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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 29, 2025

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OF

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COURT OF APPEALS

CASES REPORTED

FILED 4 JUNE 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Summary judgment—whether job reclassification constituted a disciplinary demotion—no genuine issue of material fact—In a contested case where an employee (petitioner) alleged that she was subject to a disciplinary demotion without just cause in violation of N.C.G.S. § 126-35, the administrative law judge's final decision granting summary judgment in favor of the agency (respondent) was not error where, although petitioner had received an email notifying her of a proposed

new job title (as part of a new statewide compensation system), she was never in fact placed in the proposed position and instead was reclassified into another position—one that maintained her salary and provided a higher maximum pay range than her original job. **Dixon v. N.C. Dep't of Health & Hum. Servs., 127.**

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BAIL AND PRETRIAL RELEASE

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Neglect—three-week-old infant—unexplained non-accidental injuries—injurious environment—In an abuse and neglect matter in which two children were removed from their parents' care after the younger child—three weeks old at

the time—presented at a hospital with multiple acute fractures for which the parents had no plausible explanation, the trial court did not err by adjudicating the younger child neglected. Contrary to the parents' argument that the trial court "bootstrapped" its conclusion on neglect to the abuse allegations, the trial court made additional findings regarding neglect, including that, until an explanation emerged for the child's injuries, the home remained a potentially injurious environment with no reasonable means to protect any juvenile from incurring a similar injury. **In re E.H., 139.**

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CONSTITUTIONAL LAW

Criminal defendant—pretrial release conditions modified in violation of statute—lack of prejudice—dismissal erroneously granted—Although a superior court correctly determined that the district court violated statutory requirements when it modified the conditions of defendant's pretrial release (to impose a secured bond, which resulted in defendant being detained for two to four hours until his bond was posted) without making any written findings to explain its decision, the superior court erred by granting defendant's motion to dismiss pursuant to N.C.G.S. § 15A-954, which requires a showing of prejudice. Where the superior court concluded that defendant had not suffered any prejudice, based on its unchallenged findings that defendant made no argument that his detention irreparably prejudiced his ability to prepare his case in superior court, the court's order dismissing the charges based upon a different standard—that the modification of pretrial release conditions created an "impermissible chilling effect" on defendant's constitutional right to a trial by jury—required reversal, and the matter was remanded to the superior court with instructions to remand back to the district court for an amended order. **State v. Robinson, 269.**

Double jeopardy—remand after evidence held insufficient for first-degree murder—trial on lesser offenses permitted—Having determined that the evidence was insufficient to sustain defendant's first-degree felony murder conviction and reversed the judgment entered thereupon, the appellate court remanded the matter pursuant to N.C.G.S. § 15A-1447(c) for entry of a judgment on the lesser-included offense of involuntary manslaughter, which the evidence did support. Further, on remand the State had the discretion to retry defendant under the original bill of indictment for second-degree murder and voluntary manslaughter since doing so would not violate double jeopardy principles as long as, if a guilty verdict were to be obtained on either offense, the involuntary manslaughter judgment entered on remand was then arrested. **State v. Montanino, 240.**

N.C. COURT OF APPEALS
2025 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	13 and 27
February	10 and 24
March	17
April	7 and 21
May	5 and 19
June	9
August	11 and 25
September	8 and 22
October	13 and 27
November	17
December	1

Opinions will be filed on the first and third Tuesdays of each month.

CARLOTTA DIXON, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA24-79

Filed 4 June 2024

1. Administrative Law—summary judgment—whether job reclassification constituted a disciplinary demotion—no genuine issue of material fact

In a contested case where an employee (petitioner) alleged that she was subject to a disciplinary demotion without just cause in violation of N.C.G.S. § 126-35, the administrative law judge's final decision granting summary judgment in favor of the agency (respondent) was not error where, although petitioner had received an email notifying her of a proposed new job title (as part of a new statewide compensation system), she was never in fact placed in the proposed position and instead was reclassified into another position—one that maintained her salary and provided a higher maximum pay range than her original job.

2. Administrative Law—summary judgment—pending motion to compel discovery—not prematurely granted

In a contested case where an employee (petitioner) alleged that she was subject to a disciplinary demotion without just cause in violation of N.C.G.S. § 126-35, the administrative law judge's grant of summary judgment in favor the agency (respondent) while petitioner's motion to compel discovery remained pending was not premature where the record showed that petitioner was never demoted but rather only had her position reclassified at the same salary, rendering petitioner's discovery requests irrelevant.

Appeal by petitioner from Final Decision entered 22 November 2021 by Administrative Law Judge Karlene S. Turrentine ("ALJ") in the Office of Administrative Hearings ("OAH"). Heard in the Court of Appeals 15 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel K. Kovas and Assistant Attorney General Grace R. Linthicum, for respondent-appellee.

Bailey & Dixon, LLP, by Philip A. Collins, for petitioner-appellant.

ARROWOOD, Judge.

Carlotta Dixon ("petitioner") appeals from Final Decision entered 22 November 2021. For the following reasons, we affirm the ALJ's decision.

I. Background

Petitioner was hired by North Carolina Department of Health and Human Services' ("DHHS") Division of Social Services ("DSS") in 1999. In 2004, petitioner was promoted to the position of "Social Services Program Administrator I" with a salary grade of 74. The salary grade for that position was revised to a salary grade of 75 in December 2005.

In 2015, a classification and pay plan project was initiated by the Office of State Human Resources ("OSHR"). Petitioner received an email in January 2016, notifying her that DHHS and OSHR had "recommended new job titles for all agency positions in the new statewide compensation system." The email further provided petitioner "the proposed allocations for [her] review" in an attachment. The attachment listed petitioner's proposed job title as "Human Services Program Manager II."

The new classification and pay plan system was implemented in 2018, and employees were notified of their classification titles and pay grades via memo in May of that year. Petitioner's memo stated that her new classification was "Business Officer II" with a pay grade of GN13. The notice further stated, "With the implementation of the new Statewide Compensation System, no employee's salary will be reduced . . . . Your salary will remain the same."

Before the new classification and pay plan system was implemented, petitioner earned $73,259.00 annually as a "Social Services Program Administrator I." According to OSHR's 2017 Pay Plan Book, the salary range for that position was between $48,195.00 and $81,392.00. Immediately following her reclassification in June 2018 as a "Business Officer II," petitioner's annual salary remained at $73,259.00.[1] As of 2018, the salary grade for that position was GN13 with a range between $48,051.00 and $86,431.00. According to petitioner, the paygrade for a "Human Services Program Manager II" was GN15 with a salary range between $56,046.00 and $100,814.00.

After petitioner received the memo classifying her new position as "Business Officer II," she complained to her supervisor, Mr. Richard

1. Based on legislative pay increases, petitioner's salary increased to $74,724.00 in July 2018 and $76,592.00 in July 2019 as a "Business Officer II."

Stegenga ("Mr. Stegenga"). Mr. Stegenga then sought to have petitioner's job classification reconsidered and submitted a written request for her position to be classified as "Program Manager II" with a salary grade of GN16. The request was denied.[2]

According to petitioner, five DSS employees held the position of "Social Services Program Administrator I" before the new system's implementation, but only petitioner's position was reclassified as "Business Officer II." The other four employees were reclassified as a "Human Services Program Manager II."

On 2 January 2019, petitioner filed an informal Equal Employment Opportunity ("EEO") complaint, alleging harassment and retaliation by Mr. Stegenga and Mr. Michael Becketts ("Mr. Becketts"), DHHS's Senior Director for Policy and Planning. The complaint alleged that the retaliation involved compensation. The complaint requested as a remedy that the harassment and retaliation stop, and that petitioner's "position and Unit be moved organizationally from direct supervision of Mr. Stegenga and Mr. Becketts to report directly to Assistant Secretary for County Operations for Human Services, Ms. Susan Osborne."

On 6 March 2019, petitioner received written notice regarding a change in her supervisor and work assignment. The notice included the following:

> This is to inform you that effective March 11, 2019, your Supervisor will be Susan Osborne, Assistant Secretary for County Operations for Human Services. Your duties are aligned with your working title and your revised job description is being presented at the time of this notice.
>
> Your primary job duties will include Compliance Coordination, Constituent Services Coordination, Repatriation Program Coordination and SERT Coordinator for Division of Social Services. This change is a result of reorganization within this Division to best serve citizens, counties and other stakeholders that we support in our work. This is a permanent move and will allow the Division to comply with regulations, organize our work and meet the goals of the Department.

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2. According to a November 2018 email from DSS's Human Resource Manager, "after the DHHS subject matter experts reviewed the position description, org chart and justification, it was not recommended for the Proposed Program Manager II recommendation or in a managerial position. . . . Therefore, the action was completed and the position will remain[ ] as a Business Officer II . . . ."

> Your classification continues as Business Officer II Grade 13 and your salary will remain the same.

Petitioner initialed the memo, indicating that she "accept[ed] the change in [her] work supervision and work assignment" and that she "underst[oo]d that [her] classification as Business Officer II and salary w[ould] remain the same." According to DHHS's Deputy Secretary for Employment, Inclusion, and Economic Stability Tara Myers, the change in petitioner's duties "was not disciplinary in any way"; rather, the change was due to petitioner's "duties and scope of work [being] better aligned with Ms. Osborne's responsibilities and the work she supervised."

Petitioner filed a petition for a contested case hearing on 14 May 2021, alleging that she "was demoted without just cause by being reduced in pay, position, and/or material job duties and responsibilities that are tantamount to a demotion without just cause." Petitioner issued discovery requests to DHHS on 13 July 2021, and DHHS served its responses and objections to those requests on 23 August 2021. On 13 September 2021, DHHS filed a motion for summary judgment and accompanied exhibits, including petitioner's employee history and various documents involving the classification and pay plan system and its implementation. Petitioner filed a motion to compel discovery on 11 October 2021.

DHHS's motion for summary judgment and petitioner's motion to compel discovery were noticed for hearing on 10 November 2021, but the ALJ proceeded with hearing only the summary judgment motion on the grounds that petitioner's motion to compel would be rendered moot if DHHS's motion for summary judgment was granted. Petitioner objected, contending the case was not ripe for summary judgment because DHHS had not produced in discovery communications involving petitioner's position reclassification. The ALJ issued a Final Decision 22 November 2021, granting DHHS's motion for summary judgment.

II. Discussion

Petitioner contends that summary judgment was improperly granted because an issue of material fact exists as to whether petitioner was demoted without just cause. Petitioner also contends that summary judgment was prematurely granted because relevant discovery was pending. We take each argument in turn.

A. Standard of Review

"We review an ALJ's final decision granting summary judgment de novo, considering all evidence presented in the light most favorable to the non-moving party." *FMSH L.L.C. v. N.C. Dep't of Health & Hum.*

Servs., 279 N.C. App. 157, 160 (2021) (citation omitted). "Summary judgment is properly granted if the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* (cleaned up).

B. Demotion without Just Cause

[1] Petitioner contends that an issue of material fact remains as to whether DHHS's reclassification of petitioner's position as a "Business Officer II" constituted a disciplinary demotion in violation of N.C.G.S. § 126-35 (2023). We disagree.

Section 126-35 of the North Carolina General Statutes states that no career State employee "shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126-35. The North Carolina Administrative Code defines "demotion" as "an assignment to a position with a lower pay grade or a salary reduction in an employee's current position, caused by unsatisfactory performance or a disciplinary action . . . ." N.C.A.C. 1D.0401(a) (2023). A state employee has "the right to appeal a demotion through their agency's internal grievance procedure." *Id.* After an agency decision is made, the state employee may file a contested case in the OAH where the OAH "shall hear and issue a final decision . . . within 180 days from the commencement of the case." N.C.G.S. 126-34.02(a). The state employee is also entitled to judicial review of that final decision by appeal to this Court. *Id.*

In *Gibbs v. Dep't of Hum. Res.*, the petitioner was reallocated to a different position with "fewer responsibilities and fewer employees to supervise." 77 N.C. App. 606, 609 (1985). The petitioner argued that because her new position had fewer responsibilities, she had been reduced in position and thus a finding of just cause was required. *Id.* at 610. This Court disagreed, explaining "such an interpretation of the statute . . . would severely hamper and hinder managerial decisions. Anytime there was a reorganization in a department or staff, a person who had fewer responsibilities after the reorganization could claim a reduction of position and delay such reorganization." *Id.* at 610–11. The *Gibbs* Court thus held that a demotion pursuant to N.C.G.S. § 126-35 occurs "when an employee is placed in a lower paygrade." *Id.* at 611.

Similarly, in *Winbush v. Winston-Salem State Univ.*, the petitioner, a football and softball coach at Winston-Salem State University, was promised a raise in salary for his coaching accomplishments. 165 N.C. App. 520, 523 (2004). However, before the raise went into effect, the petitioner was relieved of his coaching duties and reassigned as intramural coordinator following a dispute over a summer football camp. *Id.*

at 523–24. The petitioner never received the promised raise in salary, but his paygrade status remained the same after reassignment. *Id.* at 524. In applying *Gibbs*, this Court explained that the petitioner was never demoted because his paygrade remained the same, and "the promised raise in salary had not yet come into effect at the time of his reassignment[.]" *Id.*

Here, petitioner was never placed in the position of "Human Services Program Manager II." Although petitioner received an email in 2016 notifying her about her *proposed job title* as "Human Services Program Manager II" under the impending classification and pay plan system, her assignment to that position never materialized.[3] Upon the new system's implementation in 2018, petitioner was still a "Social Services Program Administrator I." Thus, like in *Winbush*, the proposed or "promised" job classification detailed in the 2016 email had not previously "come into effect at the time of h[er] reassignment" to "Business Officer II." *See Winbush*, 165 N.C. App. at 524. Moreover, like in *Gibbs* and *Winbush*, petitioner's reassignment to "Business Officer II" from "Social Services Program Manager I" did not involve a change in pay. Her salary remained the same, and her pay range on the maximum end increased. Petitioner's claim that she was only one of five "Social Services Program Manager I" employees reclassified as a "Business Officer II" is also not persuasive because, unlike the other four employees, she was never placed in a "Human Services Program Manager II" position—such position was merely proposed to her by email in 2016. Accordingly, petitioner's reassignment to "Business Officer II" was not a demotion pursuant to N.C.G.S. § 126-35, and summary judgment was not improperly granted by the ALJ.

C. Pending Discovery

[2] Petitioner contends that summary judgment was prematurely granted because she was not given the opportunity to obtain evidence relevant to her claim that she was demoted without just cause. We disagree.

"Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512 (1979) (citations omitted). But this "rule

3. Even petitioner's affidavit acknowledged that the 2016 email had "recommended new job titles for all agency positions" and that it concerned a "proposed allocation for [her] position . . . ."

pre-supposes that any information gleaned will be useful." *Manhattan Life Ins. Co. v. Miller Machine Co.*, 60 N.C. App. 155, 159 (1982). Thus, "the trial court is not barred in every case from granting summary judgment before discovery is completed." *Evans v. Appert*, 91 N.C. App. 362, 367–68 (1988) (citation omitted). And doing so "before discovery is complete may not be reversible error if the party opposing summary judgment is not prejudiced." *Hamby v. Profile Prod., LLC*, 197 N.C. App. 99, 113 (2009) (citing *Conover*, 297 N.C. at 512–13).

Here, as discussed above, the record shows that petitioner was never demoted pursuant to N.C.G.S. § 126-35. And petitioner's discovery requests—e.g., identification of personnel who made the reassignment decision and communications regarding the reassignment—are not relevant to that matter. Accordingly, summary judgment was not prematurely granted by the ALJ.

III. Conclusion

For the foregoing reasons, we affirm the ALJ's order granting summary judgment in favor of DHHS.

AFFIRMED.

Chief Judge DILLON and Judge ZACHARY concur.

IN THE MATTER OF E.E., S.M.E., H.L., C.L., JUVENILES

No. COA23-974

Filed 4 June 2024

Child Abuse, Dependency, and Neglect—motion to remove a party—spouse of grandparent—statutory findings supported

In a juvenile proceeding concerning four siblings who, after having been adjudicated neglected due to their parents' substance abuse, were placed in the legal and physical custody of their grandmother and her husband (respondent), the district court did not err in allowing the guardian ad litem's motion to remove respondent as a party pursuant to N.C.G.S. § 7B-401.1(g) where the district court made the statutorily required findings of fact to support removal: that (1) respondent had no legal rights to the juveniles that might be affected by the proceeding, and (2) his continuation as a party was not necessary to meet the juveniles' needs. Those findings were

supported by the record evidence, including that, after two of the juveniles were adjudicated neglected and the other two were adjudicated abused and neglected as a result of respondent's repeated sexual abuse of some of the siblings, the county department of social services was named as the juveniles' legal custodian—thus removing any custodial rights respondent may have had—and respondent was no longer residing with the grandmother due to his pending felony criminal charges—such that the issue of the necessity of his financial support of the grandmother was no longer relevant in regard to the juveniles' needs.

Appeal by Respondent from Order entered 6 July 2023 by Judge Kaleb Wingate in Jackson County District Court. Heard in the Court of Appeals 1 May 2024.

Mary G. Holliday for Petitioner-Appellee Jackson County Department of Social Services.

Mercedes O. Chut for Respondent-Appellant Custodian.

Alston & Bird LLP, by Caitlin Van Hoy and William Metcalf, for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Appellant Mr. H[1] appeals from an Order to Remove Party, which discharged him from the underlying juvenile cases. The Record before us tends to reflect the following:

Emily, Scott, Hannah, and Cole[2] are the grandchildren of Grandmother,[3] Mr. H's wife. At some point, the juveniles' Mother, the father of Hannah and Cole (Father), and all of Mother's children including the above-named juveniles and an older child, Penny,[4] moved in with Grandmother and Mr. H. This living arrangement was intact as of November 2017. At that time, however, Mother and Father were using

1. A pseudonym used for the protection of the juveniles' identities.

2. Pseudonyms stipulated to by the parties.

3. A pseudonym used for the protection of the juveniles' identities.

4. A pseudonym stipulated to by the parties. Penny is not a party to the underlying action.

illegal drugs, and this behavior led to an intervention by the Jackson County Department of Social Services (DSS).

On 14 December 2017, after an investigation, DSS filed petitions alleging all of the children to be neglected. The trial court entered non-secure custody orders the same day. These orders allowed DSS to place the children in Grandmother's and Mr. H's home. At a 20 December 2017 hearing, the trial court placed the children with Grandmother and Mr. H.

On 27 April 2018, the trial court adjudicated the juveniles to be neglected based on Mother's and Father's drug use and consequent inability to provide proper care and supervision. After the initial disposition hearing on 7 May 2018, the trial court continued the juveniles' placement with Grandmother and Mr. H. Following a permanency planning hearing on 20 May 2019, based on the parents' failure to make progress on their case plans with DSS, the trial court awarded legal custody of the juveniles to Grandmother and Mr. H in an Order entered 18 July 2019.

On 27 September 2021, DSS filed new juvenile petitions alleging Mr. H had sexually abused Emily, Hannah, and Penny over a period of years. The matters came on for an adjudication hearing on 31 August 2022. On 16 September 2022, the trial court entered an Order on Adjudication, which adjudicated Scott and Cole neglected, and Emily and Hannah abused and neglected. At that time, the juveniles remained in Grandmother's care. The 16 September 2022 Order also ordered the juveniles remain with Grandmother—"the legal custodian"—pending disposition. On 24 April 2023, the trial court entered an Order on Disposition placing the juveniles into the "legal custody" of DSS pursuant to N.C. Gen. Stat. § 7B-903(a)(6). Neither the September 2022 Order nor the April 2023 Order was appealed.

On 26 May 2023, the children's Guardian ad litem (GAL) filed a Motion to Dismiss Party to discharge Mr. H from the juvenile proceedings. During a hearing on 6 July 2023, DSS opposed GAL's Motion, specifically citing "practical" considerations related to Grandmother's economic dependence on Mr. H. Counsel for DSS explained there were

> [i]ssues related to equitable distribution between [Mr. H] and [Grandmother], [Grandmother]'s ability to maintain her Tri-Care coverage through [Mr. H]. We see benefit to us, practically speaking, if the [c]ourt will continue to have the ability to order [Mr. H] to do or not do certain things . . . And we're concerned that if he's no longer a party we're gonna lose that ability and we're not gonna know about things that are going on in terms of the home ownership,

> the occupancy of the home they now have and interim or temporary or separation agreement. [Grandmother] has the use of a vehicle that's in [Mr. H's] name. All these practical issues keep coming up, and I'm afraid that we're gonna have problems maintaining the placement, which the [c]ourt knows, is somewhat tenuous financially. We're gonna have difficulty maintaining that placement if [Mr. H] isn't really enjoying the status of a party.

On 6 July 2023, the trial court entered an Order to Remove Party discharging Mr. H from the juvenile cases and removing him as a party. The trial court found Mr. H "does not have legal rights to the above captioned juveniles that may be affected by this action. Further, [Mr. H]'s continuation in this action is not necessary to meet the juveniles' needs." On 1 August 2023, Mr. H timely filed Notice of Appeal from the 6 July 2023 Order.

Issue

The issue on appeal is whether the trial court erred by granting the Guardian ad litem's Motion to Remove Party.

Analysis

Mr. H and DSS contend the trial court erred with respect to both required findings to remove a party under N.C. Gen. Stat. § 7B-401.1(g). This statute provides: "If a guardian, custodian, or caretaker is a party, the court may discharge that person from the proceeding, making the person no longer a party, if the court finds that the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs." N.C. Gen. Stat. § 7B-401.1(g) (2021). Thus, Mr. H and DSS both argue the trial court erred by finding Mr. H does not have legal rights that may be affected by the custody proceeding, and Mr. H's continuation as a party is not necessary to meet the juveniles' needs.

This Court has held generally, "any determination requiring the exercise of judgment, or the application of legal principles" is a conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). Conclusions of law are reviewed de novo. *In re R.B.*, 280 N.C. App. 424, 431, 868 S.E.2d 119, 124 (2021) (citation omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re T.M.L.*, 377 N.C. 369, 375, 856 S.E.2d 785, 790 (2021) (citation and quotation marks omitted).

Notably, Mr. H appeals only from the July 2023 Order to Remove Party, which made the required Findings under N.C. Gen. Stat.

§ 7B-401.1(g) and discharged him from the juvenile cases. Although Mr. H makes a variety of arguments as to what the trial court should have or could have addressed, the only findings the trial court was required to make in order to remove him from the cases were those set out by statute: (1) he had no legal rights that may be affected by the proceeding; and (2) his continuation as a party was not necessary to meet the juveniles' needs. N.C. Gen. Stat. § 7B-401.1(g) (2021); *see also In re J.R.S. and Z.L.S.*, 258 N.C. App. 612, 615-16, 813 S.E.2d 283, 285-86 (2018). We review a trial court's order to determine "whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re R.A.H.*, 182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007) (citation omitted). A trial court "need not make specific findings of each subsidiary fact supporting its ultimate finding[s]." *Kleoudis v. Kleoudis*, 271 N.C. App. 35, 43, 843 S.E.2d 277, 283 (2020).

First, Mr. H argues the trial court erred as a matter of law in concluding he does not have rights to the care, custody, and control of the children and dismissing him as a party on that basis. Specifically, Mr. H contends he had "custodial rights to the children" by virtue of the time the juveniles spent in his and Grandmother's legal and physical custody, as well as the trial court's Conclusion in the April 2023 Order that the juveniles' parents "have acted in a manner contrary to their constitutionally protected status as parents and have waived that status as a result." We disagree.

Our statutes define a "custodian" in the context of juvenile proceedings as "[t]he person or agency that has been awarded legal custody of a juvenile by a court." N.C. Gen. Stat. § 7B-101(8) (2021). Thus, a party's status as a custodian is entirely dictated by the court. In the September 2022 Order, which followed the adjudication of the juveniles as abused and neglected, the trial court expressly found Mr. H sexually abused Penny, Emily, and Hannah. The trial court concluded "the conditions that led to [Mr. H] leaving the home of the juveniles continue to exist." Further, the trial court concluded "it is in the best interests of the Juveniles for them to remain in placement with their legal custodian, [Grandmother], pending further hearings." Although Mr. H had received notice of the 2021 Petition filings as the juveniles' "legal guardian[,]" no order was ever entered in this juvenile proceeding awarding guardianship of the juveniles to Mr. H. In the September 2022 Order on Adjudication, the trial court made no provision for Mr. H to have legal custody of the children. In the April 2023 Order on Disposition, the trial court appointed DSS the juveniles' legal custodian.

In the April 2023 Order, the trial court found Mr. H has been indicted on felony charges for sexually abusing Emily. Based on this Finding and

others, the trial court concluded: "it is in the best interests of the remaining Juveniles, [Emily, Scott, Hannah, and Cole] for them to be placed in the legal custody of [DSS], pending further hearings." Thus, the April 2023 Order expressly gave legal custody of the juveniles to DSS. That Order was not appealed by any party. Instead, Mr. H's appeal is only from the July 2023 Order discharging him from the juvenile cases. Thus, based on the September 2022 and April 2023 Orders, Mr. H is no longer a guardian, custodian, or caretaker of the juveniles as defined by N.C. Gen. Stat. § 7B-101. This is dispositive. Thus, the evidence in the Record supports the trial court's Finding that Mr. H has no legal rights to the juveniles that may be affected by the underlying proceedings.

Further supporting its Conclusion that Mr. H's continuation as a party is not necessary to meet the juveniles' needs, the trial court made detailed Findings in its September 2022 Order regarding Mr. H's prolonged sexual abuse of Emily, Hannah, and Penny. The trial court also made Findings regarding the negative impacts of the abuse and neglect on the juveniles in its Disposition Order. These prior Orders also establish Mr. H no longer lives in the home with Grandmother, is indicted on felony charges arising from his sexual abuse of the juveniles, and was in custody. Moreover, the Orders reflect Mr. H was the subject of domestic violence protection orders and Grandmother was awarded temporary possession of the home and vehicle leased by Mr. H. Nevertheless, Mr. H contends his financial support is necessary to maintain placement of the children with Grandmother. This ignores the fact Grandmother, herself, no longer has legal custody of the children; DSS does. While DSS has the authority to consider placement of the four children with Grandmother, that placement is not required.

Thus, the evidence in the Record supports the trial court's Finding that Mr. H has no legal rights to the juveniles that may be affected by the underlying proceeding and that his continuation as a party is not necessary to meet the children's needs. Therefore, this Finding support the trial court's determination the GAL's Motion to Remove Party should be allowed under N.C. Gen. Stat. § 7B-401.1. Consequently, the trial court did not err in removing Mr. H as a party from the underlying juvenile proceedings.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order removing Mr. H as a party from the underlying actions.

AFFIRMED.

Judges GORE and FLOOD concur.

IN RE E.H. & R.H.

No. COA23-864

Filed 4 June 2024

1. Child Abuse, Dependency, and Neglect—abuse—three-week-old infant—unexplained non-accidental injuries—sufficiency of evidence

In an abuse and neglect matter in which two children were removed from their parents' care after the younger child—three weeks old at the time—presented at a hospital with multiple acute fractures for which the parents had no plausible explanation, the trial court did not err by adjudicating the younger child abused. The court's findings of fact, including two challenged by the child's parents, and the court's conclusion that the child suffered serious physical injury by other than accidental means were supported by the testimony of a social worker and multiple medical professionals who, after evaluating the child's injuries, ruled out accidental causes.

2. Child Abuse, Dependency, and Neglect—neglect—three-week-old infant—unexplained non-accidental injuries—injurious environment

In an abuse and neglect matter in which two children were removed from their parents' care after the younger child—three weeks old at the time—presented at a hospital with multiple acute fractures for which the parents had no plausible explanation, the trial court did not err by adjudicating the younger child neglected. Contrary to the parents' argument that the trial court "bootstrapped" its conclusion on neglect to the abuse allegations, the trial court made additional findings regarding neglect, including that, until an explanation emerged for the child's injuries, the home remained a potentially injurious environment with no reasonable means to protect any juvenile from incurring a similar injury.

3. Child Abuse, Dependency, and Neglect—neglect—sibling of severely injured infant—injurious environment

In an abuse and neglect matter in which two children were removed from their parents' care after the younger child—three weeks old at the time—presented at a hospital with multiple acute fractures for which the parents had no plausible explanation, although the trial court properly adjudicated the younger child abused and neglected, the court erred by adjudicating the older

child neglected without making sufficient findings. Although the younger child's status was relevant, it was insufficient on its own to support an adjudication of the older child and, where there was no evidence of a history of neglect or abuse of the older child and no findings regarding the likelihood of future neglect of the older child so as to overcome the parental presumption of fitness, the matter was remanded for additional findings.

Judge STROUD concurring in part and dissenting in part.

Appeal by respondents from order entered 25 May 2023 by Judge J. H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 2 April 2024.

The Law Group, by L. Bryan Smith, Melissa S. Gott, and Christian J.W. Jones, and Godwin Law Firm, by David M. Godwin, for the respondent-appellant-mother and respondent-appellant-father.

New Hanover County DSS, by Jill R. Cairo, and Q. Byrd Law, by Quintin D. Byrd, for the petitioner-appellee and the guardian ad litem.

TYSON, Judge.

Respondent-Mother ("Mother") and Respondent-Father ("Father") appeal from initial adjudication and disposition order entered on 23 May 2023, which adjudicated their youngest minor child as abused and neglected and their older child as neglected. We affirm in part, vacate in part, and remand.

I. Background

Mother and Father are married and are the biological parents of E.H. and R.H. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors). E.H. was born on 14 April 2022. He was three weeks old when the New Hanover County Department of Social Services ("DSS") assumed nonsecure custody of E.H. on 9 May 2022. His brother, R.H., was four years old.

The children's paternal grandfather ("Grandfather") lives with Mother, Father, E.H., and R.H. Mother and Grandfather voluntarily brought E.H. to Novant New Hanover Regional Medical Center ("NHRMC") around 7:00 p.m. on 8 May 2022 and presented him to have

his right arm examined. Mother explained she had heard a "pop" in E.H.'s right arm while changing his diaper earlier in the day, between noon and 1:00 p.m. Mother's concern deepened when E.H. had stopped using his right arm, and she sought medical care that afternoon.

A radiologist secured and reviewed x-ray scans of E.H.'s right arm. The scan revealed E.H.'s right humerus, i.e., the long bone in the arm, was fractured midway. The fracture was recent or "acute", showing no signs of healing. The radiologist concluded the fractures had occurred between seven and ten days prior to the date of the scans.

Dr. Laura Parente was E.H.'s attending physician from his birth and during the visit to the emergency room. Dr. Parente noted E.H. was delivered via a scheduled c-section, with no complications or difficulties causing the injuries. Following the results of the initial x-ray, a full-body skeletal survey of E.H. was ordered.

Dr. David Evans, a board-certified pediatric radiologist, reviewed the full skeletal survey and the earlier x-ray of E.H.'s right arm. Dr. Evans agreed with the earlier finding that E.H.'s right humerus was acutely fractured. He also observed additional metaphyseal fractures, i.e., corner fractures, of E.H.'s distal left tibia, distal left femur, and proximal left tibia, and possible metaphyseal fractures of E.H.'s distal right femur, proximal right tibia, and distal left ulna.

All fractures revealed on the skeletal survey were deemed to be acute, as none of the fractures showed signs of healing, and all had purportedly occurred "no more than 10 days prior to the skeletal survey." Dr. Evans noted E.H.'s injuries are "virtually pathognomonic of nonaccidental trauma" and opined such injuries are inconsistent with an accident.

Dr. Parente ordered a full medical workup for E.H. after being informed of the results of Dr. Evans' skeletal survey. E.H.'s brain MRI, eye examination, bloodwork, and urine testing were unremarkable, and no other clinical concerns were discovered.

Taylor Antczak, a social worker in the forensics investigation department, met separately with Mother and Father on 9 May 2022. Mother repeated the same information she had stated upon arrival at the ER, describing hearing a "pop" during a diaper change and E.H's loss of use of his right arm. She indicated the prior twenty-four hours had been "normal." Mother offered the baby carrier/stroller could have caused E.H.'s injury, but she demonstrated proper use of the carrier. She denied any falls, drops, motor vehicle accidents, abnormal fussing, or abnormal

interactions between four-year-old R.H. and E.H. She also denied sleeping with E.H. and claimed E.H. had "not been out of her sight" since he was born.

Antczak visited with Father at the family home. Father repeated the story regarding Mother hearing a "pop" during a diaper change, but when asked to demonstrate his interaction with E.H., nothing from the demonstration could have caused the multiple injuries E.H. had sustained. Father, similar to Mother, denied the possibility of any accidents, falls, or other events that could have caused E.H.'s injuries. He confirmed Mother was E.H.'s primary caretaker. Father explained Mother had suffered from post-partum depression following the birth of R.H. years earlier, but denied any post-partum depression symptoms following the birth of E.H.

A petition was filed on 9 May 2022, which alleged E.H. to be an abused and neglected juvenile and asserted R.H. to be a neglected juvenile. An order granting nonsecure custody of both children to DSS was filed on 10 May 2022.

DSS referred E.H. to the Beacon Team at UNC Hospital in Chapel Hill for further evaluation. One-third of the cases referred to the Beacon Team clinic are opined to be of low suspicion for abuse, one-third are indeterminate, and one-third are opined as high suspicion for abuse.

Dr. Samantha Schilling is a board-certified physician, specializes in child abuse pediatrics, and is a member of the Beacon Team. Dr. Schilling met with Mother and Father and inquired about a family history of metabolic disorders, which both denied. The parents also denied a history of bone fractures for themselves or for their other son, four-year-old R.H. Mother and Father both have hypermobile Ehlers-Danlos Syndrome ("EDS"), which is a generalized joint hypermobility syndrome. Dr. Schilling opined this syndrome cannot be diagnosed in a child under the age of eight, and the syndrome is not associated with an increased risk of developing fractures.

Dr. Schilling consulted with Dr. Carolina Guimaeres, the Chief of the Pediatric Radiology Department at UNC Hospital. Follow-up skeletal surveys and x-rays of E.H. were conducted on 23 May 2022, 22 June 2022, and 10 August 2022.

Dr. Guimaeres opined the process of dating when fractures actually occur is difficult. It generally takes between seven and fourteen days before subacute healing, such as callous formation and the generation of new bone, may be detected on medical scans. The injuries to E.H.'s right arm and left ankle showed some healing and new bone formation on the

23 May 2022 scans. Dr. Guimaeres also observed two of E.H.'s ribs were acutely fractured on the 9 May 2022 scan, although those rib fractures were not originally visible and noted by NHRMC's scans. The rib fractures exhibited subacute signs of healing on the 23 May 2022 scan.

Dr. Guimaeres observed two additional acute injuries to E.H.'s right tibia (ankle) and right humerus (elbow) on the 23 May 2022 scan, which placed those injuries at the outer limit of the seven-to-fourteen-day "acute" window before healing is observable. The Child Medical Evaluation conjectured these previously undetected fractures to E.H.'s right ankle and elbow may have been present on the initial skeletal survey conducted on 9 May 2022, but may have been overlooked because of "suboptimal skeletal survey technique." The newly-revealed right ankle and elbow injuries showed no signs of healing on the 23 May 2022 scan, unlike the other acute fractures detected on the previous scan on 9 May 2022.

No new or "acute" fractures were detected a month later on the 22 June 2022 or from the 10 August 2022 scans. Dr. Guimaeres opined E.H. possessed normal bone density on each of his scans, and no observations indicated rickets nor any other underlying medical condition to cause E.H.'s injuries. Dr. Guimaeres reported her findings to Dr. Schilling and the Beacon Team. She opined significant force was needed to cause the fractures E.H. had presented with, and those particular injuries have a high specificity for child abuse in a non-ambulatory child.

Dr. Schilling testified to the following regarding the origins of E.H.'s fractures: a fracture of the right humerus is normally the result of blunt force trauma; rib fractures are typically the result of compression of the chest; and, metaphyseal/corner fractures are typically the result of indirect force such as shearing, twisting, or shaking. Dr. Schilling made a tentative diagnosis of physical abuse pending genetic testing results.

Dr. Clara Hildebrandt, an UNC Assistant Professor of Pediatric Genetics, performed genetic testing on E.H. After testing and examining genetic variants, Dr. Hildebrandt opined no underlying genetic condition was present to have caused or contributed to E.H.'s injuries.

E.H. resides in a licensed foster home in New Hanover County and has been in an out-of-home placement for over a year since the nonsecure custody order was filed on 10 May 2022. R.H. lives with his maternal grandmother in the family home, as Mother, Father, and the Grandfather had moved out. Mother and Father visit with both E.H. and R.H. for two hours each week at DSS. Additionally, Mother and Father visit with R.H. in the community under the maternal grandmother's supervision.

Mother was charged with felony child abuse inflicting serious bodily injury on 28 September 2022. The initial adjudication hearing was held across several sessions on 14-17 November 2022, 12-13 December 2022, and 18 January 2023. An order was entered five months later on 25 May 2023, adjudicating E.H. as abused and neglected as defined in N.C. Gen. Stat. §§ 7B-101(1) and (15) (2023). R.H. was adjudicated as neglected pursuant to N.C. Gen. Stat. § 7B-101(15). As of the time the initial adjudication order was entered, the felony child abuse charge against Mother remained pending.

Mother and Father each timely filed notices of appeal on 19 June 2023.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(3) (2023).

III. Issues

Mother and Father first argue the trial court erred by adjudicating E.H. as abused. They assert no clear and convincing evidence supports the following findings of facts: (1) E.H. was in the exclusive care of Mother and Father when the injuries occurred; (2) Mother and Father were responsible for E.H.'s injuries; and (3) E.H.'s injuries were inflicted by non-accidental means.

Mother and Father next argue the trial court erred by adjudicating E.H. as neglected, because no clear and convincing evidence supports a finding of neglect. They assert "the trial court made no additional findings of fact regarding actual neglect but simply bootstrapped neglect to the abuse allegations."

Finally, Mother and Father argue the trial court erred by adjudicating R.H. as neglected based solely upon the unexplained injuries to E.H.

IV. Abuse and Neglect Adjudication of E.H. and R.H.

A. Standard of Review

In reviewing an adjudication order, this Court must determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations and internal quotation marks omitted).

The "clear and convincing" standard of review "is greater than the preponderance of the evidence standard required in most civil cases." *In*

re Smith, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (citation and quotation marks omitted). Clear and convincing evidence is "evidence which should fully convince." *Id.* (citation and quotation marks omitted).

"In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted). Unchallenged findings of fact are presumed to be supported by sufficient evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted).

B. Abuse Adjudication of E.H.

[1] "The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2023).

An "[a]bused" juvenile is one "whose parent, guardian, or caretaker" either "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means." N.C. Gen. Stat. § 7B-101(1)(a).

Mother and Father argue several of the trial court's findings of fact and conclusion of "serious physical injury by other than accidental means" are not supported "by clear and convincing evidence." *Id.* §§ 7B-101(1)(a) and 805. We address each argument in turn.

1. Finding of Fact 72

Mother and Father first argue Finding of Fact 72, which found Mother and Father were the only caretakers of E.H., is unsupported.

Social Worker Antczak testified Mother had explained during the investigative interview that E.H. had been exclusively in her care:

> Q: And did you inquire of [Mother] as to any caretakers that had provided care anytime for [E.H.] since his birth?
>
> A: She indicated that she was the primary caretaker. She specifically said that he had not left her sight. However, she did say that when grandpa and dad are home, they will help her care for the child.

She also testified the paternal grandfather had never cared for E.H. without Mother or Father being present:

> Q: And did the paternal grandfather also reside in that residence?

> A: He did.
>
> Q: And at the time of the investigation, was he employed fulltime?
>
> A: He was.
>
> Q: And did it appear from your investigation that the paternal grandfather had ever cared for [E.H.] separately from one or both parents?
>
> A: No.

Dr. Parente also testified regarding whether anyone other than Mother and Father had cared for E.H. in the first four weeks of his life:

> Q: And as part of taking that history from the parents, did you inquire as to whether [E.H.] had been to daycare or attended by any other caregivers other than the parents?
>
> A: I did. Again, as a standard in any baby, you're admitting to the hospital with this type of injury, so I did ask about babysitters and daycare and who has been around the child since he has been born, and the answer was that it was the parents only and no other caregivers.

Mother and Father also argue the portion of Finding of Fact 72, providing Mother and Father were responsible for E.H.'s injuries, is not supported. This argument is premised on their first argument. Mother and Father argue: "Since baby E[.]H[.] was not in the exclusive care of Respondent-parents, the trial court's determination of abuse rests solely on baby E[.]H[.]'s unexplained injuries[.]"

Here, the trial court's finding Mother or Father was responsible for E.H.'s injuries is not premised solely upon E.H.'s injuries alone. Dr. Evans at NHRMC testified E.H.'s injuries were "virtually pathognomonic of nonaccidental trauma," and explained E.H.'s injuries were not accidental.

Dr. Schilling at UNC Hospital opined E.H.'s injuries resulted from the following actions: blunt force trauma caused the break in his arm, the compression of the chest caused the fractures to his ribs, and shearing, twisting, or shaking caused the metaphyseal/corner fractures of his other bones. Finally, Dr. Guimaeres testified significant force was needed to cause the fractures E.H. had presented with, and she explained those injuries are highly indicative of child abuse, especially in a three-week-old, non-ambulatory child.

Finding of Fact 72 is sufficiently supported. *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676; *In re Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365. Mother's and Father's argument is overruled.

2. Finding of Fact 78

Mother and Father argue the trial court's finding E.H.'s injuries were inflicted by non-accidental means was not supported by competent evidence. They assert the two injuries discovered on 23 May 2022, which was fourteen days after Mother and Father had custody of E.H. and fifteen days after E.H. was taken to NHRMC, indicate E.H.'s injuries would not have occurred while in their care.

The trial court correctly found the acute fractures to E.H.'s right ankle and right elbow depicted on the 23 May 2022 scan were "at the outer limit of the 7- to 14-day window expected for acute injuries" given E.H. had been removed from Mother's and Father's care on 9 May 2022. Dr. Guimaeres opined the fractures "were likely present on the initial skeletal survey," but were purportedly "overlooked" by "suboptimal skeletal survey technique[s]" by a board-certified pediatric radiologist and the imaging equipment at NHRMC, a teaching hospital, regional referral center, and Level 2 Trauma Center in New Hanover County. Subsequent skeletal scans completed in June and August showed no additional acute fractures.

Mother and Father also argue their medical expert witnesses found E.H. may have suffered from rickets or hypermobile EDS, which presented an alternative explanation for E.H.'s injuries. Dr. Schilling opined this syndrome cannot be diagnosed in a child under the age of eight, and the syndrome is not associated with an increased risk of developing fractures. Further, the trial court found in Finding of Fact 70:

> The Respondent-Parents jointly presented expert testimony from Dr. David Ayoub, testifying as an expert witness in the field of general radiology, Dr. Marvin Miller, testifying as an expert witness in the field of genetics, and Dr. Michael Holick, testifying as an expert witness in the fields of internal medicine and metabolic bone disease. In reviewing all of the evidence while the case was under advisement, the Court assigns almost no credibility to the testimony of these witnesses; specifically, the testimony was not grounded in sound medical principles, reflected out-of-date medical theory, and was not reflective of the current prevailing medical knowledge in the area of child physical abuse. Further, the information provided in their

> respective evaluations and the opinions drawn therefrom are not the product of reliable principles and methods nor did each apply sound scientific principles and methods reliably to the facts of the case.

Mother and Father tendered multiple properly qualified expert witnesses, which were admitted. The trial court concluded their testimonies were not based on "sound scientific principles and methods" and lacked "credibility." The trial court was presented with contradictory expert witness opinions, and in its wisdom and discretion found DSS' more credible.

Dr. Guimaraes opined E.H.'s bone metaphysis is inconsistent with cuffing, as his bones were smooth and not frayed.

> Q: And can you tell us what you would expect to see if an infant was suffering from rickets?
>
> A: So rickets has a few things in the bone. One is the [indiscernible] will be decreased, which is not the case here, but also we'll have what is called cuffing and fraying of the metaphysis. So the metaphysis, instead of looking smooth like it is here, they look frayed and very typical. They are casuistic. You can also see findings in the ribs called the rachitic rosary where you have an increased size of the anterior portion of the ribs, which we don't see it here.
>
> Q: And you didn't see evidence of any of those symptoms, is that correct?
>
> A: Correct, no.
>
> Q: But other than the fractures, did you see any deformities or anomalies in [E.H.]'s skeletal survey?
>
> A: No.
>
> Q: Any red flags at all for any underlying conditions that may have been the causation of these fractures?
>
> A: No.

Dr. Evans explained DSS' team of physicians ruled out osteogenesis imperfecta, rickets, and other metabolic bone conditions as a possible explanation for E.H.'s injuries, testified he treats multiple cases of rickets each year, and opined E.H.'s bones showed no signs of rickets.

Regarding Mother's and Father's hypermobile EDS, Dr. Schilling opined no studies indicate hypermobile EDS creates an increased risk

of fractures in children. She opined this lack of risk was confirmed by neither parent nor the brother R.H. having a history of suffering from bone fractures.

Finding of Fact 78 is supported by contradictory expert witnesses' testimonies. *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676; *In re Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365. Mother's and Father's argument is overruled.

C. Neglect Adjudication of E.H.

[2] A "[n]eglected" juvenile is one "whose parent, guardian, custodian, or caretaker" engages in certain statutorily defined criteria, including failing to "provide proper care, supervision, or discipline" or "[c]reat[ing] or allow[ing] to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(a), (e).

Mother's and Father's argument regarding whether E.H. was neglected is: "The trial court made no additional findings of fact regarding actual neglect but simply bootstrapped neglect to the abuse allegations. Give[n] the arguments *supra*, there was no clear and convincing evidence that baby E[.]H[.] was abused[,] and thus the trial court's finding of neglect should be overturned as well."

The trial court made other findings regarding E.H.'s neglect. The trial court explained, until the cause of E.H.'s injuries is established, "their home [is] an injurious environment for any juvenile as there are no reasonable means to protect any juvenile from a similar injury occurring in the home."

Mother's and Father's consistent "explanations" for how E.H.'s arm was broken during a diaper change were challenged by numerous experts and the social worker, who had observed the parents perform a proper diaper change. The diaper change account also fails to account for the numerous other fractures discovered on E.H.'s skeletal survey. Until the perpetrator or perpetrators of E.H.'s injuries are established, Mother's and Father's home presents a potentially injurious environment for E.H. Mother's and Father's argument is without merit.

D. Neglect Adjudication of R.H.

[3] "In determining whether a juvenile is a neglected juvenile, it is *relevant* whether th[e] juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15) (emphasis supplied).

DSS carries the burden to overcome the presumption of fitness and parental rights to the care, custody, and control of their children

and to prove by clear, cogent, and convincing evidence the existence of neglect, as is defined in the statute. N.C. Gen. Stat. § 7B-805. *See* N.C. Gen. Stat. § 7B-1109(f) (2023) ("The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence."); *In re Evans*, 81 N.C. App. 449, 452, 344 S.E.2d 325, 327 (1986) ("The State then has the burden, at the adjudicatory hearing stage, to prove neglect and dependency by clear and convincing evidence." (citation omitted)).

A finding of "prior abuse, standing alone, is not sufficient to support an adjudication of neglect." *In re N.G.*, 186 N.C. App. 1, 9, 650 S.E.2d 45, 51 (2007). In multiple cases "this Court has generally required the presence of other factors to suggest that the neglect or abuse will be repeated." *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014) (citing first *In re C.M.*, 198 N.C. App. 53, 66, 678 S.E.2d 794, 801-02 (2009); then *In re A.S.*, 190 N.C. App. 679, 690-91, 661 S.E.2d 313, 320-21 (2008); and then *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)).

While the decision of the trial court regarding whether the other children present in the home are neglected, "must of necessity be predictive in nature, [ ] the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

The trial court found:

> 71. Given the family's circumstances and living arrangement from mid-April through May 8, 2022, [R.H.] was necessarily present in the home when the injuries were inflicted on [E.H.] *Without either Respondent-parent taking accountability or providing any plausible explanation for [E.H.]'s injuries*, there is a substantial risk of both [E.H.] and [R.H.] of being subjected to physical abuse and neglect in that household. Due to his tender years, [R.H.] is at risk for being subjected to the same infliction of injuries as [E.H.]

(emphasis supplied).

The trial court's findings of fact regarding R.H. rely solely upon E.H.'s abuse and fail to mention any prior abuse of R.H. or other evidence predictive of probable neglect of R.H., which "is not sufficient to support an adjudication of neglect." *In re N.G.*, 186 N.C. App. at 9, 650 S.E.2d at 51. The trial court's findings of fact do not address whether other factors

were present "to suggest that the neglect [of R.H] . . . will be repeated." *In re J.C.B.*, 233 N.C. App. at 644, 757 S.E.2d at 489 (citations omitted). The testimony and record show no prior history of neglect or abuse of E.H. or of R.H.

The statute does not allow the trial court to rely solely on the abuse or neglect of E.H. to support the adjudication of R.H. as neglected, only that such evidence is "relevant" and is not conclusive to relieve DSS of its burden. N.C. Gen. Stat. § 7B-101(15). *See In re A.L.*, 279 N.C. App. 683, 863 S.E.2d 328, 2021 N.C. App. LEXIS 561, 2021 WL 4535716, at *3 (unpublished) (2021) (remanding an order, which adjudicated a juvenile neglected, ceased reunification efforts, and established a permanent plan of guardianship with a court approved caretaker, to the trial court for further findings because the order "focus[ed] almost entirely on the prior adjudications of abuse and neglect of Amy's older sister Jennifer").

The trial court is mandated to make additional findings of fact and supported conclusions regarding the purported and probability of future "neglect" of R.H., and the trial court must determine whether other evidence tends to indicate any abuse or neglect would likely be repeated against R.H. *Id.*; *In re J.C.B.*, 233 N.C. App. at 644, 757 S.E.2d at 489 (citations omitted).

The transcripts and record appear devoid of any clear and convincing evidence of neglect of R.H., other than the *ipso facto* application of non-confessed and unexplained injuries to E.H. to overcome the presumption of fitness and primary parental rights by married parents, who have no prior history of either neglect or abuse, and with one facing a felony indictment for child abuse. *See* N.C. Gen. Stat. §§ 7B-805 and 1109(f); *In re Evans*, 81 N.C. App. at 452, 344 S.E.2d at 327.

The statutory burden to prove abuse or neglect or any basis for the State to interject and interfere with constitutional and natural parental rights always rests upon the State with proof of clear, cogent, and convincing evidence. *Id.*

This burden cannot be relieved by the trial court under ultimatum threats to the parents "to confess or lose your children," or violating marital privilege, particularly in the face of pending criminal charges. *Id.* Nor can these threats overcome the presumption of fitness and consistent parental conduct. *See Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (explaining the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the North Carolina Constitution protects "a natural parent's paramount constitutional right to custody and control of his or her children" and ensures that "the

government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status." (citations omitted)); *Owenby v. Young*, 357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003) ("Until, and unless, the movant establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status, the 'best interest of the child' test is simply not implicated."); *Troxel v. Granville*, 530 U.S. 57, 66, 147 L.Ed.2d 49, 57 (2000) ("[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." (citations omitted)).

V. Conclusion

The trial court's findings of fact regarding abuse of E.H. were supported by clear and convincing evidence. *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676; *In re Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365. The portion of the trial court's order adjudicating E.H. as abused and neglected is affirmed.

The portion of the trial court's order adjudicating R.H. as neglected, however, is remanded for the trial court to make additional findings, in the absence of a compelled confession by either parent or violation of the marital privilege, regarding whether statutorily-mandated evidence exists and DSS has carried its burden to overcome the parental presumption of fitness and parental conduct to support and adjudicate R.H. as neglected. *In re J.C.B.*, 233 N.C. App. at 644, 757 S.E.2d at 489. *It is so ordered.*

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judge GORE concurs.

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

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

I concur with the majority opinion as to the adjudication of E.H. as abused and neglected, but I dissent as to the adjudication of neglect of R.H. I believe the trial court's extensive and detailed findings of fact, all of which are supported by the record and are binding on appeal, are more than sufficient to support the adjudication of neglect as to R.H.

Although the majority opinion has addressed the challenged findings of fact and correctly held each to be supported by the evidence, I would note that the trial court's order includes over eleven full pages of findings of fact, with the incorporation of an additional twelve pages of the Child Medical Evaluation ("CME") Report from "the Beacon Team at UNC Hospital in Chapel Hill, North Carolina." The Beacon Team "is a group of doctors and social workers who evaluate cases where there may have been abuse of a child or an elderly person" with the goal of providing "an objective analysis of all available medical evidence" and "additional diagnostic testing" as needed "to determine whether other potential causes of injury can be ruled out." The trial court heard six days of testimony and received hundreds of pages of evidence at the hearing. The Beacon Team carefully considered every possible alternative explanation for E.H.'s injuries but ultimately concluded "the sole causation for each and every one of [E.H.]'s observed injuries is child physical abuse."

Most of the findings address E.H.'s injuries and the various alternative explanations for the injuries which the Beacon Team and the trial court considered and rejected, but some of the findings address the behavior of Mother and Father when E.H.'s injuries were discovered. Mother's "affect was noted to be 'flat' during the interview" with the social worker on 9 May 2022 just after the report of the unexplained fractures. Father "did not go to the hospital at any time from May 8 to May 10, 2022." The social worker located Father at home on 9 May 2022. He also denied "any falls, accidents, trauma or other incident which would have caused the multiple fractures to [E.H.]." Father "repeated the same story as . . . Mother regarding the diaper change on May 8 and said he did not initially think much about it." In contrast, in his "sworn testimony during th[e] hearing," Father asserted that "when he heard the 'pop' in [E.H.]'s shoulder area during a diaper change on May 8, 2022, that he 'froze,' 'felt ill,' and wanted to immediately go to the ER." He said the diaper change was "around noon or 1:00 p.m.," but E.H. "was not taken to the ER until approximately 6 to 7 hours later, during which time, the family went to Walmart and to visit the paternal great-grandparents." Moreover, "[w]hen the decision was made to go to the ER later that evening, . . . Father stayed home with [R.H.] and did not at any time go to the hospital, even after the right arm fracture was found and after the multiple fractures were identified."

Although the primary focus of the order is the cause of E.H.'s injuries, these findings are still important to consider as the basis for the trial court's conclusion R.H. was neglected based upon his presence in

the home where E.H.'s abuse occurred. After fully addressing E.H.'s injuries, the trial court then found:

> 68. As noted in the CME Report, "[c]hildren, and especially young infants, who experience physical abuse or neglect are at risk for future harm or even death if returned to the same environment in which they sustained abuse/neglect."
>
> 69. Dr. Schilling is of the opinion that there is no way that [E.H.] could have experienced the trauma necessary to cause his injuries without his caregivers being aware of it.
>
> . . . .
>
> 71. Given the family's circumstances and living arrangement from mid-April through May 8, 2022, [R.H.] was necessarily present in the home when the injuries were inflicted on [E.H.]. Without either Respondent-Parent taking accountability or providing any plausible explanation for [E.H.]'s injuries, there is a substantial risk of both [E.H.] and [R.H.] of being subjected to physical abuse and neglect in that household. Due to his tender years, [R.H.] is at risk for being subjected to the same infliction of injuries as [E.H.].
>
> 72. The parents, as the only caretakers for [E.H.], are responsible for his injuries. The Court cannot determine if a parent does not know what happened, knows what happened and will not tell on the other parent, or is the parent who inflicted the injuries. The Respondent-Parents continue to maintain that they are not responsible for these injuries, and as such, this renders their home an injurious environment for any juvenile as there are no reasonable means to protect any juvenile from a similar injury occurring in the home. The Court currently cannot separate the parents as to culpability and has no way to address the issues as long as each parent maintains his/her current position that he or she did not injure the child and does not know how the child was injured. The Juveniles would be at risk if placed back in the home with Respondent-Mother and/or Respondent-Father.
>
> 73. No other reasonable means were available to protect the Juveniles at the time of the filing of the petition other than placement out of the home.

The majority considers the detailed and extensive findings of fact insufficient to support an adjudication of neglect of R.H. and characterizes the trial court's order as an "*ipso facto* application of non-confessed and unexplained injuries to E.H. by married parents with no prior history of either neglect or abuse, and with one facing a felony indictment for child abuse." I agree it is particularly troubling when two parents with no apparent prior history of neglect or abuse are accused of causing serious injury to a baby or of allowing serious injury to occur without taking prompt action to protect the baby. But this case is no different from many others in this regard. Cases dealing with serious non-accidental injuries to a baby are some of the most "challenging and tragic" of abuse, neglect, or dependency cases. *See In re M.T.*, 285 N.C. App. 305, 306, 877 S.E.2d 732, 736 (2022) (noting that "cases arising from serious and life-threatening non-accidental injuries to a baby are perhaps the most challenging and tragic of all").

This Court addressed a similar situation, including the adjudication of neglect of an older sibling who was not injured, in *In re M.T.*:

> Here, as in most cases involving life-threatening nonaccidental injuries to a baby, there is no direct evidence of exactly what happened. A baby cannot tell anyone what happened, and no one, other than someone who hurt the baby, saw what happened. Trial courts must often make these difficult and momentous decisions based upon circumstantial evidence and evaluation of credibility and weight of the evidence. In this case, the trial court carefully considered evidence from many witnesses and hundreds of pages of exhibits and reports, including medical records, presented at hearings held over many days.

Id. at 306-07, 877 S.E.2d at 736.

In *In re M.T.*, Mark's baby brother Ken had serious non-accidental injuries; both children also lived in a home with their mother and father, with no prior history of abuse or neglect. *Id.* at 308, 877 S.E.2d at 737. Later, after DSS's removal of the children from the home and further investigation, the father was charged with child abuse. *Id.* at 317, 877 S.E.2d at 742. The mother challenged the trial court's adjudication of the older child, Mark, who was not injured in any way, as neglected for the same reasons as Mother and Father in this case:

> As to Mark, [the m]other specifically asserts the neglect adjudication "is based on the circumstances relating to Ken's abuse or neglect in 2017" and "there are no supported

> findings establishing the presence of other factors with a nexus to Mark or to the likelihood he would be neglected by Mother if his custody was returned to her."

Id. at 344, 877 S.E.2d at 758 (alterations omitted).

This Court affirmed adjudications of neglect of another child in the home in cases where the parents are unable to explain serious injury to a baby and there is no other person who might have harmed the child. *Id.* at 354-55, 877 S.E.2d at 764-65. "[T]he trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re T.S.*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006). Trial courts must at times draw a reasonable inference from circumstantial evidence to prevent harm to a child:

> Caselaw also demonstrates why the lack of explanation can be so important. In a case the Coalition acknowledges is relevant to this consideration, our Supreme Court explained a parent's "refusal to make a realistic attempt to understand how her child was injured" can help support a "trial court's conclusion that the neglect is likely to reoccur." *In re D.W.P.*, 373 N.C. [327,] 340, 838 S.E.2d [396,] 406 [2020]. The *In re D.W.P.* Court inferred if a parent is not able to explain how their children were harmed before, there is a risk the children will be harmed the same way again if returned to the parent's custody, and that is a risk our courts are not required to take. *See id.*, 373 N.C. at 339-40, 838 S.E.2d at 406 (explaining the paramount importance of child safety before drawing the conclusion in the previous sentence). The trial court here permissibly drew the same inference explaining in Findings 87 and 88, which we have found support for above, the lack of explanation of Ken's injuries means there is a continued "risk to both children's health and safety."

In re M.T., 285 N.C. App. at 349-50, 877 S.E.2d at 761-62 (brackets omitted).

In some cases, as noted by the majority, there are other facts present, in addition to the non-accidental injury to a baby, which may also indicate a risk of abuse or neglect to another child in the home, such as mental health concerns or substance abuse. But these other factors *are not always required* for a child who lives in the home with another child who has been abused and adjudicated as neglected. The trial court must evaluate the credibility and weight of all the evidence and has the discretion to make logical inferences which are reasonably based upon the

facts in the case. *See In re A.S.*, 190 N.C. App. 679, 690, 661 S.E.2d 313, 320 (2008) ("Since the statutory definition of a neglected child includes living with a person who has abused or neglected other children and since this Court has held that the weight to be given that factor is a question for the trial court, the trial court, in this case, was permitted, although not required, to conclude that Adam was neglected based on evidence that respondent had abused Teresa by intentionally burning her.").

The majority opinion also strongly implies that the trial court is not permitted to draw a negative inference against a parent from the parent's silence or failure to give a plausible explanation of how a child's injury occurred, apparently based either upon the Fifth Amendment right against self-incrimination or upon marital privilege, as one spouse cannot be compelled to testify against the other. I first note that Mother and Father did not raise any argument on appeal regarding any infringement of their Fifth Amendment rights against self-incrimination or marital privilege. Since Chapter 7B specifically precludes them from making these arguments, that is not surprising. *See* N.C. Gen. Stat. § 7B-310 (2023); N.C. Gen. Stat. § 7B-1109(f) (2023). But since the majority has addressed this right and privilege and remanded to the trial court to make additional findings, I will further note my concerns regarding this portion of the majority opinion.

First, the majority opinion fails to cite any law supporting its position that "[t]his burden cannot be relieved by the trial court under ultimatum threats to the parents 'to confess or lose your children', or violating marital privilege, particularly in the face of pending criminal charges." It cites statutes noting the standard of proof of clear, cogent, and convincing evidence; I agree with the majority that the trial court's findings of fact are supported by clear, cogent, and convincing evidence and the order so stated. *See* N.C. Gen. Stat. § 7B-805 (2023). Oddly, the majority also cites to North Carolina General Statute Section 7B-1109(f), which states the same requirement of clear, cogent, and convincing evidence in termination of parental rights adjudications and then provides that "[n]o husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights." N.C. Gen. Stat. § 7B-1109(f). The next citation is to *In re Evans*, 81 N.C. App. 449, 344 S.E.2d 325 (1986). I will not quote from *Evans*, as it was decided in 1986 based upon very different statutes regarding abuse and neglect than are now in effect, but in *Evans*, I can find nothing to support the majority's assertions regarding "ultimatum threats" or marital privilege. *See id.* at 451, 344 S.E.2d at 326. In *Evans*, this Court upheld the trial court's adjudication of neglect but disapproved of the trial court's order

for the mother to "provide a separate bed" for the child and "submit to psychiatric or psychological evaluation or treatment *separate and apart* from her 'participation' in [the child's] treatment." *Id.* at 453, 344 S.E.2d at 328 (emphasis in original).[1]

The majority's remaining citations are to cases addressing a natural parent's paramount right to custody. Again, I entirely agree with these statements of law, but these cases do not address the issues raised in this case. Nor do they tend to support the majority's position. In *Adams v. Tessener*, 354 N.C. 57, 66, 550 S.E.2d 499, 505 (2001), the Supreme Court of North Carolina affirmed the trial court's order granting custody to grandparents based upon findings of the parents' unfitness.[2] In *Owenby v. Young*, 357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003), the Supreme Court of North Carolina affirmed the trial court's dismissal of a custody claim against the child's father filed by the maternal grandmother after the death of the child's mother. This Court had reversed the trial court's order, but the Supreme Court disagreed and reversed this Court based upon the trial court's findings that the grandmother "failed to carry her burden of demonstrating that [the] defendant forfeited his protected status. The evidence of record supports the trial court's findings of fact, which in turn support its legal conclusion that [the] defendant's protected status as parent was not constitutionally displaced." *Id.*

As to the law regarding the Fifth Amendment right against self-incrimination or the marital privilege, it is well-established that application and operation of these protections against testifying is different in a civil proceeding with the primary goal of protecting the best interest of a minor child than in a criminal prosecution. *See In re L.G.A.*, 277 N.C. App. 46, 50-51, 857 S.E.2d 761, 766 (2021) (holding the mother

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1. North Carolina statutes in effect at that time did not allow the trial court to order this type of psychiatric or psychological evaluation and treatment; our current statutes do. *See* N.C. Gen. Stat. § 7B-904 (2023) ("Authority over parents of juvenile adjudicated as abused, neglected, or dependent").

2. One portion of *Adams v. Tessener* is instructive here:

> Turning to the present case, we first note that in custody cases, the trial court sees the parties in person and listens to all the witnesses. This allows the trial court to detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.

Id. at 63, 550 S.E.2d at 503 (citation and quotation marks omitted).

was not entitled to a continuance of the hearing on motion for review in a neglect proceeding based upon the argument she would be "effectively prevented from testifying to avoid waiver of her Fifth Amendment rights against self-incrimination" due to pending criminal charges against her, based upon North Carolina General Statute Section 7B-803 (2013), which holds that "[r]esolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance" (quoting N.C. Gen. Stat. § 7B-803 (2013))); *see also In re Pittman*, 149 N.C. App. 756, 761, 561 S.E.2d 560, 564 (2002) ("Here, the child's interest in being protected from abuse and neglect is paramount."); *Qurneh v. Colie*, 122 N.C. App. 553, 558-59, 471 S.E.2d 433, 436 (1996) ("The privilege against self-incrimination is intended to be a shield and not a sword. Here, the plaintiff attempted to assert the privilege as both a shield and a sword. . . . Due to the plaintiff's refusal to answer questions regarding illegal drug use, trafficking and other drug involvement, the trial court was unable to consider pertinent information in determining plaintiff's fitness. As a policy matter, issues such as custody should only be decided after careful consideration of all pertinent evidence in order to ensure the best interests of the child are protected. Plaintiff's decision not to answer certain questions relating to his past illegal drug activity by invoking his fifth amendment privilege prevented the court from determining his fitness and necessitated the dismissal of his claim." (citations and quotation marks omitted)).

In addition to cases recognizing the difference between civil proceedings involving protection of a child and criminal prosecutions, Chapter 7B explicitly sets out this difference in proceedings for abuse, neglect, or dependency:

> No privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect, or dependency case. No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse, neglect, or dependency is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as this privilege relates

> to the competency of the witness and to the exclusion of confidential communications.

N.C. Gen. Stat. § 7B-310. Even in a proceeding for termination of parental rights—not the case we are considering here—as noted earlier, Chapter 7B sets out the standard of proof of "clear, cogent, and convincing evidence" and specifically provides that "[n]o husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights." N.C. Gen. Stat. § 7B-1109(f).

If one parent has knowledge that the other parent has harmed a child, the parent has an obligation to protect the child by providing information about the abuse. In a criminal prosecution or a civil proceeding which may result in imprisonment, a defendant's silence may not be used against him. *See Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 584, 273 S.E.2d 247, 260 (1981) ("The fifth amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. Although the fifth amendment privilege against compulsory testimonial self-incrimination is ordinarily asserted in criminal proceedings, its protection also extends to civil proceedings where a party may be subjected to imprisonment." (citation and quotation marks omitted)). But in a civil proceeding for abuse or neglect under Chapter 7B, a party's silence may allow the trial court to draw a negative inference because the purpose of this proceeding is to protect the children's best interests. *See In re Pittman*, 149 N.C. App. at 760-61, 561 S.E.2d at 564-65 ("We acknowledge the mother's argument that because an abuse and neglect proceeding can result in removal of a child from a parent's custody, a parent's constitutionally protected interest is at stake. However, the common thread running throughout the Juvenile Code, § 7B-100 *et seq.*, is that the court's primary concern must be the child's best interest. When determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child. Here, the child's interest in being protected from abuse and neglect is paramount. While the mother is not prevented from attempting to suppress her statement to Officer Batchelor in any subsequent criminal proceeding, the mother is barred from doing so in this civil proceeding where the protection of the child's interests, as distinguished from the mother's interests, is the overriding consideration." (citation and quotation marks omitted)).

The majority directs the trial court to make additional findings of fact on remand about circumstances which simply may not exist in this case, but those findings are not necessary. But of more concern, the majority seems to be barring the trial court from drawing negative inferences against either parent based upon their refusal or inability to explain what happened to E.H. In effect, the majority is directing the trial court to ignore its conviction, formed after considering extensive evidence and testimony, that R.H. is at risk of abuse by either Mother or Father, considering the type of trauma which would have been required to cause E.H.'s injuries, because one parent physically abused E.H., and the other parent is either protecting the abusing parent or is unable to protect the children from the abusing parent. But in cases with this sort of fact pattern, the trial court is often compelled to rely upon logical inferences from the established facts of the case. In *In re J.M.*, 384 N.C. 584, 604, 887 S.E.2d 823, 836 (2023), our Supreme Court affirmed the trial court's order removing "two young children from the custody of their parents after one or both parents inflicted life-threatening injuries on the youngest child, then just six weeks old." The youngest child was injured; the older child was not. *Id.* at 586, 887 S.E.2d at 825. The Supreme Court noted the similarities with *In re D.W.P.*, 373 N.C. 327, 838 S.E.2d 396:

> The parallels between *In re D.W.P.* and this case are obvious and compelling. Each case involves the serious physical abuse of an infant at home and in the care of two adults. In each case, the trial court found that the two caregivers were the only persons who could have inflicted the abuse. Moreover, while the mother in each case suggested that she was elsewhere in the home when the abuse took place, she refused to blame her partner or to supply any other plausible explanation for the infant's injuries. The explanations that were offered in each case bordered on the absurd, with the mother in *In re D.W.P.* blaming the family dog or strange sleep positions for the harm to her child and respondent-father in the present case theorizing that a difficult bowel movement accounted for Nellie's injuries. In each case, the trial court found that parental inability or unwillingness to confront the cause of the abuse prevented the parent(s) from adequately mitigating the risk of further abuse or neglect.

In re J.M., 384 N.C. at 601, 887 S.E.2d at 834. In all of these cases, one or more older children were also removed from the home based primarily or solely upon serious nonaccidental injury to an infant sibling in the

home. As in *In re J.M.*, here the trial court was "[f]aced with the gravity of the abuse and the persistent unwillingness of either parent to admit responsibility or to fault the other" and it concluded that the children could be protected only by removal from the home. *Id.* at 604, 887 S.E.2d at 836. And as in *In re M.T.*,

> [t]he trial court's job, ultimately, is to make hard decisions based upon the evidence presented, with the best interests of these two young children, [E.H. and R.H.], as its primary consideration. And our job, as an appellate court, is to determine if the trial court did that job correctly, in accord with the law. Because the trial court did that difficult job correctly, [I would] affirm the trial court's order.

285 N.C. App. at 307, 877 S.E.2d at 736. I therefore concur in part and dissent in part.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF
MARY JOYCE CLAPP HOWELL, DECEASED

No. COA23-1050

Filed 4 June 2024

1. Appeal and Error—appellate rule violations—non-jurisdictional—dismissal not warranted

In an appeal from the involuntary dismissal of a will caveat, dismissal was not warranted by three non-jurisdictional appellate rule violations by the caveator (appellant)—(1) failure to serve the notice of appeal (Appellate Procedure Rule 3); (2) failure to serve the record on appeal (Rule 11) on a second caveator who was closely aligned with appellant caveator (because they were siblings); and (3) failure to timely file record on appeal (Rule 12)—where the second caveator averred that she was not harmed by any service errors as to herself and where the record on appeal was timely mailed to the Court of Appeals (even though appellant should have filed the record electronically). Because these appellate rule violations did not impair the adversarial process or the appellate court's ability to review the appeal, the motion to dismiss the appeal filed by propounders (appellees) was denied, and the appellate court proceeded to consider the merits of the issues presented.

2. Wills—caveat—motion to reduce bond denied—no abuse of discretion

In a will caveat proceeding where the caveators asserted undue influence but failed to assert specific facts in support of that allegation, the trial court did not abuse its discretion in refusing to reduce the bond set pursuant to N.C.G.S. § 31-33(d) in the amount of $250,000—one-sixth of the estimated value of the estate—because the court considered the appropriate statutory factors: the value of the estate, the potential loss of the estate's value from litigation costs, and the (lack of) apparent merit in the caveators' position.

3. Civil Procedure—involuntary dismissal—failure to post bond in a will caveat—no abuse of discretion

In a will caveat proceeding, the trial court did not abuse its discretion by dismissing the caveators' case with prejudice pursuant to Civil Procedure Rule 41 where the caveators failed to post the required bond within the two-week statutory deadline, and, even after the trial court extended the deadline—despite the lack of a timely request by caveators—they again failed to post the bond and thus to comply with an order of the court.

Appeal by Caveators from order entered 4 May 2023 by Judge Andrew Hanford in Alamance County Superior Court. Heard in the Court of Appeals 17 April 2024.

Oertel, Koonts & Oertel, PLLC, by Geoffrey K. Oertel, for Caveator-Appellant Troy Howell.

Caveator-Appellee Melanie Jeffries, pro se.

Ellis & Winters LLP, by Pamela S. Duffy & Tyler C. Jameson, for Propounders-Appellees.

Holt Longest Wall Blaetz & Moseley, PLLC, by Peter T. Blaetz, for Other-Appellee Estate of Mary Joyce Clapp Howell.

CARPENTER, Judge.

Caveators appeal from the trial court's orders denying their motion to reduce bond and dismissing their case with prejudice. On appeal, Caveators argue that the trial court erred by: (1) denying their motion to reduce bond; and (2) dismissing their case with prejudice. After careful review, we disagree with Caveators and affirm the trial court's orders.

I. Factual & Procedural Background

On 22 July 2022, Troy Howell filed a caveat to the will of Mary Joyce Clapp Howell, which was propounded by Cheryl Thacker and Rhonda Lewallen. A caveat is a challenge to the validity of a will, and a propounder is someone who presents a will for court approval. *See Wilder v. Hill*, 175 N.C. App. 769, 772, 625 S.E.2d 572, 574 (2006).

Also on 22 July 2022, the Clerk of Alamance County Superior Court entered orders suspending administration of the Howell estate and transferring the matter to the Alamance County Superior Court's civil docket. On 12 September 2022, the trial court entered a caveat-alignment order, aligning Cheryl Thacker and Rhonda Lewallen as "Propounders" and aligning Troy Howell and Melanie Jeffries as "Caveators." Caveator Jeffries is Caveator Howell's sister. Although Caveator Jeffries did not appear before the trial court, the trial court found her to be an "interested party" in this matter.

On 9 January 2023, the trial court entered an order granting Propounders' motion for a caveat bond, requiring Caveators to post a $250,000 bond within twenty days of entry of the order. A caveat bond "provide[s] security . . . for the payment of such costs and damages as may be incurred or suffered by the estate if the estate is found to have been wrongfully enjoined or restrained." *See* N.C. Gen. Stat. § 31-33(d) (2023). On 15 March 2023, Caveators moved for a reduction of the bond.

On 4 May 2023, the trial court entered an order denying Caveators' motion to reduce the bond. The trial court did, however, extend Caveators' bond deadline until 12 May 2023. But the trial court ordered that if Caveators failed to post bond by the extended deadline, the trial court would dismiss their case with prejudice.

Nonetheless, Caveator Howell filed a notice of appeal from the trial court's 4 May 2023 order. Caveators did not post bond by 12 May 2023, so the trial court dismissed the action with prejudice. On 28 December 2023, Propounders moved to dismiss this appeal.

II. Jurisdiction

[1] An involuntary dismissal under Rule 41(b) "operates as an adjudication upon the merits." N.C. Gen. Stat. § 1A-1, Rule 41(b) (2023); *see also Whedon v. Whedon*, 313 N.C. 200, 210, 328 S.E.2d 437, 443 (1985) ("Ordinarily, an involuntary dismissal under Rule 41(b) operates as an adjudication upon the merits and ends the lawsuit."). Accordingly, we have jurisdiction under subsection 7A-27(b)(1) because the trial court's

dismissal ended the lawsuit, thus rendering the 4 May 2023 order final. *See* N.C. Gen. Stat. § 7A-27(b)(1) (2023).

Propounders, however, moved to dismiss this appeal because Caveators violated our Rules of Appellate Procedure. In support of their motion to dismiss, Propounders argue that Caveator Howell violated Rule 3 because,"[a]s reflected in the Certificate of Service to the Notice of Appeal, [Caveator Jeffries] was not served with a copy of the Notice of Appeal." Propounders also assert that Caveator Howell violated Rule 11 because "[t]he Certificate of Service on the Proposed Record on Appeal reflects that [Caveator Jeffries] was not served with a copy of the Proposed Record on Appeal." Lastly, Propounders argue that Caveator Howell violated Rule 12 by failing to timely file the record.

A. Applicable Sanctions for Violating the Rules of Appellate Procedure

We may sanction parties for failing to adhere to our Rules of Appellate Procedure, N.C. R. App. P. 25(b), and we may do so by dismissing their appeal, N.C. R. App. P. 34(b)(1). But "a party's failure to comply with non[-]jurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co., v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). "[O]nly in the most egregious instances of non[-]jurisdictional default will dismissal of the appeal be appropriate." *Id.* at 200, 657 S.E.2d at 366.

Whether to dismiss an appeal because of non-jurisdictional violations is a case-by-case inquiry. *See N.C. ex rel. Expert Discovery, LLC v. AT&T Corp.*, 287 N.C. App. 75, 84, 882 S.E.2d 660, 668–69 (2022) (citing *Dogwood*, 362 N.C. at 199–200, 657 S.E.2d at 366). To determine whether a dismissal is warranted because of non-jurisdictional violations, we consider: (1) whether the violations impair our review of the case; (2) whether the violations "frustrate" the adversarial process; and (3) the number of violations. *Id.* at 84, 882 S.E.2d at 669 (citing *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366–67).

B. The Applicable Rules of Appellate Procedure

Under Rule 3, the appellant must serve copies of the notice of appeal "upon all other parties within the time prescribed by subsection (c) of this rule." N.C. R. App. P. 3(a). Subsection (c) requires the appellant to serve a notice of appeal upon all parties within thirty days of the appealed-from order or judgment. *See* N.C. R. App. P. 3(c).

Under Rule 11, "[i]f the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided,

serve upon all other parties a proposed record on appeal . . . ." N.C. R. App. P. 11(b). Under Rule 12, the "appellant must file the record on appeal no later than fifteen days after it has been settled . . . ." N.C. R. App. P. 12(a).

C. Whether the Applicable Rules are Jurisdictional

Some of Rule 3's requirements are jurisdictional. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). Indeed, under Rule 3, filing notice of appeal is a jurisdictional requirement. *See Expert Discovery*, 287 N.C. App. at 84, 882 S.E.2d at 668. But we have "noted that where a notice of appeal is properly and timely filed, but not served upon *all* parties, this violation of Rule 3 is a non-jurisdictional defect." *Id.* (citing *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 102, 693 S.E.2d 684 (2010)). In *Expert Discovery*, we did not dismiss the appeal because "the unserved defendants were later 'informed of the fact that there was an appeal which affect[ed] their interests.' " *Id.* at 84–85, 882 S.E.2d at 669 (alteration in original) (quoting *Lee*, 204 N.C. App. at 103, 693 S.E.2d at 690). Similar to the serve-all-parties requirement of Rule 3, neither Rule 11 nor Rule 12 are jurisdictional. *See Mills v. Jackson*, No. COA21-325, 2022 N.C. App. LEXIS 319, at *3–4 (N.C. Ct. App. May 3, 2022).

D. Whether Caveators' Violations Warrant Dismissal

Here, Caveator Howell appealed this case and managed the appellate process, while Caveator Jeffries remained pro se. Caveators concede that Caveator Howell filed the record on 21 November 2023, which was more than fifteen days after the parties finalized the record. Therefore, Caveator Howell violated Rule 12. *See* N.C. R. App. P. 12(a). Caveators also concede that Caveator Howell failed to formally serve notice of appeal and the record upon Caveator Jeffries. Despite not appearing before the trial court, the trial court aligned Caveator Jeffries as an interested party; therefore, Caveator Howell violated Rules 3 and 11. *See* N.C. R. App. P. 3(a), 11(b). None of these violations, however, are jurisdictional. *See, e.g.*, *Expert Discovery*, 287 N.C. App. at 84, 882 S.E.2d at 668.

In response to Propounders' motion to dismiss, Caveators argue that Caveator Jeffries "was aware of the Notice of Appeal being filed and, although not included in the Certificate of Service as having received a formal service copy of the Notice of Appeal, did receive a copy of the Notice through her co-Caveator and brother, [Caveator Howell]." Caveators stated that Caveator Jeffries "was mistakenly not included on the Certificate of Service for the Notice but did receive a copy of the Notice of Appeal."

Caveators also stated that although Caveator Howell did not formally serve Caveator Jeffries, Caveator Jeffries signed an affidavit, stating that she received a notice of appeal and a copy of the record, and that she was not harmed by a lack of formal service because Caveator Howell is her "brother, and [they] have been working together on this case."

Concerning their late filing of the record, Caveators say that the record "was mistakenly mailed to the Court of Appeals, and the Clerk of the Court of Appeals called Caveators counsel's office on November 14, 2023 to inform that the record would not be accepted by mail and would have to be filed electronically."

Here, Caveator Howell's failure to formally serve Caveator Jeffries has not impaired our review or the adversarial process of this case. Because Caveators "have been working together on this case," our review does not lack an advocacy perspective from Caveator Jeffries. Further, Propounders have thoroughly and persuasively briefed us on appeal; Caveator Howell's violations have not impaired Propounders' advocacy.

Therefore, despite Caveator Howell's violations, our review of this appeal is not impaired. *See Expert Discovery*, 287 N.C. App. at 84–85, 882 S.E.2d at 669. So although Caveator Howell's violations are unadvised, they are not the "most egregious instances" of non-jurisdictional default. *See Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366. Accordingly, because non-jurisdictional violations "normally should not lead to dismissal of the appeal," we deny Propounders' motion to dismiss Caveators' appeal. *See id.* at 198, 657 S.E.2d at 365.

III. Issues

The issues on appeal are whether the trial court erred by: (1) denying Caveators' motion to reduce bond; and (2) dismissing Caveators' case with prejudice.

IV. Analysis

A. Motion to Reduce Bond

[2] In their first argument, Caveators assert that the trial court erred by declining to reduce their bond amount. We disagree.

We review a trial court's decision not to reduce a bond amount for abuse of discretion. *See Fayetteville Light & Power Co. v. Lessem Co.*, 174 N.C. 358, 359, 93 S.E. 836, 837 (1917). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Under subsection 31-33(d), a trial court "may require a caveator to provide security in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by the estate if the estate is found to have been wrongfully enjoined or restrained." N.C. Gen. Stat. § 31-33(d).

Here, in the 9 January 2023 order requiring Caveators to post bond, the trial court found that Caveators challenged the will by asserting undue influence, but the trial court also found that Caveators failed to "assert specific facts showing that the Will was executed as a result of undue influence." Further, the trial court found that Propounders could not administer the will because of "the pending caveat litigation." As a result, the trial court found that "Propounders [were] at a risk of irreparable loss or damage," and they would "likely incur substantial attorneys' fees in this action." The trial court valued the challenged estate at roughly $1,500,000.

The trial court found that the "Caveat lack[ed] substantial merit" because "Caveators have asserted only vague allegations and conclusory statements of opinion." The trial court then concluded that a $250,000 bond, one sixth of the estimated value of the estate, was "an appropriate amount to secure potential damage to the Estate and Propounders."

In the 4 May 2023 order, the trial court denied Caveators' motion to reduce the bond amount. The trial court also found that "Caveators have offered no evidence that they have sought to post collateral to secure the bond or have otherwise made adequate efforts to comply with the requirements of the bond order." Nonetheless, the trial court extended Caveators' time to post bond until 12 May 2023.

In setting the bond amount, the trial court considered the value of the estate, the estate's potential loss of value from litigation, and the merit, or lack thereof, of Caveators' allegations. These were the correct considerations under subsection 31-33(d). *See id.* And at less than twenty percent of the estate's estimated value, $250,000 was a reasonable bond amount.

Because the trial court followed subsection 31-33(d), and graciously extended the timeline for Caveators to post the bond—despite Caveators waiting over two months to request a reduction—the trial court's decision to deny Caveators' motion to reduce the bond was not "so arbitrary that it could not have been the result of a reasoned decision." *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Therefore, the trial court did not abuse its discretion by declining to reduce the bond. *See id.* at 285, 372 S.E.2d at 527.

B. Involuntary Dismissal with Prejudice

[3] In their second argument, Caveators assert that the trial court erred by dismissing their case with prejudice. Again, we disagree.

First, we must clarify our standard of review concerning involuntary dismissals under Rule 41. *Compare In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 247, 618 S.E.2d 819, 826 (2005) ("Dismissal under Rule 41(b) is left to the sound discretion of the trial court and will not be disturbed on appeal in the absence of a showing of abuse of discretion.") *with Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005) ("The proper standard of review for a motion for an involuntary dismissal under Rule 41 is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment.").

Rule 41(b), which allows for involuntary dismissals, is a long rule. *See* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2023). The first sentence of the rule states that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him." *Id.* In this scenario, we review dismissals for abuse of discretion. *See In re Pedestrian Walkway Failure*, 173 N.C. App. at 244–47, 618 S.E.2d at 825–26 (reviewing a Rule 41(b) dismissal for abuse of discretion where the trial court dismissed a case because of a party's misconduct and failure to comply with court orders).

Going back to the text of Rule 41(b), it also states:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

N.C. Gen. Stat. § 1A-1, Rule 41(b).

In other words, before presenting evidence in a bench trial, a defendant may move for dismissal if the plaintiff failed to prove a "right to

relief." *See id.* And if the trial court grants the defendant's motion, the trial court must make findings. *See id.* In reviewing dismissals in such scenarios, we apply the *Dean* standard of review. *See Dean*, 171 N.C. App. at 483, 615 S.E.2d at 701 (reviewing to discern "(1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment").

For some background, in *McNeely v. Southern Railway Co.*, we explained that "[s]ince the enactment of the new Rules of Civil Procedure in 1970, this Court has repeatedly distinguished between the motion for directed verdict under Rule 50 and the motion for involuntary dismissal under Rule 41(b)." 19 N.C. App. 502, 504, 199 S.E.2d 164, 166 (1973).

We "repeatedly distinguished" between Rule 50 and Rule 41(b) because they both allow the trial court to end a lawsuit on the merits when the plaintiff fails to present sufficient evidence. *See* N.C. Gen. Stat. §§ 1A-1, Rule 41(b), Rule 50. What distinguishes the rules is that Rule 50 applies in jury trials, and Rule 41(b) applies in bench trials. *McNeely*, 19 N.C. App. at 504, 199 S.E.2d at 166. Put differently, Rule 50 allows for directed verdicts; Rule 41(b) allows for involuntary dismissals. *See Dean*, 171 N.C. App. at 482–83, 615 S.E.2d at 701.

In *Dean*, the trial court purportedly granted a directed verdict, but on appellate review, we "treat[ed] the trial court's order for directed verdict" as an involuntary dismissal under Rule 41(b) because "it is well settled that a motion for a directed verdict only is proper in a jury trial . . . ." *See id.* at 482–83, 615 S.E.2d at 701.

In this quasi directed-verdict scenario, we review a trial court's dismissal under Rule 41(b) to discern "(1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *See id.* at 483, 615 S.E.2d at 701; *see also McNeely*, 19 N.C. App. at 504–05, 199 S.E.2d at 166 ("In determining the sufficiency of the evidence when ruling on a motion to dismiss made under Rule 41(b), it is the function of the trial judge to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case." (*purgandum*)).

Here, however, the trial court dismissed Caveators' case because they failed to comply with the trial court's order to post bond before 12 May 2023. Because the trial court dismissed Caveators' case for failure to "comply with . . . an[] order of court," *see* N.C. Gen. Stat. § 1A-1,

Rule 41(b), we will review the trial court's decision for an abuse of discretion, *see In re Pedestrian Walkway Failure*, 173 N.C. App. at 247, 618 S.E.2d at 826. And as detailed above, "[a]buse 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." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

Caveators failed to follow the trial court's order; they failed to post the bond within the two-week deadline. *See* N.C. Gen. Stat. § 1A-1, Rule 41(b). Even so, the trial court extended the deadline for Caveators—despite their untimely request for an extension. Yet even with their extension, Caveators again failed to post the bond and thus, failed to comply with an "order of court." *See id.*

The Caveators wasted the time and resources of both the trial court and Propounders. Accordingly, the trial court's decision to dismiss Caveators' case under Rule 41(b) was not "so arbitrary that it could not have been the result of a reasoned decision." *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Therefore, the trial court did not abuse its discretion. *See id.* at 285, 372 S.E.2d at 527.

V. Conclusion

We hold that the trial court did not err by denying Caveators' motion to reduce bond or by dismissing Caveators' case with prejudice.

AFFIRMED.

Judges WOOD and GORE concur.

RM CONTRACTORS, LLC, PLAINTIFF
v.
SANDRA L. WIGGINS, DEFENDANT

No. COA23-978

Filed 4 June 2024

1. Jurisdiction—interlocutory—partial summary judgment striking claim of lien—substantial right affected

In a case arising from a dispute regarding the construction of a home, an order granting partial summary judgment in favor of the homeowner (defendant) by striking a claim of lien filed by the contractor (plaintiff) pursuant to N.C.G.S. § 44A-8 implicated a substantial right of plaintiff that would be lost absent immediate review in that the order could be used by defendant to discharge plaintiff's claim of lien—which, if perfected, would give plaintiff's lien priority over all other interests or claims from other creditors of defendant. Accordingly, plaintiff's interlocutory appeal of the order was properly before the appellate court.

2. Liens—summary judgment improper—material factual issue disputed—lack of payment for work performed

In a case arising from the construction of a home, the trial court erred in granting partial summary judgment in favor of the homeowner (defendant) by striking a claim of lien filed by the contractor (plaintiff) pursuant to N.C.G.S. § 44A-8 where there remained a disputed issue of material fact as to the validity of the claim of lien, namely, whether plaintiff remained unpaid for some of his work performed on defendant's home.

Appeal by Plaintiff from order entered 18 July 2023 by Judge Brenda G. Branch in Nash County Superior Court. Heard in the Court of Appeals 21 February 2024.

Battle, Winslow, Scott & Wiley, PA, by M. Greg Crumpler & W. Dudley Whitley, III, for Plaintiff-Appellant.

Everette, Womble & Lawrence, by Harry Lorello, for Defendant-Appellee.

CARPENTER, Judge.

RM Contractors, LLC ("Plaintiff") appeals from the trial court's order (the "Order") granting partial summary judgment to Sandra L. Wiggins ("Defendant"). On appeal, Plaintiff argues that the trial court erred by granting Defendant partial summary judgment, striking Plaintiff's claim of lien. After careful review, we agree with Plaintiff and reverse the trial court's partial grant of summary judgment.

I. Factual & Procedural Background

In the summer of 2020, Plaintiff contracted to build a home (the "Home") for Defendant. On 13 October 2021, Plaintiff sued Defendant for breach of contract, quantum meruit, fraud, and to enforce a claim of lien on the Home.

On 6 April 2023, Defendant filed a motion for summary judgment. The trial court heard Defendant's motion on 17 April 2023, and evidence there tended to show the following. Plaintiff began working on the Home in August 2020 and last worked on the Home on 25 April 2021. Defendant paid Plaintiff a total of $179,750, but Plaintiff claimed that Defendant still owes at least $54,800. On 9 August 2021, Plaintiff filed a claim of lien on the Home to secure $54,800.

Defendant claimed she did not owe Plaintiff any money because she incurred costs to amend and complete Plaintiff's work, and her costs exceeded $54,800. And regardless of her costs, Defendant claimed that Plaintiff provided no documentation to support its $54,800 claim of lien. The parties submitted competing affidavits, each blaming the other for delays and increased construction costs.

On 18 July 2023, the trial court entered the Order, stating that "[w]hat we have at this point is each party contesting what the other is owed based on breach of contract, which is a disputed issue reserved for trial." Nonetheless, the trial court granted Defendant partial summary judgment, striking Plaintiff's claim of lien. On 31 July 2023, Plaintiff filed written notice of appeal from the Order. On 21 November 2023, Plaintiff filed a petition for writ of certiorari ("PWC").

II. Jurisdiction

[1] "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Cap., L.C.*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) (citing *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Orders granting partial summary judgment are interlocutory. *Country*

Boys Auction & Realty Co. v. Carolina Warehouse, Inc., 180 N.C. App. 141, 144, 636 S.E.2d 309, 312 (2006).

There are, however, exceptions to the general rule prohibiting us from hearing appeals from interlocutory orders. *See* N.C. Gen. Stat. § 7A-27(b)(3) (2023). One exception is the substantial-right exception, which allows us to review an interlocutory order if the order affects a "substantial right." *See id.* "An interlocutory order affects a substantial right if the order deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Suarez v. Am. Ramp Co.*, 266 N.C. App. 604, 608, 831 S.E.2d 885, 889 (2019) (*purgandum*).

In order "[t]o confer appellate jurisdiction based on a substantial right, 'the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020) (quoting *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019)); N.C. R. App. P. 28(b)(4) ("When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."). Accordingly, "if the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction." *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438.

Here, the Order is interlocutory because it grants partial summary judgment. *See Country Boys Auction & Realty Co.*, 180 N.C. App. at 144, 636 S.E.2d at 312. But Plaintiff argues that we have jurisdiction via the substantial-right exception. Specifically, Plaintiff argues this case "clearly implicates a substantial right" because the trial court struck its claim of lien. Plaintiff asserts that because the Order strikes its claim of lien, it "is left with no ability to protect its interest against future purchasers or mortgagees of the property." We agree.

A lien secures the payment of a debt. *Morganton Hardware Co. v. Morganton Graded Schs.*, 151 N.C. 507, 509, 66 S.E. 583, 584 (1909). Some liens are provided by statute. *See, e.g.*, N.C. Gen. Stat. § 44A-8 (2023). Plaintiff filed its claim of lien under section 44A-8, which states:

> Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property

> for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract.

Id.

In other words, section 44A-8 entitles Plaintiff to a lien on the Home if, pursuant to a valid contract, Plaintiff worked on the Home, and Defendant failed to pay Plaintiff for its work. *See id.* This lien is commonly called a materialman's lien. *See Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 653, 140 S.E.2d 330, 339 (1965).

A materialman's lien must be perfected before it can be enforced. *See Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 667, 242 S.E.2d 785, 789 (1978). The lien is perfected by filing a "claim of lien" and serving a copy of the claim of lien on the property owner. *See* N.C. Gen. Stat. § 44A-11(a). A claim of lien is a legal document "prepared to enforce the claimant's statutory lien rights." *N.C. State Bar v. Lienguard, Inc.*, No. 11 CVS 7288, 2014 NCBC LEXIS 11, at *25 (N.C. Super. Ct. Apr. 4, 2014) (citing *Embree Constr. Grp. v. Rafcor, Inc.*, 330 N.C. 487, 492, 411 S.E.2d 916, 921 (1992)). The claim of lien "must be filed in the office of the clerk of superior court in each county where the real property subject to the claim of lien on real property is located." N.C. Gen. Stat. § 44A-12(a).

Filing, and thus perfecting, a claim of lien establishes the "priority" of the lien. Lien priority is "a creditor's right to have a claim paid before other creditors of the same debtor receive payments." *Priority*, Black's Law Dictionary (11th ed. 2019). A properly perfected materialman's lien has "priority over all other interests or claims theretofore or thereafter created or suffered . . . ." N.C. Gen. Stat. § 44A-22. Put differently, the materialman gets paid first. *See id.*; *Rural Plumbing & Heating, Inc.*, 263 N.C. at 653, 140 S.E.2d at 339 (stating that a materialman's lien "takes priority over all the property conveyances to purchasers for value and without notice subsequent to the time when labor and materials are furnished").

After a claim of lien is filed, however, it may be discharged for a number of reasons. *See* N.C. Gen. Stat. § 44A-16(a). For example, a claim may be discharged because the lien was not timely enforced, *id.* § 44A-16(a)(3), or because the lien was satisfied, *id.* § 44A-16(a)(1). Relevant here, a claim of lien may also be discharged by:

> filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the claim of lien on real property has been dismissed or finally determined adversely to the claimant.

Id. § 44A-16(a)(4). "Typically, '[t]his subsection requires that a judgment be filed showing that the action to perfect a lien has been dismissed or otherwise decided adversely to the lien claimant in order to discharge the lien.' " *Pete Wall Plumbing Co. v. Sandra Anderson Builders, Inc.*, 215 N.C. App. 220, 226, 721 S.E.2d 663, 667 (2011) (alteration in original) (quoting *Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc.*, 333 N.C. 250, 251, 424 S.E.2d 383, 384 (1993)).

Here, the Order "struck" Plaintiff's claim of lien. The Order was therefore an adverse decision concerning Plaintiff's action to enforce the claim of lien. *See id.* at 226, 721 S.E.2d at 667. Accordingly, Defendant could use the Order to discharge Plaintiff's claim of lien. *See* N.C. Gen. Stat. § 44A-16(a)(4).

The relevant jurisdictional issue is whether the possibility of an erroneous discharge affects a substantial right. *See Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438. More precisely, the question before us is whether the possibility of an erroneous discharge affects Plaintiff's priority position, potentially causing that position to be "lost if the order is not reviewed before a final judgment is entered." *See Suarez*, 266 N.C. App. at 608, 831 S.E.2d at 889. We hold that it does.

For example, assume Plaintiff's lien is valid; the trial court erroneously struck the claim of lien. In this example, if the Home is sold after Plaintiff's claim of lien is discharged, but before the error is corrected on appeal, Plaintiff will not have first priority in the sale proceeds. So if we wait for a final judgment before reviewing the Order, we extend the possibility of the Home selling before appellate review—and we extend the possibility of Plaintiff wrongfully losing its statutorily granted priority position and thus, possibly losing sale proceeds to satisfy its statutory lien.

To limit the possibility of Plaintiff improperly losing its priority position, we conclude that the Order affects a substantial right. *See id.* at 608, 831 S.E.2d at 889. Accordingly, despite the interlocutory nature of the Order, we have jurisdiction over this appeal. *See* N.C. Gen. Stat. § 7A-27(b)(3). Because the Order is appealable, we dismiss Plaintiff's PWC as moot, and any further proceedings concerning Plaintiff's claim of lien were stayed as a matter of law because Plaintiff filed notice of

appeal. *See Dalenko v. Peden Gen. Contractors, Inc.*, 197 N.C. App. 115, 121–22, 676 S.E.2d 625, 630 (2009) (citing N.C. Gen. Stat. § 1-294) ("When a party gives notice of appeal from an appealable order, the trial court is divested of jurisdiction and the related proceedings are stayed in the lower court.").

III. Analysis

[2] We review summary-judgment rulings de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Summary judgment is appropriate when "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). Concerning summary judgment, courts "must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Indeed, "[s]ince this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

When summary judgment is granted on an issue, that issue is not tried: Receiving summary judgment has the same effect as winning at trial—but without going to trial. *See id.* at 533, 180 S.E.2d at 829 ("The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue.").

As detailed above, Plaintiff filed its claim of lien under section 44A-8, which entitles Plaintiff to a lien on the Home if Plaintiff, pursuant to a valid contract, worked on the Home, and Defendant failed to pay Plaintiff for its work. *See* N.C. Gen. Stat. § 44A-8. Here, the parties do not dispute: (1) that Plaintiff contracted with Defendant to build the Home, (2) that Plaintiff worked on the Home, and (3) that Defendant, at least partially, paid Plaintiff for its work.

But a material question of fact remains. As the trial court put it: "What we have at this point is each party contesting what the other is owed based on breach of contract, which is a disputed issue reserved

for trial." This issue—whether Plaintiff remains unpaid for work performed on the Home—is a material factual issue concerning the validity of Plaintiff's claim of lien. *See id.* In other words, if Defendant still owes Plaintiff for work performed on the Home, Plaintiff has "a right to file a claim of lien on [the Home]." *See id.* Therefore, the trial court erred in granting Defendant partial summary judgment by striking Plaintiff's claim of lien. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

IV. Conclusion

We hold that we have jurisdiction over this case because the Order affects a substantial right, and we reverse the trial court's partial grant of summary judgment because disputed material facts remain.

REVERSED.

Judges ARROWOOD and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
JEANIE KASSANDRA DITTY, DEFENDANT

No. COA23-141

Filed 4 June 2024

1. Jurisdiction—order granting motion to enforce plea agreement—prior denial by different judge—first order never entered

In an appeal by the State from an interlocutory order granting defendant's motion to enforce a plea agreement in a criminal matter, and a conditional appeal by defendant of a prior order—by a different superior court judge—denying defendant's motion to enforce, the second judge had jurisdiction to freely consider defendant's motion to enforce the plea agreement because the prior order was never properly entered. Although the first judge rendered an oral judgment and signed defendant's motion next to a notation "Denied 11-29-18," there was no marking or file stamp that would indicate that the order had been filed or entered into the clerk of court's records. Therefore, defendant's conditional appeal was dismissed as moot.

2. Criminal Law—motion to enforce plea agreement—right of State to withdraw prior to entry of plea—no detrimental reliance

In an appeal by the State from an interlocutory order granting defendant's motion to enforce a plea agreement, the trial court erred by concluding that defendant was entitled to specific performance of the State's initial plea offer—under which defendant was to plead guilty to accessory after the fact to the first-degree murder of her two-year-old daughter, as opposed to a subsequent offer to plead guilty to second-degree murder in lieu of charges for first-degree murder and felony child abuse—because the undisputed facts showed that defendant never entered—and the trial court never approved or accepted—a guilty plea under that initial offer, and that she did not change her position in detrimental reliance on the terms of the initial offer.

Appeal by the State from order entered 20 June 2022 by Judge James Floyd Ammons, Jr., in Cumberland County Superior Court and conditional appeal by Defendant from order rendered 29 November 2018 by Judge Claire Hill in Cumberland County Superior Court. Heard in the Court of Appeals 5 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant.

MURPHY, Judge.

The trial court properly concluded that it had jurisdiction to hear Defendant's 18 November 2021 *Motion to Enforce Plea Agreement* because the 29 November 2018 order on Defendant's previous motion was never entered. However, we reverse the trial court's order granting Defendant specific performance of the plea agreement for accessory after the fact to first-degree murder because she did not change her position in detrimental reliance upon the plea agreement prior to the State's withdrawal.

BACKGROUND

On 2 December 2015, Defendant Jeanie Kassandra Ditty's two-year-old daughter died as the result of a combination of head injuries, soft

tissue injuries, and internal injuries, including a lacerated liver. On 24 March 2016, Defendant was charged with felony child abuse inflicting serious bodily injury and first-degree murder in connection with her daughter's death, and she was arrested and held on these charges without bond. Two days later, Zachary Keefer—Defendant's romantic partner at the time—was arrested on the same charges.

Defendant offered to plead guilty to felony child abuse because "she knew or should have known that she was leaving her child [in the care of Keefer,] somebody who had issues with rage[]" on the day of her daughter's death. The State declined to accept this plea offer. Defendant responded by offering to plead guilty to accessory after the fact to first-degree murder, and, in support of this offer, provided the State with a polygraph that she had independently sought out, which "came back favorably." The State asked if Defendant would be willing to submit to a new polygraph administered by a State Bureau of Investigation polygrapher, and Defendant agreed. In July 2016, Defendant submitted to the State's polygraph. The results of the State's polygraph were consistent with those of Defendant's independently-sought polygraph: Defendant "passed" all questions except the one regarding whether she felt responsible for her daughter's death, which had inconclusive results.

During the next several months, the State requested that Defendant not move for bond reduction, push for an indictment, or request a probable cause hearing while the State continued its investigation and the parties continued their plea negotiations. The State ultimately requested that Defendant submit to a second interview by the Fayetteville Police Department or with Charlie Disponzio, the State's investigator; and Defendant voluntarily submitted to an interview with Mr. Disponzio on 16 November 2017.

On or about 7 January 2018, the State provided Defendant with a plea transcript and memorandum of agreement for accessory after the fact to first-degree murder; and, on 8 January 2018, Defendant signed and returned the documents. The State never signed the plea agreement. The agreement required, in pertinent part:

> 1. [Defendant] will enter a plea of GUILTY to [Accessory After the Fact to First-Degree Murder] . . . .
>
> 2. Defendant] will use her best efforts to do the following:
>
> a. Submit to interviews and debriefings with investigative agents and prosecuting attorneys for the State and the United States of America;

> b. Fully and truthfully disclose her involvement and the involvement of others in criminal activity, including her involvement in the cases in which she is charged;
>
> c. Submit to polygraph examinations of other similar investigative tools at the request of the State and the United States of America;
>
> d. Actively assist law enforcement by participating in law enforcement controlled conversations and meetings with co-conspirators or co-defendants;
>
> e. Testify fully and truthfully in any proceeding, State or Federal, including but not limited to, grand jury proceedings and trials, regarding her and others' knowledge and participation in criminal activity and crimes of violence;
>
> f. Comply with all laws of the State and the United States of America; and,
>
> g. Waive all rights to any item seized by law enforcement in these matters and agrees that same may be disposed of as by law provided without further notice to [Defendant].

The agreement did not require Defendant "to forego requesting a bond-reduction hearing, a probable cause hearing, or an indictment." Pursuant to the plea agreement, Defendant was to provide "substantial assistance and cooperation[]" and, upon delivering such assistance, would "receive an active sentence of 44 months minimum, 65 months maximum." However, if Defendant violated the terms of the agreement, the parties would be free to argue as to sentencing, with that sentencing left to the discretion of the trial court. The agreement further provided that the State would not use "statements made by [Defendant] regarding the cases in which she is currently charged in prosecutions against her[]" unless Defendant withdrew from the plea and that the State may void the agreement "in its sole discretion[] [if it] determines that [Defendant] has given false information or false testimony pursuant to this agreement[.]"

The State scheduled a plea hearing for 7 March 2018, though it canceled this hearing on its scheduled date. Due to a conflict, the Cumberland County District Attorney's office withdrew as counsel for the State on 28 March 2018, and Special Prosecutor Julia Hejazi took over the State's

prosecution of Defendant's case. *See generally* N.C.G.S. §§ 7A-413(a)(2) and 7A-415 (2023). The State informed Special Prosecutor Hejazi that Defendant had signed the plea agreement but that the State had canceled Defendant's plea hearing and, therefore, Defendant had not yet entered a guilty plea.

In April 2018, Special Prosecutor Hejazi advised Defendant that—based on her independent review of new and existing evidence—she would extend a new plea offer of second-degree murder to both Defendant and Keefer. Defendant rejected Special Prosecutor Hejazi's new offer; and, on 11 September 2018, was indicted for felony child abuse and first-degree murder. Shortly after her indictment, Defendant filed a motion seeking to enforce and compel specific performance of the State's initial plea offer for accessory after the fact to first-degree murder. The trial court, by Judge Claire Hill, rendered an oral denial of Defendant's motion on 29 November 2018.

On the same day, the State moved, and was permitted, to join Defendant and Keefer for trial. A joint trial was scheduled for 19 August 2019 but was ultimately continued until 12 November 2019. However, in November 2019, the State dropped its charges against Keefer. Defendant's case proceeded to trial on the charges of first-degree murder and felony child abuse on 9 March 2020. On 20 March 2020, the trial court declared a mistrial due to a hung jury, and a new trial was scheduled.

On 12 August 2020, Defendant's court-appointed counsel, Chief Public Defender Bernard P. Condlin, who had represented Defendant in all proceedings since March 2016, withdrew as counsel, and the trial court ordered that new counsel be assigned by the Capital Defender. On 11 September 2020, the Capital Defender appointed Meleaha Machelle Kimrey to represent Defendant.

Prior to the new trial date, Defendant filed a new *Motion to Enforce Plea Agreement*, seeking specific performance of the State's previous plea agreement for accessory after the fact to first-degree murder. In this motion, Defendant again argued that she relied to her detriment on the State's January 2018 plea agreement and, consequently, did not file for a new bond hearing; did not push for an indictment; submitted to the State's polygraph and interview; and—as a result of the late indictment—had less time than her co-defendant to review discovery materials.

On 22 November 2021, the trial court, by Judge James F. Ammons, Jr., heard and rendered its order granting Defendant's motion to enforce. Special Prosecutors Whitney Belich and Lisa Coltrain appeared as

counsel for the State at the hearing.[1] As of the hearing date, Defendant had been incarcerated pending trial for 69 months, a period of time more than the maximum sentence—65 months—that she would have received pursuant to the aborted plea agreement. On 22 November 2021, Defendant was released on a combined $50,000.00 unsecured bond and directed to return to court on 2 December 2021.

At the December appearance, the parties entered into a *Consent Order* whereby the trial court, *inter alia*, stayed further proceedings until after entry of its written order. On 10 February 2022, the State moved for reconsideration of the orally-rendered order. The trial court heard arguments on the State's motion on 24 March 2022 and ultimately entered its written order granting Defendant's motion to enforce on 20 June 2022.

On 20 July 2022, the State petitioned our review of the trial court's *Order to Enforce Plea Agreement*. On 2 September 2022, Defendant filed her response and a conditional petition for review of Judge Hill's earlier order denying Defendant's motion to enforce the plea agreement. We allowed both petitions; and, on 5 September 2023, a panel consisting of (now-Chief) Judge Chris Dillon, Judge Hunter Murphy, and Judge (now-Justice) Allison Riggs heard oral arguments in this matter. On 13 September 2023, Judge Riggs assumed a new position as Associate Justice of the North Carolina Supreme Court. Following Justice Riggs's appointment, on 3 November 2023, we ordered that this case shall be decided by a panel consisting of (now-Chief) Judge Dillon, Judge Murphy, and Judge Carolyn Thompson, who was not present for oral arguments. On 13 November 2023, Defendant filed a *Motion for New Panel to Consider Oral Argument*. We denied this motion on 19 December 2023 and took judicial notice of the prior oral argument conducted and recorded on 5 September 2023.

ANALYSIS

No judgment has been entered against Defendant. This case is before us on appeal from an interlocutory order not otherwise authorized by N.C.G.S. § 7A-27(b) or N.C.G.S. §§ 15A-1444–1445; however,

1. The record makes no specific reference to Special Prosecutor Hejazi's withdrawal as counsel for the State. However, the record contains no documents signed by Special Prosecutor Hejazi on behalf of the State after 20 March 2020. On 17 November 2021, Defendant's trial counsel certified that she served a copy of Defendant's motion upon Special Prosecutor Lisa Coltrain; and, at the 22 November 2021 hearing on this motion, Special Prosecutors Lisa Coltrain and Whitney Belich appeared as counsel for the State.

this Court—by a panel consisting of Judge (now-Justice) Richard Dietz, Judge April Wood, and Judge John Tyson (dissenting)—allowed the State's *Petition for Writ of Certiorari* and Defendant's *Conditional Petition for Writ of Certiorari* by majority vote on 19 October 2022. *See* N.C. R. App. P. 21(a)(1) (2023) (empowering appellate courts to issue writ of certiorari to review orders by trial court "when no right of appeal from an interlocutory order exists"); *see generally* N.C.G.S. § 7A-27(b) (2023) (dictating cases in which appeal from trial court "lies of right directly to the Court of Appeals"), N.C.G.S. §§ 15A-1444–1445 (2023) (governing statutory bases for appeal by criminal defendant and appeal by the State, respectively).

On appeal from the trial court's *Order to Enforce Plea Agreement*, the State argues that "the trial court[,] [by Judge Ammons,] lacked authority to overrule Judge Hill's prior denial order by granting Defendant's second motion to enforce the same plea agreement, and its 22 June 2022 order therefore should be vacated." In the alternative, the State argues that the trial court erred in granting Defendant's motion to enforce the withdrawn plea agreement on the merits.

In response to the State's appeal, Defendant argues that the trial court correctly concluded that it was not bound by Judge Hill's previous ruling and that Defendant's detrimental reliance on the plea agreement necessitated its enforcement. In the alternative, if we conclude that Judge Ammons lacked authority to overrule Judge Hill's previous ruling, Defendant challenges the trial court's order denying her motion to enforce on the merits.

A. Trial Court's Jurisdiction

[1] As a preliminary matter, we address whether the trial court's initial ruling by Judge Hill was properly entered, such that it may support both Defendant's conditional appeal and the State's argument that the trial court, by Judge Ammons, lacked jurisdiction to reconsider Defendant's motion to enforce. *See generally State v. Woolridge*, 357 N.C. 544, 549-50 (2003) (noting the "well[-]established" principle that "ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action[]" absent "a substantial change in circumstances . . . warrant[ing] a different or new disposition of the matter[]"). We review de novo whether Judge Hill's denial of Defendant's motion was entered, as an order "must be entered of record, and[,] until this shall be done, there is nothing to appeal from[,]" and no order exists to confer appellate jurisdiction. *State v. Mangum*, 270 N.C. App. 327, 331 (2020) (quoting *Logan v. Harris*, 90 N.C. 7, 7 (1884)).

During the 22 November 2021 hearing on Defendant's motion to enforce, Defendant's former trial counsel, Chief Public Defender Condlin, testified, in pertinent part, as follows:

> [THE STATE:] So Judge Hill denied this exact same motion to enforce this plea agreement that we're speaking about today?
>
> [CONDLIN] That is correct.
>
> [THE STATE:] Okay. And to your knowledge, was an order to that effect put into place?
>
> [CONDLIN:] I know she didn't ask me to draft the order.

The trial court then inquired further into Judge Hill's previous order:

> THE COURT: Anybody ever seen Judge Hill's order?
>
> [THE STATE]: Your Honor, in our file we have a drafted proposed order but it's not signed or dated . . . . [B]ut . . . we don't have any drafted -- or any signed order from Judge Hill on this motion.
>
> THE COURT: . . . . [T]he fact that there is no order that we can find probably indicates that the order was never entered.
>
> [THE STATE]: I can't speak to that, Your Honor. I mean that is possible. It's also possible that a copy of the signed order never made it back to the [S]tate to go into the file but that it does exist somewhere else[,] but I can't make any representation one way or the other to that.
>
> THE COURT: Now, I'm the first one to admit I have a hard time seeing things in the file and that's why I never say it's not in the file. I say I can't find it. But I've looked and I've asked the [C]lerk to look and I'm asking y'all and what you say you got is a draft unsigned. You got one?
>
> [TRIAL COUNSEL]: Do not, Judge. The only thing that I had was the -- a copy of the motion that had been filed and . . . written at the top "denied" but that's all that . . . [I've seen.]
>
> . . . .
>
> THE COURT: All right . . . . The clerk found the original motion to enforce the plea agreement that was denied by

> Judge Claire Hill [on 29 November 2018,] and it's denied in her writing "denied" and the date and signing it so she may not have even asked anybody [to draft] a written order . . . .

The trial court, by Judge Ammons, found that "a proper order was never entered" by Judge Hill on Defendant's motion to enforce because "there was no written order making findings of fact or conclusions of law ever included in the file." Therefore, the trial court did not purport to review Judge Hill's prior ruling on Defendant's motion to enforce; instead, it concluded—as if reviewing Defendant's motion for the first time—"that it ha[d] jurisdiction to hear this motion . . . on the basis of detrimental reliance."

In the civil context, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5 [of the North Carolina Rules of Civil Procedure]." N.C. R. Civ. P. 58 (2023). However, our Supreme Court has articulated different requirements for entry of a judgment or order in the criminal context:

> Rule 4 [of the North Carolina Rules of Appellate Procedure] treats order and judgments in criminal cases identically. *Rendering* a judgment or an order means to pronounce, state, declare, or announce the judgment or order, and is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy. *Entering* a judgment or an order is a ministerial act which consists in spreading it upon the record. For the purposes of entering notice of appeal in a criminal case under Rule 4(a), a judgment or an order is rendered when the judge decides the issue before him or her and advises the necessary individuals of the decision; a judgment or an order is entered under that Rule when the clerk of court records or files the judge's decision regarding the judgment or order.

State v. Oates, 366 N.C. 264, 266 (2012) (cleaned up) (emphasis in original). Our Supreme Court has further clarified "that a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session." *State v. Miller*, 368 N.C. 729, 738 (2016).

Here, Judge Hill rendered her denial of Defendant's motion to enforce by announcing, in open court, "In my discretion I'm denying the defense motion to enforce a plea agreement after considering the

case law and arguments of counsel." At some time after rendering her decision, Judge Hill signed Defendant's motion to enforce—file-stamped on 19 November 2018—next to a notation of "Denied 11-29-18[.]" After extensive discussion amongst the parties and the trial court, the Clerk of Court located this motion; however, no marking or file stamp by the Clerk on the notated motion, nor any other entry in the record before us, indicates Judge Hill's order was "spread[] [] upon the record" by the Clerk of Court through the ministerial act of filing or recording. *Oates*, 366 N.C. at 266; *see also McKinney v. Duncan*, 256 N.C. App. 717, 721 (2017) (holding that the "record fail[ed] to establish that the orders were entered" because they "[did] not bear a file stamp or other indication that they were ever filed with the clerk of court").

We conclude that Judge Hill's order denying Defendant's motion to enforce was never entered; and, therefore, the trial court, by Judge Ammons, was free to consider Defendant's motion to enforce. While "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[,]" we note that, in reaching the same conclusion, the trial court relied on a misapprehension of law. *Bracey v. Murdock*, 286 N.C. App. 191, 195 (2022), *disc. rev. denied*, 384 N.C. 191 (2023) (citations and marks omitted). As discussed above, an order or judgment in a criminal case is entered when the clerk of court records or files the judge's decision, and Judge Hill's order need not have been reduced to writing with findings of fact and conclusions of law to be properly entered.

B. Defendant's Motion to Enforce

[2] Next, we consider the State's argument on the merits that the trial court erred in granting Defendant's motion to enforce the plea agreement. The State contends that the trial court erred by concluding (1) that Defendant had a federal due process right to enforcement of the aborted plea agreement, despite never having pled guilty pursuant to that agreement, and (2) that Defendant detrimentally relied on—and was therefore prejudiced by—the plea agreement.

1. Enforceability of Plea Agreement without Guilty Plea

The State first challenges the trial court's conclusion that Defendant had a federal due process right to enforcement of the aborted plea agreement, despite never having pled guilty pursuant to that agreement. In support of its argument, the State cites the United States Supreme Court's holding in *Mabry v. Johnson* that

> [a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.

Mabry v. Johnson, 467 U.S. 504, 507-08 (1984). The undisputed facts indicate that Defendant never entered—and the trial court never approved or accepted—a guilty plea pursuant to the plea agreement. Thus, the State argues under *Mabry* that Defendant was not "deprive[d] . . . of liberty or any other constitutionally protected interest" absent "judgment of a court[.]" *Id.* at 507.

However, our Supreme Court has interpreted the United States Supreme Court's holdings in *Santobello v. New York* and its progeny as providing that, even when a defendant does "not enter a guilty plea pursuant to the purported [plea] agreement," she may still demonstrate that "[her] federal due process rights were violated" if "the facts reveal that [the] defendant relied to [her] detriment on the [aborted plea] agreement." *State v. Hudson*, 331 N.C. 122, 148 (1992), *cert. denied*, *Hudson v. North Carolina*, 506 U.S. 1055 (1993) (citing *State v. Collins*, 300 N.C. 142 (1980)); *see Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

Here, the trial court found that Defendant took several actions in detrimental reliance upon the aborted plea agreement, including "debriefing the State through Mr. Disponzio," "[n]ot requesting a bond hearing[,]" "remaining in custody since the day of her arrest for a total of 69 months as of . . . [22 November] 2021[,]" "[n]ot asking for a probable cause hearing, nor pushing for an indictment[,]" and "chang[ing] [her] strategy from trial preparation to preparing to testify against [Keefer]." The trial court then concluded that, under Defendant's right to due process, the State was bound by its agreement to accessory after the fact to first-degree murder when Defendant "detrimentally relied through her attorney on the plea bargain that was offered by the State of North Carolina[,]" and Defendant was therefore entitled to enforcement of that agreement. In reaching these conclusions, the trial court cited our decision in *State v. Sturgill*, 121 N.C. App. 629 (1996).

In *Sturgill*, we held that the defendant, who detrimentally relied on a law enforcement officer's promise that the State would not charge him

as a habitual felon if he provided incriminating statements, was entitled under "notions of substantial justice and fair play, as well as [the] defendant's substantive due process rights," to a new trial and suppression of his confession, even though the law enforcement officer never had authority to make such a promise. *Id.* at 631. When analyzing the facts in *Sturgill*, we noted that

> [o]ur Supreme Court addressed a *somewhat similar* issue in *State v. Collins*. In *Collins*, the defendant moved to dismiss . . . charges because the State failed to honor a plea arrangement reached between the defendant's attorney, a police officer, and an assistant district attorney. The negotiations resulted in a written plea agreement . . . .
>
> Later the same day, at a probable cause hearing on the felony charges, a different assistant district attorney refused to honor the existing plea agreement, based on his opinion that the plea bargain was inappropriate, and he had not been consulted.

Id. at 633 (emphasis added) (citation omitted).

Ultimately, we held in *Sturgill* that

> [t]he principles set forth in *Collins* and its progeny are equally applicable to the instant case. However, we note two distinguishing factors: (1) the promise made to [the] defendant was not in the context of plea negotiations, but rather was made during police interrogation; and (2) a police detective, rather than the prosecutor, made the so-called "nonprosecution agreement" with [the] defendant . . . .

Id. at 635. We then characterized "[t]he *Collins* decision [as] an affirmation that, when a defendant 'takes action constituting detrimental reliance upon an agreement,' the Constitution requires courts to '[ensure] the defendant what is reasonably due in the circumstances.' " *Id.* (quoting *Collins*, 300 N.C. at 145) (cleaned up). We further reasoned that

> [t]he change of position contemplated in *Collins* is a defendant's detrimental reliance on a governmental promise, which results in a derogation of his constitutional rights. Such agreements may not be avoided to the prejudice of defendants as those "defendants have a constitutional right to be treated with 'fairness' throughout the [prosecutorial] process."

Id. at 639 (quoting *Collins*, 300 N.C. at 148).

Although our discussion and application of the principles in *Collins* were relevant to our reasoning in *Sturgill*, they did not serve to expand or modify our Supreme Court's holding in *Collins*, nor do they have any precedential value in the context of enforcing plea agreements without judicial approval. The trial court improperly relied on *Sturgill* to support its conclusion that the State violated Defendant's constitutional right to due process. However, if we conclude that the trial court nevertheless reached the correct result under the applicable law of *Collins* and its progeny, we must uphold the trial court's ruling. *See Bracey*, 286 N.C. App. at 195.

In *Collins*, our Supreme Court interpreted the *Santobello* court's holding that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262. The *Collins* court noted it addressed "a case of first impression[,]" as—unlike in *Santobello*, where the defendant had already entered, and the trial court had accepted, a guilty plea—the defendant in *Collins* had never actually pled guilty. *Collins*, 300 N.C. at 145 ("[The] [d]efendant contends that he was deprived of . . . his fourteenth amendment right to due process of law by the judge's refusal to enforce the plea arrangement between [the] defendant and Assistant District Attorney Cole."). In *Collins*, as in this case, the State withdrew from the plea agreement before the defendant had fulfilled the obligation of pleading guilty.

In its interpretation of *Santobello*, the *Collins* court rejected the holding of the Fourth Circuit in *Cooper v. United States* that "under appropriate circumstances . . . a constitutional right to enforcement of plea proposals may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." *Id.* at 147 (quoting *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979)). Our Supreme Court instead held, in pertinent part,

> that there is no absolute right to have a guilty plea accepted. The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by [the] defendant or any other change of position by him constituting detrimental reliance upon the arrangement. The rationale behind these decisions is that plea bargain arrangements
>
> > are not binding upon the prosecutor, in the absence of prejudice to a defendant resulting from reliance

> thereon, until they receive judicial sanction, anymore than they are binding upon defendants (who are always free to withdraw from plea agreements prior to entry of their guilty plea regardless of any prejudice to the prosecution that may result from a breach).
>
> When viewed in light of the analogous law of contracts, it is clear that plea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not [the] defendant's corresponding promise to plead guilty, but rather is [the] defendant's actual performance by so pleading. Thus, the prosecutor agrees to perform if and when [the] defendant performs but has no right to compel [the] defendant's performance. Similarly, the prosecutor may rescind his offer of a proposed plea arrangement before [the] defendant consummates the contract by pleading guilty or takes other action constituting detrimental reliance upon the agreement.
>
> In the instant case, [the] defendant had neither entered a guilty plea nor in any way relied on the plea agreement to his detriment. After the rescission of the agreement, the State's motion for a continuance was granted and [the] defendant was thereafter afforded a fair trial. [The] [d]efendant has not been prejudiced by the disavowal of his plea arrangement, and we find no violation of his constitutional rights.

Id. at 148-49 (citations and marks omitted).

Our Supreme Court's holding in *Collins* established that the State has an absolute right to withdraw from a plea agreement unless and until, "but not after, the actual entry of the guilty plea by [the] defendant or any other change of position by [her] constituting detrimental reliance upon the arrangement." *Id.* at 148. Though the State may not withdraw to the prejudice of the defendant, its right to withdraw remains equal in force to that of the defendant's right "to withdraw from plea agreements prior to entry of their guilty plea regardless of any prejudice to the prosecution that may result from a breach." *Id.* at 149. The State may be bound to an offer which has not resulted in the actual entry and acceptance of the defendant's guilty plea *only* when the defendant is necessarily prejudiced by changing her position in detrimental reliance upon that agreement prior to judicial sanction or the State's withdrawal.

Under *Collins*, we treat the aborted plea agreement as a unilateral contract between the parties, where the consideration given in exchange

for the State's promises outlined in the agreement is Defendant's performance of the terms of that agreement, including the entry of a guilty plea. *Id.* ("The consideration given for the prosecutor's promise is not [the] defendant's corresponding promise to plead guilty, but rather is [the] defendant's actual performance by so pleading."). In contract law, a party may be bound by its promise in absence of consideration under the doctrine of equitable estoppel:

> The essentials of equitable estoppel or estoppel *in pais* are a representation, either by words or conduct, made to another, who reasonably believing the representation to be true, relies upon it, with the result that he changes his position to his detriment. It is essential that the party estopped shall have made a representation by words or acts and that someone shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction.

Wiggs v. Peedin, 194 N.C. App. 481, 488 (2008) (quoting *Volkman v. DP Associates*, 48 N.C. App. 155, 158 (1980)). Similarly, in the absence of Defendant's actual entry of a guilty plea in exchange for the State's promise, the State may still be bound to that promise by Defendant's detrimental reliance.

2. Defendant's Detrimental Reliance

In the instant case, the trial court concluded that, even though Defendant never entered a guilty plea, she had changed her position in detrimental reliance upon the State's plea offer before it was withdrawn. *See State v. King*, 218 N.C. App. 384, 388 (2012) (marks omitted) ("Once [a] defendant begins performance of the contract by pleading guilty or takes other action constituting detrimental reliance upon the agreement[,] the prosecutor can no longer rescind his offer."). The State challenges this conclusion, arguing that it withdrew the plea agreement prior to "any . . . change of position by [Defendant] constituting detrimental reliance upon the arrangement." *Collins*, 300 N.C. at 148.

The trial court found that

> Defendant detrimentally relied on the State's plea offer in the following ways:
>
> a. Debriefing the State through Mr. Disponzio, in which she gave incriminating statements related to a crime with which she has not been charged.
>
> b. Not requesting a bond hearing.

> c. Remaining in custody since the day of her arrest for a total of 69 months as of the date of the hearing on [22 November] 2021.
>
> d. Not asking for a probable cause hearing, nor pushing for an indictment, thereby not receiving discovery in the same manner and the same time frame as her co-defendant, Zachary Keefer, who was indicted approximately 9 months before the Defendant.
>
> e. The defense team changed their strategy from trial preparation to preparing to testify against Mr. Keefer.

Whether Defendant debriefed the State in her interview with Mr. Disponzio; abstained from requesting a bond hearing, pushing for an indictment, or asking for a probable cause hearing; remained in custody for 69 months as of the hearing date; and changed her trial strategy are findings of fact. As in other motions implicating a defendant's due process rights, such as motions to suppress, our review of these findings of fact is limited to determining whether they are supported by competent evidence. *See*, *e.g.*, *State v. Parisi*, 372 N.C. 639, 649 (2019) (cleaned up) ("As we have stated on many occasions, this Court reviews a trial court's order granting or denying a defendant's suppression motion by determining whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the trial court's ultimate conclusions of law."). However, whether Defendant took these actions in *detrimental reliance* upon—and was therefore prejudiced by—the withdrawn plea agreement is an issue of law which we review de novo. *See Hudson*, 331 N.C. at 148 (emphasis added) ("Because defendant did not enter a guilty plea pursuant to the purported agreement, whether defendant's federal due process rights were violated turns on whether the facts reveal that defendant relied to his detriment on the agreement. We agree with the trial court's *conclusion* that no such reliance is evident."); *see also Parisi*, 372 N.C. at 655 (cleaned up) (italics omitted) ("Although the issue of whether an officer had probable cause to support a defendant's arrest for impaired driving exists certainly contains a factual component, the proper resolution of that issue inherently requires the exercise of judgment or the application of legal principles, and constitutes a conclusion of law subject to de novo review rather than a finding of fact . . . .").

As the trial court found, "[t]he terms of the Memorandum of Agreement . . . did *not* require [] Defendant to forego requesting a bond-reduction hearing, a probable cause hearing, or an indictment." As a matter of law, any such forbearance by Defendant was not induced

by—and could therefore not be in reliance upon—the State's plea agreement. Furthermore, although plea negotiations began in early 2016, the State did not present Defendant with any plea offer until 7 January 2018. The trial court found that Defendant submitted to the "debriefing/interview" with Mr. Disponzio on 16 November 2017. Defendant could not "detrimentally [rely] on the State's plea offer" in making any statements during this interview, as it occurred nearly two months before she received any offer from the State. *See State v. Tyson*, 189 N.C. App. 408, 416 (2008) ("While the government must be held to the promises it made, it will not be bound to those it did not make."). Similarly, the trial court found that "by roughly sixty days into the charges being filed, [the State] was leaning towards [Keefer] being the principal[;] and, therefore, that is the direction that [trial counsel], the Defendant, and the defense team's focus went in everything they did." This finding reflects that Defendant changed her focus from trial preparation to preparing to testify against Keefer roughly sixty days after 24 March 2016—around or about 20 months before the State's presentation of the plea agreement to Defendant.

The trial court found that the State scheduled Defendant's case for plea "[d]uring the January 2018 Administrative week," and, "[a]t the time the plea was scheduled, following the signing of the plea transcript and [m]emorandum of [a]greement, Defendant had completed all conditions of the plea, except for testifying in [Keefer's] trial." The trial court made no finding—nor does Defendant raise any argument alleging—that Defendant took any action in detrimental reliance upon the agreement during the sixty-day period between its presentation on 7 January 2018 and the cancellation of the plea hearing on 7 March 2018, except for "continu[ing] to comply with the State's requests that she not seek a probable cause hearing, indictment, or bond hearing[,]" which were not part of nor induced by the plea agreement. Accordingly, the trial court's findings of fact do not support its conclusion that Defendant changed her position in detrimental reliance upon the State's plea agreement.

We return to our Supreme Court's holding in *Collins* that "there is no absolute right to have a guilty plea accepted. The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by [the] defendant or any other change of position by [her] constituting detrimental reliance upon the arrangement." *Collins*, 300 N.C. at 148. The State was free to withdraw from the agreement, as Defendant did not change her position in detrimental reliance upon it. The trial court erred in concluding that Defendant was entitled to enforcement and specific performance of the State's initial plea agreement for accessory after the fact to first-degree murder.

CONCLUSION

The trial court, by Judge Ammons, had jurisdiction to enter the 20 June 2022 order, and we dismiss the arguments in Defendant's conditional appeal as moot. The record does not reveal any change of position by Defendant in detrimental reliance upon the plea agreement, and the State remained free to withdraw the agreement. We reverse the trial court's order granting Defendant's motion to enforce the State's plea agreement and remand this case to the trial court for further proceedings.[2]

DISMISSED IN PART; REVERSED IN PART.

Chief Judge DILLON and Judge THOMPSON concur.

STATE OF NORTH CAROLINA
v.
DALUIS ALEJAND JAVIER GUZMAN, DEFENDANT

No. COA23-412

Filed 4 June 2024

Judges—motion for recusal—orders authorizing pen register and cell site location information—recusal provision of section 15A-291(c) inapplicable

In a drug trafficking prosecution, a superior court judge's order denying defendant's request for recusal at trial was affirmed where defendant failed to show the applicability of the recusal provision in N.C.G.S. § 15A-291(c)—pertaining to orders issued by judicial review panels authorizing electronic surveillance—to the judge's pre-trial orders authorizing: (1) the use of a pen register and trap and trace device; (2) the release of precise location data; (3) the release of subscriber account information, call detail records, and cell site location data; and (4) the use of a Global Positioning System tracking device. Further, defendant did not challenge the validity of the orders or argue that they exceeded the scope of the statutory provisions under which they were entered (sections 15A-262 and 15A-263); therefore, the trial judge was not required to recuse himself.

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2. We note that the State did not seek review of Judge Ammons's 22 November 2021 *Temporary Commitment Order*, and the same is not disturbed by this opinion.

Judge HAMPSON concurring by separate opinion.

Judge ARROWOOD dissenting.

Appeal by defendant from judgments entered 28 April 2022 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jocelyn C. Wright, for the State-appellee.

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

GORE, Judge.

Defendant, Daluis Alejand Javier Guzman, appeals the denial of his request for the trial judge's recusal. The trial judge entered multiple orders prior to trial authorizing, (1) the use of a pen register and trap and trace device, (2) the release of precise location data, (3) the release of subscriber account information, call detail records and cell site location data, and (4) the use of a Global Positioning System ("GPS") tracking device. Defendant argued prior to the start of trial that these orders required recusal of the trial judge who entered them, pursuant to section 15A-291(c). Upon review of the record and the briefs, we affirm the trial court's denial of the recusal request.

I.

Law enforcement obtained multiple orders, pursuant to Article 16, N.C.G.S. § 15A-291(a), between September 2019 and February 2020 to intercept cell phone conversations between defendant and co-conspirators. These types of orders could only be entered by a judicial review panel, when the request was for the interception of wire, oral, or electronic communications. N.C.G.S. § 15A-291(a) (2022). One of the judges on the panel, Judge Hardin, later recused himself during the pre-trial hearing because of his participation in the judicial review panel.

As the investigation continued, law enforcement sought three more orders, which are the subject of this appeal. The first order, entered 6 December 2019 by Judge Hall, gave authorization to use a GPS tracking device on defendant's Honda Accord ("GPS Order"). The next two orders, entered 10 January 2020 and 31 January 2020 by Judge Hall (the "January Orders"), provided authorization to install a pen register and

trap and trace device, precision location data (GPS), the release of subscriber account information, call detail records, and cell site location information ("CSLI"), both historical and prospective, for two "target telephones." Within the GPS and January Orders, Judge Hall determined there was probable cause for the authorization sought. The January Orders cited sections 15A-262 and 15A-263 within Article 12, as statutory authorization.

In February 2021, defendant was indicted with trafficking in cocaine by possession, possession with intent to sell and deliver cocaine, conspiring to traffic cocaine, and multiple counts of maintaining a vehicle and a place that was used for keeping and selling cocaine. At the pre-trial hearing on 11 April 2022, Judge Hardin recused himself once counsel raised the limitation found in section 15A-291(c), requiring the recusal of judges who participated in a judicial review panel to authorize electronic surveillance orders. Judge Hall presided over the pre-trial hearings on 20 April 2022 as a replacement to Judge Hardin. Defendant, acting pro se, raised the issue of recusal pursuant to section 15A-291(c) with Judge Hall due to the GPS and January Orders that Judge Hall entered.

Judge Hall reviewed the challenge for recusal by reading section 15A-291(c), reviewing the GPS and January Orders and consulting Judicial Standards. Upon review, Judge Hall explained the orders were authorized pursuant to sections 15A-262 and 15A-263 of Article 12, not pursuant to section 15A-291 of Article 16, and that he was not part of a judicial review panel as stated in the plain language of section 15A-291(c). Accordingly, Judge Hall refused to recuse himself because he determined he could preside fairly and without partiality. At the conclusion of the trial, on 28 April 2022, defendant was convicted of all charges and received three consecutive sentences. Defendant entered an oral notice of appeal.

II.

Defendant appeals of right pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a). Defendant argues Judge Hall erroneously refused to recuse himself prior to trial and that this error was structural. Defendant argues this is a statutory mandate under section 15A-291(c) because the January Orders signed by Judge Hall should belong within the scope of Article 16, rather than the stated scope of Article 12. We start by acknowledging defendant did not challenge the validity of the GPS and January Orders signed by Judge Hall, and therefore, the only argument preserved for our review is whether Judge Hall was required to recuse himself pursuant to section 15A-291(c). We review the application "of a question of law" de novo. *State v. Rutledge*, 267 N.C. App. 91, 95 (2019).

Defendant leads us down a circuitous route to demonstrate why Judge Hall should have recused himself under the statutory mandate of section 15A-291(c). Section 15A-291(c) states, "No judge who sits as a member of a judicial review panel shall preside at any trial or proceeding resulting from or in any manner related to information gained pursuant to a lawful electronic surveillance order issued by that panel." N.C.G.S. § 15A-291(c) (2022). According to defendant, the judge entered "a lawful electronic surveillance order" and therefore he should have recused himself. Defendant attempts a "substance over form" argument by arguing the substance of the January Orders should have qualified within the scope of Article 16. *See* N.C.G.S. § 15A-291 (2022). But this argument was not made at the trial level, and as previously stated, defendant made no suggestion at the trial level that the GPS and January Orders were improperly authorized.

Defendant made the following arguments at the trial level to support a recusal:

> [DEFENDANT]: Do you remember what Mr. Broyhill introduced on Monday, the first time we came here from General Statute 15A-291, application for electronic surveillance order. I just found that you signed three orders in this case. That was on December 6th, 2019, the GPS on the Honda Accord. And I've got the order right here. The order for this telephone that is signed by you. So you can't be the judge to preside over this case either. Because that's why we came here Monday, and Mr. Broyhill got Honorable Judge Hardin off the case.
>
> . . .
>
> [DEFENDANT]: There is another one I didn't bring today. You signed a GPS order for the Honda Accord 2014 on December 6th, 2019.
>
> . . .
>
> THE COURT: For the record, so everyone understands, the first order I have here is an order that we refer to as an order allowing a trap and trace device, it was signed by me January 10th of 2020. The statute that permits such an order is 15A-263. I'm going to look and see if it addresses whether that judge may then preside. I've never addressed this issue before.
>
> . . .

> MR. JORDAN [standby counsel]: Not to argue the point, but for clarification for Mr. Guzman.
>
> THE COURT: Yes, sir.
>
> MR. JORDAN [standby counsel]: I think he's referring to statute 15A-291, and specifically the heading of electronic surveillance, and then from there. So I don't think he's arguing the phone numbers. I think he's arguing any electronic surveillance, which I think would include the tracking device. That's my understanding.
>
> . . .
>
> THE COURT: All right, let's come back to order, please. I just spent time talking with Judicial Standards. There is no prohibition. The case will move forward. Now, put on the record the only thing I would need to be concerned about under Canon 3 is whether anything I read or heard -- which, frankly, I don't remember other than I remember -- I remember the gentleman's wife, Dorka, because I had never heard that name before, and I remembered that this morning -- whether it would impair my ability to be fair and impartial in any way, and it will not, so we will move forward.

On appeal, defendant argues beyond what was challenged at the trial level. A review of the transcript demonstrates the only issue Judge Hall passed upon was whether section 15A-291(c) would disqualify him based upon the GPS and January Orders he authorized. Defendant argued that because of the header "electronic surveillance" for section 15A-291, that any form of electronic surveillance would require Judge Hall to recuse himself. There was no argument that the GPS and January Orders went beyond the scope of their authorization and there was no argument that those Orders should have been authorized under Article 16.

Although defendant sought to compare Judge Hall with Judge Hardin, who recused himself, Judge Hall clarified that Judge Hardin recused himself because of his participation in a judicial review panel that issued multiple Article 16 Orders, commonly called "wiretap orders." Whereas the GPS and January Orders entered by Judge Hall were authorized under a different statute, Article 12, and are commonly called "ping orders." Judge Hall looked to see if Article 12 or any further statutes addressed any requirements for judicial recusal, because the GPS and January Orders were not entered under Article 16, and he did not sit on a judicial review panel.

Judge Hall only considered whether section 15A-291(c) would disqualify him having entered orders under different statutory provisions. The GPS and January Orders were not authorized pursuant to Article 16 or a judicial review panel. The plain language of section 15A-291(c) only disqualifies judges who enter orders as part of a judicial review panel that authorize "any manner related to information gained pursuant to a lawful electronic surveillance order." Therefore, given the limited review and missing challenge to the validity of the GPS and January Orders, Judge Hall correctly determined section 15A-291(c) did not require his recusal.

Defendant cites multiple cases involving denials of motions to suppress evidence gained by historical CSLI. *See Carpenter v. United States*, 138 S. Ct. 2206, 2217, 2221 (2018); *State v. Gore*, 272 N.C. App. 98, 100-101 (2020); *State v. Rogers*, No. COA21-707, 2022 WL 17420248, at *5, *7 (N.C. Ct. App. 2022) (unpublished). However, after reviewing these cases, we determine they do not assist us in the present case. We are addressing whether a trial judge must recuse himself pursuant to section 15A-291(c), not whether the GPS and January Orders went beyond the scope of their authorization under Article 12 or should have been authorized under Article 16. Additionally, we decline defendant's invitation to investigate the substance of the GPS and January Orders and consider various statutory definitions to place the Orders within the statutory constraints of Article 16. *See State v. Piland*, 263 N.C. App. 323, 333 (2018) (discussing how the law does not allow this Court to consider new legal theories by defendant that were not first passed upon at the lower court).

Finally, defendant does not argue an alternative abuse of discretion argument for judicial recusal. Accordingly, we affirm Judge Hall's refusal to recuse himself from defendant's trial. Because of our decision to affirm the trial court's ruling, we do not consider defendant's additional arguments of structural error.

III.

For the foregoing reasons we affirm the trial judge's denial of the recusal request.

AFFIRMED.

Judge HAMPSON concurs by separate opinion.

Judge ARROWOOD dissents by separate opinion.

HAMPSON, Judge, concurring.

I agree that Defendant, in this case, has failed to demonstrate that the January Orders signed by Judge Hall constitute orders permitting electronic surveillance as contemplated in Article 16 of Chapter 15A of the North Carolina General Statutes. Thus, I also agree Judge Hall did not have a statutory mandate to recuse from this case pursuant to N.C. Gen. Stat. § 15A-291(c). Therefore, there was no reversible error.

However, I am also unconvinced that the January Orders signed by Judge Hall simply fall under the provisions of Article 12 of Chapter 15A—as presently codified[1]—for pen registers and trap and trace devices. This is so because Judge Hall's January Orders expressly permitted collection of both historical and prospective, or real-time, location tracking through CSLI. As presently codified Section 15A-263 contains no express provision allowing for location tracking or the collection of CSLI. *See* N.C. Gen. Stat. § 15A-263 (2023). Location tracking using CSLI—and specifically prospective or real-time CSLI—appears to fall somewhere in between Article 16 electronic surveillance and Article 12 pen registers and trap and trace devices.

Article 16 focuses on electronic surveillance of the contents of communications: the most commonly recognized example likely being wiretaps. " 'Electronic surveillance' means the interception of wire, oral, or electronic communications as provided by this Article." N.C. Gen. Stat. § 15A-286(11) (2023). " 'Intercept' means the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device." N.C. Gen. Stat. § 15A-286(13). " 'Contents' when used with respect to any wire, oral, or electronic communication means and includes any information concerning the substance, purport, or meaning of that communication." N.C. Gen. Stat. Ann. § 15A-286(6). Issuance of an order for electronic surveillance must be supported by probable cause. N.C. Gen. Stat. Ann. § 15A-293(a) (2023).

Article 12 focuses on the collection of the numbers dialed or transmitted by a telephone and the originating number of a device from which wire or electronic communications are transmitted. *See* N.C. Gen. Stat. Ann. § 15A-260 (2023). Under Article 12:

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1. Potential changes to Article 12 were introduced in the General Assembly in House Bill 719 during the 2023 Session. Included in the proposed amendments were provisions permitting the issuance of orders for pen register or trap and trace devices and including location tracking upon a showing of probable cause. HB719, 2023 Gen. Assemb., 2023-2024 Sess. (N.C. 2023).

> "Pen register" means a device which records or decodes electronic or other impulses which identify numbers dialed or otherwise transmitted on the telephone line to which such device is attached, but the term does not include any device used by a provider or customer of a wire or electronic service for billing, or recording as an incident to billing, for communication services provided by the provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business, nor shall the term include any device which allows the listening or recording of communications transmitted on the telephone line to which the device is attached.

N.C. Gen. Stat. § 15A-260(2). " 'Trap and trace device' means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted." N.C. Gen. Stat. § 15A-260(3). The issuance of an order for pen register or trap and trace device must be supported by reasonable suspicion. N.C. Gen. Stat. § 15A-263(a)(1).

In this case, the authorization for the collection of CSLI—including prospective or real time location tracking—was beyond the scope of Article 12 as currently codified. Indeed, the applicant(s) for the orders and Judge Hall in issuing the January Orders astutely recognized these were beyond the scope of pure Article 12 orders. This is illustrated by Judge Hall's application of the probable cause standard rather than reasonable suspicion to support issuance of the January Orders. However, nothing in the January Orders permits the interception of the content of any communication.

Thus, while the January Orders may have exceeded the scope of the existing Article 12 provisions authorizing orders for pen register and trap and trace devices by including provisions for collection of CSLI, including specifically prospective or real-time CSLI, the January Orders were not orders for electronic surveillance intercepting the content of any communication governed by Article 16. Therefore, Judge Hall was not required to recuse by the statutory mandate of N.C. Gen. Stat. § 15A-291(c). Consequently, Judge Hall did not err by determining he was not required to recuse pursuant to that statute.[2] Accordingly, there was no error at trial.

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2. Not raised in this appeal—because it was not raised below—is, however, the issue of whether and to what extent a trial judge may have some separate duty to recuse from

ARROWOOD, Judge, dissenting.

The majority states that "given the limited review and missing challenge to the validity of the GPS and January Orders, Judge Hall correctly determined [N.C.G.S. §] 15A-291(c) did not require his recusal." Because I believe the pro se defendant sufficiently preserved the argument during pretrial proceedings and § 15A-291(c) was implicated by the 10 and 31 January orders, I respectfully dissent.

The majority contends that—unlike on appeal—defendant failed to argue at the trial level that Judge Hall should have recused himself because he had previously entered a lawful electronic surveillance order. But—as expressly quoted in the majority's opinion—defendant not only cited the specific statutory authority on which the argument was based, he also articulated the argument that flowed from that authority during pretrial proceedings.[1] I believe this sufficiently preserved the argument for a pro se defendant. I also agree with defendant that "[t]rial court compliance with statutory mandates is automatically preserved for appellate review" and that North Carolina General Statute § 15A-291(c) imposes such a mandate.[2] *See State v. Aikens*, 342 N.C. 567, 578 (1996) (explaining that a "trial court's failure to comply with a mandatory statute relieves defendants of their obligation to object in order to preserve the error for review." (cleaned up)). Nonetheless, despite defendant's preservation, the majority's use of "waiver" in this

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trial after that judge had considered investigatory evidence and made a determination of probable cause sufficient to justify issuance of an order permitting collection of CSLI—and, again, in particular prospective or real-time CSLI—for a suspect. Moreover, in this case, the applications for the January Orders included contents of communications intercepted pursuant to the earlier Article 16 Orders—raising the additional question of, if a member of the three-judge Article 16 panel is required to recuse from subsequent proceedings in a case, would a judge who reviewed the content of those intercepted communications and made a probable cause determination based on the content of those communications have any duty to recuse.

1. During pretrial proceedings on 20 April 2022, defendant stated, "Do you remember what Mr. Broyhill introduced on Monday, the first time we came here *from General Statute 15A-291, application for electronic surveillance order*. I just found that you signed three orders in this case. That was on December 6th, 2019, the GPS on the Honda Accord. And I've got the order right here. *The order for this telephone that is signed by you. So you can't be the judge to preside over this case either*. Because that's why we came here Monday, and Mr. Broyhill got Honorable Judge Hardin off the case." (emphasis added). Moments after this statement, defendant clarified that "[t]he order for this telephone" was Judge Hall's 10 January 2020 order.

2. The majority opinion does not address this argument for preservation.

case inhibits this Court from providing clarity to the lower courts and increasing the probability of compliance with our statutes.

North Carolina General Statute § 15A-291 governs the application and issuance of electronic surveillance orders. N.C.G.S. § 15A-291 (2023). Specifically, the statute provides that the Attorney General or their designee may apply for "an order authorizing or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers . . . ." § 15A-291(a). The statute also mandates that any judge who sits on a review panel authorizing such an order must recuse themselves from presiding over a trial involving information gained from the order. § 15A-291(c). Conversely, N.C.G.S. §§ 15A-262–63 governs the application and issuance of orders for pen register or trap and trace devices and does not mandate judicial recusal.[3]

Here, the 10 and 31 January orders signed by Judge Hall approved law enforcement's request for, *inter alia*, "incoming and outgoing call details, without geographical limits," including "location of cell site/sector (physical address) at call origination (for outbound calling) and call termination (for incoming calls) and, if reasonably available, during the progress of a call, for the Target Telephone."[4] These orders thus expressly authorized law enforcement's acquisition of defendant's cell-site location information ("CSLI").

According to Judge Hall, the 10 and 31 January orders were authorized under §§ 15A-262–63. But the orders' approval for CSLI goes well beyond an application for a pen register or a trap and trace device. Whereas pen registers and trap and trace devices merely identify the phone numbers dialed on outgoing and incoming calls, *see* N.C.G.S. § 15A-260(2)–(3), CSLI is a "qualitatively different category" of information that provides law enforcement with "a comprehensive dossier of [one's] physical movements" over an extended period of time. *Carpenter v. United States*, 585 U.S. 296, 309, 315 (2018).[5] Unlike dialed

3. Another relevant distinction between § 15A-291 and §§ 15A-262–63 is that the former requires a finding probable cause for order issuance, whereas the latter only requires a finding of reasonable suspicion.

4. The orders further approved law enforcement's request for "historical and prospective Global Positioning Location (GPS) information without geographical limits" and "other precision/specific location information on the Target Telephone during the same period."

5. As explained by the United States Supreme Court, CSLI's "time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." *Carpenter*, 585 U.S. at 311 (cleaned up).

phone numbers, the quality of CSLI data "gives police access to a category of information otherwise unknowable." *Id.* at 312. Thus, Judge Hall's January orders fall into a "qualitatively different category" than orders authorized under N.C.G.S. §§ 15A-262–63. *See id.* at 309. Although the 10 and 31 January orders purport to be governed by the provisions of N.C.G.S. §§ 15A-262–63, a review of the substance of the information sought and ordered—rather than the form—leads me to conclude that the orders are more closely akin to the information covered by N.C.G.S. § 15A-291, which mandates recusal. In fact, it is telling that the trial court applied the probable cause standard required by N.C.G.S. § 15A-291 when issuing the orders rather than the reasonable suspicion standard pursuant to N.C.G.S. §§ 15A-262–63. This further bolsters my view that these were N.C.G.S. § 15A-291-type orders.[6]

I also disagree with the concurrence that the 10 and 31 January orders were not governed by N.C.G.S. § 15A-291 because they did not authorize surveillance "intercepting the content of any communication . . . ." " 'Contents' when used with respect to any wire, oral, or electronic communication means and includes any information concerning the substance, purport, or *meaning of that communication*." N.C.G.S. § 15A-286(6) (emphasis added). Although CSLI may not concern the substance of a communication, it does concern detailed information about the communication—such as precisely when and where the communication occurred. And because such information can provide insights into or allow law enforcement to draw inferences "concerning . . . the meaning of that communication[,]"[7] I believe N.C.G.S § 15A-291 governs orders for CSLI. Accordingly, it is my opinion that Judge Hall erred by not recusing himself as required by that statute.

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6. Further, as the concurrence notes, §§ 15A-262–63 contain no provision allowing the collection of CSLI.

7. For example, communications with little time in between calls from a person in a particular location at a specific time may provide meaningful context for the person's communications, such as indicating a sense of urgency associated with the communication.

STATE OF NORTH CAROLINA
v.
JONATHAN RAY LAIL, DEFENDANT

No. COA23-845

Filed 4 June 2024

1. Appeal and Error—preservation—Rule 403—objection noted for appeal twice

In a trial on multiple charges of statutory rape, indecent liberties with a child, and incest, defendant preserved for appellate review his argument that impeachment evidence offered—a note in the handwriting of the complainant—should not have been excluded on Evidence Rule 403 grounds where, having argued the admissibility of the note, he then twice requested that his exception be noted for purposes of appeal and twice received acknowledgement from the trial court that it would be. Accordingly, the proper standard of appellate review was abuse of discretion rather than plain error.

2. Evidence—exclusion under Rule 403—abuse of discretion—failure to engage in balancing test and use of wrong scale

In a prosecution on multiple counts of statutory rape, indecent liberties with a child, and incest, the trial court abused its discretion in excluding, pursuant to Evidence Rule 403, a note in the juvenile complainant's handwriting, offered by defendant to impeach the complainant's credibility and authenticated by the complaint's identification of her handwriting, in that (1) the court's fragmented ruling—"And I also think it's more prejudicial than probative, and therefore I will not allow that to be admitted"—suggests it failed to engage in the balancing of probative value and prejudice as required under the rule, and (2) to the extent any balancing did occur, the court employed the wrong scale, namely, "more prejudicial than probative," rather than the legally correct "the probative value was *substantially* outweighed by the prejudicial effect." Further, given that the complainant's credibility—a matter reserved solely for the factfinder—was critical in this case, where her identification of defendant as the perpetrator of the crimes committed against her was the only probative evidence of that ultimate issue, the trial court's deprivation of defendant's opportunity to impeach the complainant regarding the note was prejudicial and entitled defendant to a new trial.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 1 November 2022 by Judge Karen Eady Williams in Catawba County Superior Court. Heard in the Court of Appeals 20 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Daniel P. O'Brien & Lauren M. Clemmons, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for Defendant-Appellant.

CARPENTER, Judge.

Jonathan Ray Lail ("Defendant") appeals from judgment after a jury convicted him of two counts of each of the following: statutory rape, indecent liberties with a child, and incest with a child. On appeal, Defendant argues that the trial court: (1) abused its discretion by excluding a handwritten note (the "Note"); (2) plainly erred by admitting vouching testimony; and (3) plainly erred by admitting unreliable expert testimony. After careful review, we agree with Defendant's first argument. Because Defendant was prejudiced by the Note's exclusion, he is entitled to a new trial. So although we agree with the dissent's analysis of Defendant's remaining arguments, we need not reach them.

I. Factual & Procedural Background

On 5 November 2020, a Catawba County grand jury indicted Defendant for two counts each of statutory rape, indecent liberties with a child, and incest with a child. On 24 October 2022, the State began trying Defendant in Catawba County Superior Court. Trial evidence tended to show the following.

At around 4:00 a.m. on 25 April 2020, Corporal Max Priest of the Catawba County Sheriff's Office responded to a 911 call from a couple in Newton, North Carolina. The couple called 911 because an unknown girl ("Complainant") was knocking on their front door. When Corporal Priest arrived at the couple's home, Complainant was sitting on the front porch. Complainant told Corporal Priest that she was sixteen years old, that Defendant kicked her out of the house, and that she was going to see her boyfriend in Hickory, North Carolina.

Complainant lied to Corporal Priest about her age; she eventually admitted she was thirteen years old. She also lied about Defendant

kicking her out of their home; she eventually admitted she was running away from home. Indeed, Complainant later said that she was "upset, angry" with Defendant because he cancelled a sleepover with her friends. Complainant lied about going to see a boyfriend in Hickory, too.

Complainant also told Corporal Priest that Defendant sexually assaulted her. After hearing this, Corporal Priest drove Complainant to the sheriff's office, where Complainant spoke with a Department of Social Services case worker. The case worker interviewed Complainant, and Complainant alleged two instances of sexual abuse by Defendant. The case worker determined a forensic examination and interview were needed.

A forensic examination and interview, however, required Defendant's consent, so sheriff's deputies went to Defendant's home to request his consent. Defendant consented. In the meantime, the case worker took Complainant to the Child Advocacy Center.

At the Child Advocacy Center, Complainant alleged three incidents of sexual abuse by Defendant. Julia Wetmore, a pediatric nurse practitioner, examined Complainant. Nurse Wetmore found Complainant was generally healthy and cooperative, but anxious, during the examination. During the genital exam, Nurse Wetmore observed a scar on Complainant's hymen, which Nurse Wetmore associated with blunt-force trauma.

At trial, Complainant testified that Defendant sexually assaulted her multiple times. Defendant testified, too, and denied Complainant's allegations. And in order to defend himself, Defendant challenged Complainant's credibility.

Attempting to impeach Complainant on cross-examination, Defendant tried to introduce the Note and to question Complainant about it. The Note states that Complainant snuck out of her bedroom window one night to meet "Larry." From Defendant's perspective, the Note was probative of two things: (1) Complainant's lack of credibility; and (2) that the perpetrator of Complainant's alleged assaults was actually Complainant's boyfriend—possibly "Larry." Importantly, the State did not object to the Note on Rule 412 grounds, likely because the Note did not disclose any sexual activity by Complainant that would trigger Rule 412 issues.[1]

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1. *See* N.C. Gen. Stat. § 8C-1, Rule 412 (2023) (prohibiting, generally, evidence of a victim's past sexual behavior). The dissent correctly notes that "Defendant failed to make a Rule 412(b)(2) exception . . . argument at trial." Defendant made no Rule 412 argument because the State made no Rule 412 objection. As Defendant was the party submitting the

Rather, the State objected to the Note for lack of relevance, lack of authentication, and lack of knowledge. During voir dire concerning the Note's admissibility, Complainant initially testified that she did not recognize the Note. Then she testified that she did not remember writing the Note. Yet despite not "recognizing" or "remembering" the Note, Complainant testified that the Note was in her handwriting.

Complainant also testified that she never met Larry in person, even though she "thought" Larry was her boyfriend when she wrote the Note. She further explained that the Note:

> might have come from a story because I used to write stories based off of people in my life[,] and I used to use people's names that were in my life to write little stories. So it could have been that or it could have been a dream I had or anything really.

Initially, the trial court made a speculation inquiry, then moved to hearsay. Specifically, the trial court was concerned about whether the Note was being offered for "the truth of the matter asserted." Here is the relevant colloquy:

> **Trial Court**: And here's my concern, the [Note] will be offered for the truth of the matter asserted therein, and granted, she was saying that's her handwriting, so that I agree with you on that.
>
> . . . .
>
> But my point is if the document's being offered to the jury for the truth of the matter asserted therein, and that document's saying she went out her window, someone's meeting her in a car, if that's the truth of the matter asserted therein, but she's saying that's not what happened.
>
> . . . .
>
> And so that document doesn't tell me anything besides she wrote something down. What she wrote down, the truth of what she wrote down, is at issue. It's being offered for—I can't think of a purpose other than the truth of the matter is what you're trying to get in to the jury that this is, in fact, what happened.

Note, it would be odd for him to insert Rule 412 into the conversation. Regardless, neither party discussed Rule 412 at trial, and neither party discussed Rule 412 on appeal.

The trial court then engaged with how various jurisdictions handle similar documents. Then returning to the Note, the trial court held it was inadmissible. The court said:

> **Trial Court**: So I will not allow you to admit that document for the purpose of showing anything could be remotely true in that statement because she's not going to say it. If she said yes, it happened, that would be one thing; but she's not admitting to any of that being truthful. At best it might be fanciful or fantasy of things she was just writing.

Then, almost offhandedly, the trial court said: "And I also think it's more prejudicial than probative, and therefore I will not allow that to be admitted." Defense counsel responded: "Okay. Your Honor, for the purposes of possible appellate review, since we might start tomorrow depending on what happens . . . ." The trial court then interjected: "I doubt it but for purposes of appellate review that objection will be noted for the record." And to confirm that his objection was preserved, defense counsel reiterated: "And just for the potential appellate review I'd ask to go ahead and put this in the clerk's file for review by the Court of Appeals should it come to that." The trial court confirmed: "Definitely."

Without considering the Note or corresponding testimony, the jury convicted Defendant of all offenses. The trial court entered two judgments: one sentencing Defendant to between 556 months and 797 months of imprisonment; and another sentencing Defendant to between 240 and 348 months of imprisonment, to be served after the end of the first sentence. Defendant gave oral notice of appeal in open court.

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: (1) abused its discretion by excluding the Note; (2) plainly erred by admitting vouching testimony; and (3) plainly erred by admitting unreliable expert testimony.

IV. Analysis

First on appeal, Defendant argues that the trial court abused its discretion by excluding the Note, thus entitling him to a new trial. We agree with Defendant. Because Defendant's first argument entitles him to a new trial, we will not address his remaining arguments.

A. Preservation

"No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court . . . ." N.C. Gen. Stat. § 8C-1, Rule 103(a)(1) (2023); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

B. Standard of Review

We review Rule 403 rulings for abuse of discretion, which "results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Of particular relevance here, a mistake of law is an abuse of discretion. *See State v. Rhodes*, 366 N.C. 532, 535–36, 743 S.E.2d 37, 39 (2013) (citing *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392, 414 (1996)); *In re S.R.*, 384 N.C. 516, 520, 886 S.E.2d 166, 171 (2023) (citing *Rhodes*, 366 N.C. at 536, 743 S.E.2d at 39) ("[A]s is always true, a mistake of law is an abuse of discretion."). In other words, a trial court acts arbitrarily when it applies an incorrect legal standard. *See Rhodes*, 366 N.C. at 535–36, 743 S.E.2d at 39. Otherwise, our abuse-of-discretion review would be a rubber stamp.

C. Rule 403

Generally, all relevant evidence is admissible. *Matthews v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594, 599 (1987). But Rule 403 allows a trial court to exclude relevant evidence "if its probative value is *substantially outweighed* by the danger of *unfair prejudice*, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2023) (emphasis added).

" 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. France*, 94 N.C. App. 72, 76, 379 S.E.2d 701, 703 (1989) (quoting *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986)). "Rule 403 calls for a balancing of the proffered evidence's probative value against its prejudicial effect." *Id.* at 76, 379 S.E.2d at 703 (quoting *State v. Mercer*, 317 N.C. 87, 93–94, 343 S.E.2d 885, 889 (1986)). Probative evidence necessarily has a prejudicial effect:

"the question, then, is one of degree." *Id.* at 76, 379 S.E.2d at 703 (quoting *Mercer*, 317 N.C. at 93–94, 343 S.E.2d at 889).

The "degree" to which probative evidence is prejudicial must be "substantial." N.C. Gen. Stat. § 8C-1, Rule 403. In other words, the "probative value must not merely be outweighed by the prejudicial effect, but substantially *outweighed*." *State v. Bush*, 164 N.C. App. 254, 264, 595 S.E.2d 715, 721 (2004) (emphasis added) (citing *State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 782 (1995)).

D. Cross-Examination & Credibility

North Carolina "adheres to the 'wide-open' rule of cross-examination . . . ." *State v. Penley*, 277 N.C. 704, 708, 178 S.E.2d 490, 492 (1971). Thus, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2023).

Credibility is paramount. *See State v. Whaley*, 362 N.C. 156, 161, 655 S.E.2d 388, 391 (2008). Indeed, "[w]hen testimony constitutes 'the State's sole direct evidence on the ultimate issue, . . . credibility [takes] on enhanced importance.' " *Id.* at 161, 655 S.E.2d at 391 (second alteration in original) (quoting *State v. Williams*, 330 N.C. 711, 723–24, 412 S.E.2d 359, 367 (1992)). "Moreover, 'impeachment [is] particularly critical' " when the defendant's testimony contradicts the State's. *Id.* at 161, 655 S.E.2d at 391 (alteration in original) (quoting *Williams*, 330 N.C. at 724, 412 S.E.2d at 367).

Credibility questions are for the jury—not the trial court. *See Daniels v. Hetrick*, 164 N.C. App. 197, 204, 595 S.E.2d 700, 704–05 (2004) (noting that the jury's role is to "weigh the evidence, determine the credibility of the witnesses, the probative force to be given to their testimony and determine what the evidence proved or did not prove").

E. Prejudicial Error

An "evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial." *State v. Jacobs*, 363 N.C. 815, 825, 689 S.E.2d 859, 865 (2010) (quoting *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009)). "The same rule applies to exclusion of evidence." *Id.* at 825, 689 S.E.2d at 865. And an "[e]videntiary error is prejudicial 'when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *Id.* at 825, 689 S.E.2d at 865–66 (quoting N.C. Gen. Stat. § 15A-1443(a)).

The wrongful exclusion of impeachment evidence on cross-examination often "ha[s] 'the effect of largely depriving defendant of [his] major defense.' " *Whaley*, 362 N.C. at 161, 655 S.E.2d at 391 (quoting *Williams*, 330 N.C. at 721–22, 412 S.E.2d at 366). As a result, such an exclusion is likely prejudicial, thus entitling the defendant to a new trial. *See*, *e.g.*, *id.* at 161, 655 S.E.2d at 391.

F. Application

[1] First, we must address the dissent's assertion that we are limited to plain-error review. We agree with the dissent on one point: A judge's job is "to call balls and strikes and not to pitch or bat." But we disagree with the remainder of the dissent's preservation position: We are not pitching or batting simply because we disagree with the dissent's view of the strike zone.

The dissent argues that Defendant failed to object to the exclusion of the Note, and that we therefore "presume preservation." Specifically, the dissent argues that Defendant "never objected to the trial court's decision" or "called the court's attention" to Rule 403.

Defendant submitted the Note, so it would be strange for Defendant to object to his own evidence—let alone offer additional grounds for its exclusion. But in any event, we do not presume preservation. On the contrary, Defendant "clearly presented the alleged error to the trial court." *See* N.C. Gen. Stat. § 8C-1, Rule 103(a)(1).

Directly after the trial court excluded the Note on Rule 403 grounds, defense counsel responded: "Okay. Your Honor, for the purposes of possible appellate review, since we might start tomorrow depending on what happens . . . ." The trial court interjected: "for purposes of appellate review that objection will be noted for the record." Defense counsel even reiterated: "And just for the potential appellate review I'd ask to go ahead and put this in the clerk's file for review by the Court of Appeals should it come to that." The trial court confirmed: "Definitely."

Thus, Defendant "presented to the trial court a timely request" to admit the Note, and the grounds for Defendant's position were "apparent from the context." *See* N.C. R. App. P. 10(a)(1). Indeed, defense counsel's discussion of "the specific grounds for" admitting the Note spanned sixteen pages in the trial transcript. *See id.*

To find that Defendant failed to preserve his appellate arguments concerning the Note would be to require what the Rules of Evidence prohibit: "No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly

presented the alleged error to the trial court . . . ." *See* N.C. Gen. Stat. § 8C-1, Rule 103(a)(1). Defense counsel contended that the trial court erred by excluding the Note under Rule 403 and "clearly presented the alleged error to the trial court." *See id.* Therefore, this issue is preserved, and the proper standard of review is abuse of discretion. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

[2] Here, the trial court abused its discretion by excluding the Note because it did so under the wrong legal standard. The trial court applied the wrong legal standard because: (1) it failed to engage in the requisite 403 balancing, *see France*, 94 N.C. App. at 76, 379 S.E.2d at 703; and (2) it failed to find that the Note's probative value was *substantially* outweighed by the possibility of unfair prejudice, *see Bush*, 164 N.C. App. at 264, 595 S.E.2d at 721. Thus, the trial court made a mistake of law, which was necessarily an abuse of discretion. *See Rhodes*, 366 N.C. at 535–36, 743 S.E.2d at 39.

This is a sexual-assault case, and the ultimate issue is the perpetrator's identity. Complainant testified that Defendant was the perpetrator; Defendant testified that he was not—and the only probative evidence of the perpetrator's identity is their competing testimony. So at bottom, this case is about credibility: Either Complainant told the truth, or Defendant did.

Because the State's only direct evidence of the perpetrator's identity was Complainant's testimony, Complainant's credibility was crucial to the State's case. *See Whaley*, 362 N.C. at 161, 655 S.E.2d at 391. Thus, impeachment of Complainant's credibility was "particularly critical" to Defendant's defense in this case. *See id.* at 161, 655 S.E.2d at 391.

Accordingly, Defendant offered the Note to impeach Complainant and advised the trial judge that the Note was being offered for impeachment purposes. The Note was in Complainant's handwriting, as confirmed by her testimony, thus authenticating the Note. Yet despite not "recognizing" the Note, Complainant testified that it "might have come from a story because [she] used to write stories based off of people in [her] life[,] and [she] used to use people's names that were in [her] life to write little stories." According to Complainant, the Note could have been about "anything really." Further, Complainant "thought" Larry was her boyfriend when she wrote the Note, even though she previously testified to not having a boyfriend at the time.

The contradictions within the Note and created by the Note are highly probative of Complainant's credibility. *See id.* at 161, 655 S.E.2d at 391. These contradictions could have created a reasonable doubt

concerning Defendant's guilt. Perhaps the Note contained "little stories," or maybe it detailed an actual encounter between Complainant and "Larry." Likewise, maybe Complainant's allegations against Defendant were truthful—or maybe she invented the allegations because she was "upset, angry" with Defendant. It was for the jury to decide what evidence was believable and what weight should be assigned.

Whether Complainant was credible, and whether she fabricated her allegations against Defendant, were questions for the jury. *See Daniels*, 164 N.C. App. at 204, 595 S.E.2d at 704–05. Nonetheless, the trial court deprived Defendant of the opportunity to impeach Complainant with questions about the Note. After an extended hearsay discussion, the trial court pivoted and stated, almost as an afterthought, that it "also" thought the Note was "more prejudicial than probative," so the trial court excluded the Note under Rule 403.

As mentioned above, the trial court applied the wrong standard in two ways when it excluded the Note. *See* N.C. Gen. Stat. § 8C-1, Rule 403. First, the trial court failed to engage in Rule 403 balancing before excluding the Note. *See France*, 94 N.C. App. at 76, 379 S.E.2d at 703. Instead, as an addendum to its hearsay inquiry, the trial court uttered a fragmented Rule 403 conclusion. But as "the State's sole direct evidence" on the perpetrator's identity depended on Complainant's credibility—a careful balancing was crucial—because the Note clearly impeached Complainant's credibility. *See Whaley*, 362 N.C. at 161, 655 S.E.2d at 391. The trial court, however, did not carefully weigh the Note's prejudicial effect against its probative value, which was an error of law, *see France*, 94 N.C. App. at 76, 379 S.E.2d at 703, which was an abuse of discretion, *see Rhodes*, 366 N.C. at 535–36, 743 S.E.2d at 39.

Second, even if the trial court balanced the Note's prejudicial effect against its probative value, the court used the wrong scale in doing so. *See* N.C. Gen. Stat. § 8C-1, Rule 403. The standard for excluding evidence under Rule 403 is not merely "more prejudicial than probative," as stated by the trial court. *See id.* Instead, the proper question is whether the probative value is *substantially* outweighed by the possibility of unfair prejudice. *See id.*; *Bush*, 164 N.C. App. at 264, 595 S.E.2d at 721 ("[The] probative value must not merely be outweighed by the prejudicial effect, but *substantially outweighed*." (emphasis added)). So even if the trial court engaged in careful balancing, its conclusion was still based on a mistake of law, N.C. Gen. Stat. § 8C-1, Rule 403, and was therefore an abuse of discretion, *see Rhodes*, 366 N.C. at 535–36, 743 S.E.2d at 39.

Trial courts must have room to make discretionary decisions, but they must do so within the bounds of applicable legal standards. *See id.*

at 535–36, 743 S.E.2d at 39. Accordingly, the trial court abused its discretion by excluding the Note because it failed to stay within the bounds of Rule 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403; *Rhodes*, 366 N.C. at 535–36, 743 S.E.2d at 39.

Lastly, the trial court's exclusion of the Note prejudiced Defendant. *See Jacobs*, 363 N.C. at 825, 689 S.E.2d at 865. Complainant's credibility was a critical question—and that question was for the jury—not the trial court. *See Daniels*, 164 N.C. App. at 204, 595 S.E.2d at 704–05. The trial court's exclusion was prejudicial because there "is a reasonable possibility" that if the jury considered the Note, the jury would have believed Defendant, rather than Complainant. *See Jacobs*, 363 N.C. at 825, 689 S.E.2d at 865–66.

In other words, there "is a reasonable possibility" that the jury would have found Defendant not guilty if the jury had been allowed to consider the Note. Therefore, Defendant is entitled to a new trial. *See, e.g.*, *Whaley*, 362 N.C. at 161, 655 S.E.2d at 391.

V. Conclusion

We hold that the trial court abused its discretion by excluding the Note, and Defendant was prejudiced by the exclusion. Defendant is therefore entitled to a new trial. Although we agree with the dissent's analysis of Defendant's remaining appellate arguments, we need not reach them because Defendant's first argument entitles him to a new trial.

NEW TRIAL.

Judge STADING concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority opinion's analysis erroneously applies an inappropriate and improper standard of review to award a new trial. Defendant failed to express the specific reasons why the evidence should be admitted under Rule 403. The proper standard of review of these issues is plain error. Presuming Defendant properly preserved his objection, Defendant has failed to show any abuse of discretion in the trial court's ruling to exclude admission of the Note or to show prejudice to be entitled to a new trial.

Other witnesses and wide-ranging and properly admitted evidence impeached the prosecuting witness's credibility. Defendant has failed to demonstrate plain error, abuse of discretion, prejudice, or to show the jury would have reached a different result, but for the trial court's ruling. I respectfully dissent.

I. Background

Catawba County Sheriff's Corporal Max Priest ("Corporal Priest") was dispatched and responded to a 911 call from a couple, reporting a young girl ("Complainant") knocking on their door in the early morning hours on 25 April 2020. Corporal Priest responded after 4:00 a.m. Upon arrival, Complainant asserted to Corporal Priest she was 16 years old and was enroute to see her boyfriend in Hickory.

Corporal Priest determined this information was false, because of the incorrect birthdate Complainant had provided. When challenged, Complainant admitted she was a 13-year-old runaway. Corporal Priest told her he needed to contact a parent or guardian. While sitting in the deputy's car, Complainant asserted she had been sexually assaulted by her father. Corporal Priest did not personally question Complainant about her allegations, and, per protocol, drove her to the Sheriff's Department, where she met and spoke with a Catawba County Department of Social Services ("DSS") case worker.

The DSS case worker conducted a recorded interview of Complainant, during which she alleged two specific instances of purported sexual abuse by her father. Based upon this information, the DSS case worker determined a forensic examination and interview was needed. To conduct this examination and interview, DSS and Deputies needed Defendant's parental consent and went to his residence to obtain it. Defendant was told the consent forms were needed for a physical examination of his minor daughter, who had asserted inappropriate sexual contact. Defendant initially hesitated, but he signed the forms. Complainant was taken to the Child Advocacy Center ("CAC").

CAC conducts forensic interviews for children, who may have experienced sexual or physical abuse, or who have witnessed violence. CAC also performs child medical examinations, therapy, and victim advocacy. The CAC interviewer, Adrienne Opdyke ("Opdyke"), used North Carolina's interview protocol, Recognizing Abuse Disclosures and Responding ("RADAR") to provide a structured environment for Complainant to assert her account in a juvenile-led manner.

During the CAC interview, Complainant alleged three specific incidents of purported sexual abuse by her father. The alleged incidents

spanned four years and purportedly occurred at multiple residences. Later that day, Julia Wetmore, a pediatric nurse practitioner ("Nurse Wetmore"), performed a child medical examination of Complainant. Nurse Wetmore followed established "Best Practices" and the general guidelines of the Child Medical Evaluation Program ("CMEP"), including a head-to-toe, external, and internal genitalia examination. Nurse Wetmore found Complainant was anxious, but generally healthy and cooperative. Nurse Wetmore observed a scar on Complainant's hymen during the internal genital examination, which she asserted may be associated with blunt force trauma.

Following the CAC interview and medical examinations, Catawba County Sheriff's Deputy Yang called Defendant and asked to interview him. Defendant asked if he was in trouble, but he voluntarily arrived at the Sheriff's office later that afternoon and was arrested.

The Catawba County Grand Jury indicted Defendant for rape of a child by an adult, statutory rape, two counts of indecent liberties with a child, and two counts of incest on 2 November 2020. A jury trial commenced on 24 October 2022. The jury convicted Defendant of all six offenses on 1 November 2022.

Defendant was sentenced to the following consecutive sentences: 300 to 420 months imprisonment for statutory rape; 16 to 29 months imprisonment for indecent liberties; 240 to 348 months imprisonment for incest; and, an additional 240 to 348 months imprisonment for statutory rape.

For the remaining indecent liberties and incest charges, Defendant was sentenced at 16 to 29 months and 240 to 348 months imprisonment respectively, consolidated with the first count of each of these charges. Defendant entered oral notice of appeal in open court.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Issues

Defendant argues, and the majority's opinion agrees, the trial court prejudicially erred as a matter of law and *ipso facto* abused its discretion in limiting admission of a Note in Complainant's handwriting. Defendant asserts his cross-examination of Complainant was unlawfully limited on a matter assertedly relevant to the Complainant's credibility. Under this notion, the majority's opinion presumes prejudice and concludes Defendant is entitled to a new trial on all issues.

Defendant further argues the trial court plainly erred in permitting expert testimony, which improperly vouched for Complainant's credibility. Defendant also argues the trial court plainly erred by allowing expert testimony that violated Rule 702(a)(3). *See* N.C. Gen. Stat. § 8C-1, Rule 702(a)(3) (2023). The majority's opinion agrees the latter two issues, both of which are analyzed below, are without merit.

IV. Cross-Examination

Defendant first argues the trial court prejudicially erred as a matter of law and consequently abused its discretion by excluding a Note written by the Complainant from the jury. He also argues, for the first time on appeal, the trial court erred as a matter of law and abused its discretion by applying the improper standard under Rule 403 of the North Carolina Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2023).

A. Standard of Review

The majority's opinion incorrectly asserts the standard of review on the first issue is an error of law, which equals an abuse of discretion. This Court reviews *preserved* Rule 403 objection rulings for an abuse of discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Defendant, however, failed to "stat[e] the specific grounds for the ruling [he] desired the court to make" and "obtain a ruling" on the applicability of Rule 403 at trial when cross-examining Complainant on the contents of the Note. N.C. R. App. P. 10(a)(1).

To preserve an argument for appellate review, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." *Id.* The complaining party must also "obtain a ruling." *Id.* "The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can [argue] error to the matter on appeal." *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991) (citations omitted).

"Unpreserved error in criminal cases . . . is reviewed only for plain error" and "plain error review in North Carolina is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 512-16, 723 S.E.2d 326, 330-33 (2012) (citations omitted)).

Plain error "is always to be applied cautiously" and is defined as:

> 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, 300 S.E.2d 375, 378 (1983) (emphasis supplied) (citations, quotation marks, and alterations omitted).

"To show that an error was fundamental, a defendant must establish prejudice." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Defendant has failed to "specifically and distinctly" argue this newly-found Rule 403 appellate argument, has waived review of his argument, and is not entitled to plain error review. N.C. R. App. P. 10(a)(4). Our appellate rules require a defendant to "specifically and distinctly contend[ ]" the contested action amounted to plain error. *Id.*

To establish prejudice required for a new trial "[u]nder the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, *the jury probably would have reached a different result*." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (emphasis supplied) (citation omitted). Defendant clearly failed to do so here.

"Our courts have held . . . the balancing test of Rule 403 is reviewed by this court for abuse of discretion, and we do not apply plain error to issues which fall within the realm of the trial court's discretion." *State v. Garcia*, 228 N.C. App. 89, 101-02, 743 S.E.2d 74, 82 (2013) (citations, internal quotation marks, and alterations omitted).

Here, the State objected to admission of the Note on the grounds of relevancy, authentication, and lack of knowledge. Defendant proffered the Note and argued it attacked Complainant's credibility and could be used to impeach Complainant. The trial court heard Defendant's argument for admission of the Note to challenge Complainant's credibility, and it also expressed concerns over speculation and hearsay. When the trial court ruled Defendant was prohibited from questioning Complainant about the contents of the Note, the trial court stated Defendant's blanket objection to the exclusion of the Note was "noted for the record."

On appeal, Defendant argues the trial court's offhanded comment at the end of an extensive discussion constitutes proper preservation for appellate review. The majority's opinion agrees and holds Defendant's blanket objection preserved his argument.

During the lengthy discussions about whether to admit or publish the Note, Defendant never: (1) objected to the trial court's decision on Constitutional grounds; (2) challenged the trial court's concerns over confusion of the issues to the jury; or (3) proffered how the trial court should weigh the probative value of the Note compared to prejudicial effects under Rule 403.

Defendant failed to "stat[e] the specific grounds for the ruling [he] desired the court to make" under Rule 403 when cross-examining Complainant on the contents of the Note. N.C. R. App. P. 10(a)(1). Defendant failed to "call the court's attention" on an issue he "want[ed] a ruling" on which is required to "assign error to the matter on appeal." *Canady*, 330 N.C. at 401, 410 S.E.2d at 878 (citations omitted).

Instead, Defendant attempts to "swap" his horse for a purportedly "better mount", raises his Rule 403 objection for the *first time* on appeal, and only argues the trial court abused its discretion. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("An examination of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount . . . .").

Defendant has also failed to "specifically and distinctly" allege the trial court committed *plain error* by exercising its discretion and excluding the Note under Rule 403. N.C. R. App. P. 10(a)(4). *See State v. Woodley*, 286 N.C. App. 450, 464, 880 S.E.2d 740, 750 (2022); *State v. Smith*, 269 N.C. App. 100, 105, 837 S.E.2d 166, 169 (2019).

Defendant's new argument is unpreserved. The majority's opinion: (1) presumes proper preservation and objection; (2) then elevates and reviews Defendant's argument as an error of law as equaling an abuse of discretion; (3) erroneously awards a new trial without; (4) any required demonstration of prejudice. *Id.*; *Garcia*, 228 N.C. App. at 101-02, 743 S.E.2d at 82.

"[I]t's [the judge's] job to call balls and strikes and not to pitch or bat." Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate, 109 Cong. 56 (Statement of Hon. John G. Roberts, Jr.).

B. Analysis

Presuming, *arguendo*, Defendant had properly objected to and preserved the exclusion of the Note under Rule 403 at trial, and the Appellate Rules allowed this Court to review his claim for an abuse of discretion, Defendant's argument still fails.

Defendant argues the trial court abused its discretion by denying Defendant from admitting and publishing a Note in Complainant's handwriting. The Note was written at some unknown point prior to Complainant running away from home. Defendant argues the trial court's ruling unlawfully limited his trial counsel's cross-examination of Complainant.

The Note referenced "Larry", an alleged online boyfriend, who Complainant purportedly had snuck out of her house to visit. The Note, written on lined, notebook-like paper, reads: " 'Hey, get in.' I looked out my open window to see my boyfriend Larry in his car. 'Okay. I'm coming. But be quiet. Jackie's asleep.' He nodded as I crawled out my window. I quickly got in his car."

The trial court concluded the Note appeared to be a fantasy, opposed to a recorded diary entry, as evidenced by the informal language and direct quotation marks. The Note is written in past tense and was found in the home, to which Complainant never returned after complaining of Defendant's actions to law enforcement officers. Complainant never returned to the house to author a diary entry describing the evening. No foundation was laid showing the Note described Complainant's actions immediately prior to the early-morning intervention by law enforcement officers.

Defendant's counsel attempted to use the Note to impeach the Complainant on cross-examination. Defendant proffered the online boyfriend referenced in the Note, named Larry, *may have been* the same boyfriend she first stated she was going to visit in Hickory after running away from Defendant. The court excused the jury and allowed defense counsel and the State to conduct a *voir dire* of Complainant. Defendant asked Complainant if she recognized the Note, to which Complainant responded she did not.

> Q: I'd like to show you what's been marked as Defendant's Exhibit Number 1 for identification. Do you recognize that?
>
> A: No.
>
> Q: Okay. Are you saying you did not write this?
>
> A: No, I just do not – I don't recognize it.

Complainant admitted the Note was in her handwriting, but she did not remember it.

> Q: Is that your handwriting?
>
> A: Yes, it is.

Q: So you did write it you just don't remember writing it?

A: Yes.

Complainant went on to explain she had met "Larry" online and had never met him in-person. She admits she "thought" Larry was her boyfriend at the time she wrote the Note, when she was younger. She repeatedly stated she had never snuck out of her house to meet "Larry" and emphasized the events detailed in the Note were fictious. She explained she used to "write stories based off of people in [her] life" or that it could have been based on a dream. For more context, Defendant's counsel asked Complainant the following questions:

Q: But in that note it says you talk about, I think, crawling out a window and meeting him; right?

A: Yes.

Q: Okay. And it's written in the past tense. Did that happen?

A: No.

Q: Okay. So was that from a diary entry or do you know where that came from?

A: It might have come from a story because I used to write stories based off of people in my life and I used to use people's names that were in my life to write little stories. So it could have been that or it could have been a dream I had or anything really.

Q: But the way it's written it could have actually happened; right?

A: It didn't.

Q: Okay. But it could have; right?

[THE STATE]: I'm going to object. She asked and answered.

THE COURT: Sustained.

[DEFENDANT'S COUNSEL]: So this Larry person you're in contact with, he was 17?

A: I don't really know how old he was. He had told me he was 17 but I'm not sure.

Q: Okay. And when you're talking with Officer Priest you mention going to see your boyfriend in Hickory; is that right?

A: Yes.

Q: Was that Larry?

A: No.

Q: Okay. So you're saying you never met Larry in person?

A: No. No, I said I never met Larry in person.

Q: Yeah, sorry, that was a bad question on my part. Thank you for clarifying.

Before Defendant's *voir dire* of Complainant began, the State had objected to the writing being admitted and published on the grounds of relevancy, authentication, and lack of knowledge. After the *voir dire*, the trial court expressed its concerns on the record about relevancy, speculation, as well as the Note being hearsay and being presented for the truth of the matter asserted.

The trial court exchanged several colloquies with counsel before reaching its decision:

> THE COURT: But the context behind what prompted her or provoked her to write this was missing. Is she writing that because she's writing what happened in a dream; is she writing that because it's some story she's writing or is she writing this because that's what really happened. She's saying she never met this man – or met this kid Larry and he might be 17 and that's what he portrayed himself to be online. She said she really doesn't even know how old he is. She's never met him face to face.
>
> And so that document doesn't tell me anything besides she wrote something down. What she wrote down, the truth of what she wrote down, is at issue. It's being offered for – I can't think of a purpose other than the truth of the matter is what you're trying to get in to the jury that this is, in fact, what happened. That is not, in fact, what happened based on what she's saying.
>
> So how do you impeach her by something that she's saying never happened. I mean, what you're trying to say [is] it did happen but she's never said it happened and how do you impeach her when there's not a witness to that.

The trial court made the following ruling at the end of its extensive colloquies with Defendant about admitting the Note to purportedly

impeach Complainant's credibility. At the end of it's ruling, the trial court "offhandedly" mentioned the Rule 403 balancing test:

> So I will not allow you to admit that document *for the purpose of showing anything could be remotely true in that statement because she's not going to say it*. If she said yes, it happened, that would be one thing; but she's not admitting to any of that being truthful. At best it might be fanciful or fantasy of things she was just writing. And I also think it's more prejudicial than probative and therefore I will not allow that to be admitted. At best she's acknowledged that it's her handwriting but beyond that there's nothing of evidentiary value in that document.

(emphasis supplied).

1. Rule 412

The majority's opinion correctly notes, "neither party discussed Rule 412 at trial, and neither party discussed Rule 412 on appeal." Yet the majority addresses Rule 412 on appeal and asserts Rule 412's limitations were not at issue. This assertion directly contradicts the majority's acknowledgement of the reasons for which Defendant intended to use the Note. *See* N.C. Gen. Stat. § 8C-1, Rule 412 (2023).

The majority's opinion states, the Note was "probative" because it could prove "the perpetrator of Complainant's alleged [sexual] assaults was actually Complainant's boyfriend—possibly 'Larry.' " The majority's opinion then posits: "the Note did not disclose any sexual activity by Complainant that would trigger Rule 412 issues." Later, the majority's opinion insinuates the sexual perpetrator may have been "Larry," "because the Note clearly impeached Complainant's credibility" regarding the "perpetrator's identity."

If Defendant had attempted to argue the Note showed someone other than Defendant had scarred Complainant's hymen or otherwise "was the perpetrator of Complainant's alleged assaults," Rule 412 would apply. *See* N.C. Gen. Stat. § 8C-1, Rule 412(b)(2) (explaining "evidence of specific instances of sexual behavior [may be] offered for the [limited] purpose of showing that the act or acts charged were not committed by the defendant"). For the Note to be used to call into question the identity of the perpetrator, Defendant would have been required to proffer evidence tending to show: Complainant had sexual encounters with Larry, those sexual encounters were nonconsensual, and the instances of sexual misconducts Defendant was accused of were committed by Larry instead of Defendant. *Id.*

Given the utter dearth of anything tending to show Complainant had ever met "Larry" in-person, much less had an unlawful and non-consensual sexual encounter with "Larry," the trial court exercised its discretion and properly concluded the Note was not relevant nor probative of whether an alternative perpetrator existed, or who had committed the sexual misconduct of which Defendant was accused.

If the Note was probative of an alternative perpetrator, as the majority's opinion posits, the evidence required to suggest "Larry" committed the sexual acts, as opposed to Defendant, would have clearly fallen under the purview of Rule 412(b)(2). *Id.* Defendant failed to make a Rule 412(b)(2) exception or argument at trial, because no other evidence tended to show any purported sexual activity between Complainant and "Larry."

2. Scope of Cross-Examination

"The long-standing rule in this jurisdiction is that the scope of cross-examination is largely within the discretion of the trial judge, and his rulings thereon will not be held in error in the absence of a showing that the *verdict was improperly influenced* by the limited scope of the cross-examination." *State v. Woods*, 307 N.C. 213, 220-21, 297 S.E.2d 574, 579 (1982) (emphasis supplied). "Although cross-examination is a matter of right, the *scope* of cross-examination is subject to appropriate control in the *sound discretion of the court*." *State v. Kowalski*, 270 N.C. App. 121, 126, 839 S.E.2d 443, 447 (2020) (emphasis supplied) (citation omitted).

Our Rules of Evidence generally allow a witness to be "cross-examined on any matter *relevant* to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2023) (emphasis supplied). *See also* N.C. Gen. Stat. § 8C-1, Rule 401 (2023). Notwithstanding a threshold showing of relevancy, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues*, *or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (emphasis supplied).

"In our [appellate] review, we consider not whether we might disagree with the trial court [if we were sitting in that role], but whether the trial court's actions are fairly supported by the record." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citation and quotation marks omitted).

As the majority's opinion points out, Complainant's testimony and credibility was challenged and impeached on several occasions. The

majority's opinion asserts Complainant had lied about: her age; her father kicking her out of the home, when she instead had run away from home; and, her claiming she intended to meet a boyfriend in Hickory who did not exist. Complainant was cross-examined regarding these lies. Corporal Priest was also cross-examined by Defendant regarding these inconsistences in Complainant's statements.

Defendant's ability to extensively cross-examine Corporal Priest and Complainant regarding these lies and her credibility cuts against the majority's notion asserting Defendant's inability to admit and publish the Note prejudicially limited his defense.

The trial court allowed and the jury heard lengthy evidence and testimony attacking Complainant's veracity, *yet the jury still believed her on all counts*. Defendant has failed to demonstrate the jury's "verdict was improperly influenced by the limited scope of the cross-examination" to show prejudice to award a new trial. *Woods*, 307 N.C. at 221, 297 S.E.2d at 579.

Defendant has also failed to demonstrate the trial court abused its discretion by "offhandedly" misstating the standard as "more prejudicial than probative" under Rule 403, which only allows relevant evidence to be excluded if the "probative value is substantially outweighed by" any prejudicial effects. N.C. Gen. Stat. § 8C-1, Rule 403. Defendant never demonstrated to the trial court how to weigh the probative value of the Note compared to any "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" under the Rule 403 balancing test. *Id.*

The trial court allowed both counsel to *voir dire* the witness and engaged in extensive discussions with both counsel about the proffered evidence, which encompasses nearly sixteen pages of text in the transcript. Under Rule 403, "confusion of the issues, or misleading the jury" are valid bases in the trial court's discretion to limit extraneous assertions, which the trial court discussed. *Id.*

The trial judge's comments do not indicate an abusive or careless application of the law. Instead, the transcript clearly shows careful and reasoned consideration of Defendant's arguments for the Note to be admitted, the relevancy of the Note, whether the Note was being offered for the truth of the matter asserted, concerns about speculation, and the risk of the Note confusing the issues and misleading the jury. *See* N.C. Gen. Stat. § 8C-1, Rules 401, 402, 403, 602, and 801(c) (2023).

The trial court lamented:

> THE COURT: I think that's the only fact that you have is that she wrote it. . . . And so to say here's a document, you-all go figure out what you think this means without anything else, isn't that pure speculation? If she won't say that that's what it is, how can I put that before a jury and ask them to read into [it] however you want to what this means?

The trial court further questioned Defendant's counsel regarding how the Note could be linked to the night Complainant left the house or whether her alleged boyfriend in Hickory could, in fact, be the "Larry" in the Note. Both the State and Defendant admitted Complainant never returned to the house and the Note could not concern the night she had ran away from her house. The trial court stated:

> But how could the document say that she went out a window and met someone before she had a chance to write it and put in the house. You're saying she wrote something that says she crawled out the window and met Larry, but if she's located by the police that same night, when would she have had an opportunity to write down this and go back and put it in the house?

The trial court's statements show careful and reasoned examination of the Note, and how it may be used by the jury to avoid "confusion of the issues, or misleading the jury." N.C. Gen. Stat. § 8C-1, Rule 403. *See State v. Steele*, 260 N.C. App. 315, 322, 817 S.E.2d 487, 493 (2018) ("Further, the trial court's limiting instruction demonstrated that the trial court thoughtfully considered the nature of the testimony and how it could potentially be used by the jury. Defendant has failed to demonstrate that the trial court abused its discretion.").

Presuming, *arguendo*, the issue was preserved and is properly before this Court, Defendant has failed to show: the trial court abused its discretion, prejudice, or how the jury's verdict would have been influenced by the limited scope of cross-examination to be awarded a new trial. *Id.*; *Kowalski*, 270 N.C. App. at 126, 839 S.E.2d at 447; *Woods*, 307 N.C. at 220-21, 297 S.E.2d at 579.

Defendant has also failed to demonstrate the trial court acted unreasonably or reached an arbitrary decision, that is not the product of a reasoned decision, while conducting its purported Rule 403 analysis. N.C. Gen. Stat. § 8C-1, Rule 403; *Steele*, 260 N.C. App. at 322, 817 S.E.2d at 493. Defendant's argument is properly overruled.

V. Expert Testimony

A. Standard of Review

When a defendant fails to properly preserve an issue for appellate review with a timely request, objection, or motion to the trial court, the error may still be reviewed for plain error, if it concerns the admission of evidence including expert testimony. *See State v. Hammett*, 182 N.C. App. 316, 320, 642 S.E.2d 454, 457 (2007). *See also State v. Koiyan*, 270 N.C. App. 792, 794, 841 S.E.2d 351, 353 (2020).

As noted earlier, plain error review leading to a conclusion to award a new trial only applies "in *extraordinary cases* 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*." *State v. Barden*, 356 N.C. 316, 348, 572 S.E.2d 108, 130 (2002) (emphasis supplied) (citation and internal quotation marks omitted).

Defendant must meet and carry a significantly heavier burden than that placed upon a defendant who preserved their objection *via* timely objection at trial. "To establish plain error, a defendant must demonstrate (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Hammett*, 182 N.C. App. at 320, 642 S.E.2d at 457 (citation and quotation marks omitted). Defendant's arguments fail under either standard.

B. Vouching

Defendant argues the testimony of the CAC forensic interviewer, Opdyke, effectively stamped credibility on Complainant's testimony. The testimony in question occurred when Opdyke was explaining the process and purpose of interviewing Complainant. Opdyke states the purpose is "to elicit the account in credible details" and following the protocols are necessary or the interview "probably [will not] stand up in court."

This Court has previously held that experts may not testify that "a prosecuting witness is believable, credible, or telling the truth." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). The question of whether testimony is improper vouching for a witness must be decided on a fact-specific basis. *State v. Chandler*, 364 N.C. 313, 318-19, 697 S.E.2d 327, 331 (2010).

This Court has previously deemed expert testimony to be improper when no clinical or physical evidence supports a statement that is presented as fact by the expert, or when the expert vouches for a victim by

sharing their belief in the veracity of the victim's statements. *See State v. Bush*, 164 N.C. App. 254, 259-60, 595 S.E.2d 715, 718-19 (2004) (allowing expert to testify to abuse occurred with no evidence and expressing an opinion of child's recollection was not permissible); *Hammett*, 361 N.C. at 97, 637 S.E.2d at 522 (allowing expert to state she believed the victim even without physical evidence was improper).

Opdyke did not testify Complainant's accusations were credible. Opdyke refrained from citing anything Complainant had asserted as being factual and did not vouch for Complainant's credibility. The statements at issue were made during a general overview of how and why forensic interviews are used.

When speaking about Complainant's interview, Opdyke used phrases such as "specific details" or just "details" and only noted Complainant had reported several incidents of sexual abuse. Opdyke did not opine on how she had viewed these statements, the veracity of those statements, or that she made any judgment. Opdyke noted Complainant had alleged sexual abuses occurred.

In light of these facts, and viewing the entire record for plain error, excluding Opdyke's testimony does not show the jury would probably have reached a different verdict. The jury heard Complainant's testimony, reports to authorities, testimony describing Complainant's demeanor when discussing the sexual abuse, physical evidence of sexual abuse, her testimony regarding Defendant's behavior surrounding the report stage, and his subsequent arrest.

The plain error rule "is always to be applied cautiously and only in the exceptional case." *See State v. Cummings*, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000). This is not such an "exceptional case." *Id.* Defendant did not object and has failed to show plain error in the admission of Opdyke's expert testimony to warrant a new trial.

C. Reliable Principles and Methods

Defendant's final argument asserts the trial court again committed plain error when it allowed Nurse Wetmore to testify she had conducted a physical examination in accordance with CMEP guidelines and had formed an opinion based upon these guidelines, but she failed to explicitly detail the guidelines in relation to her findings. Defendant made no objection at trial. Defendant now argues Nurse Wetmore's expert opinion of the Complainant's injury she observed lent credibility to Complainant's allegations of sexual abuse and the jury would have returned a different verdict without her testimony.

Defendant relies upon Rule 702(a), which provides an expert witness may testify in the form of an opinion "if all of the following apply: (1) [t]he testimony is based upon sufficient facts or data[,] (2) [t]he testimony is the product of reliable principles and methods[,] (3) [t]he witness has applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. § 8C-1, Rule 702(a). Defendant focuses on the third prong of the statute. Under Rule 702(a)(3), the expert's methodology or reasoning must be sufficiently tied to the facts. *Id.*; *State v. Babich*, 252 N.C. App. 165, 168, 797 S.E.2d 359, 362 (2017) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993)).

The expert witness must tie the facts to the methodology to ensure no "analytical gap between the data and the opinion proffered." *State v. McPhaul*, 256 N.C. App. 303, 313-17, 808 S.E.2d 294, 303-05 (2017). The expert also must provide details showing how she had "arrived at her actual conclusions *in this case*." *Id.* at 316, 808 S.E.2d at 305 (explaining expert opinion was unreliable and inadmissible because the expert failed to explain to the jury how she knew the fingerprints matched).

Nurse Wetmore explained the guidelines for child medical evaluations in sexual abuse cases and the process of the evaluations. She testified about conducting the medical examination on Complainant and explained the scar on Complainant's hymen. She concluded, in her expert opinion, Complainant's injury was consistent with blunt force trauma and the potential of sexual assault or abuse. Nurse Wetmore testified she had documented the results of the examination and had reached this opinion based upon CMEP guidelines.

Defendant questioned Nurse Wetmore regarding these guidelines during a *voir dire*, which centered around a medical examination conducted on Complainant in 2009 following a report of sexual assault to DSS. Complainant was three years old when the 2009 medical examination was completed. Defendant's counsel pressed Nurse Wetmore for a detailed explanation of the guidelines, and the prosecution also elicited additional testimony on the guidelines. Defendant had the unrestrained opportunity to cross-examine Nurse Wetmore regarding the CMEP guidelines, and he chose not to object or challenge her opinion or to question her further before the jury.

Nurse Wetmore did not ask the jury to simply accept her conclusion. She explained she had used nationally-recognized guidelines and how she had compared her findings during the examination with these guidelines. She further detailed how she had documented her opinion and had based it upon the guidelines. She demonstrated to the jury

where the physical injury was found by using a photograph taken during the examination.

She also explained the statistical probability of finding this sort of injury on a child alleging sexual abuse. Taken together, no gap existed between how Nurse Wetmore had analyzed the information she had observed during the examination and how she had reached her conclusion. Defendant failed to show any "analytical gap between the data and the opinion proffered." *McPhaul*, 256 N.C. App. at 313-17, 808 S.E.2d at 303-05.

Under plain error review, Defendant fails to show fundamental error resulting in the miscarriage of justice, or which would have probably resulted in the jury reaching a different verdict. *See Barden*, 356 N.C. at 348, 572 S.E.2d at 130; *Hammett*, 182 N.C. App. at 320, 642 S.E.2d at 457. This argument is properly overruled.

VI. Conclusion

Defendant's Rule 403 argument was not asserted or preserved for appellate review. Defendant engaged in extensive cross-examination of the Complainant and the investigating officer and called into question Complainant's inconsistent statement and credibility before the jury. The trial court did not abuse its discretion by excluding the written Note from the jury. The trial court's un-objected admission of testimony by Opdyke and/or Nurse Wetmore was not plain error.

Defendant received a fair trial, free from abuses of discretion and prejudicial errors he preserved or argued. No plain error is shown in the jury's verdicts or in the judgments entered thereon. Defendant is not entitled to a new trial. I respectfully dissent.

STATE v. McNEIL

[294 N.C. App. 233 (2024)]

STATE OF NORTH CAROLINA
v.
TERRENCE MERRILL McNEIL

No. COA23-977

Filed 4 June 2024

1. Drugs—trafficking by possession—constructive possession—sufficiency of evidence

In a prosecution for trafficking methamphetamine, the trial court did not err in denying defendant's motion to dismiss a charge of trafficking in methamphetamine by possession (N.C.G.S. § 90-95(h)(3b)) for insufficiency of evidence that defendant constructively possessed a package containing the contraband that was delivered to a home regularly visited by defendant. The evidence, viewed in the light most favorable to the State, was that defendant: did not contest his intent to eventually possess the package; had requested permission from a resident to have a package delivered to the home; called the resident shortly after the delivery; knew the recipient listed on the package—apparently a fake name; immediately went to the home to retrieve the package; and had two additional packages containing contraband delivered to the same home.

2. Criminal Law—jury instructions—trafficking methamphetamine—lesser included offense of attempt—plain error not shown

In a prosecution for trafficking methamphetamine by possession, the trial court did not commit plain error when it failed to instruct the jury on the lesser-included offense of attempted trafficking of methamphetamine by possession where defendant did not request such an instruction and the State's uncontradicted evidence tended to show the completed offense, namely, that defendant possessed methamphetamine when he arrived at and entered the home to which he had arranged for the contraband to be delivered.

Appeal by Defendant from judgment entered 23 February 2023 by Judge James P. Hill, Jr. in Randolph County Criminal Superior Court. Heard in the Court of Appeals 9 April 2024 in session at Elon University School of Law in the City of Greensboro pursuant to N.C. Gen. Stat. § 7A-19(a).

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas Sorensen, for the State.

Richard J. Costanza, for the Defendant.

WOOD, Judge.

Terrence Merrill McNeil appeals from a conviction finding him guilty of trafficking methamphetamine by possession, with a mandatory minimum sentence of 225 to 282 months of imprisonment and a $250,000.00 fine. For the reasons stated below, we affirm the trial court's judgment.

I. Factual and Procedural Background

On 9 October 2019, Detective Mendez, employed by the Asheboro Police Department and assigned to the vice narcotics unit, was contacted by the Department of Homeland Security concerning a package. The package had been intercepted in Tennessee where it tested positive for liquid methamphetamine. It originated from Mexico with a final delivery to "Guadalupe Zamora"[1] at 338 Rich Avenue, Asheboro, North Carolina. Upon receiving this information, Detective Mendez and other officers developed a plan to execute a controlled delivery of the package to the named address.

Detective Conner, an officer from the same unit as Detective Mendez, was assigned to complete the delivery on 11 October 2019. Other units and agencies were tasked with additional surveillance of the delivery. On that day, Detective Conner posed as a Fed-Ex employee and wore a device that was equipped with audio, video, and GPS capabilities. At approximately 11:00 a.m., Detective Conner delivered the package to a man he did not recognize, later identified as Cornelius Armstrong. Detective Conner informed Detective Mendez that after the package was accepted and taken inside, he left the house.

Shortly thereafter, Detective Mendez and other officers proceeded to the house to execute the search warrant. Upon entering the house, the officers observed the package on the floor near the front door and several people throughout the home, including Bruce Isley, Melissa Cassidy, her bedridden husband, Glenwood Cassidy, and two nurses.

1. No individual named "Guadalupe Zamora" was found during the investigation. Detective Mendez testified the name was likely fake.

While Lieutenant Hill spoke with Mrs. Cassidy about the package and the intended recipient, she received a phone call from "Terrence" (hereinafter "Defendant"). Suspicious of the call, Lieutenant Hill told Mrs. Cassidy to call Defendant and question him about the package. During the call Mrs. Cassidy informed Defendant that his package had arrived. Defendant asked if it was from Fed-Ex; when she responded that it was, he told Mrs. Cassidy he was coming to the house to get the package. When asked about the name on the package, Defendant said it was the name of the person who sent the package. At trial, Mrs. Cassidy testified that she knew Defendant because he dated her niece and frequently spent time at her home. Additionally, she testified that while speaking with Defendant on 10 October 2019, he had asked her if he could have a hoodie delivered to the house for his son.

Defendant arrived at the home, opened the front door, and was immediately arrested and taken to the police station. The seized package was sent to the State Crime Lab, which confirmed the positive results from the initial test and identified approximately 2,814 grams of methamphetamine. Subsequently, on 11 October 2019 and 12 October 2019, two more packages arrived at the same house and were addressed to "McNeil." Both packages were sent from California and contained bags of marijuana.

Before trial, Defendant plead guilty to two counts of conspiracy to sell and deliver marijuana for the two packages delivered after the 11 October package containing methamphetamine. The respective guilty plea transcript was admitted into evidence. Following the close of the State's evidence, Defendant moved to dismiss the charges of trafficking methamphetamine by transportation and trafficking methamphetamine by possession for insufficient evidence. The trial court granted the motion to dismiss the charge of trafficking by transportation but denied the charge of trafficking by possession, thereby allowing it to reach the jury.

At the charge conference, both parties agreed to the proposed jury instructions, which included instructions on trafficking in methamphetamine by possession and the doctrines of actual and constructive possession of a controlled substance. The instructions were submitted to the jury without objection. Ultimately, the jury returned a verdict finding Defendant guilty of trafficking methamphetamine by possession. The trial court sentenced Defendant to the mandatory minimum sentence of 225 to 282 months in prison and imposed a $250,000.00 fine. Defendant, through counsel, gave oral notice of appeal.

II. Discussion

Defendant presents two issues on appeal. He argues (1) the trial court erred in denying his motion to dismiss the charge of trafficking in methamphetamine by possession, and (2) the jury should have received an instruction on the lesser-included offense of attempted trafficking in methamphetamine by possession. We address each argument in turn.

A. Motion to Dismiss

[1] Defendant first argues the trial court erred when it denied Defendant's motion to dismiss the charge of trafficking in methamphetamine by possession because the State failed to present evidence that Defendant possessed or exercised dominion over the 11 October 2019 package. On appeal, the trial court's denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations omitted). This Court is tasked with determining whether "there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Watkins*, 247 N.C. App. 391, 394, 785 S.E.2d 175, 177 (2016) (citation omitted). "Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor." *Id.*

Defendant was convicted for trafficking in methamphetamine under N.C. Gen. Stat. § 90-95(h)(3b), which applies to "any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine." The State concedes, and the trial court recognized that Defendant never touched the package. Thus, the question turns to whether Defendant had constructive, rather than actual possession of the package.

Constructive possession occurs when a defendant has "the intent and capability to maintain control and dominion over [the contraband]." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). "As the terms 'intent' and 'capability' suggest, constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (citations omitted).

Constructive possession is a fact-specific analysis and often turns on a "defendant's proximity to the contraband" and "indicia of the defendant's control over the place where the contraband is found." *Miller*, 363 N.C. at 99-100, 678 S.E.2d at 594-95. If a defendant lacks exclusive possession over the location where the contraband is found, the State "must show other incriminating circumstances before constructive possession may be inferred." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) (citations omitted).

Here, the package was flagged in Tennessee and thereafter maintained by law enforcement officers until delivery to the Cassidys' home. Following delivery, the package was placed on the floor inside the home. Defendant was arrested immediately after he entered the home to retrieve the package but did not physically touch the package. Defendant does not dispute his intent to control the package; instead, he argues, "it was a practical impossibility . . . to exercise dominion and control over the package."

Defendant analogizes the facts of this case to *State v. Clark*, 137 N.C. App. 90, 527 S.E.2d 319 (2000), to support his contention of impossibility. In *Clark*, the police intercepted a package containing marijuana, removed a substantial amount of the marijuana from the package, and conducted a controlled delivery. *Id.* at 93, 527 S.E.2d at 321. This Court found that because the amount removed by police rendered the delivered quantity insufficient to support a conviction for trafficking, "the actions of the police made it impossible for [the defendant] to actually possess the quantity of marijuana required," and there was insufficient evidence that the defendant "ever had the capability to exercise dominion and control over the original package." *Id.* at 93, 95, 527 S.E.2d at 321-22. Similarly, Defendant argues that he did not have the power or capability to control the package or its contents because he was immediately arrested after walking through the door. The power to control the package is measured by possession of the contraband, not when it is shipped by a carrier.

The State argues *Clark* is distinguishable from the present case as the holding in *Clark* focused on the quantity element of the trafficking charge. The State contends there was sufficient incriminating evidence to show that Defendant had the requisite capability to exercise control over the package. The State acknowledges Defendant did not have exclusive control over the house but argues that Defendant exercised control by directing multiple shipments to the house, his ability to quickly drive over and pick-up the packages, and his proximity to the methamphetamine in the package.

Similarly, as in *Clark*, it is appropriate to assess the individual's power to control the contraband, not upon shipment, but upon controlled delivery of the package. However, unlike *Clark*, our focus is not upon the quantity of methamphetamine in the package, as that is not in dispute. As noted above, the relevant analysis focuses on Defendant's proximity to the package and evidence of Defendant's control over the place where the contraband was found, which was the Cassidys' home. *Miller*, 363 N.C. at 100, 678 S.E.2d at 595. Further, we must consider the surrounding incriminating circumstances, including evidence which places the defendant "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984) (citations omitted).

In the present case, we acknowledge Defendant did not have exclusive possession of the place where the package was found. Defendant frequently visited the Cassidys' home, but it was not his permanent residence. However, since "possession of the property where the drugs are located, either exclusive or nonexclusive, is not . . . the sole method of showing constructive possession[,]" we must examine whether Defendant was within close juxtaposition to the contraband, along with other incriminating evidence. *State v. Bowens*, 140 N.C. App. 217, 223, 535 S.E.2d 870, 874 (2000) (citations omitted).

The only evidence of Defendant's proximity to the package of methamphetamine was the distance between him and the package after he walked through the front door. However, the State offered evidence of several incriminating circumstances. Defendant called Mrs. Cassidy the day prior to the controlled delivery asking if he could have a package delivered to her home. On the day of delivery, during his phone conversation with Mrs. Cassidy, Defendant asked if his package was from Fed-Ex. When asked about "Guadalupe Zamora," Defendant stated that it was the person who sent him the package, which confirmed Defendant was inquiring about that specific package; Defendant immediately came to the house to retrieve the package upon delivery confirmation; Defendant had three packages, all containing contraband, delivered to the Cassidy residence.

Based on these facts, we are unpersuaded by Defendant's contention that he did not have the opportunity to exercise control over the package because he was arrested prior to making physical contact with the package. Defendant was within close juxtaposition to the seized package; had knowledge about the details of the delivery, including the carrier service and name on the package; arrived at the house as soon as

he learned it had been delivered; and had subsequent packages containing contraband sent to the house. These circumstances were sufficient for the jury to infer that Defendant had the requisite control over the package and therefore, had constructive possession. Accordingly, we find no error in the trial court's denial of Defendant's motion to dismiss.

B. Jury Instructions

[2] Defendant next contends the trial court erred when it failed to instruct the jury on the lesser-included offense of attempted trafficking in methamphetamine by possession. Defendant concedes he did not request this instruction at the trial court; therefore, our standard of review is plain error. N.C. R. App. P. 10(a)(4).

The standard under plain error is "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." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citations omitted). "To show plain error, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (citation and quotation marks omitted). "The trial judge must charge on a lesser included offense if: (1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified." *State v. White*, 142 N.C. App. 201, 205, 542 S.E.2d 265, 268 (2001) (citation omitted). In other words, the lesser included offense instruction is appropriate when "the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citations omitted).

Defendant contends "while [he] may have intended to possess the package of methamphetamine, he never did." As a result, without the element of possession, a jury could have found him guilty of an attempt, short of the completed offense. However, "an attempt charge is not required if the State's evidence tends to show completion of the offense" and "there is no conflicting evidence relating to the elements of the crime charged." *State v. Broome*, 136 N.C. App. 82, 88, 523 S.E.2d 448, 453 (1999) (citations omitted).

Here, the State presented sufficient, uncontradicted evidence to allow the jury to conclude that Defendant had constructive possession of the package. Based on the analysis set forth above, we hold

that an attempt instruction was not required as the offense was complete when Defendant arrived at the house and walked through the door. Since all of the elements under N.C. Gen. Stat. § 90-95(h)(3b)(c) are met, and the offense of trafficking by possession was complete, the trial court did not commit plain error by failing to instruct on the lesser included instruction.

III. Conclusion

When viewed in the light most favorable to the State, the evidence presented at trial was sufficient for the jury to infer that Defendant constructively possessed methamphetamine. The trial court did not err in its denial of Defendant's motion to dismiss. Additionally, the trial court did not err when it failed to instruct the jury on the lesser-included offense of attempted trafficking by possession. Accordingly, we hold Defendant received a fair trial free from error.

NO ERROR.

Judges GRIFFIN and FLOOD concur.

STATE OF NORTH CAROLINA
v.
PHILIP ANTHONY MONTANINO, DEFENDANT

No. COA23-409

Filed 4 June 2024

1. Homicide—first-degree murder—verdict sheet—omission of not guilty option—no plain error

In a trial for first-degree murder on theories of felony murder and premeditation and deliberation, the trial court did not commit plain error by submitting a verdict sheet to the jury which omitted an explicit option to find defendant "not guilty"—instead reading, in pertinent part: "We, the jury, return the unanimous verdict as follows: 1. Guilty of First Degree Murder ANSWER:___ IF YOU ANSWER "YES", IS IT? A. On the basis of malice, premeditation and deliberation? ANSWER:___ B. Under the first degree felony murder rule? ANSWER:___"—where the trial court properly instructed the jury about its ability and duty to return a "not guilty" verdict if it found the State did not prove the elements of first-degree murder (or its lesser-included offenses) beyond a reasonable doubt.

2. Homicide—felony murder—larceny of victim's car—insufficient evidence of value

In a trial for first-degree felony murder where larceny of the victim's car was the underlying felony, defendant's conviction could not be sustained because the essential element that elevates larceny to a felony is that the value of the stolen property exceeds $1,000 (N.C.G.S. § 14-72(a)), but the only evidence regarding the value of the victim's car offered by the State—concerning its: (1) year, make, and model; (2) visual appearance; and (3) operability—has been held to be insufficient for presentation to the jury of the issue of a vehicle's value for felony larceny purposes.

3. Constitutional Law—double jeopardy—remand after evidence held insufficient for first-degree murder—trial on lesser offenses permitted

Having determined that the evidence was insufficient to sustain defendant's first-degree felony murder conviction and reversed the judgment entered thereupon, the appellate court remanded the matter pursuant to N.C.G.S. § 15A-1447(c) for entry of a judgment on the lesser-included offense of involuntary manslaughter, which the evidence did support. Further, on remand the State had the discretion to retry defendant under the original bill of indictment for second-degree murder and voluntary manslaughter since doing so would not violate double jeopardy principles as long as, if a guilty verdict were to be obtained on either offense, the involuntary manslaughter judgment entered on remand was then arrested.

Judge STROUD concurring in part and dissenting in part.

Appeal by defendant from judgment entered 6 December 2021 by Judge Josephine Kerr-Davis in Durham County Superior Court. Heard in the Court of Appeals 20 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Steven Armstrong, for the State.

Kimberly P. Hoppin for defendant-appellant.

DILLON, Chief Judge.

Defendant Philip Anthony Montanino appeals judgment entered upon a jury's verdict finding him guilty of first-degree murder based

on the felony-murder rule for the death of Elizabeth Watson which occurred when Defendant stole her car. (The jury found him "not guilty" of first-degree murder based on premeditation and deliberation but returned no verdict on the lesser-included offenses of second-degree murder or voluntary manslaughter.)

Because there was insufficient evidence from which the jury could find that Defendant's underlying crime was a felony—specifically, the State failed to present sufficient evidence to prove the value of the victim's car to elevate the larceny to a felony—we must reverse Defendant's conviction and remand to the trial court for entry of judgment for the lesser-included offense of involuntary manslaughter. However, on remand the State may retry Defendant for second-degree murder and voluntary manslaughter; but should the State so elect to retry Defendant on those charges and obtain a conviction on either charge, the trial court shall arrest judgment on the involuntary manslaughter conviction.

I. Background

On 2 July 2018, the victim Elizabeth Watson was found dead in her Durham apartment by police who were conducting a welfare check after the victim's daughter was unable to reach her the previous two days. Other evidence at trial tended to show as follows:

When the police conducted the welfare check, they found the victim's apartment in a state of "disarray," appearing as if there had been a party. The police found the victim dead in her bedroom, wedged between her bed and a wall. She had likely been dead for at least a day. She died from multiple blunt force trauma, suffering injuries to her brain, face, neck, torso, and extremities. She had been struck over 40 times on her back alone. Her blood alcohol level was .10. Police also found empty beer cans in the apartment with fingerprints, later identified as belonging to Defendant. Defendant and the victim had a history of drinking alcohol together at her apartment.

Police also discovered that the victim's car was missing from the apartment parking lot. Later that day, police found Defendant in Chapel Hill in the vicinity of the victim's vehicle. When apprehended by police, Defendant asked, "Is she dead?" Police found the victim's driver's license and debit card in Defendant's wallet. Police also learned that Defendant sold the victim's smartphone at an ecoATM kiosk in Burlington the previous afternoon.

Defendant moved for dismissal based on insufficient evidence at the close of the State's evidence and again at the close of his evidence. Both motions were denied.

The jury found Defendant guilty of first-degree murder, based on the felony murder rule, determining that the victim died in the course of Defendant stealing her car. He was sentenced to life in prison without the possibility of parole. He appeals.

II. Analysis

Defendant presents two arguments on appeal, which we address in turn.

A. Verdict Sheet

[1] Defendant first argues that the trial court erred by failing to include a spot on the verdict form sheet giving the jury the option to find Defendant "not guilty." Defendant concedes that he failed to object at trial to this oversight. Accordingly, we review for plain error. Defendant bears the burden to show, not only error, "but that absent the error, the jury probably would have reached a different result." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009).

It is true that the verdict form did not contain a space for the jury to find Defendant "not guilty." However, the wording on the verdict sheet accomplishes the same thing by giving the jury the option to answer "No" on each of the charges. The verdict sheet (with the jury's answers in BOLD) reads as follows with respect to the charge of first-degree murder:

> *We, the jury, return the unanimous verdict as follows:*
>
> 1. *Guilty of First Degree Murder*
>
> *ANSWER:* **YES**
>
> *IF YOU ANSWER "YES", IS IT?*
>
> A. *On the basis of malice, premeditation and deliberation?*
>
> *ANSWER:* **NO**
>
> B. *Under the first degree felony murder rule?*
>
> *ANSWER:* **YES**
>
> *If you find the Defendant Guilty of First Degree Murder stop here.*

[The verdict sheet continued with questions regarding Defendant's guilt for second-degree murder and voluntary manslaughter, to which the jury could respond either "Yes" or "No." However, since the jury answered "Yes" on the charge of first-degree felony murder, the jury did not answer any questions on the lesser charges.]

The wording in the verdict sheet might not be ideal and does contain language that is ambiguous. However, the ambiguity favors Defendant. Specifically, based on the phrasing, a "No" answer *could be* construed simply to mean that the jury did not *unanimously* agree on Defendant's guilt on a particular crime. That is, the jury could have thought a "No" answer on first-degree murder based on premeditation and deliberation was appropriate where they were hung on that charge. We, though, construe this ambiguity against the State and interpret the "No" answer on the charge of first-degree murder based on premeditation and deliberation as a "Not Guilty" verdict.

In any event, we conclude that the omission of a separate question whereby the jury could have indicated a verdict of "not guilty" of all charges did not rise to the level of plain error. We note our dissenting colleague's reliance on *State v. McHone*, where a jury was instructed on two theories of first-degree murder. 174 N.C. App. 289, 620 S.E.2d 903 (2005). In that case, our Court held it was plain error for the trial court to fail to include an instruction to the jury regarding its duty to find the defendant "not guilty" in its final mandate coupled with the failure to include a "not guilty" option on the verdict sheet on the murder charges. *Id.* at 299, 620 S.E.2d at 910. However, we conclude that this case is distinguishable.

In the present case, before going through the elements of each crime, the trial court instructed the jury that it could find Defendant "not guilty," specifically stating that "[u]nder the law and evidence in this case it is your duty to return one of the following verdicts: Guilty of first degree murder, or, guilty of second murder, or, guilty of voluntary manslaughter, or not guilty." Our dissenting colleague quotes large portions of the instructions provided by the trial court for the theories of first-degree murder, where the trial court does not discuss the option of returning a "not guilty" verdict. However, following the portion of the final mandate that is quoted in the dissent, the trial court continues:

> If you do not find the Defendant guilty of first degree murder [under either theory of premeditation and deliberation or under the felony murder rule], you must then determine whether or not the Defendant is guilty of second degree murder.

Then after reviewing the elements of second-degree murder, the trial court instructed the jury:

> . . . it would be your duty to return a verdict of guilty of second degree murder. If you do not so find or have

> a reasonable doubt as to one or more of these things, *it would be your duty to return a verdict of not guilty*, but you would also be – but you should also consider voluntary manslaughter.

(Emphasis added.) Then after reviewing the elements of voluntary manslaughter, the trial court again reminded the jury in its final mandate of the option to find Defendant "not guilty":

> . . . it would be your duty to find the Defendant guilty of voluntary manslaughter. . . . However, if you do not so find or have a reasonable doubt as to one or more of these things, *you will return a verdict of not guilty of voluntary manslaughter*.

(Emphasis added.) We conclude that this case is closer to *State v. Gosnell*, 231 N.C. App. 106, 750 S.E.2d 593 (2013). In that case, our Court held there was no plain error where the trial court's final mandate did not expressly state that the jury could find the defendant "not guilty" while discussing first-degree murder, BUT DID discuss the "not guilty" option when instructing on second-degree murder, stating:

> From our review of the entirety of the jury instructions on murder, it appears that, as to the theory of premeditation and deliberation, the trial court failed to comport precisely with the requirement to instruct that the jury would return a verdict of "not guilty" if it rejected the conclusion that Defendant committed first-degree murder on the basis of premeditation and deliberation, per *McHone*. However, it further appears that the trial court, in its instructions, comported with the requirement regarding both lying in wait and second-degree murder.

Id. at 109, 750 S.E.2d at 595. Admittedly, our case is not on "all fours" with *Gosnell*, as the verdict sheet in *Gosnell* did include a space for a "not guilty" verdict. *See id.* at 110, 750 S.E.2d at 596.

However, what further distinguishes our case from *McHone* concerns the verdict sheets. While neither the verdict sheet in our case nor the one in *McHone* contained a space where the jury could expressly indicate a "not guilty" verdict, unlike our case, the verdict sheet in *McHone* did contain a "not guilty" option for separate robbery charges – which were not lesser-included offenses of the homicide charges – and that Court stated "the content and form of the verdict sheet on the taking offenses, which *did* afford a space for a not guilty verdict [ ] likely

reinforced the suggestion that defendant must have been guilty of first degree murder on some basis." *McHone*, 174 N.C. App. at 298, 620 S.E.2d at 909. The verdict sheet in the present case, though, did not have this issue, as the jury was only instructed on the homicide charges.

We further note that the trial court gave the jury a "jury pack" prior to their deliberation, which referenced the jury's option to return a verdict of "not guilty." Finally, the jury did, in essence, find Defendant "not guilty" of first-degree murder based on premeditation and deliberation by answering "No" on the verdict sheet with respect to that charge.

In sum, we conclude that the trial court did not commit plain error in its instruction to the jury.

B. Insufficiency of the Evidence

[2] Defendant argues that his murder conviction, based on felony murder, must be set aside based on insufficiency of evidence. The underlying felony upon which the jury based its verdict was his larceny of the victim's car. Defendant correctly argues that, in order to prove *felony* larceny, the State had the burden of proving that the victim's car was worth over $1,000.00. He contends, though, that the State failed to meet its burden of proving the car's value. Based on binding Supreme Court precedent, we must agree.

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). In our review, we view the evidence in the light most favorable to the State. *State v. Elder*, 383 N.C. 578, 586, 881 S.E.2d 227, 234 (2022).

Felony murder—a type of first-degree murder—is the killing of a person which is "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]" N.C. Gen. Stat. § 14-17(a) (2023).

Here, Defendant was tried for felony murder, with larceny with a deadly weapon as the underlying felony. One essential element of felonious larceny which must be proven by the State is that the value of the stolen property exceeded more than $1,000.00. N.C. Gen. Stat. § 14-72(a) (2023). *See also State v. Boomer*, 33 N.C. App. 324, 329, 235 S.E.2d 284, 287 (1977) ("General Statute 14-72 requires the State to prove the value of the 'property taken' . . . to be in excess of" $1,000.00). Though there was evidence that Defendant stole several items from the victim, the

trial court only instructed the jury regarding the victim's vehicle, a 2012 Suzuki Grand Vitari.

While the jury is "free to exercise their own reason, common sense and knowledge acquired by their observation and experiences in everyday life" when determining the stolen property's value, *State v. Edmondson*, 70 N.C. App. 426, 430, 320 S.E.2d 315, 318 (1984), our Supreme Court has instructed that "[t]he jury may not speculate as to the value." *State v. Holland*, 318 N.C. 602, 610, 350 S.E.2d 56, 61 (1986).[1] That is, the State must put on some evidence from which the jury can make a dollar value determination. *See*, *e.g.*, *State v. Cotten*, 2 N.C. App. 305, 311, 163 S.E.2d 100, 104 (1968) (holding that evidence in the form of an opinion regarding the value of the stolen items is sufficient, even if the person offering the opinion is not an expert, so long as the witness demonstrates knowledge gained from experience, information, and observation).

Here, the State did not offer any opinion evidence regarding the vehicle's value, evidence of what the victim paid for the vehicle, or any other evidence which included a dollar amount from which the jury could make a value determination. The State, however, points to the following evidence concerning the vehicle's value as being sufficient: (1) the vehicle's year, make, and model (a 2012 Suzuki Grand Vitari); (2) visual evidence of the car's condition (as seen partially in the background of police body camera footage); and (3) the operability of the vehicle (based on evidence that Defendant drove the vehicle from Durham to Burlington and then to Chapel Hill).

Based on our Supreme Court's holding in *Holland*, though, we must conclude that the State's evidence was insufficient to prove the value of the victim's vehicle.

Holland also involved a prosecution concerning a stolen vehicle in which the State had the burden to prove the value of the vehicle exceeded a certain value (then $400.00) to elevate the charge to a felony. *See Holland*, 318 N.C. at 610, 350 S.E.2d at 61. In that case, the State offered no evidence regarding the vehicle's dollar value in the form of an opinion or otherwise (*e.g.*, the purchase price of the vehicle or what

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1. A separate holding in *Holland*—specifically, that in considering circumstantial evidence an inference may not be made from an inference—was overruled by our Supreme Court in *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987). However, the Court in *Childress* left undisturbed the holding in *Holland* regarding the sufficiency of evidence in proving the value of a stolen vehicle in a criminal prosecution.

the defendant sold the vehicle for). *See id.* Rather, the State merely presented evidence showing (1) the stolen vehicle's year, make, and model (a 1975 Chrysler Cordoba); (2) the stolen vehicle was the owner's favorite vehicle, and the owner took "especially good care" of the vehicle; (3) a picture of the vehicle; and (4) evidence that the vehicle was operable (as the vehicle was found in Danville, Virginia, after being stolen from the victim's Reidsville home). *Id.* Our Supreme Court, however, held that this evidence was "insufficient for presentation of the issue of value to the jury." *Id.*

Like in *Holland*, the State presented no evidence as to the monetary value of the victim's vehicle. Moreover, the evidence here was even less robust than that presented by the State in *Holland*. Instead of presenting a picture of the vehicle to the jury, the State in the present case merely relied on the vehicle's partial appearance in the background of police footage to show the car's condition. And, unlike in *Holland*, there was no evidence concerning the victim's care for the vehicle.

Because there was insufficient evidence to prove the underlying felony upon which Defendant was convicted of first-degree murder based on the felony murder rule, we must reverse Defendant's first-degree murder conviction. And based on principles of double jeopardy, Defendant cannot be retried for first-degree murder based on felony murder. *See State v. Callahan*, 83 N.C. App. 323, 325, 350 S.E.2d 128, 129–30 (1986) ("Appellate reversal of a conviction on the basis of insufficiency [of evidence] has the same effect as a judgment of acquittal and the Double Jeopardy Clause precludes retrial."). *See also McDaniel v. Brown*, 558 U.S. 120, 131 (2010) ("Because reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, such a reversal bars a retrial.").

III. Instructions on Remand

[3] Regarding the protocol to follow in this situation, Section 15A-1447(c) of our General Statutes states that

> [i]f the appellate court finds that the evidence with regard to a charge is insufficient as a matter of law, the judgment must be reversed and the charge must be dismissed unless there is evidence to support a lesser included offense. In that case *the court may remand for trial on the lesser offense.*

N.C. Gen. Stat. § 15A-1447(c) (2023) (emphasis added). However, our Supreme Court has a "long-standing, consistent precedent of acting *ex mero motu* to recognize a verdict of guilty of a crime based upon

insufficient evidence as a verdict of guilty of a lesser-included offense." *State v. Stokes*, 367 N.C. 474, 480, 756 S.E.2d 32, 36–37 (2014).

In this case, the jury necessarily found that the victim died while Defendant was committing an unlawful act: misdemeanor larceny. *See* N.C. Gen. Stat. § 14-72(a) (2023) (showing that the elements of misdemeanor larceny are identical to the elements of felonious larceny, save for the value requirement). And involuntary manslaughter can be proven by showing that the defendant killed another "by an unlawful act not amounting to a felony[.]" *State v. Brichikov*, 383 N.C. 543, 549, 881 S.E.2d 103, 109 (2022). *See also State v. Lane*, 115 N.C. App. 25, 30, 444 S.E.2d 233, 237 (1994) (holding that North Carolina has not abandoned "the common law doctrine of misdemeanor manslaughter").

Accordingly, based on *Stokes*, we remand with instructions that judgment be entered against Defendant convicting him of involuntary manslaughter (under the theory of misdemeanor manslaughter).

We recognize, though, that this case has an extra wrinkle, in that the jury was instructed on two different theories of murder, each which has different lesser-included offenses, and that the jury did not acquit Defendant of the lesser-included offenses associated with premeditated murder. We also recognize that those lesser-included offenses carry greater punishments than involuntary manslaughter, the lesser-included offense of felony murder.

The district attorney, if (s)he in his/her prosecutorial discretion so chooses, may retry Defendant *under the original bill of indictment* for second-degree murder and voluntary manslaughter, as doing so would not violate the principles of double jeopardy, provided that if (s)he so elects and is able to obtain a conviction, the judgment convicting Defendant of involuntary manslaughter must be arrested.

The verdict sheet indicates that the jury specifically rejected the State's alternate theory for first-degree murder (*i.e.*, that Defendant acted with premeditation and deliberation in causing the victim's death). However, the verdict sheet also included an option by which the jury could have convicted Defendant of second-degree murder and an option by which the jury could have convicted Defendant of voluntary manslaughter. But since the jury found Defendant guilty of first-degree murder based on the felony-murder rule, the jury never answered whether it believed the State had proven the elements of second-degree murder (*i.e.*, that Defendant killed the victim with malice, though without premeditation and deliberation) or voluntary manslaughter (*i.e.*, that Defendant killed the victim without malice).

A retrial for second-degree murder and/or voluntary manslaughter is one of "continuing jeopardy," as the original indictment in this case embraced second-degree murder and involuntary manslaughter as lesser-included offenses of first-degree premeditated murder and also embraced misdemeanor manslaughter as a lesser-included offense of first-degree felony murder. *See*, *e.g.*, *State v. Courtney*, 372 N.C. 458, 831 S.E.2d 260 (2019) (discussing the concept of "continuing jeopardy"). And the fact that the jury's verdict supports a conviction of involuntary manslaughter as a lesser-included offense of first-degree felony murder does not prohibit the State from retrying Defendant for crimes that are lesser included offenses of first-degree murder based on premeditation, as the jury was instructed on those offenses but did not return any verdict. Felony murder and premeditated murder involve different elements. There is nothing in the jury's verdict which mandates a conclusion that they found Defendant did not act with malice in causing the victim's death or that he committed voluntary manslaughter, but only that he did not act with premeditation and deliberation.

Any double jeopardy concerns here are like those addressed by the United States Supreme Court in *Ohio v. Johnson*, 467 U.S. 493 (1984). In that case, the Court held that the conviction of a lesser-included offense based on a plea bargain does not bar a trial of the greater-included offenses alleged in the same indictment. *Id.* Rather, the double jeopardy concern would arise in the present case only if Defendant were to be convicted on retrial for second-degree murder or voluntary manslaughter. However, this concern would be easily remedied by the trial court arresting judgment on the involuntary manslaughter conviction. *See also State v. Henning*, 681 N.W.2d 871 (Wis. 2004), and cases cited therein.

We note that a holding that the State not be allowed to retry Defendant under the original indictment where the jury convicts only on one theory of murder could lead to absurd results. For instance, under such a holding, if we had held in this case that there was NO evidence that Defendant stole the vehicle, Defendant would have to be released. In such case, the State would have no opportunity to retry for second degree murder or voluntary manslaughter.

III. Conclusion

Based on binding Supreme Court precedent, we must reverse Defendant's first-degree murder conviction based on the felony murder rule. On remand, the trial court may enter judgment for involuntary manslaughter, a lesser-included offense.

Also, on remand the State may, in its discretion, retry Defendant for second-degree murder and voluntary manslaughter under the original

indictment, as the jury did not return a verdict as to those charges. The State, however, may not retry Defendant for first-degree murder. Prosecution for first-degree murder based on the felony-murder rule is foreclosed by our holding that the State's evidence was insufficient to prove that crime. The State does not get a second bite at the apple to offer the evidence it failed to offer in the first trial. And prosecution for first-degree murder based on premeditation and deliberation is foreclosed on remand based on the jury's verdict acquitting Defendant of that charge in the first trial.

If, on remand, the State elects to retry Defendant and Defendant is convicted of either second-degree murder or voluntary manslaughter and judgment is entered accordingly, Defendant's conviction for involuntary manslaughter shall be arrested.

REVERSED AND REMANDED.

Judge STADING concurs.

Judge STROUD concurs in part and dissents in part.

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

While I concur with the majority's opinion on the insufficiency of evidence of the value of the car, I write separately to dissent on the issue regarding the verdict sheet and jury instructions. As the trial court's final mandate to the jury did not include a clear instruction that the jury may find Defendant "not guilty" of murder but *did* include this instruction for the lesser offenses the jury did not reach, and the verdict sheet supplied to the jury only included spaces for verdicts entitled "Answer," I would grant Defendant a new trial.

I. Verdict Sheet and Jury Instructions

Defendant argues "the trial court committed plain and reversible error by omitting a 'not guilty' option in the final mandate to the jury and on the verdict sheet." As the majority opinion correctly notes, since Defendant did not object to the jury instructions or proposed verdict sheet at trial, we review this argument for plain error. *See State v. McHone*, 174 N.C. App. 289, 294, 620 S.E.2d 903, 907 (2005) ("Because defendant did not object at trial to the omission of the not guilty option from the trial court's final mandate to the jury, we review the trial court's actions for plain error." (citation omitted)).

"It is well established that the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *Id.* (citation and quotation marks omitted). Here, Defendant challenges both the verdict form and the jury instructions, particularly the absence of the instruction that the jury should find Defendant "not guilty" if the State fails to meet its burden of proof and the lack of designations on the verdict sheet to answer "Guilty" or "Not Guilty" as to each crime submitted to the jury. There is no specific form required for a verdict sheet, but the preferred practice is to require the jury to answer "guilty" or "not guilty" for each crime. *See State v. Hicks*, 86 N.C. App. 36, 43, 356 S.E.2d 595, 599 (1987) ("[A]lthough the verdict sheet utilized by the trial court is not preferred and the use of 'not guilty' on the verdict sheet is preferred we conclude that there is no reasonable possibility that the outcome would have differed if the jury verdict sheet would have been worded differently." (citation omitted)). Further, "[o]ur Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can constitute reversible error." *McHone*, 174 N.C. App. at 295, 620 S.E.2d at 907 (citations omitted). However, even where the verdict sheet fails to include an option of "Not Guilty," a guilty verdict can be deemed no error if "[t]he trial court's final mandate to the jury specifically instructs the jury with respect to the permissible verdicts that it could return." *Hicks*, 86 N.C. App. at 43, 356 S.E.2d at 599.

Here, the majority decided the trial court did not commit plain error since the jury instructions explained to the jury it could return a not guilty verdict if it finds the State did not meet its burden. The trial court, in its general instructions on direct versus circumstantial evidence, did instruct "[a]fter weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty." However, after explaining the elements required for first-degree murder under the theories of premeditation and deliberation or the felony murder rule, the trial court did not include any instruction regarding finding Defendant "not guilty." The trial court instructed:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date that the Defendant, acting with malice, killed the victim with a deadly weapon thereby proximately causing the victim's death, that the Defendant intended to kill the victim and that the Defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

> If you do not so find or you have a reasonable doubt as to one or more of these things, you would return a verdict of - - *you would not return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.* Whether or not you find the Defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, you would then also consider whether or not the Defendant is guilty of first degree murder under the basis of the first degree Felony Murder Rule.
>
> . . . .
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant took and carried away another person's property without the other person's consent knowing that the Defendant was not entitled to take it and intending at the time to deprive the alleged victim of its use permanently and that the property was worth more than $1,000 and that while committing a larceny the Defendant killed - - killed the victim, and that the Defendant's act was the proximate cause of the victim's death, it would be your duty to return a verdict of guilty of first degree murder under the Felony Murder Rule. If you do not so find or if you have a reasonable doubt as to one or more of these things, *you will not return a verdict of guilty of first degree murder under the Felony Murder Rule.*

(Emphasis added.)

Thus, as to each theory of first-degree murder, the trial court instructed the jury should either "return a verdict of guilty" or "not return a verdict of guilty." In contrast, for the lesser offenses of second-degree murder and voluntary manslaughter, the trial court specifically instructed the jury that "if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty[.]" I also note that the wording of the instruction to "not return a verdict of guilty" as to murder was exactly the same in *McHone*, where this Court reversed for plain error based on the combination of the jury instructions and a verdict sheet with no spaces for an answer of "not guilty." *McHone*, 174 N.C. App. at 292, 300, 620 S.E.2d at 906, 911.

The wording of the jury instructions on first-degree murder – without a directive to find Defendant "not guilty" if the jury did not find the elements proven beyond a reasonable doubt – but with the instruction

to "not return a verdict of guilty" may be harmless had the verdict sheet clearly directed the jury to find Defendant "Guilty" or "Not Guilty" of each crime, but it did not. The verdict form, with the jury's handwritten answers in italics, read as follows:

> We, the jury, return the unanimous verdict as follows:
>
> 1. Guilty of First Degree Murder
>
> ANSWER: *Yes*
>
> IF YOU ANSWER "YES", IS IT:
>
> A. On the basis of malice, premeditation and deliberation?
>
> ANSWER: *No*
>
> B. Under the first degree felony murder rule?
>
> ANSWER: *Yes*
>
> If you find the Defendant Guilty of First Degree Murder stop here.
>
> 2. Guilty of Second Degree Murder
>
> ANSWER: _____
>
> If you find defendant Guilty of Second Degree Murder you must unanimously find one or more of A, B, or C below.
>
> A. Is it malice meaning hatred, ill will, or spite?
>
> ANSWER: _____
>
> B. Is it malice defined as condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in another's death, without just cause, excuse or justification?
>
> ANSWER: _____
>
> C. Is it malice that arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief?
>
> ANSWER: _____

> If you find the Defendant Guilty of Second Degree Murder stop here.
>
> 3. Guilty of Voluntary Manslaughter
>
> ANSWER: _____

Nowhere on the verdict sheet was there a blank to indicate if the jury found Defendant "Not Guilty;" the verdict sheet only had a blank under each charge titled "Answer:[.]"

In *Hicks*, the trial court used a similar verdict sheet without a blank for either "Guilty" or "Not Guilty" but only a blank for "Answer:[.]" *Hicks*, 86 N.C. App. at 43, 356 S.E.2d at 599. However, in *Hicks*, the trial court instructed the jury clearly on how to fill out the verdict sheet, stating "[w]hen all twelve members of the jury agree on a verdict, your foreperson should record *your verdict* on the verdict sheet. There are two counts and *the foreperson should write in 'guilty' or 'not guilty' where the word 'answer' is, and there is a line drawn there*." *Id.* (emphasis in original).

Thus, this Court held there was no error since

> [t]he trial court's final mandate to the jury specifically instructs the jury with respect to the permissible verdicts that it could return. Moreover, *the trial court specifically instructed the jury on how to enter the verdict on the sheet supplied to them by the trial court*. When the jury was polled each juror answered that the verdict returned by the foreperson was his or her verdict and that each still assented thereto.

Id. (emphasis added).

Here, while the jury was polled after the verdict was issued, the trial court did not instruct the jury on how to properly fill out the verdict form, only stating, "All 12 of you must agree on your verdict. You cannot reach a verdict by majority vote. *When you have agreed upon a unanimous verdict as to each charge or as to the charges, your foreperson should indicate so on the verdict form.*" (Emphasis added.) The trial court's instructions did not give the jury any direction it could find Defendant "not guilty" but just to find him guilty or to "not return a verdict of guilty."

This case is more similar to *McHone* than *Hicks*. In *McHone* this Court held the trial court committed plain error in the jury instructions, reversed the murder conviction, and remanded for new trial. *See McHone*, 174 N.C. App. at 300, 620 S.E.2d at 911. In *McHone*, the trial court used substantially similar language to this case in its instructions on first-degree murder and the basis for a guilty verdict based on malice,

premeditation and deliberation or the felony murder rule. *See id.* at 297, 620 S.E.2d at 909. This Court stated,

> We first consider the jury instructions on murder in their entirety in determining whether the failure to provide a not guilty mandate constitutes plain error. The trial court judge correctly instructed the jury that if it did not find the requisite malice, premeditation and deliberation, it "would not return a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation" and must then consider whether the killing was done consistent with the requirements of the felony murder rule. Likewise, the concluding portion of the jury instruction on felony murder mirrored the one concerning malice, premeditation and deliberation in that it stated that the jury "would not return a verdict of guilty of first-degree murder under the felony murder rule" if the State failed in one or more of the elements of felony murder. The instruction, then, in the absence of a final not guilty mandate, essentially pitted one theory of first degree murder against the other, and *impermissibly suggested* that the jury should find that the killing was perpetrated by defendant on the basis of at least one of the theories. Telling the jury "not to return a verdict of guilty" as to each theory of first degree murder does not comport with the necessity of instructing the jury that it *must or would* return a verdict of not guilty should they completely reject the conclusion that defendant committed first degree murder.
>
> Secondly, we consider the content and form of the first degree murder verdict sheet in determining whether the failure to provide a not guilty mandate constitutes plain error. Here, the trial court initially informed the jury that it was their "duty to return one of the following verdicts: guilty of first-degree murder or not guilty." However, the verdict sheet itself did not provide a space or option of "not guilty." And while the content and form of the verdict sheet did not compel the jury to return a verdict of guilty insofar as it stated "if" it found defendant guilty of first degree murder, we repeat our observation that it failed to afford exactly that which the court initially informed the jury it would be authorized to return—a not guilty verdict.

Id. at 297-98, 620 S.E.2d at 909 (emphasis in original) (brackets omitted).

In *McHone*, the verdict form did include blanks for "not guilty" for the lesser offenses, although not for murder. Here, the verdict form did not include a "not guilty" blank for any charge, but the jury instructions for the lesser offenses did include the instruction regarding finding the defendant "not guilty" as to those lesser offenses only. The jury instructions here thus have the same effect as the erroneous instructions in *McHone*:

> Rather than help correct the failure to provide a similar not guilty mandate with respect to the first degree murder charge, the presence of a not guilty final mandate as to the taking offenses likely reinforced the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder. Likewise, the content and form of the verdict sheet on the taking offenses, which did afford a space for a not guilty verdict, also likely reinforced the suggestion that defendant must have been guilty of first degree murder on some basis[.]

Id. at 298, 620 S.E.2d at 909.

McHone relied on several North Carolina Supreme Court cases which direct the trial court must explicitly instruct the jury it should return a verdict of "not guilty" if not satisfied by the evidence beyond a reasonable doubt. *See State v. Ramey*, 273 N.C. 325, 329, 160 S.E.2d 56, 59 (1968) ("In our opinion, and we so decide, defendant was entitled to an explicit instruction, even in the absence of a specific request therefor, to the effect the jury should return a verdict of not guilty if the State failed to satisfy them from the evidence beyond a reasonable doubt that a bullet wound inflicted upon Mabry by defendant proximately caused his death. The trial judge inadvertently failed to give such instruction. The necessity for such instruction is not affected by the fact there was plenary evidence upon which the jury could base a finding that a bullet wound inflicted upon Mabry by defendant proximately caused his death." (citation omitted)); *see also State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962) ("Furthermore, when the trial judge undertook to apply the law to the evidence with reference to the first count, he told the jury that if they were satisfied beyond a reasonable doubt that the stated hypotheses were the facts it would be their duty to return a verdict of guilty as charged. However, he failed to give the converse or alternative view and to tell the jury that if they were not satisfied beyond a reasonable doubt that those were the facts, they would acquit the defendant. This likewise was error. In his mandate with reference to the second count, he did give the alternative instruction." (citation omitted)). The Supreme Court cases also make it clear this error requires a new trial

even if the defendant did not object to the instructions, despite "plenary evidence" the jury could base a verdict of guilt upon. *See id.*

Finally, the majority relies on *State v. Gosnell* to assert the jury instructions are sufficient since the trial court gave a proper instruction in the lesser-included charges of second-degree murder and voluntary manslaughter, despite not doing so in the instructions for first-degree murder. 231 N.C. App 106, 750 S.E.2d 593 (2013). However, the majority recognizes *Gosnell* is distinguishable from this case as the verdict sheet in *Gosnell* included an option for "not guilty" but the verdict sheet here did not. *Id.* at 109, 750 S.E.2d at 595. The court in *Gosnell* also considered how the verdict sheet and instructions differed from *McHone*, as *Gosnell* noted the trial court gave proper instructions for lying in wait and second-degree murder and provided spaces to indicate "not guilty" on the verdict sheet:

> This Court in *McHone* considered the instructions and verdict sheet for the other offenses with which the defendant was charged.
>
> Rather than help correct the failure to provide a similar not guilty mandate with respect to the first degree murder charge, the presence of a not guilty final mandate as to the taking offenses likely *reinforced* the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder.
>
> Additionally, this Court noted that the verdict sheet for the other offenses, which did afford a space for a not guilty verdict, also likely *reinforced* the suggestion that the defendant must have been guilty of first degree murder on some basis.
>
> In the present case, there are no other offenses to analyze in the course of our plain error review. *The verdict sheet provided a space for a "not guilty" verdict, and the trial court's instructions on second-degree murder and the theory of lying in wait comported with the requirement in McHone.*

Id. at 110, 750 S.E.2d at 596 (citations, quotation marks, and brackets omitted).

This case does not "comport with the requirement in *McHone*." *Id.* Here, the verdict sheet, combined with the jury instructions, makes this

case rise to the level of plain error, since the verdict sheet "failed to afford exactly that which the court initially informed the jury it would be authorized to return—a not guilty verdict." *McHone*, 174 N.C. App. at 298, 620 S.E.2d at 909. Here, the trial court also gave the proper instruction for the jury to find Defendant "not guilty" as to the lesser offenses while not using this language for first degree murder. *McHone* involved a verdict sheet which included options for "guilty" or "not guilty" in the lesser-included charges but not for the greater offenses, so this case is still so similar to *McHone* to require a new trial. *See id.*

The majority also notes that the trial court gave the jury a "jury pack" of the instructions to use during deliberations. This is correct, but the jury pack simply included the same jury instructions I would find to be in error. Giving the jury erroneous instructions in written form would be more likely to reinforce the effect of the erroneous instruction than to ameliorate it.

I would hold the instructions and verdict sheet require a new trial since the instructions and the jury verdict sheet did not direct the jury to find Defendant "not guilty" of each theory of murder if not convinced beyond a reasonable doubt of guilt. These errors, combined with the trial court's proper instructions to the jury regarding a verdict of "not guilty" as to second-degree murder and voluntary manslaughter, create a situation similar to *McHone*, where "the trial court's inadvertent omission tipped the scales of justice in favor of conviction and *impermissibly suggested* that the defendant must have been guilty of first degree murder on some basis." *Id.* at 299, 620 S.E.2d at 910 (emphasis in original).

II. Instructions on Remand

As noted above, I concur with the majority in its holding that the State presented insufficient evidence of the value of the Suzuki car, and thus the conviction of first-degree murder under the felony murder rule based on felony larceny must be reversed. This is unfortunate, since it is obvious the 2012 Suzuki Vitara was worth more than $1,000.00. The car was in good condition based on the photographs in evidence and was operational, based on Defendant's driving it to Chapel Hill where it was found. In addition, at trial the State argued the jury could find the $1,000.00 value for the items stolen by Defendant including the cell phone, flat screen television, *and* the Suzuki. But the State presented no evidence whatsoever of the values of these items, and the jury instructions directed the jury to consider only the value of the Suzuki for purposes of felony larceny.

Although I concur on the holding as to felony murder based on felony larceny, I dissent as to the majority opinion's "instructions on remand."

Although the majority mentions the discretion of the prosecutor, the language of the opinion seeks to control that discretion. Essentially, the majority issues a mandate that infringes upon the prosecutorial discretion granted to the District Attorney by the North Carolina Constitution. *See* N.C. Const. art. IV, § 18 ("The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe."). As to the felony murder conviction, the proper action for the majority would be governed by North Carolina General Statute Section 15A-1447(c):

> If the appellate court finds that the evidence with regard to a charge is insufficient as a matter of law, the judgment must be reversed and the charge must be dismissed unless there is evidence to support a lesser included offense. *In that case the court may remand for trial on the lesser offense.*

N.C. Gen. Stat. § 15A-1447(c) (2023) (emphasis added).

But because I would also hold the trial court erred in the jury verdict form and instructions as to how the jury should address the issues on the verdict form, I would simply grant a new trial on the charges of second-degree murder and voluntary manslaughter, as directed by North Carolina General Statute Section 15A-1447(a): "If the appellate court finds that there has been reversible error which denied the defendant a fair trial conducted in accordance with law, it must grant the defendant a new trial." N.C. Gen. Stat. § 15A-1447(a) (2023).

Although the jury found Defendant not guilty of first-degree murder based on premeditation and deliberation, it did not address second-degree murder or voluntary manslaughter. Based on the jury instructions and verdict sheet, Defendant was not found guilty or not guilty of these charges, but the State presented substantial evidence which would allow a properly instructed jury to find Defendant guilty of these charges. Therefore, a new trial on these charges is appropriate. *See Burks v. United States*, 437 U.S. 1, 15-16, 57 L. Ed. 2d 1, 12 (1978) ("In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt

or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." (citation omitted)).

The majority opinion has crafted directions on remand not just for the trial court but also for the District Attorney. I can find no case in which this Court or the North Carolina Supreme Court has found error in a conviction and has remanded with specific directives to the District Attorney about how to proceed on remand and including alternative instructions to the trial court and District Attorney. The majority recognizes that its holding on the sufficiency of the evidence as to first-degree murder under the felony murder rule, combined with its holding of no error as to the issues regarding the jury verdict form and instruction, creates a difficult dilemma for the State in a case where a woman was brutally killed and the evidence clearly indicates Defendant killed her, even if the specific type of homicide is less clear. This is a hard case, but we must "bear in mind Lord Campbell's caution: 'Hard cases must not make bad law.' " *Congleton v. City of Asheboro*, 8 N.C. App. 571, 574, 174 S.E.2d 870, 872 (1970). I believe issuing directives to the District Attorney is bad law. If the majority has determined it should "remand with instructions that judgment be entered against Defendant convicting him of involuntary manslaughter," it should so order.

As best I can tell, this sort of directive to the District Attorney is novel. This Court has the authority to reverse and to issue a mandate to the *trial court* as to how to proceed on remand, and all parties to a case are limited by the law of the case as set out in any appellate opinion before remand. As an appellate court, we have very limited information about this case and no information of any current circumstances which may affect any new trial or any other proceedings on remand. For example, witnesses from the trial may become unavailable, or new witnesses may be discovered. New evidence may be discovered and presented. These changes may benefit either the State or Defendant, but this Court's duty is to issue a clear mandate to the trial court in accord with its holdings on appeal as directed by North Carolina General Statute Section 15A-1447. *See* N.C. Gen. Stat. § 15A-1447 (2023). I concur with the majority to reverse the first-degree felony murder charge based on insufficiency of evidence, but I would otherwise reverse for error in the jury instructions and verdict sheet and remand to the trial court for new

trial, with the State free to proceed on remand as the District Attorney deems appropriate in the exercise of her discretion.

III. Conclusion

I respectfully concur in part and dissent in part and would grant Defendant a new trial.

STATE OF NORTH CAROLINA
v.
MATTHEW THOMAS PRIMM

No. COA23-949

Filed 4 June 2024

Sexual Offenses—solicitation by computer of a child—age of victim—defendant's knowledge—sufficiency of evidence

For purposes of the offense of solicitation by computer of a child (N.C.G.S. § 14-202.3), the State presented substantial evidence—both circumstantial and direct—from which a jury could reasonably infer that defendant knew the victim was less than sixteen years old at the time he exchanged a series of messages with her and arranged to meet her in order to engage in sexual activity. Although the victim told defendant that she was taking college classes, she clarified that they were dual enrollment classes and that she was still in high school; further, after the victim informed defendant that she was fourteen and asked "so it isn't an issue," he responded, "Naw," and was soon thereafter apprehended by law enforcement in his vehicle at a gas station not far from the victim's home.

Appeal by defendant from judgment entered 20 April 2023 by Judge William Anderson Long, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Mayes, for the Defendant.

WOOD, Judge.

I. Factual and Procedural History

On the evening of 2 September 2019, Amy[1] exchanged Snapchat messages with Defendant. She was fourteen years old at the time. Defendant had been to Amy's home because he gave her parents a roofing estimate and performed roofing work. Amy did not recall seeing him at that time because she had remained in her room. She did not believe she would recognize him if she saw him. Amy closely resembles her older sister, who was fifteen at the time. Amy testified that Defendant may have mistaken her for her sister during their message exchanges because her sister had shown Defendant where the air conditioner was while he was performing the roofing work. Because Amy was signed into her phone with both her own and her mother's email addresses, all of her mother's contacts automatically downloaded to her phone. Amy would randomly add as many people as she could from her phone's contact list, including Defendant, as contacts on Snapchat.

Amy began communicating with Defendant on Snapchat at approximately midnight. Defendant sent a picture of his face to Amy, but she did not recognize him. However, Defendant stated his name, and his display name on Snapchat was "Matteo," resembling "Matthew," and his username handle was "Primmizel," resembling Primm. Amy realized Defendant may have known who she was because he told her that he knew her mother had a tongue piercing.

The conversation was platonic at first as they asked each other who they were and what they were doing. Defendant asked Amy to send a picture of herself, but she told him she would send a picture of her face after she met him in person. Amy did send Defendant a picture of the top of her hair only and never a picture of her face. Amy told Defendant she took college classes, though she explained that they were dual enrollment courses that she took while still in high school.

Eventually, Defendant mentioned coming to her house, and she thought he was joking at first. Defendant made it clear he was not joking, stating, "Yeah I'll come if you can get out." Amy began to get "creeped out," but she did not tell her parents because she did not want them to get mad. She messaged him, "for what?? [F]or all I know you could come kill me." Defendant messaged, "Hahaha that's pretty paranoid . . . You friended me . . . If you don't wanna come out it's cool." Amy asked him, "but do you really think I can sneak out[?]," and he replied, "Idk [I don't

1. A pseudonym is used to protect the identity of the juvenile pursuant to N.C. R. App. P. 42(b).

know] can you[?]" Amy also asked him, "why would you drive here just to say hi and bye[?]," and he replied, "To teach you how to suck a dick."

At this point, Amy became afraid, so she went into her parents' bedroom at 1:00 a.m. to tell them what was happening. Her father ("Andrew")[2] had Amy ask Defendant questions to see if what she told him was true. Andrew asked Amy to ask Defendant his name, and he confirmed it was "Matt [P]rimm." Andrew continued to have Amy message Defendant and tried to obtain information so that law enforcement could "catch" him. Amy asked what type of vehicle he was in, and Defendant replied that it was a tan truck. Amy's mother called the police to report the incident. Eventually, Defendant told her he had arrived and was "down the street." Amy messaged Defendant, "and you know I'm 14 so it isn't an issue[?]" because her father wanted Amy to communicate her age to Defendant. Defendant replied, "Naw," to which Amy responded, "sorry . . . okay." The final message from Defendant asked Amy to send him a selfie.

Because Snapchat automatically deletes messages and pictures, Amy turned on a message-saving feature of the application at approximately the same time that she went into her parents' bedroom. Defendant's and Amy's message exchanges prior to this time were not saved. Amy's family never saw Defendant that night.

At approximately 3:30 a.m., Mooresville Police Officer Wes Bumgardner ("Officer Bumgardner") received a dispatch call placed by Andrew regarding a suspicious person. Andrew explained that Defendant was in the neighborhood trying to pick up his fourteen-year-old daughter. Officer Bumgardner responded to Amy's house and asked Amy and Andrew to provide written statements explaining what had happened. He did not view the Snapchat messages that night but asked Amy's family to screenshot the Snapchat messages and email them to him.

At approximately 3:30 or 4:00 a.m., Mooresville Police Officer Joshua Glenn ("Officer Glenn") received a call from dispatch about a suspicious person as well as a description of the person's vehicle, a tan pickup truck. Officer Glenn drove toward Amy's home looking for the vehicle. On his way there, he noticed a vehicle matching the suspicious person's vehicle description near a Valero gas station. He did not recall whether the vehicle was traveling or parked. He conducted a stop of the vehicle and asked for the driver's license and registration. He processed

2. A pseudonym is used for father to protect the identity of the juvenile pursuant to N.C. R. App. P. 42(b).

the driver's information in his patrol vehicle and learned the driver was Defendant, and his license showed a birthdate in the year 1987. After determining Defendant did not have any pending warrants for his arrest, Officer Glenn released Defendant because he did not have a reason to charge him with a crime. The interaction lasted approximately five to ten minutes.

Once Amy's family emailed screenshots of the Snapchat messages to Officer Bumgardner, he forwarded the email of the screenshots to Detective Bronkie-Knight, an investigator of sexual assault crimes. Detective Bronkie-Knight spoke to an assistant district attorney about the case and learned that the police department could charge Defendant with soliciting a child by computer. On 13 September 2019, Officer Bumgardner obtained an arrest warrant for Defendant charging him with solicitation of a child by computer or certain other electronic devices to commit an unlawful sex act in violation of N.C. Gen. Stat. § 14-202.3(a). It stated he unlawfully told Amy he would teach her "how to suck a dick" and drove to Mooresville to meet her down the street from her house.

Detective Elizabeth Watts ("Detective Watts") replaced Detective Bronkie-Knight as the lead detective in the case after Detective Bronkie-Knight left the police department. Detective Watts became involved with the case for the first time in October 2022. She obtained a search warrant for Defendant's "Primmizel" Snapchat account. Because of the delay in obtaining the search warrant, the only information Snapchat had maintained regarding Defendant's Snapchat account was that it had been deleted on 3 September 2019.

On 8 July 2020, a grand jury indicted Defendant for one count of solicitation of a child by a computer in violation of N.C. Gen. Stat. § 14-202.3(a). Defendant's trial was held 17-20 April 2023. Defendant made motions to dismiss the charge at the close of the State's evidence and at the close of all evidence. The trial court denied both motions. The trial court instructed the jury on both the class G offense and the lesser-included class H offense of solicitation of a child by means of a device capable of electronic data transmission. The offense of solicitation of a child by a computer or other certain electronic devices is punishable as a class G felony if a defendant actually appears at the meeting location. However, if the defendant or other person for whom the defendant arranges the meeting does not actually appear at the meeting location, then the offense is a class H felony. The jury found Defendant guilty of the lesser-included offense. The trial court imposed a sentence of 6-17 months of imprisonment suspended for 36 months of

supervised probation. Defendant entered oral notice of appeal in open court, and on 24 April 2023 he filed a written notice of appeal.

II. Analysis

Defendant argues the trial court erred in denying his motions to dismiss because there was insufficient evidence demonstrating Defendant believed Amy was younger than sixteen years old. Specifically, Defendant argues the evidence demonstrates he believed Amy was a college student and did not know she was fourteen until Andrew directed her to send him a message stating she was fourteen years old, at which time Defendant began driving away from her location.

"This Court reviews 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). Our Supreme Court has clearly defined the standard of review for a motion to dismiss:

> When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. The evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state's favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence. There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime.

State v. Barnett, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016).

N.C. Gen. Stat. § 14-202.3 defines solicitation of a child by an electronic device as follows:

> A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer or any other device capable of electronic data storage or transmission, a child who is less than 16 years of age and at least five years younger than the defendant, *or* a person the defendant *believes* to be a child who is less than 16 years of age and who the defendant believes to be at least five years younger than the defendant, to meet with the defendant or any other person for

> the purpose of committing an unlawful sex act. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-202.3(a) (emphasis added).

Here, the trial court instructed the jury on the class H solicitation offense—the lesser-included offense of which the jury found Defendant guilty—in the following manner:

> First, the Defendant *knowingly* with the intent to commit a sex act enticed and advised the person to meet with the Defendant.
>
> Second, that the purpose of the meeting was to commit a sex act. A sex act means oral intercourse done with another human.
>
> Third, that the Defendant enticed and advised the person by means of a device capable of electronic data transmission, i.e. a cell phone, to meet the Defendant.
>
> Fourth, that the Defendant was 16 years of age or older at the time of the offense.
>
> And fifth, that the person enticed and advised by the Defendant was less than 16 years of age and at least 5 years younger than the Defendant.

(Emphasis added). Defendant focuses on the portion of the criminal statute which criminalizes soliciting a child one *believes* to be less than sixteen years old. However, the trial court instructed the jury on the first alternative presented in the statute—that Defendant *knowingly* solicited a child less than sixteen years old. Moreover, the indictment states the offense as Defendant *knowingly* solicited Amy. We address Defendant's motion to dismiss accordingly.

First, circumstantial evidence supports the inference that Defendant knew Amy was less than sixteen years old. Although Amy told Defendant she took college classes, she clarified that they were dual enrollment classes and that she was still in high school. Amy testified Defendant may have confused her with her older sister because she closely resembles her, and her sister had shown Defendant where the air conditioner was while he performed roofing work at their house. However, Amy's older sister was fifteen at the time these events occurred. Therefore, although Amy looked like her older sister, even her older sister was less than sixteen years old at the time. Moreover, Defendant understood that Amy would have to sneak out of her house to meet with him.

Second, direct evidence indicates Defendant was aware of Amy's age. Amy messaged Defendant at her father's request, informing him that she was fourteen years old and asking, "so it isn't an issue[?]" Defendant answered, "Naw." Defendant argues it was at this moment that he decided to abandon his attempt to meet with Amy and began to drive away. Officer Glenn testified that Defendant's vehicle was pointing north on Park Avenue when he stopped him indicating that Defendant's vehicle was pointing away from Amy's home. Andrew testified that the Valero gas station was only a five- to ten-minute walk away from Amy's home. Under the circumstances, Defendant's response could be interpreted in more than one way.

Moreover, Defendant was still within a five- to ten-minute walk of Amy's residence at the time Officer Glenn conducted the stop. The evidence tends to show Amy had gone into her parents' bedroom at 1:00 a.m., and Officer Glenn did not receive the dispatch call regarding Defendant until approximately 3:30 or 4:00 a.m., indicating Defendant traveled to the vicinity of Amy's home with the intent to meet her to engage in sexual activity even after she informed him she was fourteen years old.

It was the jury's responsibility to determine Defendant's state of mind—specifically, whether he knew Amy was fourteen years old—on 2 September 2019. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) ("contradictions and discrepancies are for the jury to resolve and do not warrant dismissal"). The jury reasonably could interpret Defendant's reply to Amy, stating "Naw," to mean that the fact she was fourteen was *not* an issue for him. Indeed, in the light most favorable to the State, Defendant's response indicated he did not care that Amy was fourteen and chose to proceed with the plan to meet with her to engage in sexual activity regardless of her age.

In light of the standard of review on a motion to dismiss, that "[t]he evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state's favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence," we are satisfied there was substantial evidence from which the jury reasonably inferred Defendant knew Amy was less than sixteen years old and that he still planned to meet with her to engage in sexual activity. *Barnett*, 368 N.C. at 713, 782 S.E.2d at 888. Accordingly, the trial court did not err in denying Defendant's motions to dismiss.

III. Conclusion

Substantial evidence was presented to allow the jury to infer Defendant knew Amy was less than sixteen years old while attempting to meet her to engage in sexual activity. Accordingly, the trial court did not err in denying Defendant's motions to dismiss.

NO ERROR.

Judges ARROWOOD and FLOOD concur.

STATE OF NORTH CAROLINA
v.
FREDERICK ROBINSON, DEFENDANT

No. COA23-564

Filed 4 June 2024

1. Jurisdiction—district court—criminal matter—modification of conditions of pretrial release—jurisdiction retained after notice of appeal

After defendant was found guilty of multiple criminal offenses in a district court bench trial and gave notice of appeal in open court, the district court was not divested of jurisdiction to modify the conditions of defendant's pretrial release. Based on the plain language of N.C.G.S. §§ 15A-534 and 15A-1431, the legislature intended for the district court to retain jurisdiction to modify pretrial release conditions after a defendant's notice of appeal until a case is transferred and docketed in the superior court.

2. Bail and Pretrial Release—modification of conditions of pretrial release—secured bond imposed—statutory violation—written findings of fact required

Although the district court retained jurisdiction to modify the conditions of defendant's pretrial release after defendant gave oral notice of appeal from a guilty verdict on multiple charges, the district court violated N.C.G.S. § 15A-534(b) by imposing a secured cash bond against defendant without making written findings of fact.

3. Constitutional Law—criminal defendant—pretrial release conditions modified in violation of statute—lack of prejudice—dismissal erroneously granted

Although a superior court correctly determined that the district court violated statutory requirements when it modified the conditions of defendant's pretrial release (to impose a secured bond, which resulted in defendant being detained for two to four hours until his bond was posted) without making any written findings to explain its decision, the superior court erred by granting defendant's motion to dismiss pursuant to N.C.G.S. § 15A-954, which requires a showing of prejudice. Where the superior court concluded that defendant had not suffered any prejudice, based on its unchallenged findings that defendant made no argument that his detention irreparably prejudiced his ability to prepare his case in superior court, the court's order dismissing the charges based upon a different standard—that the modification of pretrial release conditions created an "impermissible chilling effect" on defendant's constitutional right to a trial by jury—required reversal, and the matter was remanded to the superior court with instructions to remand back to the district court for an amended order.

Appeal by the State from order entered 3 November 2022 by Judge Tanya Wallace in Guilford County Superior Court. Heard in the Court of Appeals 19 March 2024.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellee.

FLOOD, Judge.

The State appeals from an order granting Defendant Frederick Robinson's motion to dismiss in superior court. After careful review of the Record, we conclude the district court retained jurisdiction to modify the conditions of Defendant's pretrial release but modified the conditions in violation of our statutory provisions. We further conclude that the superior court erred in granting Defendant's motion to dismiss because Defendant presented no argument that he was irreparably prejudiced in the preparation of his case by his brief time in custody. Accordingly, we reverse and remand to the superior court for further remand to the district court for findings of fact to support the imposition of a secured cash bond against Defendant.

I. Facts and Procedural Background

On 27 June 2019, Defendant was charged with felony assault by strangulation, interfering with emergency communications, and communicating threats. The Guilford County District Court set a $2,500 unsecured appearance bond for pretrial release. Later, the State reduced the charge of assault by strangulation to simple assault. At the subsequent bench trial held on 24 August 2022, Judge Larry L. Archie found Defendant guilty of all charges and imposed a 150-day suspended sentence[1] and twelve months' supervised release. Defendant gave oral notice of appeal in open court. After Defendant gave oral notice of appeal, the district court entered an order modifying the conditions of Defendant's pretrial release to impose a $250 secured bond. Defendant was then taken into custody for "a few hours," until his family posted the $250 secured bond.

On 31 October 2022, Defendant moved in Guilford County Superior Court to dismiss the charges against him, alleging, in pertinent part, that the district court "no longer had authority to modify [the] bond" once Defendant had given notice of appeal in open court. Further, Defendant argued that N.C. Gen. Stat. § 15A-1431 ("Section 1431") provided "the mechanism by which defendants in misdemeanor cases assert their right to a jury trial." Lastly, Defendant stated that "fear of vindictiveness may unconstitutionally deter a defendant from exercising the right to a trial by jury" and that the modification of his bond and subsequent period of custody "significantly harmed [his] fundamental right to liberty; therefore, dismissal is the appropriate remedy."

A hearing on Defendant's motion was held on 3 November 2022, during which the presiding superior court judge stated during the hearing that "the original bond of a written promise to appear remained in full force and effect at the time that the appeal was entered[,]" and that Defendant's "sentence did not include a period of incarceration, and no reasons for change are apparent from the review of the file." The superior court then granted Defendant's motion to dismiss and in a written order, made the following factual findings:

> 5. Following sentencing, [] Defendant gave notice of appeal from the judgment, exercising his constitutional right to a jury trial.

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1. The district court correctly determined Defendant's prior record level to be Class A1 level 2; however, it incorrectly sentenced him to 150 days when, based on his prior record level, the maximum sentence is seventy-five days. *See* N.C. Gen. Stat. § 15A-1340.23 (2023).

> 6. Subsequently, a $250 cash appeal bond was set by the [t]rial [c]ourt to secure Defendant's appearance in [s]uperior [c]ourt. No explanation was forthcoming from the [t]rial [c]ourt nor findings made in writing or otherwise to explain the necessity of a change in bond from a Written Promise to Appear to a Cash Bond.
>
> . . . .
>
> 8. [] [D]efendant was taken into custody, where he remained two to four hours before family members posted the cash bond.
>
> . . . .
>
> 11. Although there may have been reasons why the [d]istrict [c]ourt Judge changed the bond and made more restrictive pretrial release conditions, they were not recorded or notated in any form.
>
> 12. There is no argument presented, and the [c]ourt does not find, that the $250 cash bond and subsequent time in custody affected [] Defendant's ability to prepare his case in [s]uperior [c]ourt, or otherwise to consult with counsel to be ready for trial.

Based upon those findings, the superior court made several conclusions. First, it concluded that the district court did not properly modify Defendant's bond pursuant to statute, stating "[t]here were no findings made by the [district] [c]ourt, pursuant to statute, addressing the need for a change from the previous bond set," and the failure to make such findings was a violation of statutory provisions. Next it concluded that Defendant's Sixth Amendment right to a jury trial was "impermissibly infringed" by the denial of his right to a reasonable bond. The superior court reasoned that, because "any person, held in such circumstances, under the limited facts of this case, could conclude that remand of [their] case" back to district court "would be preferable to awaiting [a superior court] trial in custody," the modification of Defendant's conditions of pretrial release created an "impermissible chilling effect." Finally, the superior court concluded that Defendant's Fourth Amendment right to be free from unreasonable seizures was violated when a new bond was set without proper findings in accordance with applicable statutory mandates.

The superior court then granted Defendant's motion to dismiss, and the State appealed.

II. Jurisdiction

This matter is properly before this Court pursuant to N.C. Gen. Stat. § 15A-1445(a)(1), allowing the State to appeal directly from a superior court's decision dismissing criminal charges when doing so would not violate the rule against double jeopardy. N.C. Gen. Stat. § 15A-1445(a)(1) (2023).

III. Analysis

There are two primary issues raised on appeal: first, whether the superior court erred when it concluded the district court erred by omitting written findings from the order in which it imposed a secured cash bond against Defendant, and second, whether the superior court erred when it dismissed the charges against Defendant upon finding his constitutional rights were violated. Before we consider those issues, however, we must first determine whether the district court retained jurisdiction to modify the terms of Defendant's pretrial release after Defendant gave oral notice of appeal.

A. The District Court's Jurisdiction

[1] As a matter of first impression in this Court, we consider whether the district court was immediately divested of jurisdiction over this matter upon Defendant's oral notice of appeal following his guilty verdict. On appeal, the State contends that "[t]he bench and bar would benefit greatly from an opinion . . . settling th[is] debate." To "settle the debate," we must address "conflicting views" regarding the interplay of two statutes, namely N.C. Gen. Stat. § 15A-534 ("Section 534"), governing the procedure for determining conditions of pretrial release, and Section 1431, governing appeals by defendants from orders entered by magistrate or district court judges.

We review questions of statutory interpretation *de novo*. *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011). "Our task in statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Dudley*, 270 N.C. App. 771, 773, 842 S.E.2d 163, 165 (2020) (citation omitted). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019) (citation omitted). Unambiguous words will be given their plain meaning unless a word's "plain meaning will lead to 'absurd results, or contravene the manifest purpose of the Legislature[.]' " *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) (citations omitted). "Statutes dealing with the same subject matter must be

construed *in pari materia* and harmonized, if possible, to give effect to each." *State v. Hollars*, 176 N.C. App. 571, 573, 626 S.E.2d 850, 852 (2006) (citations omitted).

To answer the question of whether a district court is immediately divested of jurisdiction to modify the conditions of a defendant's pretrial release the moment a defendant "notes" an appeal, we begin by examining the plain language of the two statutes at issue. Section 534, titled "[p]rocedure for determining conditions of pretrial release," states, in relevant part:

> (a) In determining conditions of pretrial release a judicial official must impose at least one of the following conditions:
>
> > (1) Release the defendant on his written promise to appear.
> >
> > (2) Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.
> >
> > (3) Place the defendant in the custody of a designated person or organization agreeing to supervise him.
> >
> > (4) Require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage . . . or by at least one solvent surety.
> >
> > (5) House arrest with electronic monitoring.
> >
> > . . . .
>
> (b) The judicial official in granting pretrial release must impose condition (1), (2), or (3) in subsection (a) above unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. Upon making the determination, the judicial official . . . *must record the reasons for doing so in writing* to the extent provided in the policies or requirements issued by the senior resident superior court judge[.]
>
> (e) . . . [A] district court judge may modify a pretrial release order of the magistrate or clerk or any pretrial release order entered by him at any time prior to:

> (1) In a misdemeanor case tried in the district court, *the noting of an appeal*[.]

N.C. Gen. Stat. § 15A-534(a), (b) and (e)(1) (2023) (emphasis added). The pretrial release policies of the eighteenth judicial district further state that the reasons for imposing a secured cash appearance bond must be recorded in writing.

Meanwhile, Section 1431 titled "[a]ppeals by defendants from magistrate and district court judge; trial de novo," provides in relevant part the following:

> (b) A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo *with a jury as provided by law*.
>
> (c) Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk. Within 10 days of entry of judgment, the defendant may withdraw his appeal and comply with the judgment. Upon expiration of the 10-day period, if an appeal has been entered and not withdrawn, the clerk must transfer the case to the appropriate court.
>
> (d) A defendant convicted by a magistrate or district court judge is not barred from appeal because of compliance with the judgment, but notice of appeal after compliance must be given by the defendant in person to the magistrate or judge who heard the case . . . . The magistrate or district court judge *must* review the case and fix conditions of pretrial release as appropriate.
>
> (e) Any order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order.
>
> (f1) Appeal pursuant to this section stays the execution of all portions of the judgment, including all of the following:
>
> (1) Payment of costs,
>
> (2) Payment of a fine,
>
> (3) Probation or special probation, or
>
> (4) Active punishment.
>
> Pursuant to subsection (e) of this section, however, the judge may order any appropriate condition of pretrial

> release, including confinement in a local confinement facility, *pending the trial de novo in superior court.*

N.C. Gen. Stat. § 15A-1431(b)–(f1) (2023) (emphasis added).

The State argues, more specifically, that because Section 1431(d) "plainly gives the district court authority to set conditions of release after a defendant gives notice of appeal," it therefore cannot be said that Section 534 "divests the [d]istrict [c]ourt of jurisdiction following notice of appeal." Defendant, however, contends the plain language of Section 534(e)(1) states that because a district court judge may modify an order of pretrial release at any time prior to "the noting of an appeal," the implication is that *after* a defendant "notes" an appeal, the district court is immediately divested of jurisdiction. N.C. Gen. Stat. § 15A-534(e)(1). Finally, the State points out the phrase "the noting of an appeal" is used only once throughout Chapter 15, and it happens to be within Section 534.

In that the phrase "the noting of an appeal" appears just once among several instances in which "notice of appeal" is mentioned within Section 534, we interpret them to mean the same thing. *See Hollars*, 176 N.C. App. at 573, 626 S.E.2d at 852. Next, considering the plain language of the statutes, it appears that Section 534's language is permissive while Section 1431's is directive. Section 534 provides the district court "may" modify conditions of pretrial release, while Section 1431 mandates that the district court "must" review the case and fix conditions of pretrial release as appropriate. Further, Section 1431 gives a district court jurisdiction to modify a defendant's conditions of pretrial release until the case is transferred and docketed in the superior court, ten days after the defendant's notice of appeal is given. *See* N.C. Gen. Stat. § 15A-1431(f1) and (g). As the State contends, the use of the word "must" in Section 1431 confirms the Legislature intended the district court's authority to extend past a defendant's notice of appeal. *See* N.C. Gen. Stat. § 15A-1431(d).

Further, according to Section 1431(c), a defendant has ten days following the entry of judgment to appeal and, should that appeal not be withdrawn, "the clerk must transfer the case to the appropriate court." N.C. Gen. Stat. § 15A-1431(c). If the district court were immediately divested of jurisdiction upon a defendant's noting of an appeal, as Defendant contends, then the ten-day period following the notice of appeal and the transfer of the case to the appropriate court would be a jurisdictional no-man's land. This interpretation of the plain meaning of the statutes would both render an absurd result and contravene the purpose of the Legislature—to govern the procedure for taking an appeal from a magistrate or district court. *See Rankin*, 371 N.C. at 889, 821 S.E.2d at 792.

Lastly, in consideration of the district court's jurisdiction, Defendant contends that references to "the judge" in subsections (e) and (f1) of Section 1431 should be taken to mean the superior court judge and not the district court judge. This interpretation ignores the context of the statute. *See Wynn v. Frederick*, 385 N.C. 576, 584, 895 S.E.2d 371, 378 (2023) (analyzing the statutory context of the articles to glean legislative intent). The title of Section 1431 is "[a]ppeals by defendants from magistrate and district court judge; trial de novo." Further, Section 1431(f1) states that "the judge may order any appropriate condition of pretrial release . . . pending the trial de novo in superior court." N.C. Gen. Stat. § 15A-1431(f1). The statute's title, plain language, references to "the judge" in subsections (e) and (f1) immediately following the use of the words "magistrate or district court judge" just above in subsection (d), and subsequent placement of "superior court" at the end of section (f1), taken together, show that the broad references to "the judge" refer to magistrates and district court judges, not superior court judges. *See State v. Bare*, 197 N.C. App. 461, 470, 677 S.E.2d 518, 526 (2009) (considering a change in the wording of the statute's title when discerning what the Legislature's intent was in enactment); *see also Frederick*, 385 N.C. at 584, 895 S.E.2d at 378.

Given that the plain language contained in Section 1431 mandates action from a magistrate or district court following a defendant giving notice of appeal, we conclude that the district court is not immediately divested of jurisdiction following "the noting of an appeal." Further, we conclude that references to "the judge" in subsections (e) and (f1) in Section 1431 refer to magistrate and district court judges. For that reason, we hold the district court retained jurisdiction to modify the conditions of Defendant's pretrial release after Defendant had given his notice of appeal, but before the case was transferred to the superior court.

B. The Superior Court's Order

On appeal the State argues the superior court was correct in concluding the district court erred in amending the conditions of Defendant's pretrial release without making any written findings of fact but challenges the conclusion that Defendant's constitutional rights were so flagrantly violated that the only remedy available was dismissal of the criminal charges against him. We take the issues of the lack of written findings of fact and alleged constitutional violations in turn.

1. Standard of Review

When reviewing a trial court's grant of a criminal defendant's motion to dismiss, this Court 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. Dorman*, 225 N.C. App. 599, 618, 737 S.E.2d 452, 465 (2013). "As the movant, the defendant bears the burden of showing the flagrant constitutional violation and . . . irreparable prejudice to the preparation of his case." *Dorman*, 255 N.C. App. at 619, 737 S.E.2d at 466. Whether a defendant has satisfied the standard for dismissal of charges based on a flagrant constitutional violation is a question of law reviewed *de novo*. *Id.* at 618, 737 S.E.2d at 465.

2. District Court's Lack of Findings of Fact when Modifying Bond

[2] Having concluded the district court retained jurisdiction to modify the conditions of Defendant's pretrial release, we first turn to the superior court's conclusion regarding the district court's imposition of a secured cash bond against Defendant, despite the district court's order's lack of written findings of fact.

As noted above, Section 534 provides the rules governing the imposition of pretrial release conditions. Under those rules, should a judicial official impose a secure cash bond, they "must record the reasons for doing so in writing[.]" N.C. Gen. Stat. § 15A-534(b).

As the superior court found in its order, "[t]here were no findings made by the [district] [c]ourt, pursuant to [Section 534], addressing the need for a change from the previous bond set." Further, on appeal the State does not challenge any findings of the superior court, and therefore those findings are deemed properly supported by the evidence. *See State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

Because the uncontroverted facts in the Record show the district court failed to make any written findings to support its imposition of a secured cash bond against Defendant, we conclude the superior court was correct in its conclusion that the district court improperly modified the conditions of Defendant's pretrial release.

3. Conclusions Regarding Constitutional Violations

[3] On appeal, the State argues the superior court erred in granting Defendant's motion to dismiss after explicitly finding Defendant made no argument that his brief period of detention irreparably prejudiced his "ability to prepare his case in [s]uperior [c]ourt, or otherwise consult with counsel to be ready for trial[.]"

On motion by a defendant, the court must dismiss the charges stated in the criminal pleading if the "defendant's constitutional rights have

been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2023). A defendant moving to dismiss criminal charges "bears the burden of showing the flagrant constitutional violation and . . . irreparable prejudice to the preparation of his case." *State v. Williams*, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008). Dismissal under Section 15A-954 is a "drastic relief[,]" and motions to dismiss should "be granted sparingly." *State v. Joyner*, 295 N.C. 55, 59, 243 S.E.2d 367, 370 (1978). A motion to dismiss should be denied if the defendant "cannot meet his burden of demonstrating his defense has been actually, as opposed to potentially, prejudiced." *Dorman*, 225 N.C. App. at 623, 737 S.E.2d at 468. "A dismissal pursuant to Section 15A-954(a)(4) is not appropriate in every case in which there has been a flagrant constitutional violation. The violation must have also caused 'such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.' " *Id.* at 622, 737 S.E.2d at 467 (citing *State v. Williams*, 362 N.C. at 639, 669 S.E.2d at 298).

The trial court found in Finding No. 12 "[t]here is no argument presented, and the [c]ourt does not find, that the $250 cash bond and subsequent time in custody affected [] Defendant's ability to prepare his case in [s]uperior [c]ourt, or otherwise to consult with counsel to be ready for trial." The trial court reiterated the lack of prejudice, in its conclusions of law: "Defendant was not irreparably prejudiced in his trial preparation for [s]uperior [c]ourt by the change in bond."

Here, irrespective of whether Defendant's constitutional rights were violated by the district court's omission of findings of fact from the order imposing a $250 cash bond and subsequent detention of "two to four hours," based upon the superior court's own unchallenged finding and conclusions, Defendant did not suffer any prejudice, much less irreparable prejudice, to the preparation of his case such that there is no remedy but to dismiss the prosecution. *See Dorman*, 225 N.C. App. at 622, 737 S.E.2d at 467.

In the case *sub judice*, Defendant did not argue to the superior court that he was prejudiced in preparation of his case, and further, the superior court found Defendant was not prejudiced. We are bound by the unchallenged findings of the trial court. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. Instead, on appeal Defendant seeks to rely upon *State v. Thompson*, a case in which our state's Supreme Court returned a narrow holding in the defendant's favor, concluding that his due process rights had been violated by an "unreasonable delay[,] prevent[ing] him from receiving a prompt post-detention hearing as soon as was

reasonably feasible." 349 N.C. 483, 502-03, 508 S.E.2d 277, 289 (1998). *Thompson* addressed the provisions of N.C. Gen. Stat. § 15A-534.1(a), applicable only to certain domestic violence cases, which requires that "the judicial official who determines the conditions of pretrial release shall be a judge," and a magistrate may act only "[i]f a judge has not acted . . . within forty-eight hours following the arrest of the accused." *Thompson*, 349 N.C. at 487, 508 S.E.2d at 279. As the *Thompson* Court explained, "[e]ssentially, under the amended domestic-violence legislation, the arrestee 'must be held in jail,' without a consideration of the specific facts of their case 'until a judge [or, after forty-eight hours, a magistrate] sets conditions of pretrial release.' " *Id.* at 487, 508 S.E.2d at 279.

In *Thompson*, the defendant was held in "jail on a Saturday, Sunday, and Monday for a total of almost forty-eight hours," despite the availability of a judge to set the conditions of pretrial release sooner. As a result, the defendant was detained longer before his conditions of release were set than "the full penalty for two of [the three] offenses before the State satisfied its burden of proving his guilt beyond a reasonable doubt." *Id.* at 502, 508 S.E.2d at 289. The Court in *Thompson*, however, made it clear that its dismissal of the charges against the defendant was based "solely upon procedural due process grounds[,]" stating the defendant was unreasonably deprived of liberty when he was detained "well beyond any time period necessary to serve any governmental interest[.]" *Id.* at 503, 508 S.E.2d at 289. Importantly, the *Thompson* Court made no conclusions regarding whether the defendant had been prejudiced by his unconstitutional detention; therefore, Defendant's reliance on the *Thompson* court's holding to show his "two to four" hours of detention was *per se* prejudicial is incorrect.

Further, Defendant's motion and the superior court's order are based upon N.C. Gen. Stat. § 15A-954, which requires a showing of two conditions: (1) "[t]he defendant's constitutional rights have been flagrantly violated," and (2) "there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4). Despite its finding that Defendant had suffered no prejudice, the superior court order dismissed the charges based upon a different standard than the standard set by N.C. Gen. Stat. § 15A-954. In its order granting Defendant's motion to dismiss, the superior court reasoned that the modification of Defendant's conditions of pretrial release created an "impermissible chilling effect" to Defendant's Sixth Amendment right to a trial by jury; however, the superior court went on to conclude as a matter of law that

"Defendant was *not* irreparably prejudiced in his trial preparation for [s]uperior [c]ourt by the change in bond[.]" (emphasis added) Even if the type of harm Defendant alleged—a chilling effect of his statutory rights due to fear of "vindictiveness"—exists, this is not a "prejudice to the defendant's preparation of his case."

Because the trial court's findings of fact do not support its conclusion of law, we conclude the superior court erred in granting Defendant's motion to dismiss. *See Joyner*, 295 N.C. at 59, 243 S.E.2d at 370 (holding dismissal under Section 15A-954 is a "drastic relief" and motions to dismiss should "be granted sparingly").

IV. Conclusion

In conclusion, we hold the district court retained jurisdiction to modify the conditions of Defendant's pretrial release. Further, the superior court correctly concluded the district court erred when it failed to make written findings to support the imposition of a cash bond against Defendant; however, the superior court erred in granting Defendant's motion to dismiss because it found Defendant was not irreparably prejudiced in the preparation of his case.

Given these conclusions, we reverse and remand the superior court's order, with instruction that this case be remanded back to the district court for an amended order in compliance with N.C. Gen. Stat. § 15A-534 and "the policies or requirements issued by the senior resident superior court judge."

REVERSED and REMANDED.

Judges STROUD and MURPHY concur.

STATE v. SCOTT

[294 N.C. App. 282 (2024)]

STATE OF NORTH CAROLINA
v.
MARKEE DEKOY SCOTT, DEFENDANT

No. COA23-936

Filed 4 June 2024

1. Appeal and Error—guilty plea—petition for writ of certiorari—invited error

In a case arising from defendant's guilty plea to four counts of selling cocaine, defendant's petition for certiorari review of his appellate argument—that the trial court did not accurately inform him of the consequences of his plea because the court was unaware of an arrangement for defendant to testify for the State in an unrelated matter—was denied because defendant invited any error when he requested that the plea agreement omit any mention of the side arrangement in order to prevent his planned cooperation with the State from becoming publicly known, and moreover, despite not knowing of the side agreement, the trial court provided defendant with a thorough recitation of the consequences of his plea.

2. Criminal Law—withdrawal of a guilty plea—fair and just reason—consideration of factors

Defendant failed to demonstrate a fair and just reason for withdrawing his guilty plea to four counts of selling cocaine where the factors stated in *State v. Handy*, 326 N.C. 532 (1990) all weighed against permitting the plea withdrawal. Defendant never asserted his innocence; the State's proffered evidence of defendant's guilt—which included video recordings of defendant selling cocaine to confidential informants—was strong and uncontested; defendant acknowledged, at both the plea examination and at sentencing, that he was represented by competent counsel, a certified specialist in criminal law; defendant waited seventeen months after entering into the agreement before moving to withdraw his guilty plea; before accepting the plea, the trial court explicitly forecast to defendant the sentence that was eventually entered; and the record did not support defendant's contention that he entered into his plea agreement under coercion. Further, because defendant failed to offer a fair and just reason for withdrawing his plea, no consideration of any potential prejudice to the State was required.

Appeal by Defendant from judgments entered 10 January 2023 by Judge Robert C. Roupe in New Hanover County Superior Court. Heard in the Court of Appeals 14 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State.

The Carolina Law Group, by Kirby H. Smith, III, for Defendant.

GRIFFIN, Judge.

Defendant Markee Dekoy Scott appeals from judgments entered upon a guilty plea to four counts of selling crack cocaine. Defendant also petitions this Court for a writ of certiorari to review whether the trial court properly advised him of the direct consequences of his guilty plea. Defendant contends the trial court erred by denying his motion to withdraw his guilty plea because the State withheld information necessary for an informed decision and by failing to adequately inform him of the consequences of pleading guilty. We deny Defendant's petition and hold the trial court did not err because Defendant failed to offer a just and fair reason for withdrawing his guilty plea.

I. Factual and Procedural Background

Between 26 September 2017 and 7 May 2018, on four separate occasions, Defendant sold crack cocaine to confidential informants working on behalf of the Wilmington Police Department. Each transaction was recorded on video. On 13 May 2019, Defendant was indicted for four counts of selling crack cocaine, four counts of delivering crack cocaine, and four counts of possession with intent to sell and deliver crack cocaine. On 15 July 2021, Defendant pled guilty to four counts of selling crack cocaine. In exchange, the State dismissed the remaining counts. Anticipating that Defendant would testify on the State's behalf in another matter, the State prayed for judgment to be continued and the trial court granted Defendant pretrial release.

On 5 September 2021, while on pretrial release, Defendant was arrested and charged with possession of a firearm by a felon, carrying a concealed weapon, assault on a female, and larceny. His pretrial release was subsequently revoked. Defendant chose not to testify in the unrelated matter. As a result of Defendant's decision, on 10 January 2023, the State prayed for judgment and Defendant's matter came on for sentencing. At sentencing, Defendant moved to withdraw his plea. After reviewing the plea colloquy, the trial court denied his motion, consolidated two of the

four counts, and entered three judgments upon Defendant's guilty plea. Defendant was sentenced to nineteen to thirty-two months' incarceration for each judgment to be served consecutively. Defendant timely appealed.

II. Analysis

A. Petition for Writ of Certiorari

[1] Defendant argues the trial court erred by failing to properly advise him of the consequences of his plea agreement. Specifically, Defendant contends the trial court "could not properly advise [Defendant] of the direct consequences of his guilty pleas, pursuant to N.C.G.S. § 15A-1022(b), because it was not informed of a side agreement between the parties."

A defendant who pleads guilty may only appeal their plea under limited circumstances. *State v. Ledbetter*, 371 N.C. 192, 195, 814 S.E.2d 39, 42 (2018). Pursuant to N.C. Gen. Stat. § 15A-1444, a defendant who has pled guilty has the right to appeal whether their sentence:

> (1) [r]esults from an incorrect finding of the defendant's prior record level under [N.C. Gen. Stat. §] 15A-1340.14 or the defendant's prior conviction level under [N.C. Gen. Stat. §] 15A-1340.21;
>
> (2) [c]ontains a type of sentence disposition that is not authorized by [N.C. Gen. Stat. §] 15A-1340.17 or [N.C. Gen. Stat. §] 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (3) [c]ontains a term of imprisonment that is for a duration not authorized by [N.C. Gen. Stat. §] 15A-1340.17 or [N.C. Gen. Stat. §] 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2)(1)–(3) (2023). A defendant may also appeal "whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing [] if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense[,]" as well as from the denial of a motion to withdraw their plea N.C. Gen. Stat. § 15A-1444(a1), (e) (2023).

Defendant's argument that the trial court did not inform Defendant of the consequences of his guilty plea because neither defense counsel nor the prosecution informed the trial court of the arrangement for Defendant to testify in an unrelated matter is not appealable. Acknowledging this, Defendant petitions this Court for a writ of certiorari.

A defendant challenging whether the trial court improperly accepted a guilty plea "may obtain appellate review [] upon grant of a writ of certiorari." *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987); *see also State v. Demaio*, 216 N.C. App. 558, 563, 716 S.E.2d 863, 866 (2011) (granting a defendant's petition for a writ of certiorari to review whether the trial court improperly accepted his guilty plea). However, " '[a] petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown.' " *State v. Rouson*, 226 N.C. App. 562, 563–64, 741 S.E.2d 470, 471 (2013) (quoting *State v. Grundler*, 251 N.C. 117, 189, 111 S.E.2d 1, 9 (1959)).

Here, the record reflects the omission of Defendant's agreement was at his request. Defendant did not want his name appearing "in the plea transcript as cooperating with the State . . . so that language was left out of the [plea] transcript." As this was Defendant's request, the omission of the cooperation agreement is at most invited error. *See State v. Thompson*, 359 N.C. 77, 103, 604 S.E.2d 850, 869 (2004) ("A defendant is therefore precluded from obtaining relief when the error was invited by his own conduct." (citation and internal marks omitted)). Additionally, the cooperation agreement did not impact Defendant's sentence because the initial plea agreement stipulated there was "no specific agreement as to the terms of what sentencing will occur."

In fact, while examining Defendant, the trial court went to great lengths to ensure Defendant understood the potential consequences of his plea. The trial court stated " . . . the State could pray judgment and you could get [nineteen] – this is the top of the presumptive – [nineteen] months minimum to [thirty-two] months maximum in four consecutive sentences." The trial court forecasted Defendant's argument on the record, stating:

> . . . I'm concerned, and I'll state it right out there, that if you come back in eight months or something and say, Well, I thought I was going to get probation, and it's, like, well, then we – the State, not me – but the State could say, Well, the State thought he was going to do X and he didn't do X; therefore, we're putting the hammer on him. That's a possibility, all right? I'm not trying to dissuade anybody, but I just want to be clear. There could be four active sentences like I discussed and it could be probation.

Thus, Defendant's contention that the trial court could not properly inform him of the consequences of pleading guilty is incorrect. The trial court plainly stated what could and did happen. Defendant

chose to plead guilty, did not cooperate with the State, and was then sentenced to three consecutive sentences of nineteen to thirty-two months' incarceration.

Accordingly, we deny Defendant's petition for a writ of certiorari as it is without merit.

B. Motion to Withdraw

[2] Next, Defendant contends the trial court erred by denying his motion to withdraw his plea because he made the motion for a fair and just reason. Specifically, Defendant contends the State chose not to serve him with an outstanding order for his arrest prior to the entry of his guilty plea "for punitive purposes, in the event [Defendant] failed to cooperate with the State's prosecution" in the unrelated matter. However, Defendant also acknowledges "[i]t is undisputed that all the parties in this case were unaware [Defendant] had an outstanding order for his arrest at the time he pled guilty."

When "reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, the appellate court . . . makes an independent review of the record." *State v. Chery*, 203 N.C. App. 310, 312, 691 S.E.2d 40, 43 (2010) (citation and internal marks omitted). If a "defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason." *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) (citations and internal marks omitted); *see also State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 717 (1993). However, "there is no absolute right to withdraw a guilty plea[.]" *State v. Taylor*, 374 N.C. 710, 718, 843 S.E.2d 46, 52 (2020); *see also State v. Robinson*, 177 N.C. App. 225, 229, 628 S.E.2d 252, 254 (2006). "Whether the [defendant's] reason is fair and just requires a consideration of a variety of factors." *Marshburn*, 109 N.C. App. at 108, 425 S.E.2d at 717 (citations and internal marks omitted).

> Some of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

Taylor, 374 N.C. at 716, 843 S.E.2d at 50 (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163 (citations omitted)). When a defendant provides "a

fair and just reason in support of his motion to withdraw, the State may refute the [defenda]nt's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea." *State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992) (citation and internal marks omitted). However, if we determine that a defendant has failed to provide an adequate reason to support their motion, then we do not analyze prejudice to the State. *Taylor*, 374 N.C. at 725, 843 S.E.2d at 56.

Here, Defendant failed to show a just and fair reason to withdraw his plea. Reviewing the record under the precedent set forth in *Handy*, all factors weigh against Defendant. Defendant never asserted his innocence. Rather, Defendant, under oath, stated he was in fact guilty of each count of selling crack cocaine that he was indicted for and subsequently pled guilty to. Moreover, the State's proffer of evidence was strong as it included video recordings capturing Defendant selling crack cocaine to undercover informants. The State also tested the substances sold and confirmed they were all crack cocaine. In addition to the strength of the State's case, Defendant also acknowledged, during both the plea examination and during sentencing, that he was represented by competent counsel throughout the trial court proceedings–an attorney who is a certified specialist in criminal law.

The record also does not reflect that the guilty plea was entered in haste or at a time when Defendant was confused. Defendant entered his plea approximately fourteen months after he was indicted. He then moved to withdraw the plea approximately seventeen months later. This amount of time reflects a series of reasoned decisions rather than one made in haste. *See Marshburn*, 109 N.C. App. at 108–09, 425 S.E.2d at 718 (explaining an eight-month delay in moving to withdraw a guilty plea requires stronger reasoning than had the defendant moved to withdraw only a few days after entering the plea). Defendant also fully understood the consequences of pleading guilty. The trial court explicitly forecasted the potential outcome and sentence that was later entered. During the plea examination, the trial court informed Defendant that he could be made to serve four consecutive sentences rather than the three which were entered at sentencing.

Defendant also argues he was coerced into pleading guilty as the State knew of an outstanding order for his arrest but chose not to serve him with it for punitive purposes. Whether the State chose not to serve Defendant with the outstanding order for his arrest is of no consequence to his guilty plea here. As an initial observation, the record does not contain the order at issue. Thus, we are unable to ascertain whether that order even related to the present case. Regardless, the

record reflects that Defendant moved to withdraw his guilty plea in an effort to resolve the matter and have it dismissed, not because he was coerced into pleading guilty. At sentencing, Defendant stated:

> I'm ready to get this resolved, like, if we can, like dismiss it, because I've got other matters that I've been locked up for for [sixteen] months. So my – it's kind of, like, hindering me from taking care of the other cases. It's been going on for, like, what two years now, this case? And so I'm just trying to get it resolved.

Defendant's statements belie his argument on appeal and reflect he was dissatisfied with the outcome of his plea despite being made fully aware of said outcome prior to entering the plea.

In total, a review of the record within the framework of *Handy* fails to show Defendant carried his burden of offering a fair and just reason to withdraw his guilty plea.

We take this opportunity to clarify the test used to determine whether a motion to withdraw a guilty plea should be granted. Defendant argues:

> [i]t is the responsibility [of] the appellate court to determine for itself, considering the reasons given by the defendant and *any prejudice to the State*, if it would be fair and just to allow the motion to withdraw. *Marshburn*, 109 N.C. App. at 108, 425 S.E.2d at 718 (emphasis added). Accordingly, motions to withdraw a guilty plea, prior to sentencing, should be liberally granted if there is a fair and just reason to grant the motion and if the State is not materially prejudiced by the granting of the motion.

This reflects an erroneous understanding that the reason given by a defendant is weighed against any prejudice to the State. This is an oversimplification of the standard. The correct standard requires us to analyze prejudice to the State *only if* a defendant carries their burden of showing a just and fair reason for withdrawing their guilty plea. If a defendant carries their burden, *then* we weigh that reason against prejudice to the State. In *State v. Taylor*, our Supreme Court held that analysis of prejudice to the State is not required if a defendant fails to offer a fair and just reason for withdrawing their plea. *Taylor*, 374 N.C. at 725, 843 S.E.2d at 56. There, a panel of this Court, after examining the *Handy* factors, concluded the defendant "failed to demonstrate a fair and just reason for the withdrawal of his plea." *State v. Taylor*, 263 N.C. App. 413, 2018 WL 6614053, at *8 (2018). We then examined the State's argument

that allowing the defendant to withdraw his plea would prejudice their case. *State v. Taylor*, 2018 WL 6614053, at *9. On review, our Supreme Court held this subsequent analysis to be "unnecessary surplusage," as we had already determined the defendant did not offer a fair and just reason under the *Handy* factors. *Taylor*, 374 N.C. at 725, 843 S.E.2d at 56. Thus, guided by the holding in *Taylor*, we do not examine the prejudice, or lack thereof, to the State's case here.

After an independent review of the record, we cannot conclude that Defendant provided a fair and just reason for withdrawing his guilty plea.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not err by denying Defendant's motion to withdraw his guilty plea because Defendant failed to offer a just and fair reason for doing so.

AFFIRMED.

Judges MURPHY and GORE concur.

JUDI BADER SUNSHINE, PLAINTIFF
v.
IAN SUNSHINE, DEFENDANT

No. COA23-559

Filed 4 June 2024

Divorce—alimony—amount awarded—not supported by findings

The trial court's alimony order was vacated where the amount awarded to plaintiff was not supported by the court's findings of fact regarding plaintiff's income and the parties' pre-separation standard of living. While the court properly considered costs associated with plaintiff's pre-order of inventory to avoid supply chain issues in her business when calculating plaintiff's gross income and properly determined plaintiff's annual income from a part-time teaching assistant position, the court imputed labor expenses claimed by plaintiff in the operation of her business as income without making the requisite finding of fact that plaintiff had depressed her income in bad faith. Additionally, while the court's findings regarding the parties' investment savings were supported by the evidence, its characterization of the parties' pre-separation standard of living as

"frugal" in two findings of fact and its finding that plaintiff failed to demonstrate the need to purchase a home in light of that standard of living were unsupported. The matter was remanded for new findings of fact and a recalculation of defendant's monthly alimony obligation to plaintiff.

Appeal by Plaintiff from orders entered 3 August and 23 November 2022 by Judge Rashad Hauter in Wake County District Court. Heard in the Court of Appeals 7 February 2024.

Tharrington Smith, LLP, by Jeffrey R. Russell, Evan B. Horwitz, and Casey C. Fidler, for Plaintiff-Appellant.

Jackson Family Law, by Jill Schnabel Jackson, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff appeals from an order granting her alimony and a subsequent order denying her motion for a new trial. Plaintiff argues that the trial court made several errors resulting in an insufficient alimony award. For the reasons stated herein, we vacate the order granting alimony and remand for further findings of fact, conclusions of law supported by those findings, and a proper determination of the amount of alimony in accordance with those findings and conclusions.

I. Background

Judi Bader Sunshine ("Plaintiff") and Ian Sunshine ("Defendant") were married on 3 June 2000 and separated on or about 7 March 2020. Two children were born of the marriage, both of whom had reached the age of majority before entry of the challenged alimony order.

Defendant has been in the packaging supply business for more than twenty-seven years and is the sole owner of Sun Pro Packaging, Inc. Plaintiff became a stay-at-home mother in 2001, around the time that the parties' first child was born, and she did not return to work outside the home until 2016. She is employed part-time as a teaching assistant for special needs children at Quest Academy and she owns Wingin' It, a business that sells butterfly farming supplies.

Plaintiff commenced this action on 31 August 2020 by filing a complaint for child custody, child support, postseparation support, alimony, equitable distribution, and attorney's fees. Defendant filed an answer

and counterclaims for child custody and equitable distribution. Plaintiff filed a reply to Defendant's counterclaims and affirmative defenses.

A hearing on Plaintiff's claims for postseparation support, child support, and attorney's fees was held, and an order was entered on 11 January 2021 ("PSS and Child Support Order"). The trial court found that Defendant had reasonable monthly expenses of approximately $16,000 and a monthly net income of $38,000, and that Plaintiff had reasonable monthly expenses of $9,859 and a monthly gross income of $1,000. The trial court further found that Plaintiff is a dependent spouse who is actually substantially dependent upon Defendant for her maintenance and support and awarded her $6,859 per month in postseparation support for thirty-six months or until entry of an alimony order. The trial court awarded Plaintiff $2,000 per month in child support until the parties' remaining minor child graduated from high school approximately five months after entry of the PSS and Child Support Order. The trial court further found that Plaintiff was entitled to reimbursement from Defendant for her attorney's fees.

On 29 September 2021, the trial court entered a Consent Equitable Distribution Judgment and Order. Defendant was distributed the following property: the marital residence and the parties' lake house with the mortgage notes upon each; three cars; a boat; two jet skis; investment accounts with a value of approximately $614,609; Defendant's IRA; 66% of profits from a deferred profit plan and the tax liability thereon; Sun Pro Packaging, Inc.; and various items of personal property. Plaintiff was distributed the following: a cash award of $475,000 associated with the parties' marital residence and lake house that Defendant received; two cars; investment accounts with a value of approximately $614,609; Plaintiff's IRA; 34% of profits from Defendant's deferred profit plan; Wingin' It; and various items of personal property.

Plaintiff's alimony claim was heard on 14 March 2022. On 8 April 2022, the trial court orally rendered preliminary findings of fact and announced that it was awarding Plaintiff alimony in the amount of $6,500 per month for 120 months. Counsel for the parties submitted supplemental written closing arguments and draft orders to the trial court after its oral ruling.

The written order ("Alimony Order") was entered on 3 August 2022. The trial court found that Defendant's net monthly income was $25,473.58 and reasonable monthly living expenses were $11,788.39, leaving him a monthly surplus of $13,685.19. The trial court found that Plaintiff's net monthly income was $3,419.84 and reasonable monthly living

expenses were $5,932.68, leaving her a monthly shortfall of $2,512.84. The trial court awarded Plaintiff alimony in the amount of $2,513 for 120 months.

Plaintiff moved for a new trial or alteration of the Alimony Order. The trial court entered an order on 23 November 2022 denying Plaintiff's motion. Plaintiff timely filed a notice of appeal from the Alimony Order and the order denying her motion for a new trial.

II. Discussion

Plaintiff sets forth the following issues on appeal, arguing that the trial court erred by: (1) awarding an insufficient amount of alimony to Plaintiff; (2) failing to find and conclude that Defendant engaged in other marital misconduct; and (3) making certain findings of fact and conclusions of law. Plaintiff essentially argues that the trial court made certain factual and legal errors that led to an insufficient alimony award.

We note that although Plaintiff noticed appeal from the trial court's order denying her motion for a new trial, Plaintiff made no argument to this Court that that trial court erred by denying that motion. Any argument that the trial court erred by denying the motion for a new trial is deemed abandoned. *See* N.C. R. App. P. 28(a).

A. Standard of Review

"As our statutes outline, alimony is comprised of two separate inquiries." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). "The trial court's first determination as to whether a party is entitled to alimony is reviewed de novo." *Madar v. Madar*, 275 N.C. App. 600, 604, 853 S.E.2d 916, 921 (2020) (italics omitted). "If the trial court determines that a party is entitled to alimony, then a second determination is made as to the amount of alimony to be awarded, which we review for abuse of discretion." *Id.* "The trial court's decision constitutes an abuse of discretion where it 'is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision[.]' " *Collins v. Collins*, 243 N.C. App. 696, 700, 778 S.E.2d 854, 856 (2015) (citation omitted). "An error of law is by definition an abuse of discretion." *Li v. Zhou*, 252 N.C. App. 22, 26, 797 S.E.2d 520, 523 (2017) (citations omitted).

This Court reviews a trial court's order containing findings of fact "to determine if 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." *Klein v. Klein*, 290 N.C. App. 570, 577, 892 S.E.2d 894, 903 (2023) (quotation marks and citation omitted). "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." *Id.* "[C]onclusions of law are reviewable de novo" on appeal. *Smith v. Smith*, 247 N.C. App. 166, 169, 785 S.E.2d 434, 437 (2016) (quotation marks and citations omitted). Furthermore, "[t]he labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." *Walsh v. Jones*, 263 N.C. App. 582, 589, 824 S.E.2d 129, 134 (2019) (citation omitted). "If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' de novo." *Id.* (italics omitted).

B. Law Governing Alimony

" 'Alimony' means an order for payment for the support and maintenance of a spouse or former spouse, periodically or in a lump sum, for a specified or for an indefinite term, ordered in an action for divorce . . . or in an action for alimony without divorce." N.C. Gen. Stat. § 50-16.1A(1) (2022). "The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in [N.C. Gen. Stat. § 50-16.3A(b)]." *Id.* § 50-16.3A(a) (2022).

A dependent spouse is a spouse "who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." *Id.* § 50-16.1A(2) (2022). A supporting spouse is a spouse "upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support." *Id.* § 50-16.1A(5) (2022). If the court finds that the supporting spouse participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation and that the dependent spouse did not, then the court shall order that alimony be paid to the dependent spouse. *Id.* § 50-16.3A(a).

In determining the amount, duration, and manner of payment of alimony, the trial court shall consider all relevant factors, including the following statutory factors:

> (1) The marital misconduct of either of the spouses . . . ;
>
> (2) The relative earnings and earning capacities of the spouses;
>
> (3) The ages and the physical, mental, and emotional conditions of the spouses;

> (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
>
> (5) The duration of the marriage;
>
> (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
>
> (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
>
> (8) The standard of living of the spouses established during the marriage;
>
> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> (11) The property brought to the marriage by either spouse;
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The relative needs of the spouses;
>
> (14) The federal, State, and local tax ramifications of the alimony award;
>
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
>
> (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

Id. § 50-16.3A(b) (2022).

The trial court must make a specific finding of fact on each of these factors if evidence is offered on that factor. *Id.* § 50-16.3A(c) (2022). The

trial court is not, however, required to make findings about the weight and credibility it gives to the evidence before it. *Robinson v. Robinson*, 210 N.C. App. 319, 327, 707 S.E.2d 785, 791 (2011). The trial court must "set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." N.C. Gen. Stat. § 50-16.3A(c). The trial court is to "exercise its discretion in determining the amount, duration, and manner of payment of alimony." *Id.* § 50-16.3A(b).

C. Plaintiff's Arguments

The trial court determined that Plaintiff is a dependent spouse, Defendant is a supporting spouse, Defendant participated in an act of illicit behavior during the marriage and Plaintiff did not, and that an award of alimony to Plaintiff is equitable under the circumstances. The trial court awarded Plaintiff alimony in the amount of $2,513 for 120 months. Plaintiff's arguments before this Court pertain solely to the amount of alimony awarded.

1. Plaintiff's Income

Plaintiff first argues that the trial court erroneously calculated her actual income in the following three ways: (1) by disallowing $5,060 in labor expenses for Wingin' It; (2) by disallowing $13,399.73 in inventory expenses for Wingin' It; and (3) by finding that her annual income for Quest Academy employment was $22,000.

In determining an alimony award, the trial court must consider "[t]he relative earnings and earning capacities of the spouses[.]" N.C. Gen. Stat. § 50-16.3A(b)(2). "Alimony is ordinarily determined by a party's *actual* income, from all sources, at the time of the order." *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (citation omitted). Yet, there are exceptions to this general rule. A trial court may impute income to a party if the trial court first finds that the party has depressed their income in bad faith. *Id.* "Bad faith for [a] dependent spouse means shirking the duty of self-support[.]" *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (citations omitted). Bad faith may be proven "from evidence that a spouse has refused to seek or to accept gainful employment; willfully refused to secure or take a job; deliberately not applied himself or herself to a business or employment; [or] intentionally depressed income to an artificial low." *Id.* (quotation marks and citations omitted). Additionally, this Court has allowed the trial court to use prior years' incomes to determine a party's current income in cases where the trial court found the evidence of actual income to be unreliable or otherwise insufficient. *See, e.g.*, *Diehl v. Diehl*,

177 N.C. App. 642, 649-50, 630 S.E.2d 25, 30 (2006); *Zurosky v. Shaffer*, 236 N.C. App. 219, 242-44, 763 S.E.2d 755, 769-70 (2014).

a. Labor and Inventory Expenses for Wingin' It

Here, the trial court made the following findings of fact relevant to Plaintiff's arguments concerning the labor and inventory expenses:

> 32. Defendant also alleges that Plaintiff is underemployed and has the ability to earn substantially more than she currently earns.
>
> 33. Plaintiff has not attempted to find a fulltime job with benefits since the parties' date of separation. Plaintiff testified that she wants to focus on her butterfly business. Plaintiff testified that her butterfly business sales increased by $20,000 this year and expects her business to make more in the future. Plaintiff works an average of 15 hours a week on the butterfly business and has an employee that helps her with order fulfillments. Plaintiff explained that her business is seasonal and that she works substantially more hours during the Summer.
>
> 34. Plaintiff's 2021 income tax return reflects negative income from Wingin It, which is not consistent with prior years. Based on Plaintiff's testimony at trial, Wingin It operates at a 40% profit margin.
>
> 35. Plaintiff had the time and ability to perform packaging/order fulfillment duties for Wingin It, yet she incurred an increasing and unnecessary expense for another person to perform such tasks for her. Plaintiff's Schedule C Part III of her personal tax return shows an annual cost of labor expense of $5,060 in 2021, $4,000 in 2020, $2,200 in 2019 and $0 in 2018.
>
> 36. Considering Plaintiff's work schedule, she could easily perform the duties that she pays another person to perform without affecting her business or her employment with Quest Academy thereby allowing her to save approximately $5,060 per year in labor costs.
>
> 37. Additionally, in 2021, contrary to her actions in other years, Plaintiff pre-ordered additional inventory (the sales of which will not occur or be reflected until 2022) and incurred an additional $13,399.73 expense which effectively lowered the income generated by the business.

Plaintiff testified that she bought supplies early in anticipation of supply chain issues.

38. The Wingin It profit and loss statements from 2021 reflect $83,035 in sales and $64,246 in cost of goods (which includes $5,060 for the cost of labor and additional costs for three inventory orders) for a gross income of $18,789 before the Part II business expenses are deducted.

39. It is reasonable to infer from the statements of the Plaintiff and the history of the company prior to 2021, that as receivables from sales increase for the business, so should the income.

40. Further, the pre-order of supplies in the Fall of 2021 that were intended for sale in 2022 has caused the 2021 income to appear temporarily lower than it normally would. The expense incurred in 2021 should be recovered in 2022.

41. In determining Plaintiff's actual income from Wingin It, the unnecessary cost of labor expense should be added back when determining gross income. For the year 2021, this amount is $5,060.

42. Further, for the year 2021, the third supply order of $13,399.73 should be added back. Adding back the cost of labor and third supply order will cause the gross income in Part I of Schedule C to be $37,248.73, which is 44.85% of gross receipts.

43. The Court then considered what, if any, of the Part II expenses to deduct from gross income. The Part II expenses duplicate some of the expenses listed on Plaintiff's Financial Affidavit as her household and personal expenses. To the extent duplicate expenses are included in Plaintiff's Part II Expenses, they are not considered when calculating Plaintiff's reasonable expenses included in her financial affidavit.

44. The Part II expenses on Plaintiff's 2021 income tax return total $19,404. It is appropriate to subtract the "Car and Truck" deduction of $476 from Plaintiff's business expenses and to also not consider it as a personal regular recurring monthly expense. Plaintiff no longer has a car payment for the Mini Cooper and the Mazda was

> purchased for the parties' adult child Lily who also shared in the purchase of that vehicle. This results in the total Part II expenses being $18,928.
>
> 45. For 2021, when considering the Part I gross income from Wingin It of $37,248.73 and the Part II expenses of $18,928, Wingin It income after business expenses is $18,320.73.

i. Labor Expense

Plaintiff challenges the trial court's decision to add the $5,060 labor expense back into her Wingin' It income to determine her 2021 gross income. Although Plaintiff challenges findings of fact 35, 36, 41, and 45, Plaintiff's challenge is a legal argument that the trial court erred "by erroneously imputing income to her without the requisite finding of bad faith."

The trial court found that "Plaintiff has not attempted to find a full-time job with benefits since the parties' date of separation[,]" "Plaintiff had the time and ability to perform packaging/order fulfillment duties for Wingin' It, yet she incurred an increasing and unnecessary expense for another person to perform such tasks for her[,]" and that Plaintiff "could easily perform the duties that she pays another person to perform without affecting her business or employment . . . ." Accordingly, the trial court added "the unnecessary cost of labor expense" of $5,060 to her gross income for the year 2021.

The trial court's findings allude to evidence of bad faith and it is apparent that the trial court imputed income of $5,060 to Plaintiff for 2021. However, the trial court did not specifically find that Plaintiff depressed her income in bad faith. *See Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. Absent such a finding, the trial court's findings were not sufficient to support its imputation of $5,060 to Plaintiff's 2021 gross income.

ii. Inventory Expense

Plaintiff next challenges the trial court's decision to add $13,399.73 back to her 2021 gross income to account for a pre-order of inventory in the Fall of 2021 for sale of items in 2022 in anticipation of supply chain issues. Although Plaintiff challenges findings of fact 37, 40, 42, and 45, this is again a legal argument that the trial court erred "by erroneously imputing income to her without the requisite finding of bad faith."

The trial court found that "in 2021, contrary to her actions in other years, Plaintiff pre-ordered additional inventory (the sales of which will not occur or be reflected until 2022) and incurred an additional $13,399.73 expense which effectively lowered the income generated

by the business." The trial court further found that this pre-order "has caused the 2021 income to appear temporarily lower than it normally would" and thus this "supply order of $13,399.73 should be added back" to her 2021 gross income.

Unlike the "unnecessary" cost of labor discussed above, the pre-order of supplies caused Plaintiff's income to appear "temporarily lower" than normal, indicating that Plaintiff's 2021 gross income as reported was an unreliable measure of her income for purposes of alimony. This case is similar in ways to *Diehl* and *Zurosky*.

In *Diehl*,[1] plaintiff "challenge[d] the trial court's use of an average of his monthly gross incomes in 2001 and 2002 as a basis for finding his monthly gross income for 2003 . . . ." 177 N.C. App. at 649, 630 S.E.2d at 30. We concluded that the trial court's findings of fact that the evidence of actual income was unreliable were supported by the evidence and held, "Given the unreliability of [plaintiff's] documentation, we cannot conclude . . . that the trial court abused its discretion by averaging . . . income from his . . . two prior tax returns to arrive at his 2003 income." *Id.* at 650, 630 S.E.2d at 30. This Court also found plaintiff's characterization of the trial court's methodology of averaging prior years' incomes as "imputation" of income to be inaccurate and held that the law of imputation of income was inapplicable. *Id.* Thus, the trial court was not required to make a finding of bad faith. *Id.*

In *Zurosky*, this Court distinguished cases wherein the trial court imputed income to a party when that party acted in bad faith to depress their income from cases where a party's reported income was unreliable, explaining that in *Diehl*, "the trial court did not make a finding of bad faith or have evidence that the spouse deliberately depressed his income; the trial court used prior years' incomes because the trial court did not have sufficient evidence regarding his actual income." 236 N.C. App. at 243, 763 S.E.2d at 769. As in *Diehl*, there were concerns over the reliability of the reported income in *Zurosky*. Accordingly, we held that the trial court did not abuse its discretion in using prior years' income to determine actual income for purposes of computing alimony. *Id.* at 243-44, 763 S.E.2d at 770.

Here, as in *Diehl* and *Zurosky*, the trial court was concerned with the reliability of Plaintiff's reported income. The trial court found that

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1. Although *Diehl* involved the computation of plaintiff's income for purposes of child support, its reasoning has been applied in alimony cases. *See Zurosky*, 236 N.C. App. at 242-44, 763 S.E.2d at 769-70.

"contrary to her actions in other years, Plaintiff had pre-ordered additional inventory" and that Plaintiff testified that she "bought supplies early in anticipation of supply chains issues." The trial court further found that this pre-order "caused the 2021 income to appear temporarily lower than it normally would." Thus, based on her past business decisions and the reason for pre-ordering inventory, her reported 2021 gross income was not a reliable measure of her actual income. Unlike in *Diehl* and *Zurosky*, the reliability of Plaintiff's reported income was not attributable to Plaintiff's failure to provide sufficient or reliable documentation; in fact, her pre-order of inventory was potentially a wise business decision. Nonetheless, as in *Diehl* and *Zurosky*, the trial court's findings here support its decision to include the $13,399.73 cost of the inventory order in the calculation of Plaintiff's 2021 gross income.

b. Quest Academy Income

Plaintiff next argues that the trial court erroneously found that her actual income from Quest Academy was $22,000 annually.

Finding of Fact 28 provides: "Plaintiff is currently employed in a contract part time position at Quest Academy where [she] works approximately 15 hours per week and earns $22,000 in annual income. Plaintiff anticipates signing a full year contract with Quest Academy in May 2022."

Plaintiff testified that she began working at Quest Academy in October of 2021. When asked how much she was paid for working three days a week at Quest Academy, Plaintiff responded, "I came in, sort of, at the middle of the year. Somebody quit, and they reached out to me and offered me a position. And so it's not for the full year, but I know that for the full year it would be $22,000 a year." When asked if she planned to continue working at that job, Plaintiff responded, "Yes, I do." The following exchange then took place between the trial court and Plaintiff:

> THE COURT: That's $22,000 a year if it's the full year?
>
> [PLAINTIFF]: Yes.
>
> THE COURT: Working three days a week?
>
> [PLAINTIFF]: Uh-huh.
>
> THE COURT: Okay. Thank you.

Plaintiff's testimony is competent evidence to support the challenged finding of fact that she earns $22,000 in annual income from Quest Academy.

Plaintiff argues that her Financial Affidavit, her 2021 Federal income tax return, and her Social Security Historical Statement of Income do not reflect that Plaintiff had received $22,000 in annual income from Quest Academy as stated in the above finding. However, Plaintiff did not work a full academic year in 2021 and had yet to work a full academic year as of the 14 March 2022 trial; accordingly, Plaintiff's 2021 tax return and 7 February 2022 Social Security Historical Statement of Income would not have reflected an annual income of $22,000 from Quest Academy.

As this challenged finding of fact is supported by competent record evidence, it is conclusive on appeal. *Klein*, 290 N.C. App. at 577, 892 S.E.2d at 903.

c. Summary of Plaintiff's Income Discussion

For the reasons stated above, we hold as follows: Absent a finding that Plaintiff acted in bad faith by incurring a $5,060 labor expense for Wingin' It, the trial court's findings were not sufficient to support its imputation of $5,060 to Plaintiff's 2021 gross income. However, the trial court's findings support its decision to include the $13,399.73 inventory expense in the calculation of Plaintiff's 2021 gross income for Wingin' It, and the evidence supports the trial court's finding that Plaintiff's annual income from Quest Academy was $22,000. Accordingly, we vacate the Alimony Order and remand this matter to the trial court with instructions to determine whether Plaintiff depressed her income in bad faith. If the trial court finds so, it must make an explicit finding of bad faith. If it does not so find, the trial court must recalculate Defendant's monthly alimony obligation to Plaintiff without imputing the $5,060 in income to her.

2. Standard of Living

Plaintiff next argues that the trial court undervalued the parties' standard of living during the marriage, specifically challenging the trial court's findings that the parties lived in a frugal manner, and that the trial court erred by failing to allow Plaintiff expenses for a comparable dwelling and investment savings. Plaintiff thus argues that the trial court's failure to consider the parties' actual accustomed standard of living resulted in an insufficient alimony award.

"[T]he parties' needs and expenses for purposes of computing alimony should be measured in light of their accustomed standard of living during the marriage." *Barrett v. Barrett*, 140 N.C. App. 369, 372, 536 S.E.2d 642, 645 (2000); *see* N.C. Gen. Stat. § 50-16.3A(b)(8) (In determining alimony, the trial court shall consider "[t]he standard of living of the spouses established during the marriage[.]"). Our Supreme Court has

made it clear that the "accustomed standard of living is based upon the parties' lifestyle during the marriage and not just economic survival":

> We think usage of the term accustomed standard of living of the parties completes the contemplated legislative meaning of maintenance and support. The latter phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed.

Rea v. Rea, 262 N.C. App. 421, 428, 822 S.E.2d 426, 432 (2018) (quoting *Williams v. Williams*, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980)).

a. Frugal Manner of Living

Plaintiff argues that the findings of fact and the evidence do not support the portions of findings of fact 11 and 81(g) that "the parties lived in a frugal manner." The trial court made the following relevant findings of fact:

> 11. Despite having the financial ability to live an extravagant lifestyle during their marriage, the parties lived in a frugal manner.
>
> 12. Around 2003, the parties purchased a lake house on Lake Gaston.
>
> 13. During the marriage, the parties took a vacation to Costa Rica when they were first married, went to Jamaica for their anniversary, visited Israel, and went to Disney World with their children. However, the majority of vacations they parties took during the marriage were spent at the lake house.
>
> . . . .
>
> 64. The parties lived in a 4300 square foot home during their marriage. Although owning a home would be consistent with the parties' accustomed standard of living during the marriage, Plaintiff failed to demonstrate any need for the purchase of a house.

. . . .

81. The Court gave due consideration to the factors outlined in N.C.G.S. § 50-16.3A(b) and finds that an award of alimony is equitable. The Court makes specific findings concerning those factors outlined in N.C.G.S. § 50-16.3A upon which evidence was received by the Court as follows:

. . . .

g. Factor (b)(8): As more fully explained above, the parties had the ability to live an extravagant lifestyle during their marriage but lived in a frugal manner.

While "frugal" is a subjective term, it can be defined as "characterized by or reflecting economy in the use of resources" and implies an "absence of luxury and simplicity of lifestyle." Frugal, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/frugal (last visited May 23, 2024). Here, in addition to the challenged findings regarding the "frugal manner" in which the parties lived, the trial court made the following findings about their standard of living: the parties lived in a 4,300 square-foot home; the parties owned a second home at the lake where they vacationed; and the parties also vacationed in Costa Rica, Jamaica, Israel, and Disney World. The record evidence supports these findings of fact and the record evidence also indicates that at the time of separation, the parties had accumulated five vehicles–an Acura RLX, an Infiniti, a Mazda Miata, a Ford Escape, and a Mini Cooper–a pontoon boat, and two jet skis. While the findings regarding the parties' standard of living and the record evidence would not support a finding that the parties lived in an extravagant manner, they likewise do not support a finding that the parties "lived in a frugal manner." We thus vacate the portions of findings 11 and 81(g) stating that the parties "lived in a frugal manner."

b. Comparable Dwelling

Plaintiff next argues that the portion of the trial court's finding of fact 64 that states that "Plaintiff failed to demonstrate any need for the purchase of a house" is not supported by any evidence or law. Plaintiff argues that the trial court erred by relying on her apartment rent of $1,475, "which is significantly lower than the $4,697 mortgage the parties paid as part of their accustomed standard of living during the marriage[,]" in determining her reasonable monthly needs and expenses.

The parties accustomed standard of living "contemplates the economic standard established by the marital partnership" and anticipates

that, where possible, alimony "shall sustain that standard of living for the dependent spouse to which the parties together became accustomed." *Rea*, 262 N.C. App. at 428, 822 S.E.2d at 432 (citation omitted).

The trial court made the following relevant findings of fact:

> 61. Plaintiff currently lives in an apartment where she has resided for two years. Plaintiff currently pays $1,475 to rent an apartment. Plaintiff recently renewed her lease for a third year in January 2022.
>
> 62. Although Plaintiff is currently renting an apartment, she desires to purchase a home where her mortgage would be approximately $2,200 per month.
>
> 63. Despite having the current financial resources to purchase a home, Plaintiff has not purchased a home due to the current state of the housing market.
>
> 64. The parties lived in a 4300 square foot home during their marriage. Although owning a home would be consistent with the parties' accustomed standard of living during the marriage, Plaintiff failed to demonstrate any need for the purchase of a house.
>
> . . . .
>
> 81. . . .
>
> > . . . .
> >
> > i. Factor (b)(10): As a result of the Consent Order and Judgment for Equitable Distribution, Plaintiff was removed from liability on the home mortgage and lake cabin mortgage (which were awarded to the Defendant) . . . . Defendant has a combined monthly mortgage expense of $4,753.39. . . .

While a majority of these findings, including that "owning a home would be consistent with the parties' accustomed standard of living during the marriage," are supported by competent evidence, the portion of finding 64 that "Plaintiff failed to demonstrate any need for the purchase of a house" is not supported. The trial court must "consider the parties' accustomed standard of living during the marriage and not just [Plaintiff's] actual expenses at the time of trial." *Myers v. Myers*, 269 N.C. App. 237, 261, 837 S.E.2d 443, 460 (2020).

The trial court's supported findings regarding the parties accustomed standard of living during the marriage include the following: "The parties lived in a 4300 square foot home during their marriage" and "owning a home would be consistent with the parties' accustomed standard of living during the marriage[.]" Furthermore, finding of fact 81(i) indicates that Defendant continues to reside in the former-marital home and lake home, making $4,753.39 in monthly mortgage payments.

Based upon these findings and the record evidence, Plaintiff's residence in a rental apartment for $1,475 monthly is a significant reduction in her standard of living from the standard established during the parties' marriage and from the standard Defendant continues to enjoy. Although the trial court made detailed findings of fact regarding what it found to be the parties' reasonable individual expenses, these findings appear to be based solely upon the evidence of expenses for each party at the time of trial without consideration of the parties' accustomed standard of living. *See id.* ("No findings indicate any difference between [Plaintiff's] *actual expenses* after separation as compared to the *accustomed standard of living* during the marriage . . . ."). When the trial court considers the parties' accustomed standard of living developed during the marriage, instead of Plaintiff's reduced standard of living after separation, her reasonable needs will be higher. While there is no requirement that Plaintiff enjoy the same lifestyle as Defendant's current lifestyle, the trial court must consider the accustomed standard of living developed by the parties during the marriage in determining Plaintiff's reasonable need for support. *Id.* at 261-62, 837 S.E.2d at 460.

Based upon the trial court's findings, this is not a case where the trial court limited the alimony award because Defendant lacked the ability to pay more alimony, nor was the alimony award reduced based upon any marital fault by Plaintiff—in fact, Defendant admitted marital fault in this case. We thus vacate the portion of finding 64 stating that "Plaintiff failed to demonstrate any need for the purchase of a house."

c. Investment Savings

Plaintiff next argues that the trial court erred by not including savings expenses for Plaintiff more consistent with the parties' accustomed standard of living. Plaintiff specifically argues that the trial court erred by narrowly focusing on "retirement savings" instead of considering various savings and investment accounts possessed by the parties and funded by their excess earnings.

"[T]he trial court can properly consider the parties' custom of making regular additions to savings plans as a part of their standard of living

in determining the amount and duration of an alimony award . . . ." *Glass v. Glass*, 131 N.C. App. 784, 789-90, 509 S.E.2d 236, 239 (1998). However, the trial court may consider a savings component to an alimony award "only if the parties' had a habit of regularly contributing money to savings during their marriage." *Collins*, 243 N.C. App. at 707, 778 S.E.2d at 860 (citation omitted). *See Rhew v. Rhew*, 138 N.C. App. 467, 473, 531 S.E.2d 471, 475 (2000) ("Evidence was presented that established an historical pattern of such contributions, which satisfied the requirement in *Glass* that there be a custom of regular savings."). "Further, our case law establishes that the purpose of alimony is not to allow a party to accumulate savings." *Glass*, 131 N.C. App. at 790, 509 S.E.2d at 240.

Here, the trial court made the following challenged findings of fact:

> 70. There is insufficient evidence that the parties have established a pattern of saving for retirement as part of their accustomed standard of living during the marriage.
>
> 71. The financial affidavits of each party do not reflect any retirement contributions for their respective date of separation expenses. Further, the parties' personal tax returns that were admitted into evidence do not reflect a retirement contribution.
>
> 72. Therefore, the Court is not considering the $600 retirement expense on Plaintiff's financial affidavit.

Plaintiff argues that the trial court's finding of fact that she "was distributed $569,702 in *investment accounts* and a cash distributive award totaling $475,000 in addition to other cash, *bank accounts*, and *investments* in her name" and that "[w]hen combined with other IRA *and bank accounts*, Plaintiff had cash and *investments* of approximately $1,468,208 as of the date of trial" shows that "savings and investments were a part of the parties' standard of living during the marriage." While we agree that this finding shows an accumulation of money in various accounts, indicating that the parties saved money during the marriage, we are bound by case law that requires evidence of a regular pattern of savings. *See, e.g.*, *Glass*, 131 N.C. App. at 789-90, 509 S.E.2d at 239; *Collins*, 243 N.C. App. at 707, 778 S.E.2d at 860. Plaintiff points to no evidence, and we can find none, to establish a regular pattern of savings contributions to satisfy the requirement in *Glass* that there be a custom of regular savings. Accordingly, the challenged findings of fact are binding upon us. *Klein*, 290 N.C. App. at 577, 892 S.E.2d at 903.

d. Summary of Standard of Living Discussion

For the reasons stated above, we hold as follows: The portions of the trial court's findings of fact 11 and 81(g) stating that the parties "lived in a frugal manner" are not supported by the evidence and are vacated. The portion of finding of fact 64 stating that "Plaintiff failed to demonstrate any need for the purchase of a house" is not supported and is vacated. The trial court did not err by excluding savings expenses for Plaintiff. Accordingly, we vacate the Alimony Order and remand this matter to the trial court with instructions to determine Plaintiff's reasonable needs in light of the parties' accustomed standard of living and a new alimony order consistent with this determination.

3. Differential Treatment

Plaintiff next argues that "[t]he trial court manifestly abused its discretion by applying differential treatment to the parties when it determined the amount of alimony." Plaintiff's argument is essentially that the trial court awarded Plaintiff an insufficient amount of alimony in light of the parties' accustomed standard of living and disparate incomes. As we have addressed Plaintiff's arguments above and have determined that the trial court erred in various ways, we need not reiterate our analysis here.

4. Marital Misconduct

Plaintiff finally argues that the trial court erred by failing to find and conclude that Defendant engaged in marital misconduct other than Defendant's admitted illicit sexual behavior. Plaintiff points to evidence of alcohol and drug use by Defendant and of controlling and cruel conduct by Defendant.

"In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including . . . [t]he marital misconduct of either of the spouses." N.C. Gen. Stat. § 50-16.3A(b)(1).

> "Marital misconduct" means any of the following acts that occur during the marriage and prior to or on the date of separation:
>
> . . . .
>
> f. Indignities rendering the condition of the other spouse intolerable and life burdensome;
>
> . . . .

> h. Excessive use of alcohol or drugs so as to render the condition of the other spouse intolerable and life burdensome[.]

Id. § 50-16.1A(3) (2022).

In addition to finding that "Defendant now admits that he had a sexual relationship with Jill O'Kane during the parties' marriage prior to their separation[,]" the trial court found that "[d]uring the marriage, Defendant would often come home impaired from alcohol and marijuana after attended hockey games." Although the trial court did not make findings of fact regarding Defendant's alleged controlling and cruel behavior, "[t]he court is not required to make findings about the weight and credibility which it gives to the evidence before it." *Robinson*, 210 N.C. App. at 327, 707 S.E.2d at 791. Furthermore, the trial court is not required to include findings of each piece of evidence presented at trial and is instead, only required to "resolve the material, disputed factual issues raised by the evidence." *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013). Accordingly, the trial court was not required to make additional findings of fact about alleged misconduct by Defendant in awarding alimony to Plaintiff.

III. Conclusion

For the reasons stated herein, we vacate the Alimony Order and remand the matter to the trial court with the following instructions: (1) Determine whether Plaintiff depressed her income in bad faith by incurring a $5,060 labor expense for Wingin' It. If the trial court finds so, it must make an explicit finding of bad faith. If it does not so find, the trial court must recalculate Defendant's monthly alimony obligation to Plaintiff without imputing the $5,060 in income to her. (2) Vacate findings of fact 11 and 81(g) stating that the parties "lived in a frugal manner." (3) Vacate the portion of finding of fact 64 stating that "Plaintiff failed to demonstrate any need for the purchase of a house." (4) Determine Plaintiff's reasonable needs and expenses in light of the parties' accustomed standard of living during the marriage—not just Plaintiff's actual expenses at the time of trial—and recalculate Defendant's monthly alimony obligation to Plaintiff based on this determination. (5) Enter a new order for alimony.

VACATED AND REMANDED.

Judges WOOD and GORE concur.

ROBERT WHITE, PLAINTIFF
v.
BRAVE QUEST CORP. AND ELOGHOMES.COM, DEFENDANTS

No. COA23-928

Filed 4 June 2024

Appeal and Error—interlocutory appeal—orders compelling discovery and imposing sanctions—no substantial right shown

In a case involving claims for breach of contract and unfair and deceptive trade practices, an appeal from interlocutory orders compelling discovery and imposing sanctions was not properly before the appellate court where the appellant did not (1) file a notice of appeal from the discovery order until four months after the order was entered, rendering it untimely; or (2) meet his burden to show that the sanctions order affected a substantial right and, thus, were immediately appealable. Accordingly, the purported appeal was dismissed.

Appeal by plaintiff from order entered 18 April 2023 by Judge Brenda G. Branch in Nash County Superior Court. Heard in the Court of Appeals 16 April 2024.

Walker Kiger, PLLC, by David Steven Walker, II, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, by Daniel T. Strong, for defendants-appellees.

FLOOD, Judge.

Plaintiff Robert White appeals from the trial court's order compelling discovery and an order imposing sanctions against him for failure to comply with the discovery order. On appeal, Plaintiff argues the trial court erred in granting Defendants Brave Quest Corp. and eloghomes.com's motion to compel discovery and ordering sanctions against Plaintiff. Because Plaintiff did not file a timely notice of appeal as to the motion to compel, and failed to adequately allege the sanctions order affected a substantial right, we conclude Plaintiff's appeal is not properly before this Court.

I. Factual and Procedural Background

Defendant Brave Quest Corp. is a North Carolina business that operates a website with the domain name, "eloghomes.com." Defendants are in the business of selling and manufacturing log homes and supplies. In January 2021, Plaintiff entered into an agreement wherein Defendants would send log home building materials to Plaintiff in Arizona. The parties agreed that 10 July 2021 would be the delivery date. On 24 January 2021, Plaintiff, in contemplation of the agreement, paid Defendants $32,678.69. On 28 April 2021, Plaintiff paid an additional $51,852.33 to Defendants, bringing Plaintiff's total payment amount to $84,531.02. Any remaining balance was to be paid upon delivery of the building materials.

Defendants provided Plaintiff with preliminary blueprints for his review, and Plaintiff requested design changes. Defendants made the requested changes and sent the revised blueprints to Plaintiff, but Plaintiff did not respond. Plaintiff failed to approve the blueprints and make arrangements for the delivery of the log home. Defendants offered to extend the 10 July 2021 deadline and preserve the originally agreed upon price. On 29 July 2021, Plaintiff responded to Defendants' offer and indicated he would "have to cancel [his] purchase and perhaps make the purchase later on." On 30 July 2021, Plaintiff wrote to Defendants again and "demanded" they reduce the agreed upon price by $8,866.00. Defendants did not accept Plaintiff's "demand," but they did offer to give Plaintiff additional time to make additional payments on the outstanding amount owed or change his order to a less expensive design. Plaintiff responded with a threat of litigation.

On 28 December 2021, Plaintiff filed a complaint alleging Defendants breached the contract that they had entered into with Plaintiff and committed Unfair and Deceptive Trade Practices ("UDTP").

On 25 March 2022, Defendants moved to dismiss Plaintiff's UDTP claim for failure to state a claim upon which relief can be granted in violation of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 6 January 2023, Defendants filed a motion for partial summary judgment on the UDTP claim, and a motion to compel discovery. In the motion to compel discovery, Defendants requested production of Plaintiff's medical records for the period of the parties' communication, as Plaintiff "ha[d] indicated to Defendants that his failure to respond was due to health problems." It is unclear from the Record on appeal when Plaintiff made these indications to Defendants regarding his health.

On 17 January 2023, a hearing was held regarding Defendants' various motions. The trial court, Judge George Hicks presiding, entered an

order on 20 January 2023 denying the motion to dismiss that Defendants' had asserted in their answer, denying Defendants' separately filed motion for partial summary judgment, and granting Defendants' motion to compel discovery. The trial court found that, "from the information provided, [ ] [P]laintiff's medical history is relevant to the matters before the [c]ourt." Judge Hicks' order stated that, if Plaintiff desired to testify to his medical condition regarding his failure to respond, "such testimony or reference would operate as an implied waiver of the patient[-] physician privilege." Thus, Judge Hicks ordered Plaintiff to either (1) provide Defendants' counsel a copy of all Plaintiff's medical records during the relevant time period or (2) stipulate that Plaintiff's medical condition will not be brought up during trial.

Plaintiff chose not to stipulate and did not comply with Judge Hicks' order that he produce all medical records during the relevant time, but instead provided two medical reports from the Mayo Clinic that were each two pages in length, with one "clearly missing at least one page." The first medical report submitted by Plaintiff was from 26 February 2021 and referred to an order for a CT scan and a follow-up visit, but there was not a report about the scan or the follow-up visit. The second report indicated Plaintiff had an appointment on 28 July 2021. The 28 July 2021 report also referenced a "recent evaluation" made by another physician, but that evaluation was likewise not included in the medical reports submitted to Defendants.

Defendants filed a motion for discovery sanctions, arguing Plaintiff failed to comply with Judge Hicks' order that Plaintiff provide "his medical records for all providers from January 1, 2021 until December 15, 2021." Defendants also suggested the medical reports Plaintiff did provide indicated that he had made false statements about his medical condition, and Defendants needed his complete medical records for that time frame to verify whether Plaintiff's statements were indeed false. Due to these alleged false statements, Defendants requested that the trial court sanction Plaintiff by dismissing his entire complaint.

The trial court, then with Judge Brenda Branch presiding, held a hearing on 17 April 2023 regarding the motion for sanctions. After hearing arguments from each party, the trial court stated it was "prepared for sanctions[,]" but it would "consider something less than dismissal." The trial court gave the parties an opportunity to discuss an option that would include sanctions less severe than dismissal of the entire case.

Just over an hour later, the parties came back into session, and Defendants' counsel exclaimed that Plaintiff "won't agree to anything, he won't produce anything, he won't agree to any sanction whatsoever."

Following the hearing, the trial court granted Defendants' motion for sanctions, finding, in relevant part:

> 3. Despite many efforts to have Plaintiff comply with the Discovery Order, Plaintiff remained steadfast in blatantly and obstinately violating the Discovery Order.
>
> . . . .
>
> 5. The facts as proven demonstrate that Plaintiff has made false statements about his health condition in an attempt to excuse his deliberate failure to respond to prodigious efforts by Defendants to comply with their contracts and to get Plaintiff to comply with their contracts. The documents that were withheld by Plaintiff in violation of the Discovery Order may be further evidence of those false statements and therefore appear to be relevant to Defendants' case. The evidence appears to show that there is no factual basis for [the UDTP claim] in Plaintiff's Verified Complaint and the failure of Plaintiff to comply with the Discovery Order impedes the ability of Defendants fully and fairly to defend against that Claim.

Judge Branch dismissed Plaintiff's UDTP claim with prejudice and, ordered "that it is proven that Plaintiff knowingly and intentionally made false statements about his health condition in an effort to excuse his deliberate failure to respond to prodigious efforts by Defendants to comply with their contracts with Plaintiff[.]"

On 15 May 2023, Plaintiff filed a notice of appeal from Judge Hicks' order granting Defendants' motion to compel discovery and from Judge Branch's order imposing sanctions.

II. Jurisdiction

Plaintiff asserts that, "while these orders are interlocutory, they affect a substantial right of [] [P]laintiff, namely the physician[-]patient privilege." The physician-patient privilege, however, is irrelevant to the sanctions order, and Plaintiff has not provided any case citation to support the proposition that a sanctions order is interlocutory or that it affects a substantial right.

"An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999)

(citation omitted). One exception to this general rule exists "where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable." *Berens v. Berens*, 247 N.C. App. 12, 17, 785 S.E.2d 733, 738 (2016) (citation and internal quotation marks omitted). A second exception exists when a discovery order is enforced by sanctions. *See Feeassco, LLC v. Steel Network, Inc.*, 264 N.C. App. 327, 331–32, 826 S.E.2d 202, 206–07 (2019) ("Generally, a discovery order, including an order compelling discovery, is not immediately appealable. However, when a discovery order is enforced by sanctions . . . the order affects a substantial right and is immediately appealable. The appeal tests the validity of both the discovery order and the sanctions imposed." (citations omitted)). Even though an interlocutory order may be immediately appealable, however,

> [t]he appellant bears the burden of demonstrating that the order is appealable despite its interlocutory nature. It is not the duty of this Court to construct arguments for or find support for an appellant's right to appeal; the appellant must provide sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

Dewey Wright Well and Pump Co., Inc. v. Worlock, 243 N.C. App. 666, 669, 778 S.E.2d 98, 100–01 (2015) (citation omitted). "As a result, if the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of the appellate jurisdiction." *Bartels v. Franklin Operations, LLC*, 288 N.C. App. 193, 198, 885 S.E.2d 357, 361 (2023) (citation omitted).

First, even if the discovery order impacted a physician-patient privilege and was immediately appealable, Plaintiff did not file a notice of appeal until four months after the order was entered, and his appeal was therefore untimely. *See Watson v. Watson*, 288 N.C. App. 265, 267, 885 S.E.2d 858, 860 (2023) ("[W]hen a litigant elects to appeal an interlocutory judgment . . . while other claims are pending, the litigant still must comply with Rule 3 of our Rules of Appellate Procedure, requiring that the notice of appeal be filed within thirty days after entry of the judgment[.]") (second alteration in original); *see also* N.C. R. App. P. 3(c) (2023) ("In civil actions . . . a party must file and serve a notice of appeal . . . within thirty days after entry of judgment[.]").

Second, Plaintiff did not meet his burden of showing the order imposing sanctions was appealable because it affected a substantial right, and this Court will not "construct arguments for or find support for" Plaintiff's appeal. *See Worlock*, 243 N.C. App. at 669, 778 S.E.2d at 100.

Accordingly, as Plaintiff's appeal of the discovery order was not filed within thirty days of its entry, and he failed to show how the sanctions order was appealable as an interlocutory order that affected a substantial right, we dismiss Plaintiff's appeal. *See Watson*, 288 N.C. App. at 267, 885 S.E.2d at 860; *see also Worlock*, 243 N.C. App. at 669, 778 S.E.2d at 100.

III. Conclusion

We conclude that Plaintiff's appeal from the order granting Defendants' motion to compel discovery was untimely, and we therefore dismiss that issue. We further conclude that the order imposing sanctions is not properly before us as it is an interlocutory order and Plaintiff failed to show the order imposing sanctions affected a substantial right.

DISMISSED.

Judges ZACHARY and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 JUNE 2024)

BECK v. DePAOLO No. 23-764	Buncombe (20CVS4200)	Affirmed
BROOKS v. CUNNINGHAM No. 23-1074	Wake (22CVS8960)	Affirmed
COHEN v. CONT'L AEROSPACE TECHS., INC. No. 23-907	Nash (15CVS1134)	Appeal Dismissed Without Prejudice
HOFFMAN v. CURRY No. 23-398	Chatham (19CVD963)	Affirmed
IN RE E.C. No. 23-1128	Washington (21JA14-19) (22JA19)	Affirmed
IN RE H.D.B. No. 23-893	Stanly (14JT62) (19JT25) (20JT60)	Affirmed
IN RE I.F. No. 23-888	Transylvania (21JA26) (21JA27) (21JA28)	Affirmed.
IN RE J.R.S. No. 23-976	Onslow (21JT186)	Affirmed
IN RE K.E.L. No. 23-972	Wake (20JT174) (20JT175)	Affirmed
IN RE K.S. No. 24-65	Forsyth (11JB140)	Affirmed
IN RE WHITE OAK MISSIONARY BAPTIST CHURCH No. 23-441	Halifax (21CVS159)	Affirmed
MASHBURN v. CHANDLER No. 23-1042	Cherokee (20CVS292)	Affirmed
RAPER v. RAPER No. 23-922	Iredell (21CVD2569)	Dismissed

ROBBINS v. ROBBINS No. 23-860	Harnett (19CVD2621)	Dismissed
STATE v. ALSTON No. 23-999	Wake (21CR210945-910)	No Error
STATE v. BANNISTER No. 24-66	Pitt (22CRS53523)	No Error
STATE v. DAVIS No. 23-795	Onslow (17CRS55146)	No Error
STATE v. DURNER No. 22-545	Carteret (18CRS53879)	No Error
STATE v. FRIZZELL No. 23-237	Lee (19CRS495-96)	No Error
STATE v. GOMEZ No. 23-1129	Wake (21CRS216656-910)	No Error
STATE v. GREEN No. 23-475	Transylvania (20CRS169-171)	Dismissed
STATE v. HINTON No. 23-673	Edgecombe (20CRS51943)	No Error
STATE v. McDUFFIE No. 23-836	Harnett (18CRS53832)	No Error
STATE v. McNAIR No. 23-541	Pitt (20CRS55803) (21CRS15) (21CRS53836)	No Error In Part; Vacated In Part and Remanded.
STATE v. MORALES No. 23-708	Wake (18CRS223187)	No Error
STATE v. PALMER No. 23-901	Craven (21CRS50247) (22CRS643)	No Error
STATE v. PRICE No. 22-915	Chowan (19CRS208) (19CRS209)	No Error
STATE v. RANGEL No. 23-966	Mecklenburg (15CRS207225-27)	Affirmed
STATE v. TALLEY No. 23-804	Haywood (21CRS52359)	No Error in Part; Vacated in Part and Remanded

STATE v. WEBSTER No. 23-956	McDowell (21CRS51332) (21CRS51334)	No Error

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