective Diaz did not have probable cause prior to the knock-and-talk, I disagree with the application of the inevitable discovery rule. Additionally, the remaining evidence supplied in the warrant, including the items associated with the burglary, the VIN, and Defendant's identity, would not have been discovered through independent lawful means. By eliminating the illegal search, not only did Detective Diaz not have probable cause, but he would only have knowledge that a vehicle with certain characteristics and a fictitious license plate transported a woman who attempted to redeem a stolen lottery ticket. This knowledge is vastly different than having the knowledge that the Durango contains items consistent with those from the burglary. Therefore, I respectfully disagree that inevitable discovery is applicable in this case. When viewed through a lens of independent and lawful circumstances, the application of the rule is unable to "eliminate the taint that led to the discovery and seizure of the [evidence] in the first instance." *Id.*

II. Conclusion

In sum, I would hold Detective Diaz did not have probable cause to apply for the search warrant of the Durango prior to the knock-and-talk. Detective Diaz's actions of walking to the rear of the vehicle, waiting at the rear, moving to the front side of the vehicle, and peering

into the driver-side window were not justified by the knock-and-talk exception, and therefore constituted an illegal search under the Fourth Amendment. Furthermore, the inevitable discovery doctrine is not applicable because Detective Diaz did not have probable cause and the other incriminating evidence could not have been discovered through independent lawful means. Accordingly, the evidence the officers obtained while on Defendant's property after the failed knock-and-talk should have been suppressed. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
ROGELIO MARIN RAMIREZ

No. COA23-965

Filed 7 May 2024

1. Appeal and Error—preservation of issues—exclusion of evidence—no offer of proof

In a prosecution for second-degree sexual offense and second-degree rape, defendant failed to preserve for appellate review his argument that the trial court erred by sustaining an objection during the cross-examination of a detective about whether defendant had admitted to the alleged sexual assault where, although defense counsel noted his exception to the exclusion of that testimony, he did not make an offer of proof and the content and significance of the excluded evidence was not apparent from the record.

2. Evidence—lay opinion testimony—evidence excluded—no abuse of discretion

In a prosecution for second-degree sexual offense and second-degree rape, any error by the trial court in prohibiting defense counsel from asking a detective whether he found defendant truthful during their conversation was not prejudicial in light of the overwhelming evidence against defendant, including that: the victim awakened in her apartment after arriving home in an intoxicated state to find defendant engaged in vaginal intercourse with her; he later inserted his penis into the victim's mouth; multiple DNA samples taken from the victim's body as part of a sexual assault kit matched defendant; the victim's credit and debit cards were discovered in a search of defendant's car; and defendant's cellphone

contained video, photo, and location data placing him at the victim's apartment with her when the assaults occurred.

3. Judgments—criminal—clerical error—inclusion of term "forcible" on judgments

The erroneous inclusion of the term "forcible" on criminal judgments entered upon defendant's convictions for second-degree sexual offense and second-degree rape were mere clerical errors where the indictment, jury instructions, and verdict sheet for each charge correctly identified the offense for which defendant was tried and found guilty; accordingly, the matter was remanded for correction of the errors.

Appeal by Defendant from judgments entered 10 March 2023 by Judge David Hugh Strickland in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State-Appellee.

Drew Nelson for Defendant-Appellant.

COLLINS, Judge.

Defendant Rogelio Ramirez appeals from judgments entered upon guilty verdicts of second-degree sexual offense and second-degree rape. Defendant argues that the trial court erred by prohibiting defense counsel from soliciting a response from the detective as to whether Defendant admitted to the alleged assault and by excluding the detective's testimony that he did not believe Defendant was being truthful during their conversation, and that the written judgments contain clerical errors. Because Defendant failed to preserve his argument that the trial court erred by prohibiting defense counsel from soliciting a response from the detective as to whether Defendant admitted to the alleged assault, we dismiss in part. Furthermore, the trial court did not prejudicially err by excluding the detective's testimony that he did not believe Defendant was being truthful during their conversation, and we therefore find no prejudicial error in part. However, as the written judgments contain clerical errors, we remand the judgments to the trial court for correction of the clerical errors.

I. Background

The evidence at trial tended to show the following: On 14 December 2019, Deirdre Carroll and four friends went out for drinks. Throughout the evening, Carroll consumed alcohol until she was "really, really intoxicated" and was "swaying quite a bit [and] slurring her words[.]" Carroll's friend called an Uber at approximately midnight to take Carroll to her apartment a half-mile away. The driver dropped Carroll off at her apartment building and watched her walk inside; the driver observed that Carroll was very intoxicated and "could not stand up."

Carroll did not remember leaving the bar or arriving back at her apartment. However, Carroll eventually woke up naked on her couch and "[a] man [she] did not know had his penis inside of [her]." The man, later identified as Defendant, then "crawled up [her] body and stuck his penis in [her] mouth." At that point, Carroll lost consciousness.

Carroll woke up naked on her couch at approximately 8:00 a.m. with pain in her head, elbow, and vagina. Carroll fell back asleep, and when she woke up at approximately 10:00 a.m., she noticed matted blood on her head. Carroll went to the hospital and told the hospital staff that someone had "penetrated [her] both vaginally and orally." A nurse performed a sexual assault examination, and a sexual assault evidence kit was collected. Carroll had a head wound that required four staples; several bruises on her arm, elbow, and chest; red knuckles and a swollen thumb; and a small laceration on her vulva. A nurse "took photographs of the head wound, photographs of [her] entire body, with the various bruises, including [her] vulva . . . [and] did an internal examination." The nurse also collected DNA samples from Carroll's fingernails, knuckles, external genitalia, and vagina.

Detective Michael Melendez with the Charlotte Mecklenburg Police Department arrived at the hospital to speak with Carroll at approximately 2:30 p.m. Carroll told Detective Melendez that "someone had assaulted [her] in [her] apartment and [she] did not know who that person was." Carroll also told him that her credit card and debit card were missing from her wallet, and that there had been two unauthorized transactions on her credit card at a gas station and Waffle House. Carroll later informed Detective Melendez that her pleasure device was missing from her bedroom.

A detective reviewed surveillance footage from the Waffle House, and the surveillance footage showed that Defendant used Carroll's credit card at approximately 6:19 a.m. on 15 December 2019.

After receiving information on 17 December 2019 about a vehicle connected to the case, Detective Melendez went to the address to which the vehicle was registered. Detective Melendez asked Defendant about the unauthorized credit card transactions, and Defendant stated that Carroll told him he could use the credit card. Detective Melendez asked Defendant if he could search his vehicle, and Defendant consented. Carroll's credit card, debit card, and pleasure device were found in Defendant's car.

A search warrant was subsequently issued for Defendant's phone. Defendant's phone contained a video of Carroll sitting on the toilet in her bathroom, which had been recorded at 2:10 a.m. on 15 December 2019. The phone also contained a photograph of Carroll's driver's license, which had been taken at 2:45 a.m. on 15 December 2019. A report of Defendant's location was generated based on his phone's GPS coordinates. The report showed that Defendant remained at Carroll's apartment building from 12:18 a.m. until 3:18 a.m. on 15 December 2019. The report also showed that Defendant then went to a gas station and Waffle House.

The DNA samples collected from Carroll's fingernails, knuckles, external genitalia, and vagina matched Defendant's DNA.

Defendant was indicted for second-degree forcible sexual offense and second-degree forcible rape.[1] The jury returned guilty verdicts of second-degree sexual offense and second-degree rape. The trial court sentenced Defendant to 72 to 147 months' imprisonment for second-degree sexual offense and 72 to 147 months' imprisonment for second-degree rape. Defendant appealed.

II. Discussion

A. Whether Defendant Admitted to Alleged Assault

[1] Defendant first argues that the trial court erred by prohibiting defense counsel from soliciting a response from Detective Melendez as to whether Defendant admitted to the alleged assault. Defendant failed to preserve this argument for appellate review.

It is well settled that "[i]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of

1. Defendant was also indicted for second-degree forcible sexual offense, second-degree forcible rape, and second-degree kidnapping stemming from an unrelated alleged assault. However, Defendant was acquitted of these charges at trial.

proof is required unless the significance of the evidence is obvious from the record." *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007). Furthermore, "the essential content or substance of the witness'[s] testimony must be shown before we can ascertain whether prejudicial error occurred." *Id.* (citations omitted). "Absent an adequate offer of proof, we can only speculate as to what a witness's testimony might have been." *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861-62 (2010) (citations omitted).

Here, defense counsel asked Detective Melendez, "I would assume that because we did not hear it during the direct examination, that Mr. Ramirez did not admit to having nonconsensual sex with Ms. Carroll correct?" The State objected to the question and asked to be heard outside the presence of the jury. After discussion, the trial court sustained the objection. Defense counsel noted the objection for the record but then proceeded to discuss other questions without making an offer of proof. We cannot engage in speculation as to how Detective Melendez would have answered the question, and Defendant's argument is thus dismissed.

B. Whether Detective Melendez Believed Defendant Was Being Truthful

[2] Defendant next argues that the trial court erred by excluding Detective Melendez's testimony that he did not believe Defendant was being truthful during their conversation.

We review the trial court's decision to exclude evidence for abuse of discretion. *State v. Mobley*, 206 N.C. App. 285, 288, 696 S.E.2d 862, 865 (2010). Evidentiary error does not necessitate a new trial unless the erroneous exclusion was prejudicial. *Jacobs*, 363 N.C. at 825, 689 S.E.2d at 865. To establish prejudice, a defendant must show that "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).

Even assuming arguendo that the trial court erred by excluding this testimony, Defendant cannot establish prejudice in light of the overwhelming evidence of his guilt. The evidence at trial tended to show that on 14 December 2019, Carroll consumed alcohol until she was "really, really intoxicated" and was "swaying quite a bit [and] slurring her words[.]" Carroll's friend called an Uber at approximately midnight to take Carroll to her apartment a half-mile away. Carroll did not remember leaving the bar or arriving back at her apartment. However, Carroll woke up naked on her couch and "[a] man [she] did not know

had his penis inside of [her]." The man, later identified as Defendant, then "crawled up [her] body and stuck his penis in [her] mouth." At that point, Carroll lost consciousness. Carroll went to the hospital the following morning, and a nurse performed a sexual assault examination and administered a sexual assault kit. The nurse collected DNA samples from Carroll's fingernails, knuckles, external genitalia, and vagina, which matched Defendant's DNA.

Defendant consented to a search of his vehicle, and Carroll's credit card, debit card, and pleasure device were found inside. A search warrant was subsequently issued for Defendant's phone. Defendant's phone contained a video of Carroll sitting on the toilet in her bathroom and a photo of Carroll's driver's license. The video had been recorded at 2:10 a.m. on 15 December 2019, and the photo had been taken at 2:45 a.m. on 15 December 2019. Furthermore, a report of Defendant's location was generated based on his phone's GPS coordinates. The report showed that Defendant remained at Carroll's apartment building from 12:18 a.m. until 3:18 a.m. on 15 December 2019. In light of this evidence, there is no reasonable possibility that, had the trial court admitted the testimony, a different result would have been reached at trial.

As Defendant has failed to establish prejudice from the trial court's ruling, the trial court did not prejudicially err by excluding Detective Melendez's testimony that he did not believe Defendant was being truthful during their conversation.

C. Clerical Errors in the Judgments

[3] Defendant argues, and the State concedes, that the written judgments contain clerical errors.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Palacio*, 287 N.C. App. 667, 687, 884 S.E.2d 471, 485 (2023) (quotation marks and citation omitted).

Here, Defendant was indicted for second-degree forcible sexual offense and second-degree forcible rape. Prior to trial, the trial court omitted the term "forcible" from the indictments at the State's request. The trial court properly omitted the term "forcible" from its jury instructions and the verdict sheets. The jury subsequently returned guilty verdicts of second-degree sexual offense and second-degree rape. However, the written judgments both contain the term "forcible." Accordingly, we remand the judgments to the trial court for correction of the clerical errors.

III. Conclusion

Defendant failed to preserve his argument that the trial court erred by prohibiting defense counsel from soliciting a response from Detective Melendez as to whether Defendant admitted to the alleged assault. Furthermore, the trial court did not prejudicially err by excluding Detective Melendez's testimony that he did not believe Defendant was being truthful during their conversation. However, the written judgments contain clerical errors. Accordingly, we dismiss in part and find no prejudicial error in part but remand the judgments to the trial court for correction of the clerical errors.

DISMISSED IN PART; NO PREJUDICIAL ERROR IN PART; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Chief Judge DILLON and Judge STADING concur.

STATE OF NORTH CAROLINA
v.
ANTHONY RAYSHAWN SIMPSON

No. COA23-676

Filed 7 May 2024

Costs—attorney fees—opportunity to be heard—money judgment

In an assault and habitual felon status case, the trial court erred by failing to give defendant notice and an opportunity to be heard at sentencing before entering a money judgment against him for his counsel's fees under N.C.G.S. § 7A-455, where the interests of defendant and trial counsel were not necessarily aligned. Although the trial court addressed the issue of attorney fees with defense counsel in defendant's presence, the court did not inform defendant of his right to be heard on the issue and nothing in the record indicated that defendant understood that he had this right. Accordingly, the civil judgment for attorney fees was vacated and the matter was remanded to give defendant notice of his right to be heard on the issue.

Judge GRIFFIN dissenting.

Appeal by defendant from judgments entered 25 January 2023 by Judge John O. Craig, III in Rowan County Superior Court. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Michelle Abbott for defendant-appellant.

THOMPSON, Judge.

Defendant Anthony Rayshawn Simpson appeals from a civil judgment against him for the attorney's fees incurred by his court-appointed counsel. On appeal, defendant argues that the trial court erred by failing to provide him with notice and an opportunity to be heard on the issue of attorney's fees. After careful review, we vacate and remand the civil judgment for further proceedings on the issue of attorney's fees.

I. Factual Background and Procedural History

Defendant was incarcerated at Piedmont Correctional Institute in Salisbury, North Carolina, for an unrelated offense. On 14 November 2018, defendant was involved in a physical altercation with a detention officer at the facility, leading to defendant's indictment on 23 April 2019, for assault on a detention employee inflicting physical injury.

On 23 January 2023, the matter came on for hearing at the Criminal Session of Rowan County Superior Court. Following a two-day trial, defendant was found guilty upon a jury's verdict of assault on a detention employee inflicting physical injury. Pursuant to the jury's verdict, defendant then pled guilty to having attained habitual felon status.

Shortly thereafter, during sentencing, defense counsel raised the issue of attorney's fees with the court, without invoking the words "attorney's fees." The entire colloquy between defense counsel and the court on the issue of attorney's fees consisted of the following:

> [DEFENSE COUNSEL]: I'm appointed. I have about 18-and-a-half hours total.
>
> THE COURT: All right.
>
> [DEFENSE COUNSEL]: I had it as [$]1[,]202.50. If I can just add one thing. [Defendant] has been on good behavior throughout this trial. I just want the [c]ourt to take note.

THE COURT: Yes, certainly will note that.

The court did not inquire of defendant whether he *personally* wished to be heard on the issue of attorney's fees at this time. A few moments later, pursuant to the jury's guilty verdict and defendant's guilty plea to having attained habitual felon status, the court sentenced defendant to forty to sixty months in the custody of the North Carolina Division of Adult Correction *and* entered a civil judgment against defendant for attorney's fees:

> THE COURT: I'll assess the attorney['s] fee at $1,202.50 as well as the court costs, but they may go to a civil judgment. I will also recommend work release for [defendant] whenever he becomes eligible in the DAC.
>
> [DEFENSE COUNSEL]: We respectfully enter notice of appeal.
>
> THE COURT: All right. Note that, and I will appoint the Appellate Defender to represent [defendant]. Good luck to you, [defendant].

After defendant entered his oral notice of appeal, the proceeding concluded. From this civil judgment, defendant appeals.

II. Discussion

A. Appellate jurisdiction

At the outset, we note that defendant entered oral notice of appeal from the trial court's civil judgment for attorney's fees. Oral notice of appeal is insufficient to confer jurisdiction on our Court to review the trial court's order entering a civil judgment of $1,202.50 in attorney's fees against defendant. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 697 (2008) (holding that a judgment for attorney's fees constituted a civil judgment and required written notice of appeal because "defendant was required to comply with Rule 3(a) of the [North Carolina] Rules of Appellate Procedure when appealing from those [civil] judgments").

However, defendant has filed a petition for writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. Under North Carolina Rule of Appellate Procedure 21(a)(1), this Court may issue a writ of certiorari to permit review "when the right to prosecute an appeal has been lost by failure to take timely action." *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (acknowledging an appellate court's authority to "review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely

manner"). This Court has issued a writ to review a civil judgment for attorney's fees despite the party's failure to file a written notice of appeal from the civil judgment. *See, e.g.*, *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018) (issuing the writ of certiorari when defendant failed to enter timely written notice of appeal).

In our discretion, we allow defendant's petition for certiorari, because defendant has presented a meritorious argument regarding the trial court's civil judgment of $1,202.50 in attorney's fees against him. *Id.* (issuing the writ of certiorari although "[i]t is less common for this Court to allow a petition for a writ of certiorari where a litigant failed to timely appeal a civil judgment[,] . . . [the defendant's] argument on the issue of attorney[']s fees is meritorious"). Certiorari should be allowed when "the ends of justice will be thereby promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924); *see, e.g.*, *State v. Hammond*s, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012) (issuing the writ of certiorari to avoid manifest injustice).

B. Attorney's fees

On appeal, defendant argues that the trial court "erred by entering a civil judgment for attorney's fees against [defendant] without providing him with notice and an opportunity to be heard." We agree.

"In certain circumstances, trial courts may enter civil judgments against convicted indigent defendants for the attorney[']s fees incurred by their court-appointed counsel." *Friend*, 257 N.C. App. at 522, 809 S.E.2d at 906. "Before imposing a judgment for these attorney[']s fees, the trial court *must* afford the defendant notice and an opportunity to be heard." *Id.* (emphasis added). "Ordinarily, when a defendant is represented by counsel, notice to defendant's counsel that the court is taking up the issue would be sufficient to satisfy the requirement that the defendant must have notice and an opportunity to be heard." *Id.* at 522, 809 S.E.2d at 907.

However, "[w]hen the court is contemplating a money judgment against the defendant for attorney[']s fees . . . the interests of the defendant and trial counsel are not necessarily aligned." *Id.* at 522–23, 809 S.E.2d at 907. Therefore, to "avoid the risk that defendants are deprived of the opportunity to be heard in this context, we . . . hold that, before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel . . . trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Id.* at 523, 809 S.E.2d at 907. "*Absent a colloquy directly with the defendant on this issue*, the requirements of notice and opportunity to

be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.* (emphasis added).

In setting forth the aforementioned law in *State v. Friend*, Judge (now Justice) Dietz relied upon two unpublished decisions where "the trial court did not ask the defendants if they wished to be heard." *Id.* at 522, 809 S.E.2d at 907. Instead, "the trial court in both cases stated that it was taking up the issue, questioned the defendants' counsel about the amount of fees to be awarded, and then announced that it was entering a judgment in the amount of those fees." *Id.* Our Court noted that "[i]n both cases, this Court held that [the] trial court's discussion with counsel did not provide the defendant with sufficient opportunity to be heard." *Id.*

We find this trio of cases dispositive to the issue raised by defendant in the present case, as the court *only* "questioned [defendant's] counsel about the amount of fees to be awarded, and then announced that it was entering a judgment in the amount of those fees[,]" without asking "defendant[ ]—personally, not through counsel—whether [he] wish[ed] to be heard on the issue." *Id.* at 522–23, 809 S.E.2d at 907.

In its appellate brief, the State argues that "the trial court did address the issue of attorney's fees with [defendant's] attorney in front of [defendant][,]" and defendant "could hear what was being said and could have objected." The State further contends that defendant had "a history during the trial of interjecting on issues that he thought were important[,]" as he had "spontaneously raised his hand to ask a question to the court." We find these arguments unavailing, as our caselaw instructs that the trial court "ask defendants—*personally, not through counsel*—whether they wish to be heard on the issue [of attorney's fees]." *Id.* at 523, 809 S.E.2d at 907 (emphasis added).

As noted above, the trial court did not engage in "a colloquy directly with [defendant] on th[e] issue [of attorney's fees]." *Id.* Therefore, we must determine whether there is "other evidence in the record demonstrating that [defendant] received notice, was aware of the opportunity to be heard on the issue [of attorney's fees], and chose not to be heard." *Id.*

Upon our careful review of the record and transcript of the proceeding, we conclude that there is *not* "evidence in the record demonstrating that [defendant] received notice, was aware of the opportunity to be heard on the issue [of attorney's fees], and chose not to be heard." *Id.*

There was no discussion of attorney's fees at trial until the aforementioned colloquy between *defense counsel* and the court at defendant's sentencing; nothing in the colloquy between *defense counsel* and the court would allow our Court to infer that defendant "received notice, was aware of the opportunity to be heard on the issue [of attorney's fees], and chose not to be heard[,]" as required by our caselaw. *Id*. at 522–23, 809 S.E.2d at 906 (noting that "[b]efore imposing a judgment for these attorney['s] fees, the trial court *must* afford the defendant notice and an opportunity to be heard" on the issue of attorney's fees). In fact, the words "attorney's fees" were never invoked until the trial court entered the civil judgment for attorney's fees against defendant at the end of the trial.

III. Conclusion

For the aforementioned reasons, we conclude that the trial court did err by failing to provide defendant with notice and an opportunity to be heard on the issue of attorney's fees. Consequently, we vacate the civil judgment for attorney's fees and remand for further proceedings on that issue, specifically to give defendant notice of his right to be heard on the amount he would be charged for attorney's fees.

VACATED AND REMANDED.

Judge STROUD concurs.

Judge GRIFFIN dissents by separate opinion.

GRIFFIN, Judge, dissenting.

Initially, I would deny Defendant's petition for writ of certiorari because his notice of appeal did not comply with Rule 3(a) of the North Carolina Rules of Appellate Procedure. *See State v. Bursell*, 372 N.C. 196, 198–99, 827 S.E.2d 302, 304 (2019) (explaining that "failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice" (citation and internal marks omitted)). However, since the majority reached the merits of Defendant's argument, I dissent for the reasons below.

In *State v. Friend*, this Court held "trial courts must provide criminal defendants, personally and not through their appointed counsel, with

an opportunity to be heard before entering a money judgment under [N.C. Gen. Stat.] § 7A-455." *State v. Friend*, 257 N.C. App. 516, 518, 809 S.E.2d 902, 904 (2018). To satisfy this right, trial courts, "before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, [] should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Id.* at 523, 809 S.E.2d at 907. This is because "[c]ounsel for defendants understand that, if they wish to be heard on an issue during an ongoing court proceeding, they can simply rise and ask the court for permission to be heard." *Id.* at 522, 809 S.E.2d at 907. However, the language directly below conditions this requirement by stating that

> [a]bsent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Id. at 523, 809 S.E.2d at 907. There, "nothing in the record indicate[d] that [the defendant] understood he had" the right to be heard on the issue of attorney's fees. *Id.*

Thus, if there is not a direct colloquy, there must be other evidence in the record demonstrating a defendant (1) had notice, (2) was aware of the opportunity to be heard, and (3) chose not to be heard. The majority "conclude[s] that there is *not* 'evidence in the record demonstrating that [Defendant] received notice, was aware of the opportunity to be heard on the issue [of attorney's fees], and chose not to be heard.' " I disagree.

Here, the record contains key differences that place this case within the other evidence standard of *Friend*. For example, Defendant raised his hand requesting to be heard during the trial proceedings. The trial court did not tell him that he had to speak through his counsel and allowed him to speak directly to the court. Additionally, Defendant was present in the courtroom when the trial court and counsel took up the issue of attorney's fees. The trial judge stated, "I'll assess the attorney fee at $1,202.50 as well as the court costs, but they may go to a civil judgment." Defendant remained silent during this exchange, but made a request to hug his wife shortly after, which the trial judge allowed. Given his willingness to speak up during sentencing, Defendant's silence on the issue is indicative of his choice to not be heard. Defendant's behavior shows his awareness that he could question the court about a variety of issues and chose not to question the attorney's fees.

Further, unlike in *State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005), where the defendant was completely unaware of the total amount of fees, Defendant was put on notice of the total amount of attorney's fees imposed because the trial judge stated the amount in Defendant's presence.

Our precedent suggests a direct colloquy is the best practice. That practice was not employed by the trial court in this case. However, after surveying the relevant case law, the criteria for what constitutes sufficient evidence to meet the other evidence standard in *Friend* is undeveloped. Here, the record indicates there is other evidence reflecting the standard was met. I would deny Defendant's petition for writ of certiorari. On the merits, I would hold the trial court did not err and provided Defendant with sufficient notice and an opportunity to be heard.

STATE OF NORTH CAROLINA
v.
RONALD WAYNE VAUGHN, JR.

No. COA23-337

Filed 7 May 2024

1. Homicide—jury instruction—self-defense—section 14-51.4—stand-your-ground provision—causal nexus required

In a prosecution for first-degree murder, the trial court erred in concluding that defendant's possession of a weapon of mass death and destruction—a sawed-off shotgun—categorically disqualified him under N.C.G.S. § 14-51.4(1) from a jury instruction on the statute's stand-your-ground provision (as codified in N.C.G.S. § 14-51.3(a)(1)) and by failing to instead instruct the jury that, for such disqualification to apply, the State must prove the existence of an immediate causal nexus between defendant's possession of the shotgun and the confrontation during which he used deadly force. Further, there was a reasonable possibility that, had the court properly instructed the jury, it would have reached a different result at trial, given that: (1) the State explicitly (and erroneously) argued that the stand-your-ground provision was categorically inapplicable during closing arguments, and (2) the evidence—viewed in the light most favorable to defendant—tended to show that after being told to vacate his home, defendant: went inside the trailer, locked the door, and attempted unsuccessfully to contact 911; retrieved the

shotgun because he could not locate other potential means of protection; went onto his porch and told the victim and his mother to leave; and eventually insulted the victim's mother twice, at which point the victim took off his shirt, yelled "Let's end this," and rushed defendant, coming within five feet at the point defendant shot and killed him. This showing of prejudicial error entitled defendant to a new trial on first-degree murder.

2. Homicide—jury instruction—self-defense—section 14-51.4—defense of habitation—causal nexus required—no evidentiary support for instruction

In a prosecution for first-degree murder, the trial court erred in concluding that defendant's possession of a weapon of mass death and destruction—a sawed-off shotgun—categorically disqualified him under N.C.G.S. § 14-51.4(1) from a jury instruction on the defense of habitation (as codified in N.C.G.S. § 14-51.2) but nonetheless did not err by failing to instruct the jury on that defense because the evidence at defendant's trial did not support it. Specifically, while section 14-51.2 states that that the defense of habitation applies only where deadly force is used against a person who has, or is in the process of, unlawfully and forcefully entering a home—including its curtilage—the evidence here was that defendant, the victim, and the victim's mother were sitting in a car in the driveway—and thus within the curtilage—of defendant's home when the victim's mother gave defendant a notice to vacate. Because the victim had entered defendant's home lawfully and without force before he was killed, the defense of habitation was inapplicable.

3. Criminal Law—defenses—justification—possession of weapon of mass destruction

As to a charge of possession of a weapon of mass death and destruction (N.C.G.S. § 14-288.8), the trial court did not err in denying a requested jury instruction on justification because that defense has only been held to excuse—in narrow and extraordinary circumstances demonstrated by evidence of four required factors—a different offense, possession of a firearm by a felon (N.C.G.S. § 14-415.1). Moreover, any need for the appellate court to consider extending the applicability of the defense of justification was unnecessary because, even in the light most favorable to defendant, the evidence did not support all four required factors in his case.

Judge ZACHARY concurring by separate opinion.

Appeal by Defendant from judgments entered 24 November 2021 by Judge R. Gregory Horne in Lincoln County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State-Appellee.

Anne Bleyman for Defendant-Appellant.

COLLINS, Judge.

Defendant Ronald Vaughn, Jr., appeals from judgments entered upon guilty verdicts of first-degree murder and possessing a weapon of mass death and destruction. Defendant argues that the trial court erred by denying his requested jury instructions on the stand-your-ground provision and defense of habitation as to the first-degree murder charge, and the defense of justification as to the possession of a weapon of mass death and destruction charge.

In light of the Supreme Court's decision in *State v. McLymore*, 380 N.C. 185, 868 S.E.2d 67 (2022), we hold that the trial court erred by denying Defendant's requested jury instruction on the stand-your-ground provision and that Defendant has met his burden of showing that the error was prejudicial. However, the trial court did not err by denying Defendant's requested jury instruction on the defense of habitation. Defendant is entitled to a new trial for the first-degree murder charge.

Furthermore, the trial court did not err by denying Defendant's requested jury instruction on the defense of justification, and we find no error in Defendant's conviction for possession of a weapon of mass death and destruction. Nonetheless, because Defendant's pre-trial confinement credit was assigned to the vacated first-degree murder judgment, we remand the possession of a weapon of mass death and destruction judgment for resentencing after his new trial so that his credits may be properly applied.

I. Background

The evidence at trial tended to show the following: Kimberly Ingram was the owner of a single-wide trailer in Lincolnton. Defendant rented the trailer from Ingram and lived there with two roommates. Ingram's son, Gary Somerset, was friends with Defendant and had been temporarily staying at the trailer for approximately a month.

On 25 August 2017, Defendant and Somerset were visiting Defendant's mother's residence. During this time, Ingram texted Defendant and asked him to call her. Ingram told Defendant that her boyfriend had choked her, and Defendant told her that she could stay at the trailer. Somerset was very upset and told Defendant's mother that "if he found out that . . . guy put his hands on his mama he was going to kill him." Defendant and Somerset returned to the trailer to meet Ingram. Defendant, Somerset, and Ingram were sitting in the living room and "[t]hings just started escalating"; Ingram said something that made Somerset mad about "an abusive situation with an ex-boyfriend," and then "names were being thrown around."

Defendant, Somerset, and Ingram then left the trailer for approximately twenty minutes to "calm down in a car ride[.]" During the car ride, Defendant told Somerset "that no one in his family loved him, that he didn't have anywhere to stay, that his own sister wouldn't let [him] stay with [her], and that 'Your own mother doesn't even care you about [sic].' " Ingram told Defendant that his statements were not true, that she loved Somerset, and that Somerset could stay anywhere she stayed. Defendant told Ingram that she should be more appreciative, and Ingram responded, "What? I don't think so. Wait a minute. This is getting way out of hand." Ingram then stated, "You know what? I think it's best if you guys move because I'm going to have to have my house back because I can't live with you all like this."

At that point, they pulled into the driveway. Ingram wrote Defendant a notice to vacate the trailer and handed it to him as he exited the car. Defendant "ripped it up [and] threw it in the air right in front of [Ingram's] face." Defendant stood on the porch and continued to argue with Ingram and Somerset as they sat in the car. Defendant "told them to leave multiple times, but they still weren't leaving."

Defendant eventually went inside the trailer and locked and latched the screen door. Defendant retrieved his iPad from the kitchen and tried to call 911, but his iPad "would not cooperate with [him.]" Defendant yelled, "Does anyone have a phone[,]" but "[n]o one answered [him]." Defendant "felt [he] had to grab something . . . [and] couldn't find any of the other things that [he] had intentionally just deliberately left lying around in case[.]" There was a lock-blade knife in the kitchen and an axe in the living room, but Defendant did not see those "in the panic." Defendant walked through the kitchen and living room and into the back bedroom where his roommate was sitting. The closet in the back bedroom was secured by a combination lock and contained a Winchester .410 caliber shotgun with a sawed-off barrel. Defendant attempted to

unlock the closet but could not remember the combination. Defendant's roommate input the combination, retrieved the shotgun, and handed it to Defendant.

Defendant walked back through the trailer, unlocked the screen door, and returned to the porch. Defendant then stated, "You all need to leave. You all should have done left. You all know you need to leave." After that, "there was still some more arguing and screaming about who was the rightful owner of the house and who needed to get out." Defendant asked Ingram and Somerset if they could talk and "let everything be okay[,]" and Ingram responded, "No, . . . it is what it is. I've got to have my house back." Defendant then said to her, "You're just a bitch." Somerset told Defendant not to disrespect Ingram, and Defendant replied, "She's a f[**]king bitch." At that point, Somerset exited the car, took his shirt off, yelled, "Let's end this[,]" and rushed towards Defendant. When Somerset was approximately five feet away, Defendant shot him in the chest with the shotgun. Somerset died at the scene.

A search warrant was subsequently issued for the trailer. A Winchester .410 caliber shotgun with a sawed-off barrel was found under a pillow on the bed in the back bedroom, and Winchester .410 shotgun shells were found on a coffee table in the living room. The length of the shotgun barrel was 9.87 inches, and the overall length was 17.22 inches.

Defendant was indicted for first-degree murder and possessing a weapon of mass death and destruction. The matter came on for trial on 15 November 2021. The jury returned guilty verdicts of first-degree murder and possessing a weapon of mass death and destruction. The trial court sentenced Defendant to life imprisonment without parole for first-degree murder and a concurrent sentence of 16 to 29 months of imprisonment for possessing a weapon of mass death and destruction. Defendant appealed.

II. Discussion

A. Stand-Your-Ground Provision/Defense of Habitation

Defendant argues that the trial court erred by denying his requested jury instructions on the stand-your-ground provision and the defense of habitation as to the first-degree murder charge.

"The jury charge is one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Hamilton*, 262 N.C. App. 650,

660, 822 S.E.2d 548, 555 (2018) (quotation marks and citation omitted). "Where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case[.]" *State v. Lee*, 370 N.C. 671, 674, 811 S.E.2d 563, 566 (2018) (quotation marks, brackets, and citations omitted). In determining whether competent evidence sufficient to support a self-defense instruction has been presented, the evidence is taken as true and considered in the light most favorable to the defendant. *State v. Coley*, 375 N.C. 156, 159, 846 S.E.2d 455, 457 (2020). "Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (citations omitted). "[A] defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." *State v. Bass*, 371 N.C. 535, 542, 819 S.E.2d 322, 326 (2018).

We review a trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). An error in jury instructions is prejudicial and requires a new trial if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2023). The burden to show prejudice is on the defendant. *Id.*

"[A]fter the General Assembly's enactment of [N.C. Gen. Stat.] § 14-51.3, there is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense. Section 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions." *State v. McLymore*, 380 N.C. 185, 191, 868 S.E.2d 67, 72 (2022). N.C. Gen. Stat. § 14-51.4 applies to "[t]he justification described in . . . [N.C. Gen. Stat.] § 14-51.3." N.C. Gen. Stat. § 14-51.4 (2023). Accordingly, "when a defendant in a criminal case claims perfect self-defense, the applicable provisions of [N.C. Gen. Stat.] § 14-51.3—and, by extension, the disqualifications provided under [N.C. Gen. Stat.] § 14-51.4—govern." *McLymore*, 380 N.C. at 191, 868 S.E.2d at 73.

Under N.C. Gen. Stat. § 14-51.3, "[a] person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself . . . or another against the other's imminent use of unlawful force." N.C. Gen. Stat. § 14-51.3(a) (2023). N.C. Gen. Stat. § 14-51.3 also codifies the stand-your-ground provision and provides, in pertinent part, that a

person is justified in using deadly force and has no duty to retreat in any place he has the lawful right to be if: (1) he "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself . . . or another[,]" or (2) "[u]nder the circumstances permitted pursuant to [N.C. Gen. Stat. §] 14-51.2." *Id.*

N.C. Gen. Stat. § 14-51.2 codifies the defense of habitation and provides, in pertinent part, that "the lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself . . . or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if" (1) "[t]he person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered . . . [the] home[,]" and (2) "[t]he person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred." N.C. Gen. Stat. § 14-51.2(b) (2023). The relevant distinction between the two statutes is that a rebuttable presumption arises that the lawful occupant of a home reasonably fears imminent death or serious bodily harm when using deadly force at home under the circumstances in section 14-51.2(b) while this presumption does not arise in section 14-51.3(a)(1). *Lee*, 370 N.C. at 675, 811 S.E.2d at 566.

However, the justification described in the stand-your-ground provision and the defense of habitation "is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C. Gen. Stat. § 14-51.4(1). In *State v. Crump*, this Court held that N.C. Gen. Stat. § 14-51.4(1) "does not require a causal nexus between the disqualifying felony and the circumstances giving rise to the perceived need for the use of force[.]" 259 N.C. App. 144, 145, 815 S.E.2d 415, 417 (2018), *rev'd on other grounds*, 376 N.C. 375, 851 S.E.2d 904 (2020), and *overruled by State v. McLymore*, 380 N.C. 185, 868 S.E.2d 67. The Supreme Court reversed *Crump* on other grounds without addressing whether a causal nexus between the disqualifying felony and the circumstances giving rise to the perceived need for the use of force was required. *See Crump*, 376 N.C. at 393, 851 S.E.2d at 918. Subsequently, however, in *McLymore*, the Supreme Court overruled *Crump* on the causal nexus issue, holding that "in order to disqualify a defendant from justifying the use of force as self-defense pursuant to [N.C. Gen. Stat.] § 14-51.4(1), the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." 380 N.C. at 197, 868 S.E.2d at 77. To do so, "[t]he State must introduce

evidence that but for the defendant attempting to commit, committing, or escaping after the commission of a felony, the confrontation resulting in injury to the victim would not have occurred." *Id.* at 197-98, 868 S.E.2d at 77 (quotation marks and citation omitted). Where the State introduces such evidence, the existence of a causal nexus is a jury determination and the trial court must instruct the jury that "the State [is required] to prove an immediate causal nexus between a defendant's attempt to commit, commission of, or escape after the commission of a felony and the circumstances giving rise to the defendant's perceived need to use force." *Id.* at 187, 868 S.E.2d at 70.

Here, this Court's decision in *Crump* was the controlling precedent on the causal nexus issue at the time of trial as the Supreme Court's opinion in *McLymore* had not yet been issued. Thus, the trial court and the parties did not have the benefit of *McLymore* when this case was tried. The following discussion regarding the stand-your-ground provision, defense of habitation, and disqualifying felony took place during the charge conference:

> [THE STATE]: But I also think that under 14-51.4 [Defendant] is not allowed to have the stand-your-ground provision or defense of habitation because he was, number one, committing a felony at the time by possessing a weapon of mass death and destruction; and, number two, he provoked the use of force against him or herself by the statements that he made prior to using them. So I think that they get a self-defense instruction, but I don't think they get the instruction for 51.2 and 51.3 based on the plain language of 14-51.4.
>
> THE COURT: [Defense counsel], I'll hear you on that.
>
> [DEFENSE COUNSEL]: The people on this side do not love the *Crump* decision obviously. The *Crump* decision, I think in overbroad language by its terms sounds like it wipes out self-defense entirely. I'm thankful the [c]ourt is not taking that direction. But it does in interpreting 14-51.4 squarely point to 14-51.2 and 14-51.3 and says those justifications are not available . . . . And so if the [c]ourt finds that the evidence in this case in the light most favorable does not support the instruction because of *Crump*, then that is where it lands. However, we contend that *Crump* is written overbroadly and the self-defense itself survives.
>
> . . . .

> THE COURT: . . . . [M]y understanding of *Crump* is just that, that I believe self-defense survives, but obviously we have the prohibition with regard to those other defenses.
>
> Did you wish to be heard further about that, [defense counsel]?
>
> [DEFENSE COUNSEL]: I do not. I cannot make an argument interpreting *Crump* other than it's blocking 14-51.2 and .3 through 51.4. I want to and I don't see it.

After taking the matter under advisement overnight and further discussion the following morning, the trial court declined to give instructions on the stand -your-ground provision and the defense of habitation.

1. Stand-Your-Ground Provision

[1] In light of the Supreme Court's decision in *McLymore*, the trial court erred by concluding that Defendant's possession of a weapon of mass death and destruction categorically disqualified him under N.C. Gen. Stat. § 14-51.4(1) from a jury instruction on the stand-your-ground provision and by failing to instruct the jury that "the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." *Id*. at 197, 868 S.E.2d at 77.

Furthermore, Defendant has met his burden of showing a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. First, the State specifically referenced the stand-your-ground provision during closing arguments and explicitly, yet erroneously, instructed the jury that it does not apply in this case:

> Now, let's talk about the law for just a minute. You heard during the opening remarks from His Honor about the potential defenses in this case. And I want to be clear before you go back there because you all are citizens, and I'm sure you all watch the news. And there's a lot of things in the headlines right now, especially right now. But this case and the law that you're going to hear is not -- I repeat not -- stand your ground. And the law you're going to hear in this case is not -- I repeat not -- the castle doctrine. Under our law in the state of North Carolina, it does not apply in this case, so you're not going to hear about it. The only law you're going to hear is the common law defense of self-defense. . . .

Additionally, the evidence viewed in the light most favorable to Defendant could have supported a jury determination that Defendant's use of deadly force was justified and that there was no causal nexus between the disqualifying felony and his use of deadly force. The evidence at trial tended to show that Defendant, Somerset, and Ingram were sitting in the living room and "[t]hings just started escalating[,]" and then "names were being thrown around." They left the trailer for approximately twenty minutes to "calm down in a car ride" but continued to argue in the car. Ingram told Defendant during the car ride that he needed to move out of the trailer. After pulling into the driveway, Ingram wrote Defendant a notice to vacate the trailer and handed it to him as he exited the car. Defendant "ripped it up [and] threw it in the air right in front of [Ingram's] face." Defendant stood on the porch and continued to argue with Ingram and Somerset as they sat in the car. Defendant "told them to leave multiple times, but they still weren't leaving."

Defendant eventually went inside the trailer and locked and latched the screen door. Defendant retrieved his iPad from the kitchen and tried to call 911, but his iPad "would not cooperate with [him.]" Defendant "felt [he] had to grab something . . . [and] couldn't find any of the other things that [he] had intentionally just deliberately left lying around in case[.]" Defendant retrieved the Winchester .410 caliber shotgun with a sawed-off barrel from the back bedroom.

Defendant returned to the porch and said, "You all need to leave. You all should have done left. You all know you need to leave." After that, "there was still some more arguing and screaming about who was the rightful owner of the house and who needed to get out." Defendant asked Ingram and Somerset if they could talk and "let everything be okay[,]" and Ingram responded, "No, . . . it is what it is. I've got to have my house back." Defendant then said to her, "You're just a bitch." Somerset told Defendant not to disrespect Ingram, and Defendant replied, "She's a f[**]king bitch." At that point, Somerset exited the car, took his shirt off, yelled, "Let's end this[,]" and rushed towards Defendant. When Somerset was approximately five feet away, Defendant shot him in the chest with the shotgun. Somerset died of a shotgun wound to the chest.

In light of this evidence, there is a reasonable possibility that, had the trial court instructed the jury on the stand-your-ground provision and causal nexus requirement, the jury would have determined that Defendant's use of deadly force was justified because he reasonably believed that such force was necessary to prevent imminent death to himself and that there was no causal nexus between Defendant's felonious possession of a weapon of mass death and destruction and his use of force.

Accordingly, the trial court prejudicially erred by failing to instruct the jury on the stand-your-ground provision and the causal nexus requirement. Defendant is thus entitled to a new trial for the first-degree murder charge.

2. Defense of Habitation

[2] As with the stand-your-ground provision, in light of the Supreme Court's decision in *McLymore*, the trial court erred by concluding that Defendant's possession of a weapon of mass death and destruction categorically disqualified him under N.C. Gen. Stat. § 14-51.4(1) from a jury instruction on the defense of habitation. Nonetheless, the trial court did not err by failing to give the requested defense of habitation instruction because the evidence did not support the instruction. *See State v. Hancock*, 248 N.C. App. 744, 748, 789 S.E.2d 522, 525 (2016) ("[A] trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for it." (quotation marks, brackets, and citation omitted)).

N.C. Gen. Stat. § 14-51.2 codifies the defense of habitation and provides, in pertinent part, that "the lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if" (1) "[t]he person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered . . . [the] home[,]" and (2) "[t]he person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred." N.C. Gen. Stat. § 14-51.2(b). "Home" is defined "to include its curtilage," N.C. Gen. Stat. § 14-51.2(a)(1) (2023), which includes the porch. *State v. Blue*, 356 N.C. 79, 89, 565 S.E.2d 133, 139 (2002).

Under the statute's plain language, the lawful occupant of a home is presumed to have held a reasonable fear of imminent death or serious bodily injury when using deadly force only if the person against whom the deadly force was used was *in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered* the occupant's home, including the curtilage of the home, and the occupant of the home knew or had reason to believe that the unlawful and forceful entry was occurring or had occurred. *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." (citation omitted)).

Accordingly, if the person against whom the deadly force was used was entering or had entered the occupant's home lawfully and without force, the presumption afforded by the defense of habitation does not apply.

The statute's plain language comports with the historic understanding and justification for the defense. In *State v. Miller*, our Supreme Court explained:

> When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by the taking of the life of the intruder. Under those circumstances, the law does not require such householder to flee or to remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family. . . . But the jury must be the judge of the reasonableness of defendant's apprehension.

267 N.C. 409, 411, 148 S.E.2d 279, 281 (1966) (quotation marks and citations omitted). Ten years later, our Supreme Court further explained that

> one of the most compelling justifications for the rules governing defense of habitation is the desire to afford protection to the occupants of a home under circumstances which might not allow them an opportunity to see their assailant or ascertain his purpose, other than to speculate from his attempt to gain entry by force that he poses a grave danger to them.

State v. McCombs, 297 N.C. 151, 157, 253 S.E.2d 906, 910 (1979) (citation omitted). Although N.C. Gen. Stat. § 14-51.2 expanded the defense of habitation to allow deadly force not only to prevent an unlawful entry but also to terminate an unlawful entry, the justification for protecting the occupants from an intruder's unlawful entry has remained.

Here, the evidence at trial showed that Defendant, Somerset, and Ingram were sitting in the living room when "[t]hings just started escalating[.]" Defendant, Somerset, and Ingram then left the trailer for approximately twenty minutes to "calm down in a car ride[.]" During the car ride, the parties continued arguing. Ingram then stated, "You know what? I think it's best if you guys move because I'm going to have to

have my house back because I can't live with you all like this." They then pulled back into the driveway. Ingram wrote Defendant a notice to vacate the trailer and handed it to him as he exited the car. At that point, Somerset had lawfully entered Defendant's home and thus the justification for the presumption afforded by the defense of habitation did not apply.

Accordingly, the trial court did not err by denying Defendant's requested jury instruction on the defense of habitation.

B. Defense of Justification

[3] Defendant also argues that the trial court erred by denying his requested jury instruction on the defense of justification as to the possession of a weapon of mass death and destruction charge.

Our Supreme Court held in *State v. Mercer* that "in narrow and extraordinary circumstances," justification may be available as a defense to a charge of possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1. 373 N.C. 459, 463, 838 S.E.2d 359, 362 (2020). Under *Mercer*, a defendant is entitled to a jury instruction on the defense of justification to the charge of possession of a firearm by a felon only where each of the following four factors is supported by evidence taken in the light most favorable to the defendant: (1) "the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury"; (2) "the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct"; (3) "the defendant had no reasonable legal alternative to violating the law"; and (4) "there was a direct causal relationship between the criminal action and the avoidance of the threatened harm." *Id.* at 464, 838 S.E.2d at 363.

Here, Defendant was charged with possessing a weapon of mass death and destruction under N.C. Gen. Stat. § 14-288.8, not with possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1. Thus, under *Mercer*, Defendant was not entitled to a jury instruction on the defense of justification. We need not decide whether to extend *Mercer*'s holding to a charge of possession of a weapon of mass death and destruction because here, even if the defense were available, there is no record evidence, when taken in the light most favorable to Defendant, to support all of the four factors set forth in *Mercer*.

Accordingly, the trial court did not err by denying Defendant's requested jury instruction on the defense of justification as to the possession of a weapon of mass death and destruction charge.

III. Conclusion

The trial court prejudicially erred by failing to instruct the jury on the stand-your-ground provision and causal nexus requirement as to the first-degree murder charge. However, the trial court did not err by denying Defendant's requested jury instruction on the defense of habitation. Defendant is entitled to a new trial for the first-degree murder charge.

Furthermore, the trial court did not err by denying Defendant's requested jury instruction on the defense of justification as to the possession of a weapon of mass death and destruction charge, and we find no error in Defendant's conviction for that charge. Nonetheless, because Defendant's pre-trial confinement credit was assigned to the vacated first-degree murder judgment, we remand the possession of a weapon of mass death and destruction judgment for resentencing after his new trial so that his credits may be properly applied.

NEW TRIAL IN PART; NO ERROR IN PART; REMANDED FOR RESENTENCING IN PART.

Judge MURPHY concurs.

Judge ZACHARY concurs by separate opinion.

ZACHARY, Judge, concurring.

I concur in the majority opinion. The defense of habitation, as set forth in N.C. Gen. Stat. § 14-51.2, is limited except as provided in that statute. Defendant is not entitled pursuant to the plain language of the statute to the requested jury instruction on the defense of habitation.

I write separately to emphasize that this Court "is an error-correcting body, not a policy-making or law-making one." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 739, 796 S.E.2d 529, 533 (2017) (cleaned up). Whether it was the intent of the General Assembly to foreclose the defense of habitation from cases such as that before us—in which the curtilage was lawfully entered—is beyond judicial inquiry. "It is the province of the lawmaking power to change or modify the statute, not ours. What the General Assembly has written it has written, and if it be not satisfied with its present writing it can write again." *State v. Whitehurst*, 212 N.C. 300, 305, 193 S.E. 657, 661 (1937) (cleaned up).

JAVA WARREN AND JANNIFER WARREN, PLAINTIFFS
v.
CIELO VENTURES, INC. D/B/A SERVPRO NORTH CENTRAL MECKLENBURG COUNTY, DEFENDANT

No. COA22-926

Filed 7 May 2024

Unfair Trade Practices—summary judgment—one-year limitation of liability clause

In an action brought by homeowners against a company hired to remediate damage from a water heater leak, the trial court erred in granting summary judgment in favor of the company on the homeowners' Unfair and Deceptive Trade Practices Act (UDTPA) claim because the one-year clause of limitations included in the work authorization contract had to yield to the applicable statutorily proscribed limits for UDTPA claims. Accordingly, the trial court's order was vacated and the matter was remanded for further proceedings.

Appeal by plaintiffs from order entered 19 May 2022 by Judge Louis A. Trosch in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 April 2023.

Crawford Law Office, PC, by Derek Crawford, and the Cochran Firm, by Jeffrey Mitchell and Hugo L. Chanez, for plaintiffs-appellants.

Hendrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, David L. Levy, and Kristy M. D'Ambrosio, for defendant-appellee.

STADING, Judge.

Java and Jannifer Warren ("plaintiffs") appeal from the trial court's order granting summary judgment for Cielo Ventures, Inc., conducting business as Servpro of North Central Mecklenburg County ("defendant"). The trial court ruled that the one-year limitation of liability clause in defendant's work authorization contract extended to claims made under North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"). N.C. Gen. Stat. § 75-1.1 (2023). For the reasons below, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. Background

On 8 July 2017, plaintiffs discovered their water heater leaked throughout their house. That same day, plaintiffs notified their homeowner insurance provider, Government Employees Insurance Company ("GEICO"), of the incident. GEICO operated through Homesite Insurance. After plaintiffs contacted GEICO, defendant's representatives conducted a preliminary inspection of the house on 10 July 2017. Defendant informed plaintiffs that the water leak resulted in extensive damage to the house, requiring them to "bring in the calvary," and start work immediately. Defendant recommended that plaintiffs get a hotel in the meantime.

Plaintiffs and defendant entered into an agreement entitled "Authorization to Perform Services and Direction of Payment" ("authorization contract"). Among other terms, the authorization contract contained a clause stating:

> NO ACTION, REGARDLESS OF FORM, RELATING TO THE SUBJECT MATTER OF THIS CONTRACT MAY BE BROUGHT MORE THAN ONE (1) YEAR AFTER THE CLAIMING PARTY KNEW OR SHOULD HAVE KNOWN OF THE CAUSE OF ACTION.

On 20 July 2017, plaintiffs visited the house and discovered defendant had completed minimal or no remediation work at all. Later inquiries revealed that another project preoccupied defendant. The unattended water damage allowed mold to proliferate throughout the house. Plaintiffs thus retained the services of another company, hoping to remediate the damage to their house. After the failed attempt, a certified industrial hygienist found visible mold throughout the house and concluded that the threshold for remediation had been surpassed. As a result, plaintiffs' house was demolished, for which Homesite Insurance compensated them.

On 9 July 2021, plaintiffs filed a claim under North Carolina's UDTPA against defendant. In response, defendant sought summary judgment, arguing that the claim was time-barred under the authorization contract. At the end of the hearing on the motion, the trial court granted summary judgment for defendant "based on the statute of limitations" as lessened by the authorization contract. Plaintiffs timely filed a notice of appeal challenging the trial court's order.

II. Jurisdiction

This Court has jurisdiction to hear plaintiffs' appeal under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Analysis

Plaintiffs assert several reasons for their challenge to the trial court's grant of summary judgment for defendant. First, they contend that precedent rejects one-year limitation clauses for UDTPA claims as unreasonable. Second, they argue that N.C. Gen. Stat. § 75-16.2 (2023) precludes contractual time limitations of UDTPA claims, which proscribes a four-year statutory limitations period. As discussed below, because of the policy underpinning the UDTPA, we hold that the one-year clause of limitation contained in the work authorization contract does not apply to UDTPA claims and must yield to the statutorily prescribed limitation.

A. Summary Judgment Order

At first blush, the order granting summary judgment for the defendant lacks a prima facie rationale for its disposition. This Court may review only "what is in the record or in the designated verbatim transcript. . . ." *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 (1985) (citing N.C. R. App. P. 9(a)). It can know "only what appears of record on appeal. . . ." *State v. Perry*, 229 N.C. App. 304, 316, 750 S.E.2d 521, 531 (2013) (citation omitted). Even though such rationale is unnecessary to determine a summary judgment order's validity, explanations do not void the judgment "and may be helpful, if the facts are not at issue and support" it. *Danaher v. Joffe*, 184 N.C. App. 642, 645, 646 S.E.2d 783, 785 (2007) (citation omitted).

Here, the trial court orally explained that it "grant[ed] the motion for summary judgment . . . based on the statute of limitations." It reached that decision only "after hearing from [c]ounsel, reviewing the file in this matter, as well as the materials submitted by both parties[, and] additional attachments." (ellipses omitted). Upon review of the transcript, we conclude that the trial court based its grant of summary judgment for defendant on the authorization contract's one-year limitation of claims clause.

A party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ." N.C. R. Civ. P. 56(c). In response to an appeal of a trial court's order for summary judgment, we review *de novo* two "critical questions of law": whether "(1) there is a genuine issue of material fact and[ ] (2) whether the movant is entitled to judgment as a matter of law." *Manecke v. Kurtz*, 222 N.C. App. 472, 474–75, 731 S.E.2d 217, 220 (2012) (citations omitted). We assess the record's evidence "in the light most favorable to the non-mov[ant]." *Id.* (citation omitted). At issue is whether the one-year clause of limitation or the four-year statute

of limitation applies to plaintiffs' UDTPA claim. There is no genuine issue of material fact for us to resolve in this matter. Instead, we address whether case and statutory law compel the application of the time limitation provided by the work agreement or the UDTPA.

B. Statute of Limitations Precedent

Plaintiffs first argue that this Court's opinion in *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1 (1979) explicitly rejects enforcement of one-year limitation clauses for UDTPA claims as contrary to public policy. We ultimately agree that plaintiffs' UDTPA claim is not time-barred. However, we do not rely on *Holley* because a limitation of liability clause was not at the heart of its legal analysis. Rather, this Court was tasked with determining "the appropriate statute of limitations for the [UDTPA] . . . in the decade between 1969 and 1979." *Id.* at 234, 259 S.E.2d at 5. The question for this Court was whether a one-year or a three-year statute should apply to such claims. *Id.* at 239, 259 S.E.2d 1, 8 (1979). To arrive at its conclusion, the *Holley* Court analyzed "the statutory scheme by which North Carolina regulates unfair trade practices" and noted "that the General Assembly has subsequently extended this period to four years. . . ."[1] *Id.* at 234, 259 S.E.2d at 5. It applied canons of construction to choose the longer three-year statute when the applicable statute of limitations is an open question. *See id.* at 241, 259 S.E.2d at 8. While instructive, *Holley* does not address the precise issue before us: whether parties can contractually agree to a time limit for asserting claims under the UDTPA.

C. Legislative Purpose of the UDTPA

Defendant relies in part on *Steele v. Safeco Ins. Co. of Am.*, 223 N.C. App. 522, 735 S.E.2d 451 (2012) (unpublished table decision), to argue that a contractually shortened one-year limitation clause is reasonable for UDTPA claims. Regardless of *Steele*'s nonbinding dictum on this point, we hold that allowing limitations for such claims would circumvent the General Assembly's stated purpose in enacting the UDTPA. The more appropriate analysis lies in considering the UDTPA's statutory text, legislative purpose, and specific creation of a private right of action subject to a prescribed four-year statute of limitations. The General Assembly "establish[ed] an effective private cause of action for aggrieved consumers in this State . . . because common law remedies

1. While the *Holley* litigation was underway, the North Carolina General Assembly enacted a four-year bar to similar claims that did not apply to "any [then-]pending civil action." *Holley*, 43 N.C. App. at 239, 259 S.E.2d at 7–8 (quoting H.B. 238, 1979 Gen. Assemb., Reg. Sess. ch. 169, sec. 2 (N.C. 1979)).

had proved often ineffective." *Marshall v. Miller*, 302 N.C. 539, 549, 276 S.E.2d 397, 403 (1981). Enacted in 1969[2] and amended in 1977,[3] North Carolina's UDTPA interdicts "unfair or deceptive acts" that affect intrastate "commerce." S.B. 515, 1969 Gen. Assemb., Reg. Sess. ch. 833 (N.C. 1969), *amended by* H.B. 1050, 1977 Gen. Assemb., Reg. Sess. ch. 747 (N.C. 1977). In 1979, the General Assembly further amended the state's UDTPA to bar "[a]ny civil action brought to enforce [its] provisions unless commenced within four years" of the alleged injury.[4] H.B. 238,

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2. The relevant 1969 statutory text is as follows:

G.S. 75-1.1. Methods of competition, acts and practices regulated: legislative policy.

(a) Unfair methods of competition and *unfair or deceptive acts* or practices in the conduct of any trade or *commerce* are hereby declared unlawful, [and]

(b) The *purpose* of this Section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that *good faith and fair dealings* between buyers and sellers at all levels of commerce be had in this State[.]

S.B. 515, 1969 Gen. Assemb., Reg. Sess. ch. 833, sec. 1, subsec. b, ll.13–19 (N.C. 1969) (codified as amended at N.C. Gen. Stat. § 75-1.1(a)–(b)) (emphases added).

3. The relevant 1977 statutory text is as follows:

Section 1. G.S. 75-1.1(a) is rewritten to read as follows:

(a) *Unfair* methods of competition in or affecting *commerce*, and *unfair or deceptive acts* or practices in or affecting *commerce*, are declared unlawful.

Sec. 2. G.S. 75-1.1(b) is rewritten to read as follows:

(b) For purposes of this section, "*commerce*" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

H.B. 1050, 1977 Gen. Assemb., Reg. Sess. ch. 747 (N.C. 1977) (codified at N.C. Gen. Stat. § 75-1.1(a)–(b)) (emphases added).

4. The relevant 1979 statutory text is as follows:

Section 1. Chapter 75 of the General Statutes is amended as follows:

§ 75-16.2. Limitation of actions. — *Any* civil action brought under this Chapter to enforce the provisions thereof shall be barred *unless commenced within four years* after the cause of action accrues.

Sec. 2. This act is effective upon ratification but *shall not apply* to any *pending* civil action.

H.B. 238, 1979 Gen. Assemb., Reg. Sess. ch. 169 (N.C. 1979) (codified at N.C. Gen. Stat. § 75-16.2) (internal quotation marks and ellipses omitted) (emphases added).

1979 Gen. Assemb., Reg. Sess. ch. 169, sec. 1 (N.C. 1979) (ellipses omitted). "An action for unfair or deceptive practices is a creation of statute, and therefore *sui generis*, so the cause of action exists independently, regardless of whether a contract was breached." *Nelson v. Hartford Underwriters Ins.*, 177 N.C. App. 595, 608, 630 S.E.2d 221, 231 (2006).

Instead of a breach of contract claim, plaintiffs stated a claim under the UDTPA "distinct from other claims with respect to statutes of limitations." *See Page v. Lexington Ins.*, 177 N.C. App. 246, 251, 628 S.E.2d 427, 430 (2006) (applying a three-year statute of limitations to the breach of contract, breach of fiduciary duty, and bad faith claims, but treating the UDTPA claim as separate and distinct with a four-year limitations period); *see also Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 485, 593 S.E.2d 595, 601 (holding that applicable four-year and two three-year statutes of limitation, respectively, did not bar the plaintiffs' UDTPA, fraud, and negligence claims).

This Court has read a "deceptive" act under the UDTPA as any "practice [that] has the capacity or tendency to deceive" another party. *Walker v. Fleetwood Homes of N.C., Inc.*, 176 N.C. App. 668, 671, 627 S.E.2d 629, 631–32 (2006) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 362 N.C. 63, 653 S.E.2d 393 (2007). " 'Unfairness' is a broader concept than. . . 'deception.' " *Id.* An affirmative act of deception definitionally requires deceitful intent. *See* Deception, Black's Law Dictionary (11th ed. 2019). An unfair practice, on the other hand, "offends established public policy." *Id.* The practice may also be "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* (holding that a violation of regulatory statutes regarding warranty repairs for manufactured homes may support a UDTPA claim); *see also Morgan v. AT&T Corp.*, 168 N.C. App. 534, 540–41, 608 S.E.2d 559, 564 (2005) (holding that the plaintiff's UDTPA claim survived summary judgment when the defendant phone company continued to bill the plaintiff long after she canceled the contract).

In North Carolina, our courts have acknowledged the ability of parties to contractually shorten their claim limitations in some cases. *See, e.g.*, *Town of Pineville v. Atkinson/Dyer/Watson Archs., P.A.*, 114 N.C. App. 497, 499, 442 S.E.2d 73, 74 (1994) (two-year limitation); *Horne-Wilson, Inc. v. Nat'l Sur. Co.*, 202 N.C. 73, 161 S.E. 726 (1932) (one-year limitation); *Welch v. Phx. Assur. Co.*, 192 N.C. 809, 136 S.E. 117 (1926) (one-year limitation). Yet, in considering the claim at issue in this matter, we must pay deference to the legislative purpose of the UDTPA:

> To provide civil legal means to maintain ethical standards of dealings between persons engaged in business and . . .

> the consuming public within this State, to the end that good faith and dealings between buyers and sellers at all levels of commerce be had in this State.

N.C. S.B. 515 (1969) (brackets omitted), *amended by* N.C. H.B. 1050 (1977). Our courts thus look to whether the allegedly unfair action violates public policy and how the action affects consumers. *Walker*, 176 N.C. App. at 671, 627 S.E.2d at 631–32; *Morgan*, 168 N.C. App. at 540–41, 608 S.E.2d at 564. This public policy weighs against permitting contractual abrogation of the UDTPA statute of limitations.

Statutes of limitation compel rights of action within a reasonable time "to ensure that the opposing party has a fair opportunity to defend" against otherwise "stale claims." 51 Am. Jur. 2d *Limitation of Actions* § 17 (1970); *cf. id.* § 7 (2024). Statutes of limitation are public policy choices that "determine[e] of the point at which the right of a party to pursue a claim must yield to competing interests, such as the *unfairness* of requiring the opposing party to defend against" outdated claims. *Morris v. Rodeberg*, 385 N.C. 405, 409, 895 S.E.2d 328, 331 (2023) (emphasis added). They are pragmatically "blunt instruments" created by the General Assembly "to promote—not defeat—the ends of justice." *Id.* And so, this policy of repose yields "where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428, 13 L. Ed. 2d 941, 945, 85 S.Ct. 1050, 1055 (1965). Considering the foregoing, this Court will not construe the generalized one-year clause of limitation contained in the authorization contract as a bar to plaintiffs' claim asserted under North Carolina's UDTPA.

IV. Conclusion

The trial court erred in finding that plaintiffs' UDTPA claim was time-barred by the limitation included in the work authorization contract. Accordingly, we vacate the trial court's order granting summary judgment for defendant and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges WOOD and GORE concur.

WENNINGER v. WENNINGER

[293 N.C. App. 791 (2024)]

MYRA WENNINGER, PLAINTIFF
v.
LEE ARTHUR WENNINGER, DEFENDANT

No. COA23-741

Filed 7 May 2024

Parties—failure to join—necessary party—revocable trust—owner of property up for equitable distribution

In an equitable distribution action, where the parties had previously stipulated that certain assets were titled to a revocable trust, and where the trial court declined to distribute the trust property after correctly determining that it lacked jurisdiction to do so—because the property's true owner, the trust, was not a party to the action—the court's equitable distribution order was vacated as null and void because the court erred in failing to join the trust ex mero motu as a necessary party to the action, pursuant to Civil Procedure Rule 19.

Appeal by defendant from judgment and order entered 30 December 2022, and orders entered 25 January 2023 and 2 March 2023, by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 6 February 2024.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, and Kennedy Law Associates, PLLC, by Marsha C. Kennedy, for plaintiff-appellee.

Myers Law Firm, PLLC, by R. Lee Myers, for defendant-appellant.

ZACHARY, Judge.

Defendant Lee Arthur Wenninger ("Husband") appeals from (1) the trial court's judgment and order determining the issues of equitable distribution, alimony, and attorney's fees ("the Equitable Distribution Order"); (2) the trial court's order denying his motion to add the Myra Louise Wenninger Revocable Trust ("the Trust") as a necessary party to the action; and (3) the trial court's order denying his Rule 60(b) motion for relief from the Equitable Distribution Order. After careful review, we vacate and remand.

I. Background

Husband and Plaintiff Myra Wenninger ("Wife") were married in 2006, separated in 2019, and divorced in 2021. One child was born of the marriage.

On 18 September 2019, Wife initiated this action by filing a complaint for, *inter alia*, child custody, child support, alimony, equitable distribution, and attorney's fees. On 27 December 2019, Husband filed an answer and counterclaim for, *inter alia*, child custody, child support, equitable distribution, alimony, and attorney's fees. Husband and Wife filed equitable distribution affidavits on 24 January and 4 February 2020, respectively, and Wife filed a reply on 4 February 2020. On 17 May 2021, the trial court entered an order resolving the parties' claims for child custody and child support.[1]

On 25 April 2022, the trial court entered a final pretrial order containing the parties' stipulations and allegations as to whether certain items of property were marital or separate and, in some instances, proposed distributions. Among the items addressed by the parties were three bank accounts and one car that the parties agreed were titled to the Trust ("the Trust Property").[2] The parties stipulated that two of the bank accounts were marital property and should be distributed to Wife, but disputed the classification and distribution of the third bank account and the car, leaving those determinations for the trial court.

That same day, the issues of equitable distribution, alimony, and attorney's fees came on for hearing in Mecklenburg County District Court. Following the trial, on 20 July 2022, the trial court rendered its ruling in open court. When the trial court reached the Trust Property, it announced: "I've got a curve ball for y'all." The trial court determined that because the Trust Property was "not owned by the parties on the date of separation" but rather was owned by the Trust, which was "not a party to this lawsuit[,]" the court could not distribute any items of the Trust Property. However, the trial court considered that "[s]ome assets are in trust" in making its unequal distribution in favor of Wife.

On 4 November 2022, Husband filed a motion to join the Trust as a necessary party to the equitable distribution action, pursuant to N.C. Gen. Stat. § 1A-1, Rule 19.

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1. The child custody and support order is not included in the record, but there appears to be no dispute that these claims were resolved and are not at issue in the present appeal.

2. No competent evidence was presented below regarding the trustees or beneficiaries of the Trust.

On 30 December 2022, the trial court entered the Equitable Distribution Order, in which it restated its earlier ruling, including its determination that it could not distribute the Trust Property because the Trust was not a party to the action. The trial court ordered an unequal distribution of the net marital estate, awarding 60% to Wife and 40% to Husband.

On 24 January 2023, Husband filed a motion for relief from the Equitable Distribution Order, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60. Husband raised several arguments in his Rule 60 motion, including that the trial court incorrectly concluded that the Trust Property "could not be considered an asset of the marriage as it was not owned by the parties on the date of separation" and that the trial court's failure to join the Trust as a necessary party rendered the Equitable Distribution Order void.

The following day, the trial court entered its order denying Husband's Rule 19 motion ("the Rule 19 Order"). The trial court found as fact that it "rendered its verdict on July 20, 2022[,]" that neither Husband nor Wife "timely moved to join [the Trust] at any time prior to the verdict on the parties' respective claims for equitable distribution[,]" and that Husband filed his Rule 19 motion "over three months after the verdict was rendered by the [c]ourt." Accordingly, the trial court concluded that "Defendant failed to raise the defense of failure to join a necessary party prior to the verdict and such a defense cannot be raised after the verdict" and that "it is otherwise untimely to request a party be added."

On 27 January 2023, Husband timely filed notice of appeal from the Equitable Distribution Order.[3] On 6 February 2023, Husband amended his Rule 60 motion to include the Rule 19 Order as an exhibit. On 9 February 2023, Wife filed a response to Husband's Rule 60 motion, as well as a motion for sanctions. On 20 February 2023, Husband timely filed notice of appeal from the Rule 19 Order.

On 2 March 2023, the trial court entered its order denying Husband's Rule 60 motion ("the Rule 60 Order"). Husband timely filed notice of appeal from the Rule 60 Order on 15 March 2023.

II. Discussion

Husband raises several arguments on appeal, of which the dispositive argument is that the trial court erred by failing to add the Trust as a

3. Wife also filed timely notice of appeal; however, she does not raise any challenge to the Equitable Distribution Order and states in her appellate brief that she "withdraws her notice of appeal." *See* N.C. R. App. P. 37(e).

necessary party to the equitable distribution action. Because we agree with Husband on this dispositive issue, we need not reach the other issues he raises.

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Nicks v. Nicks*, 241 N.C. App. 487, 495, 774 S.E.2d 365, 372 (2015) (cleaned up). "By contrast," this Court reviews de novo "conclusions of law drawn by the trial court from its findings of fact[.]" *Brown v. Brown*, 288 N.C. App. 509, 516, 886 S.E.2d 656, 662 (2023) (citation omitted).

B. Analysis

Rule 19 of the North Carolina Rules of Civil Procedure governs the necessary joinder of parties and provides, in pertinent part:

> (a) Necessary joinder. -- Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.
>
> (b) Joinder of parties not united in interest. -- The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but *when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.*

N.C. Gen. Stat. § 1A-1, Rule 19(a)–(b) (2023) (emphasis added).

Our appellate courts have long recognized the distinction, for the purposes of joinder, between necessary and proper parties. "A necessary party is a party that is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without its presence as a party." *Geoghagan v. Geoghagan*, 254 N.C. App. 247, 249, 803 S.E.2d 172, 175 (cleaned up), *disc. review denied*, 370 N.C. 277, 805

S.E.2d 492 (2017). "This Court has also described a necessary party as one whose interest will be directly affected by the outcome of the litigation." *Id.* (cleaned up).

On the other hand, a proper party is "a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties." *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 439, 527 S.E.2d 40, 44 (2000) (citation omitted).

Although the trial court has discretion as to whether to add a proper party, the trial court has no discretion as to whether to add a necessary party. "Necessary parties *must* be joined in an action. Proper parties *may* be joined." *Id.* at 438, 527 S.E.2d at 44 (emphases added) (citation omitted). "When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action." *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202–03 (1983) (footnote omitted). "Any such defect should be corrected by the trial court *ex mero motu* in the absence of a proper motion by a competent person." *Id.* at 764, 304 S.E.2d at 203.

This Court has explained that Rule 19's "necessary joinder rules . . . place a mandatory duty on the [trial] court to protect its own jurisdiction to enter valid and binding judgments." *In re Foreclosure of a Lien by Hunters Creek Townhouse Homeowners Ass'n*, 200 N.C. App. 316, 318, 683 S.E.2d 450, 452 (2009) (citation omitted). "A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void." *Id.* at 319, 683 S.E.2d at 453 (citation omitted). "Thus, if [the Trust] is a necessary party to the resolution of the instant matter, the trial court erred in failing to join [the Trust] and its [Equitable Distribution O]rder . . . is null and void." *Id.*

In this case, the trial court relied upon this Court's decision in *Nicks* to support its conclusion that it lacked jurisdiction to distribute the Trust Property. In *Nicks*, the trial court concluded that an LLC was marital property when, in fact, it was owned entirely by a trust rather than either spouse. 241 N.C. App. at 495, 774 S.E.2d at 372. The *Nicks* Court recognized that "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with [the third party's] participation limited to the issue of the ownership of that property." *Id.* (citation omitted).

Consistent with *Nicks*, the trial court here appropriately recognized that the Trust was a necessary party to the equitable distribution action.

Because the parties stipulated that the Trust held title to the Trust Property, the Trust was "a necessary party to the equitable distribution proceeding," and the trial court correctly concluded that it would not have jurisdiction to distribute the Trust Property without the Trust being made a party to the proceeding. *Id.* (citation omitted).

Nevertheless, despite the trial court's apt recognition that the Trust was a necessary party, the trial court erred as a matter of law by failing to join the Trust *ex mero motu* as a necessary party to the equitable distribution action. Pursuant to Rule 19, the trial court has a "*mandatory duty* . . . to protect its own jurisdiction to enter valid and binding judgments." *Hunters Creek*, 200 N.C. App. at 318, 683 S.E.2d at 452 (emphasis added) (citation omitted). However, this mandatory duty does not absolve the trial court of its equally mandatory duty to classify and distribute property that all parties agree is subject to equitable distribution. *See* N.C. Gen. Stat. § 1A-1, Rule 19(b) ("[W]hen a complete determination of such claim cannot be made without the presence of other parties, the court *shall* order such other parties summoned to appear in the action." (emphasis added)).

Again, *Nicks* is instructive. The *Nicks* Court vacated the equitable distribution judgment and remanded the case because the trial court had inappropriately classified and distributed as marital property an LLC held in trust; notably, however, this disposition did not preclude the trial court from properly classifying and distributing the same property—the LLC held in trust—on remand. Rather, the *Nicks* Court repeatedly indicated that the proper procedure on remand would be to join the trust as a necessary party and resolve the equitable distribution accordingly. *See Nicks*, 241 N.C. App. at 499, 774 S.E.2d at 375 ("[O]ur decision to remand this case based on the failure to join the [t]rust as a necessary party necessarily vacates the trial court's valuation of [the LLC, and] provides ample opportunity for a proper de novo valuation of [the LLC] *once the* [*t*]*rust is properly joined as a necessary party* . . . ." (emphasis added)); *see also id.* at 500, 774 S.E.2d at 375 ("In short, it is clear from the record that *once the* [*t*]*rust*—which holds legal title to [the LLC] and the marital assets therein—*is joined as a necessary party to this action*, [the wife] will have a strong claim for the imposition of a constructive trust." (emphases added)).

Because the Trust was not joined as a necessary party, the Equitable Distribution Order "is null and void." *Hunters Creek*, 200 N.C. App. at 319, 683 S.E.2d at 453 (citation omitted). We therefore vacate the Equitable Distribution Order. In light of our disposition, we necessarily

also vacate the Rule 19 Order and the Rule 60 Order. Consequently, we need not reach Husband's remaining arguments.

III. Conclusion

For the foregoing reasons, the Equitable Distribution Order, the Rule 19 Order, and the Rule 60 Order are vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Chief Judge DILLON and Judge FLOOD concur.

ELIZABETH AND JASON WHITE, PETITIONERS
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES AND CHILDREN'S HOME SOCIETY OF NORTH CAROLINA, INC., RESPONDENTS

No. COA23-529

Filed 7 May 2024

Administrative Law—final agency decision—applicable standards of judicial review exceeded—adoption assistance benefits

In a proceeding regarding eligibility for federally funded adoption assistance benefits provided under Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 as administered by the Department of Health and Human Services (DHHS), the superior court exceeded its limited authority upon judicial review in reversing the final agency decision of DHHS to deny benefits to a child's adoptive parents. The superior court's conclusion that the final agency decision was arbitrary, capricious, and an abuse of discretion rested on its reasoning that the adoptive parents' 2021 benefits application was denied only because respondents (DHHS and the child-placement agency) failed to adequately advise the adoptive parents about the availability of, and requirements for, those benefits at the time of the child's adoption in 2014. However, appellate review of the whole record revealed that the child never met the program's eligibility requirements, either at the time of his adoption or when the application was made seven years later, and that ineligibility was unrelated to any failure by respondents to advise the adoptive parents about the adoption assistance program.

Accordingly, the superior court's reversal of the final agency decision was reversed.

Judge TYSON dissenting.

Appeal by respondents from order entered 16 September 2022 by Judge William Long in Forsyth County Superior Court. Heard in the Court of Appeals 9 January 2024.

TBM LAW, PLLC, by Tiffany B. Massie, for petitioners-appellees.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for respondent-appellant North Carolina Department of Health and Human Services.

Assistant County Attorney Erica Glass for respondent-appellant Forsyth County Department of Social Services.

Hill Evans Jordan & Beatty, PLLC, by Michele G. Smith, for respondent-appellant Children's Home Society of North Carolina, Inc.

ZACHARY, Judge.

This case concerns the superior court's limited standard of review when acting as an appellate tribunal upon a petition for judicial review from the final decision of an administrative agency pursuant to N.C. Gen. Stat. § 150B-43 (2023).

Respondents North Carolina Department of Health and Human Services ("DHHS"), Forsyth County Department of Social Services ("DSS"), and Children's Home Society of North Carolina, Inc., ("CHS") appeal from the superior court's order (1) reversing DHHS's final decision denying Petitioners Elizabeth and Jason White's request for adoption assistance benefits for their adopted child, "CW";[1] (2) awarding Petitioners ongoing and retroactive adoption assistance benefits; and (3) awarding attorney's fees to Petitioners. After careful review, we reverse the superior court's order, which reversed the final decision of DHHS.

1. We adopt the initials used by the parties to protect the identity of the juvenile.

I. Background

The subject matter of this appeal is the adoption assistance benefits program under Title IV-E of the Adoption Assistance and Child Welfare Act of 1980. *See* 42 U.S.C. § 670 *et seq*. Although the adopted child in this case clearly has extensive needs, he does not meet the eligibility requirements for adoption assistance benefits under Title IV-E. In concluding otherwise, the trial court exceeded its limited authority under N.C. Gen. Stat. § 150B-43.

As this appeal relates to the State's determination of an adopted child's eligibility for Title IV-E adoption assistance benefits—an issue grounded in federal and state law—we begin with an overview of the applicable statutes, regulations, and agency guidance.

A. Applicable Legal Principles

Title IV-E provides federal funding for adoption assistance subsidies to States that develop a plan for a subsidy and maintenance program and obtain approval of that plan from the United States Secretary of Health and Human Services. 42 U.S.C. § 670.[2] Title IV-E requires that "[e]ach State having a plan approved under this part shall enter into adoption assistance agreements . . . with the adoptive parents of children with special needs." *Id*. § 673(a)(1)(A). DHHS supervises North Carolina's adoption assistance payments program. N.C. Gen. Stat. § 108A-25(a)(4).

"The primary goal of the [T]itle IV-E adoption assistance program is to provide financial support to families who adopt difficult-to-place children from the public child welfare system. These are children who otherwise would grow up in State foster care systems if a suitable adoptive parent could not be found." U.S. Dep't of Health & Hum. Servs., Admin. for Child., Youth & Fams., Pol'y Announcement, Log No. ACYF-CB-PA-01-01, at 12–13 (Jan. 23, 2001) ("Federal Policy Announcement"). "The [T]itle IV-E adoption assistance program, therefore, was developed to provide permanency for children with special needs in public foster care by assisting States in providing ongoing financial and medical assistance on their behalf to the families who adopt them." *Id*. at 2.

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2. Between 2014, the year of CW's birth and adoption, and 2021, when Petitioners first applied for adoption assistance benefits, the relevant federal and state provisions were amended several times. *See*, *e.g.*, Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. 110-351, §§ 101(b), (c)(1), (c)(5), (f), 402, 122 Stat. 3949. As these amendments do not alter the substance of our analysis, for ease of reading, we refer to the laws and regulations currently in effect, except where indicated.

Title IV-E provides specific requirements that children with special needs must meet in order to qualify for adoption assistance benefits. 42 U.S.C. § 673(a)(2)(A). The numerous eligibility requirements differ based on the child's age and circumstances, *id.*, but at all times relevant to this appeal, a child was required to meet Title IV-E's definition of "a child with special needs" to be eligible for adoption assistance benefits, *id.* § 673(a)(1)(B), (c).

In considering whether a child is "a child with special needs" under Title IV-E, the State must determine, *inter alia*,

> that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section[.]

Id. § 673(c)(1)(B). The State must also conclude, subject to certain exceptions not applicable to the case before us, that "a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section[.]" *Id.*

Additionally, for Title IV-E adoption assistance benefits to be available, the State agency and the prospective adoptive parents must enter into an adoption assistance agreement before the adoption becomes final. *See* Federal Policy Announcement, at 6 ("Title IV-E adoption assistance is available on behalf of a child if s/he meets all of the eligibility criteria and the State agency enters into an adoption assistance agreement with the prospective adoptive parent(s) **prior to** the finalization of the adoption."); *see also* 45 C.F.R. § 1356.40(b)(1) (2023) (requiring that any adoption assistance agreement "[b]e signed and in effect at the time of or prior to the final decree of adoption").

In addition to these federal laws and regulations—of which we have only articulated those pertinent to the present case—North Carolina laws and regulations also bear on a child's eligibility for adoption assistance benefits. DHHS and DSS have statutory authorization to administer the adoption assistance program "under federal regulations" and state rules promulgated by the Social Services Commission. N.C. Gen. Stat. § 108A-25(a). Further, our General Statutes provide:

> Adoption assistance payments for certain adoptive children shall be granted in accordance with the rules of the Social Services Commission to adoptive parents who adopt a child eligible to receive foster care maintenance payments or supplemental security income benefits; provided, that the child cannot be returned to his or her parents; and provided, that the child has special needs which create a financial barrier to adoption.

Id. § 108A-49(b).

At the time of CW's adoption in 2014, the North Carolina Administrative Code enumerated specific eligibility criteria for the receipt of adoption assistance benefits, including that "[t]he child is, or was, the placement responsibility of a North Carolina agency authorized to place children for adoption at the time of adoptive placement"; that "[t]he child has special needs that create a financial barrier to adoption"; and that "[r]easonable but unsuccessful efforts have been made to place the child for adoption without the benefits of adoption assistance[.]" 10A N.C. Admin. Code 70M.0402(a)(2)–(4) (2014).[3] The Administrative Code also included the requirement that "the adoptive parents must have entered into an agreement with the child's agency prior to entry of the Decree of Adoption." 10A N.C. Admin. Code 70M.0402(b)(4) (2014).

B. Factual and Procedural Background

CW was born prematurely in North Carolina on 28 May 2014. CW's mother exposed CW to various illegal substances in utero. On 31 May 2014, CW's mother relinquished her parental rights to CW to CHS for the purpose of adoption with prospective adoptive parents. CHS is a private, not-for-profit child-placement agency. In June 2014, CHS placed CW with Petitioners in a potential adoptive placement, which was formalized on 10 September 2014 following the termination of CW's putative biological father's parental rights. Petitioners formally adopted CW on 23 December 2014. At the time of the adoption, there had been no discussion of adoption assistance benefits, and no adoption assistance agreement established.

In the years since his adoption, CW has been diagnosed with attention-deficit/hyperactivity disorder and various ocular conditions.

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3. Presently, the North Carolina Administrative Code explicitly incorporates by reference the eligibility criteria for adoption assistance benefits found in 42 U.S.C. § 673(a)(2). *See* 10A N.C. Admin. Code 70M.0402(a)(2) (2023).

CW has also been evaluated for possible autism spectrum disorder on multiple occasions.

In March 2021, Petitioners first discussed the possibility of receiving adoption assistance benefits with CHS's Infant Connections Program Supervisor. Petitioners and the CHS supervisor completed an adoption assistance eligibility checklist, and Petitioners submitted an application for adoption assistance on 10 May 2021. Upon receipt of the application, a DSS agent "inquired if there was a date scheduled for finalizing the adoption as 'the adoption agreement will have to be completed and signed prior to finalizing' the adoption." The CHS supervisor informed the DSS agent that "the adoption was finalized in 2014"; that "an adoption assistance application was not completed at that time"; and that "[t]his was a private adoption where [CHS] was the legal guardian prior to the adoption being finalized."

On 27 May 2021, DSS determined that CW "was not eligible for Adoption Assistance as his adoption was finalized in 2014 prior to entering into an adoption assistance agreement[.]" Petitioners appealed DSS's decision to DHHS, and a local hearing was held on 21 July 2021. On 23 July 2021, the local hearing officer affirmed DSS's decision.

On 28 July 2021, Petitioners filed a request for a state appeal, and DHHS held a state hearing on 22 September 2021. On 29 September 2021, the state hearing officer affirmed DSS's decision. Petitioners contested the state hearing officer's decision, and on 24 November 2021, the assistant chief hearing officer entered a final decision affirming DSS's decision.

On 21 December 2021, Petitioners filed a petition for judicial review in Forsyth County Superior Court pursuant to N.C. Gen. Stat. § 108A-79(k). Petitioners named DHHS, DSS, and CHS as respondents. On 12 September 2022, the matter came on for hearing. By order entered on 16 September 2022, the superior court concluded that "Respondents' decision to deny Petitioners' request for adoption assistance was erroneous, arbitrary, capricious and an abuse of discretion, and should be reversed[.]" The superior court also concluded: "Based on CW's past and present medical history and circumstances, CW qualified as a 'special needs' child in 2014, and he still meets those qualifications today . . . ."

Consequently, the superior court concluded that "Petitioners are entitled to receive adoption assistance both from the date of this Order, and retroactive assistance to December 23, 2014[.]" The superior court remanded the matter "to Respondents for a determination of the amount of adoption assistance to which Petitioners are entitled" and for the execution of "all necessary documents in order for Petitioners to receive

adoption assistance retroactive to December 23, 2014 and continuing thereafter as long as CW meets eligibility requirements[.]" The court also awarded Petitioners $10,750.00 in attorney's fees.

Respondents each filed timely notices of appeal. DHHS also filed a motion to stay execution of the superior court's order pending appeal, which the superior court denied by order entered on 16 December 2022.

II. Discussion

On appeal, Respondents each raise several arguments contending that the superior court's order must be reversed. For the reasons that follow, we agree.

A. Standard of Review

The North Carolina Administrative Procedure Act ("APA"), "codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Hum. Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). A party aggrieved by the final decision of an administrative law judge in a contested case has a right to judicial review by the superior court. N.C. Gen. Stat. § 150B-43.

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

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

Id. § 150B-51(b).

The APA provides a reviewing court with two different standards of review, "depend[ing] on the nature of the challenge being addressed." *Christian v. Dep't of Health & Hum. Servs.*, 258 N.C. App. 581, 584, 813 S.E.2d 470, 472, *appeal dismissed*, 371 N.C. 451, 817 S.E.2d 575 (2018).

> In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(c).

When applying de novo review, a reviewing court "considers the matter anew and freely substitutes its own judgment for the agency's." *Christian*, 258 N.C. App. at 584, 813 S.E.2d at 472 (citation omitted). "Using the whole record standard of review, [a reviewing court] examine[s] the entire record to determine whether the agency decision was based on substantial evidence such that a reasonable mind may reach the same decision." *Id.* at 584–85, 813 S.E.2d at 472.

Under the whole record standard of review, "a reviewing court is not free to weigh the evidence presented to an administrative agency and substitute its evaluation of the evidence for that of the agency." *Sound Rivers, Inc. v. N.C. Dep't of Envtl. Quality*, 385 N.C. 1, 3, 891 S.E.2d 83, 85 (2023) (citation omitted). "The 'whole record' test does not allow the reviewing court to replace the [agency]'s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo." *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977); *see also N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004).

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in [N.C. Gen. Stat. §] 7A-27." N.C. Gen. Stat. § 150B-52. "The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under [N.C. Gen. Stat. §] 150B-51(c), the [superior] court's findings of fact shall be upheld

if supported by substantial evidence." *Id.* On appeal from a superior court's order "reversing the decision of an administrative agency, our standard of review is twofold and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *McCrann ex rel. McCrann v. Dep't of Health & Hum. Servs., Div. of Mental Health, Developmental Disabilities & Substance Abuse Servs.*, 209 N.C. App. 241, 246, 704 S.E.2d 899, 903, *disc. review denied*, 365 N.C. 198, 710 S.E.2d 23 (2011).

B. Analysis

In that we are reviewing an order of the superior court acting as a reviewing court, our first task under the APA is to determine "whether the superior court applied the appropriate standard of review[,]" *id.*, as governed by the type of error asserted by Petitioners, *see* N.C. Gen. Stat. § 150B-51(c). In their petition for judicial review below, Petitioners argued that DHHS's final decision was (1) based on an error of law, in that Respondents misinterpreted 42 U.S.C. § 673; and (2) arbitrary, capricious and an abuse of discretion, in that this alleged statutory misinterpretation resulted in Respondents' failing "to fulfill their duty to inquire as to CW's eligibility [for adoption assistance benefits] and inform Petitioners." *See id.* § 150B-51(b)(4), (6). Accordingly, the interpretation of 42 U.S.C. § 673 is a question of law reviewed de novo. *Id.* § 150B-51(c). We review the question of whether DHHS's final decision was arbitrary, capricious, and an abuse of discretion using the whole record test. *Id.*

After careful review, we conclude that the superior court exceeded its limited authority when reviewing DHHS's final decision. Accordingly, we cannot say that "the superior court properly applied th[ese] standard[s]" of review. *McCrann*, 209 N.C. App. at 246, 704 S.E.2d at 903.

We begin with the superior court's conclusion, upon reviewing the whole record, that "Respondents' actions surrounding this matter were arbitrary and capricious and in bad faith." The superior court reached this conclusion by reasoning that "Petitioners did not meet the criteria for eligibility for adoption assistance when they applied ***only*** as a result of Respondents[']' failure to adequately advise Petitioners of the availability of adoption assistance and the requirements of the same." This is incorrect.

Our careful review of the whole record suggests that, although CW has extensive needs, he did not meet the specific eligibility requirements for adoption assistance benefits, either at the time of his initial adoption

in 2014 or when Petitioners submitted their application in 2021. Further, CW's ineligibility was not the result of any failure by CHS or DSS to adequately advise Petitioners about the program.

As stated above, federal and state law articulate specific eligibility requirements for adoption assistance benefits. Yet, the superior court determined that "CW would have been eligible to receive adoption assistance as of December 2014, and . . . it is clear that CW is still currently eligible to receive adoption assistance" without assessing whether CW met these requirements. For instance, there is no evidence in the record to suggest that CW was "eligible to receive foster care maintenance payments or supplemental security income benefits[,]" as required by our General Statutes. N.C. Gen. Stat. § 108A-49(b). By determining that CW was eligible for adoption assistance without satisfying this statutory requirement for eligibility, the superior court improperly "weigh[ed] the evidence presented to [DHHS] and substitute[d] its evaluation of the evidence for that of [DHHS]." *Sound Rivers*, 385 N.C. at 3, 891 S.E.2d at 85 (citation omitted).

Section 108A-49(b) also requires that "the child ha[ve] special needs which create a financial barrier to adoption." N.C. Gen. Stat. § 108A-49(b). As stated above, in the context of adoption assistance, a determination of "special needs" requires, *inter alia*, the presence of "a specific factor or condition . . . because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance[.]" 42 U.S.C. § 673(c)(1)(B). This determination also requires that "a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section[.]" *Id.*; *see also* 10A N.C. Admin. Code 70M.0402(a)(4) (2014). In accord with these statutory and regulatory requirements, DHHS recognized in its final decision that "the evidence does not support that [CW] was 'un-adoptable' or hard to place due to special needs or that any efforts had to be made with other specialized adoption agencies or adoption exchanges in order to facilitate an adoption of [CW]."

Instead of "examin[ing] the entire record to determine whether [DHHS's] decision was based on substantial evidence such that a reasonable mind may reach the same decision[,]" *Christian*, 258 N.C. App. at 584–85, 813 S.E.2d at 472, the superior court made one finding of fact: "Respondents were well aware of CW's special needs prior to adoption, as CW received Medicaid from birth until shortly after the finalization of his adoption." The whole record does not support this finding, nor would this finding be dispositive of the legal issue of whether CW was "a child with

special needs" because this finding does not comport with the definition of the term "special needs" as used in the adoption assistance context.

Indeed, as regards these requirements, the superior court's determination of CW's eligibility is belied by the whole record. Not only was DHHS's decision "based on substantial evidence such that a reasonable mind may reach the same decision[,]" *Christian*, 258 N.C. App. at 584–85, 813 S.E.2d at 472, it is unreasonable to conclude that CW could not be placed with adoptive parents without adoption assistance when he *was*, in fact, placed with Petitioners without adoption assistance.

Moreover, because CW was plainly ineligible for Title IV-E adoption assistance benefits on these grounds, the whole record does not support the superior court's finding that "Petitioners did not meet the criteria for eligibility for adoption assistance when they applied ***only*** as a result of Respondents[']' failure to adequately advise Petitioners of the availability of adoption assistance and the requirements of the same." Accordingly, the superior court erred by concluding that "Respondents' actions were without substantial justification," or that DHHS's final decision was "not supported by the whole record and [wa]s arbitrary, capricious and an abuse of discretion."

The superior court also did not dispute the federal and state regulatory requirement that the adoption assistance application be signed and approved before the adoption became final. *See* 45 C.F.R. 1356.40(b)(1); 10A N.C. Admin. Code 70M.0402(b)(4) (2014). DHHS cited these regulations in its final decision and correctly observed that Petitioners' application did not comply with this requirement. Nonetheless, the superior court relied upon the existence of "extenuating circumstances"—namely, the perceived "arbitrary and capricious and bad faith" actions of Respondents—to conclude that "this matter [needed] to be re-opened and a subsequent determination [made] of CW's eligibility for adoption assistance."

North Carolina's appellate courts have never adopted or applied the "extenuating circumstances" doctrine when interpreting Title IV-E; however, other jurisdictions had adopted this doctrine prior to the 2001 issuance of the Federal Policy Announcement. As the Supreme Court of Pennsylvania explained in *Laird v. Department of Public Welfare*, a 1992 federal policy statement formed the basis for the extenuating circumstances doctrine. 23 A.3d 1015, 1024 (Pa. 2011). That earlier guidance "stated that adoptive parents would be eligible for a fair hearing if a state agency charged with the administration of adoption subsid[i]es failed to notify adoptive parents of the availability of subsidies[.]" *Id.*

The Federal Policy Announcement "clarified several outstanding adoption assistance questions, while also revoking fifteen previously issued policy statements and interpretations[,]" including the 1992 policy statement that formed the basis for the extenuating circumstances doctrine. *Id.* at 1025. Yet, as the *Laird* Court explained, the Federal Policy Announcement "did not abolish the extenuating circumstances doctrine; rather, it detailed various clarifications to it." *Id.*

Here, in its order, the superior court relied, in part, on the Federal Policy Announcement, describing its guidance as follows:

> a. Adoption agencies, whether public or private, have an affirmative duty to notify prospective adoptive parents and prospective legal guardians of the availability of adoption assistance.
>
> b. *Failure by the State agency to advise potential adoptive parents about the availability of adoption assistance is an extenuating circumstance*, which justifies a fair hearing and a subsequent grant of adoption assistance if the child meets the eligibility requirements.

(Emphasis added).

It is true that the Federal Policy Announcement states that "the State or local [T]itle IV-E agency is responsible for assuring that prospective adoptive families with whom they place eligible children who are under their responsibility are apprised of the availability of [T]itle IV-E adoption assistance." Federal Policy Announcement, at 13. But the superior court overlooked the very next paragraph, which explains how that responsibility dissipates in cases such as this, in which the child was adopted through a private adoption agency, such as CHS, without the involvement or knowledge of the State or local Title IV-E agency.

The Federal Policy Announcement explains:

> However, in circumstances where the State agency does not have responsibility for placement and care, or is otherwise unaware of the adoption of a potentially special needs child, it is incumbent upon the adoptive family to request adoption assistance on behalf of the child. *It is not the responsibility of the State or local agency to seek out and inform individuals who are unknown to the agency about the possibility of [T]itle IV-E adoption assistance for special needs children who also are unknown to the*

> *agency*. This policy is consistent with the intent and purpose of the statute, and that is to promote the adoption of special needs children who are in the public foster care system.

Id. (emphasis added). Additionally, the Federal Policy Announcement reiterates that "[t]he right to a fair hearing is a procedural protection that provides due process for individuals who claim that they have been wrongly denied benefits. *This procedural protection, however, cannot confer [T]itle IV-E benefits without legal support or basis*." *Id.* at 17 (emphasis added).

CW did not meet the eligibility requirements for adoption assistance in 2014, thus relieving CHS of any liability for a supposed "failure to adequately advise Petitioners of the availability of adoption assistance and the requirements of the same." Moreover, the Federal Policy Announcement makes clear that the superior court's conclusion that DHHS and DSS had an "affirmative duty to provide information to Petitioners related to the potential availability of adoption assistance" is erroneous. Indeed, at the judicial-review hearing, counsel for both DHHS and DSS explained that each respective agency was unaware of CW's private adoption through CHS.

Our dissenting colleague views this case as concerning "Respondents' duty to fully share and inform prospective adoptive parents of their knowledge of specific facts of a child's health conditions and needs and prognosis gained exclusively through their care, custody, and control over the child." *Dissent*, slip op. at *3. However, as DSS and DHHS make clear in their appellate briefs, "there is nothing in the record to indicate that either . . . DSS or DHHS were actually aware of the private adoption proceedings entered into by [CHS] and Petitioners prior to the finalization of CW's adoption in 2014." Indeed, nothing in the record supports the trial court's finding that "Respondents were well aware of CW's special needs prior to adoption, as CW received Medicaid from birth until shortly after the finalization of his adoption." In so finding, the superior court improperly imputed to DSS and DHHS knowledge of CW, his condition, and his adoption, and impermissibly exceeded its limited standard of review by making its own findings of fact that were not supported by the whole record. *See Sound Rivers*, 385 N.C. at 3, 891 S.E.2d at 85.

As for the period of "care, custody, and control over the child" on which our dissenting colleague focuses, *dissent* at *3, the record reflects that the period in which CHS had sole custody of CW before placing

him with Petitioners was between four days and three weeks, not six months. As the superior court correctly noted, CHS placed CW with Petitioners in June 2021, and the record reflects that when three-week-old CW was seen in the emergency department, Petitioners were present as "his adoptive parents[.]"

Rather than concerning any "affirmative duty" on the part of any of the Respondents "to use their knowledge and expertise and to share the information they have gained and the potential availability of means to defray costs and accomplish identified special needs[,]" as our dissenting colleague posits, *id.* at *8, this appeal is properly focused on the superior court's appropriate standards of review. DHHS's final decision reflected an accurate interpretation of the applicable federal and state statutes and regulations, and an appropriate application of the facts presented to the law. The superior court exceeded the limits of the applicable standards of review by concluding that CW was eligible for adoption assistance benefits, that "Respondents' actions were without substantial justification," and that there were extenuating circumstances justifying a reconsideration of CW's eligibility. The superior court did not properly apply the appropriate standards of review, and improperly "weigh[ed] the evidence presented to [DHHS] and substitute[d] its evaluation of the evidence for that of [DHHS]." *Id.* (citation omitted). Accordingly, the superior court's order reversing DHHS's final decision must be reversed.

In light of our disposition, we decline to address the arguments presented by CHS and DSS regarding whether the superior court lacked jurisdiction on appeal from DHHS's final decision to enter an order against those entities.

III. Conclusion

For the foregoing reasons, we reverse the superior court's order, which reversed the final decision of DHHS.

REVERSED.

Judge STROUD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

Respondents, NC DHHS, CHS, and Forsyth County DSS failed to carry their burden to show any error and prejudice in the superior court's order. The order is properly affirmed.

The issue before us is simple: What duty, if any, did Respondents possess to disclose the potential availability of State and Federal adoption assistance benefits to Petitioners, prior to Petitioners' adoption of C.W.? C.W. was under CHS' and DSS' sole legal custody, care, and control and possessed expertise and specialized knowledge of these programs. The superior court correctly found CHS and DSS owed such duties, had failed to disclose, and are liable to Petitioners. The superior court reviewed the whole record, found, and concluded: "Based on C[.]W[.]'s past and present medical history and circumstances, C[.]W[.] qualified as a 'special needs' child in 2014, and he still meets those qualifications today[.]" I respectfully dissent.

I. Jurisdiction

The Superior Court possessed jurisdiction to hear the petition involving a final agency decision pursuant to N.C. Gen. Stat. § 108A-79(k) (2023). This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

II. Background

C.W.'s mother was addicted to and had ingested various illegal drugs, while he was *in utero*. C.W. was delivered prematurely at 34 weeks by Cesarean Section on 28 May 2014. C.W. weighed 5 pounds 11.7 ounces at birth. C.W. tested positive at birth for the presence of Cocaine, Opiates, Amphetamines, Benzodiazepines, and Marijuana. He was treated for the effects of premature delivery and the effects of the illicit drugs in his body and remained hospitalized for two weeks after birth. C.W. was diagnosed having Monofixation Syndrome, hyperopia, ptosis, and accommodative esotrapia. CHS gained exclusive care, custody, and control over C.W. shortly after he was born.

The superior court correctly found DSS became involved with C.W. by receiving an application for, seeking, and securing Medicaid benefits for him. C.W. remained within CHS' and DSS' legal care, custody, and control until his adoption by Petitioners was finalized 23 December 2014. Despite C.W.'s health and history at birth, and the treatments he had received while in CHS' legal custody, it is undisputed Petitioners received no disclosure or discussion of adoption assistance

benefits potentially available under 42 U.S.C. § 673(a)(2). *See* 10A N.C. Admin. Code 70M.0402(a)(2) (2023) (incorporating by reference the eligibility criteria for adoption assistance benefits found in 42 U.S.C. § 673(a)(2) (2018)).

Petitioners formally adopted C.W. on 23 December 2014. C.W. has been diagnosed with attention-deficit/hyperactivity disorder and various vision/ocular conditions. C.W.'s multiple evaluations also show potential autism spectrum disorders.

The whole record clearly shows, and the superior court correctly found: "Respondents were well aware of C[.]W[.]'s special needs prior to adoption, as C[.]W[.] received Medicaid from birth until shortly after the finalization of his adoption." The superior court also found and concluded: "C[.]W[.] would have been eligible to receive adoption assistance as of December 2014, and . . . it is clear that C[.]W[.] is still currently eligible to receive adoption assistance."

III. N.C. Gen. Stat. § 108A-49(b)

N.C. Gen. Stat. § 108A-49(b) requires "the child ha[ve] special needs which create a financial barrier to adoption." N.C. Gen. Stat. § 108A-49(b) (2023). This statute incorporates the Federal adoption assistance requirement that, a determination of "special needs" requires, *inter alia*, the presence of "a specific factor or condition . . . because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption [financial] assistance[.]" 42 U.S.C. § 673(c)(1)(B).

Respondents and the majority's opinion assert Petitioners cannot meet these statutory thresholds. I disagree. Theirs is an *ipso facto* argument, which seeks to excuse or obliterate Respondents' duty to fully share and inform prospective adoptive parents of their knowledge of specific facts of a child's health conditions and needs and prognosis gained exclusively through their care, custody, and control over the child.

This duty is particularly relevant when the prospective adoptive parents cannot access the relinquishing parent and do not know the child's family health history, genetic predisposition, or inherited traits. To use these statutes as purported authority to withhold or excuse failure to disclose critical health information needed and potential financial resources available to properly care for the child is an anathema to the very reasons these assistance programs exist.

As the superior court properly found and concluded, the "financial barrier to adoption" requirement only exists within the context

of and after full disclosure by CHS and DSS of all known and relevant information about the child's health and conditions and prognosis to the prospective parents in order to enable them to assess needs and available resources, and to make an informed decision. N.C. Gen. Stat. § 108A-49(b) (providing the "financial barrier to adoption" requirement). This is particularly true with a newborn or infant child, as here, where the child's medical history, evaluations, and prognosis lies solely and exclusively with Respondents.

The superior court properly focused on what CHS and DSS knew or should have known and failed to disclose about C.W.'s condition, needs, and prognosis before and, at a minimum, between his birth in May 2014 and his adoption by Petitioners the following December. Respondents, not Petitioners, had a contract with C.W.'s mother before, during, and after his birth and exercised exclusive control over his medical care and treatments until he was formally placed with Petitioners in September 2014. Respondents continued to exercise legal custody and control over C.W. until his adoption was completed in December 2014. The superior court correctly rejected Respondents' specious argument that Petitioners could not satisfy this required "financial barrier to adoption" without Petitioners first being fully informed by Respondents. N.C. Gen. Stat. § 108A-49(b).

IV. Assistance application be signed and approved prior to adoption

Federal and state regulations require the adoption assistance application to be signed and approved "*prior to*" the adoption becoming final. 10A N.C. Admin. Code 70M.0402(b)(4) (2014) (emphasis supplied); *see also* 45 C.F.R. 1356.40(b)(1) (2012) (explaining the "adoption assistance agreement" must "[b]e signed and in effect at the time of or prior to the final decree of adoption").

The whole record shows Petitioners and CHS eventually completed an adoption assistance eligibility checklist. Petitioners submitted an application for adoption assistance on 10 May 2021. DSS received the application and "inquired if there was a date scheduled for finalizing the adoption as 'the adoption agreement will have to be completed and signed prior to finalizing' the adoption."

CHS informed DSS "the adoption was finalized in 2014"; admitted "an adoption assistance application was not completed at that time"; and, that " '[t]his was a private adoption where [CHS] was the legal guardian prior to the adoption being finalized.' "

The superior court properly relied upon the whole record and the existence of these "extenuating circumstances" to conclude "this matter

[needed] to be re-opened and a subsequent determination [made] of C[.]W[.]'s eligibility for adoption assistance." The "extenuating circumstances" cited in addition to the facts stated above were Respondents' "arbitrary and capricious and bad faith" actions.

The presence and use of "extenuating circumstances" has been applied to excuse strict compliance with the "prior to" requirement when interpreting Title IV-E by other jurisdictions relying on federal policy statements from 1992 and 2001. The Supreme Court of Pennsylvania explained, in *Laird v. Department of Public Welfare*, a 1992 federal policy statement formed the basis for the "extenuating circumstances" doctrine. 23 A.3d 1015, 1024 (Pa. 2011). The earlier Federal guidance "stated that adoptive parents would be eligible for a fair hearing if a state agency charged with the administration of adoption subsid[i]es failed to notify adoptive parents of the availability of subsidies[.]" *Id.*

The 2001 Federal Policy Announcement "clarified several outstanding adoption assistance questions, while also revoking fifteen previously issued policy statements and interpretations[,]" including the 1992 policy statement that formed the basis for the extenuating circumstances doctrine. *Id.* at 1025 (citing U.S. Dep't of Health & Hum. Servs., Admin. for Child., Youth & Fams., Pol'y Announcement, Log No. ACYF-CB-PA-01-01 (Jan. 23, 2001) ("2001 Federal Policy Announcement"). The 2001 Federal Policy Announcement "did not abolish the extenuating circumstances doctrine; rather, it detailed various clarifications to it." *Id.*

The superior court correctly relied upon, cited, and summarized the 2001 Federal Policy Announcement as follows:

> c. *Adoption agencies*, *whether public or private*, *have an affirmative duty to notify prospective adoptive parents and prospective legal guardians of the availability of adoption assistance.*
>
> d. *Failure* by the State agency *to advise potential adoptive parents* about the availability of adoption assistance is *an extenuating circumstance*, which justifies a fair hearing and a subsequent grant of adoption assistance if the child meets the eligibility requirements.

(emphasis supplied).

The superior court correctly found and concluded the 2001 Federal Policy Announcement mandates: "the State or local [T]itle IV-E agency is responsible for assuring that prospective adoptive families with whom they place eligible children who are under their responsibility

are apprised of the availability of [T]itle IV-E adoption assistance." 2001 Federal Policy Announcement, ACYF-CB-PA-01-01, at 13.

The superior court properly considered DSS' role and involvement in securing Medicaid coverage for C.W. and CHS' involvement or knowledge of the State or local Title IV-E agency. The 2001 Federal Policy Announcement reiterates: "The right to a fair hearing is a procedural protection that provides due process for individuals who claim that they have been wrongly denied benefits. This procedural protection, however, cannot confer [T]itle IV-E benefits without legal support or basis." *Id.* at 17.

The "legal support or basis" the superior court found upon review of the whole record was, "Respondents were well aware of C[.]W[.]'s special needs prior to adoption, as C[.]W[.] received Medicaid from birth until shortly after the finalization of his adoption." DSS, along with CHS, were privy to all of C.W.'s family and medical history, diagnoses at birth, tests, evaluations, and prognoses from his birth for over six months until the adoption was finalized. Respondents possessed exclusive and specialized knowledge and skills, which they failed to share with Petitioners.

V. Conclusion

Our common sense of transparency and fairness is violated when the "ball is hidden" or by failure to speak when a duty to speak exists. While acts of omission may not be regarded as culpable as affirmative or willful acts of commission, adoption is not like an AS-IS; WHERE-IS, WITH ALL FAULTS commercial transaction.

This duty to disclose is particularly relevant in infants, as here, where critical needs, risks, and prognosis must be shared to allow the adoptive parents to plan to meet both known or likely needs. This "affirmative duty" to disclose is reinforced by Federal and State policies to assist and supplement orphaned or abandoned children with known special needs to promote adoptions and cease or reduce them being public charges.

To fully assess and plan for future needs, prospective adoptive parents must be provided with known medical, mental, physical needs, and prognoses, and of the availability of public assistance to fulfill these special needs. The superior court correctly found and concluded public and private agencies involved in these adoption processes owe an "affirmative duty" to use their knowledge and expertise and to share the information they have gained and the potential availability of means to defray costs and accomplish identified special needs.

The superior court reviewed the whole record and found: "Respondents were well aware of C[.]W[.]'s special needs prior to adoption, as C[.]W[.] received Medicaid from birth until shortly after the finalization of his adoption," and that "C[.]W[.] would have been eligible to receive adoption assistance as of December 2014, and . . . it is clear that C[.]W[.] is still currently eligible to receive adoption assistance."

These properly supported findings from the whole record support the superior court's conclusion that "Petitioners are entitled to receive adoption assistance both from the date of this Order, and retroactive assistance to December 23, 2014[.]" The superior court's order also remanded the matter "to Respondents for a determination of the amount of adoption assistance to which Petitioners are entitled" and for the execution of "all necessary documents in order for Petitioners to receive adoption assistance retroactive to December 23, 2014 and continuing thereafter as long as C[.]W[.] meets eligibility requirements[.]" The court in its discretion also properly found and awarded Petitioners reimbursement of $10,750.00 in attorney's fees as the prevailing party.

CHS and DSS failed to carry their burden to show error and prejudice in the superior court's order. The order is properly affirmed. I respectfully dissent.

WILSON RATLEDGE, PLLC, Plaintiff
v.
JJJ FAMILY, LP, a Nevada Limited Partnership, and LOFTIN ENTERPRISES, LLC, General Partner of JJJ FAMILY, LP, Defendants

No. COA23-959

Filed 7 May 2024

1. Jurisdiction—personal—general—minimum contacts—nonresident business entities—continuous and systematic contacts

In an action for breach of contract and related claims brought by a North Carolina law firm against nonresident business entities (defendants), the trial court did not err in concluding that it had general jurisdiction over defendants where its findings of fact—including that the employee who for years managed defendants' transactions and finances worked remotely from her home in North Carolina and that defendants filed taxes, received mail, and stored business records in North Carolina—demonstrated defendants'

continuous and systematic contacts with this state. Having purposefully availed themselves of the privilege of conducting activities in North Carolina, defendants' constitutional due process rights were not violated by the court's exercise of jurisdiction.

2. Jurisdiction—personal—specific—minimum contacts—nonresident business entities—contract with North Carolina law firm

In an action for breach of contract and related claims brought by a North Carolina law firm against nonresident business entities (defendants), the trial court did not err in concluding that it had specific jurisdiction over defendants where its findings of fact—including that the parties contracted via an engagement letter drafted, accepted, and executed in this state for legal services by a North Carolina law firm, governed by the laws of this state, with substantial legal work performed in this state, and payment made to plaintiff in this state—demonstrated that the action arose out of defendants' contacts with North Carolina. In light of those sufficient minimum contacts with North Carolina, defendants' constitutional due process rights were not violated by the court's exercise of jurisdiction.

Appeal by defendants from order entered 14 July 2023 by Judge John W. Smith in Superior Court, Wake County. Heard in the Court of Appeals 3 April 2024.

Smith, Anderson, Blount, Dorsett, Mitchell, & Jernigan, LLP, by John E. Harris and J. Mitchell Armbruster, for defendant-appellants.

Bailey & Dixon, LLP, by David S. Coats, for plaintiff-appellee.

ARROWOOD, Judge.

JJJ Family, LP ("JJJ Family") and Loftin Enterprises, LLC ("Loftin Enterprises") (together, "defendants") appeal from the trial court's order denying their motion to dismiss for lack of personal jurisdiction. Defendants contend the trial court erred in concluding it had specific and general jurisdiction over them. We affirm the trial court's order.

I. Background

Peter Loftin ("decedent") was from North Carolina and oversaw two businesses, the defendant companies, as part of a larger structure to

manage his business assets and interests. JJJ Family is a Nevada limited partnership, and Loftin Enterprises is a Delaware limited liability company. Loftin Enterprises is the General Partner of JJJ Family, and both defendants maintain offices in Florida. Decedent controlled both defendant companies, and he employed Ms. Amy Usrey ("Usrey") as his assistant. Usrey managed both defendant companies from Johnston County, North Carolina, including the day-to-day management of JJJ Family.

Thomas J. Wilson ("Wilson") is a founding member of the law firm Wilson Ratledge, PLLC ("plaintiff"), and plaintiff and Wilson began representing decedent as legal counsel in the early 2000s. Plaintiff is a North Carolina law firm with its primary office in Raleigh, North Carolina and an office in Florida. Plaintiff and Wilson represented decedent in tax, business, and estate matters. Decedent passed away on 16 November 2019. Decedent's will appointed Wilson as the personal representative of his estate probated in Florida, making him the controlling authority for defendant companies.

On 14 February 2020, Wilson hired plaintiff, his own law firm, to represent defendants. The parties signed an engagement letter providing that plaintiff would represent defendants "as needed and requested and accepted by us from time to time, initially with respect to all business matters relating to the Limited Partnership, its affiliates and Partners . . . ." Wilson signed the engagement letter on behalf of defendants.

A dispute arose between Wilson and decedent's children regarding Wilson's administration as personal representative of the Florida Estate. On 28 January 2022, Wilson and decedent's children entered into an agreement ("the Side Agreement") appointing Jorian Loftin as co-personal representative of the estate. The Side Agreement provided that Wilson and plaintiff "may each seek payment of attorney's fees and costs for its representation of [Wilson] in the Probate Administration and Adversary Case . . . ." The Side Agreement further provided under the "Governing Law" section that the agreement "shall be governed by and construed in accordance with the laws of the State of Florida," and under the "Entire Agreement" provision, that the agreement "supersedes all prior and contemporaneous agreements . . . of the parties." Plaintiff law firm signed the agreement.

On 13 February 2023, plaintiff filed suit against defendants alleging breach of contract, quantum meruit in the alternative, and tortious interference with contract. Plaintiff sought sums owed for legal representation pursuant to the engagement letter. Defendants filed a motion to dismiss for lack of personal jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2).

On 26 June 2023, a hearing on the motion was held in Superior Court, Wake County. The trial court entered an order denying the motion on 14 July 2023. The trial court concluded that

> 3. At the time this action was instituted, Defendants were engaged in substantial activities within North Carolina. . . .
>
> 4. Personal jurisdiction over this action and both of the Defendants is authorized by N.C.G.S. § 1-75.4.
>
> 5. This action arises out of Defendants' contacts with North Carolina and Defendants had fair warning that they may be sued in North Carolina for services performed under the Contract.
>
> 6. Moreover, Defendants both have sufficient contacts with North Carolina.
>
> 7. The Contract also has a substantial connection with North Carolina.
>
> 8. North Carolina properly has specific jurisdiction over both of the Defendants.
>
> 9. North Carolina also properly has general jurisdiction over both of the Defendants.
>
> 10. The exercise of personal jurisdiction over this action and both of these Defendants does not violate the Due Process clause of the United States Constitution.

Defendants filed timely notice of appeal 28 July 2023.

II. Discussion

On appeal, defendants argue that the trial court erred in concluding it had personal jurisdiction over defendants. For the following reasons, we affirm the trial court's order.

As a preliminary matter, we note defendants' appeal from a denial of a motion to dismiss for lack of jurisdiction is interlocutory. However, "[t]he denial of a motion to dismiss for lack of jurisdiction is immediately appealable." *Cambridge Homes of N.C., LP v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 410 (2008) (citations omitted); N.C.G.S. § 1-277(b) (2023).

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Cambridge Homes of N.C., LP*, 194 N.C. App. at 410

(citation omitted). Moreover, "if the trial court's findings of fact resolving the defendant's jurisdictional challenge are not assigned as error, the court's findings are presumed to be correct." *Brown v. Refuel America, Inc.*, 186 N.C. App. 631, 634 (2007) (cleaned up). We review whether the trial court's findings of fact support its conclusions of law de novo. *Nat'l Util. Rev., LLC v. Care Ctrs., Inc.*, 200 N.C. App. 301, 303 (2009) (citation omitted).

Our analysis of personal jurisdiction is two-fold. "First, jurisdiction over the action must be authorized by N.C.G.S. § 1-75.4, our state's long-arm statute. Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Skinner v. Preferred Credit*, 361 N.C. 114, 119 (2006) (citations omitted). Defendants do not challenge that the long-arm statute authorizes jurisdiction here. Thus, the sole issue is whether the trial court's exercise of jurisdiction violated due process.

"To satisfy the requirements of the due process clause, there must exist 'certain minimum contacts [between the non-resident defendant and the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 695 (2005) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "The factors used in determining the existence of minimum contacts include (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 145 (1999) (cleaned up).

There are two bases for finding sufficient minimum contacts: specific jurisdiction and general jurisdiction. *Banc of Am. Sec. LLC*, 169 N.C. App. at 696. We discuss each in turn below.

A. General Jurisdiction

[1] Defendants contend that the trial court erred in its determination that it had general jurisdiction over defendants. We disagree.

General jurisdiction over a defendant exists "even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient 'continuous and systematic' contacts between defendant and the forum state." *Replacements, Ltd.*, 133 N.C. App. at 145 (citations omitted). Defendants "must engage in acts by which they purposefully avail themselves of the privilege of conducting activities within

the forum State." *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 279 (2007) (cleaned up).

In *Schaeffer v. SingleCare Holdings, LLC*, our Supreme Court held that a business with an employee working remotely in North Carolina purposely availed itself in the state. 384 N.C. 102, 112 (2023). The corporate defendant in that case paid state taxes, mailed tax documents to the plaintiff's North Carolina address, and paid him in the state. *Id.* at 111. The company contacted the plaintiff frequently and supported his work in North Carolina, and because of its contacts, the Supreme Court reasoned that the business "voluntarily and knowingly engaged with a North Carolina-based employee" and was thus subject to personal jurisdiction in the state. *Id.* at 112.

Defendants do not challenge any of the facts relevant to the court's determination of general jurisdiction. In its order, the trial court found:

> 6. The Decedent was born and raised in North Carolina and developed a substantial business in North Carolina.
>
> . . . .
>
> 12. Ms. Amy Usrey, who was the Decedent's long-time assistant, is a citizen and resident of Johnston County, North Carolina.
>
> 13. Ms. Usrey managed both Defendants JJJ and Loftin Enterprises from North Carolina.
>
> 14. Ms. Usrey has been a Manager of Defendant Loftin Enterprises since 2012, has controlling signatory authority for Defendant JJJ, and is responsible for the ultimate day-to-day management of JJJ.
>
> 15. The tax returns for both Defendants have been prepared by their accountant in North Carolina and North Carolina has been listed as their address on their tax returns.
>
> 16. Both Defendants maintained post office box mailing addresses in North Carolina.
>
> 17. Defendant Loftin Enterprises maintains a storage unit in North Carolina for their business records.

These findings are presumed to be correct, and the question becomes whether they support the court's conclusion that general jurisdiction can be exercised over defendants.

We hold these findings are sufficient to establish general jurisdiction over defendants. Like the employee in *Schaeffer*, Usrey worked for both defendant companies remotely from her home in North Carolina. Both defendants conducted business in North Carolina through Usrey, who was responsible for daily tasks such as engaging in transactions and managing finances for both defendants. Similar to the company in *Schaeffer*, defendants filed taxes and received returns in North Carolina, received mail in North Carolina, and stored business records in North Carolina. The management of defendants' businesses in North Carolina evidence their "continuous and systematic" contacts with this state, and the trial court did not err in concluding it had general jurisdiction over defendants.

B. Specific Jurisdiction

[2] Defendants next argue that the trial court erred in concluding that it had specific jurisdiction over defendants. We disagree.

Specific jurisdiction over a defendant arises out of the defendant's contacts with the forum state. *Beem USA Limited-Liability Ltd. P'ship v. Grax Consulting, LLC*, 373 N.C. 297, 303 (2020) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). "While a contractual relationship between an out-of-state defendant and a North Carolina resident is not dispositive of whether minimum contacts exists, a single contract may be a sufficient basis for the exercise of specific personal jurisdiction if it has a substantial connection with this State." *Hundley v. AutoMoney, Inc.*, 284 N.C. App. 378, 384 (2022) (citations and internal quotation marks omitted).

The trial court found, and defendants do not contest:

> 7. The Contract pertained to legal services provided by Plaintiff to Defendants for non-probate matters.
>
> 8. Thomas Wilson was authorized by Defendant JJJ to enter into the Contract.
>
> 9. The Contract was drafted in North Carolina, was accepted in North Carolina, was executed in North Carolina, and required the payment of fees to [plaintiff] in North Carolina.
>
> 10. The Contract also specifies that the agreement "shall be governed and construed in accordance with the laws if the State of North Carolina" and in numerous provisions cites to the applicability of certain North Carolina State Bar

> rules and North Carolina Bar Association requirements.
>
> 11. All invoices from [plaintiff] involved substantial legal work performed by [plaintiff] in North Carolina.
>
> . . . .
>
> 19. The invoices under the Contract were generated in and transmitted from North Carolina by [plaintiff] and payment was to be made to [plaintiff] in North Carolina.

The only finding of fact defendants challenge on appeal is that plaintiff was not a party to the Side Agreement. Specifically, defendants challenge the following finding:

> 18. Counsel for Defendants during the hearing handed up a "Side Agreement" dated January 28, 2022, between Thomas Wilson as personal representative of the Decedent's Estate, Jorian Loftin – the Decedent's son, and Kairee Hall as guardian for Decedent's other sons – Jett Loftin and Jagger Loftin. Neither [Wilson Ratledge], JJJ, or Loftin Enterprises are parties to the Side Agreement.

Defendants argue that because plaintiff signed the Side Agreement, they were a party to the agreement and thus were bound by the governing law and entire agreement provisions. This argument is without merit—on the first page of the Side Agreement, the document states that "WILSON, JORIAN, JETT, and JAGGER shall each be referred to hereunder as a 'party' or collectively, the 'parties.' Counsel for the parties are identified at the end of this Agreement." On its face, the Side Agreement identifies the parties to the agreement, and this designation does not include plaintiff or defendants as parties. Therefore, the trial court's finding that plaintiff was not a party to the agreement was correct.

Given that plaintiff and defendants contracted in North Carolina for plaintiff's legal representation, defendants were on notice that they could be sued in North Carolina. The trial court found that the engagement letter was drafted, accepted, and executed in North Carolina and was for legal services provided by a North Carolina law firm. The terms and conditions provided that the engagement letter and terms would be governed by North Carolina law and referred to North Carolina State Bar rules and requirements. The trial court also found that all of plaintiff's invoices "involved substantial legal work performed by [plaintiff] in North Carolina" and required payment to plaintiff in North Carolina. These uncontested findings support the trial court's conclusion that this action arose out of defendants' contacts with North Carolina, and the

trial court did not err in determining it had specific jurisdiction over defendants. *See Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 618–19 (2000) (holding personal jurisdiction existed where defendant owned and leased real property and North Carolina had an interest in adjudicating a case involving a resident arising from a contract for the resident's services); *see also A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 260–61 (2006) ("Here, the only contacts are telephone calls and a few proposed contracts, one sent by Haire. Defendants never entered into a contract with A.R. Haire, Inc. either in or out of the State of North Carolina.").

III. Conclusion

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

AFFIRMED.

Judges WOOD and FLOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 MAY 2024)

ARNOLD v. SWEYER & ASSOCS., INC. No. 23-640	Brunswick (19CVS1911)	Affirmed.
BLACKMON v. BLACKMON No. 23-538	Pitt (20CVD2234)	Vacated and Remanded
DIMUZIO v. DIMUZIO No. 23-494	Columbus (18CVD1519)	Affirmed
HANSON v. MARTEN TRANSP., LTD. No. 23-843	N.C. Industrial Commission (20-747132)	Affirmed.
HURD v. PRIORITY AUTO. HUNTERSVILLE, INC. No. 23-1104	Mecklenburg (19CVD12741)	Reversed and Remanded
IN RE A.F.L. No. 23-1059	Montgomery (21JT11) (21JT12)	DISMISSED in part, and AFFIRMED in part.
IN RE C.D.G. No. 23-894	Wake (15JT120) (15JT122)	Affirmed
IN RE M.K.P-C. No. 23-1075	Lincoln (22JT5)	Reversed
IN RE Z.M. No. 23-829	Alleghany (22JA11) (22JA12) (22JA13)	Affirmed
IN RE Z.S. No. 23-850	Forsyth (22JA84) (22JA86)	Affirmed
JONES v. CORN No. 23-935	Henderson (19CVS1447)	Affirmed
KENT v. JOHNSON No. 22-1060	Guilford (20CVD7835)	Affirmed
KUSTOM U.S., INC. v. BRYANT No. 23-370	Onslow (20CVS2015)	Affirmed
NORMAN v. ALLSTATE INS. CO. No. 23-1111	Davidson (23CVS712)	Affirmed

STATE v. AFZAL No. 23-800	Wake (21CRS210926) (21CRS210927)	Vacated in part and remanded.
STATE v. ALLEN No. 23-831	Edgecombe (21CRS52225)	No Error
STATE v. ANDERSON No. 23-169	Guilford (20CRS26090-92)	No Error
STATE v. AROLD No. 23-1076	Transylvania (22CRS50078)	Dismissed
STATE v. BEST No. 22-856	Sampson (18CRS52520)	No Error
STATE v. BULLOCK No. 23-818	Guilford (21CRS79038-40)	No Error.
STATE v. CARPENTER No. 23-867	Mitchell (21CRS50241)	Remanded.
STATE v. CHINNAS No. 23-706	Guilford (20CRS88040)	No Error.
STATE v. EL No. 23-745	Mecklenburg (19CRS204328) (19CRS24814)	No Error
STATE v. FRANK No. 23-695	Bladen (21CRS272-278)	No Error in Part, Remanded in Part.
STATE v. FRASER No. 23-670	Craven (20CRS51140) (21CRS626)	No Error
STATE v. GLENDENING No. 23-366	Pender (21CRS50088)	No Error
STATE v. GREER No. 23-926	Catawba (22CRS2595) (23CRS242172)	No Error
STATE v. GRICE No. 23-1058	Brunswick (20CRS52906) (20CRS54860) (22CRS918-922)	Remanded
STATE v. HAMMOND No. 23-1118	Onslow (21CRS769) (21CRS776)	NO ERROR in part, and REMANDED in part.

STATE v. HEMINGWAY No. 23-275	Columbus (13CRS50656)	Affirmed
STATE v. HILL No. 23-910	Cabarrus (20CRS53548)	Remanded
STATE v. JACKSON No. 23-1054	Pitt (22CRS265533)	No Error
STATE v. KELLIHER No. 23-691	Cumberland (01CRS59934)	Vacated and Remanded
STATE v. KUERS No. 23-486	Pitt (18CRS54622)	No Error
STATE v. O'BUCKLEY No. 23-1034	McDowell (19CRS51908) (20CRS26) (20CRS28-29)	No Error
STATE v. SAUNDERS No. 23-916	Vance (17CRS53719)	No Error
STATE v. SHEPARD No. 23-824	Martin (19CRS216)	No Plain Error
STATE v. SMITH No. 22-621	Davie (13CRS50876)	Affirmed
STATE v. SPEIGHT No. 23-815	Beaufort (21CRS51209) (21CRS51220)	No Error
STATE v. WHITAKER No. 23-569	Randolph (21CRS50076)	No Plain Error
STATE v. WYNNE No. 23-586	Martin (20CRS50450)	No Error
WILLIAMS v. N.C. DEP'T OF ADULT CORR. No. 23-876	N.C. Industrial Commission (TA-27245)	Affirmed

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