294 N.C. App.—No. 3 Pages 318-550

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 5, 2025

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 18 JUNE 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Judicial review—agency final decision—proper standards of review applied— In a contested case initiated by a licensed home health care agency (petitioner) enrolled in the North Carolina Medicaid Program, the superior court did not err in denying petitioner's petition for judicial review and affirming the final decision of the Administrative Law Judge (ALJ) upholding the denial by the Department of Health and Human Services (respondent) of claims submitted by petitioner totaling $982,789.50. The superior court applied the proper standards of review to petitioner's petition—whole record review of factual determinations and de novo review of legal questions—in its decision and identified specific evidence in the record that supported the ALJ's determinations, including respondent's documentation of each denied claim and petitioner's noncompliance with the Medicaid Program requirements

APPEAL AND ERROR

of her appeal and, where her motion to dismiss the firearm charge was insufficient to preserve a challenge to the sufficiency of the evidence with regard to involuntary manslaughter, the appellate court invoked Appellate Rule 2 to consider the merits of defendant's appeal as to the manslaughter conviction. **State v. Cable, 452.**

Preservation of issues—courtroom restraints—invited error—failure to object—Defendant failed to preserve for appellate review any challenge to the use of courtroom restraints during his trial for drug and firearm offenses. Further, where defendant did not object to being shackled, but merely asked to be seated before the jury entered the courtroom so that they could not see his restraints, any error was invited and therefore waived. **State v. Bruer, 442.**

Preservation of issues—failure to object to sufficiency of evidence—appeal dismissed—Where defendant did not move to dismiss a misdemeanor charge of making harassing phone calls for lack of sufficient evidence, he failed to preserve for appellate review a sufficiency challenge, and the appellate court declined to invoke Appellate Rule 2 to consider the issue. **State v. Rager, 482.**

ATTORNEYS

Discipline—appellate review—whole record test—conclusions regarding misconduct—findings of fact supported and sufficient—In a disciplinary proceeding in which the attorney was alleged to have violated multiple Rules of Professional Conduct from a wide range of misconduct—including by committing multiple tax-related crimes and mortgage fraud; mishandling client funds; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation—substantial evidence (in view of the whole record test) supported each of the factual findings by the Disciplinary Hearing Commission (DHC) and its conclusions that the attorney engaged in misconduct. Given that result in the adjudication phase of the hearing, the DHC did not err in then proceeding to the disposition phase to determine the appropriate discipline to impose. **N.C. State Bar v. Key, 372.**

Discipline—failure to consider attorney's commission of multiple felonies and bad faith obstruction of disciplinary proceeding—remand required—In the adjudicatory phase, the Disciplinary Hearing Commission (DHC) did not err in failing to conclude that the attorney violated Rule of Professional Conduct 8.4(b) by committing a federal crime involving fraud and false statements where the DHC did not make a finding of willfulness—an essential element of that offense—in connection with the attorney's inaccurate tax filings. In the disposition phase, the DHC's findings of fact were supported by substantial evidence in view of the whole record, with the exception of a portion of one finding regarding the attorney's provision of shelter to the homeless population in his community. However, the DHC abused its discretion in deciding the appropriate discipline to impose without considering, as required by the Administrative Code, the attorney's commission of tax-related felonies (27 N.C.A.C. 1B.0116(f)(2)(D)) and his bad faith obstruction of the disciplinary process (27 N.C.A.C. 1B.0116(f)(3)(M)). Accordingly, the portion of the order of discipline suspending the attorney's license for five years was vacated, and the matter was remanded for further proceedings. **N.C. State Bar v. Key, 372.**

CHILD CUSTODY AND SUPPORT

Custody—modification—temporary order did not become a permanent order by operation of time—The trial court erred in determining that a temporary

consent order (as modified) had become a permanent custody order "by acquiescence"—that is, because neither party set the matter for further hearing in a reasonable time. The language of the original consent order—including its title "Temporary Consent Order" and multiple uses of the word "temporary" within—indicate that the trial court and the parties intended that it be entered without prejudice to any party; thus, the original order was a temporary custody order. Further, the record evidence showed that, despite a number of delays in court proceedings due to the Covid-19 pandemic and issues regarding plaintiff's counsel, plaintiff never let more than 7 months pass without actively pursuing court action regarding the issue of child custody. Accordingly, the matter was remanded for a hearing on permanent custody. **Lawrence v. Lawrence, 355.**

CONTRACTS

Breach of contract—loss of business investment—promissory note—officer's personal guaranty—In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's breach of contract claim against the CEO of the business (defendant) under a Convertible Promissory Note (pursuant to which plaintiff pledged to loan the company money), because, although defendant signed the note in his official capacity as CEO, he did so as an agent of the company; therefore, he was neither liable as an officer of the company nor a party to the promissory note. However, the trial court erred by dismissing plaintiff's breach of contract claim regarding defendant's Personal Guaranty, under which defendant guaranteed a portion of plaintiff's investment, and which plaintiff alleged defendant failed to fulfill. Any dispute regarding whether defendant's guaranty was terminated when his employment with the company ended—whether voluntarily or not—was a factual issue not appropriate for resolution at the pleading stage. **Hale v. MacLeod, 318.**

CRIMINAL LAW

Jury instructions—special instruction—not submitted in writing—not an accurate statement of law—In a trial on multiple charges related to a home break-in, the trial court did not err in denying defendant's request for a special jury instruction, namely, that a latent palm print matched to defendant found on the shotgun recovered from the victim's apartment could only be considered evidence of defendant's guilt if the jury believed that the print "was found in the place where the crime was committed under such circumstances and could only have been put there when the crime was committed." The special jury instruction was not submitted to the trial court in writing and did not constitute a correct application of the law to the facts of defendant's case in that, as to the only offense on which defendant was convicted—possession of firearm by a felon—the evidence before the jury demonstrated that defendant could only have placed his palm print on the firearm at a time when he was a felon and, thus, whether that placement occurred during the burglary, robbery, and assault leading to the additional charges (of which defendant was acquitted) was irrelevant. **State v. Young, 518.**

Prosecutor's arguments—reference to excluded evidence—In a trial on charges of first-degree burglary, robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon—only the latter of which resulted in a guilty verdict from the jury—the trial court did not err in failing to intervene in the absence of an objection by defendant

when, during closing arguments, the prosecutor described a detective's reference to photographs recovered from defendant's cellphone depicting defendant holding a firearm as "important evidence" even though the trial court had excluded the photographs themselves after determining that their probative value was substantially outweighed by their prejudicial impact. As the detective had been allowed to testify about the photographs without any objection by defendant, the prosecutor's reference to testimony already in evidence was not improper, much less grossly improper and prejudicial. **State v. Young, 518.**

Waiver of jury trial—statutory inquiry—failure to conduct—new trial granted—Defendant was granted a new trial on a misdemeanor charge of making harassing phone calls because the superior court failed to conduct an inquiry, pursuant to N.C.G.S. § 15A-1201, to determine whether defendant knowingly and voluntarily waived his right to a jury trial. Although the State represented to the trial court that defendant had previously waived his right, there was nothing in the record to indicate that defendant—who appeared pro se in district court for a bench trial—knew or had reason to know that he was entitled to a jury trial in superior court. Further, where the evidence of guilt was not overwhelming, there was a reasonable possibility that a jury would have reached a different result. **State v. Rager, 482.**

DIVORCE

Equitable distribution—distributive award—classification, valuation, and distribution of property—remand for additional findings—The trial court's equitable distribution order—distributing the marital estate equally, which was not challenged on appeal, and requiring the wife to pay a distributive award to the husband as a cash lump sum of $44,420.40—was affirmed in part and reversed and remanded in part. Specifically, the trial court properly classified, valued, and distributed property between the parties, including the wife's student loan debt, funds from a loan taken out against a life insurance policy, and debt from a subordinate lien on the marital home (resulting from a loan deferral, which reduced the amount of equity in the home). Further, the wife did not demonstrate prejudice from a nine-month delay in entry of the order. However, two portions of the order were reversed and, on remand, the trial court was directed to: correct a clerical error; add a finding and table entry in its order regarding the stipulated classification and distribution of the life insurance liability; make additional findings on whether the presumption of in-kind distribution had been rebutted and whether the wife had sufficient liquid assets to pay the distributive award and, if not, to consider the sale of the marital home, and; to hold a hearing if either party requested to present additional evidence. **Sapia v. Sapia, 419.**

EVIDENCE

Hearsay statements and defendant's silence—recorded jailhouse telephone calls—no error or plain error—In a prosecution resulting in defendant's conviction for second-degree murder in connection with a fatal shooting, the trial court did not err by admitting recordings of two jailhouse telephone calls between defendant and an unidentified female during which—after an automated message warned that the calls were subject to recording and monitoring—defendant did not offer a denial to the female's report of neighborhood gossip that defendant was the shooter, instead replying that someone had been trying to rob him. The recordings: were relevant under Rule of Evidence 401 as defendant's silence when told that neighbors

believed he fired the fatal shot was some evidence of guilt; were not unduly prejudicial under Rule of Evidence 403 because of the female's hearsay reports of neighborhood sentiment in light of the trial court's limiting instruction that the jurors should not consider those reports for the truth of the matter asserted; and did not implicate defendant's constitutional rights to silence, due process, or a fair trial because they were made freely and voluntarily to a private individual rather than to a State actor. **State v. Saddler, 496.**

Pretrial photographic identification—impermissibly suggestive—harmless beyond a reasonable doubt—In a trial on multiple charges related to a home break-in where defendant's identity as the perpetrator was at issue, the trial court's admission of the victim's pretrial identification of defendant was error in light of its finding of fact that the identification was impermissibly suggestive because law enforcement had provided the victim with defendant's name as an arrested suspect whose palm print matched one recovered from the shotgun used against the victim, and the victim then researched defendant online and attended defendant's bond hearing. However, given defendant's acquittal on all charges other than possession of a firearm by a felon—for which other evidence was introduced, including that defendant was already a felon when he gained access to the gun that had his palm print on it—any error in the identification of defendant as the perpetrator of the burglary, robbery, and assault against the victim was harmless beyond a reasonable doubt as to the firearm possession charge **State v. Young, 518.**

Prosecutorial misconduct—potential impeachment evidence withheld—no prejudice shown—In a prosecution resulting in defendant's conviction for second-degree murder in connection with a fatal shooting from a vehicle that sped away, even if the knowledge of a former district attorney regarding an embezzlement investigation of a law enforcement witness for the State was imputed to the district attorney office employees working on defendant's case, defendant could not demonstrate prejudice where: (1) the witness in question testified that, although gunshot residue was detected in a vehicle, no gunshot residue was detected on defendant or his clothing; and (2) significant other evidence of defendant's guilt was before the jury. **State v. Saddler, 496.**

FIDUCIARY RELATIONSHIP

Breach of fiduciary duties—loss of business investment—claim not available to creditor—In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's claim against the CEO of the business (defendant) for breach of fiduciary duties because defendant was not a controlling shareholder and plaintiff was a creditor, not a shareholder and, therefore, there was no fiduciary relationship between the two men. Further, even assuming defendant owed a duty to plaintiff during the company's insolvency, any duty ceased once the company transferred its assets to an assignee LLC for the purposes of liquidating the company and distributing its assets. **Hale v. MacLeod, 318.**

FIREARMS AND OTHER WEAPONS

Failure to store a firearm to protect a minor—"in a condition that the firearm can be discharged"—applicable to loaded weapons only—In a prosecution arising from the death of a teenager from a self-inflicted gunshot wound, defendant's conviction for failure to store a firearm to protect a minor (N.C.G.S. § 14-315.1) was

reversed where, after the appellate court determined that the statutory language that the firearm must be "in a condition that [it] can be discharged" was ambiguous on its face, the appellate court applied the rule of lenity and principles of statutory interpretation and concluded that the legislature intended for the statute to apply only to loaded firearms. Here, where defendant left an unloaded revolver in a holster on top of a gun safe, the State had not proven this element of the offense. **State v. Cable, 452**.

Failure to store a firearm to protect a minor—firearms in house other than the one discharged—elements not met—In a prosecution arising from the death of a teenager from a self-inflicted gunshot wound, defendant's conviction for failure to store a firearm to protect a minor (N.C.G.S. § 14-315.1)—based on the presence of unsecured firearms in defendant's home other than the revolver used by the victim—was reversed for lack of evidence that the victim gained access to the firearms and caused the death of another not in self-defense, both of which were necessary elements of the charged offense. **State v. Cable, 452.**

Possession of a firearm by a felon—constructive possession—nonexclusive control of premises—sufficiency of evidence—The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a felon because the State failed to present substantial evidence linking defendant (a male) to a firearm that law enforcement officers found in a closed bedroom dresser drawer in the home rented by defendant's girlfriend. The totality of the circumstances did not support a theory of constructive possession by defendant—even though he was seen entering the home just before the officers' search, the mailbox outside listed defendant's last name, and some men's clothes were in the bedroom closet—where the decor and possessions indicated that the bedroom was occupied by a female, the dresser drawer contained only the girlfriend's personal items, and the girlfriend asserted that the gun was hers and that defendant's last name on the mailbox was a result of his daughter (who had the same surname) having previously lived with her. **State v. Norris, 475.**

Possession of a firearm by a felon—constructive possession—sufficiency of evidence—The State presented substantial evidence from which a jury could reasonably infer that defendant constructively possessed a firearm for purposes of the offense of possession of a firearm by a felon, including that, when law enforcement executed a search warrant at defendant's workplace, defendant was found near an office where three firearms were discovered, one of which was located in a drawer that also contained a bill of sale made out to defendant for a truck that he admitted purchasing. Further, there was overwhelming evidence of defendant's dominion and control over the premises, which he referred to as "my shop" and which was known by the community to be his, and to which he had invited law enforcement to conduct drug busts on numerous occasions. **State v. Bruer, 442.**

FRAUD

Constructive—loss of business investment—lack of fiduciary relationship—In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's claim against the CEO of the business (defendant) for constructive fraud because there was no fiduciary relationship between the two men, without which a claim for constructive fraud fails. **Hale v. MacLeod, 318.**

a citation for reckless driving, defendant did not preserve for appellate review her argument that there was a fatal variance between the conduct alleged in the citation and the superior court's jury instruction regarding the offense because she failed to move for the offense to be charged in a new pleading pursuant to N.C.G.S. § 15A-922(c) in the district court—the court of original jurisdiction. Further, even assuming that such a variance existed, the superior court did not commit plain error in instructing the jury on the charge of reckless driving because defendant did not demonstrate prejudice where the citation incorporated by reference the citing officer's crash report—which noted defendant's two admissions to intentionally "brake-checking" the driver who subsequently collided with defendant's vehicle from the rear—and the evidence included uncontroverted testimony from the officer regarding defendant's admissions as well as body-cam footage of defendant's statements. **State v. Carpio, 465.**

Reckless driving charged by citation—subject matter jurisdiction—statutory right to new pleading not timely invoked—In a proceeding that resulted in defendant's conviction by a jury on one count of reckless driving, the superior court had subject matter jurisdiction and thus properly denied defendant's motion to dismiss the charge on the basis of alleged defects in the citation she was issued where defendant did not seek to have the offense charged in a new pleading as provided by N.C.G.S. § 15A-922(c) in the district court—here, the court of original jurisdiction—and, accordingly, was no longer in a position to assert her statutory right to object to trial by citation in the superior court. **State v. Carpio, 465.**

SECURITIES

Securities fraud—loss of business investment—no evidence of security—lack of reliance to plaintiff's detriment—In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's claims against the CEO of the company (defendant) for securities fraud pursuant to N.C.G.S. § 78A-56 (providing causes of action for violations of, relevant to plaintiff's claims, sections 78A-8(1) and 78A-24). First, the "Note Package" (a set of business documents that included the promissory note signed by plaintiff pledging a loan to the company) was not a security that was required to be registered. Second, plaintiff failed to identify an actual false statement of material fact or concealment of a material fact by defendant, and plaintiff failed to show that he justifiably relied to his detriment on any misrepresentation, particularly in light of the numerous disclaimers contained in the Note Package, one of which specifically stated that plaintiff could lose the entire amount of his loan. **Hale v. MacLeod, 318.**

UNFAIR TRADE PRACTICES

Loss of business investment—in or affecting commerce—claim inapplicable for capital fundraising—In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's claim against the CEO of the company under North Carolina's Unfair and Deceptive Trade Practices Act (N.C.G.S. § 75-1.1) because plaintiff's loan to the company pursuant to a promissory note was not a transaction for the regular purchase and sale of goods but constituted capital fundraising and, therefore, was not activity "in or affecting commerce." **Hale v. MacLeod, 318.**

Self-help eviction—conclusions of law supported by competent evidence—In a case arising from a self-help eviction executed by the homeowner and her property manager (defendants) against the home's resident (plaintiff), the trial court did not err in determining, as the fact-finder in a bench trial, that defendants violated N.C.G.S. § 75-1.1—the Unfair and Deceptive Practices Act (UDPA)—when, after the homeowner's complaint for summary ejectment was dismissed with prejudice, she locked plaintiff out of the home and directed the manager to put plaintiff's belongings on the curb, resulting in the loss of nearly $10,000 worth of plaintiff's personal property in addition to depriving plaintiff of his lawful residence. The trial court did not fail to consider all of the relevant evidence before it—including emails, text messages, photographs, journal entries, prior court orders, and affidavits submitted by plaintiff—in determining that defendants' actions were not in compliance with the procedures set forth in the Ejectment of Residential Tenants Act (N.C.G.S. §§ 42-25.6–42-25.9) and, accordingly, constituted violations of the UDPA. Further, because defendants failed to make any argument at trial regarding plaintiff's alleged problematic behavior—which in any event would have been irrelevant as to plaintiff's UDPA claim—or the effect of res judicata, defendants' arguments on those issues were not properly before the appellate court. **Myers v. Broome-Edwards, 364.**

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.

HALE v. MACLEOD

[294 N.C. App. 318 (2024)]

MIKE HALE, PLAINTIFF
v.
WILLIAM ERIC MACLEOD, MD, JONATHAN PAGE, AND
GREEN FARMS COMPANY, LLC, DEFENDANTS

No. COA23-285

Filed 18 June 2024

1. Fraud—fraud and fraudulent inducement—loss of business investment—unfulfilled promises—prospective business performance

In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's claim against the CEO of the business (defendant) for fraudulent inducement and fraud where several of plaintiff's allegations involved mere unfulfilled promises and not deception or concealment of facts. Plaintiff's allegations involving statements about the future prospects of the business did not satisfy the elements of fraud where the business documents he was given contained extensive disclaimers, including that plaintiff could suffer a total loss of his investment. Finally, where plaintiff alleged that one or more people failed to disclose information or gave false information, plaintiff failed to meet the specificity requirement with regard to the identity of the person making the representation and what information he alleged should have been provided.

2. Fiduciary Relationship—breach of fiduciary duties—loss of business investment—claim not available to creditor

In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's claim against the CEO of the business (defendant) for breach of fiduciary duties because defendant was not a controlling shareholder and plaintiff was a creditor, not a shareholder and, therefore, there was no fiduciary relationship between the two men. Further, even assuming defendant owed a duty to plaintiff during the company's insolvency, any duty ceased once the company transferred its assets to an assignee LLC for the purposes of liquidating the company and distributing its assets.

3. Fraud—constructive—loss of business investment—lack of fiduciary relationship

In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court

properly dismissed plaintiff's claim against the CEO of the business (defendant) for constructive fraud because there was no fiduciary relationship between the two men, without which a claim for constructive fraud fails.

4. Contracts—breach of contract—loss of business investment—promissory note—officer's personal guaranty

In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's breach of contract claim against the CEO of the business (defendant) under a Convertible Promissory Note (pursuant to which plaintiff pledged to loan the company money), because, although defendant signed the note in his official capacity as CEO, he did so as an agent of the company; therefore, he was neither liable as an officer of the company nor a party to the promissory note. However, the trial court erred by dismissing plaintiff's breach of contract claim regarding defendant's Personal Guaranty, under which defendant guaranteed a portion of plaintiff's investment, and which plaintiff alleged defendant failed to fulfill. Any dispute regarding whether defendant's guaranty was terminated when his employment with the company ended—whether voluntarily or not—was a factual issue not appropriate for resolution at the pleading stage.

5. Unfair Trade Practices—loss of business investment—in or affecting commerce—claim inapplicable for capital fundraising

In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's claim against the CEO of the company under North Carolina's Unfair and Deceptive Trade Practices Act (N.C.G.S. § 75-1.1) because plaintiff's loan to the company pursuant to a promissory note was not a transaction for the regular purchase and sale of goods but constituted capital fundraising and, therefore, was not activity "in or affecting commerce."

6. Appeal and Error—declaratory relief—failure to argue—abandonment of claim

In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, where plaintiff failed to include any argument in his appellate brief regarding the trial court's dismissal of his claim for declaratory relief, this issue was deemed abandoned.

7. Securities—securities fraud—loss of business investment—no evidence of security—lack of reliance to plaintiff's detriment

In an action arising from plaintiff's loss of a $250,000 business investment after the business entered liquidation, the trial court properly dismissed plaintiff's claims against the CEO of the company (defendant) for securities fraud pursuant to N.C.G.S. § 78A-56 (providing causes of action for violations of, relevant to plaintiff's claims, sections 78A-8(1) and 78A-24). First, the "Note Package" (a set of business documents that included the promissory note signed by plaintiff pledging a loan to the company) was not a security that was required to be registered. Second, plaintiff failed to identify an actual false statement of material fact or concealment of a material fact by defendant, and plaintiff failed to show that he justifiably relied to his detriment on any misrepresentation, particularly in light of the numerous disclaimers contained in the Note Package, one of which specifically stated that plaintiff could lose the entire amount of his loan.

Appeal by plaintiff from an order entered 29 August 2022 by Judge Daniel A. Kuehnert in Buncombe County Superior Court. Heard in the Court of Appeals 20 September 2023 in session at Wake Forest University School of Law in the City of Winston-Salem pursuant to N.C. Gen. Stat. § 7A-19(a).

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, and Allen Stahl & Kilbourne, PLLC, by James. W. Kilbourne, Jr. for plaintiff-appellant.

Fitzgerald Hanna & Sullivan, PLLC, by Douglas W. Hanna, for Jonathan Page, defendant-appellee.

WOOD, Judge.

Mike Hale ("Hale") appeals the trial court's 29 August 2022 order dismissing with prejudice his complaint against Green Farms Company, LLC ("GF Co."), its Manager William MacLeod ("MacLeod"), and its CEO, Jonathan Page ("Page"), alleging numerous causes of action involving fraud, securities fraud, breach of fiduciary duties, breach of contract, and unfair and deceptive trade practices. GF Co. operated in the hemp and CBD industry. We affirm in part and reverse in part.

I. Factual and Procedural History

Hale and his wife were friends with MacLeod's sister, who at some point introduced them to MacLeod. Hale learned MacLeod was an orthopedic surgeon who was no longer practicing medicine but was now involved in successful business ventures. On or about 8 March 2020, Hale met with MacLeod to discuss MacLeod's business ventures, including hemp and cannabidiol ("CBD"). During their meeting, Hale told MacLeod that he was interested in investing in local business opportunities. That same day, Hale emailed MacLeod to say that he was specifically interested in participating in the initial round of funding for the hemp and CBD business. Thereafter, MacLeod introduced Hale to Page, the CEO of GF Co. MacLeod and Page told Hale that MacLeod was the majority and controlling shareholder of GF Co., and that they both were personally liable for the success of GF Co.

On 12 March 2020, all three men participated in a Zoom video conference call during which Page and MacLeod made representations regarding the state of GF Co. and the hemp and CBD industries. After the call, Page sent two documents to Hale via email: (1) a competitive analysis to help Hale better understand the CBD market, key players in it, and GF Co.'s market share, and (2) a four-year Cash Flow Return on Investment projection analysis. In further emails, Page and MacLeod discussed in detail GF Co.'s current business, customers, financial information, and confidential information. Page represented in writing that the Return-on-Investment analysis showed: "$5 [million] invested for 10% of the company generates 7.2 x cash on cash return in 4 years. This is merely the gain on the interim distributions made from cash (not on a liquidation event). Additional gain would be realized on years 5 and forward on liquidation." Page also represented in writing that GF Co. had engaged Emmet Moore ("Moore"), a Certified Public Accountant, as "CFO and VP of Finance." Page wrote that Moore had previous experience of executing two IPOs (Initial Public Offerings), raising over $2 billion in debt and equity financing, and managing extensive mergers and acquisitions activity. Later in March, Moore made representations to Page regarding GF Co.'s financial condition and continuing growth prospects, as well as his own confidence in and commitment to GF Co.'s management.

Page subsequently introduced Hale to Mark Van Kirk ("Van Kirk"). Page informed Hale that Van Kirk was responsible for putting together a financial instrument for GF Co. MacLeod, Van Kirk, and Page each stated to Hale that to ensure he would be repaid funds, they wanted him to loan capital to GF Co. as a secured creditor rather than taking an equity interest in GF Co.

MacLeod, Van Kirk, and Page provided Hale with a "capitalization table" which represented GF Co. had a "Pre-Money Valuation" of $160,000,000.00 and had already raised $20,770,550.00 in "Total Capital." MacLeod and Page told Hale that GF Co.'s assets were worth more than enough to ensure that, in the worst-case scenario, Hale's loan would be repaid in full in the event of liquidation of the business. Subsequently, Van Kirk told Hale that he was not as confident in GF Co. as were MacLeod and Page, and for that reason he insisted the deal be offered to Hale as a loan with personal guarantees from MacLeod and Page. Van Kirk explained that he was involved in structuring and documenting a "convertible note" secured by GF Co.'s assets and personally guaranteed by both MacLeod and Page.

On or about 2 July 2020, "at the direction, with the approval of and on behalf of MacLeod," Page provided Hale with a package of documents titled "Convertible Note Investor Package" (the "Note Package"), dated June 2020. Hale signed the Convertible Promissory Note on 2 July 2020 by which he agreed to loan $250,000.00 to GF Co.

The Note Package contains "Letters from Management" from both MacLeod as Chairman and Page as CEO of GF Co. Page's signed Personal Letter states, among other things:

> At Green Farms Co, we've made substantial progress towards scaling up this company to a billion-dollar valuation (with over $100 million in our deal pipeline today)[.]
>
> . . .
>
> *That's why I have chosen to personally guarantee this Note Series*, *pledging my personal balance sheet*, because I see the CBD green rush right around the corner and I know with this next round of financing, Green Farms will be in the right position at the right time to seize it.

(Emphasis added).

The Note Package also contained a "Pro-Forma and Deck," which was a slideshow of information about GF Co.'s business prospects. The slideshow stated GF Co. could "conservatively generate $18.6 MM in monthly revenues." The "Pro-Forma and Deck" also contained a section titled "Capital Stock & Liquidation Analysis." This section represented that GF Co. had $20,770,550.00 "Total Capital" and $399,595.00 "Senior Debt," or just 1.9 percent of Total Capital. A slide titled "Pro Forma Liquidation Scenario Analysis" stated GF Co.'s liquidation value as $11,408,054.00, which included the projected value of assets purchased

with capital raised from the convertible note round. A slide titled "Green Farms Pipeline Detail" listed prospective business with other companies at various stages of the negotiation process—either "Contract," "LOI" (Letter of Intent), or "Pipeline," with most prospective business opportunities being "Pipeline" opportunities. The projected income statement predicted $22,945,191.00 in revenue by the end of 2020, and the projected cash flow statement predicted positive cash flow beginning by the end of 2021.

A separate section of the "Pro-Forma and Deck" titled "Convertible Note Round" detailed the "Convertible Note Terms." "Key Terms" of the note included "Full collateralization of principal by equipment from lab build-out and existing equipment" and "Personal guarantees from [MacLeod] and [Page] and a corporate guaranty." The Convertible Note Terms also stated: "Fully Collateralized" and "Full Guaranties." A "Convertible Note Summary" slide repeated these representations.

Included in the Note Package provided by Page was a document titled "Convertible Promissory Note" signed by Page *in his capacity as CEO*. Hale was listed as the "Holder" of the note. The Convertible Promissory Note dated 2 July 2020 stated a loan amount of $250,000.00. The Convertible Promissory Note included a disclaimer stating that the instrument was not registered under the Securities Act of 1933 or any other securities law pursuant to applicable exemptions.

Under the terms of the Convertible Promissory Note, repayment of the note would be secured by the property and assets set forth in Schedule 1 which was attached to the Convertible Promissory Note and listed various real estate and personal property. The Convertible Promissory Note further stated:

> To secure the payment of the Notes, promptly when due, and the Company's obligations under the Notes, the Company hereby pledges and assigns to the Holders, and hereby grants to the Holders, a first ranking security interest in and lien on the Collateral not already encumbered. Borrowers shall provide Holders a subordinate lien and security interest on Collateral already encumbered.

Regarding filing financing statements, the Convertible Promissory Note provided:

> Upon the final closing of [the note], the Company hereby irrevocably authorizes the Administrative Agent[1] . . . at

1. The Convertible Promissory Note stated Van Kirk was the Administrative Agent.

> any time and from time to time to file in any filing office in the appropriate UCC jurisdictions any initial financing and continuation statements and amendments thereto . . . . The Company hereby covenants to give, execute, deliver, file and/or record any financing statement, notice, instrument, document, agreement, or other papers requested by the Administrative Agent (in his absolute and sole discretion) to create, preserve or perfect the security interest granted pursuant hereto or, after the occurrence of an Event of Default[,] . . . to enable the Holders to exercise and enforce their rights hereunder with respect to such pledge and security, including without limitation, causing any or all of the Collateral to be transferred of record into the name of Holders or their nominee.

The Convertible Promissory Note included disclaimers for economic risk, stating that the Holder acknowledges he could suffer a complete loss of the Holder's investment. The Convertible Promissory Note also included a disclaimer regarding the "Forward-Looking Statements" within the Note Package, which stated that there "is no assurance that such statements will prove accurate, and the Company has no obligation to update such statements."

As for guarantees of the loan, the Convertible Promissory Note stated MacLeod and Page

> will personally guarantee the aggregate principal balance under this Note then outstanding (the "Guarantee Amount"). Each guarantor will carry only a percentage of the Guarantee Amount equal to the guarantor's percent ownership in the Company. For example, Mr. Page owns five percent (5%) of the Company. His personal guarantee will be limited to five percent (5%) of the Guarantee Amount. A guarantor will be relieved of said guarantor's personal guarantee if said guarantor . . . no longer owns any portion of the Company or the Company has terminated the guarantor's employment with the company.

Page signed a separate document titled "Personal Guaranty," also dated 2 July 2020, identifying Page as a "Guarantor," and stating his guarantee was up to the amount of the "Cap," which was defined as five percent of the value of the Convertible Promissory Note, corresponding to Page's five percent ownership in GF Co. At Section 7, the Personal Guaranty contained a "Release of Guaranty" clause which stated Page would be relieved of his obligations if he "no longer owns any portion of the

Company . . . or the Company has terminated [Page's] employment with the Company."

Section 11 of the Personal Guaranty contained a "Governing Law; Submission to Jurisdiction Clause" that stated:

> The Guarantor [Page] irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever, whether in law or equity, or whether in contract or tort or otherwise, against the Holder, in any way relating to this Guaranty or the transactions contemplated hereby, in any forum other than the state courts located in Buncombe County, North Carolina or the U.S. District Court for the Western District of North Carolina[.]

Schedule 2 was attached to the Convertible Promissory Note and stated the "Company will achieve the minimum Revenue measured on a trailing twelve-month basis of not less than" $35,000,000.00 by 30 June 2021. Schedule 2 further covenanted that GF Co. would furnish to Hale:

> (i) the unqualified, audited fiscal year-end financial statements of the Company . . . no later than sixty (60) days after the Date of Note for the year 2019 and then no later than June 30 of the subsequent fiscal year
>
> (ii) no later than 30 days after the end of each calendar quarter, the internally prepared quarterly financial statements of the Company, certified by Company's chief financial officer, each containing consolidated and consolidating profit and loss statements for the quarter then ended and for Company's fiscal year to date, consolidated and consolidating balance sheets as at the last day of such quarter and a consolidated statement of cash flows for the quarter then ended and for Company's fiscal year to date.

After Hale made the $250,000.00 loan, GF Co. did not provide Hale any of the financial information GF Co. covenanted to furnish in Schedule 2 of the Convertible Promissory Note. Hale did not receive any communication from GF Co., MacLeod, or Page until he received an email on 14 May 2021 notifying him that GF Co. had assigned its assets and filed for liquidation in a Michigan circuit court to distribute assets (the "Michigan Liquidation").

On 18 May 2021, MacLeod and Page called Hale to inform him that GF Co. had shuttered its business because it was no longer viable primarily

due to the price reduction of CBD oil. They also informed Hale they had caused GF Co. to file liquidation proceedings in Michigan and that they both had voluntarily resigned from GF Co.'s management. They stated GF Co.'s assets were valued at a discounted rate of $6.1 million, that secured creditors, including Hale, were owed $5.3 million, and asserted they believed all creditors would be paid. In June 2021, Hale emailed Van Kirk regarding performing his responsibilities as Administrative Agent. Van Kirk expressed surprise and indicated his intent to resign as Administrative Agent.

On 22 June 2021, Hale's lawyer served a Notice of Default and Demand to GF Co.'s principal place of business in Asheville, North Carolina, and to MacLeod's and Page's email addresses. On 28 June 2021, Steven Gross ("Gross"), representing MacLeod and Page, emailed Hale's lawyer. Gross stated that GF Co. had transferred all legal and equitable title to all of its assets to a Series LLC responsible for liquidating GF Co. and distributing the liquidation proceeds to its creditors. Gross explained it was GF Co.'s belief that an assignment for the benefit of creditors under Michigan law (where GF Co.'s real estate was located) would be "the most efficient means of liquidating its assets in an orderly, controlled manner." Gross further explained GF Co. assigned ownership of all of its assets to the assignee LLC "much like what happens in a [C]hapter 7 Bankruptcy." Gross reported Hale had the right to file UCC financing statements and that the Convertible Promissory Note did not require GF Co., MacLeod, or Page to file financing statements. Gross further stated that because Hale did not file UCC financing statements, the assignee LLC would likely treat Hale's claim as unsecured. Finally, Gross stated that because GF Co. had terminated MacLeod and Hale as required by the assignment of all of its assets, their obligations to guarantee the Convertible Promissory Note were released pursuant to Section 7 of the Personal Guaranty.

On 12 August 2021, Hale filed suit against Page, MacLeod, and GF Co. On 3 September 2021, Hale requested details regarding the operations at GF Co., including how GF Co. had used the proceeds of Hale's $250,000.00 loan, the actual sales numbers for the fiscal years 2019-2021, and the details regarding why and how MacLeod and Page resigned their employment. In his complaint, Hale stated, upon information and belief, GF Co.'s assets were sold for substantially less than $1,000,000.00. On 18 October 2021, MacLeod and GF Co. filed a motion to dismiss the complaint.

On 5 November 2021, Hale filed a First Amended Complaint (the "Amended Complaint") in which he alleged nine causes of action: (1)

fraudulent inducement; (2) fraud, including representations and concealment; (3) breach of fiduciary duties; (4) constructive fraud; (5) breach of contract, including the covenant of good faith and fair dealing; (6) unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1; (7) declaratory relief pursuant to N.C. Gen. Stat. § 1-253; and (8 and 9) in the alternative to the sixth cause of action, securities fraud and other violations of N.C. Gen. Stat. § 78A-56 under the North Carolina Securities Act.

On 1 December 2021, MacLeod and GF Co. renewed their motion to dismiss. On 7 December 2021, Page filed a motion to dismiss the Amended Complaint for failure to state a claim. On 22 August 2022, the trial court held a hearing on the motions to dismiss. On 29 August 2022, the trial court entered its order granting Page's motion to dismiss. On 8 September 2022, Hale voluntarily dismissed his complaint against MacLeod and GF Co. without prejudice. On 21 September 2022, Hale filed written notice of appeal of the trial court's order granting Page's motion to dismiss. All other facts are provided as necessary in our analysis.

II. Analysis

A. Standard of Review

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prod., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). We view "the allegations as true and in the light most favorable to the non-moving party." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (ellipsis omitted). Rule 9 of our Rules of Civil Procedure requires that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." N.C. R. Civ. P. 9(b). Our Supreme Court elaborated on the Rule 9 particularity requirements, stating:

> The particularity required by the rule generally encompasses the time, place and contents of the fraudulent representation, the identity of the person making the representation and what was obtained by the fraudulent acts or representations. The particularity required cannot be satisfied by using conclusory language or asserting fraud through mere quotes from the statute.

Terry v. Terry, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981).

"When reviewing pleadings with documentary attachments on a Rule 12(b)(6) motion, the actual content of the documents controls, not the allegations contained in the pleadings." *Schlieper v. Johnson*, 195 N.C. App. 257, 263, 672 S.E.2d 548, 552 (2009) (citing *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) for the proposition that "contrary terms of loan agreement attached to the complaint [are] controlling over allegations"). "The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings." *Builders Mut. Ins. Co. v. Glascarr Properties, Inc.*, 202 N.C. App. 323, 324, 688 S.E.2d 508, 510 (2010).

B. Causes of Action 1 and 2: Fraudulent Inducement and Fraud

[1] "A successful fraud claim requires a plaintiff prove: (1) representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. The elements for showing fraudulent inducement are identical." *Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc.*, 385 N.C. 250, 263–64, 891 S.E.2d 100, 112 (2023) (citation and quotation marks omitted).

"It is generally held, and is the law in this State, that mere unfulfilled promises cannot be made the basis for an action of fraud." *Williams v. Williams*, 220 N.C. 806, 810, 18 S.E.2d 364, 366 (1942); *see also Value Health Sols., Inc.*, 385 N.C. at 276, 891 S.E.2d at 120 ("Failure to reach an agreement on the amendment of the milestones does not support a finding that PRA knew it was false at the time it represented that PRA would work towards an amendment") (citing *Williams*). "There must be evidence of a misrepresentation of existing or ascertainable facts, as distinguished from a matter of opinion or representation relating to future prospects." *Value Health Sols., Inc.*, 385 N.C. at 274–75, 891 S.E.2d at 119 (quotation marks omitted).

Here, because the elements for showing fraud and fraudulent inducement are identical, we consider the first and second causes of action together. Hale alleged in his complaint that Page made representations by providing information in the Note Package and Convertible Promissory Note regarding, at a minimum: (1) favorable market conditions on the hemp and CBD industries; (2) GF Co.'s ability to obtain financing and favorable business returns (including, for example, the representation that GF Co. had $100 million of deals in the "pipeline"); (3) Page's covenant to bring any and all disputes relating to the Convertible Promissory Note and Personal Guaranty in Buncombe County, North Carolina; (4) Page's implied promise that he would remain as an officer

of GF Co. or did not specifically plan to utilize the "Release of Guaranty" clause to escape liability for his obligations under the Personal Guaranty; (5) Page's covenant to cause GF Co. to furnish quarterly financial statements; and (6) Hale would obtain status as a secured creditor through the efforts of GF Co. and/or Van Kirk as the Administrative Agent, specifically by filing a financing statement.

Hale's claims regarding venue, Page's alleged implied promise to remain employed as an officer of GF Co., Page's failure to furnish quarterly financial statements, and Page's failure to ensure Hale's security interest was perfected by filing a UCC financing statement assert claims regarding unfulfilled promises, not fraud. The claims constitute allegations that Page and/or MacLeod did not fulfill the terms of their agreements with Hale. Allegations that Page agreed to certain terms and failed to comply with such terms do not constitute proper claims of fraud because fraud claims must be plead with specificity and require an adequately stated claim that one party has deceived another. Therefore, we conclude Hale failed to state claims of fraudulent inducement or fraud based on obligations Page purported to undertake but failed to accomplish because these are claims regarding unfulfilled promises. *Value Health Sols., Inc.*, 385 N.C. at 275–76, 891 S.E.2d at 119–20.

We further conclude Hale has failed to adequately state claims of fraud in the pleadings regarding any of GF Co.'s prospective business performance. Hale pleads:

> Defendants MacLeod and/or Page's conduct including representations prior to and [at] the time of signing the Convertible Note and thereafter, including failures to disclose material information regarding the state of the Hemp and CBD oil market at the time induced the Promissory Note, preclude Hale from discovering the financial condition of the company.

The documentation provided by Page to Hale contained extensive disclaimers throughout, including the Convertible Promissory Note's statements that the Holder could suffer a complete loss on an investment in the company and there "is no assurance that such statements will prove accurate, and the Company has no obligation to update such statements." We further note Rule 9 of the Rules of Civil Procedure requires a plaintiff to plead the "identity of the person making the representation" and that the "particularity required cannot be satisfied by using conclusory language or asserting fraud through mere quotes from the statute." *Terry*, 302 N.C. at 85, 273 S.E.2d at 678. Here, Hale does not particularly

identify who he alleges fraudulently concealed information; rather, he alleges that "MacLeod and/or Page" failed to disclose information.

Most importantly, Hale alleges MacLeod and/or Page failed to disclose information in violation of their alleged contractual obligations to do so, which amounts to an unfulfilled promise rather than fraudulently concealing facts. Moreover, Hale does not particularly identify *what information* Page failed to provide and upon which Hale relied, in violation of Rule 9's particularity requirement.

Finally, Hale fails to demonstrate fraudulent inducement and fraud based solely on the facts Page and/or MacLeod are alleged to have claimed existed at the time, such as the purported $100 million in deals GF Co. had "in the pipeline." Significantly, Hale's complaint states that "The Personal Letter of Page includes representations *MacLeod intended Hale to rely on*, including without limitation: that GF Co. had $100 million in business in the 'pipeline today[.]' " (Emphasis added). During oral argument, Hale emphasized this "$100 million in the pipeline" representation as one of the key false statements of existing fact because it signaled the strong financial health of the company and in any event must have been false because GF Co. became insolvent less than a year later. Assuming arguendo that the statement was false, Hale alleges *MacLeod*, not Page, intended for him to rely upon the misrepresentation. Therefore, Hale fails to state a claim of fraudulent inducement or fraud by Page.

Because our appellate courts require claims of fraud to be based on particularly alleged existing facts, not merely on future prospects or unfulfilled promises, Hale fails to state claims of fraudulent inducement or fraud based on (1) any failure on Page's part to fulfill his obligations under the agreements between him and Hale; and (2) purported misrepresentations concerning GF Co.'s future financial performance. *Value Health Sols.*, 385 N.C. at 275–76, 891 S.E.2d at 119–20. Accordingly, we affirm the trial court's ruling as to these claims.

C. Cause of Action 3: Breach of Fiduciary Duties

[2] In his Amended Complaint, Hale alleges GF Co. and Page in his capacity as CEO breached their fiduciary duty to Hale as a secured creditor. The complaint specially alleges: "Upon information and belief, at some point in time during the time period described herein, GF Co. entered a Zone of Insolvency, which triggered heightened duties owed to GF Co.'s creditors," including Page's duties as the CEO to Hale as a secured creditor.

"A claim for breach of fiduciary duty requires the existence of a fiduciary relationship." *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004). This Court has defined a fiduciary relationship

> as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence, and it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Farndale Co., LLC v. Gibellini, 176 N.C. App. 60, 67, 628 S.E.2d 15, 19 (2006) (brackets, and ellipsis omitted).

This court in *Gibellini* noted, "it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders." *Id.* In contrast, "[a]s a general rule, directors of a corporation do not owe a fiduciary duty to creditors of the corporation." *Whitley v. Carolina Clinic, Inc.*, 118 N.C. App. 523, 526, 455 S.E.2d 896, 899 (1995). This Court provided further guidance in *Whitley*:

> [D]irectors of an insolvent corporation cannot as creditors of such corporation secure to themselves a preference. They must share ratably in the distribution of the company's assets. . . . [A]n insolvent corporation cannot in any way prefer the claims of its directors, officers or shareholders because they are not allowed to take advantage of their intimate knowledge of the corporate affairs or their position of trust to the detriment of other creditors."

Id. at 526, 455 S.E.2d at 899 (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 15.3, at 255 (4th ed. 1990)).

Whether Page owed a fiduciary duty to Hale depends on whether: (1) Page was a controlling shareholder or an officer of GF Co.; and, (2) Hale was a shareholder. Because Page was the CEO, he was an officer of GF Co. Moreover, Page was a shareholder of GF Co., owning a five percent (5%) interest in GF Co. and a co-trustee with MacLeod of Canyon Trust which owned fifty-seven and a half percent (57.5%) of GF Co. through Canyon Trust.[2] However, Hale was a creditor, not a shareholder. Clearly, the Convertible Promissory Note was convertible for a

2. While Page and MacLeod were co-trustees of the Canyon Trust, MacLeod was its sole beneficiary.

future percentage ownership interest in GF Co.; however, Hale does not contend that he executed his option to convert the Note into shares in the company.

Second, even if a duty were imposed upon Page toward Hale during GF Co.'s insolvency, such duty ceased once the Company transferred all of its assets to the Series LLC charged with the task of liquidating GF Co. and distributing the proceeds.

Finally, in the section titled "Conflicts of Interest & Other Matters," the Offering Memorandum states: "Fiduciary Duties[:] The Manager owes no fiduciary duties to the Company or to any members. Officers of the Company only owe those fiduciary duties specifically set forth in an employment agreement between the Company and said officer, if any." A careful review of the Record before us does not reveal the existence of a specific, contractual fiduciary duty imposed upon Page toward Hale because Page was not a controlling shareholder and Hale was not a shareholder. *Schlieper*, 195 N.C. App. at 263, 672 S.E.2d at 552. Hale's breach of fiduciary duty claim also fails. Accordingly, we affirm the trial court's dismissal of Hale's claim for breach of fiduciary duty.

D. Cause of Action 4: Constructive Fraud

[3] In *White*, this Court provided guidance regarding how to differentiate between stating a claim for breach of fiduciary duty versus stating a claim of constructive fraud:

> Although the elements of these causes of action overlap, each is a separate claim under North Carolina law. . . . To survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured. Intent to deceive is not an element of constructive fraud. The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself.

White, 166 N.C. App. at 293–94, 603 S.E.2d at 155–56 (citations omitted).

If no fiduciary relationship exists, then no further analysis is required for a claim of constructive fraud. *See id.* at 294–95, 603 S.E.2d at 156 ("Since we have already found sufficient allegations of a fiduciary relationship, the controlling issue as to the constructive fraud claim is whether the complaint sufficiently alleges a wrongful benefit").

As no fiduciary relationship existed between Page and Hale, our analysis of constructive fraud ends. We hold Hale failed to state a claim of constructive fraud. We affirm the trial court's dismissal of Hale's claim of constructive fraud.

E. Cause of Action 5: Breach of Contract

[4] "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).

"[T]he usual rule [is] that an officer of a corporation will not be individually bound when contracting within the scope of his employment as an agent of the corporation." *Howell v. Smith*, 261 N.C. 256, 260, 134 S.E.2d 381, 384 (1964). "When a corporate officer acts as an agent for the corporation and enters into a contract with a third party, providing notice that he is acting as the agent for the corporation, the corporate officer is not personally liable for corporation obligations arising from said contract." *Nutek Custom Hosiery, Inc. v. Roebuck*, 161 N.C. App. 166, 168, 587 S.E.2d 502, 504 (2003).

Hale's breach of contract claims pertain to the Convertible Promissory Note and Page's Personal Guaranty. His breach of contract claims arising out of the Convertible Promissory Note pertain to: (1) GF Co.'s purported obligation to file a financing statement to perfect Hale's security interest in GF Co.'s assets; and (2) the propriety or impropriety of GF Co.'s termination of all of its employees. GF Co. and Hale were parties to the Convertible Promissory Note. Although Page signed the note, he did so in his official capacity as CEO of GF Co. as is indicated by his title as CEO being recorded beneath his signature line. The signature page listed GF Co. as the party signing the contract, making Page an agent acting on behalf of a disclosed principal, and therefore, Page is not personally liable for GF Co.'s obligations unless personally guaranteed. In other words, Page is not the proper party under the promissory note to pursue for such claims because he is neither liable as an officer of the company nor a party to the contract. *Schlieper*, 195 N.C. App. at 263, 672 S.E.2d at 552. Because under basic agency law, Page is not liable as an agent for obligations arising out of the Convertible Promissory Note, Hale's breach of contract claim under the promissory note fails.

Second, Hale alleges Page failed to bring an action in Buncombe County, North Carolina in accordance with Page's Personal Guaranty. To the contrary, Page argues that the language in Section 11 of the Personal Guaranty—stating that Page would bring "any action, litigation, or proceeding of any kind whatsoever, whether in law or equity, or whether

in contract or tort or otherwise, *against the Holder* [Hale], in any way relating to the Guaranty or the transactions contemplated hereby" only in Buncombe County or the U.S. District Court for the Western District of North Carolina—merely obligated Page to commence any legal action *against Hale* relating to the Guaranty in those venues. (Emphasis added). We agree. Although the language in the venue clause is broad, it did not prevent GF Co. from commencing the Michigan Liquidation because that legal proceeding was not an action *against Hale*.

We now address whether Hale successfully states a breach of contract claim as to Page's Personal Guaranty. The Personal Guaranty contains the same terms as those in the Convertible Promissory Note—that, commensurate with Page's five percent (5%) ownership interest in GF Co., he would guarantee five percent (5%) of the "Guarantee Amount." The Convertible Promissory Note defined the Guarantee Amount as "the aggregate principal balance under this Note." Hale separately signed a document, the Personal Guaranty, in which he personally guaranteed to Hale "the amount of the Cap." The Cap was defined as five percent (5%) of "the outstanding aggregate principal balance due under the Note." Both the Convertible Promissory Note and Page's Personal Guaranty contained "release" provisions releasing Page from liability under the Personal Guaranty if he no longer owns any portion of GF Co. or if GF Co. were to terminate his employment with the company.

In Hale's breach of contract cause of action, he alleges Page "breached the terms of the . . . Guaranty Agreement[ ], including the covenants of good faith and fair dealing therein, by resigning from employment after assigning GF Co's assets to an unrelated party supposedly for the benefit of creditors." He further alleges he is entitled to specific performance of the terms of Page's Personal Guaranty.

Page argues, however, that because he was "terminated" from employment with GF Co., he was released from liability under the Personal Guaranty. In a letter written by Page's attorney, Gross states that "as a requirement of the assignment" of all GF Co.'s assets to the Series LLC responsible for liquidating them, "all Company employees were terminated, including Dr. MacLeod and Mr. Page." However, Hale alleges in his complaint that on 18 May 2021, MacLeod and Page called Hale to inform him GF Co. was no longer viable, they were shutting down the business, "and that they *voluntarily resigned* from GF Co.'s management." (Emphasis added).

"A complaint should not be dismissed under Rule 12(b)(6) unless it affirmatively appears that plaintiff is entitled to no relief under any

state of facts which could be presented in support of the claim." *Ladd v. Est. of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (quotation marks and ellipsis omitted). Upon a motion to dismiss, the allegations contained in the complaint are taken as true. *Christenbury Eye Ctr., P.A.*, 370 N.C. at 5, 802 S.E.2d at 891. Nevertheless, documents attached to and incorporated in a complaint are controlling if they contradict the contents of the complaint. *See Schlieper*, 195 N.C. App. at 263, 672 S.E.2d at 552. For example, the court in *Schlieper* noted that if the terms of a contract attached to the complaint are contrary to the allegations contained in the complaint, the contract terms control. *Id.* (citing *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847).

Here, Hale attached to his complaint a letter from Page's attorney to Hale's attorney representing that Page was terminated from employment with GF Co. This letter, prepared in anticipation of or during litigation, is not a controlling document like the contract in *Oberlin Capital*. The letter is not the subject of the dispute in this case; rather, the Personal Guaranty is the subject of dispute, and Hale alleges Page did not fulfill its terms. The letter from Page's attorney is relevant to the factual question of whether Page actually was terminated and therefore whether he was released from the terms of the Personal Guaranty. However, we will not resolve a factual dispute at the pleading stage.

Taking Hale's allegations as true, we hold he has made sufficient allegations to withstand a Rule 12(b)(6) motion on his claim for breach of contract by alleging that Page did not uphold the terms of the Personal Guaranty when he failed to pay Hale five percent of the outstanding balance of the Note's value. Because Hale adequately stated a claim for breach of contract with respect to Page's Personal Guaranty, the trial court erred in dismissing the claim.

F. Cause of Action 6: Unfair and Deceptive Trade Practices

[5] In his opening brief, Hale fails to argue for reversal of the trial court's order dismissing his claim of unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 (the Unfair and Deceptive Trade Practices Act, or, the "Act") which prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a). In his appellate brief, Hale offers only the following in support of this claim: "Hale alleges that he was fraudulently induced to loan money to GF Co. relying on promises that he would be considered a fully secured lender treated differently than ordinary equity holders and paid prior to investors in circumstances like those contained in the allegations."

Our Supreme Court recently stated, "actions solely connected to a company's capital fundraising are not 'in or affecting commerce,' even under a reasonably broad interpretation of the legislative intent underlying these terms." *Nobel v. Foxmoor Grp.*, 380 N.C. 116, 120, 868 S.E.2d 30, 34 (2022). The court in *Nobel* held that a transaction involving a promissory note to raise capital for a newly formed company did not implicate "the regular purchase and sale of goods," but rather was only an investment "to provide and maintain adequate capital for the enterprise." *Id.* at 117–18, 120–21 868 S.E.2d at 32, 34 (quotation marks and brackets omitted). Similarly, Hale's loan to GF Co. was not "in or affecting commerce" within the meaning of the Act. *Id.* at 122, 868 S.E.2d at 34–35.

Regardless of whether Hale abandoned his unfair and deceptive trade practices claim, we hold the analysis in *Nobel* controls here because the Convertible Promissory Note concerned the raising of capital for GF Co. rather than the regular purchase and sale of goods, such as GF Co.'s business in hemp or CBD. Therefore, Hale fails to state a claim of unfair and deceptive trade practices, and we affirm the trial court's dismissal of that claim.

G. Cause of Action 7: Declaratory Relief

[6] Hale also seeks declaratory relief pursuant to N.C. Gen. Stat. § 1-253 and requests this court to declare the Michigan Liquidation "void *ab initio*" and for all legal proceedings to be conducted in North Carolina. N.C. R. App. P. 28 provides in pertinent part:

> The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C. R. App. P. 28(a). Hale fails to argue this issue in his brief and therefore is deemed to have abandoned this issue on appeal. Accordingly, the trial court's dismissal of Hale's claim for declaratory relief is affirmed.

H. Causes of Action 8 and 9: Securities Fraud

[7] Hale next argues Page violated N.C. Gen. Stat. § 78A-56. Section (a) of the statute contains two antifraud provisions. N.C. Gen. Stat. § 78A-56(a)(1) provides a cause of action for violations of, among other provisions, sections 78A-8(1) and 78A-24. We address N.C. Gen. Stat. §§ 78A-8(1) and 78A-24 in turn.

First, N.C. Gen. Stat. § 78A-8(1) makes it "unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly . . . [t]o employ any device, scheme, or artifice to defraud." As an initial matter, we note that a plaintiff must actually allege he purchased a security to properly allege a violation of N.C. Gen. Stat. § 78A-8. This Court has held that where a defendant's counterclaim did not "allege the stock he purchased was a 'security,' " the defendant failed to state a claim for securities fraud. *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 41, 626 S.E.2d 315, 322 (2006). Here, Hale merely argues that to the extent "Page took the position that the Note Package, including the Guaranty is . . . a security under North Carolina Law," Page committed securities fraud. However, there is nothing in the record to suggest either Page or MacLeod represented to Hale that the Note Package was a security required to be registered. The Note Package contained an "Offering Memorandum" which provided notices regarding GF Co.'s "$10,000,000 OFFERING . . . FOR ACCREDITED INVESTORS ONLY":

> These securities have not been registered with the Securities and Exchange Commission ("SEC"), or with any state securities commission or any other regulatory authority. The securities are being offered in reliance upon an exemption from the registration requirement of federal and state securities laws and cannot be resold unless they are subsequently registered under such laws or unless an exemption from registration is available.
>
> Neither the SEC nor any othe[r] agency has passed on, recommended, or endorsed the merits of this offering or the accuracy or adequacy of this memorandum. Any representations to the contrary is unlawful.
>
> An investment in this company involves significant risk.
>
> See "RISK FACTORS."

(Regular capitalization used for clarity of reading).[3] A section in the Offering Memorandum titled "Investor Notices" states:

> [GF Co.] is a limited liability company . . . . No person other than the manager[4] of the company . . . has been authorized

3. We modify the capitalization throughout for ease of reading.

4. The Offering Memorandum stated GF Co. is a manager-managed limited liability company managed by MacLeod.

> to make representations, or give any information, with respect to the company except the information and representations contained in this memorandum. Any further information given or representation made by any sales agent, broker, dealer, salesman, or other person must be regarded as unauthorized. . . .
>
> Convertible promissory notes are available only to persons willing and able to bear the economic risks of this investment for an indefinite period of time. Convertible promissory notes are speculative securities, involve a high degree of risk, and are intended for sale to a limited number of experienced and accredited investors. . . .
>
> This offering is expected to be conducted as an exempt securities offering. Specifically, convertible promissory notes are offered pursuant to an exemption from registration under Section 4(A)(2) of the Securities Act of 1933, as amended (the "Securities Act"), the applicable provisions of Rule 506(B) under Regulation D promulgated thereunder, and applicable state securities. . . . Convertible promissory notes have not been, and will not be, registered under the Securities Act, and have not been registered with, or approved by, any federal or state securities . . . administrator or any other regulatory authority. . . .
>
> . . .
>
> Notice to North Carolina Residents Only: These securities may be offered pursuant to a claim of exemption under the North Carolina Securities Act. The North Carolina Securities Administration[5] neither recommends nor endorses the purchase of any securities, nor has the administrator passed upon the accuracy or adequacy of the information provided herein. Any representation to the contrary is a criminal offense.

Hale's "to the extent approach" simply fails to argue that the Convertible Promissory Note is a Security, not exempt from the provisions of N.C. Gen. Stat. § 78A-8. We will not attempt to construct a claim for him.

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5. There is no entity named North Carolina Securities Administration, so we presume this reference is to the North Carolina Secretary of State Securities Division.

Second, under N.C. Gen. Stat. § 78A-24:

> It is unlawful for any person to offer or sell any security in this State unless (i) it is registered under this Chapter, (ii) the security or transaction is exempted under [N.C. Gen. Stat. §§] 78A-16 or 78A-17 and such exemption has not been denied or revoked under [N.C. Gen. Stat. §] 78A-18, or (iii) it is a security covered under federal law.

The Securities Act of 1933 generally requires issuers of security offerings to file a registration statement. 15 U.S.C. § 77d, f, g. However, 15 U.S.C. § 77d exempts "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(a)(2). Specifically, 17 C.F.R. § 230.506(b) (2021) provides a "safe harbor" for securities offered under 15 U.S.C. § 77d(a)(2) if the security offering complies with 17 C.F.R. §§ 230.501 (2020) and 230.502 (2021).[6] 17 C.F.R. § 230.501 (2020) provides a safe harbor to private securities offerings to accredited investors, including "any person . . . who the issuer reasonably believes comes within any of the" enumerated categories in 17 C.F.R. § 230.501(a) (2020). 17 C.F.R. § 230.501(a) (2020). Hale represented and warranted to GF Co. that he is an accredited investor.

Here, Hale argues that Page violated the Securities Act only to the extent that Page argues that the financial instrument at issue, the Convertible Promissory Note, is a security exempt from registration. Specifically, Hale argues:

> The Note Package specifically includes the misrepresentation that the promissory note is not a security required to be registered in North Carolina. . . . GF Co's principal place of business and registered address was in North Carolina. As a result, Hale may also be entitled to recovery for

6. 17 C.F.R. § 230.502 (2021) applies when "the issuer sells securities under § 230.506(b) to any purchaser that is not an accredited investor." 17 C.F.R. § 230.502(b)(1). Here, Hale represented and warranted to GF Co. that he is an accredited investor, and therefore, the requirement for the issuer to provide certain information does not apply. 17 C.F.R. § 230.502 (2021) also prohibits "general solicitation" and "general advertising" of security offerings and imposes limitations on resale. 17 C.F.R. § 230.502(c), (d) (2021). Here, there is no evidence in the Record nor allegation by Hale that GF Co. generally advertised Convertible Promissory Notes to the public. Moreover, the Offering Memorandum specifically states, "Convertible Promissory Notes cannot be sold, transferred, or pledged in the absence of registration under the Securities Act and the applicable state securities laws or the availability of an exemption therefrom. There is no public or other market for Convertible Promissory Notes, and no such market is expected to develop." Therefore, the Convertible Promissory Note complies with 17 C.F.R. § 230.502 (2021).

> misrepresentation and/or non-compliance with N.C. Gen. Stat. 78A-24 by offering and selling a security that was required to be, but was not, registered in North Carolina.

Hale does not allege any specific reasons why the Convertible Promissory Note constituted a security under N.C. Gen. Stat. § 78A-2 (state definition of security)[7] or 15 U.S.C. § 77b (federal definition of security).[8] Instead, Hale alleges in a merely conclusory manner that the "Convertible Note was not registered as a security as required by [N.C. Gen. Stat. §] 78A-24 and does not qualify for exemptions pursuant to [N.C. Gen. Stat. §§] 78A-16 . . . [or] 78A-17 from registration according to North Carolina laws."

It is true that North Carolina law generally requires registration of security offerings unless specifically exempted. N.C. Gen. Stat. §§ 78A-16, 78A-17, 78A-24. Federal law specifically exempts from the "provisions of section 77(e)," or in other words, exempts from federal securities regulations, "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(a)(2). State law also provides a similar private offering exemption for "[a]ny transaction pursuant to an offer directed by the offeror to not more than 25 persons . . . if the seller reasonably believes that all the buyers in this State are purchasing for investment." N.C. Gen. Stat. § 78A-17(9).

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7. N.C. Gen. Stat. § 78A-2 defines "security" as follows:

> "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract including without limitation any investment contract taking the form of a whiskey warehouse receipt or other investment of money in whiskey or malt beverages; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under a title or lease; viatical settlement contract or any fractional or pooled interest in a viatical settlement contract; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

N.C. Gen. Stat. § 78A-2(11).

8. Federal law defines a security as one "designated as qualified for trading in the national market system pursuant to section 78k-1(a)(2) of this title that is listed, or authorized for listing, on a national securities exchange (or tier or segment thereof)." 15 U.S.C. § 77r(b)(1)(A). 15 U.S.C. § 78k-1(a)(2), in turn, directs the Securities and Exchange Commission to "designate the securities or classes of securities qualified for trading in the national market system from among securities other than exempted securities."

Here, the Offering Memorandum explicitly states:

> This offering is expected to be conducted as an exempt securities offering. Specifically, convertible promissory notes are offered pursuant to an exemption from registration under Section 4(A)(2) of the Securities Act of 1933 [15 U.S.C. § 77d(a)(2)], as amended (the "Securities Act"), the applicable provisions of Rule 506(B) under Regulation D [17 C.F.R. § 230.506(b) (2021)] promulgated thereunder, and applicable state securities. Convertible promissory notes have not been, and will not be, registered under the Securities Act, and have not been registered with, or approved by, any federal or state securities . . . administrator or any other regulatory authority.

Therefore, GF Co. explicitly issued the Convertible Promissory Note as a private offering exempt under 15 U.S.C. § 77d(a)(2) from federal requirements for securities registration, and also exempt under State law pursuant to N.C. Gen. Stat. § 78A-17(9). Accordingly, Hale fails to state a claim under N.C. Gen. Stat. § 78A-24.

Third, the second antifraud provision of N.C. Gen. Stat. § 78A-56(a) imposes liability upon:

> [a]ny person who . . . [o]ffers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

N.C. Gen. Stat. § 78A-56(a)(2). Regarding what constitutes a misrepresentation, this Court has stated:

> The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care. . . . [W]hen the party relying on the false or misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.

Hudson-Cole Dev. Corp. v. Beemer, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999).

Having addressed N.C. Gen. Stat. § 78A-56(a)(1), we now focus on N.C. Gen. Stat. § 78A-56(a)(2). Hale's complaint mentions N.C. Gen. Stat. § 78A-56(a)(2) only once:

> To the extent the Convertible Note is considered a security, both MacLeod and Page were offerors and/or sellers of the securities, and their conduct included soliciting Hale to purchase, offering to sell a security to Hale, and soliciting an offer to buy a security, using fraud, and/or (2) making materially false statements or omissions made in connection with an offer or sale of a security. Both MacLeod and Page are liable to Hale pursuant to N.C. Gen. Stat. § 78A-56(a), *including pursuant to section 78A-56(a)(2)*.

(Emphasis added). Hale fails to identify a false statement of material fact or concealment of a material fact other than that MacLeod and Page falsely asserted the Convertible Promissory Note was exempt from securities registration requirements. Hale does allege that MacLeod and Page falsely stated that GF Co. obtained all authorizations or registration required by law. However, as explained above, we hold Page carried his burden in demonstrating the Convertible Promissory Note was not subject to registration as a security.

Moreover, Hale does not "allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Beemer*, 132 N.C. App. at 346, 511 S.E.2d at 313. Hale does not point to any attempt on his part to obtain further clarification—or any information at all—regarding the precise status of the Convertible Promissory Note. The Offering Memorandum explained the Convertible Promissory Note was not registered as a security and that GF Co. was relying on exemptions pursuant to 15 U.S.C. § 77d(a)(2) and 17 C.F.R. § 230.506(b) (2021). Therefore, Hale's claim under N.C. Gen. Stat. § 78A-56(a)(2) fails.

We note Hale would not have need to look far in the exercise of reasonable due diligence. The Note Package contained numerous disclaimers. The Offering Memorandum contained a "Risk Factors" section which stated:

> An investment in this company is speculative. Prospective investors are strongly advised to consider carefully the special risks involved in investing in the company. In addition to the other risks and conflicts of interest described

> elsewhere in this memorandum, prospective investors should consider the following risks which apply to the company before making a decision to invest. . . .
>
> We have a limited operating history upon which you may evaluate us. . . .
>
> Our success is dependent on our management and key personnel. . . . If any of our senior management, or any of our advisors, if any, were unable or unwilling to continue in their positions, our business and operations could be disrupted or fail.
>
> Management has broad discretion as to the use of proceeds. . . .
>
> Actual results of operations will vary from the Company's projections. . . .
>
> Our business plan is unproven. . . .
>
> The hemp industry is extremely speculative. . . .
>
> We cannot ensure that we will earn a profit or that our product range will be accepted by consumers. . . .
>
> Increased competition, competitive pressures, industry developments, and market conditions could affect the growth of business and adversely impact financial results. . . .
>
> Notes are not guaranteed and could become worthless. The Notes are not guaranteed or insured by any government agency or by any private party. The amount of earnings is not guaranteed and can vary with market conditions. The return of all or any portion of capital invested in the Notes is not guaranteed, and the Notes could become worthless. . . .
>
> The Notes are restricted securities and a market for such securities may never develop. . . . The Company has neither registered the Notes nor underlying securities, nor any other securities under the Securities Act. . . .
>
> We may be required to register under the Securities Exchange Act.

The Note Package's slideshow also contained a "Disclaimers" page. "General" disclaimers stated:

> The information provided in this presentation pertaining to [GF Co.], its business assets, strategy, and operations is for general informational purposes only and is not a formal offer to sell or a solicitation of an offer to buy any securities, options, futures, or other derivatives relates to securities in any jurisdiction and its content is not prescribed by securities laws. Information contained in this presentation should not be relied upon as advice to buy or sell or hold such securities or as an offer to sell such securities. While the information in this presentation is believed to be accurate and reliable, [GF Co.] and its agents, advisors, directors, officers, employees and shareholders make no representations or warranties, expressed or implied, as to the accuracy of such information and [GF Co.] expressly disclaims any and all liability that may be based on such information or errors or omissions thereof. . . . Prospective investors should not construe the contents of this presentation as legal, tax, investment or other advice. All prospective investors should make their own inquiries and consult their own advisors as to legal, tax, investment, and related matters concerning an investment in the securities of the Company.

"Forward Looking Statement and Financial Projections" disclaimers stated:

> Certain information in this presentation and oral statements made in any meetings are forward-looking and relate to [GF Co.] and its anticipated financial position, business strategy, events and courses of action. Forward-looking statements and financial projections . . . are subject to a variety of known and unknown risks and uncertainties . . . that could cause actual events or results to differ materially from those anticipated in the forward-looking statements and financial projections or could cause [them] to not occur at all. . . . [W]e cannot guarantee future results, level of activity, performance or achievements and there is no representation that the actual results achieved will be the same, in whole or in part, as those set out in the forward-looking statements and financial projections. Readers are cautioned to not place undue reliance on forward-looking statements or financial projections.

The Note Package further contained a "Cautionary Note Regarding Forward-Looking Statements" which stated:

> Statements contained in this Memorandum . . . discuss future expectations, and state other "forward looking" information. Those statements are subject to known and unknown risks, uncertainties and other factors, many of which are beyond the Company's control, which could cause the actual results to differ materially from those contemplated by the statements. . . . In light of the risks, assumptions, and uncertainties involved, no person, including the Company, can assure that the forward looking information contained in this Memorandum will in fact transpire or prove to be accurate.

As a signer of the Convertible Promissory Note, Hale specifically represented, warranted, and acknowledged:

> that investment in the Securities involves a high degree of risk, and represents that the Holder is able, without materially impairing the Holder's financial condition, to hold the Securities for an indefinite period of time *and to suffer a complete loss of the Holder's investment*."

(Emphasis added). This disclaimer constitutes a clear, specific notification to Hale that he could lose the entirety of his loan to GF Co. Any claims he now brings stating he reasonably relied upon information provided by Page painting GF Co.'s future business prospects in a positive light must fail given the clear disclaimers provided in the Convertible Promissory Note and elsewhere. "When reviewing pleadings with documentary attachments on a Rule 12(b)(6) motion, the actual content of the documents controls, not the allegations contained in the pleadings." *Schlieper*, 195 N.C. App. at 263, 672 S.E.2d at 552; *see also Builders Mut. Ins. Co.*, 202 N.C. App. at 324, 688 S.E.2d at 510 ("The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings."). Thus, we affirm the trial court's dismissal of Hale's claims of securities fraud.

III. Conclusion

For the foregoing reasoning, we hold Hale fails to state a claim for: causes of action one and two, fraudulent inducement and fraud, because Page's representations involved unfulfilled promises or future business prospects rather than fraud; cause of action three, breach of fiduciary duties, because Page was not a controlling shareholder and Hale was not a shareholder; cause of action four, constructive fraud, because no fiduciary relationship existed between Page and Hale; cause of action six, unfair and deceptive trade practices, because the

Convertible Promissory Note did not concern the regular purchase and sale of goods; cause of action seven, declaratory relief pursuant to N.C. Gen. Stat. § 1-253 because Hale did not address it in his brief; and causes of action eight and nine, securities fraud, because Hale does not support his contention that the Note Package was a security required to be registered and does not demonstrate he "justifiably relie[d] to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Beemer*, 132 N.C. App. at 346, 511 S.E.2d at 313.

We reverse the trial court's ruling as to Hale's fifth cause of action because we hold he states a claim for breach of contract as to Page's alleged failure to uphold the Personal Guaranty.

AFFIRMED IN PART AND REVERSED IN PART.

Judges TYSON and COLLINS concur.

HALIKIERRA COMMUNITY SERVICES, LLC, PETITIONER
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, DIVISION OF HEALTH BENEFITS, RESPONDENT

No. COA23-897

Filed 18 June 2024

Administrative Law—judicial review—agency final decision—proper standards of review applied

In a contested case initiated by a licensed home health care agency (petitioner) enrolled in the North Carolina Medicaid Program, the superior court did not err in denying petitioner's petition for judicial review and affirming the final decision of the Administrative Law Judge (ALJ) upholding the denial by the Department of Health and Human Services (respondent) of claims submitted by petitioner totaling $982,789.50. The superior court applied the proper standards of review to petitioner's petition—whole record review of factual determinations and de novo review of legal questions—in its decision and identified specific evidence in the record that supported the ALJ's determinations, including respondent's documentation of each denied claim and petitioner's noncompliance with the Medicaid Program requirements that led to each denial, as well

as petitioner's failure to present any evidence suggesting that the claims should not have been denied. Further, the superior court correctly held that respondent did not improperly delegate its discretionary decision-making authority to a private contractor where the contractor only applied expressly established criteria in reviewing petitioner's claims and thus did not exercise any discretion.

Appeal by Petitioner from Order entered 25 April 2023 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 1 May 2024.

Ralph Bryant Law Firm, by Ralph T. Bryant, Jr., for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

HAMPSON, Judge.

Factual and Procedural Background

Halikierra Community Services LLC (Petitioner) appeals from an Order denying Petitioner's Petition for Judicial Review of a Final Decision issued by an Administrative Law Judge and affirming the Final Decision. The Record before us tends to reflect the following:

Respondent, the North Carolina Department of Health and Human Services (DHHS), is the executive agency responsible for overseeing the provision of certain services, including Medicaid, in North Carolina. The Division of Health Benefits is a sub-agency within DHHS responsible for the direct administration of North Carolina's Medicaid program. N.C. Gen. Stat. § 108A-54 (2021). During the time periods relevant to this case, Petitioner was a licensed home care agency enrolled with the North Carolina Medicaid Program to provide personal care services to Medicaid beneficiaries.

The requirements for providers to render personal care services to Medicaid beneficiaries are laid out in Medicaid Clinical Coverage Policy 3L. To participate in the Medicaid program, providers are required to enter into a provider agreement with DHHS, 42 CFR § 431.107(b) (2021), and bill DHHS for reimbursement. N.C. Gen. Stat. § 108C-2(10) (2021); 10A N.C.A.C. 22F .0104 (2018). North Carolina's Medicaid Provider Participation Agreement requires providers to abide by all state and federal laws and regulations; DHHS's medical coverage policies;

and guidelines, policies, provider manuals, implementation updates, and bulletins published by DHHS or its sub-agencies.

On 24 June 2018, Petitioner was placed on prepayment review pursuant to N.C. Gen. Stat. § 108C-7. Notice of this placement was sent to Petitioner by the Carolina Centers for Medical Excellence (CCME), a DHHS contractor. This notice described the prepayment review process and explained the requirements for a provider to be removed from prepayment review.

Medicaid providers submit claims for reimbursement of services through an electronic system called NCTracks. When a provider is on prepayment review, the claims submitted to NCTracks are sent to CCME and CCME requests any records required to support each claim. For each claim at issue here, CCME sent Petitioner an "Original Records Request" letter, which listed the specific documents Petitioner needed to submit for the claim to be processed and approved. All of the records requested were documents Petitioner was already required to maintain by law or under the Medicaid Clinical Coverage Policy. If the documents Petitioner submitted were insufficient, CCME sent a second request letter listing the missing documents and providing time for Petitioner to submit those documents. If Petitioner failed to submit the required documents or if the submitted documents showed non-compliance with the relevant clinical policies, CCME processed and denied the claim. In total, CCME denied $982,789.50 of claims submitted by Petitioner while it was on prepayment review.

On 6 August 2018, DHHS sent Petitioner a letter alleging it had "credible allegations of fraud" against Petitioner and notified Petitioner of the immediate suspension of all payments to it as a result, retroactive to 1 August 2018. On 14 December 2018, Petitioner appealed this action by filing a contested case petition with the Office of Administrative Hearings (OAH). On 3 January 2019, DHHS notified Petitioner it had rescinded the August 2018 action.

On 2 October 2018, DHHS sent Petitioner a notice of termination of its participation in the Medicaid provider network due to alleged non-compliance with certain requirements. On 14 December 2018, Petitioner appealed this action by filing a contested case petition with the OAH. On 15 March 2019, DHHS issued another notice of a decision to terminate Petitioner from the North Carolina Medicaid program. This notice stated Petitioner's termination was due to its failure to meet the minimum claims accuracy rate required during the prepayment review period. On 9 May 2019, Petitioner appealed by filing a contested case hearing with OAH. On 5 July 2019, OAH consolidated the cases regarding the

October 2018 and March 2019 actions for hearing. On 17 September 2020, DHHS rescinded both the 2 October 2018 and 15 March 2019 administrative actions. Thus, as of 17 September 2020, all of DHHS's administrative actions initiated against Petitioner had been rescinded.

This matter, including DHHS's denial of payment for the $982,789.50 in claims submitted by Petitioner, came on for hearing before an Administrative Law Judge (ALJ) on 8 December 2020. On 14 July 2021, the ALJ entered a Final Decision, which concluded Petitioner had failed to meet its burden of proving it had provided all of the required documentation for its claims when it submitted the claims and that its claims should not have been denied. Based on its Findings and Conclusions, the ALJ's Final Decision upheld DHHS's decision to deny payment for Petitioner's outstanding claims.

On 10 August 2021, Petitioner filed a Petition for Judicial Review, appealing the Final Decision. The trial court held a hearing on this Petition on 31 January 2023. On 25 April 2023, the trial court entered an Order denying Petitioner's Petition for Judicial Review and affirming the ALJ's Final Decision. On 23 May 2023, Petitioner timely filed Notice of Appeal to this Court.

Issues

The issue on appeal is whether the trial court erred by denying Petitioner's Petition for Judicial Review and affirming the Final Decision entered by the ALJ.

Analysis

I. Mootness

As an initial matter, during the underlying judicial review, Petitioner contended OAH lost jurisdiction to hear the underlying case when DHHS rescinded the Notices of Termination. Whether Petitioner is entitled to stay in the Medicaid program, however, is merely tangential to the matter at hand in this case¬—whether Petitioner is entitled to payment for its denied claims.

Indeed, when Petitioner made this argument below, the trial court correctly noted the North Carolina Administrative Code gives providers 18 months to refile denied claims. After that time period elapses, claim denials become final. 10A N.C.A.C. 22B .0104(b) (2018). Here, at the time of the underlying judicial review, the 18-month refile period for the $982,789.50 of Petitioner's denied claims had passed. Therefore, the claim denials were final. The finalization of those claim denials thus became a final agency action, which is appealable under the

Administrative Procedure Act. *See* N.C. Gen. Stat. § 150B-43 (2021) ("Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article[.]").

II. Denial of Payment

"The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Hum. Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). The APA provides a party aggrieved by a final decision of an ALJ in a contested case a right to judicial review by the superior court. N.C. Gen. Stat. § 150B-43 (2021). "A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court[.]" N.C. Gen. Stat. § 150B-52 (2021). The APA sets forth the scope and standard of review for each court.

The APA limits the scope of the superior court's judicial review as follows:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2021). The APA also sets forth the standard of review to be applied by the superior court as follows:

> In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the

> relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(c) (2021).

Although the standards of review superior courts are to apply are clearly articulated in our statutes, nowhere in its briefing to this Court does Petitioner clearly articulate the standard of review it believes we should apply. Indeed, at the outset of its argument, Petitioner merely restates what is effectively the same argument it raised below: DHHS "has acted arbitrarily and capriciously and substantially prejudiced [P]etitioner's rights; exceeded its authority, and acted erroneously, failed to use proper procedure, or failed to act as required by law[.]"

"The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases." N.C. Gen. Stat. § 150B-52 (2021). "Thus, our appellate courts have recognized that '[t]he proper appellate standard for reviewing a superior court order examining a final agency decision is to examine the order for errors of law.' " *EnvironmentaLEE v. N.C. Dep't of Env't & Nat. Res.*, 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018) (quoting *Shackleford-Moten v. Lenoir Cnty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citation omitted)). This process is a "twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Nat. Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007) (citation and quotation marks omitted). "As in other civil cases, we review errors of law de novo." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005) (citation omitted).

Here, the trial court set out the standard of review it applied in its Order as follows: "Given the nature of the alleged error asserted by the [P]etitioner, this court applied a 'whole record' standard of review of the Final Decision's Findings of Fact and applied a de novo standard of review of the Final Decision's Conclusions of Law." The trial court found there was substantial evidence to support the ALJ's Findings

of Fact and the ALJ's Conclusions of Law correctly applied the law to those Findings.

Relevant to the sole issue of payment denial, the ALJ found Petitioner submitted the claims at issue, but it "did not provide the requested additional information to support the denied claims." Further, the ALJ found "[DHHS] introduced evidence of each claim that was submitted by Petitioner . . . For the claims that were denied, the Coverage Policy citation for which the claim was non-compliant was noted." Additionally, "[DHHS] provided the contemporaneous notes of the initial reviewers regarding the specific policy provisions for which the claims were denied as non-compliant." Importantly, the ALJ found "Petitioner presented no evidence that any one of the 23,000 claims that were denied while Petitioner was on prepayment review should not have been denied at the time of CCME's initial review, and thus, should be overturned." Accordingly, the trial court found there was "substantial evidence to support the Findings of Fact" after reviewing "the whole [R]ecord, the Final Decision, the briefs submitted in this matter, and the arguments of counsel[.]"

"It is well settled that in cases appealed from administrative tribunals, '[q]uestions of law receive de novo review,' whereas fact-intensive issues 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.' " *N.C. Dep't of Env't. & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (quoting *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). When the trial court applies the whole record test, it "must examine all record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lackey v. N.C. Dep't of Hum. Res.*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (quoting *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)).

Here, the trial court correctly applied whole record review. The Record contains substantial evidence supporting the trial court's decision to affirm the ALJ's Order. In its Findings, the trial court noted its review of the ALJ's Final Determination, the Record in its entirety, and the briefs and arguments of both parties. In turn, the Final Decision pointed to specific evidence in the Record supporting the ALJ's

determination. This evidence included DHHS documents for each claim that was denied, noting the Coverage Policy citation with which the claim was non-compliant, and contemporaneous notes made by initial reviewers regarding specific policy provisions with which each claim was non-compliant. DHHS also provided examples of the types of non-compliant claims at issue in this case, which the trial court detailed. Moreover, the Final Decision correctly noted Petitioner presented no evidence that any of its denied claims should not have been denied at the time of CCME's initial review. Thus, based on the evidence in the Record, the trial court correctly applied whole record review to conclude there was substantial evidence to justify the ALJ's Final Decision.

On the issue of payment denial, the trial court concluded the ALJ's Final Decision should be affirmed. Again, the trial court expressly noted it reviewed the ALJ's Conclusions of Law de novo. The ALJ concluded: "Petitioner failed to meet its burden of proving that (i) all required documentation was provided at the time the claim was submitted and was available for review by the prepayment review vendor and (ii) the claim should not have been denied at the time of the vendor's initial review." The ALJ also noted in its Conclusions that " '[u]nconvered services' includes non-compliance with Clinical Coverage Policies 3K1, 3K-2 and 3L" and "Petitioner agreed as a condition of participation in the NC Medicaid program to abide by the Clinical Coverage Policies developed by [DHHS]."

These Conclusions were based on the trial court's Findings, which show Petitioner failed to provide any evidence its claims complied with the Coverage Policies and should not have been denied. In the absence of evidence to the contrary, the trial court correctly affirmed the ALJ's Final Decision denying payment to Petitioner.

Petitioner alleges the trial court erred in affirming the payment denials because DHHS improperly delegated its discretionary decision-making authority to CCME, a private contractor. On the issue of delegation, this Court has previously concluded "both federal and state regulations clearly contemplate that the role of a private company will be limited to the performance of duties that do not include rendering a discretionary decision as to the most appropriate course of action in a particular case." *N.C. Dep't of Health & Hum. Servs. v. Parker Home Care, LLC*, 246 N.C. App. 551, 566, 784 S.E.2d 552, 561 (2016). Accordingly, this Court held: "a private company . . . does not have the authority to substitute for DHHS" in making decisions "that require the exercise of discretion and the application of DHHS's policy priorities[.]" *Id.*

In the case *sub judice*, however, CCME did not make any discretionary decisions. Rather, CCME merely applied expressly established criteria as articulated in the Clinical Coverage Policies. While Petitioner is correct to say DHHS cannot delegate discretionary decisions to a private contractor, payment denial in this instance did not entail the exercise of any discretion on CCME's part. Petitioner's attempt to cast these claim denials as an administrative sanction in the prepayment review process is misplaced. Whether Petitioner was on prepayment review is entirely separate from whether it properly filed its claims with the required documentation in order to be reimbursed. As DHHS aptly notes, "[t]he ability to deny payment for claims that do not meet [the Clinical Coverage Policies] requirements is inherent to the claim submission and review process." This is consistent with the trial court's Finding that "[w]hile these denied claims may have been the basis of the two termination notices, the causal relationship does not go both ways and the recission of the termination notices does not prove that the claims were improperly denied."

Thus, we conclude the trial court correctly applied the appropriate standards of review in the instant case. Therefore, the trial court did not err in affirming the ALJ's Final Decision. Consequently, the trial court properly denied Petitioner's Petition for Judicial Review.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in the trial court's Findings or Conclusions and affirm its Order.

AFFIRMED.

Judges GORE and FLOOD concur.

LAWRENCE v. LAWRENCE

[294 N.C. App. 355 (2024)]

MICHAEL BRIAN LAWRENCE, PLAINTIFF
v.
HAILEY HAWKINS LAWRENCE, DEFENDANT

No. COA23-892

Filed 18 June 2024

1. Appeal and Error—interlocutory orders and appeals—permanent custody order—final order for purpose of appeal

In a child custody matter, plaintiff father's appeal—from an order determining that a consent order (as modified) was a permanent custody order—was not interlocutory where, although a hearing on custody and holiday visitation remained pending in the trial court, the determination order was a final order for purposes of appellate jurisdiction pursuant to N.C.G.S. §§ 7A-27(b)(2) and 50-19.1.

2. Child Custody and Support—custody—modification—temporary order did not become a permanent order by operation of time

The trial court erred in determining that a temporary consent order (as modified) had become a permanent custody order "by acquiescence"—that is, because neither party set the matter for further hearing in a reasonable time. The language of the original consent order—including its title "Temporary Consent Order" and multiple uses of the word "temporary" within—indicate that the trial court and the parties intended that it be entered without prejudice to any party; thus, the original order was a temporary custody order. Further, the record evidence showed that, despite a number of delays in court proceedings due to the Covid-19 pandemic and issues regarding plaintiff's counsel, plaintiff never let more than 7 months pass without actively pursuing court action regarding the issue of child custody. Accordingly, the matter was remanded for a hearing on permanent custody.

Appeal by Plaintiff from an order entered 5 October 2022 by Judge Andrew K. Wigmore in Carteret County District Court. Heard in the Court of Appeals 17 April 2024.

Wyrick Robbins Yates & Ponton LLP, by Charles W. Clanton and Jessica B. Heffner, for the Plaintiff-Appellant.

Peacock Family Law, by Carolyn T. Peacock, for the Defendant-Appellee.

WOOD, Judge.

Plaintiff appeals from a Determination of Permanent Custody Order entered on 5 October 2022. Defendant moved to dismiss the appeal on grounds of lack of appellate jurisdiction. Plaintiff argues on appeal that the trial court erred in its conclusion that the consent custody order entered by the parties had become permanent, rather than remaining temporary. For the reasons stated below, we hold this Court has jurisdiction over the appeal and reverse the trial court's 5 October 2022 order.

I. Factual and Procedural Background

Michael Brian Lawrence ("Plaintiff") and Haley Hawkins Lawrence ("Defendant") are the parents of one child, a daughter, born 9 July 2016. They married on 16 May 2015 and later separated on 29 November 2018. On 16 January 2019, Plaintiff filed a complaint for child custody, child support, divorce from bed and board, interim distribution, equitable distribution, and attorney fees. On 17 January 2019, the court entered an Ex Parte Temporary Child Custody Order granting the parties joint legal and physical custody on a week on / week off basis. On 18 January 2019, the court entered an order requiring the parties to attend mediation.

A hearing on the Temporary Custody order was held on 31 January 2019. During a recess at the hearing, Plaintiff and Defendant came to an agreement on temporary child custody terms. Ultimately, the court entered a Temporary Consent Order (the "January Consent Order") containing the terms to which the parties agreed. The January Consent Order contained, in-part, the following provisions:

> 1. The Defendant shall have temporary primary custody of the minor child….
>
> 2. The Plaintiff shall have temporary secondary custody, pursuant to the following schedule:
>
> a. Every other weekend from Friday at 4:00 p.m. until Sunday at 6:00 p.m., beginning Friday, February 1, 2019.
>
> b. One day during the week from 4:00 p.m. until 7:00 p.m.
>
> . . .
>
> 8. This is a temporary order.

The order did not make any provisions for summer or holiday visitation.

The January Consent Order was subsequently modified on 17 April 2019. With the parties' consent, the trial court entered a Modified Temporary Order (the "Modified Consent Order"), which stated:

> 1. The Plaintiff's visitation with the minor child shall continue on an every other weekend basis from Friday 2:30 p.m. until Monday morning at 8:30 a.m.
>
> 2. The Plaintiff shall no longer have mid-week visitation with the minor child.
>
> 3. Except as modified herein, the remaining terms and conditions of the January 31, 2019, Temporary Consent Order shall remain in full force and effect.

Between March 2019 and October 2019, both parties served each other with written discovery requests, interrogatories, and requests for the production of documents; and both parties filed motions to compel, some of which related to child custody. The motions to compel were noticed for a hearing, but the record does not show that a hearing was held, or whether the information sought was related to child custody. On 7 October 2019, following Plaintiff's attorney's withdrawal, Plaintiff's new attorney filed a calendar request and a notice of hearing on child custody, set for 9 December 2019. On 2 December 2019, Plaintiff filed a calendar request and notice for hearing on "Christmas Visitation," set for 9 December 2019. There is nothing in the record to show that a hearing was conducted on 9 December 2019.

On 23 January 2020, the parties participated in a court-ordered mediation, which ended in "an impasse." In July 2020, Plaintiff's second attorney withdrew from the case, and on 21 August 2020, Plaintiff's new counsel filed a calendar request and a notice of hearing on custody, set for the 31 August 2020 term of the court. From August 2020 to August 2021, Plaintiff filed multiple calendar requests and notices of hearing on the issue of custody, and both Plaintiff and Defendant filed motions for peremptory settings. The case was continued multiple times by a series of continuance orders for reasons including the COVID-19 pandemic, withdrawal of Plaintiff's attorney, retirement of Plaintiff's subsequent attorney and not being reached by the court.

On 31 August 2021, the trial court conducted a hearing on the motions for peremptory setting and Plaintiff's motion for a scheduling order. At the hearing, Defendant's counsel raised that the issue of whether the January Consent Order, as modified by the Modified Consent Order, was a temporary or permanent order needed to be decided. The court agreed and concluded that the issue of whether it was a permanent order was to

be heard prior to the custody trial. The court also directed Defendant's counsel to draft a scheduling order; however, Plaintiff's counsel failed to timely respond to the proposed order. Thereafter, Defendant's counsel filed a Motion in the Cause, requesting a new scheduling order to be entered. On 3 December 2021, a hearing was conducted on the Motion in the Cause. The court addressed the scheduling order, holiday visitation, and again, the scheduling of a hearing on the status of the January Consent Order.

On 14 December 2021, the trial court entered a Scheduling Order, which stated "[t]his matter shall be scheduled peremptorily for hearing for a determination as to whether or not the Temporary Custody Order entered on January 31, 2019, has become a permanent Order at 2:00 p.m. on January 24, 2022." It further concluded, "[t]he trial in this matter shall be set for the March 21, 2022, term of Court in Carteret County Domestic Court for all remaining issues not previously decided by the Court."

On 18 February 2022, a hearing was held on the issue of whether the January Consent Order was temporary or permanent. The trial court determined and announced that the January Consent Order was a permanent order but did not file a written order containing the ruling until October 2022. The trial set for hearing on 21 March 2022 was not held. On 23 September 2022, Plaintiff filed a Motion to Establish Holiday and Summer Visitation, along with a notice of hearing and calendar request, which requested the court to establish a schedule.

On 5 October 2022, the trial court entered its Order from the 18 February 2022 hearing ("October 2022 Order"), finding in-part:

> 32. Eighteen (18) months passed from the entry of the original January 31, 2019, Consent Order until the Notice of Hearing was filed by the Plaintiff requesting a hearing on the issue of custody in August 2020.
>
> 33. The Order originally entered on January 31, 2019, and subsequently modified by consent on April 16, 2019, became a Permanent Order by acquiescence. Neither the Plaintiff nor the Defendant filed Motions for Hearing or Review for this Order to be reviewed by the Court for a period of no less than 18 months.
>
> 34. The Plaintiff and Defendant have been following the terms of the prior Consent Order previously entered on January 31, 2019, on a year-round basis.

The court further concluded:

> 3. The January 31, 2019 Order and subsequent modification on April 16, 2019, is a Permanent Order because it was not entered without prejudice; it did not have a reconvening trial date; it established an indefinite schedule regarding physical custody; and it determined all issues relating to custody pending before the Court.

Thus, the January Consent Order, and the Modified Consent Order, were found to be a permanent custody order. The parties were directed to comply with N.C. Gen. Stat. § 50-13.7, which requires a party to show a "substantial change in circumstances" that affects the well-being of the child, for further modification of the Order. On 3 November 2022, Plaintiff filed a notice of appeal from the October 2022 Order.

II. Appellate Jurisdiction

[1] As a threshold matter, we first must determine whether this appeal is properly before us. On 21 February 2024, Defendant filed a Motion to Dismiss on grounds of lack of appellate jurisdiction. Defendant asserts this Court lacks jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2) and § 50-19.1. N.C. Gen. Stat. § 7A-27(b)(2) provides that an appeal as of right exists "from any final judgment of a district court in a civil action." Further, N.C. Gen. Stat. § 50-19.1 allows a party to appeal from an order adjudicating a claim for child custody if "the order or judgment would otherwise be a final order or judgment within the meaning of [N.C. Gen. Stat.] 1A-1, Rule 54(b)."

Defendant contends the October 2022 Order is not a final order for purposes of § 7A-27(b)(2) or § 50-19.1. Instead, Defendant argues, the October 2022 Order is interlocutory and not immediately appealable, as further action was required by the trial court. In *Veazey v. City of Durham*, the Court distinguished between final judgments and interlocutory orders stating: "[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court[,]" whereas, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-362, 57 S.E.2d 377, 381 (1950) (citations omitted).

Citing *Veazey*, Defendant argues the October 2022 Order is interlocutory because it (1) "was made during the pendency of an action" as it determined the question of whether the January Consent Order was temporary or permanent, so the parties were on notice before the custody trial; (2) "it did not dispose of the case" as the custody issue

was still pending and Plaintiff had a Motion to Establish Holiday and Summer Visitation still pending; and (3) further action was required by the trial court to determine the custody issue. *Id.*

Contrary to Defendant's assertion, the October 2022 Order is immediately appealable because "an appeal of right does lie from the final, permanent custody order reflecting the trial court's ultimate disposition." *Brown v. Swarn*, 257 N.C. App. 417, 422-23, 810 S.E.2d 237, 240 (2018) (citation omitted). The trial court determined in the October 2022 Order that the January Consent Order and Modified Consent Order was "found to be a Permanent Custody Order." Although a hearing on custody and holiday visitation was pending, any order entered on those issues following the October 2022 Order would be a modification of the "permanent custody order." "Pursuant to N.C. Gen. Stat. § 50-13.7(a) (2005), 'an order of a court of [North Carolina] for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.' " *Lewis v. Lewis*, 181 N.C. App. 114, 118, 638 S.E.2d 628, 631 (2007). "The word custody under the statute also includes visitation." *Id.* (citations omitted). The pendency of a motion to modify custody does not affect whether this court has jurisdiction over the appeal on the underlying permanent custody order. Therefore, we hold this court has jurisdiction over Plaintiff's appeal.

III. Analysis

[2] Plaintiff presents two arguments on appeal: (1) the trial court incorrectly determined that the temporary consent order, as modified, was a permanent custody order; and (2) the trial court incorrectly determined that the temporary consent order, as modified, became a permanent order "by acquiescence."

A. *Senner* Test

"[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal *de novo*." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009) (citation omitted). A permanent custody order "establishes a party's present right to custody of a child and that party's right to retain custody indefinitely[,]" whereas, a temporary custody order "establish[es] a party's right to custody of a child pending the resolution of a claim for permanent custody." *Regan v. Smith*, 131 N.C. App. 851, 852-53, 509 S.E.2d 452, 454 (1998) (citations omitted). In general, "an order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings

was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (citations omitted). If the custody order fails to meet any of the three prongs, it is considered permanent. *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011) (citation omitted). However, "a trial court's designation of an order as 'temporary' or 'permanent' is neither dispositive nor binding on an appellate court." *Woodring v. Woodring*, 227 N.C. App. 638, 643, 745 S.E.2d 13, 18 (2013) (citation omitted).

"An order is entered without prejudice if it is entered without loss of any rights; [and] in a way that does not harm or cancel the legal rights or privileges of a party." *Marsh v. Marsh*, 259 N.C. App. 567, 570, 816 S.E.2d 529, 532 (2018) (citations and internal quotations omitted). This Court has held that the inclusion of the express language "without prejudice" is sufficient for an order to be deemed as temporary. *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002). Neither the January Consent Order nor Modified Consent Order contained the language indicating they were entered "without prejudice."

Despite the exclusion of this language, Plaintiff contends it is clear from the language of the January Custody Order and the circumstances under which it was entered that the trial court and the parties intended it to be entered without the loss of rights or otherwise prejudicial to either party. Plaintiff cites *Marsh* to support his argument. In *Marsh*, this Court held that an order was temporary, even without the express language, because "it [was] clear from the plain language of the order that it was entered without the loss of rights, or otherwise prejudicial to the legal rights of either party." *Marsh*, 259 N.C. App. at 571, 816 S.E.2d at 532. In that case, the order included language such as "will not be binding on the parties in future hearings" and "pending further orders of the Court." *Id.* at 570, 816 S.E.2d at 532.

It is clear from the plain language of the January Consent Order that it was entered without prejudice, therefore the first prong under *Senner* is met. *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (citations omitted). The January Consent Order is titled "Temporary Consent Order" with "Temporary" and "Consent" handwritten. The findings of fact include "[t]he parties announced to the court during the temporary hearing they agreed to a temporary order." Further, it states that Defendant "shall have temporary primary custody" and Plaintiff "shall have temporary secondary custody." Finally, it states "[t]his is a temporary order." Further, the parties reiterated the January Consent Order was temporary when they entered the Modified Consent Order which states the "Temporary Consent Order entered on January 31, 2019, shall be modified as follows."

We conclude that the language in the January Consent Order is sufficient to find that the order was entered without prejudice to the rights of either party. Despite the order not explicitly stating it was entered "without prejudice," "it is clear from the plain language of the order that it was entered without the loss of rights." *Marsh*, 250 N.C. App. at 571, 816 S.E.2d at 532. Therefore, we hold the January Consent Order was a temporary custody order.

B. Permanency Through Operation of Time

Next, Plaintiff argues the trial court erred when it concluded that the January Consent Order and the Modified Consent Order "became a Permanent Order by acquiescence. Neither the Plaintiff nor the Defendant filed Motions for Hearing or Review for this Order to be received by the Court for a period of no less than 18 months." Whether a temporary order converted into a permanent order through time or acquiescence is reviewed *de novo*. *Eddington v. Lamb*, 260 N.C. App. 526, 529, 818 S.E.2d 350, 353 (2018) (citations omitted). "A temporary custody order may become permanent by operation of time, when neither party sets the matter for a hearing within a reasonable time[.]" *Id.* (citations and internal quotations omitted). Thus, the focus is on whether a hearing was requested, rather than if it was heard, as "[a] party should not lose the benefit of a temporary order if she is making every effort to have the case tried but cannot get it heard." *LaValley*, 151 N.C. App. at 292-93 n.5, 564 S.E.2d at 915 n.5.

Since "a reasonable period of time must be addressed on a case-by-case basis" we are guided by the previous holdings of this Court and the facts in the current case. *Id.* at 293 n.6, 564 S.E.2d at 915 n.6. In *LaValley*, this Court held that the temporary order became permanent as twenty-three months was not a reasonable time to forgo seeking a hearing on permanent custody and there were no issues left unresolved. *Id.* at 292-293, 564 S.E.2d at 915. In *Woodring*, this Court held that a period of twelve months was not unreasonable because "the parties were before the court at least three times in the intervening period between the entry of the temporary order and the scheduled permanent custody hearing." *Woodring*, 227 N.C. App. at 644, 745 S.E.2d at 19. In *Senner*, a twenty-month delay was held reasonable as the record contained evidence that the parties were negotiating a new custody arrangement during the relevant period. *Senner*, 161 N.C. App. at 81. 587 S.E.2d at 677.

In this case, the trial court's conclusion that neither party filed requests for a period of no less than eighteen months is unsupported by the evidence. The January Consent Order was entered on 31 January 2019, the Modified Consent Order was entered 17 April 2019, and

Plaintiff filed a calendar request and notice for hearing on the issue of custody on 7 October 2019. On 2 December 2019, Plaintiff filed a calendar request and notice for hearing on the issue of Christmas visitation. The hearings were rescheduled through a series of continuance orders for reasons including the COVID-19 pandemic, withdrawal of Plaintiff's attorney, retirement of Plaintiff's subsequent attorney and not being reached by the court. In its 18 January 2019 consent order, the trial court had ordered the parties to participate in a mediated settlement conference; however, the mediation did not take place until 23 January 2020 and ended in an impasse leaving the issues of "child support" and "final custody" to be determined at trial. Following mediation, Plaintiff filed a series of calendar requests and notices for a hearing on custody: On 21 August 2020, set for the 31 August – 4 September 2020 session; On 3 September 2020, set for the 14 – 18 September 2020 session; On 21 September 2020, set for the 19 – 23 October 2020 session.

Between the entry of the January Consent Order and Plaintiff's 7 October 2019 calendar request, less than nine months elapsed. Approximately seven months elapsed from the completion of the court-ordered mediation to August 2020 when Plaintiff's attorney filed another calendar request and notice of hearing. As "the relevant time period starts when a temporary order is entered and ends when a party requests the matter be set for hearing, not when the hearing is held", we hold that the period of nine months is not unreasonable. *Lamb*, 260 N.C. App. at 529, 818 S.E.2d at 353 (citation omitted). The record does not support the trial court's calculation of an eighteen-month period of inaction. The record reflects that Plaintiff was actively seeking court hearings on the issue of custody, including permanent custody and visitation, following the entry of the January Consent Order. Therefore, the temporary order did not become permanent by operation of time through acquiescence.

IV. Conclusion

The January Consent Order, and its subsequent modification, was a temporary order when it was entered, and because at least one of the parties sought a permanent hearing within a reasonable time, it did not become a permanent order by operation of time through acquiescence. Accordingly, we reverse the October 2022 Order finding that the January Consent Order and Modified Consent Order became a permanent order and remand to the trial court for a hearing on permanent custody.

REVERSED AND REMANDED.

Judges CARPENTER and GORE concur.

MYERS v. BROOME-EDWARDS

[294 N.C. App. 364 (2024)]

HENRY MYERS, PLAINTIFF
v.
SANDRA BROOME-EDWARDS AND DONALD BLAIR, DEFENDANTS

No. COA23-1027

Filed 18 June 2024

Unfair Trade Practices—self-help eviction—conclusions of law supported by competent evidence

In a case arising from a self-help eviction executed by the homeowner and her property manager (defendants) against the home's resident (plaintiff), the trial court did not err in determining, as the fact-finder in a bench trial, that defendants violated N.C.G.S. § 75-1.1—the Unfair and Deceptive Practices Act (UDPA)—when, after the homeowner's complaint for summary ejectment was dismissed with prejudice, she locked plaintiff out of the home and directed the manager to put plaintiff's belongings on the curb, resulting in the loss of nearly $10,000 worth of plaintiff's personal property in addition to depriving plaintiff of his lawful residence. The trial court did not fail to consider all of the relevant evidence before it—including emails, text messages, photographs, journal entries, prior court orders, and affidavits submitted by plaintiff—in determining that defendants' actions were not in compliance with the procedures set forth in the Ejectment of Residential Tenants Act (N.C.G.S. §§ 42-25.6–42-25.9) and, accordingly, constituted violations of the UDPA. Further, because defendants failed to make any argument at trial regarding plaintiff's alleged problematic behavior—which in any event would have been irrelevant as to plaintiff's UDPA claim—or the effect of res judicata, defendants' arguments on those issues were not properly before the appellate court.

Appeal by defendants from orders entered 10 April 2023 and 28 April 2023 by Judge Jennifer L. Fleet in Mecklenburg County District Court. Heard in the Court of Appeals 2 April 2024.

Legal Aid of North Carolina, Inc., by Thomas Holderness, Holly Oner, Justin Tucker, and Celia Pistolis, for plaintiff-appellee.

Wooden Bowers, PLLC, by Walter L. Bowers, Jr., for defendants-appellants.

THOMPSON, Judge.

Defendants appeal from the trial court's order following a bench trial, finding that defendants had violated, *inter alia*, the North Carolina Unfair and Deceptive Practices Act by executing a self-help eviction against plaintiff. After careful review, we affirm.

I. Factual Background and Procedural History

Defendants Sandra Broome-Edwards (defendant Broome-Edwards) and Donald Blair (defendant Blair), own and manage, respectively, the home that plaintiff resided in during the events in question. In 2020, defendant Broome-Edwards filed several complaints for summary ejectment against plaintiff; each was dismissed. However, on 7 December 2020, after another one of plaintiff's complaints was dismissed with prejudice, defendant Broome-Edwards locked plaintiff out of the home and instructed defendant Blair to put plaintiff's belongings on the curb. At trial, plaintiff testified that he lost over $17,000 in personal belongings from the property that defendant Blair left out on the curb. The court found the value of the lost property to be $9,725.

The following day, plaintiff filed this action alleging that defendants had breached the implied covenant of quiet enjoyment, had wrongfully evicted plaintiff in violation of N.C. Gen. Stat. §§ 42-25.6 and 25.9(a), had violated N.C. Gen. Stat. § 75-1.1, the Unfair and Deceptive Practices Act (UDPA), and that plaintiff was entitled to a temporary restraining order and preliminary injunction "requiring [defendant Broome-Edwards] to return [plaintiff]'s belongings to [the home]; to provide [plaintiff] with all keys necessary to unlock the exterior doors . . . and the door to [plaintiff's] room; and to refrain from taking any action to remove [plaintiff] from the [p]remises or his room" until "a valid writ of possession has been issued."

On 9 December 2020, the court entered an order enjoining defendants "from prohibiting plaintiff from having access to" the home and ordering defendants to give plaintiff a key to the home "immediately[.]" When presented with the order of the court, defendant Broome-Edwards responded via text message that she did not "give a damn what the judge say[s]. This is my house, I can do whatever I want with it." Defendants did not allow plaintiff back into the home. On 11 December 2020, plaintiff filed a motion for contempt alleging that defendants had "willfully failed and refused to abide by the terms of the [9 December 2020] Order in that [d]efendants ha[d] failed to restore [p]laintiff's access to the [p]remises." Plaintiff was homeless during the winter of 2020-2021.

On 6 January 2021, the court entered an order for defendants to appear and show cause, finding that there was probable cause that

defendants were "in contempt for willfully violating the [t]emporary [r]estraining [o]rder issued by the [c]ourt on [9 December] 2020." Plaintiff was allowed back into the home in February 2021. Defendant Broome-Edwards testified that she allowed plaintiff back into the home to keep "from being in contempt of court and going to jail."

The matter went to arbitration in May 2021. On 4 June 2021, defendants appealed the arbitration award in favor of plaintiff to Mecklenburg County District Court. The matter was continued several times and ultimately came on for a bench trial on 13 March 2023 in Mecklenburg County District Court. By order entered 10 April 2023, the trial court concluded that defendants had "engaged in self-help tactics in violation of [N.C. Gen. Stat.] § 42-25.9[,]" had engaged "in actions [that] violated [N.C. Gen. Stat.] § 42-59.1[,]" had engaged "in actions [that] were done in commerce and in violation of the Unfair and Deceptive Practices Act, [N.C. Gen. Stat.] § 75-1.1[,]" and that plaintiff was entitled to an award of attorney's fees. From this order, defendants filed timely written notice of appeal on 9 May 2023.

II. Discussion

Before this Court, defendants allege the following issues:

> I. Whether the trial court erred by failing to review all the facts associated with the claim of unfair and deceptive trade practices[?]
>
> II. Whether the trial court erred in finding that res judicata would not bar the present claims[?]
>
> [III]. Whether the trial court erred in entering judgment against [co-defendant] Blair[?]

We will address each of these issues in the analysis to follow.

A. Standard of review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (internal quotation marks and citation omitted). "Upon a finding of such competent evidence, this Court is bound by the trial court's findings of fact even if there is also other evidence in the record that would sustain findings to the contrary." *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005). "Competent evidence is evidence that a reasonable mind

might accept as adequate to support the finding." *Id.* (internal quotation marks and citation omitted).

B. Unfair and Deceptive Practices Act

On appeal, defendants contend that the trial court erred "by failing to review all the facts associated with the claim of unfair and deceptive practices." We do not agree.

1. Competency of the evidence

To prevail on a claim for a violation of N.C. Gen. Stat. § 75-1.1, "a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 275, 775 S.E.2d 316, 323 (2015) (citation omitted). It is well established that "a landlord's trespass upon [a] leased premises, eviction of the tenant without resort to the judicial process, and conversion of the tenant's personal property constituted unfair or deceptive acts or practices in commerce within the meaning of [N.C. Gen. Stat.] § 75-1.1." *Stanley v. Moore*, 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995). And "violations of established public policy may [also] constitute unfair and deceptive practices." *Id.*

N.C. Gen. Stat. § 42-59.1 proclaims that "[t]he General Assembly recognizes that the residents of this State have the right to the peaceful, safe, and quiet enjoyment of their homes." N.C. Gen. Stat. § 42-59.1 (2023). N.C. Gen. Stat. § 42-25.6, which governs the "[m]anner of ejectment of residential tenants[,]" provides that

> [i]t is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed[,] or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 or Article 7 of this Chapter.

Id. § 42-25.6. "If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease" and the "lessor, landlord[,] or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal." *Id.* § 42-25.9(a).

Our Supreme Court has recognized that "the [Ejectment of Residential Tenants] Act embodies the public policy of this state, as

determined by the legislature, that residential tenants not be evicted through self-help measures without resort to the judicial process." *Stanley*, 339 N.C. at 724, 454 S.E.2d at 228–29. Consequently, lessors, landlords, or agents who execute "self-help" evictions in violation of the Ejectment of Residential Tenants Act may also be liable for "a violation of the Unfair and Deceptive Practices Act, thus giving rise to an award of treble damages and attorney's fees under that Act." *Id.* at 724, 454 S.E.2d at 229.

Here, the trial court concluded that defendants had "engaged in self-help tactics in violation of [N.C. Gen. Stat.] § 42-25.9[,]" that defendants had "engage[d] in actions which violated [N.C. Gen. Stat.] § 42-59.1[,]" and that defendants "engaged in actions which were [ ] done in commerce and in violation of the Unfair and Deceptive Practices Act, [N.C. Gen. Stat.] § 75-1.1. . . ." In the order, the trial court entered several findings of fact that were supported by competent evidence to support its conclusions of law:

> 3. In December 2020, [d]efendant Blair, at the direction of and with the knowledge and consent of [d]efendant Broome[-]Edwards, changed the locks on the subject property.
>
> 4. On [7 December] 2020, [d]efendant Blair, at the direction of and with the knowledge and consent of [d]efendant Broome[-]Edwards, removed [plaintiff's] belongings from the premises and placed them on the curb outside of the property. At the time [d]efendants took this action[,] they were aware they had no legal right to do so.
>
> . . . .
>
> 6. On [9 December] 2020, [the trial court] entered a [t]emporary [r]estraining [o]rder requiring [d]efendants to immediately restore [p]laintiff's access to the premises and prohibiting [d]efendants from removing [p]laintiff's property from the premises. The [t]emporary [r]estraining [o]rder also prohibited [d]efendants from taking any steps to evict [p]laintiff without judicial process.
>
> 7. Defendant Broome[-]Edwards testified [that] she 'saw the [t]emporary [r]estraining [o]rder and refused to let [plaintiff] in[.]' Defendant Broome[-]Edwards further testified, 'I let [plaintiff] in because my attorney told me to or I would be in contempt[.]'

8. Defendant Blair flagrantly ignored the [m]agistrate's [j]udgment and 'laughed' when contacted by [p]laintiff's counsel regarding [plaintiff's] right to re-entry onto the subject premises and the removal of his personal belongings.

9. Defendant Bro[o]me[-]Edwards and [d]efendant Blair disobeyed [the trial court]'s [t]emporary [r]estraining [o]rder and denied [plaintiff] re-entry into the premises.

. . . .

11. [Plaintiff] testified as to the personal belongings which were placed on the curb outside of the subject premises. [Plaintiff] was able to retrieve only a portion of his belongings.

. . . .

13. Defendants Broome-Edwards and Blair intentionally and deliberately refused [p]laintiff re-entry into the premises until February of 2021.

. . . .

27. The [c]ourt makes the following findings regarding the award of treble damages:

a. The actions of [d]efendants Broome-Edwards and Blair were done in commerce and in violation of the Unfair and Deceptive Practices Act, [N.C. Gen. Stat.] § 75-1.1.

b. The actions of [d]efendants Broome-Edwards and Blair were willful, [and] malicious, which caused injury to [p]laintiff and his property as contemplated under 11 U.S. Code § 523(a)(6).

c. The prohibition against treble damages in [N.C. Gen. Stat.] § 42-25.9 does not preclude recovery of treble damages and attorney's fees under the Unfair and Deceptive Practices Act, [N.C. Gen. Stat.] § 75-1.1.

After careful review, we conclude that there was competent evidence to support the trial court's findings of fact, and in turn, its conclusions of law, that defendants had engaged in self-help tactics in violation of N.C. Gen. Stat. §§ 42-25.9, -59.1, and 75-1.1. At trial, plaintiff proffered testimony and evidentiary exhibits including emails, text messages,

photographs, journal entries, prior court orders, and affidavits—that is, competent evidence "that a reasonable mind might accept as adequate to support the finding"—that defendants had engaged in a self-help eviction in violation of N.C. Gen. Stat. §§ 42-25.9, -59.1, and 75-1.1. *Eley*, 171 N.C. App. at 369, 614 S.E.2d at 558. "Upon a finding of such competent evidence, this Court is bound by the trial court's findings of fact[,]" *id.*, and for this reason, we conclude that the findings of fact support the conclusions of law and ensuing judgment.

2. Allegations against plaintiff as defense to UDPA claim

Defendants also contend that the trial court "declined to consider any evidence or permit discussion of [plaintiff]'s violent behavior, the health risks he posed, or the complaints received by [defendant] Broome-Edwards." Our careful review of the record informs us that defendants made no argument regarding plaintiff's allegedly problematic behavior at trial, and as such, this argument is deemed abandoned. *See* N.C. R. App. P. 10(a) (noting that "[i]n 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").

However, assuming, *arguendo*, that defendants had presented evidence at trial regarding plaintiff's alleged behavior, these allegations are immaterial, as a plaintiff's conduct is irrelevant for purposes of a UDPA claim. *See Media Network Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 452, 678 S.E.2d 671, 684 (2009) (holding that the plaintiff's conduct "is also irrelevant" when evaluating a UDPA claim because "the actor's conduct is of sole relevance"). Therefore, the trial court did not err in "declin[ing] to consider any evidence or permit discussion of [plaintiff]'s violent behavior, the health risks he posed, or the complaints received by [defendant] Broome-Edwards[,]" and properly disregarded considerations of plaintiff's conduct when evaluating the UDPA claim against defendants.

Again, because there is competent evidence in the record that tends to support the findings of fact, and findings of fact supported by competent evidence are binding on appeal, the trial court did not err in concluding as a matter of law that defendants had violated N.C. Gen. Stat. §§ 42-25.9, -59.1, and 75-1.1, and that plaintiff was thereby entitled to treble damages for defendants' violation of the Unfair and Deceptive Practices Act.

C. Agent liability for defendant Blair

Defendants also contend that "the judgment against [co-defendant] Blair must be reversed as he was never personally served with the lawsuit and has never participated in this litigation." We do not agree, as the record affirmatively shows that appellate counsel, "an attorney for [defendant] Blair [who] [was] authorized to[,] and d[id] accept service of the summons and complaint in this matter" on 5 March 2021. Therefore, this argument lacks merit.

Moreover, defendant Blair argues that "the actions in question were carried out pursuant to explicit instructions and directions of [defendant Broome-Edwards]" and that defendant Blair is therefore "shielded from liability pursuant to the doctrine of respondeat superior." We disagree, because, as noted above, the Ejectment of Residential Tenants Act expressly holds agents liable for violations of the Act. *See* N.C. Gen. Stat. § 42-25.9(a) (mandating that "the lessor, landlord, or *agent shall be liable* to the tenant for damages caused by the tenant's removal or attempted removal") (emphasis added). Here, the trial court found that "[d]efendant Blair act[ed] at the direction of [d]efendant Broome[-] Edwards and *is her agent for the purposes of the subject property*." (emphasis added). For the aforementioned reasons, we conclude that the trial court's judgments against defendant Blair were proper.

D. Res Judicata

Finally, defendants argue that "the trial court erred in finding that res judicata would not bar the present claims." We note that defendants did not argue that res judicata barred this claim before the trial court. Therefore, the issue is unpreserved for appellate review. *See* N.C. R. App. P. 10(a) (noting that "[i]n 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").

It is well established that "the law does not permit parties to swap horses between courts in order to get a better mount" before the appellate court. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Here, our careful "examination of the record discloses that the cause was not tried upon th[e] [res judicata] theory," *id.*, and for this reason, we decline to address defendants' argument that res judicata would bar the present claim.

III. Conclusion

We conclude that the trial court's conclusions of law were supported by competent evidence, that the trial court did not err in failing to consider allegations regarding plaintiff's conduct for purposes of a UDPA claim, that defendant Blair is liable as an agent of defendant Broome-Edwards, and that defendants' res judicata argument was unpreserved for appellate review. For the aforementioned reasons, the order of the trial court is affirmed.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

THE NORTH CAROLINA STATE BAR, Plaintiff
v.
MARK A. KEY, Attorney, Defendant

No. COA23-866

Filed 18 June 2024

1. Attorneys—discipline—appellate review—whole record test—conclusions regarding misconduct—findings of fact supported and sufficient

In a disciplinary proceeding in which the attorney was alleged to have violated multiple Rules of Professional Conduct from a wide range of misconduct—including by committing multiple tax-related crimes and mortgage fraud; mishandling client funds; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation—substantial evidence (in view of the whole record test) supported each of the factual findings by the Disciplinary Hearing Commission (DHC) and its conclusions that the attorney engaged in misconduct. Given that result in the adjudication phase of the hearing, the DHC did not err in then proceeding to the disposition phase to determine the appropriate discipline to impose.

2. Attorneys—discipline—failure to consider attorney's commission of multiple felonies and bad faith obstruction of disciplinary proceeding—remand required

In the adjudicatory phase, the Disciplinary Hearing Commission (DHC) did not err in failing to conclude that the attorney violated Rule of Professional Conduct 8.4(b) by committing a federal crime

involving fraud and false statements where the DHC did not make a finding of willfulness—an essential element of that offense—in connection with the attorney's inaccurate tax filings. In the disposition phase, the DHC's findings of fact were supported by substantial evidence in view of the whole record, with the exception of a portion of one finding regarding the attorney's provision of shelter to the homeless population in his community. However, the DHC abused its discretion in deciding the appropriate discipline to impose without considering, as required by the Administrative Code, the attorney's commission of tax-related felonies (27 N.C.A.C. 1B.0116(f)(2)(D)) and his bad faith obstruction of the disciplinary process (27 N.C.A.C. 1B.0116(f)(3)(M)). Accordingly, the portion of the order of discipline suspending the attorney's license for five years was vacated, and the matter was remanded for further proceedings.

Appeal by Defendant and cross-appeal by Plaintiff from order entered 20 February 2023 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 16 April 2024.

The North Carolina State Bar, by Interim Counsel Carmen H. Bannon and Deputy Counsel Savannah B. Perry, for Plaintiff-Appellee/Cross-Appellant.

Mark A. Key, Pro se, Defendant-Appellant/Cross-Appellee.

COLLINS, Judge.

Mark Key ("Defendant") appeals, and the North Carolina State Bar ("Plaintiff") cross-appeals, from an order of discipline entered by the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC") suspending Defendant's law license for five years and allowing him to seek a stay of the balance of the suspension after three years if he complies with certain conditions. For the reasons stated herein, we affirm in part, dismiss in part, and vacate and remand in part.

I. Procedural Background

Plaintiff filed a complaint against Defendant on 30 September 2021. Defendant filed three separate motions to extend his time to answer the complaint, which were granted. Defendant filed an answer on 22 December 2021.

The DHC entered an order on 6 May 2022 scheduling the disciplinary hearing for 28 November through 2 December 2022. The DHC

entered a consent order on 7 July 2022 setting the discovery deadline for 7 October 2022. Defendant filed a motion to stay the disciplinary proceedings pending the outcome of an ongoing federal investigation into his tax-related crimes, which was denied.

Plaintiff served its first requests for admission, first set of interrogatories, and first request for production of documents on 29 July 2022. Defendant served his responses to Plaintiff's first requests for admission on 26 August 2022 but did not timely respond to Plaintiff's first set of interrogatories or first request for production. Plaintiff served its second request for production on 2 September 2022. Defendant sent Plaintiff an email containing five PDF attachments on 12 September 2022 but did not indicate how the documents were responsive to Plaintiff's first request for production. Defendant served his responses to Plaintiff's first set of interrogatories on 14 September 2022.

Plaintiff filed a motion to compel on 16 September 2022, alleging that Defendant's responses to Plaintiff's first set of interrogatories and first request for production "are wholly inadequate and are not consistent with the rules or warranted by existing law." Plaintiff also filed a motion to determine the sufficiency of Defendant's responses to Plaintiff's first requests for admission, alleging that "[m]ost of Defendant's responses to Plaintiff's [requests] are inadequate, inconsistent with the rules governing discovery, and not warranted by existing law." Plaintiff filed a second motion to compel on 13 October 2022, alleging that Defendant did not respond to Plaintiff's second request for production.

The DHC entered an order on 19 October 2022 granting Plaintiff's motion to compel and ordering Defendant to fully respond to Plaintiff's first set of interrogatories and first request for production within three business days. Defendant delivered his responses to Plaintiff's first set of interrogatories and first request for production via a USB drive on 21 October 2022. Three days later, Plaintiff notified Defendant that it could only access certain documents on the USB drive. Defendant sent Plaintiff an email the following day containing 39 PDF attachments but did not indicate how the documents were responsive to Plaintiff's first request for production.

The DHC entered an order on 1 November 2022 granting Plaintiff's second motion to compel and ordering Defendant to respond to Plaintiff's second request for production by 3 November 2022. The DHC also entered an order on 2 November 2022 finding that Defendant's responses to Plaintiff's first requests for admission did not comply with Rule 36 of the North Carolina Rules of Civil Procedure and ordering Defendant to correct his responses within three business days. Defendant did not

respond to Plaintiff's second request for production and did not correct his responses to Plaintiff's first requests for admission. As a result, the DHC entered an order on 7 November 2022 deeming certain requests for admission admitted.

Plaintiff filed a motion for sanctions on 8 November 2022, alleging that Defendant's responses to Plaintiff's first set of interrogatories were "evasive, incomplete, or non-responsive"; Defendant's responses to Plaintiff's first request for production did not indicate how the documents were responsive to Plaintiff's requests and Defendant failed to produce most of the requested documents; and Defendant failed to respond to Plaintiff's second request for production. Plaintiff requested that the DHC enter an order prohibiting Defendant from introducing into evidence or objecting to the admissibility of any documents that would have been responsive to its requests for production. The DHC denied the motion.

After a hearing, the DHC entered an order of discipline on 20 February 2023 suspending Defendant's law license for five years and allowing him to seek a stay of the balance of the suspension after three years if he complies with certain conditions. Defendant appealed, and Plaintiff cross appealed.

II. Factual Background

Plaintiff alleged in its complaint that Defendant had engaged in numerous instances of misconduct, detailed below.

A. Tax-Related Crimes

Defendant was the sole owner of The Key Law Office, which was registered as a professional corporation. As owner of The Key Law Office, Defendant employed several employees from 2016 to 2020, including himself. During this period, Defendant committed several tax-related crimes in his capacity as owner of The Key Law Office and in his individual capacity.

Defendant failed to withhold or pay over to the Internal Revenue Service ("IRS") and the North Carolina Department of Revenue ("NCDOR") amounts due for federal and state income taxes on the wages of his employees. Furthermore, Defendant repeatedly failed to file Employer's Quarterly Federal Tax Returns ("IRS Form 941") to report the amount of Social Security and Medicare taxes ("FICA taxes") withheld from the wages of his employees. During the fourth quarter of 2019, Defendant failed to pay over to the IRS the FICA taxes withheld from the wages of his employees.

Defendant failed to timely file his federal income tax returns from 2015 to 2018. Defendant filed his 2018 federal income tax return in June 2020 and his 2015, 2016, and 2017 federal income tax returns in September 2020. At the time he filed his 2015, 2016, and 2017 federal income tax returns, Defendant failed to pay the taxes due. Defendant also failed to pay the federal income taxes due at the time he filed his 2019 and 2020 returns.

Defendant similarly failed to timely file his state income tax returns from 2015 to 2018. Defendant filed his 2018 state income tax return in June 2020 and his 2015, 2016, and 2017 state income tax returns in August 2021. At the time he filed his state income tax returns, Defendant failed to pay the full amount of taxes due for 2015 and 2016. Defendant also failed to pay the state income taxes due at the time he filed his 2019 and 2020 returns.

B. Employee Taxes

Defendant employed Diamond Zephir as an associate from April to August 2018. Defendant told Zephir that he would pay federal and state income taxes on her behalf but failed to do so. As a result, Zephir owed federal and state income taxes on the wages she earned while employed by Defendant. Defendant also issued a W-2 to Zephir that underreported her wages. When Zephir received the inaccurate W-2 and discovered that Defendant had failed to withhold federal and state income taxes, she contacted Defendant. Defendant assured Zephir that he would issue a corrected W-2 that accurately reflected her wages and tax withholdings but failed to do so.

Zephir asked Defendant to pay the federal and state income taxes she owed, and Defendant refused. Zephir filed suit against Defendant and obtained a judgment for the federal and state income taxes she owed, the tax refund she would have been entitled to if her taxes had been properly paid, and litigation costs. The following day, Defendant filed a Transmittal of Wage and Tax Statement ("IRS form W-3") along with W-2 forms for his 2018 employees. Defendant submitted the W-2 for Zephir that underreported her wages.

C. Trust Accounting

Debra Jordan and her two children retained Defendant to handle a personal injury matter in June 2016. In November 2020, Plaintiff received a report from an insurance adjuster that Defendant had received settlement checks but had not returned executed settlement releases for his clients. Plaintiff opened a grievance file to investigate the report and conducted an audit of Defendant's trust account. The audit revealed

that (1) Defendant failed to ensure that the entrusted funds he received on behalf of the Jordans were deposited into his trust account; (2) when Defendant received payments that were partially legal fees and partially entrusted funds, he did not deposit those payments into his trust account intact; (3) Defendant did not prepare required monthly and quarterly reconciliation reports; (4) Defendant failed to maintain complete and accurate client ledgers; (5) Defendant commingled earned fees and entrusted funds; and (6) Defendant did not promptly pay or deliver clients' entrusted property to which they were entitled.

D. Representation of T.M.

T.M. retained Zephir in August 2018 to handle an absolute divorce and alimony claim. After Zephir resigned from The Key Law Office, Defendant began representing T.M. Defendant also agreed to represent T.M. in her pending child custody and equitable distribution matters. As a result, the lawyer that T.M. had previously retained to handle these matters withdrew. Defendant filed a complaint for absolute divorce, alimony, and attorney's fees on 24 September 2018. The trial court entered a judgment for absolute divorce on 19 November 2018.

The child custody matter was scheduled to be heard on 2 May 2019. Prior to the hearing, Defendant's assistant informed T.M. that Defendant would not be able to attend. Defendant sent another lawyer, who was not employed by The Key Law Office, to attend the hearing. T.M. had never met with or spoken to that lawyer, and she had not given Defendant permission to share confidential information with the lawyer.

In the weeks following the meeting, Defendant did not respond to T.M.'s emails and phone calls. Defendant eventually met with T.M. on 9 July 2019 and "provided an explanation for why he wasn't there and asked pretty much what happened," and T.M. "gave a recount of what [she] had experienced or what [she] could remember[.]"

On 27 January 2020, T.M. sent Defendant an email stating, "I would like to request the Key Law Office and any associate withdraw from representation on my cases pending, effective immediately. Please direct any needed correspondence and documentation to this e-mail." Defendant did not withdraw from representation. Three days later, Defendant filed a notice of hearing scheduling T.M.'s equitable distribution matter for mid-February.

E. Mistrial

Defendant represented a client charged with felonious restraint, and the matter came on for trial in Wake County Superior Court on 11 June

2019. During the State's direct examination of a witness, Defendant continuously raised the same objection that had been previously overruled. Defendant repeatedly attempted to elicit testimony from a witness on cross-examination that the trial court had previously ruled inadmissible. Defendant became angry and raised his voice at the trial court in the presence of the jury. At that point, the trial court ended the proceedings for the day.

After the jury left the courtroom, the trial court said, "Mr. Key let me tell you something. . . [.]" Before the trial court could finish the statement, Defendant stood up, aggressively pointed his finger, and said, "Let me tell you something. . . ." The trial court instructed Defendant to sit down and informed him that it could initiate contempt proceedings against him based on his misconduct. The trial court gave Defendant the opportunity to apologize, but he did not do so. Due to Defendant's misconduct in the presence of the jury, the trial court entered an order declaring a mistrial on 17 June 2019.

F. Mortgage Fraud

Defendant's girlfriend purchased a home in New Hill for approximately $740,000 in October 2016, and Defendant lived in the home with her until their relationship ended in May 2020. Defendant wanted to purchase the home from her when their relationship ended, but she refused to sell it to him.

In July 2020, Defendant was introduced to Kristian Smith. Defendant expressed his desire to purchase the home, and Smith agreed to purchase the home and sell it to Defendant. Smith incorporated an entity called Sweet Fruits Healing, LLC ("Sweet Fruits") on 14 July 2020. Around this time, Defendant established a joint bank account with Smith. Defendant began depositing money into the joint account over the next two months. Smith never deposited any funds into the joint account.

Sweet Fruits purchased the home for $740,000 on 28 September 2020. Sweet Fruits funded the purchase with a one-year mortgage loan for $518,000 and money that Defendant had deposited into the joint account. After Sweet Fruits purchased the home, Defendant began living there again.

Defendant purchased the home from Sweet Fruits for $522,000 on 30 April 2021. Defendant funded the purchase with a mortgage loan from Navy Federal Credit Union for $531,135. In his loan application, Defendant falsely represented that he did not have any credits towards the purchase of the house; the property value was $522,000; he did not have a business affiliation with the seller of the property; he was

not currently delinquent or in default on a federal debt; and he had not "entered into any other agreement, written or oral, in connection with this real estate transaction."

The loan application contained a Borrower Certification and Authorization, which stated:

> In applying for the loan, I completed a loan application containing information which may include the purpose of the loan, the amount and source of the down payment, employment and income information, and assets and liabilities. I certify that all of the information is true and complete. I made no misrepresentations in the loan application or other documents, nor did I omit any pertinent information.

By signing the loan application, Defendant also acknowledged that the "information [he] provided in this application is true, accurate, and complete as of the date [he] signed this application."

Defendant submitted his earning statements for January and February 2021 in support of his loan application, which falsely indicated that he received bi-weekly paychecks from his law firm and that federal and state income taxes had been withheld from his wages.

G. Misconduct During Grievance Process

Plaintiff opened a grievance file to investigate the tax-related matters and sent Defendant a letter of notice on 15 March 2021 advising him of the grievance and directing him to submit a written response within 15 days. The following day, Defendant was served with a subpoena directing him to produce certain documents by 9 April 2021. Defendant did not submit a written response to the letter and did not produce any documents.

Plaintiff emailed Defendant on 21 April 2021 notifying him that he had failed to comply with the subpoena. Defendant responded that same day and attached "some of the information" that was requested in the subpoena. Defendant sent additional documents on 27 April 2021, and Plaintiff sent a detailed follow-up email notifying him which documents were missing. After Defendant sent additional documents on 3 May 2021, Plaintiff sent another detailed follow-up email notifying him which documents were missing. Defendant submitted his untimely response to the letter of notice on 11 May 2021.

Plaintiff interviewed Defendant on 7 July 2021, and Defendant made multiple misrepresentations during the interview. Plaintiff also

reviewed a spreadsheet with Defendant during the interview to explain which documents were still missing.

Despite multiple reminders as to which documents were missing, Defendant failed to completely produce all subpoenaed documents.

III. Standard of Review

There are two phases in attorney disciplinary cases: (1) "an adjudicatory phase in which the DHC determines whether the defendant committed the misconduct"; and (2) "a disposition phase in which the DHC determines the appropriate discipline." *N.C. State Bar v. Adams*, 239 N.C. App. 489, 493, 769 S.E.2d 406, 410 (2015) (citation omitted).

In reviewing an order of discipline, we apply the whole record test to determine whether the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law. *N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 309 (2003). "The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." *N.C. State Bar v. Key*, 189 N.C. App. 80, 84, 658 S.E.2d 493, 497 (2008) (citation omitted). The whole record test "also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn." *Talford*, 356 N.C. at 632, 576 S.E.2d at 310 (citation omitted). "However, the mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the committee." *Key*, 189 N.C. App. at 84, 658 S.E.2d at 497 (citations omitted). Unchallenged findings of fact are binding on appeal. *Id.* at 87, 658 S.E.2d at 498.

The whole record test must be applied separately to the adjudicatory phase and the disposition phase. *N.C. State Bar v. Megaro*, 286 N.C. App. 364, 372, 880 S.E.2d 401, 407 (2022).

To satisfy the evidentiary requirements of the whole record test, "the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing." *Talford*, 356 N.C. at 632, 576 S.E.2d at 310 (quotation marks, brackets, and citation omitted). Clear, cogent, and convincing "describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985) (citation omitted). "It has been defined as evidence which should fully convince." *Id.* (quotation marks and citation omitted).

IV. Defendant's Appeal

[1] Defendant essentially argues that the DHC erred by finding and concluding that he engaged in any sort of misconduct. We address his arguments in the same order in which the DHC organized its findings and conclusions in its order of discipline.[1]

A. Tax-Related Crimes

Defendant argues that the DHC erred by finding that he committed multiple tax-related crimes.

Defendant challenges the following findings of fact:

> 18. [Defendant] failed to pay over to the IRS the FICA taxes collected from the wages of firm employees during the fourth quarter of 2019.
>
> . . . .
>
> 21. At the time he belatedly filed the 2015-2018 returns, [Defendant] did not pay the federal income taxes due for tax years 2015 through 2017.
>
> 22. [Defendant] also did not pay the federal income taxes that were due in connection with his 2019 and 2020 returns.
>
> . . . .
>
> 25. At the time he belatedly filed the returns for tax years 2015 through 2017, [Defendant] did not pay in full the state income taxes, plus penalties and interest, due in connection with his 2015 and 2016 returns.
>
> 26. [Defendant] also did not pay the state income taxes that were due in connection with his 2019 and 2020 returns.
>
> . . . .
>
> 28. Under this Panel's clear, cogent and convincing standard of review, [Defendant] violated 26 U.S.C. § 7203 by:
>
> > (a) willfully failing to timely file federal income tax returns for tax years 2015 through 2018; and

1. We do not address the numerous new arguments Defendant presented in his reply brief as "Defendant may not use his reply brief to make new arguments on appeal." *State v. Triplett*, 258 N.C. App. 144, 147, 810 S.E.2d 404, 407 (2018). Likewise, we do not consider the numerous arguments that Defendant presented in his Appellee brief but did not assert in his Appellant brief "due to page limitations[.]"

(b) willfully failing to timely pay federal income taxes owed for 2015 through 2017, 2019, and 2020.

. . . .

30. Under this Panel's clear, cogent and convincing standard of review, [Defendant] violated 26 U.S.C. § 7202 by:

(a) willfully failing to withhold federal income taxes from the wages of his law firm employees, including his own; and

(b) willfully failing to pay over to Treasury all FICA taxes withheld from the wages of firm employees in 2019.

. . . .

33. Under this Panel's clear, cogent and convincing standard of review, [Defendant] violated N.C. Gen. Stat. §§ 105-236(a)(8) and (9) by:

(a) willfully failing to withhold or pay over to NCDOR amounts due for state income taxes on the wages of any law firm employees, including his own, during the period from 2016 through 2020;

(b) willfully failing to timely file state personal income tax returns for tax years 2015 through 2018; and

(c) willfully failing to timely pay state income taxes for tax years 2015 through 2017, 2019, and 2020.

1. Findings of Fact 18, 21, 22, 25, and 26

Defendant's Form 941 for the fourth quarter of 2019 was due by 31 January 2020. Defendant did not file his Form 941 for the fourth quarter of 2019 until 9 March 2020. The IRS transcript reflects that Defendant made a partial payment when he untimely filed the Form 941, but still owed $8,274.83 as of 22 February 2021. Finding of Fact 18 is therefore supported by substantial evidence.

Defendant filed his 2015, 2016, and 2017 federal income tax returns in September 2020. The IRS transcripts reflect that: (1) Defendant did not make any payments towards his 2015 taxes, and he owed $2,899 as of 3 October 2022; (2) Defendant did not make any payments towards his 2016 taxes until 4 June 2021, approximately nine months after he filed the return; and (3) Defendant did not make any payments towards his 2017

taxes until 4 August 2021, and he owed $6,299.14 as of 3 October 2022. Accordingly, Finding of Fact 21 is supported by substantial evidence.

Defendant's 2019 federal income tax return shows that Defendant owed $7,540 in taxes. Although the tax return was signed by Defendant and dated 5 July 2020, the IRS transcript reflects that Defendant did not file a tax return for 2019.[2] The IRS transcript reflects that Defendant made the following payments totaling $6,950: (1) $2,900 on 10 April 2020; (2) $3,500 on 27 August 2021; and (3) $550 on 27 December 2021. As Defendant's 2019 federal income tax return shows that he owed $7,540 in taxes and Defendant only paid $6,950, Defendant failed to pay the full amount of taxes due for 2019. Defendant admitted in his answer that he "did not pay in full the federal income taxes that were due in connection with his 2020 return." Accordingly, Finding of Fact 22 is supported by substantial evidence.

Defendant's state income tax records from NCDOR reflect that he owed the following amounts towards his taxes as of 26 August 2021: (1) $29.38 for 2015; (2) $500.91 for 2016; (3) $1,325.59 for 2019; and (4) $11,450.52 for 2020. Accordingly, Findings of Fact 25 and 26 are supported by substantial evidence.

2. Finding of Fact 28

Finding of Fact 28 is more appropriately categorized as a conclusion of law, and we therefore review it de novo. *See Key*, 189 N.C. App. at 88, 658 S.E.2d at 499.

Under 26 U.S.C. § 7203,

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor[.]

26 U.S.C. § 7203. Willfulness is the "voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991).

The record is replete with evidence that Defendant's failure to timely file and pay his federal income tax returns was willful. Defendant has

2. Defendant filed an "[a]mended tax return" on 19 August 2021, which was "sent back to originator" on 15 July 2022.

an extensive history of failing to timely file his income taxes beginning in 1998. The IRS sent Defendant multiple notices of federal tax liens between 2001 and 2016 due to his failure to pay taxes.[3] Defendant testified at the disciplinary hearing that the IRS had levied his bank accounts in the past to collect delinquent federal income taxes. When Defendant sold his home in 2015, he was required to pay $31,152.46 to discharge his home from federal tax liens. The IRS also auctioned off property owned by Defendant to collect delinquent taxes on 11 January 2018.

Defendant stated during his interview with Plaintiff, "I don't want to pay taxes." Defendant also admitted in the following exchange that he intentionally refrained from paying his 2009 tax delinquencies until the ten-year statute of limitations had expired:

> [PLAINTIFF]: But with that said you're just waiting for the statute of limitations to pass.
>
> [DEFENDANT]: And that's true. That's a true statement.
>
> [PLAINTIFF]: I mean, what do you think with most attorneys having a tax lien filed on them, most attorneys would just—
>
> [DEFENDANT]: And most attorneys wait for a statute of limitations [chuckles].
>
> [PLAINTIFF]: Not as it relates to taxes, Mr. Key. Not as it relates to taxes.
>
> [DEFENDANT]: Even when it relates to taxes. If you're an attorney, you have an attorney's mind for the most part and when I saw a statute of limitations back in February or so I was like, "OK great now I can apply for a mortgage."
>
> [PLAINTIFF]: Do you believe that your attorney mindset to wait for the statute of limitations is the right one to have such that you're disregarding your legal obligation to timely pay your taxes?

---

3. Defendant argues that the DHC abused its discretion by admitting past tax liens into evidence. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith[,]" but may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023). As the tax liens were admitted into evidence to show that Defendant knew he had an obligation to pay taxes and intentionally ignored that obligation, the DHC did not abuse its discretion by admitting them into evidence.

> [DEFENDANT]: So I think that's a respectable question. I don't. I think to a -- that depends on the circumstances but you said with respect to the failure to pay taxes, I have an issue with a personal issue with this -- the interest. I have a personal issue with the—And so what I was talking to the lady about was the interest and the penalties and the amount associated with that. I don't like that.

Defendant's extensive history of failing to timely file and pay his income taxes, coupled with his statements to Plaintiff, constitutes substantial evidence to support a finding that Defendant willfully failed to timely file and pay his federal income taxes. Accordingly, Finding of Fact 28 is supported by substantial evidence.

3. Finding of Fact 30

Finding of Fact 30 is more appropriately categorized as a conclusion of law, and we therefore review it de novo. *See Key*, 189 N.C. App. at 88, 658 S.E.2d at 499.

Under 26 U.S.C. § 7202, any person required "to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony[.]" 26 U.S.C. § 7202. A person "includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." *Id.* § 7343.

Defendant argues that Plaintiff was required to "present evidence of the portion of employee wages that constitutes federal taxable wages for employees of [The Key Law Office] from 2016-2020" but cites no authority to support this proposition aside from merely referencing 26 U.S.C. § 3402, which provides that an "employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary." *Id.* § 3402(a)(1). Defendant also argues that it "is not a violation of 7202 if the defendant fails to withhold federal income taxes from his own wages" but cites no authority to support this proposition. These arguments are thus deemed abandoned. *See* N.C. R. App. P. 28(b)(6). As Defendant makes no supported arguments regarding his willful failure to withhold federal income taxes from the wages of his employees, Finding of Fact 30(a) is binding on appeal.

Defendant argues that he "did not receive adequate notice as required by law that [Plaintiff] intended to argue that [he] willfully failed

to timely file [The Key Law Office's] quarterly tax returns[,]" and that Plaintiff "failed to present sufficient evidence that [he] willfully failed to file [The Key Law Office's] business tax returns." Contrary to Defendant's assertions, Plaintiff did not make this argument and the DHC made no such finding. Rather, the DHC found that Defendant violated 26 U.S.C. § 7202 by "willfully failing to *pay over* to Treasury all FICA taxes withheld from the wages of firm employees in 2019." (emphasis added). As Defendant does not specifically challenge this finding of fact, it is binding on appeal.[4] *Key*, 189 N.C. App. at 87, 658 S.E.2d at 498.

4. Finding of Fact 33

Finding of Fact 33 is more appropriately categorized as a conclusion of law, and we therefore review it de novo. *See id.* at 88, 658 S.E.2d at 499.

Under N.C. Gen. Stat. § 105-236(a)(8), any person "required to collect, withhold, account for, and pay over any tax who willfully fails to collect or truthfully account for and pay over the tax shall . . . be guilty of a Class 1 misdemeanor." N.C. Gen. Stat. § 105-236(a)(8) (2023). Furthermore, under section 105-236(a)(9),

> [a]ny person required to pay any tax, to file a return, to keep any records, or to supply any information, who willfully fails to pay the tax, file the return, keep the records, or supply the information, at the time or times required by law, or rules issued pursuant thereto, is . . . guilty of a Class 1 misdemeanor.

Id. § 105-236(a)(9) (2023). "Willfully means to purposely commit an offense in violation of a known legal duty." *State v. Howell*, 191 N.C. App. 349, 354, 662 S.E.2d 922, 926 (2008) (citations omitted).

Defendant argues that Plaintiff was required to "present evidence of the portion of employee wages, if any, that constitutes state taxable wages for employees of [The Key Law Office] from 2016-2020." Defendant cites no authority to support this proposition aside from merely referencing N.C. Gen. Stat. § 105-163.2, which provides that an employer "shall deduct and withhold from the wages of each employee the State income taxes payable by the employee on the wages." N.C. Gen. Stat.

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4. Defendant summarily argues that his law firm's failure "to pay the fourth quarter employer portion of FICA taxes does not subject [him] to criminal liability under 7202." However, as owner of The Key Law Office, Defendant was required to "collect, account for, and pay over any tax imposed[,]" including FICA taxes. 26 U.S.C. § 7202.

§ 105-163.2(a) (2023). This argument is thus deemed abandoned. *See* N.C. R. App. P. 28(b)(6). As Defendant makes no supported arguments regarding his willful failure to withhold state income taxes from the wages of his employees, Finding of Fact 33(a) is binding on appeal.

As further discussed above, Defendant's extensive history of failing to timely file and pay his income taxes, coupled with his statements to Plaintiff, constitutes substantial evidence to support a finding that Defendant willfully failed to timely file and pay his state income taxes. Finding of Fact 33(b) is therefore supported by substantial evidence.

For the reasons stated above, the DHC did not err by finding and concluding that Defendant committed multiple tax-related crimes in his capacity as owner of The Key Law Office and in his individual capacity.

B. Employee Taxes

Defendant argues that the DHC erred by concluding that he violated North Carolina Rule of Professional Conduct 8.4(c) by "falsely telling Zephir that he would be responsible for paying income taxes on her behalf" and "knowingly certifying on the IRS form W-3 for tax year 2018 that Zephir's inaccurate W-2 was accurate[.]"

It is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer[.]" N.C. R. Prof. Cond. 8.4(c).[5]

Defendant challenges the following findings of fact:

> 39. . . . Zephir owed federal and state income taxes on the income earned while she was employed by [Defendant's] law firm.
>
> . . . .
>
> 41. When Zephir received the inaccurate W-2 and discovered the income tax debt caused by [Defendant's] failure to withhold from her paychecks, she contacted [Defendant].
>
> . . . .
>
> 45. On 9 May 2019, approximately three months after Zephir notified [Defendant] that her W-2 was inaccurate and one day after he participated in the hearing at which

5. Defendant argues that Rule 8.4(c) does not apply to "contractual disputes between attorneys where it does not involve a crime and/or a client." Defendant cites no authority to support this proposition, and we find no merit to this contention.

> judgment was entered against him on Zephir's claim, [Defendant] filed with the IRS a Transmittal of Wage and Tax Statements (IRS form W-3) along with W-2 forms for the employees of his law firm during 2018.
>
> 46. The W-2 form for Zephir that [Defendant] filed on 9 May 2019 underreported Zephir's 2018 wages.

Zephir's verified complaint against Defendant stated that she "owe[d] $317.00 to the State of North Carolina and $792.00 to the Federal Government, totaling $1,109.00 as a result of Defendants not having paid [her] North Carolina State and Federal taxes throughout her employment with the Key Law Office."

Zephir also testified during her deposition that she owed taxes on the income she earned while employed by Defendant. Accordingly, Finding of Fact 39 is supported by substantial evidence.

Finding of Fact 41 is supported by screenshots of multiple Facebook messages that Zephir sent Defendant regarding her inaccurate W-2 as well as a letter that Zephir sent Defendant on 11 February 2019 detailing the inaccuracies in her W-2.

Defendant argues that Finding of Fact 45 is erroneous because "the W-2 was not filed with the IRS as [Plaintiff] contends and the DHC found" as the "law does not require an employer to file W-2's with the IRS." Defendant misconstrues the DHC's finding. The DHC found that Defendant filed "a Transmittal of Wage and Tax Statement (IRS form W-3) *along with W-2 forms* for the employees of his law firm during 2018." (emphasis added). This comports with the instructions on IRS Form W-3, which state, "Mail Form W-3 with Copy A of Form(s) W-2[.]" However, the portion of Finding of Fact 45 stating that Defendant filed this form "with the IRS" is unsupported because a W-3 is filed with the Social Security Administration, not the IRS. However, this error is inconsequential, and the remainder of Finding of Fact 45 is supported by substantial evidence.

Finding of Fact 46 is supported by the copy of Zephir's inaccurate W-2 that was submitted with the W-3 filed by Defendant.

In addition to the findings of fact above, the DHC also made the following unchallenged findings of fact:

> 37. [Defendant] told Zephir that he would be responsible for paying to the IRS and NCDOR federal and state income taxes due in connection with her employment at the law firm.

> 38. [Defendant] did not withhold or pay over to the tax authorities any federal or state income taxes on behalf of Zephir during her employment.
>
> . . . .
>
> 40. The W-2 [Defendant] issued to Zephir by [Defendant's] law firm in early 2019 falsely underreported her wages by approximately $3,000.00.
>
> . . . .
>
> 42. [Defendant] assured Zephir that he would change her W-2 to accurately reflect the income she received as well as all tax withholdings. He failed to do so.
>
> 43. Zephir asked [Defendant] to pay the amounts she owed to the tax authorities due to [Defendant's] failure to withhold from her paychecks. [Defendant] refused.
>
> . . . .
>
> 47. By signing the W-3, [Defendant] swore under penalty of perjury to the accuracy of the W-2 that he knew underreported Zephir's wages.

The DHC's findings of fact support its conclusions of law that:

> (b) By falsely telling Zephir that he would be responsible for paying income taxes on her behalf Defendant engaged in conduct involving dishonesty, deceit or misrepresentation in violation of Rule 8.4(c);
>
> (c) By knowingly certifying on the IRS form W-3 for tax year 2018 that Zephir's inaccurate W-2 was accurate, Defendant engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c)[.]

Accordingly, the DHC did not err by concluding that Defendant violated Rule 8.4(c).

C. Trust Accounting

Defendant argues that the DHC erred by concluding that he failed to comply with the Rules of Professional Conduct regarding his trust account.

1. Rule 1.15-2(a), (b), and (g)

Defendant argues that the DHC erred by concluding that he violated Rule 1.15-2(a), (b), and (g) by "failing to ensure that entrusted funds

he received on behalf of [the Jordans] were deposited into his trust account" and "failing to deposit payments that were partially for his fees and partially entrusted funds into his trust account intact[.]"

Rule 1.15-2 provides:

> (a) Entrusted Property. All entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15.
>
> (b) Deposit of Trust Funds. All trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer. . . .
>
> . . . .
>
> (g) Mixed Funds Deposited Intact. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact.

N.C. R. Prof. Cond. 1.15-2(a), (b), (g).[6]

The DHC made the following unchallenged findings of fact, which are binding on appeal:

> 48. In or around June 2016, Debra Jordan and her children, [Jeffrey and Jaccob[7]] (collectively "the Jordans") retained [Defendant] to represent them in a personal injury matter.
>
> 49. In November 2020, the insurance adjuster assigned to the Jordans' matters reported to the State Bar that [Defendant] accepted settlement offers on behalf of the Jordans in June 2019 and that [Defendant] received settlement checks but had not returned executed settlement agreements for Debra or [Jeffrey].
>
> 50. The State Bar opened grievance file no. 20G0861 to investigate the report from the insurance adjuster assigned to the Jordans' matters.

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6. The Rules of Professional Conduct have been amended such that Rule 1.15-2(g) is now Rule 1.15-2(h). We use the version of the Rules of Professional Conduct in effect at the time the order of discipline was entered.

7. We use a pseudonym to protect the identities of the children.

> 51. In the investigation of grievance file no. 20G0861, the State Bar conducted an audit of [Defendant's] general trust account at Truist (formerly BB&T Bank) . . . .
>
> 52. The State Bar's investigation and audit revealed the following deficiencies in [Defendant's] trust account management and handling of entrusted funds:
>
> > (a) [Defendant] failed to ensure that the entrusted funds he received on behalf of Debra and [Jeffrey] Jordan were deposited into his trust account;
> >
> > (b) When [Defendant] received payments that were partially for his fees and partially entrusted funds, [Defendant] did not deposit those payments into his trust account intact. This failure to deposit mixed funds intact occurred, for example, when [Defendant] received payments from clients for criminal and civil cases that included court costs and/or filing fees[.]

These findings of fact support the DHC's conclusion of law that:

> (d) By failing to ensure that entrusted funds he received on behalf of Debra and [Jeffrey] Jordan were deposited into his trust account and by failing to deposit payments that were partially for his fees and partially entrusted funds into his trust account intact, Defendant failed to properly maintain and disburse entrusted funds in violation of Rule 1.15-2(a), (b), and (g)[.]

Accordingly, the DHC did not err by concluding that Defendant violated Rule 1.15-2(a), (b), and (g).

2. Rule 1.15-3(d)(1) and (2)

Defendant concedes that he failed to prepare required monthly and quarterly reconciliation reports for his trust accounts as required by Rule 1.15-3(d)(1) and (2), but nonetheless argues that the DHC erred by concluding that he violated Rule 1.15-3(d)(1) and (2) because his failure "was not grossly negligent, intentional, or willful." However, Rule 1.15-3(d)(1) and (2) contains no such scienter requirement. *See* N.C. R. Prof. Cond. 1.15-3(d)(1) ("Each month, the balance of the trust account as shown on the lawyer's records shall be reconciled with the current bank statement balance for the trust account."); N.C. R. Prof. Cond. 1.15-3(d)(2) ("For each general trust account, a reconciliation report shall be prepared at least quarterly."). Accordingly, the DHC did not err

by concluding that Defendant violated Rule 1.15-3(d)(1) and (2) by failing to prepare required monthly and quarterly reconciliation reports for his trust accounts.

3. Rule 1.15-2(a) and (k)

Defendant argues that the DHC erred by concluding that he violated Rule 1.15-2(a) and (k) by "disbursing more funds from his trust account for clients than he held in trust for those clients[.]"

Rule 1.15-2 provides:

> (a) Entrusted Property. All entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15.
>
> . . . .
>
> (k) No Benefit to Lawyer or Third Party. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

N.C. R. Prof. Cond. 1.15-2(a), (k).[8]

Defendant challenges Finding of Fact 52(d), which states that he "failed to maintain complete and accurate client ledgers[.]"

Plaintiff conducted an audit of Defendant's trust account in January 2021, which revealed the following: Defendant issued a check to Debra Jordan on behalf of Jeffrey for $917. The check was negotiated on 30 November 2016 and again on 16 August 2019, resulting in a negative balance of $917. Defendant did not correct the negative balance until 1 October 2020. Similarly, Defendant issued a check to Jaccob Jordan for $353.20. The check was negotiated on 13 October 2016 and again on 19 November 2019, resulting in a negative balance of $353.20. Defendant did not correct the negative balance until 1 October 2020. Defendant issued a check to another client and told her not to cash it until the following week because there were insufficient funds in her client balance to cover the full amount of the check. The client immediately deposited the check, which resulted in a negative balance of $5,100.

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8. The Rules of Professional Conduct have been amended such that Rule 1.15-2(k) is now Rule 1.15-2(l). We use the version of the Rules of Professional Conduct in effect at the time the order of discipline was entered.

The client ledgers produced by Defendant never showed that Jeffrey or Jaccob Jordan had a negative balance. Defendant also produced multiple client ledgers for certain clients that differed from one version to the next. During his deposition, Defendant testified as follows:

> [PLAINTIFF:] . . . . Can you tell me, [Defendant], are these client ledgers that you produced to the State Bar?
>
> [DEFENDANT:] They are.
>
> [PLAINTIFF:] Is there a reason that you declined to authenticate them in connection with Plaintiff's Request for Admission?
>
> [DEFENDANT:] Because -- I don't know. So in 2017 we started manually putting this into the electronic system, and I have not gone into the electronic system to make sure every entry was accurate.
>
> And so honestly, when you guys asked me to produce this, I produced it as it was, and I didn't put it in the system. I had staff put it into the system. And it's not uncommon for people to miss things. It's not uncommon for people to invert numbers. It's not uncommon for them to put it under the wrong client's ledger.
>
> And so I did not want to say that these are accurate because there might be mistakes into the system since it was manually input into the system.
>
> [PLAINTIFF:] You understand that the accuracy of your trust account records is your responsibility.
>
> [DEFENDANT:] It is. . . .

Finding of Fact 52(b) is therefore supported by substantial evidence.

The DHC's findings of fact support its conclusion of law that:

> (h) By disbursing more funds from his trust account for clients than he held in trust for those clients, Defendant failed to properly maintain and disburse entrusted funds and used entrusted funds for the benefit of someone other than the beneficial owner in violation of Rule 1.15-2(a) and (k)[.]

Accordingly, the DHC did not err by concluding that Defendant violated Rule 1.15-2(a) and (k).

4. Rule 1.15-2(a) and (n)

Defendant argues that the DHC erred by concluding that Defendant violated Rule 1.15-2(a) and (n) by "not promptly paying or delivering to clients, or to third persons as directed by clients, entrusted property belonging to the clients and to which the clients are currently entitled[.]"

Rule 1.15-2 provides:

> (a) Entrusted Property. All entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15.
>
> . . . .
>
> (n) Delivery of Client Property. A lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled.

N.C. R. Prof. Cond. 1.15-2(a), (n).

Defendant challenges the italicized portion of Finding of Fact 52(f), which states that he "*did not promptly pay or deliver to clients, or to third persons as directed by clients, entrusted property belonging to clients* and to which the clients were currently entitled." As Defendant does not challenge the remaining portion of Finding of Fact 52(f), it is binding on appeal.

When Plaintiff audited Defendant's trust account in January 2021, there were multiple clients with aged balances, including: a $4,013 balance since 16 June 2016; a $3,312.58 balance since 21 October 2016; an $11,250 balance since 17 January 2017; a $500 balance since 13 November 2017; and a $15,800 balance since 27 December 2019. Finding of Fact 52(f) is therefore supported by substantial evidence.

The DHC's findings of fact support its conclusion of law that:

> (i) By not promptly paying or delivering to clients, or to third persons as directed by clients, entrusted property belonging to the clients and to which the clients are currently entitled, Defendant failed to properly maintain and disburse entrusted funds in violation of Rule 1.15-2(a) and (n)[.]

Accordingly, the DHC did not err by concluding that Defendant violated Rule 1.15-2(a) and (n).

D. Representation of T.M.

Defendant next argues that the DHC erred by concluding that he violated the Rules of Professional Conduct regarding his representation of T.M.

1. Rule 1.6(a)

Defendant argues that the DHC erred by concluding that he violated Rule 1.6(a) by "providing confidential information to the lawyer he sent to represent T.M. at the May 2019 hearing, who was not a member of Defendant's law firm[.]"

"A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." N.C. R. Prof. Cond. 1.6(a). "A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:"

> (1) to comply with the Rules of Professional Conduct, the law or court order;
>
> (2) to prevent the commission of a crime by the client;
>
> (3) to prevent reasonably certain death or bodily harm;
>
> (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;
>
> (5) to secure legal advice about the lawyer's compliance with these Rules;
>
> (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court; or
>
> (8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the

> composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

N.C. R. Prof. Cond. 1.6(b).

"Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation." N.C. R. Prof. Cond. 1.6, cmt. 5. "Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." *Id.* Although Rule 1.6 provides that disclosing confidential information between lawyers in the same firm is impliedly authorized to carry out the representation, it does not provide that disclosing confidential information to lawyers outside of the firm is impliedly authorized to carry out the representation.

Here, the DHC made the following unchallenged findings of fact, which are binding on appeal:

> 57. Just before a May 2019 custody hearing in T.M.'s case, [Defendant's] assistant informed T.M. that [Defendant] would not be able to attend the hearing.
>
> 58. [Defendant] sent another lawyer in his place who was unfamiliar with the facts and unknown to T.M.
>
> 59. [Defendant] provided information acquired during the course of his professional relationship with T.M. ("confidential information") to the lawyer he sent to fill in at the May 2019 custody hearing.
>
> 60. T.M. did not consent in writing to [Defendant] disclosing confidential information to the other lawyer, who was not a member of [Defendant's] law firm.
>
> 61. [Defendant's] disclosure of confidential information to a lawyer unknown to T.M. was not impliedly authorized in order to carry out the representation.

These findings of fact support the DHC's conclusion of law that, "[b]y providing confidential information to the lawyer he sent to represent T.M. at the May 2019 hearing, who was not a member of Defendant's law firm, Defendant revealed information acquired during the professional

relationship in violation of Rule 1.6(a)[.]" Accordingly, the DHC did not err by concluding that Defendant violated Rule 1.6(a).

2. Rule 1.4

Defendant argues that the DHC erred by concluding that he violated Rule 1.4 by "failing to respond to T.M.'s inquiries and failing to notify T.M. of important developments in the case[.]"

Under Rule 1.4(a), a lawyer shall "promptly comply with reasonable requests for information[.]" N.C. R. Prof. Cond. 1.4(a)(4). Furthermore, a lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." N.C. R. Prof. Cond. 1.4(b).

Here, the DHC made the following unchallenged findings of fact, which are binding on appeal:

> 62. During the weeks after the May 2019 hearing, [Defendant] did not inform T.M. whether the custody order had been entered and [Defendant] did not respond to T.M.'s calls or emails.
>
> 63. Throughout the representation, [Defendant] failed to communicate with T.M. about the status of the matter and did not respond to reasonable requests for information from T.M.

These findings of fact support the DHC's conclusion of law that:

> (k) By failing to respond to T.M.'s inquiries and failing to notify T.M. of important developments in the case, Defendant failed to respond to reasonable requests for information in violation of Rule 1.4(a) and failed to provide sufficient information to allow the client to make informed decisions about the representation in violation of Rule 1.4(b)[.]

Accordingly, the DHC did not err by concluding that Defendant violated Rule 1.4.

3. Rule 1.16(a), (d)

Defendant argues that the DHC erred by concluding that he violated Rule 1.16(a) and (d) by "setting T.M.'s [equitable distribution] matter for hearing after T.M. terminated the attorney-client relationship and failing to comply with T.M.'s directive to withdraw from her case[.]"

"A client has a right to discharge a lawyer at any time, with or without cause[.]" N.C. R. Prof. Cond. 1.16, cmt. 4.[9] A lawyer "shall withdraw from the representation of a client if . . . the lawyer is discharged." N.C. R. Prof. Cond. 1.16(a)(3). "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests[.]" N.C. R. Prof. Cond. 1.16(d).

Here, the DHC made the following unchallenged findings of fact, which are binding on appeal:

> 64. On 27 January 2020, T.M. sent [Defendant] an email terminating the representation and directing him to withdraw.
>
> 65. Three days later, [Defendant] filed a Notice of Hearing setting T.M.'s [equitable distribution] matter for mid-February. [Defendant] did not file a motion to withdraw from T.M.'s case.

The DHC's unchallenged findings of fact support its conclusion of law that:

> (l) By setting T.M.'s [equitable distribution] matter for hearing after T.M. terminated the attorney-client relationship and failing to comply with T.M.'s directive to withdraw from her case, Defendant failed to withdraw when terminated in violation of Rule 1.16(a), and failed to take reasonably practicable steps to protect a client's interests upon termination of the representation in violation of Rule 1.16(d)[.]

Accordingly, the DHC did not err by concluding that Defendant violated Rule 1.16(a) and (d).

E. Mistrial

1. Testimony of Presiding Judge

Defendant first argues that the DHC abused its discretion by prohibiting him from cross-examining the judge who presided over the felonious restraint trial "on any personal animus that he harbors against [him]."

First, the DHC did not prohibit Defendant from cross-examining the judge about any personal animus. On direct examination, the judge

---

9. Defendant asserts without legal support that "[j]udges do not allow attorneys to withdraw until all orders have been entered in that case." We find no legal support for this contention.

testified that he had no animus towards Defendant. On cross-examination, the following exchange took place:

> [DEFENDANT:] You and I have had some issues before you even became a judge, didn't we?
>
> [WITNESS:] No. I don't know you other than I know who you are as an attorney. I never hung out with you.
>
> [DEFENDANT:] Okay, well, let me ask you this question.
>
> [WITNESS:] I've never had dinner with you, lunch with you. I don't know you as to be a friend of yours.
>
> [DEFENDANT:] Okay. Well, do you recall when a restraining order was taken out against you by a female?
>
> [PLAINTIFF:] Objection.
>
> [DEFENDANT:] Do you recall that restraining order?
>
> [PANEL CHAIR:] Sustained. I would like to remind you, [the judge] is not on trial here.

The DHC allowed Defendant to ask the judge whether they "had some issues" between them, and the judge answered, "No." The DHC prohibited Defendant from asking an apparently irrelevant and inflammatory question. *See State v. Mason*, 315 N.C. 724, 730, 340 S.E.2d 430, 434 (1986) ("Trial judges retain broad discretion to preclude cross-examination . . . that is intended to merely harass, annoy or humiliate a witness." (citations omitted)).

Furthermore, Defendant made no offer of proof as to what the judge's testimony would have been, and we cannot engage in speculation as to what the judge would have testified. *See State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) ("[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record."); *see also State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861-62 (2010) ("Absent an adequate offer of proof, we can only speculate as to what a witness's testimony might have been." (citations omitted)). Defendant's argument is thus dismissed.

2. Hearsay Evidence

Defendant next argues that the DHC "abused its discretion by allowing hearsay into evidence over [his] objection."

In disciplinary proceedings, the North Carolina Rules of Evidence govern the admissibility of evidence. *N.C. State Bar v. Mulligan*, 101 N.C. App. 524, 527, 400 S.E.2d 123, 125 (1991). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). "However, out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998).

Here, the prosecutor in the felonious restraint trial testified as follows during the disciplinary hearing:

> [PROSECUTOR:] . . . . So during this portion, we still have -- the jury is still in the courtroom. This is -- we have gone back on to the cross-examination of the State's witness by [Defendant]. As the jury sat there, [Defendant] -- I could sense him becoming more frustrated with the court sustaining the objections that I was making to the questions that had been asked.
>
> And as [Defendant] began to become more frustrated, the louder he became in front of the jury. Where it ultimately culminated with him saying back to [the presiding judge] around this point he -- once a series of objections was sustained and reading back from this, [Defendant] stated, "Judge," very loudly in front of the jury.
>
> And that continued with the rest of the questions that he went through. He continued to essentially engage [the presiding judge] in front of the jury, became more loud, and it was to the point that one of the jurors later asked whether he was going to be going to jail.

This statement is not considered hearsay as it was not offered for the truth of the matter asserted, but rather was offered to show the effect that Defendant's misconduct had on the jury. Accordingly, the DHC did not err by admitting the prosecutor's testimony that "one of the jurors later asked whether [Defendant] was going to be going to jail."

3. Testimony of Former Client

Defendant argues that the DHC abused its discretion by prohibiting Defendant's former client from testifying during the disciplinary hearing. Defendant made no offer of proof as to what his former client's testimony would have been, and we cannot engage in speculation as to

what his former client would have testified. *See Raines*, 362 N.C. at 20, 653 S.E.2d at 138; *see also Jacobs*, 363 N.C. at 818, 689 S.E.2d at 861-62. Defendant's argument is thus dismissed.

F. Mortgage Fraud

Defendant argues that the DHC erred by concluding that he committed mortgage fraud.

Defendant challenges the following findings of fact:

> 92. In the 22 March 2021 loan application, [Defendant] knowingly made the following false representations:
>
> (a) He did not have any credits towards the purchase of the house.
>
> (b) The value of the property was $522,000.
>
> (c) He did not have a business affiliation with the seller of the property.
>
> (d) He was not currently delinquent or in default on any Federal debt.
>
> (e) He had not entered into any agreement, written or oral, in connection with the real estate transaction, other than the sales contract submitted to the lender.
>
> . . . .
>
> 94. The earnings statements [Defendant] submitted to Navy Federal falsely indicated that he had received biweekly salary checks from his law firm and that state and federal income taxes had been withheld from the wages he earned in January and February 2021.
>
> 95. Pursuant to N.C. Gen. Stat. § 14-118.12, a "person is guilty of [the felony offense of] residential mortgage fraud when, for financial gain and with the intent to defraud, that person . . . [k]nowingly makes or attempts to make any material misstatement, misrepresentation, or omission within the mortgage lending process with the intention that a mortgage lender, mortgage broker, borrower, or any other person or entity that is involved in the mortgage lending process relies on it."
>
> 96. Pursuant to 18 U.S. Code § 1014, "[w]hoever knowingly makes any false statement or report . . . for the purpose of

> influencing in any way the action of . . . a Federal credit union . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, . . . or any person or entity that makes in whole or in part a federally related mortgage loan . . . upon any application . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."
>
> 97. [Defendant's] actions described in paragraphs 89 through 93 above, all when evaluated pursuant to the Panel's clear, cogent and convincing standard, were in violation of 18 U.S. Code § 1014 and constituted the criminal offense of residential mortgage fraud as defined in N.C. Gen. Stat. § 14-118.12.

1. Finding of Fact 92

Finding of Fact 92 is supported by the Navy Federal loan application and Defendant's own statements. Section 2b of the application, labeled "Other Assets and Credits You Have," states, "Include *all* other assets and credits below." (emphasis added). Defendant checked the box "Does not apply" despite contributing over $200,000 towards Sweet Fruits' purchase of the home. In section 4a of the application, labeled "Loan and Property Information," Defendant listed the property value as $522,000 despite the house being sold for $740,000 seven months earlier.

Section 5a of the application, "About this Property and Your Money for this Loan," asks, "Do you have a family relationship or business affiliation with the seller of the property?" Defendant checked the "no" box. However, Defendant admitted to having a business affiliation with Kristian Smith during his interview with Plaintiff:

> [PLAINTIFF]: But you knew you had bought the property from this entity that you were unfamiliar with. Like you didn't ask any q—like literally the grantor on the deed is Sweet Fruits, LLC. That wasn't strange to you?
>
> [DEFENDANT]: No, it wasn't because a lot of companies do that. A lot of companies buy and sell homes.
>
> [PLAINTIFF]: But this wasn't a company. This was your friend Kristian, who you met and simultaneously opened a bank account with.
>
> [DEFENDANT]: Well I call you guys "my friend," but she's really not my friend. It was a *business situation*. It was not a, um—it was a *business situation*.

(emphasis added). Section 5b of the application, "About Your Finances," asks, "Are you currently delinquent or in default on a Federal debt?" Defendant checked the "no" box. However, the record is replete with evidence that Defendant was delinquent on multiple federal debts.

Section 6 of the application, labeled "Acknowledgements and Agreements," states the following:

> I agree to, acknowledge, and represent the following:
>
> . . . .
>
> For purchase transactions: The terms and conditions of any real estate sales contract signed by me in connection with this application are true, accurate, and complete to the best of my knowledge and belief. I have not entered into any other agreement, written or oral, in connection with this real estate transaction.

Defendant argues that Plaintiff "did not introduce any recordings, writings, or other exhibits" that Defendant "and the seller had a written or oral agreement other than the purchase agreement." However, Defendant admitted in his interview with Plaintiff that he had an oral agreement with Kristian Smith:

> [PLAINTIFF]: What's your verbal contract?
>
> [DEFENDANT]: You know the statute of frauds don't allow verbal contracts when it comes to real property, but
> . . .
>
> [PLAINTIFF]: Humor me.
>
> [DEFENDANT]: What?
>
> [PLAINTIFF]: What was the agreement?
>
> [DEFENDANT]: The agreement is, was, that um, she would purchase the house for me. And she said later on she's gonna need me. And that I was responsible for paying all the fees associated therewith as well as any mortgage until I had put it in my name.
>
> [PLAINTIFF]: Did you pay the homeowners' association too?
>
> [DEFENDANT]: I paid those dues as well.
>
> [PLAINTIFF]: So you literally paid all the maintenance due on the house.

> [DEFENDANT]: I paid everything. Everything.
>
> [PLAINTIFF]: All she had to do was just get the mortgage and going to closing.
>
> [DEFENDANT]: That's it. And that's—my friends, that's not uncommon in domestic cases. A lot of times the husband or wife will have a straw purchaser purchase something for them. Purchase the house for them.

Accordingly, Finding of Fact 92 is supported by substantial evidence.

2. Finding of Fact 94

Finding of Fact 94 is supported by the earnings statements Defendant submitted in support of his loan application as well as testimony from Defendant's former CPA, a State Bar investigator, and Defendant himself. The earnings statement for 9 January 2021 to 22 January 2021 reflected that: (1) Defendant's gross pay was $8,400; (2) Defendant withheld $121.80 to pay FICA Medicare taxes, $520.80 to pay FICA Social Security taxes, $1,919.47 to pay federal income taxes, and $483 to pay state income taxes; and (3) Defendant's net pay was $5,354.93. The earnings statement for 23 January 2021 to 5 February 2021 reflected the same earnings and deductions.

During the disciplinary hearing, Defendant's former CPA testified to the following:

> [PLAINTIFF:] Were you working with [Defendant] and the Key Law Office in January of 2021?
>
> [CPA:] We were.
>
> [PLAINTIFF:] To your knowledge, was the Key Law Office withholding federal and state income taxes from the wages of [Defendant] in January of 2021?
>
> [CPA:] Not to my knowledge on the bank account that we were reconciling, the check stubs we were receiving.
>
> [PLAINTIFF:] Did you look in your payroll records and the records that you received from [Defendant] for a check in the amount of $5,354.93 to [Defendant]?
>
> [CPA:] I did. I did not find it.
>
> [PLAINTIFF:] And . . . were you still working for [Defendant] and the Key Law Office assisting them with their payroll reports between January of 2021 and February 2021?

> [CPA:] Yes, ma'am.
>
> [PLAINTIFF:] To your knowledge, was the Key Law Office withholding state and federal income taxes from the wages of [Defendant] during that time?
>
> [CPA:] Not to my knowledge.
>
> [PLAINTIFF:] Did you look in the records that you have at your office about what had been paid from the operating account as salaries to [Defendant] and see a check in the amount of $5,354.93 to [Defendant]?
>
> [CPA:] I did look and did not see a check in that amount.

Furthermore, an investigator for the State Bar testified as follows:

> [PLAINTIFF:] Did [Defendant] indicate to Navy Federal Credit Union through this earnings statement that he was withholding and paying federal and state income taxes from his own wages in January and February 2021?
>
> [INVESTIGATOR:] Yes, that's correct.
>
> [PLAINTIFF:] Did [Defendant] also indicate to the State Bar that he pays earned employee salaries including his own from his firm operating account?
>
> [INVESTIGATOR:] Yes.
>
> [PLAINTIFF:] Was there a check written for [Defendant's] firm operating account at PNC Bank in the amount of $5,354.93 on or about January 29, 2021?
>
> [INVESTIGATOR:] No. Per my review for the operating account for that period, there is no such check in that amount.
>
> [PLAINTIFF:] . . . was there a check written from [Defendant's] firm operating account in the amount of $5,354.93 on or around February 12, 2021?
>
> [INVESTIGATOR:] No, not from my review of operating account records.

Defendant likewise testified that he "was not paid biweekly." Accordingly, Finding of Fact 94 is supported by substantial evidence.

3. Finding of Facts 95, 96, and 97

Findings of Fact 95, 96, and 97 are more appropriately categorized as conclusions of law, and we therefore review them de novo. *See Key*, 189 N.C. App. at 88, 658 S.E.2d at 499.

In addition to the findings of fact above, the DHC also made the following unchallenged findings of fact:

> 76. [Defendant] wanted to buy the property from [his ex-girlfriend] when their relationship ended.
>
> 77. Although [she] intended to sell the property, she refused to sell it to [Defendant].
>
> 78. In July 2020, [Defendant] discussed his desire to buy the property with a man named Javon Howell, who was in a relationship with a woman named Kristian Smith. Howell and Smith agreed to purchase the property from [Defendant's ex-girlfriend] and sell it to [Defendant].
>
> 79. By mid-July 2020, [Defendant] had established a joint bank account with Smith.
>
> 80. On 14 July 2020, Smith incorporated an entity called Sweet Fruits Healing, LLC ("Sweet Fruits").
>
> 81. For approximately two months after he opened the joint account with Smith, [Defendant] moved large sums of money into and out of the account. Neither Smith nor Howell deposited funds into the account.
>
> . . . .
>
> 83. On 24 September 2020, $20,000.00 of the funds [Defendant] had deposited into the joint account with Smith was transferred out to an account belonging to Smith and/or Howell.
>
> 84. On 28 September 2020, [Defendant's ex-girlfriend] sold the property to Sweet Fruits. The purchase price was $740,000.00, which Sweet Fruits partially funded with a $518,000.00 mortgage with a one-year repayment term.
>
> 85. Sweet Fruits paid the remainder of the purchase price with money deposited by [Defendant] into the joint account with Smith.

> 86. After Sweet Fruits bought the property, [Defendant] began living there again. On five occasions during the ensuing six months, [Defendant] provided Smith with approximately $4,800.00 purportedly to cover mortgage payments, escrows, and homeowner's association dues associated with the property.

As Findings of Fact 95, 96, and 97 are supported by the DHC's findings of fact and the evidence supporting those findings, the DHC did not err by concluding that Defendant committed mortgage fraud.

G. Misconduct During Grievance Process

Defendant argues that Plaintiff "failed to present sufficient evidence that Defendant made false statements and that such statements were material." (capitalization altered).

Under Rule 8.1, a lawyer in connection with a disciplinary matter shall not "knowingly make a false statement of material fact" or "knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority[.]" N.C. R. Prof. Cond. 8.1(a), (b).

Defendant challenges the following findings of fact:

> 102. In his 11 May 2021 response, [Defendant] falsely stated: "In early 2020 I not only filed all my tax returns[,] I paid $12,000 towards my outstanding taxes.
>
> . . . .
>
> 106. [Defendant] never completely produced all subpoenaed documents.
>
> 107. On 7 July 2021, [Defendant] was interviewed by the State Bar regarding grievance file nos. 21G0082 and 20G0861. During the interview, [Defendant] made false statements, including:
>
> (a) That he had signed and filed his past-due income tax returns at the same time he filed his past-due federal tax income returns;
>
> (b) That he did not see or sign the Navy Federal loan application until the date of closing; and
>
> (c) That he first learned during the week prior to the interview that certain federal tax lien documents had been filed against him.

In his response to Plaintiff's letter of notice, Defendant stated, "In early 2020 I not only filed all my tax returns I paid $12,000 towards my outstanding taxes." When Plaintiff asked during the interview for documentation of this payment, Defendant stated, "I could've sworn I paid $12,000, so that may have been an error." Despite Defendant's representation that he paid $12,000 towards his taxes, Defendant never provided any documentation that such payment was made. Accordingly, Finding of Fact 102 is supported by substantial evidence.

Likewise, Finding of Fact 106 is supported by substantial evidence. Plaintiff sent emails to Defendant on 29 April 2021 and 7 May 2021 detailing which documents were missing from Defendant's previous partial disclosures. Plaintiff also reviewed a spreadsheet with Defendant during the interview to explain which documents were still missing. This evidence directly negates Defendant's contention that Plaintiff "fail[ed] to allege the specific documents not received."

Finding of Fact 107 is supported by Defendant's statements during his interview with Plaintiff. Defendant stated that he thought he filed his state income tax returns at the same time he filed his federal income tax returns. Defendant further stated, "I signed both state and federal income tax returns and I asked my secretary to put them in the mail to the respective agencies." Defendant stated that he "definitely signed them" and "hope they were put in the mail." Regarding the Navy Federal loan application, Defendant stated that he "never saw the application until . . . closing[,]" and that he "signed it at closing." With respect to the federal tax lien documents, Defendant stated, "First, I already told you in that letter that I wasn't aware of that which I was not aware of those liens being filed. But I actually recently looked at them, like a week ago . . . ." Defendant further stated, "I didn't even know that this was filed until last week. When you guys requested the information and I did my objection, I emailed them and asked them to send me the liens and, and anything involving the liens, and that was my first time seeing this." Accordingly, Finding of Fact 107 is supported by substantial evidence.

In addition to these findings of fact, the DHC also made the following unchallenged findings of fact:

> 103. [Defendant] was also served with a subpoena issued by the Grievance Committee in connection with file no. 21G0082 and file no. 20G0861 (which involved the allegations of trust account mismanagement . . .).
>
> 104. [Defendant] was required to produce documents pursuant to the subpoena on 9 April 2021. [Defendant] did

> not produce any documents pursuant to the subpoena on 9 April 2021.
>
> 105. [Defendant] produced documents on April 21, April 27, May 3, and May 17. After each partial-production, the State Bar sent him a detailed follow up email stating what was still missing.

The DHC's findings of fact support its conclusions of law that:

> (o) By failing to timely respond to the Letter of Notice and failing to timely and fully comply with the subpoena in grievance file no. 21G0082, Defendant knowingly failed to respond to lawful demands for information from a disciplinary authority in violation of Rule 8.1(b); and
>
> (p) By providing false information to the State Bar during the grievance process, Defendant knowingly made false statements of material fact in connection with a disciplinary matter in violation of Rule 8.1(a).

Accordingly, the DHC did not err by concluding that Defendant violated Rule 8.1(a) and (b).

H. Discipline

Defendant argues that "the DHC abused its discretion in imposing finding[s] of fact[], conclusions of law and imposing suspension in the order of discipline against [him]." (capitalization altered). Defendant specifically argues that his case should not have proceeded to the disposition phase because "the DHC should not have found against [him] during the adjudication phase." As discussed above, the DHC did not err by finding and concluding that Defendant engaged in misconduct. The DHC thus did not err by proceeding to the disposition phase to determine the appropriate discipline.

V. Plaintiff's Cross-Appeal

[2] Plaintiff argues that (1) the DHC erred by prohibiting Plaintiff from objecting during Defendant's testimony; (2) the DHC failed to make certain conclusions of law; (3) several of the DHC's findings of fact and conclusions of law regarding discipline are unsupported; and (4) the DHC abused its discretion by suspending Defendant's law license. We address each argument in turn.

A. Objections During Defendant's Testimony

Plaintiff first argues that "the DHC committed fundamental error when it suspended the application of the Rules of Evidence by prohibiting the State Bar from objecting during Defendant's testimony." (capitalization altered). Plaintiff concedes that it is "not challenging findings by the DHC that were based on inadmissible testimony to which the State Bar was not permitted to object" but nonetheless asks this Court to address this issue "so future litigants . . . are not similarly deprived of the substantial right of meaningful appellate review." We decline the request to do so and dismiss this portion of Plaintiff's appeal.

B. Rule 8.4(b)

Plaintiff argues that the DHC erred by failing to conclude that Defendant violated Rule 8.4(b) because the DHC "found that Defendant engaged in the precise conduct criminalized under 26 U.S.C. § 7206(1)."

Under Rule 8.4(b), it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]" N.C. R. Prof. Cond. 8.4(b). Pursuant to 26 U.S.C. § 7206, which governs the crime of fraud and false statements, any person who "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony[.]" 26 U.S.C. § 7206(1).

Here, the DHC made the following findings of fact:

> 45. On 9 May 2019, approximately three months after Zephir notified [Defendant] that her W-2 was inaccurate and one day after he participated in the hearing at which judgment was entered against him on Zephir's claim, [Defendant] filed with the IRS a Transmittal of Wage and Tax Statement (IRS form W-3) along with W-2 forms for the employees of his law firm during 2018.
>
> 46. The W-2 form for Zephir that [Defendant] filed on 9 May 2019 underreported Zephir's 2018 wages.
>
> 47. By signing the W-3, [Defendant] swore under penalty of perjury to the accuracy of the W-2 that he knew underreported Zephir's wages.

Contrary to Plaintiff's assertion, the DHC did not find that Defendant engaged in all elements of 26 U.S.C. § 7206(1) because the DHC did not

find that Defendant acted willfully. Accordingly, the DHC did not err by failing to conclude that Defendant violated Rule 8.4(b).

C. Findings of Fact Regarding Discipline

Plaintiff argues that "two of the DHC's findings of fact regarding discipline related to Defendant's character and reputation are not supported by evidence." (capitalization altered).

These challenged findings state:

> 11. Senior Resident Superior Court Judge Winston Gilchrist testified that Defendant was a valued member of the Harnett County Bar, and provided legal services to many indigent defendants in criminal matters. Judge [Gilchrist] also testified that Defendant served a unique and valuable role in his representation of a particular subset of that County's population. Judge Gilchrist also testified that although he had many interactions with Defendant during Defendant's years of practice (both as opposing counsel and as a judge), he never observed Defendant engage in inappropriate courtroom conduct. The Panel gave substantial weight to Judge Gilchrist's testimony in reaching discipline for Defendant.
>
> . . . .
>
> 13. Defendant has assisted those less fortunate in his community, including but not limited to, providing temporary shelter at his office for members of the community's homeless population when weather was severe, and the best version of Defendant is a positive lawyer role model for young men.

Judge Gilchrist testified that he was familiar with Defendant's reputation and that Defendant "enjoy[s] a good reputation among the judges in Harnett County" and is "a much sought-after attorney by many folks." Judge Gilchrist further testified that "[w]e certainly depend on [Defendant] a great deal in terms of indigent representation, which is a significant problem that we face in the court system today, having enough attorneys who are willing to do that[,]" and that Defendant has "always been willing to take those types of cases and handle them diligently." Judge Gilchrist also testified that he "never found [Defendant] to be inappropriate" and has "never had any difficulty with [Defendant] personally in court in terms of being able to get along with [him]." Accordingly, Finding of Fact 11 is supported by substantial evidence.

Finding of Fact 13 is supported in part by testimony from Defendant's employee that Defendant is "pretty active in the community" and "a very positive force in the community with young men." Defendant's employee further testified that Defendant donated boxes of food to help "families that are in need" and donated money to a family whose house burned down. However, the record is devoid of evidence that Defendant "provid[ed] temporary shelter at his office for members of the community's homeless population when weather was severe," and this portion of Finding of Fact 13 is therefore unsupported. Nonetheless, the remainder of Finding of Fact 13 is supported by substantial evidence.

D. Conclusions of Law Regarding Discipline

Plaintiff argues that the DHC erred by "failing to make conclusions of law that were established by its findings of fact, the record, and the evidence"; "making findings of fact regarding discipline that were unsupported by adequate evidence"; "making a conclusion of law based on those unsupported findings"; and "failing to make a necessary finding that was supported by uncontroverted evidence." (capitalization altered).

"If the charges of misconduct are established, the [DHC] will consider any evidence relevant to the discipline to be imposed." 27 N.C. Admin. Code 1B.0116(f). In imposing the appropriate discipline, the DHC must consider several factors, including:

> (A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;
>
> . . . .
>
> (C) dishonest or selfish motive, or the absence thereof;
>
> . . . .
>
> (F) a pattern of misconduct;
>
> (G) multiple offenses;
>
> (H) effect of any personal or emotional problems on the conduct in question;
>
> . . . .
>
> (N) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
>
> (O) refusal to acknowledge wrongful nature of conduct;
>
> . . . .

> (Q) character or reputation;
>
> (R) vulnerability of victim; [and]
>
> (S) degree of experience in the practice of law[.]

27 N.C. Admin. Code 1B.0116(f)(3).

In imposing suspension or disbarment, the DHC must consider the following factors, among others:

> (C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;
>
> . . . .
>
> (E) negative impact of defendant's actions on client's or public's perception of the profession;
>
> (F) negative impact of the defendant's actions on the administration of justice;
>
> . . . .
>
> (H) effect of defendant's conduct on third parties; [and]
>
> (I) acts of dishonesty, misrepresentation, deceit, or fabrication[.]

27 N.C. Admin. Code 1B.0116(f)(1). Moreover, disbarment "shall be considered where the defendant is found to engage in:"

> (A) acts of dishonesty, misrepresentation, deceit, or fabrication;
>
> (B) impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts; [or]
>
> . . . .
>
> (D) commission of a felony.

27 N.C. Admin. Code 1B.0116(f)(2).

We review the DHC's disciplinary action for abuse of discretion. *N.C. State Bar v. Culbertson*, 177 N.C. App. 89, 97, 627 S.E.2d 644, 650 (2006).

1. Commission of a Felony

Plaintiff argues that "the DHC erred by failing to conclude as a matter of law that Defendant's commission of a felony was among the factors considered in deciding the appropriate discipline[.]" We agree.

Under 27 N.C. Admin. Code 1B.0116(f)(2)(D), "[d]isbarment shall be considered where the defendant is found to engage in: . . . [the] commission of a felony." 27 N.C. Admin. Code 1B.0116(f)(2)(D).

Here, the DHC made the following findings of fact:

> 29. "Any person required under [the IRS Code] to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over [income taxes withheld from employee wages and FICA taxes] shall, in addition to other penalties provided by law, be guilty of a felony." 26 U.S.C. § 7202.
>
> 30. Under this Panel's clear, cogent and convincing standard of review, [Defendant] violated 26 U.S.C. § 7202 by:
>
> > (a) willfully failing to withhold federal income taxes from the wages of his law firm employees, including his own; and
> >
> > (b) willfully failing to pay over to Treasury all FICA taxes withheld from the wages of firm employees in 2019.
>
> . . . .
>
> 95. Pursuant to N.C. Gen. Stat. § 14-118.12, a "person is guilty of [the felony offense of] residential mortgage fraud when, for financial gain and with the intent to defraud, that person . . . [k]nowingly makes or attempts to make any material misstatement, misrepresentation, or omission within the mortgage lending process with the intention that a mortgage lender, mortgage broker, borrower, or any other person or entity that is involved in the mortgage lending process relies on it."
>
> 96. Pursuant to 18 U.S. Code § 1014, "[w]hoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . a Federal credit union . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, . . . or any person or entity that makes in whole or in part a federally related mortgage loan . . . upon any application . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

> 97. [Defendant's] actions . . . , all when evaluated pursuant to the Panel's clear, cogent and convincing standard, were in violation of 18 U.S. Code § 1014 and constituted the criminal offense of residential mortgage fraud as defined in N.C. Gen. Stat. § 14-118.12.

Despite finding that Defendant engaged in the commission of multiple felonies, the DHC did not conclude that this factor, which requires disbarment to be considered, was present in this case.

Accordingly, the DHC erred by failing to consider Defendant's commission of multiple felonies in imposing the appropriate discipline.

2. Bad Faith Obstruction of the Disciplinary Process

Plaintiff argues that "the DHC erred by failing to conclude as a matter of law that Defendant's bad faith obstruction of the disciplinary process was among the factors required to be considered in deciding the appropriate discipline[.]" We agree.

In all disciplinary cases, the DHC must consider a defendant's "bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency" in imposing the appropriate discipline. 27 N.C. Admin. Code 1B.0116(f)(3)(M). Pursuant to Rule 8.1 of the Rules of Professional Conduct, a lawyer in connection with a disciplinary matter shall not "knowingly make a false statement of material fact" or "knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority[.]" N.C. R. Prof. Cond. 8.1(a), (b).

Here, the DHC made the following findings of fact:

> 98. The State Bar opened grievance file no. 21G0082 to investigate the tax-related matters . . . .
>
> 99. [Defendant] was served with a Letter of Notice in grievance file no. 21G0082 that required him to submit a response to the allegations in the grievance within 15 days. [Defendant] did not respond within 15 days.
>
> 100. [Defendant's] response to the Letter of Notice in file no. 21G0082 was due on 31 March 2021. He did not request an extension of time and did not respond until 11 May 2021.
>
> . . . .

> 103. [Defendant] was also served with a subpoena issued by the Grievance Committee in connection with file no. 21G0082 and file no. 20G0861 (which involved the allegations of trust account mismanagement . . .).
>
> 104. [Defendant] was required to produce documents pursuant to the subpoena on 9 April 2021. [Defendant] did not produce any documents pursuant to the subpoena on 9 April 2021.
>
> . . . .
>
> 106. [Defendant] never completely produced all subpoenaed documents.
>
> 107. On 7 July 2021, [Defendant] was interviewed by the State Bar regarding grievance file nos. 21G0082 and 20G0861. During the interview, [Defendant] made false statements . . . .

Based on these findings of fact, the DHC made the following conclusions of law:

> (o) By failing to timely respond to the Letter of Notice and failing to timely and fully comply with the subpoena in grievance file no. 21G0082, Defendant knowingly failed to respond to lawful demands for information from a disciplinary authority in violation of Rule 8.1(b); and
>
> (p) By providing false information to the State Bar during the grievance process, Defendant knowingly made false statements of material fact in connection with a disciplinary matter in violation of Rule 8.1(a).

By "knowingly fail[ing] to respond to lawful demands for information" from Plaintiff in violation of Rule 8.1(b) and "knowingly ma[king] false statements of material fact in connection with [Plaintiff's] disciplinary matter" in violation of Rule 8.1(a), Defendant "intentionally fail[ed] to comply with rules or orders of [a] disciplinary agency[.]" *See* 27 N.C. Admin. Code 1B.0116(f)(3)(M). Accordingly, the DHC erred by failing to consider Defendant's "bad faith obstruction of the disciplinary proceedings" in imposing the appropriate discipline.

3. Character or Reputation

Plaintiff argues that the DHC's conclusion of law that "Defendant's character and/or reputation was a relevant factor in determining the appropriate discipline . . . is contradicted by the DHC's findings about

his dishonesty and criminality and is supported only by two findings that lack evidentiary support."

In all disciplinary cases, "any or all of the following factors shall be considered in imposing the appropriate discipline: . . . character or reputation[.]" 27 N.C. Admin. Code 1B.0116(f)(3)(Q).

Here, the DHC made the following findings of fact:

> 11. Senior Resident Superior Court Judge Winston Gilchrist testified that Defendant was a valued member of the Harnett County Bar, and provided legal services to many indigent defendants in criminal matters. Judge [Gilchrist] also testified that Defendant served a unique and valuable role in his representation of a particular subset of that County's population. Judge Gilchrist also testified that although he had many interactions with Defendant during Defendant's years of practice (both as opposing counsel and as a judge), he never observed Defendant engage in inappropriate courtroom conduct. The Panel gave substantial weight to Judge Gilchrist's testimony in reaching discipline for Defendant.
>
> 12. Defendant is an effective criminal defense lawyer and can be an asset to clients in that role.
>
> 13. Defendant has assisted those less fortunate in his community, including but not limited to, *providing temporary shelter at his office for members of the community's homeless population when weather was severe*, and the best version of Defendant is a positive lawyer role model for young men.

As discussed above, the italicized portion of Finding of Fact 13 is unsupported by the evidence. Nonetheless, the remainder of this finding, along with the other findings, support the DHC's conclusion that Defendant's character or reputation was among the factors to be considered in imposing the appropriate discipline.

Accordingly, the DHC did not err by considering Defendant's character or reputation in imposing the appropriate discipline.

4. Negative Impact of Defendant's Actions on Client's or Public's Perception of the Profession

Plaintiff argues that "the Order of Discipline does not contain any finding to support paragraph 2(b) of the DHC's conclusions of law

regarding discipline, providing that the negative impact of Defendant's actions on the perception of the profession was among the factors relevant to determining the appropriate discipline." (capitalization altered). Plaintiff argues that "[u]ncontroverted testimony supported this conclusion, but the DHC erred by failing to support its conclusion with any finding of fact" and asks this Court to "remand this matter to the DHC for entry of an Order of Discipline containing the appropriate finding."

Under 27 N.C. Admin. Code 1B.0116(f)(1)(E), "[t]he following factors shall be considered in imposing suspension or disbarment: . . . negative impact of defendant's actions on client's or public's perception of the profession[.]" 27 N.C. Admin. Code 1B.0116(f)(1)(E).

Here, the DHC made the following finding of fact:

> 7. Both the prosecutor and the presiding judge in the [felonious restraint] case testified that they had never seen courtroom conduct by a lawyer that was as aggressive and disrespectful as Defendant's conduct during the [felonious restraint] trial. When an officer of the court publicly displays disrespect for the judiciary, it tends to damage public perception of the legal system and undermine public confidence in the legitimacy of the judicial process. Defendant's courtroom conduct posed a risk of significant harm to public perception of the legal system, the reputation of the profession, and the administration of justice.

Contrary to Plaintiff's assertion, this finding supports the DHC's conclusion that the "negative impact of Defendant's actions on clients or the public's perception of the profession" was among the factors "to be considered in imposing suspension or disbarment[.]" Plaintiff's argument therefore lacks merit.

E. Discipline

Plaintiff argues that "the DHC abused its discretion by suspending Defendant's license to practice law rather than disbarring him, when suspension was inconsistent with prior cases and not reasonably related to the protection of the public, the profession, and the administration of justice." (capitalization altered). Because we have determined that the DHC erred by failing to consider Defendant's commission of multiple felonies and bad faith obstruction of the disciplinary proceedings in imposing the appropriate discipline, we do not address Plaintiff's argument.

VI. Conclusion

The DHC did not err by finding and concluding that Defendant engaged in misconduct, and we dismiss the arguments that are not properly before us. However, because the DHC failed to consider Defendant's commission of multiple felonies and bad faith obstruction of the disciplinary proceedings in imposing the appropriate discipline, we vacate the portion of the order of discipline suspending Defendant's law license and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART; DISMISSED IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and FLOOD concur.

CARMELO SAPIA, Plaintiff
v.
LENA C. SAPIA, Defendant

No. COA23-295

Filed 18 June 2024

1. **Appeal and Error—appellate rule violations—incomplete record on appeal—frustration of review—dismissal not warranted**

   In an appeal from an equitable distribution order, appellant-wife violated Appellate Rule 9 by failing to include in the record on appeal the equitable distribution affidavits, the final pretrial order, and a spreadsheet the parties referred to during testimony. Further, appellant inappropriately included extraneous information—such as a motion to amend, which the trial court never ruled on, and an "Exhibit A" with unclear provenance—and listed several standards of review in her brief without clearly connecting them to her appellate arguments. Despite numerous problems hampering its review, the appellate court nevertheless determined that, because appellant's noncompliance with the appellate rules were not so substantial as to leave appellee-husband without notice of the issues involved, dismissal was not required.

2. **Divorce—equitable distribution—distributive award—classification, valuation, and distribution of property—remand for additional findings**

The trial court's equitable distribution order—distributing the marital estate equally, which was not challenged on appeal, and requiring the wife to pay a distributive award to the husband as a cash lump sum of $44,420.40—was affirmed in part and reversed and remanded in part. Specifically, the trial court properly classified, valued, and distributed property between the parties, including the wife's student loan debt, funds from a loan taken out against a life insurance policy, and debt from a subordinate lien on the marital home (resulting from a loan deferral, which reduced the amount of equity in the home). Further, the wife did not demonstrate prejudice from a nine-month delay in entry of the order. However, two portions of the order were reversed and, on remand, the trial court was directed to: correct a clerical error; add a finding and table entry in its order regarding the stipulated classification and distribution of the life insurance liability; make additional findings on whether the presumption of in-kind distribution had been rebutted and whether the wife had sufficient liquid assets to pay the distributive award and, if not, to consider the sale of the marital home, and; to hold a hearing if either party requested to present additional evidence.

Appeal by defendant from order entered 22 December 2022 by Judge Tracy H. Hewett in District Court, Mecklenburg County. Heard in the Court of Appeals 3 October 2023.

No brief filed for plaintiff-appellee.

Access to Justice Project, by Melissa J. Hordichuk, for defendant-appellant.

STROUD, Judge.

Defendant Lena Sapia appeals from an order for equitable distribution. We affirm in part and reverse and remand in part.

I. Background

Plaintiff Carmelo Sapia ("Husband") and Defendant Lena Sapia ("Wife") were married in 2014 and separated "on or about October 16, 2019." Two children were born to the marriage. Husband filed a complaint on 22 January 2020 with claims for child custody, child support, post-separation support, alimony, equitable distribution, and attorney fees. On 3 February 2020, Wife filed her answer and counterclaims for child custody, child support, and equitable distribution. On 18 March 2022, the

trial court heard the equitable distribution claims and on 22 December 2022, the trial court entered an "Order for Equitable Distribution; Expenses for the Minor Children"[1] (capitalization altered) ("the Order"). On 4 January 2023, Wife filed a "Motion to Amend Judgment [-] Rule 59" (capitalization altered) seeking correction of some clerical errors and raising several "Issues of Law." This motion was not heard or ruled upon by the trial court. Wife then filed notice of appeal from the Order on 20 January 2023.

II. Observations Concerning this Appeal

[1] Review of this appeal is complicated by several problems. We first note that our record does not include the final pretrial order, although according to the transcript, the trial court entered a pretrial order and the parties stipulated to the classification, valuation, and distribution of many items of property and debts. We note that pretrial orders are required by North Carolina General Statute Section 50-21(d) in equitable distribution cases. *See* N.C. Gen. Stat. § 50-21(d) (2023). Mecklenburg County's Family Court Rules also require a signed, final pretrial order. *See* Local Rules of Domestic Court, Mecklenburg Cty., 13.5 (Aug. 21, 2017) ("The Final Pretrial Order (FPTO) shall be entered using Form CCF-38 or Form CCF-38A. If the Parties/attorneys fail to file the FPTO by the date designated by the Judge, the Parties/attorneys may face sanctions that could include shortened time for presentation of evidence by one or both Parties, monetary sanctions, or other sanction deemed appropriate given the circumstances of the case. The signatures of the Parties on the Final Pretrial Order shall be acknowledged before a Notary Public or taken upon oath before the Courtroom Clerk."). The pretrial order sets out the issues the parties have agreed upon and the issues to be determined by the trial court in an equitable distribution hearing.

In addition to the absence of the pretrial order, for the first 34 pages of the transcript the trial court and counsel for both parties discussed the stipulations on various items of property and issues which may or may not have been part of the pretrial order, but our record does not include the document used during this colloquy, so we are unable to understand much of the discussion. *See* N.C. R. App. P. 9(a)(1)j ("(1) . . . . The printed record in civil actions and special proceedings shall contain: . . . . j. copies of all other documents filed and statements of

1. Despite the title, the Order addresses only equitable distribution. The reference to "expenses for the minor children" in the title of the order may arise from the fact that medical bills of the minor children were included in the distribution as a marital debt.

all other proceedings had in the trial court *which are necessary to an understanding of all issues presented on appeal* unless they appear in another component of the record on appeal." (emphasis added)). For example, the parties and trial court often refer to items apparently by schedule and line number, such as B1 or J12, but without the document, these designations are meaningless to us. Ultimately, it appears the parties resolved many matters before beginning the presentation of evidence to address the matters they had not agreed upon. In addition, from the transcript, it seems the parties filed equitable distribution affidavits and financial affidavits.[2] These affidavits would have listed the items of property and debts and the parties' contentions as to classification, valuation, and distribution of these items, and some affidavits are discussed during the hearing, but no affidavits are in our record on appeal.[3] In addition, the parties apparently resolved the claims of alimony, child custody, and child support, according to the transcript, leaving only equitable distribution to be heard. In violation of Rule 9(a) of the North Carolina Rules of Appellate Procedure, Wife's brief also refers to at least one document which was not included in our record, a Consent Order for Permanent Child Custody and Attorneys Fees. *See In re L.B.*, 181 N.C. App. 174, 185, 639 S.E.2d 23, 28 (2007) ("Matters discussed in the brief outside the Record are not properly considered on appeal since the Record imports verity and binds the reviewing court." (citations and quotation marks omitted)).

The hearing was held by WebEx, and during the questioning of witnesses and testimony, counsel and the parties referred frequently to a "spreadsheet" listing the property and debts in contention. It appears that the parties, counsel, and trial court were viewing this spreadsheet on their computers and referring to it during the hearing. At the beginning of direct examination of Wife by Husband's counsel, he asked if she has "a copy of the spreadsheet that we're kind of going off." She asks for the exhibit number, and he stated, "It's not an exhibit. It's an independent spreadsheet." According to the transcript, Wife's counsel then sent Wife an Excel spreadsheet and she then referred to this during her testimony.

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2. Each party is required by North Carolina General Statute Section 50-21(a) to file and serve equitable distribution inventory affidavits "listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property." N.C. Gen. Stat. § 50-21(a) (2023).

3. Other affidavits mentioned during the testimony are an "affidavit from her father" about a gift and an affidavit about "the life insurance" which apparently deals with Wife's aunt's life insurance proceeds intended to be distributed to "her nephews or great nephews or something like that." These affidavits are not in our record or in the 9(d) supplement.

But as best we can tell, this "spreadsheet" was not introduced as an exhibit and is not in our record on appeal or the Rule 9(d) supplement. So again, we are unable to understand some of the testimony because we do not have the benefit of the "spreadsheet" used during the hearing.

Our confusion continues based upon a "Motion to Amend Judgment [-] Rule 59" filed by Wife on 4 January 2023. This motion was included in our Record on appeal, although the trial court never ruled upon it. The motion alleges "[t]here are numerous clerical issues in the Judgment, many of which were addressed in Judge Hewett's final markup. (Markup). A copy of the Markup is attached hereto as Exhibit A." There is no Exhibit A attached to the motion in our printed record on appeal, but there is a document which appears to be a draft of the Order with handwritten notations in the Rule 9(d) supplement. Exhibit A includes notations going far beyond clerical errors to substantive changes to the proposed order. Based upon the record, we cannot tell who made the handwritten notations on the "Exhibit A" document or when those notations were made. The document is identified in the Index of the Rule 9(d) supplement as "Exhibit A to Defendant-Appellant's Motion to Amend Judgment – Judge's Markup of Order." But the document itself does not indicate who made the notations on the draft of the Order. And even if we accept Wife's representation that the trial court made these notations, these notations would not affect our review. "[A]n order is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737-38 (1997); *see also* N.C. Gen. Stat. § 1A-1, Rule 58 (2023). To the extent Wife's arguments on appeal rely upon any notations upon "Exhibit A," we cannot address these arguments because we must confine our review to the filed, signed Order from which Wife appealed.

As a final complication, the "Standards of Review" section of Wife's brief lists several standards of review. She notes that findings of fact must be supported by competent evidence and conclusions of law are reviewed *de novo*. She also states that a trial court's "decisions may be reversed upon a manifest abuse of discretion" and "failure to comply with the provisions of the state's equitable distribution statute[,]" citing *Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986), and *Pott v. Pott*, 126 N.C. App. 285, 289, 484 S.E.2d 822, 826 (1994). These statements of law are all generally correct, but Wife's arguments mostly fail to connect the issues with any particular standard of review. To the extent her arguments clearly identify a challenged finding of fact or conclusion of law, we will generously apply the appropriate standard of review for that issue since she technically mentions the standards of review in

the brief, in very minimal compliance with North Carolina Rules of Appellate Procedure Appendix E. *See* N.C. R. App. P. Appendix E.

Because of Wife's violation with North Carolina Rule of Appellate Procedure 9 by her failure to include the equitable distribution affidavits, the final pretrial order, and the spreadsheet used during testimony, while including extraneous information such as the Motion to Amend and Exhibit A, we have considered whether this noncompliance rises to the level of a "substantial failure or gross violation" of the appellate rules justifying dismissal of the appeal. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366-67 (2008) ("In determining whether a party's noncompliance with the appellate rules rises to a level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent review on the merits would frustrate the adversarial process." (citations omitted)). Based upon the limited issues presented by Wife's appeal, we do not hold dismissal is appropriate, but we repeat this Court's previous admonition from *Hill v. Hill*:

> While these rules violations are substantial, and come very close to meriting dismissal of the appeal, we conclude that this appeal should not be dismissed. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008) (holding that "only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate."). However, the manner in which this appeal has been presented fundamentally hampers our review. The Court of Appeals sits as a reviewer of the actions of the trial court. In that role, we must be impartial to all parties. It is not our role to advocate for a party that has failed to file a brief, nor is it our role to supplement and expand upon poorly made arguments of a party filing a brief. "It is not the role of the appellate courts to create an appeal for an appellant. The Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Abbott v. N.C. Bd. of Nursing*, 177 N.C. App. 45, 48, 627 S.E.2d 482, 484-85 (2006) (citations omitted). We address only those issues which are clearly and understandably presented to us. On issues that require remand to the trial court, we will attempt to be clear and concise as to the perceived defect, and what the trial court needs to do upon remand to correct these defects.

> We acknowledge that our trial courts are overworked and understaffed. However, it is ultimately the responsibility of the trial judge to insure that any judgment or order is properly drafted, and disposes of all issues presented to the court before the judge affixes his or her signature to the judgment or order. This is particularly true in a complex case, such as one involving the equitable distribution of marital property.

Hill v. Hill, 229 N.C. App. 511, 514-15, 748 S.E.2d 352, 356 (2013) (ellipses omitted).

Ultimately, we have determined Wife's noncompliance is not so substantial that it leaves Husband "without notice of the basis upon which" this Court may rule. *Id.* In addition, Wife has not challenged any of the findings of fact as unsupported by evidence; her challenge to Finding 16 addresses a clerical error. With these limitations and caveats in mind, we will address Wife's issues on appeal.

III. Analysis

[2] Wife makes several arguments on appeal regarding the valuation and classification of property. We will address each argument in turn.

1. Standard of Review

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Although this is a "generous standard of review," the trial court must still comply with the requirements of N.C. Gen. Stat. § 50-20(c), which sets out a three step analysis:

> First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any

> encumbrances. Third, the court must distribute the marital property in an equitable manner.

Id. at 515, 748 S.E.2d at 356 (citations omitted).

2. Finding No. 16 Regarding Mortgage Debt

Wife first contends that the "incontrovertible competent evidence" shows that the mortgage on the parties' marital home was in only her name as of the date of separation so the trial court "either made an arbitrary, unsupported factual finding or a clerical error." The trial court found:

> 16. As the time of the date of separation, the former marital residence was encumbered by a mortgage held by Quicken Loan, in both Husband and Wife's names, in the amount of $321,297.41.

Wife is correct that the evidence shows the mortgage was only in her name, both at the date of separation and at the time of trial. However, whose name the mortgage was in as of the date of separation does not affect the classification or valuation of the mortgage and it did not affect the trial court's valuation of the debt, conclusions of law, or distribution. *See Atkins v. Atkins*, 102 N.C. App. 199, 208, 401 S.E.2d 784, 789 (1991) ("The fact that the debt is in the name of one or both of the spouses is not determinative of the proper classification." (citation omitted)). This Court has defined "marital debt" as "one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). Thus, this is a clerical error, and we will remand for correction of Finding No. 16 to remove the words "both Husband and."

3. Classification of Wife's Student Loans

Wife contends "the trial court erred in classifying $34,297.35 of [Wife's] student loans as her separate property because the court failed to make adequate factual findings and there is overwhleming (sic) evidence in the record to support a classification of marital property." Wife notes that classification of property is a conclusion of law and that conclusions of law must be supported by adequate findings of fact, citing *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 860 (1993).

> The standard of review for a trial court's classification of property during equitable distribution is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper

> in light of such facts. 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. . . . While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Roberts v. Kyle, 291 N.C. App. 69, 74-75, 893 S.E.2d 482, 486 (2023) (citations and quotation marks omitted). As Wife challenges the trial court's classification of the student loans, we will review *de novo*.

Wife does not identify any findings of fact she contends are not supported by the evidence, so the trial court's findings regarding the student debt are binding on this Court. *See id.* at 74, 893 S.E.2d at 486.

The trial court found:

> 59. During the course of the marriage, Wife incurred student loan debt in her individual name with NelNet. Some of the student loan debt was "refunded" by Wife's educational institutions and use for living purposes for the mutual benefit of the marriage/family. The portion of Wife's student loan debt which was "refunded," and not used toward Wife's educational expenses is a marital debt in the amount of ($29,500.67), which shall be distributed equally between parties. The remaining portion of the student loan debt to be distributed to Wife as her separate debt.

This finding of fact was not challenged by Wife. But Wife contends the "full $63,798.02" should have been classified as marital debt and that the trial court should have made additional findings of fact to support its classification and valuation. She also contends Husband "failed to meet this burden of proof" to rebut the presumption that her student debt was a marital debt. But Wife has the burden of proof on this issue backwards: "The party *claiming the debt to be marital* has the burden of proving the value of the debt on the date of separation and that it was incurred during the marriage for the joint benefit of the husband and wife." *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990) (emphasis added) (citations and quotation marks omitted). Wife claims the "full amount" of the student loan is marital, so she had the burden to prove this.

Wife seems to contend that the trial court erred as a matter of law by classifying a portion of her student loan debt as separate based upon *Warren v. Warren*, 241 N.C. App. 634, 638, 773 S.E.2d 135, 139 (2015).

She also contends that "like in *Warren*, the parties have conceded that [Wife's] salary increased significantly during the marriage as a result of [her] return to school, and the parties substantially enjoyed the benefit of [her] increased salary for thirty-four months before they separated[.]"

We first note that *Warren* does not hold that all student debt incurred during a marriage *must* be classified as marital debt. *See id.* at 637-38, 773 S.E.2d at 138. In *Warren*, the findings of fact supported that classification. *See id.* at 639, 773 S.E.2d at 139. In *Warren*, all the plaintiff-wife's student debt was incurred during the marriage and "both parties testified that they had agreed plaintiff would return to school to obtain her occupational therapy degree, and both were aware student loans were required to accomplish this goal." *Id.* at 638, 773 S.E.2d at 138. There was also evidence the loans were used for both educational expenses and "general living expenses such as groceries," medical expenses, children's activities, and other household expenses. *Id.* The husband also conceded the "marriage benefited from plaintiff's increased earning capacity for a period of twenty months." *Id.* This court concluded that

> since the student loan debt was incurred during the marriage, plaintiff presented substantial evidence demonstrating that the loan funds were used to benefit the family as well as satisfy her educational expenses. In addition, the marriage lasted long enough for the parties to substantially enjoy the benefits of plaintiff's newly-earned degree. Therefore, plaintiff satisfied her burden of proving that the debt was incurred for the joint benefit of both parties.

Id. at 639, 773 S.E.2d at 139.

Here, *Wife* had the burden to prove the full amount of her student loan debt was incurred for the benefit of the marriage. The trial court found that about half of her student debt was marital. The trial court's classification was consistent with *Warren*, as the facts in this case differ greatly from *Warren*.[4] *See generally id.* In *Warren*, all the wife's student loan debt was incurred during the marriage and the wife completed her education during the marriage. *See id.* Here, Wife began her education before the marriage, completed one degree during the marriage, and began work toward her master's degree but did not complete

4. The spreadsheet or some other document used during the hearing apparently included information regarding the student debt. Husband's attorney noted that "number J14 is probably the second of two big items, and that's just the student loan debt of hers and I don't think – we're not going to be able to resolve that part, so you'll probably have to hear evidence on that. We say it's her separate, they say it's marital."

that degree before the separation. About one-third of her total debt was incurred either before or after the marriage. Wife contended all the loan disbursements during the marriage should be marital debt "[b]ecause the majority of those loans that were taken out were dispersed (sic) to me and paid for our everyday expenses, including our IVF." But Wife did not know how much of the $69,633.79 debt incurred during the marriage was used for educational expenses as opposed to living expenses during the marriage. Wife had attended five different schools over the years but did not know how much tuition she paid at the two schools she attended during the marriage while working on her bachelor's degree.

Nor did Husband here "concede" Wife's bachelor's degree caused her salary during the marriage to increase significantly, as she contends. Instead, he argued quite the opposite, as Wife already had a substantial income before she received her bachelor's degree. There was evidence her salary increased each year from 2014 through 2019, although she also had several lay-offs and job changes. In any event, the trial court found that a substantial portion of Wife's student loan debt, $29,500.67, was used for the mutual benefit of the marriage and family. The trial court's classification of Wife's student loan debt as partially separate and partially marital is supported by its findings of fact.

4. Classification and Distribution of $10,053.40 Liability

Wife argues that "the trial court erred in failing to properly identify the parties' $10,053.40 marital loan in distribution because the court made a clerical error in its order."

The trial court found:

> 37. Based on the stipulations of the parties, the Court finds that the proceeds from the Mutual of Omaha life insurance policy, in the amount of $10,053.40 was received by Wife for the benefit of Wife's nephews. Within thirty (30) days from the date of the entry of this Order, Wife shall provide documentation to Husband substantiating that Wife paid the proceeds from the Mutual of Omaha life insurance policy, in the amount of $10,053.40, to Wife's nephews.

Wife contends "the parties stipulated at trial that the $10,053.40 marital loan taken against the proceeds of a life insurance policy held in trust by [Wife] would be classified as a marital debt and distributed in full to" Wife. To support her contention of a stipulation to the classification, valuation, and distribution of this debt, Wife cites pages of the transcript where the attorneys were discussing the stipulations as to various items of property and debts before beginning the hearing, and as noted

above, our record does not include the documents they were referring to. But it is apparent from the discussion that the stipulation regarding the $10,053.40 life insurance proceeds was not addressed in the missing documents; counsel for the parties discussed how to classify and distribute this item and the transcript addressed the stipulation sufficiently for us to consider her argument. *See Wirth v. Wirth*, 193 N.C. App. 657, 662, 668 S.E.2d 603, 607 (2008) ("While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." (citation omitted)).

> MR. MEREDITH: And then moving down to the life insurance. I've got that affidavit. He doesn't know about that. I haven't asked him about that. I guess assuming that to be the case -- basically, Your Honor, this was -- they sent us an affidavit yesterday or last night that said that this money was -- I think it was her aunt that passed away, and she was the beneficiary of this, of this life insurance, and that that it was -- so there wasn't a trust set up, but that she's kind of the executor and that half of this money goes to what would be I guess her nephews or great nephews or something like that.
>
> MS. HORDICHUK: No. All of it not half of it, all of it.
>
> MR. MEREDITH: Well, half goes to each.
>
> MS. HORDICHUK: Yeah. Right. Yeah.
>
> MR. MEREDITH: Well, half goes to each. So I'll talk to him about that, and the stipulation made would just be that she utilizes those funds for that and then we just move on.
>
> MS. HORDICHUK: But, Eric, just to be clear, this is also part of the CD loan, so that money doesn't exist anymore. What happened was they cashed the check. They had put aside 3,000 about into their bank account because they had thought that they would have to pay a tax on it, and it ended up that they didn't have to pay the tax and that money got spent and it was in the joint account. And then they took the $7,000 and put it in a CD, so at least it accrued some interest. And then in 2018 your client had wanted --they took it out. So they took the funds out of the CD, and I have all the documentation of that. So that's all, you know, a loan, and he was referring to it as a $7,000

> loan, but really it's the full 10,000 and change because that was spent by both of the parties.
>
> MR. MEREDITH: Okay. So we had stipulated on the next page that the CD loan with seven grand. How much is the actual loan then?
>
> MS. HORDICHUK: It's that full check, 10,053.40.
>
> MR. MEREDITH: So the idea is that they owe that back?

After the trial court and counsel had discussed other items on the spreadsheet, they took a break for counsel to discuss the possible stipulations with Husband and Wife. After court resumed, Husband's counsel reported their stipulation regarding "the life insurance proceeds."

> MR. MEREDITH: So you have all the stipulations, Judge, and we can add to that B1, the BMW. My client would stipulate that that is her separate property, so that would be distributed to her. Again, the car's gone, but it's just the proceeds are distributed to her at a zero value. We stipulated to the distribution of C4, the BB&T checking account to my client at the 1760 number. *Down at the bottom, so the life insurance proceeds. What we're going to do is we're going to distribute that to Wife at the 10,000 figure, but it's going to be a negative. It's going to be a debt, and then that will eradicate the CD loan on J13.*
>
> THE COURT: All right. Do you concur, Ms. Hordichuk?
>
> MS. HORDICHUK: Yes, yeah.
>
> THE COURT: All right.

(Emphasis added.)

The Order includes a table listing the trial court's description, classification, valuation, and distribution of the items of marital property and debts. The table in the Order classifies the "Certificate of Deposit Loan" as a marital debt with a value of $0.00 and distributes this to Husband. This portion of the Order is in accord with the stipulation, since the parties agreed to "eradicate the CD loan." But the trial court should have then added an item to the table we will call the "life insurance liability" as a marital debt distributed to Wife. Based on the stipulation, the life insurance proceeds were not an item of property but instead this sum had become a marital debt. The "certificate of deposit" loan was "eradicated" since it reflected the same liability as the life insurance liability.

Instead of paying the life insurance proceeds to the nephews, the parties had used the funds for their own expenses during the marriage, converting this amount to a marital debt owed to Wife's nephews, as reflected by the stipulation. As stated in the stipulation, "we're going to distribute that to Wife at the 10,000 figure, but it's going to be a negative. It's going to be a debt, and then that will eradicate the CD loan on J13." The trial court's finding failed to account for the part of the stipulation to treat the life insurance proceeds not as an item of property owed to the nephews but as a marital debt to be distributed to Wife. However, despite the language in Finding 37 and the life insurance liability not being listed in the table in the Order, based on our calculations the trial court properly considered the $10,000 life insurance liability in its distribution and allocated it to Wife as a marital debt.

Based upon the discussion in the transcript, it would be impossible for Wife to "provide documentation" she had paid the life insurance proceeds to the nephews since the parties had instead used the proceeds for their own expenses during the marriage. And there was no stipulation that Wife would provide documentation of any payment to the nephews. Because Finding 37 treated the life insurance proceeds as an asset of the nephews that Wife needed to pay to them, Finding 37 is not consistent with the stipulation. However, as noted above, the trial court included the life insurance liability in the final distribution amount despite Finding 37 treating it as an asset belonging to the nephews instead of as a marital debt. According to the stipulation, the life insurance liability should have been included in the portion of the Order's table listing the parties' marital debts, in the amount of $10,053.40, assigned to Wife. We therefore reverse the Order as to Finding 37 and remand for the trial court to add findings clarifying the classification and distribution of this debt in accord with the stipulation.

5. Distribution of Subordinate Lien on Marital Home

Wife argues that "the trial court erred in distributing [Wife's] post-separation subordinate lien on the former marital residence as a positive divisible asset because it was inconsistent with the Court's valuation." She contends the trial court's distribution table "contradicted its own factual findings without any rational basis and erroneously decreased the amount of real property debt distributed to" Wife.

To understand the trial court's valuation and distribution of the debt on the marital home as shown in the distribution table, we must consider several findings of fact regarding the value of the home, the amount of the original mortgage debt, and the amount of the subordinate lien. Wife

does not challenge any of these findings of fact as unsupported by the evidence, so they are binding on appeal. *See Roberts*, 291 N.C. App. at 74, 893 S.E.2d at 486. The trial court valued the marital home as of the date of separation at $371,000.00 and $421,471.00, as of the date of distribution. The trial court then found:

> 15. The former marital residence shall be distributed to Wife.
>
> 16. As the time of the date of separation, the former marital residence was encumbered by a mortgage held by Quicken Loan, in both Husband and Wife's names, in the amount of $321,297.41.
>
> 17. At the time of trial, the former marital residence was encumbered by a new loan held by Flagstar, in Wife's individual name.
>
> 18. Since the date of separation, Wife has alone paid for the mortgage encumbering the former marital residence. Wife further encumbered the former marital residence by way of a COVID-19 financial hardship program with Flagstar, allowing wife to place the loan in temporary forbearance. This loan deferral reduced equity in the home which shall be appropriately accounted for in the distribution of the marital.
>
> 19. Wife resumed making regular mortgage payments in February, 2022, and the mortgage remains current. The balance on the mortgage at trial was $351,898.59.
>
> 20. When Wife resumed making monthly mortgage payments in February, 2022, Flagstar submitted a standalone partial claim with the U.S. Department of Housing and Urban Development, in accordance with the hardship forbearance program established by the CARES Act, thereby allowing Wife's forbearance arrearages of ($46,219.74) to be placed in a zero-interest subordinate lien against the former marital residence, which Wife will repay when the mortgage terminates.
>
> 21. Between the date of separation and trial, Wife paid a total of $16,364.57 towards the mortgage encumbering the former marital residence. Despite Husband's ability to pay, he did not contribute to paying the mortgage or taxes after the date of separation.

> 22. Wife alone has maintained and paid taxes on the former marital residence since the date of separation.
>
> . . . .
>
> 41. As the time of the date of separation, the former marital residence was encumbered by a mortgage held by Mr. Cooper, in both Husband and Wife's names, in the amount of $321,297.41.
>
> 42. At the time of trial, the former marital residence was encumbered by a new loan held by Flagstar, in Wife's individual name, *in the amount of ($351,898.59)*, *which includes the $46,219.74 forbearance loan.*
>
> 43. Since the date of separation, Wife has alone paid for the mortgage encumbering the former marital residence.
>
> 44. Wife further encumbered the former marital residence by way of a loan deferral such that she reduced the equity in the home, in the amount of $46,219.74 which protected the home foreclose. This additional encumbrance of ($46,219.74) which benefits Wife, should be appropriately accounted for in the distribution of the marital estate.
>
> . . . .
>
> 66. Wife has maintained and paid the taxes on the former marital residence, she paid $16,364.57 toward the mortgage after the date of separation, and the deferment she secured kept the former marital residence from being foreclosed on during COVID years and the economic toll of the separation of the parties. The Court notes that the deferment is being accounted for in the distribution of assets so it is not being used to weigh against her in the percentage of distribution.

(Emphasis added.)

The trial court then set out the distribution of the property and debts in table form, including the home, original mortgage, and the post-separation lien as follows:

Description of property	**Class.**	**Distribute to H Value**	**Distribute to W value**
[ ] Connecticut Avenue, Charlotte, North Carolina . . .	M	0	421,471.00[5]
[6]		0	(16,364.57)
TOTALS		0	$405,106.43

. . . .

DEBT REAL PROPERTY			
[ ] Connecticut Avenue, Charlotte, North Carolina	M	0	($351,898.59)[7]
Loan forbearance by Wife	D		$46,219.74
TOTALS			(305,678.85)

Wife's argument that the $46,219.74 should be shown as a "negative" instead of a "positive" misinterprets the trial court's distribution table. She contends the trial court treated the lien as a "positive divisible asset" which is inconsistent with the trial court's valuation in Finding of Fact 44 which finds $46,219.74 as the "additional encumbrance" on the marital home. But the trial court found in Finding 42 that the total loan amount encumbering the home as of the date of trial as listed in the table "includes the $46,219.74 forbearance loan." Thus, in the table the trial court added $46,219.74 to the amount of the original mortgage debt on the home, for a total debt at the time of distribution of $351,898.59. Had the trial court listed the "loan forbearance by Wife" as a negative number in the table, as Wife argues, the total outstanding debt would have been increased to $398,118.33. This number would not be supported by the evidence, as the payoff statement in evidence showed the "amount due to payoff as of 03/31/22" was $351,898.59. The statement also shows this payoff amount includes the "unpaid advances" from the

5. Finding of Fact 13 states this is the value of the marital home as of the date of distribution.

6. This entry was not labelled but according to Finding of Fact 21, $16,364.57 was the amount of payments Wife made on the marital home between the date of separation and the date of trial. By reducing the value of the marital home, the trial court gave Wife the benefit of these payments as a distributional factor as noted in Finding 66.

7. This is the date of distribution balance of the mortgage according to Finding of Fact 19 and this amount includes the $46,219.74 forbearance loan.

subordinate lien. Therefore, the trial court's table correctly reflects the amount of mortgage debt distributed to Wife as $305,678.85 and the distribution accounts for the $46,219.74 in accord with the findings of fact.[8]

6. Delay in Entry of Order

Wife argues "the trial court erred in failing to credit [Wife] for the additional $17,959.42 she paid toward the mortgage on the former marital residence after trial because the court took nine months to enter a final judgment and the change in property value during that time was substantial." Wife cites *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000), in support of her argument, claiming that the nine-month delay between the trial and entry of the Order is "more than a *de minimis* delay" during which she continued to make payments on the mortgage on the home.

We first note Wife has conflated two arguments. First, she contends she should receive "credit" for the mortgage payments she made between trial and entry of the Order. She also contends, based on *Wall*, she is entitled to a "new distribution on remand" due to a "substantial change in the value of property subject to distribution."

We will address Wife's argument as to the delay first. The 19-month delay in *Wall* was more than twice the delay in this case. *See id.* at 314, 536 S.E.2d at 654. But even if we assume a nine-month delay is more than *de minimis*, Wife's argument fails because she has not demonstrated any prejudice from the delay in entry of the Order. This Court has addressed the need to demonstrate prejudice from the delay in entry of an order as discussed in *Wright v. Wright*:

> Finally, defendant argues that the trial court erred in rendering its equitable distribution judgment twenty-one months after the last evidentiary hearing. Specifically, defendant argues that the delay here requires the trial court to enter a new order after allowing the parties to offer additional evidence. We disagree.
>
> Defendant directs our attention to this Court's ruling in *Wall v. Wall*, 140 N.C. App. 303, 314, 536 S.E.2d 647, 654 (2000). In *Wall*, the defendant argued that his due process rights under both the United States Constitution and the

8. Wife also makes an argument in the alternative regarding the classification of the subordinate lien, but we will not address this argument as it would not benefit her for us to do so, and Husband has not appealed.

> North Carolina Constitution were violated by a delay of nineteen months from the date of the trial to the entry of equitable distribution judgment. 140 N.C. App. at 313-14, 536 S.E.2d at 654. We concluded that "there is inevitably some passage of time between the close of evidence in an equitable distribution case and the entry of judgment," but that "a nineteen-month delay between the date of trial and the date of disposition is more than a *de minimis* delay, and requires that the trial court enter a new distribution order on remand." *Id.* at 314, 536 S.E.2d at 654.
>
> However, subsequent to our ruling in *Wall* we addressed the same issue in *Britt v. Britt*, 168 N.C. App. 198, 606 S.E.2d 910 (2005). There, we determined that "*Wall* establishes a case-by-case inquiry as opposed to a bright line rule for determining whether the length of a delay is prejudicial." *Id.* at 202, 606 S.E.2d at 912. And that "since *Wall*, this Court has declined to reverse late-entered equitable distribution orders where the facts have revealed that the complaining party was not prejudiced by the delay." *Id.* We then found that "in *Wall*, potential changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order warranted additional consideration by the trial court." *Id.* We then concluded that the plaintiff in *Britt* "made no argument that the circumstances that counseled in favor of reversing the order in *Wall* are present in the case *sub judice*." *Id.*

Wright v. Wright, 222 N.C. App. 309, 314-15, 730 S.E.2d 218, 222 (2012) (ellipsis and brackets omitted).

Wife's only argument of prejudice from the delay is that she continued to make mortgage payments for the nine months between the trial and entry of the Order. Of course, our record does not include any evidence Wife actually made these payments after the trial and she did not request the trial court to re-open the case to present this evidence; she simply argues this number based upon the amount of the mortgage payments multiplied by the number of months. We will assume for purposes of argument she has continued to make her mortgage payments after the trial. But we fail to see how making these payments prejudiced Wife. According to unchallenged findings in the Order, Wife and the children have resided in the former marital home since the parties' separation, the mortgage is solely in her name, and the home was distributed to her. Presumably she would have continued to make mortgage payments on

the home she owns and is living in no matter how quickly the trial court entered the equitable distribution order. She would also receive the benefit of living in the home and increased equity in the home from making these payments.

Wife's related argument that we should remand for the trial court to give her "credit" for the $17,959.42 in mortgage payments she claims to have paid fails for the same reason. Wife has not demonstrated any reason to remand for a new hearing or a new order to address any changes during the delay between the trial and entry of the Order.

7. Distributive Award

Wife's final argument is that the "trial court erred in ordering [Wife] to pay [Husband] a $44,420.40 distribtuive (sic) award because the court failed to cite any factual findings or legal conclusions to support a rebuttal of the presumption of in-kind distribution." She contends the trial court erred by failing to follow the statutory presumption of an in-kind distribution and making no findings of whether Wife "has sufficient liquid assets to pay the distributive award."

The trial court's Order includes findings of fact addressing distributional factors under North Carolina General Statute Section 50-20(c) and concludes that an equal division is equitable; that conclusion is not challenged on appeal. However, the trial court did not make any findings of fact or conclusions of law about the presumption of an in-kind distribution and did not identify any liquid assets available to pay the distributive award. The only provision of the Order addressing the distributive award is in the decree:

> 3. Distributive Award. After considering the division of property, as set forth herein, it is necessary that Wife pay to Husband a distributive award to Husband in the amount of $44,420.40. Wife shall pay the distributive award, as provided herein, by making a cash lump sum payment directly to Husband in the amount of $44,420.40 within 180 days from the date of the entry of this Order.

It is apparent the trial court did "consider the division of property" as set out in the Order, and the only apparent way to accomplish an equal distribution is a distributive award. There was minimal liquid property available. The parties' main asset was the equity in the marital home.[9]

9. Accordingly, at the trial, much of the testimony and argument addressed Wife's ability to refinance the home or obtain a loan secured by the home to pay any potential distributive award.

Their financial accounts had minimal value, and the accounts distributed to Wife were valued at only $2,640.40. The parties had substantial credit card debt and those debts were also distributed to the parties as they had stipulated. But Wife is correct the trial court must make findings to address the presumption of an in-kind distribution before ordering a distributive award:

> In 1997 N.C. Gen.Stat. § 50-20(e) was amended to create a rebuttable presumption that an in-kind distribution of property is equitable. In creating this presumption the General Assembly discarded the impracticality standard. The trial court's order, in this case, is devoid of any findings of fact or conclusions of law pertaining to this presumption. The trial court did not follow the statutory presumption and made a distributive award. When there is a presumption in the law, the finder of fact is bound by the presumption unless it finds that the presumption has been rebutted. We hold that in equitable distribution cases, if the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination.
>
> Further, N.C. Gen. Stat. § 50-20(c) enumerates distributional factors to be considered by the trial court. One of those factors is the liquid or nonliquid character of all marital property and divisible property. The trial court is required to make findings as to whether the defendant has sufficient liquid assets from which he can make the distributive award payment.
>
> In the instant case, the trial judge only listed one source of liquid assets from which defendant could pay the distributive award. That liquid asset, held in the trust account of defendant's attorney, totaled $5,219.47. This amount, as Judge Keever stated in her order, is only partial payment for the distributive award of $25,000.00. Judge Keever made no findings as to whether defendant had other sufficient liquid assets to pay the distributive award. Although defendant may in fact be able to pay the distributive award, defendant's evidence is sufficient to raise the question of where defendant will obtain the funds to fulfill this obligation.
>
> We therefore reverse the trial court on this assignment of error, and remand this matter for additional findings of fact

> on whether the presumption of an in-kind distribution has been rebutted and whether defendant has sufficient liquid assets to pay the distributive award to plaintiff, consistent with this opinion.

Urciolo v. Urciolo, 166 N.C. App. 504, 506-07, 601 S.E.2d 905, 908 (2004) (citations, quotation marks, and brackets omitted).

As in *Urciolo*, the trial court's findings fail to address "whether [Wife] has sufficient liquid assets from which" she can pay "the distributive award payment." *Id.* Nor did the trial court make any findings or conclusions to support the rebuttal of the in-kind distribution presumption. *Id.* We therefore must reverse the distributive award and "remand this matter for additional findings of fact on whether the presumption of an in-kind distribution has been rebutted and whether [Wife] has sufficient liquid assets to pay the distributive award to [Husband], consistent with this opinion." *Id.*

8. Discrepancies between the Findings and the Table in the Order

Since we must remand for entry of a new order as discussed above, we also note that the trial court's calculations of the total debt on the table in the Order includes discrepancies in the total debt assigned to Wife. The amounts, classifications, and distribution of the debts as shown in the table are correct, based on the unchallenged Findings of Fact numbers 47 through 61, except for the omission of the life insurance liability.[10] However, the total shown for Wife's share of credit card debt is ($363.032), which is not a currency value. As discussed above, the trial court did not include the life insurance liability in the table in its Order. Despite this omission in the table, the trial court still included the life insurance liability in its distributive award, as all the debts allocated to Wife, including the mortgage and life insurance liability, equal $363,032.05, which is presumably the number the trial court included in the table for Wife's debts where it instead stated "$363.032[.]" Adding to the confusion, the "363.032" number listed as the sum of the debts is listed in the portion of the table titled "Debt Credit Cards," but the items listed in that section do not add up to $363,062.05, since the mortgage debt and car loan are listed in another section of the table and the life insurance debt was not listed in the table at all. But the trial court's

10. Finding of Fact 58 is repeated in Finding number 60 but the debt amount is stated correctly in the table. Findings of Fact 57 and 60 both address the same debt, the REACH embryo debt; they are worded differently but state the same amount of debt and it is stated correctly in the table.

math was correct, even if it was not clearly stated in the table or Order, since $363,062.05 is the total of the marital debts distributed to Wife, including the mortgage, car loan, credit cards, and life insurance liability. Using the values as stated in the findings of fact, we calculate the total net marital estate as $21,944.78. According to the Order, the property distributed to Wife is valued at $418,424.82 and the property distributed to Husband is valued at $2,090.37. Wife is responsible for marital debts of $363,032.05, and Husband is responsible for marital debts of $35,538.36. To equalize the distribution based upon these values, a distributive payment from Wife to Husband would be $44,420.38, which is essentially the distributive award the trial court entered of $44,420.40. Thus, upon remand, the trial court shall clarify the table section in the Order to correctly show the amounts of the debts and distribution of the debts to each party and the total net value of the marital estate. We note that while a table such as the one included in the trial court's Order is very helpful in an equitable distribution order, we urge the trial court to be careful to make sure the entries in the table match up to the findings of fact and that the mathematical calculations in the table are correct. We also admonish Wife for her failure to examine the Order carefully enough to discover that several of the issues she raised on appeal were simply misinterpretations of the numbers in the Order.

9. Instructions on Remand

Since there has been no challenge to an equal distribution of the marital estate on appeal, the distribution on remand remains equal and we have affirmed the trial court's classification, valuation, and distribution of the marital property. On remand, the trial court shall correct the clerical error in Finding 16 and add a finding of fact and table entry as to the stipulated classification and distribution of the life insurance liability in Finding 37. In addition, we "remand this matter for additional findings of fact on whether the presumption of an in-kind distribution has been rebutted and whether defendant has sufficient liquid assets to pay the distributive award to plaintiff, consistent with this opinion." *Id.* at 507, 601 S.E.2d at 908. On remand, if either party requests to present additional evidence limited to the issue of the findings as to the distributive award, the trial court shall hold a hearing to receive evidence and argument limited to this issue. But this mandate does not limit the trial court's discretion in how to accomplish the equal distribution of the net marital estate on remand. The trial court is not required to order a distributive award on remand but has the discretion to determine the appropriate means of distribution based upon its findings on remand addressing the presumption in favor of an in-kind distribution. Should

the trial court determine the presumption of an in-kind distribution has not been rebutted or that Wife does not have "other sufficient liquid assets" to pay a distributive award, in its discretion it may also consider ordering sale of the marital home. *See Wall*, 140 N.C. App. at 308, 536 S.E.2d at 650.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ZACHARY and MURPHY concur.

STATE OF NORTH CAROLINA
v.
ROBERT HAROLD BRUER

No. COA23-604

Filed 18 June 2024

1. Jury—selection—prejudicial statement by prospective juror—mistrial denied—abuse of discretion

The trial court abused its discretion by denying defendant's motion for a mistrial in his prosecution for drug and firearm offenses after a prospective juror stated during voir dire (and in front of the jury pool) that he was a prison guard and knew defendant from defendant's time in prison. The statement was obviously prejudicial to defendant, and the trial court failed to make an inquiry of all jurors, both accepted and prospective, to determine whether they heard the statement and, if so, what effect the statement had on them. Further, the court failed to determine whether the statement was so minimally prejudicial that the jury members might reasonably be expected to disregard it and render a fair and impartial verdict.

2. Firearms and Other Weapons—possession of a firearm by a felon—constructive possession—sufficiency of evidence

The State presented substantial evidence from which a jury could reasonably infer that defendant constructively possessed a firearm for purposes of the offense of possession of a firearm by a felon, including that, when law enforcement executed a search warrant at defendant's workplace, defendant was found near an office where three firearms were discovered, one of which was located

in a drawer that also contained a bill of sale made out to defendant for a truck that he admitted purchasing. Further, there was overwhelming evidence of defendant's dominion and control over the premises, which he referred to as "my shop" and which was known by the community to be his, and to which he had invited law enforcement to conduct drug busts on numerous occasions.

3. Appeal and Error—preservation of issues—courtroom restraints—invited error—failure to object

Defendant failed to preserve for appellate review any challenge to the use of courtroom restraints during his trial for drug and firearm offenses. Further, where defendant did not object to being shackled, but merely asked to be seated before the jury entered the courtroom so that they could not see his restraints, any error was invited and therefore waived.

Appeal by Defendant from judgments entered 26 August 2022 by Judge Jonathan Wade Perry in Stanly County Superior Court. Heard in the Court of Appeals 20 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for Defendant-Appellant.

COLLINS, Judge.

Defendant Robert Harold Bruer appeals from judgments entered upon jury verdicts finding him guilty of possession with intent to sell and deliver methamphetamine, possession of cocaine, and possession of a firearm by a felon. Defendant also pled guilty to having attained habitual felon status. Defendant argues, and the State concedes, that the trial court erred by denying his motion for a mistrial and that Defendant is entitled to a new trial. Defendant also argues that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon and by failing to comply with statutory mandates regarding shackling. We conclude as follows: the trial court erred by denying Defendant's motion for a mistrial; the trial court did not err by denying Defendant's motion to dismiss; and Defendant invited any error regarding the use of shackles during the trial and failed to preserve the issue for appeal. Defendant is entitled to a new trial.

I. Background

Defendant was employed as an auto mechanic at ASR Corporation ("ASR"), an auto mechanic shop located in Albemarle, North Carolina. On 5 April 2018, officers with the Albemarle Police Department arrived at ASR to execute a search warrant based on Defendant's alleged involvement in the sale of narcotics. When officers entered ASR, Defendant was standing with a group of employees near the office of the auto repair shop. Upon entry, the officers ordered the employees to lie on the ground; the employees complied, were handcuffed, and were led outside of the building.

During the search, the officers found the following items on the floor beside Defendant: a black bag containing nine grams of methamphetamine; one-and-a-half grams of cocaine; 90 alprazolam pills; and other pills of varying colors and types. The officers also found a Ziploc bag containing two grams of methamphetamine "on the floor close to the office." Inside the office in the bottom drawer of a desk, officers found a pistol and a bill of sale for a Dodge Truck made out to "Rob Brur." Officers also found a rifle and a shotgun leaning against the interior wall of the office.

Defendant was indicted for possession with intent to sell and deliver methamphetamine; possession with intent to sell and deliver cocaine; possession with intent to sell and deliver a schedule IV controlled substance; possession of a firearm by a felon; and having attained habitual felon status.

The case came on for trial on 22 August 2022. During jury selection, the State asked prospective jurors whether they knew anyone involved in the trial, and one of the prospective jurors, Mr. Webb, stated that he was a prison guard and knew Defendant from when Defendant was in prison. Defendant moved for a mistrial on the grounds that the jury had been tainted, arguing that at least 11 other prospective jurors, and possibly the other remaining 60 prospective jurors, heard Mr. Webb's statement. The trial court denied Defendant's motion. The jury found Defendant guilty of possession with intent to sell and deliver methamphetamine, possession of cocaine, and possession of a firearm by a felon. Defendant pled guilty to having attained habitual felon status and the trial court sentenced Defendant as a habitual felon to a total active sentence of 146 to 248 months' imprisonment. Defendant properly noticed appeal.

II. Discussion

Defendant argues, and the State concedes, that the trial court erred by denying his motion for a mistrial and that Defendant is entitled to a

new trial. Defendant also argues that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon and by failing to comply with statutory mandates regarding shackling. We address each argument in turn.

A. Motion for Mistrial

[1] Defendant first argues, and the State concedes, that the trial court erred by denying his motion for a mistrial after "a prospective juror announced in front of the jury pool that he had worked as a prison guard and knew [Defendant] from his time in prison."

"The right to trial by jury in criminal cases is such a fundamental part of our criminal justice system that it must be jealously guarded, even at the cost of delay and inconvenience in the trial court." *State v. Howard*, 133 N.C. App. 614, 619, 515 S.E.2d 740, 743 (1999). "It is axiomatic that criminal defendants have the right to be tried by an impartial jury free from outside influences." *State v. Barnes*, 345 N.C. 184, 203, 481 S.E.2d 44, 53-54 (1997) (citation omitted). N.C. Gen. Stat. § 15A-1061 safeguards this right and provides that a trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2023); *see State v. Lynch*, 254 N.C. App. 334, 336, 803 S.E.2d 190, 192 (2017). "[T]he decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge[,]" and this Court reviews the trial court's decision for an abuse of discretion. *Id.* (quotation marks and citation omitted).

"Our decision in *State v. Mobley*, 86 N.C. App. 528, 358 S.E.2d 689 (1987), sets out the preferred procedure for the trial court to follow when a prospective juror answers a question with information obviously prejudicial to a criminal defendant." *Howard*, 133 N.C. App. at 616, 515 S.E.2d at 741. In *Mobley*, the trial court prejudicially erred by denying the defendant's motion to dismiss the prospective jurors when a prospective juror identified himself as a police officer and stated that he "had dealings with the defendant on similar charges." 86 N.C. App. at 532, 358 S.E.2d at 691. The trial court excused the juror for cause and instructed the jury to strike from their minds any reference the prospective juror had made to defendant. *Id.* at 532-33, 358 S.E.2d at 691. Defendant moved the trial court to dismiss the prospective jurors based on the juror's statement; the trial court denied the motion. *Id.* at 533, 358 S.E.2d at 691-92. On appeal, this Court granted Defendant a new trial, explaining:

> A statement by a police officer-juror that he knows the defendant from "similar charges" is likely to have a substantial effect on other jurors. The potential prejudice to the defendant is obvious. On the defendant's motion to dismiss the other jurors, the trial court, at the least, should have made inquiry of the other jurors as to the effect of the statement. The more prudent option for the trial court would have been to dismiss the jurors who heard the statement and start over with jury selection. In any event, the attempted curative instruction was simply not sufficient.

Id. at 533-34, 358 S.E.2d at 692.

In *Howard*, the trial court prejudicially erred by failing to dismiss the entire jury panel, restore all peremptory challenges to defendants, and begin the process of jury selection from the beginning after one prospective juror stated during jury selection that one of the defendants looked familiar to her, she had been an officer at a detention center, and she knew the defendant "from there." 133 N.C. App. at 615, 515 S.E.2d at 741. Although "the trial court recognized the obvious prejudice to defendants of the statements made by the prospective juror," the trial court dismissed only eight of the nine jurors—retaining the ninth juror "whom the trial court stated was not in the courtroom when the statements in question were made"—and restored "only a portion of the peremptory challenges previously expended by defendants." *Id.* at 617, 515 S.E.2d at 742.

This Court explained that the trial court's decision to keep one juror and its failure to make a "formal inquiry" into whether or not that remaining juror heard the statement was prejudicial. *Id.* at 618, 515 S.E.2d at 742-43. We granted the defendants a new trial, holding that:

> [W]here inappropriate answers are given or comments made by a prospective juror during the jury selection process, the trial court should make an inquiry of all jurors, both accepted and prospective, to determine whether they heard the statements, the effect of such statements on them, and whether they could disabuse their minds of the harmful effects of the prejudicial comments. Unless the trial court determines that the statements were so minimally prejudicial that the members of the jury might reasonably be expected to disregard them and render a fair and impartial verdict without regard to such statements, the far more prudent course is to dismiss the panel,

> restore all peremptory challenges to all parties, and begin the process of jury selection anew.

Id. at 619, 515 S.E.2d at 743.

Here, jury selection took place off the record. The following exchange regarding Mr. Webb's statement that "[he] knew [Defendant] when [Defendant] was in prison and [he] was a guard" occurred after the trial court sent the prospective jurors out of the courtroom:

> The Court: All right. So let the record reflect the prospective jurors are out of sight and sound of the courtroom. So let me just recreate. So when we were asking -- not we. When [the State] asked the jury if they knew any of the participants in the case, Juror No. 5, Mr. Riley Webb, I think his exact response was, I knew [Defendant] from when I was a guard in prison. Was that what he said, or pretty close to it?
>
> [The State]: Your Honor, that's pretty close. It was something along the lines of -- I knew [Defendant] when he was in prison and I was a guard.
>
> The Court: Yeah.
>
> [The State]: Something along those lines, yes, sir.
>
> The Court: Okay. And that was it and then we stopped and y'all approached.
>
> [The State]: Yes.
>
> The Court: Okay. It took me a second because, like I said, I'm having a hard time hearing what they say. He may have said he was a guard in DOC. I must have missed that.
>
> . . . .
>
> The Court: Okay. All right. So given that, for the record I asked the prospective jurors to step out. I went ahead and excused Mr. Webb for cause. I explained to the jury that's because he personally knew [Defendant] and that would always be an issue as prospective jurors. Then I told them I was going to ask them to step out briefly so we could address the logistics. And I was trying to minimize because I don't know -- I mean, the 11 other ones in the box probably heard it. I don't know if the audience did or not. I don't

> know. Having said all that, though, [Defense Counsel], do you want to be heard as far as what transpired?
>
> [Defense Counsel]: Yes, sir, I do. . . .

Defendant then moved for a mistrial, arguing that Mr. Webb's statement caused him substantial and irreparable prejudice. The trial court denied Defendant's motion, stating, "I don't think it meets that substantial prejudice threshold as I read it. That's going to be my ruling in my discretion." The trial court then stated, "I'm not planning on saying anything else about [Mr. Webb's statement] because I don't want to draw their attention to it, especially for folks out in the audience who haven't heard it at all."

Here, as in *Mobley* and *Howard*, Mr. Webb was a prospective juror who was employed in the criminal justice system and who made a statement during jury selection that he knew Defendant from when Defendant was in prison. Just as "[a] statement by a police-officer juror that he knows the defendant from 'similar charges' " resulted in "obvious prejudice," Mr. Webb's statement that he knew Defendant from when Defendant was in prison resulted in "obvious prejudice" to Defendant. *See Howard*, 133 N.C. App. at 617, 515 S.E.2d at 742; *Mobley*, 86 N.C. App. at 533-34, 358 S.E.2d at 692. Additionally, although Defendant had been charged with possession of a firearm by a felon and the prospective jurors would have been aware of this charge, "[e]vidence of incarceration may, in fact, be more prejudicial [than evidence of a conviction] where, as here, the jury is left to speculate as to the seriousness of the offense and the length of the sentence." *State v. Rios*, 251 N.C. App. 318, 323, 795 S.E.2d 234, 237 (2016). Furthermore, the trial court acknowledged that "the 11 other [jurors] in the box probably heard [Mr. Webb's statement]" and that it "[did not] know if the audience did or not."

The trial court, however, failed to "make an inquiry of all jurors, both accepted and prospective to determine whether they heard [Mr. Webb's] statement[]," failed to "determine . . . the effect of such [a] statement[] on them, and whether they could disabuse their minds of the harmful effects of the prejudicial comments[,]" and failed to determine that Mr. Webb's statement was "so minimally prejudicial that the members of the jury might reasonably be expected to disregard [it] and render a fair and impartial verdict." *Howard*, 133 N.C. App. at 619, 515 S.E.2d at 743. Accordingly, the trial court abused its discretion by denying Defendant's motion for a mistrial. *See id.*; *see also Lynch*, 254 N.C. App. at 336, 803 S.E.2d at 192.

B. Motion to Dismiss

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon for insufficient evidence that he possessed a firearm.

"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) (italics and citation omitted). Under 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) (quotation marks and citations omitted).

Upon a defendant's motion to dismiss for insufficient evidence, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quotation marks and citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. McCoy*, 234 N.C. App. 268, 271-72, 759 S.E.2d 330, 334 (2014) (quotation marks and citation omitted). "The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence." *Id.* at 272, 759 S.E.2d at 334 (quotation marks and citation omitted).

"There are two elements to possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *Id.* "Possession . . . may be actual or constructive. Actual possession requires that a party have physical or personal custody of an item. A person has constructive possession . . . when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition." *Id.* (quotation marks and citation omitted). However, "[u]nless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find [that] a defendant had constructive possession." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). Proximity to the contraband "can be sufficient [to prove constructive possession] when combined with other factors[,]" *State v. Livingston*, 290 N.C. App. 526, 530, 892 S.E.2d 265, 269 (2023), such as "indicia of the defendant's control over the place where the contraband was found." *State v. Bradshaw*, 366 N.C. 90, 94, 728 S.E.2d 345, 348 (2012) (citation omitted).

Here, the State put forth substantial evidence showing that Defendant constructively possessed a firearm: First, Defendant was standing in front of the office at ASR where three firearms were found; a rifle and a shotgun were found leaning against the wall inside the office and a pistol was found in a desk drawer in the office. Second, the pistol was found next to a bill of sale for a truck; the name on the bill of sale was "Rob Brur" and Defendant admitted that the bill of sale was for a truck that he had purchased. This is evidence that Defendant exercised "dominion and control" over the firearms found in the office. *See Bradshaw*, 366 N.C. at 96-97, 728 S.E.2d at 349-50 (determining that the defendant had dominion and control over contraband found in a bedroom where police also found bills with defendant's name on them in the same bedroom); *see also Livingston*, 290 N.C. App. at 531, 892 S.E.2d at 269-70 (holding that the defendant had dominion and control over contraband in a bag when that bag was touching a second, smaller bag that contained three of the defendant's identification cards and his credit card). Third, there was overwhelming testimony about Defendant's control of ASR and its premises. The testimony shows that officers met with Defendant at ASR "30 to 40 times"; officers referred to, and the community thought of, ASR as "Rob's shop"; Defendant referred to ASR as "my shop"; and Defendant served as a confidential informant for law enforcement and allowed law enforcement to carry out numerous drug "busts" at ASR.

Viewing the evidence in the light most favorable to the State, we determine that there is substantial evidence to show that Defendant constructively possessed the firearms seized during the raid at ASR and that the trial court did not err in denying Defendant's motion to dismiss the charge of possession of a firearm by a felon.

C. Shackling

[3] Defendant lastly argues that he is entitled to a new trial because the trial court, in violation of N.C. Gen. Stat. § 15A-1031, failed to make any findings regarding him being shackled and failed to instruct the jury regarding the shackles.

"[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (citation omitted). Furthermore, "[o]ur Supreme Court, and this Court, held that failure to object to shackling waives any error which may have been committed." *State v. Sellers*, 245 N.C. App. 556, 558, 782 S.E.2d 86, 88 (2016) (quotation marks and citations omitted).

Here, Defense counsel did not object to Defendant being shackled during trial and Defense counsel asked for and received accommodations regarding Defendant's shackling. The State first brought to the trial court's attention, outside of the presence of the jury, the fact that Defendant was restrained with shackles underneath his pants. The trial court asked Defense counsel for his opinion on Defendant being restrained, and Defense counsel requested that Defendant be permitted to be seated on the witness stand before the jury was brought into the courtroom so that the jury would not see or hear the restraints and would not see Defendant "walk a little funny" due to the restraints. The trial court agreed to Defense counsel's request and further determined that it would dismiss the jury at the conclusion of Defendant's testimony and take a recess so that the jury would not see Defendant "getting down and walking[.]" Defendant further argues that, even if Defense counsel waived this issue by failing to object at trial, this "Court should invoke Rule 2 to waive the preservation requirement to prevent manifest injustice[.]" We decline to invoke Rule 2 and dismiss this argument.

III. Conclusion

The trial court erred by denying Defendant's motion for a mistrial, and Defendant is entitled to a new trial. However, the trial court did not err by denying Defendant's motion to dismiss the charge of possession of a firearm by a felon, and Defendant invited any error regarding the use of shackles during the trial and failed to preserve the issue for appeal.

NEW TRIAL.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
KIMBERLY CABLE, DEFENDANT

No. COA23-192

Filed 18 June 2024

1. Appeal and Error—premature notice of appeal—certiorari granted—preservation of issues—limited motion to dismiss—Rule 2 invoked

Although defendant prematurely gave oral notice of appeal—prior to entry of judgment for her convictions for failure to store a firearm to protect a minor and involuntary manslaughter—in violation of Appellate Rule 4, the appellate court issued a writ of certiorari to reach the merits of her appeal and, where her motion to dismiss the firearm charge was insufficient to preserve a challenge to the sufficiency of the evidence with regard to involuntary manslaughter, the appellate court invoked Appellate Rule 2 to consider the merits of defendant's appeal as to the manslaughter conviction.

2. Firearms and Other Weapons—failure to store a firearm to protect a minor—"in a condition that the firearm can be discharged"—applicable to loaded weapons only

In a prosecution arising from the death of a teenager from a self-inflicted gunshot wound, defendant's conviction for failure to store a firearm to protect a minor (N.C.G.S. § 14-315.1) was reversed where, after the appellate court determined that the statutory language that the firearm must be "in a condition that [it] can be discharged" was ambiguous on its face, the appellate court applied the rule of lenity and principles of statutory interpretation and concluded that the legislature intended for the statute to apply only to loaded firearms. Here, where defendant left an unloaded revolver in a holster on top of a gun safe, the State had not proven this element of the offense.

3. Firearms and Other Weapons—failure to store a firearm to protect a minor—firearms in house other than the one discharged—elements not met

In a prosecution arising from the death of a teenager from a self-inflicted gunshot wound, defendant's conviction for failure to store a firearm to protect a minor (N.C.G.S. § 14-315.1)—based

on the presence of unsecured firearms in defendant's home other than the revolver used by the victim—was reversed for lack of evidence that the victim gained access to the firearms and caused the death of another not in self-defense, both of which were necessary elements of the charged offense.

4. Homicide—involuntary manslaughter—conviction for underlying unlawful act reversed—manslaughter conviction vacated

In a prosecution arising from the death of a teenager from a self-inflicted gunshot wound, where the appellate court reversed defendant's convictions for failure to store a firearm to protect a minor for insufficient evidence of each element of that offense pursuant to N.C.G.S. § 14-315.1, since defendant's violation of section 14-315.1 served as the "unlawful act" for purposes of her conviction for involuntary manslaughter—and where the State did not pursue the alternate theory of involuntary manslaughter based on a culpably negligent act or omission—defendant's manslaughter conviction was vacated.

Appeal by Defendant from judgment entered 26 April 2022 by Judge Marvin P. Pope, Jr., in McDowell County Superior Court. Heard in the Court of Appeals 15 November 2023.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park, Solicitor General Fellow Mary Elizabeth D. Reed, and Special Deputy Attorney General Zachary K. Dunn, for the State.

Thomas, Ferguson & Beskind, LLP, by Olivia Warren, for Defendant.

GRIFFIN, Judge.

Defendant Kimberly Cable appeals from judgment entered after a bench trial in which she was convicted of two counts of failure to store a firearm to protect a minor, under N.C. Gen. Stat. § 14-315.1, and involuntary manslaughter, under N.C. Gen. Stat. § 14-18. Defendant contends the trial court erred in denying her motion to dismiss as there was insufficient evidence to sustain her convictions. We hold the trial court erred in denying Defendant's motion to dismiss as to both counts of failure to store a firearm to protect a minor. Therefore, we reverse Defendant's convictions for failure to store a firearm to protect a minor in violation

of N.C. Gen. Stat. § 14-315.1 and vacate Defendant's conviction for involuntary manslaughter in violation of N.C. Gen. Stat. § 14-18.[1]

I. Factual and Procedural Background

This case arises from a tragic incident in which a sixteen-year-old boy, Kevin, died from a self-inflicted gunshot wound while visiting Defendant's sixteen-year-old son, Wyatt, at their family home.[2] Evidence at trial tended to show the following:

On 27 July 2018, Wyatt invited Kevin to spend the night at his home. Defendant was home and aware of the boys' presence. Defendant had an unloaded, holstered Taurus Raging Bull .44 Magnum revolver and a box of ammunition lying on top of an open gun safe in her bedroom. At around 2:00 a.m., Wyatt went into Defendant's bedroom where Defendant was sleeping with her husband and retrieved the revolver and the box of ammunition. Wyatt took the revolver to his bedroom to show Kevin. After showing Kevin the revolver, Wyatt placed the revolver and the box of ammunition on top of a gun safe located in his bedroom.

Some time later, Kevin asked Wyatt if he wanted to play Russian roulette. Kevin then took the revolver and a bullet from the top of the safe in Wyatt's room, loaded the revolver, pointed it at his head, and pulled the trigger. Kevin died instantly. Police responded to the incident and discovered, among other things, 57 additional firearms located throughout Defendant's home.

On 18 September 2018, Defendant was indicted on two counts of failure to store a firearm to protect a minor—Count I pertaining to the revolver and Count II pertaining to the other firearms located throughout the home—and involuntary manslaughter.

On 25 April 2022, the matter came on for trial in McDowell County Superior Court. Defendant waived her right to a jury trial and proceeded with a bench trial before Judge Pope, who found Defendant guilty on all counts. Defendant gave oral notice of appeal. Defendant was sentenced to a consolidated term of 13 to 25 months' imprisonment. The active sentence was suspended for 36 months' supervised probation. Defendant attempted to clarify the trial court had received her notice of appeal.

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1. We recognize, in addition to Defendant's contentions regarding the sufficiency of the State's evidence, Defendant also argues N.C. Gen. Stat. § 14-315.1 unconstitutionally burdens the right to keep and bear arms. However, because we reverse Defendant's convictions, we need not address the constitutionality of the statute.

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

Defendant then requested the trial court arrest judgment on Count I of failure to store a firearm to protect a minor as it was the unlawful act which supported the involuntary manslaughter conviction. The trial court agreed and modified the judgment.

II. Jurisdiction and Preservation

[1] Defendant filed a petition for writ of certiorari requesting this Court allow her direct appeal from the trial court's judgment entered 26 April 2022. Defendant concedes she prematurely entered oral notice of appeal before entry of the final judgment in violation of Rule 4, thereby depriving this Court of jurisdiction to hear her appeal. *See* N.C. R. App. P. 4; *see also State v. Smith*, 292 N.C. App. 662, 665, 898 S.E.2d 909, 912 (2024).

Through Rule 21, "[t]his Court may issue a writ of certiorari 'in appropriate circumstances . . . to permit review of the judgments [. . .] when the right to prosecute an appeal has been lost by failure to take timely action[.]' " *Smith*, 292 N.C. App. at 665, 898 S.E.2d at 912 (quoting N.C. R. App. P. 21(a)(1)).

In the exercise of our discretion, we grant Defendant's petition for writ of certiorari in order to reach the merits of her appeal. However, even where we grant Defendant's petition to reach the merits of her appeal, we are generally precluded from addressing contentions not properly preserved for appellate review, such as Defendant's contentions regarding her involuntary manslaughter conviction.

Our North Carolina Rules for Appellate Procedure, Rule 10(a)(3), prescribes the specific procedure necessary to preserve a sufficiency of the evidence issue for appellate review. *See* N.C. R. App. P. 10(a)(3). Under Rule 10(a)(3), a defendant in a criminal case may not make insufficiency of the State's evidence the basis of an issue on appeal unless she made a motion to dismiss at trial. *Id*. Where the defendant makes a general motion to dismiss for insufficient evidence, the motion "preserves all sufficiency of the evidence issues for appellate review." *State v. Golder*, 374 N.C. 238, 245, 839 S.E.2d 782, 787 (2020). But, where the defendant makes a motion to dismiss for insufficient evidence referencing a specific charge, the motion only preserves issues relating to that charge. *See State v. Gettleman*, 275 N.C. App. 260, 270, 853 S.E.2d 447, 454 (2020) ("[T]argeted motions to dismiss certain charges cannot preserve issues concerning the sufficiency of the evidence regarding the charges that the defendant deliberately chose not to move to dismiss.").

Here, Defendant made a targeted motion to dismiss for insufficient evidence, stating: "[Y]our Honor, [ ] we would ask you dismiss the failure to secure a firearm." Further, Defendant's arguments on the motion

referred only to the insufficiency of the evidence concerning the charge for failure to secure a firearm to protect a minor. Presumably, these arguments would mirror or overlap potential arguments on a motion to dismiss the involuntary manslaughter charge, had they been made. However, the trial court was not required to consider or rule on the sufficiency of the State's evidence as to the involuntary manslaughter charge where Defendant neither mentioned the charge, nor raised any issue or made any specific argument concerning the charge. Because Defendant's targeted motion to dismiss did not require the trial court to consider or rule on the sufficiency of the State's evidence as to the involuntary manslaughter charge, we hold Defendant's motion to dismiss did not preserve any sufficiency of the evidence issue concerning the involuntary manslaughter charge.

Nonetheless, Rule 2 of our North Carolina Rules of Appellate Procedure allows us to suspend or vary the requirements or provisions of Rule 10 where doing so will "prevent manifest injustice to a party, or to expedite decision in the public interest." *See* N.C. R. App. P. 2. The circumstances of this case require we invoke Rule 2 to suspend Rule 10 and consider the merits of Defendant's argument pertaining to her involuntary manslaughter conviction. Defendant's motion to dismiss otherwise properly preserved any issue concerning the sufficiency of the State's evidence relating to her convictions for failure to store a firearm to protect a minor.

III. Standard of Review

Whether the State presented substantial evidence of each essential element of the crimes for which Defendant was charged is a question of law. *See State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2017). Thus, we review the trial court's denial of Defendant's motion to dismiss for insufficient evidence de novo to determine whether the State presented substantial evidence of each essential element of the crimes charged and of Defendant having been the perpetrator of those crimes. *Id.*; *see also State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) ("Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." (internal marks and citation omitted)). In making our determination, we must view all evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

IV. Analysis

Defendant argues the State failed to offer substantial evidence of each essential element of the crimes charged—two counts of failure to store a firearm to protect a minor and involuntary manslaughter.

A. Failure to Store a Firearm to Protect a Minor

Defendant contends the State failed to offer substantial evidence of each essential element of N.C. Gen. Stat. § 14-315.1 under Count I of 18 CRS 51387, which charged Defendant with failure to properly store the Taurus Raging Bull .44 Magnum revolver, and Count II of 18 CRS 51387, which charged Defendant with failure to properly store the other firearms located throughout the home.

Relevant here, North Carolina General Statutes, section 14-315.1 states, in part:

> (a) Any person who resides in the same premises as a minor, owns or possesses a firearm, and stores or leaves the firearm (i) in a condition that the firearm can be discharged and (ii) in a manner that the person knew or should have known that an unsupervised minor would be able to gain access to the firearm, is guilty of a Class 1 misdemeanor if a minor gains access to the firearm without the lawful permission of the minor's parents or a person having charge of the minor and the minor:
>
> . . .
>
> (3) Causes personal injury or death with it not in self defense; or
>
> . . .
>
> (b) Nothing in this section shall prohibit a person from carrying a firearm on his or her body, or placed in such close proximity that it can be used as easily and quickly as if carried on the body.

N.C. Gen. Stat. § 14-315.1(a)-(b) (2023).

1. Count I of 18 CRS 51387

[2] Defendant contends there was insufficient evidence to sustain her conviction under Count I of 18 CRS 51387, as the State failed to offer substantial evidence to prove she improperly stored the Taurus Raging Bull .44 Magnum revolver, in violation of N.C. Gen. Stat. § 14-315.1.

Defendant specifically argues:

> (1) The State did not prove [ ] [Defendant] stored a firearm "in a condition that the firearm can be discharged"[;]
>
> (2) The State did not prove [ ] [Defendant] stored a firearm "in a manner that the person knew or should have known that an unsupervised minor would be able to gain access"[;]
>
> (3) The State did not prove [ ] [Defendant's] firearm was not "placed in such close proximity that it can be used as easily and quickly as if carried on the body"[;] and
>
> (4) The State did not prove [ ] "the minor" who gained access to the revolver possessed or used it in violation of the statute.

In addressing Defendant's first contention we note the undisputed evidence at trial showed, on the date of the incident, Defendant left an unloaded Taurus Raging Bull .44 Magnum revolver in a holster on top of a gun safe in her bedroom. Defendant does not refute this evidence, but instead raises an issue of statutory interpretation. Defendant asserts, under the plain meaning of N.C. Gen. Stat. § 14-315.1, an unloaded gun with a double safety is not in a condition that it can be discharged. Thus, Defendant argues the revolver, here, was not in a condition that it could be discharged because "no amount of handling or even mishandling the [revolver] in the condition in which it was stored would have resulted in intentional or accidental discharge."

Our Court has addressed this statute once before, in *State v. Lewis*, 222 N.C. App. 747, 732 S.E.2d 589 (2012), but not to the extent this appeal requires. In *Lewis*, the defendant was convicted of improper storage and involuntary manslaughter after his three-year-old son tragically died from a self-inflicted gunshot wound. *Id.* at 748, 732 S.E.2d at 590. The defendant appealed arguing there was not substantial evidence to prove he stored his handgun "in a manner that [he] knew or should have known that an unsupervised minor would be able to gain access to the firearm[.]" *Id.* at 750, 732 S.E.2d at 592. The Court in *Lewis* stated the defendant recognized the handgun was "in a condition that the firearm [could] be discharged," within the meaning of N.C. Gen. Stat. § 14-314.1, where the handgun was both loaded and not secured by any type of safety mechanism. *See id.* However, this lone statement is not indicative of our Court having interpreted what it means for a firearm to be "in a condition that the firearm can be discharged" under N.C. Gen. Stat. § 14-314.1. As such, we are faced with an issue of first impression and

must ascertain what it means for a firearm to be "in a condition that the firearm can be discharged" under N.C. Gen. Stat. § 14-315.1.

All statutory interpretation must begin with "the plain meaning of the words of the statute." *Sharpe v. Worland*, 137 N.C. App. 82, 85, 527 S.E.2d 75, 77 (2000). As is well established within the rules of statutory construction, "when the language of a statute is clear and without ambiguity, [the Court must] give effect to the plain meaning of the statute[.]" *State v. Abshire*, 363 N.C. 322, 329, 677 S.E.2d 444, 450 (2009) (citation omitted). Conversely, "when the language of a statute is ambiguous, [the] Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Id.*

The pertinent language within N.C. Gen. Stat. § 14-315.1 describes a firearm to be "in a condition that the firearm can be discharged[.]" N.C. Gen. Stat. § 14-315.1(a)(i). In assessing this specific language, we note the term "discharge," in the context of firearms and other weaponry, is not explicitly, or even generally, defined within our General Statutes. Therefore, we turn to the dictionary definition of the word. *See Perkins v. Ark. Trucking Servs.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) ("[I]n the absence of a contextual definition, [we] look to dictionaries to determine the ordinary meaning of the [word][.]"); *see also In re McLean Trucking Co.*, 281 N.C. 242, 252, 188 S.E.2d 452, 458 (1972) ("Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning."). Merriam Webster defines the verb "discharge" in several ways, including, in the context of firearms specifically, to "go off [or] fire." *Discharge*, Merriam Webster, https://www.merriam-webster.com/dictionary/discharge (last visited May 8, 2024). Still, this definition—"to fire"—offers little to no guidance on what it means for a firearm to be "in a condition that the firearm can be discharged," as a firearm can technically be fired when it is loaded or unloaded (commonly referred to as "dry firing"). Further, it remains unclear whether the language of N.C. Gen. Stat. § 14-315.1 contemplates the existence and/or use of manufacturer or additional safety mechanisms—*i.e.*, is a firearm "in a condition that the firearm can be discharged" when secured by some type of safety mechanism? Moreover, insofar as the statute applies to loaded firearms, it is unclear whether a loaded firearm is "in a condition that the firearm can be discharged" when it is simply loaded, or whether the firearm must be loaded with a bullet chambered.

Undoubtedly, this statute, by the language used therein, is subject to various interpretations. Therefore, having attained no resolve as to what it means for a firearm "to be in a condition that the firearm can

be discharged," it is fair to conclude the language of N.C. Gen. Stat. § 14-315.1 is ambiguous on its face.

In construing an ambiguous criminal statute, we must apply the rule of lenity. *See State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007). The rule of lenity requires we "strictly construe the statute in favor of the defendant." *State v. Conway*, 194 N.C. App. 73, 79, 669 S.E.2d 40, 44 (2008). The rule does not, however, require the words within the statute "be given their narrowest or most strained possible meaning." *Id.* (internal marks and citation omitted). Rather, the statute should still be " 'construed utilizing common sense and legislative intent.' " *Id.* (quoting *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (internal marks and citation omitted)). In determining legislative intent, we look to "the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means[.]" *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978) (internal marks and citation omitted).

Having already addressed the language of the statute and the plain meaning of the term "discharge," as used therein, we look to the use of the term in other criminal statutes as we consider our Court's interpretation of those statutes to be instructive.

Our North Carolina General Statutes, section 14-34.1, criminalizes, among other things, the act of discharging a firearm into occupied property. *See* N.C. Gen. Stat. § 14-34.1 (2023). Though this statute does not specifically define the word "discharge," we are convinced by the context of the statute that it intends "discharge" to apply only to loaded firearms. The essential elements of N.C. Gen. Stat. § 14-34.1—(1) the willful or wanton discharging (2) of a firearm (3) into any property (4) while it is occupied—cannot be met without the existence of shot, bullets, pellets, or other missiles. *See id.* If "discharge," under N.C. Gen. Stat. § 14-34.1, was defined to include dry firing a firearm, the essential element of "into any property" could never be met as there can be no "into" without a projectile. *See State v. Canady*, 191 N.C. App. 680, 689, 664 S.E.2d 380, 385 (2008) ("[T]he 'into [property]' element is satisfied when [a] bullet[] damage[s] the exterior of a building, even though there is no evidence that the bullet[] penetrated to the interior." (citation omitted)). In line with this reasoning, our Court in *State v. Dew* stated, "[d]ischarging a firearm means firing a shot[.]" 379 N.C. 64, 72, 864 S.E.2d 268, 275 (2021) (citing *State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510 (1995) (holding for purposes of double jeopardy, each discharge or shot

fired was a separate event which could be charged)). Thus, "discharge," within the meaning of N.C. Gen. Stat. § 14-34.1 must be the firing of a loaded firearm. *See Canady*, 191 N.C. App. at 689, 664 S.E.2d at 385; *see also Dew*, 379 N.C. at 72, 864 S.E.2d at 275.

Before applying this definition to the statute at issue, we review the relevant legislative history to ensure this interpretation is consistent with the legislative intent.

Section 14-315.1 was enacted by our General Assembly in 1993, together with related legislation, all intended to protect minors and further prevent, among other things, the presence of weapons on school property. *See* An Act to Make it a Misdemeanor to Fail to Store Firearms in a Reasonable Manner for the Protection of Minors, ch. 558 § 2, 1993 N.C. Sess. Laws 558. Aside from being rewritten in 1994 to include language relating to North Carolina's newly adopted structured sentencing law, the statute has otherwise remained the same. *See* An Act to Make Technical and Conforming Changes to the General Statutes and Session Laws Relating to Structured Sentencing, Misdemeanors, and Felonies, ch. 14 § 11, 1994 N.C. Sess. Laws 14.

Since its enactment, N.C. Gen. Stat. § 14-315.1 has contained the ambiguous "in a condition that the firearm can be discharged" language. This language is distinguishable from that used in other, earlier enacted legislation, which referenced the condition of firearms more distinctly using terms such as "loaded" and "unloaded." *See* N.C. Gen. Stat. §§ 14-316 (2023), (1971) (making it unlawful for a parent, or other similarly situated person, to allow a child under the age of twelve to have access to a firearm whether that firearm "be loaded or unloaded"); *see also* N.C. Gen. Stat. §§ 14-34 (2023), (1969) (criminalizing the act of pointing a gun at another person "whether such gun or pistol be loaded or not loaded"). Because the General Assembly previously referenced firearms using terminology such as "loaded" and "unloaded," we presume the use of broader "in condition that the firearm can be discharged" language was intentional. *See Comstock v. Comstock*, 244 N.C. App. 20, 24, 780 S.E.2d 183, 186 (2015) ("Where, as here, the General Assembly includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion." (internal marks and citation omitted)).

Upon considering N.C. Gen. Stat. § 14-315.1—the language within the statute, the use of similar language in other statutes, the legislative history, and the purpose of the statute—and applying the rule of lenity, we hold a firearm is "in a condition that the firearm can be discharged"

when it is loaded. While our General Assembly intentionally drafted N.C. Gen. Stat. § 14-315.1 broadly by using the "in a condition that the firearm can be discharged" language, this holding does not overly restrict the statute. Our holding resolves some ambiguity, but it remains unclear whether the statute contemplates the existence and/or use of any safety mechanisms, or whether a loaded firearm is "in a condition that the firearm can be discharged" simply because it is loaded, or if it must be loaded with a bullet chambered, ready to fire. Nonetheless, we need not address any further ambiguities within the statute as the firearm here was not loaded and thus, for our purposes, Defendant's revolver was not stored "in a condition that the firearm [could] be discharged" within the meaning of N.C. Gen. Stat. § 14-315.1.

Because Defendant's firearm was not stored "in a condition that the firearm [could] be discharged," there was insufficient evidence to support Defendant's conviction under Count I of 18 CRS 51387. We therefore reverse Defendant's conviction under Count I of 18 CRS 51387 for failure to store a firearm to protect a minor in violation of N.C. Gen. Stat. § 14-315.1.[3]

2. Count II of 18 CRS 51387

[3] In addition to Count I, Defendant was charged with failure to store a firearm to protect a minor in violation of N.C. Gen. Stat. § 14-315.1 under Count II of 18 CRS 51387, which states:

> [D]efendant [ ] unlawfully and willfully did[,] as a person who resides in the same premises [ ] as a minor, [Kevin], leave firearms, possessed or owned by [ ] [D]efendant, in a condition that the firearm could be discharged and in a manner that [ ] [D]efendant knew that an unsupervised minor would be able to gain access to the firearms, and the minor gained access to the firearms without the lawful permission of person having charge of the minor, and the minor caused the death of a minor with it not in self-defense.

Defendant argues the State failed to offer substantial evidence of each essential element of the crime charged under Count II. Specifically, Defendant contends the State failed to prove both "the minor gained

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3. Defendant further argues the State failed to present substantial evidence to prove the remaining elements alleged in Count I of 18 CRS 51387. However, because we reverse Defendant's conviction under Count I, we need not address Defendant's remaining sufficiency of the evidence arguments as to that conviction.

access to the firearms" and "the minor caused the death of a minor with it not in self-defense" where there was no evidence to suggest a minor gained access to any firearm other than the revolver specifically alleged in Count I.

The State concedes, for the reasons argued by Defendant, there was insufficient evidence to support Defendant's conviction under Count II. We agree and reverse Defendant's conviction under Count II for failure to store a firearm to protect a minor in violation of N.C. Gen. Stat. § 14-315.1.

B. Involuntary Manslaughter

[4] Defendant contends the State failed to offer substantial evidence of each essential element of involuntary manslaughter under N.C. Gen. Stat. § 14-18. Specifically, Defendant argues because "the State's evidence was insufficient to sustain a conviction on the underlying misdemeanor, [ ] the involuntary manslaughter conviction must also be vacated."

Involuntary manslaughter is "the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury[.]" *State v. Davis*, 15 N.C. App. 395, 399, 190 S.E.2d 434, 437 (1972) (internal marks, citation, and emphasis omitted). Thus, there is only one essential element the State is required to prove to establish involuntary manslaughter—an unlawful killing. *See Lewis*, 222 N.C. App. at 752, 732 S.E.2d at 593. However, the State may prove this essential element by showing the killing was proximately caused by either: "(1) an unlawful act not amounting to a felony nor naturally dangerous to human life[;] or (2) a culpably negligent act or omission." *Id.* at 751, 732 S.E.2d at 592.

Although Defendant's argument seemingly fails to recognize there are two theories under which the State may prove involuntary manslaughter—an unlawful act or a culpably negligent act or omission—the trial court arrested judgment on Count I of 18 CRS 51387 for failure to store the revolver to protect a minor. Specifically, during sentencing the State noted:

> THE STATE: It has occurred to me one thing to mention, Your Honor.
>
> TRIAL COURT: I'm sorry?
>
> THE STATE: One thing does occur to me. In 18 CRS 51387 Count 1, the improper storage that firearm, that Count 1 is the Taurus .44 Magnum.

> TRIAL COURT: Right.
>
> THE STATE: That is the unlawful act that supports the involuntary manslaughter.
>
> TRIAL COURT: Right.
>
> THE STATE: I'm—I wonder that Count 1 should be arrested because it actually was used for involuntary—
>
> TRIAL COURT: Oh, yes. If that was the weapon, yes.
>
> THE STATE: Yes.

While the State could prove involuntary manslaughter under either of the two theories, the record evidence here indicates Defendant's conviction was based on her conviction of the underlying misdemeanor—failure to store the revolver to protect a minor. The record does not include any reference to the alternate theory as Defendant neglected to argue the involuntary manslaughter charge in her motion to dismiss. Not only this, but because the matter was on for bench trial, there was no discussion as to the inclusion of the alternate theory in a jury instruction or the verdict sheet. Without more, we are unable to determine whether the trial court considered the sufficiency of the State's evidence as to the alternate theory—Defendant's commission of a culpably negligent act. Thus, where we reverse the underlying misdemeanor, Count I of 18 CRS 51387, we must also vacate the involuntary manslaughter conviction which, based on the record, we must presume was based on Defendant's conviction of that misdemeanor.[4]

V. Conclusion

We reverse Defendant's convictions for failure to store a firearm to protect a minor in violation of N.C. Gen. Stat. § 14-315.1 and vacate Defendant's conviction for involuntary manslaughter in violation of N.C. Gen. Stat. § 14-18.

REVERSED AND VACATED.

Judges MURPHY and STADING concur.

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4. Defendant further argues the State failed to offer substantial evidence to prove Defendant's conduct was the proximate cause of Kevin's death. However, because we vacate Defendant's conviction, we need not address this contention.

STATE v. CARPIO

[294 N.C. App. 465 (2024)]

STATE OF NORTH CAROLINA
v.
MARY CARPIO, DEFENDANT

No. COA23-987

Filed 18 June 2024

1. Motor Vehicles—reckless driving charged by citation—subject matter jurisdiction—statutory right to new pleading not timely invoked

In a proceeding that resulted in defendant's conviction by a jury on one count of reckless driving, the superior court had subject matter jurisdiction and thus properly denied defendant's motion to dismiss the charge on the basis of alleged defects in the citation she was issued where defendant did not seek to have the offense charged in a new pleading as provided by N.C.G.S. § 15A-922(c) in the district court—here, the court of original jurisdiction—and, accordingly, was no longer in a position to assert her statutory right to object to trial by citation in the superior court.

2. Motor Vehicles—reckless driving charged by citation—fatal variance with jury instruction—argument not preserved—plain error not shown

In a proceeding arising from a citation for reckless driving, defendant did not preserve for appellate review her argument that there was a fatal variance between the conduct alleged in the citation and the superior court's jury instruction regarding the offense because she failed to move for the offense to be charged in a new pleading pursuant to N.C.G.S. § 15A-922(c) in the district court—the court of original jurisdiction. Further, even assuming that such a variance existed, the superior court did not commit plain error in instructing the jury on the charge of reckless driving because defendant did not demonstrate prejudice where the citation incorporated by reference the citing officer's crash report—which noted defendant's two admissions to intentionally "brake-checking" the driver who subsequently collided with defendant's vehicle from the rear—and the evidence included uncontroverted testimony from the officer regarding defendant's admissions as well as body-cam footage of defendant's statements.

Appeal by defendant from judgment entered 29 November 2022 by Judge Marvin K. Blount in Dare County Superior Court. Heard in the Court of Appeals 28 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeanne Hill Washburn, for the State.

Gilda C. Rodriguez, for defendant-appellant.

FLOOD, Judge.

Defendant Mary Carpio appeals from the superior court's judgment suspending her sentence for reckless driving. On appeal, Defendant argues the superior court: (A) lacked jurisdiction to enter judgment against Defendant, due to a fatally defective citation that did not factually allege the manner in which Defendant's driving was reckless; and (B) erred or plainly erred in instructing the jury on the reckless driving charge, as there was a fatal variance between the citation and the jury charge. After careful consideration, we conclude the superior court had jurisdiction to enter judgment against Defendant and therefore did not err in doing so, and the superior court did not plainly err in its jury instruction on reckless driving.

I. Factual and Procedural Background

On the morning of 2 March 2021, Gretchen Montague stopped her vehicle at the traffic light by the YMCA and Dowdy Park, on NC Highway 158 in Dare County, North Carolina. This location was within a school zone, the speed limit was thirty-five miles per hour, and traffic was heavy. Ms. Montague was driving in the left lane, and next to her at the light, in the right lane, was a flat-bed eighteen-wheeler. While at the light, Ms. Montague noticed that Defendant, who was driving a van immediately behind her and with a passenger in the passenger seat, was making hand gestures. Ms. Montague interpreted these gestures to mean that Defendant wanted her to drive forward, and Ms. Montague pointed at the red traffic light. When the traffic light turned green, Ms. Montague proceeded through the intersection at thirty-five miles per hour.

Ms. Montague's vehicle exited the school zone, at which point she merged into the right lane ahead of the eighteen-wheeler, and Defendant's van merged behind her. Ms. Montague then merged back into the left lane, whereupon she found herself driving next to Defendant's van for approximately 500 yards at approximately sixty miles per hour. As they drove alongside each other, Ms. Montague observed: Defendant appeared upset and was being antagonized by the passenger of the van; Defendant took her shirt off, and appeared to flex her muscles; and Defendant made hand gestures, which Ms. Montague interpreted to

mean Defendant wanted Ms. Montague to pull over. Ms. Montague then sped ahead in the left lane and merged back into the right lane.

At this point, Defendant's van was in the left lane, and Ms. Montague slowed down so Defendant could go past her. Instead, Defendant merged back into the right lane ahead of Ms. Montague and applied her brakes. Ms. Montague did not stop in time to avoid colliding with Defendant's van and rear-ended the van. Ms. Montague later testified that she was traveling between fifty and sixty miles per hour when she collided with the van, and that this collision happened approximately three miles away from the YMCA stoplight. Upon collision, Ms. Montague hit her head and her vehicle sustained damages, which cost $4,843.83 to repair.

Nags Head Police Department Patrol Officer Christian Aguirre eventually arrived at the scene, at which point the two vehicles had pulled over to the grassy shoulder of the road. Officer Aguirre did not observe any tire or skid marks on the road and observed that the traffic was light. Officer Aguirre spoke with Defendant, and she twice admitted to him that she had "intentionally brake-checked" Ms. Montague. Officer Aguirre later testified that, based on his experience in conducting traffic crash investigations: he listed Ms. Montague's vehicle as driving forty-five miles per hour in a fifty mile-per-hour zone at the time of the collision; he did not know whether Defendant's vehicle came to a complete stop; and he could not say how far apart the vehicles were when Defendant applied the brakes to her van. Officer Aguirre further testified that, while the driver who collides from behind is typically responsible, he cited Defendant for reckless driving based on his determination that Defendant operated her vehicle in a careless manner, as Defendant twice stated that she "intentionally brake-checked" Ms. Montague.

Officer Aguirre issued Defendant a citation for Reckless Driving (the "Citation"). The Citation provides that Defendant did "operate a motor vehicle on a street or highway carelessly and heedlessly in willful and wanton disregard of the rights and safety of others" in violation of N.C. Gen. Stat. § 20-140(a) (2023). Further, the Citation: contains Defendant's name and address; identifies Officer Aguirre as the officer issuing the citation; cites Defendant to appear in Dare County District Court at a designated time and date; and references under its "Officer Comments" section, Officer Aguirre's "Crash Report," which includes a narrative of the events leading up to the crash and the resulting citation. The Crash Report states, in pertinent part, that Defendant "slammed on [her] breaks [sic], which forced [Ms. Montague] to swerve to avoid a collision[,]" and that Defendant "admitted two times to [Officer Aguirre] that she did 'break[-]check [sic]' " Ms. Montague.

On 18 November 2021, this matter came on for hearing before the Dare County District Court. The Record contains nothing that suggests, before or during the district court hearing, Defendant objected to the Citation. Following the hearing, Defendant was found guilty, and the district court issued against her a Judgment Suspending Sentence. Defendant gave notice of appeal to the superior court, and prior to the hearing, Defendant made a motion to dismiss the reckless driving charge, alleging the Citation was defective as it failed to include "any specific factual detail." The superior court denied this motion.

On 28 November 2022, this matter came on for a jury trial before the superior court. During evidence, in addition to hearing testimony from Defendant, Ms. Montague, and Officer Aguirre, the jury was presented with portions of Officer Aguirre's bodycam footage, which included footage of Defendant twice admitting to intentionally brake-checking Ms. Montague. Following evidence, during the charge conference, Defendant's counsel objected to a reckless driving jury instruction on the ground that the alleged conduct to be included in the instruction "[w]as not present in the pleadings[,] . . . [which] amounts to an alteration of this charge cited." The superior court overruled this objection.

The superior court thereafter provided its jury instruction, which included, in pertinent part:

> [I]n this case [D]efendant has been charged with reckless driving. For you to find [D]efendant guilty of this offense, the State must prove two things beyond a reasonable doubt. First, that [D]efendant drove a vehicle upon a highway. U.S. 158 in Dare County is a highway. Second, that she drove that vehicle by aggressively passing the vehicle operated by Ms. Montague and abruptly applying the brakes causing a crash from the rear. And that in doing so, she acted carelessly and heedlessly in willful or wanton disregard of rights or safety of others.

On 29 November 2022, the jury returned its verdict, finding Defendant guilty of "reckless driving- carelessly and heedlessly[.]" The superior court thereafter entered its judgment, sentencing Defendant as a prior misdemeanor conviction level III and to a term of sixty days' imprisonment in a misdemeanant confinement program. Defendant timely appealed.

II. Jurisdiction

Appeal to this Court lies of right from the final judgment of a superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

On appeal, Defendant argues the superior court: (A) lacked jurisdiction to enter judgment against Defendant; and (B) erred or plainly erred in instructing the jury on the charge of reckless driving based on a manner of driving not alleged in the Citation. We address each argument, in turn.

A. The Superior Court's Subject Matter Jurisdiction

[1] Defendant argues the superior court did not have jurisdiction to enter judgment against Defendant, as the Citation failed to allege the factual circumstances supporting the charge. Defendant specifically contends the Citation did not contain a description of Defendant's specific actions that allegedly constituted reckless driving, such that the citation was defective. Upon review, we find the superior court had jurisdiction to enter judgment against Defendant.

"A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case." *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008) (citations omitted). "The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal." *State v. Barnett*, 223 N.C. App. 65, 68, 733 S.E.2d 95, 98 (2012) (citation omitted). "Under a *de novo* review, th[is] [C]ourt 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 and internal quotation marks omitted).

N.C. Gen. Stat. § 15A-922 governs the use of citations as criminal pleadings of the State for misdemeanor offenses prosecuted in district court, and regarding a defendant's objection to a trial by citation, the statute provides:

> A defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading. The prosecutor must then file a statement of charges unless it appears that a criminal summons or a warrant for arrest should be secured in order to insure the attendance of the defendant, and in addition serve as the new pleading.

N.C. Gen. Stat. § 15A-922(c) (2023). Following a defendant's appropriate motion, "[t]he statement of charges, summons, or warrant may then be subjected to the scrutiny argued for by [the d]efendant. However, a defendant must file his or her objection to the citation *in the district court division*." *State v. Jones*, 255 N.C. App. 364, 368, 805 S.E.2d 701,

704 (2017) (emphasis added); *see also State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857 (2002) ("[The] defendant's objection to trial by citation must be asserted in the court of original jurisdiction, in this case, the district court." (citation omitted)).

In *State v. Monroe*, upon appeal from sentencing in district court for driving under the influence ("DUI") and driving while license revoked, the defendant argued before the superior court that there was a jurisdictional defect for his DUI charge, as the relevant citation was defective. 57 N.C. App. 597, 598, 292 S.E.2d 21, 21 (1982). The superior court issued a judgment upholding the district court's sentencing of defendant and the defendant appealed to this Court, whereupon we provided, regarding N.C. Gen. Stat. § 15A-922(c):

> Had [the] defendant filed his motion prior to his trial at district court, the statute would indeed have precluded his trial on the citation alone. This statutory right applies only to the court of original jurisdiction, however. The appellate jurisdiction of the superior court is derivative in nature. Once jurisdiction had been established and [the] defendant had been tried in district court, therefore, he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court.

Id. at 598–99, 292 S.E.2d at 22 (citation omitted). Per this articulated standard, we concluded the superior court had jurisdiction to try Defendant's DUI charge, and therefore found no error in the superior court's judgment. *See id.* at 599, 292 S.E.2d at 22.

Here, following appeal from the district court and prior to hearing before the superior court, Defendant moved to dismiss the reckless driving charge, arguing the Citation was defective in that it failed to allege "any specific factual detail." Per North Carolina law, however, for a defendant to properly object to a trial by citation, he must make such objection before the court of original jurisdiction. *See Jones*, 255 N.C. App. at 368, 805 S.E.2d at 704; *see also Phillips*, 149 N.C. App. at 318, 560 S.E.2d at 857; *Monroe*, 57 N.C. App. at 598–99, 292 S.E.2d at 22. Where a defendant fails to do so, he has waived that statutory right on appeal. *See Monroe*, 57 N.C. App. at 598–99, 292 S.E.2d at 22.

The instant case was first heard in the district court—the court of original jurisdiction—and the Record on appeal contains no evidence that Defendant objected to trial by citation before the district court. As such, upon her appeal to the trial court, Defendant—like the defendant

in *Monroe*—was no longer in a position to assert her statutory right to object to trial by citation. *See id.* at 598–99, 292 S.E.2d at 22. The superior court's appellate jurisdiction over Defendant's case was derivative in nature, and as Defendant had been fully tried in district court, regardless of any defect in the Citation, the superior court had jurisdiction to try, and enter judgment against, Defendant. *See id.* at 598–99, 292 S.E.2d at 22. Accordingly, upon our *de novo* review, we find no error in the superior court's entry of judgment against Defendant. *See id.* at 599, 292 S.E.2d at 22; *see also Barnett*, 223 N.C. App. at 68, 733 S.E.2d at 98.

B. Fatal Variance

[2] Defendant next argues the superior court erred or plainly erred by instructing the jury on the reckless driving charge, as there was a fatal variance between the instruction and the Citation. Defendant specifically contends the jury instruction was based on a manner of driving not alleged in the Citation, and that preparation of Defendant's defense was therefore prejudiced. We disagree.

As an initial matter, we must address whether this issue is preserved for our appellate review. Under Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure,

> [i]n 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.

N.C. R. App. P. 10(a)(1). Defendant's counsel, here, objected to the superior court's jury instruction on the reckless driving charge before the superior court, where he provided the alleged conduct to be included in the instruction "[w]as not present in the pleadings and that it amount[ed] to an alteration of this charge cited." While this would seemingly constitute a timely objection to the superior court's jury instruction per Rule 10(a)(1), this Court has provided that, where a defendant does not timely move to dismiss a charge in question, he fails to preserve for appeal any argument that there was a fatal variance between the jury instruction on that charge and the relevant criminal pleading. *See State v. Gettleman*, 275 N.C. App. 260, 271, 853 S.E.2d 447, 454 (2020) (determining that the defendant failed to preserve an argument that the jury instructions and indictment created a fatal variance because the defendant failed to move to dismiss the charge in question). As discussed above, Defendant failed to timely move to dismiss the Citation, and as such, has failed to preserve for our review any argument as to the superior court's jury instruction on reckless driving. *See id.* at 278, 862 S.E.2d at 458.

Where a criminal defendant has failed to preserve an argument for our appellate review, we may review his argument for plain error, but only if the defendant "specifically and distinctly" contends the alleged error amounted to plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). Under a plain error review, the defendant must demonstrate that the alleged error was prejudicial to his case. *See id.* at 518, 723 S.E.2d at 334. An error is prejudicial where "the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002); *see also State v. Collington*, 375 N.C. 401, 405, 847 S.E.2d 691, 695 (2020).

Here, Defendant provides in her appellate brief that "[s]hould this Court find that this issue was not preserved for appellate review, [Defendant] requests review of the [superior] court's instruction on reckless driving, as she specifically and distinctly contends the [superior] court committed plain error." As such, we review Defendant's fatal variance argument for plain error. *See Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

Under North Carolina law,

> [w]hen allegations asserted in a[criminal pleading] fail to conform to the equivalent material aspects of the jury charge, our Supreme Court has held that a fatal variance is created, and the [criminal pleading] is insufficient to support that resulting conviction. Furthermore, for a variance to warrant reversal, the variance must be material, meaning it must involve an essential element of the crime charged. The determination of whether a fatal variance exists turns on two policy concerns, namely, (1) insuring that the defendant is able to prepare his defense against the crime with which he is charged and (2) protecting the defendant from other prosecution for the same incident. However, a variance does not require reversal unless the defendant is prejudiced as a result.

State v. Cheeks, 267 N.C. App. 579, 612–13 833 S.E.2d 660, 682 (2019) (citation and internal quotation marks omitted). As to the elements of reckless driving, a person commits this criminal offense when he "drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others[.]" N.C. Gen. Stat. § 20-140(a) (2023); *see also State v. Haizlip*, 248 N.C. App. 303, 790 S.E.2d 754, 2016 WL 3584550, at *6 (2016) (unpublished) (concluding there was sufficient evidence of the defendant's

reckless driving where the State presented evidence the defendant, *inter alia*, "accelerated through a yield sign forcing another driver to apply his brakes to avoid colliding with" the defendant).

Here, Defendant argues the variance between the Citation and the jury instruction prejudiced preparation of her defense for the reckless driving charge, as, if she had known that "abruptly applying the brakes" was the conduct for which she would be charged with this offense, "she may have opted not to testify or have better explained the circumstances that led to utilize her brake." This argument is disingenuous, as per the Record on appeal, referenced under the "Officer Comments" section of the Citation is Officer Aguirre's "Crash Report," which provides that Defendant "slammed on [her] brakes, which forced [Ms. Montague] to swerve to avoid a collision[,]" and "admitted two times to [Officer Aguirre] that she did 'brake check' " Ms. Montague. This is certainly conduct that could amount to driving a vehicle "carelessly and heedlessly in willful or wanton disregard of the rights or safety of others[,]" and its inclusion in a criminal pleading would apprise a defendant of the conduct upon which a reckless driving charge is based. N.C. Gen. Stat. § 20-140(a); *see also Haizlip*, at *6.

While Officer Aguirre's allegations of Defendant's conduct were not contained in the body of the Citation, North Carolina courts recognize the "long-standing principle of substance over form when analyzing the sufficiency of an indictment[,]" and the "form" of a misdemeanor citation is subject to an even less scrutinous standard than that of an indictment. *State v. Newborn*, 384 N.C. 656, 657, 887 S.E.2d 868, 870 (2023) ("Because the indictment here alleged facts to support the essential elements of the crimes with which [the] defendant was charged such that [the] defendant had sufficient notice to prepare his defense, the indictment is valid."); *see also State v. Jones*, 371 N.C. 548, 557, 819 S.E.2d 340, 346 (2018) (providing that, in issuing a misdemeanor citation, "[a]n officer on his or her beat cannot reasonably be expected to utilize the same measured standards of thoroughness and exactness . . . that a grand jury applies in its quietude in composing an indictment or a prosecutor employs in drafting an information").

Accordingly, as the Citation incorporates by reference Officer Aguirre's Crash Report, which in turn contains allegations of Defendant slamming her brakes in front Ms. Montague's vehicle and twice admitting to this conduct, we cannot say that Defendant was uninformed of the factual allegations upon which the reckless driving charge was premised, nor that her preparation of her defense was prejudiced. *See Cheeks*, 267 N.C. App. at 612–13, 833 S.E.2d at 682; *see also* N.C. Gen. Stat. § 20-140(a); *Haizlip*, at *6.

We note that, in her reply brief, Defendant contends the Crash Report was not provided to Defendant with the Citation, and that her counsel was unable to obtain a copy of it from the clerk's office or the State. Based on this contention, Defendant argues that her defense preparation was prejudiced. As this Court has held, however, "a reply brief is not an avenue to correct the deficiencies contained in the original brief[,]" and any argument not contained in the original brief will be treated as abandoned. *State v. Dinan*, 233 N.C. App. 694, 698–99, 757 S.E.2d 481, 485 (2014) (citations omitted); *see also* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). As such, this argument is treated as abandoned and will not be considered by this Court.

Since, as discussed above, the Citation incorporated by reference the Crash Report and the alleged conduct contained therein, and Defendant therefore was able to prepare her defense, assuming there was a variance between the Citation and the superior court's jury charge, Defendant suffered no prejudice as a result of the variance. *See Cheeks*, 267 N.C. App. at 612–13, 833 S.E.2d at 682. Further, assuming again there was a variance and the superior court's jury instruction on reckless driving was therefore improper, the jury heard Officer Aguirre's uncontroverted testimony that Defendant twice admitted to intentionally brake-checking Ms. Montague, and saw body-cam footage of Defendant making these admissions. *See* N.C. Gen. Stat. § 20-140(a); *see also Haizlip*, at *6. In consideration of this properly-admitted evidence, together with the Citation's reference to the Crash Report, we conclude any error here was not "so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). The superior court committed no plain error.

IV. Conclusion

We conclude that, as Defendant failed to bring timely objection in, and had been fully tried by, the district court, the superior court had jurisdiction to enter judgment against Defendant and therefore did not err in doing so. Further, assuming there was variance between the misdemeanor citation and the jury charge, Defendant has failed to demonstrate any prejudice as a result of this variance, and the superior court therefore committed no plain error in its jury instruction.

NO ERROR in part, and NO PLAIN ERROR in part.

Judges GRIFFIN and THOMPSON concur.

STATE v. NORRIS

[294 N.C. App. 475 (2024)]

STATE OF NORTH CAROLINA
v.
TERRY WAYNE NORRIS, JR.

No. COA23-889

Filed 18 June 2024

Firearms and Other Weapons—possession of a firearm by a felon—constructive possession—nonexclusive control of premises—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of possession of a firearm by a felon because the State failed to present substantial evidence linking defendant (a male) to a firearm that law enforcement officers found in a closed bedroom dresser drawer in the home rented by defendant's girlfriend. The totality of the circumstances did not support a theory of constructive possession by defendant—even though he was seen entering the home just before the officers' search, the mailbox outside listed defendant's last name, and some men's clothes were in the bedroom closet—where the decor and possessions indicated that the bedroom was occupied by a female, the dresser drawer contained only the girlfriend's personal items, and the girlfriend asserted that the gun was hers and that defendant's last name on the mailbox was a result of his daughter (who had the same surname) having previously lived with her.

Appeal by defendant from judgment entered 1 August 2022 by Judge Jacqueline D. Grant in Rutherford County Superior Court. Heard in the Court of Appeals 29 May 2024.

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

MK Mann Law, by Mikayla Mann, for the defendant-appellant.

TYSON, Judge.

Terry Wayne Norris, Jr., ("Defendant") appeals from judgment entered upon a jury's conviction of possession of a firearm by a felon. We reverse the trial court's denial of Defendant's motion to dismiss and remand to the trial court to enter an order of dismissal.

I. Background

Law enforcement officers approached a residence located at 124 Hamilton Street in Forest City ("Hamilton Street") on 11 July 2020 to execute an arrest warrant on Defendant for another charge, which is not the subject of this appeal and was subsequently dismissed. Ms. Ledford, Defendant's girlfriend, and her two children reside at Hamilton Street. Whether Defendant also resides at Hamilton Street and has constructive possession of the contents therein is at issue.

Hamilton Street was understood by the officers to be the primary location where Defendant might be found. The mailbox contained the word "Norris," Defendant's last name. When the officers approached Hamilton Street, they observed Defendant enter the home. After a brief but unspecified amount of time, Defendant returned to the porch, where he was arrested. The officers requested and obtained consent from Ms. Ledford to search the home without a warrant.

During the search, the officers found a handgun purportedly owned by Ms. Ledford. The handgun was found inside a dresser drawer containing Ms. Ledford's personal items, such as lotion, hairspray, and other feminine products. The drawer was located in a bedroom dresser.

The State argues Ms. Ledford and Defendant are co-occupants of the bedroom, while Ms. Ledford and Defendant argue the bedroom was solely occupied by Ms. Ledford and her children. The bedroom possessed pink décor, pocketbooks, and other general items and clutter that suggested the occupant was female. Officers found a mix of male and female clothing in the closet. Officers additionally found a non-descript piece of paper purportedly with Defendant's name in a tote bag located inside the bedroom closet. The paper does not appear in the record. Neither officer provided additional specificity on the nature of the paper that purportedly listed Defendant's name when questioned.

Defendant, a convicted felon, was charged with possession of a firearm by a felon. At the close of the State's evidence, Defendant moved to dismiss the charge for insufficiency of the evidence. The trial court denied the motion. Defendant presented evidence and renewed his motion to dismiss at the close of all the evidence, which was again denied.

Evidence at trial focused on constructive rather than actual possession, as Defendant was never seen in physical possession of the handgun. The trial court, after review by Defendant and with no objections, provided jury instructions including theories for both actual and constructive possession. The jury found Defendant guilty of possession of a

firearm by a felon, and the trial judge sentenced him to an active term of 75 to 102 months imprisonment.

II. Jurisdiction

This Court possesses jurisdiction to review a final judgment entered in a criminal case pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court erred by denying his motions to dismiss. He asserts the State proffered insufficient evidence to establish his constructive possession of the firearm. Defendant additionally argues the trial court committed plain error by providing jury instructions including actual possession and constructive possession.

IV. Sufficiency of the Evidence

A. Standard of Review

A trial court's denial of a motion to dismiss is reviewed *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citation omitted). "Under a *de novo* review, th[is] [C]ourt considers the matter anew and freely substitutes its own [judgment] for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

B. Analysis

A trial court properly denies a motion to dismiss "if there is substantial evidence (1) of each element of the offence charged . . . and (2) of [the] defendant[ ] being the perpetrator of such offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Gallion*, 282 N.C. App. 305, 334-35, 870 S.E.2d 681, 702 (2022) (citation omitted).

When determining whether substantial evidence exists, the court examines all evidence in the light most favorable to the State, allowing the State every reasonable inference thereon. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (citation omitted). "Only defendant's evidence which does not contradict and is not inconsistent with the [S]tate's evidence may be considered favorable to [the] defendant if it explains or clarifies the [S]tate's evidence or rebuts inferences favorable to the [S]tate." *State v. Sharpe*, 289 N.C. App. 84, 87, 887 S.E.2d 116, 119 (2023) (quoting *State v. Sumpter*, 318 N.C. 102, 107-08, 347 S.E.2d 396, 399 (1986)). "Evidence is not substantial if it arouses only a suspicion about the facts . . . , even if the suspicion is strong." *Sumpter*, 318 N.C. at

108, 347 S.E.2d at 399 (citation omitted). *See also State v. Blizzard*, 280 N.C. 11, 16, 184 S.E.2d 851, 854 (1971) (explaining evidence only raising a suspicion of guilt is insufficient).

1. Possession of a Firearm by a Felon.

Defendant was charged with possession of a firearm by a felon. "There are two elements to possession of a firearm by a felon: (1) [the] defendant was previously convicted of a felony and (2) thereafter possessed a firearm." *State v. McCoy*, 234 N.C. App. 268, 272, 759 S.E.2d 330, 334 (2014); N.C. Gen. Stat. § 14-415.1(a) (2023). Defendant does not contest his status as a felon, and the State's theory of his possession rests solely upon constructive possession.

Constructive possession is established when an item is not under the defendant's physical custody, but he has knowledge of the item alongside the power and intent to control the item. *State v. Taylor*, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010). A court's determination of constructive possession rests on the totality of the circumstances. *State v. Glasco*, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262 (2003).

If an item was found in a location where the Defendant had exclusive control, an inference of knowledge, power, and intent to control exists and "may be sufficient" to support denial of a motion to dismiss. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession." *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764 (citing *State v. Young*, 190 N.C. App. 458, 461, 660 S.E.2d 574, 577 (2008)).

A determination of whether other sufficient incriminating circumstances exist is fact intensive, but the evidence must exceed speculation and provide circumstances linking the contraband specifically to the Defendant. *See State v. McLaurin*, 320 N.C. 143, 147, 357 S.E.2d 636, 638-39 (1987) (holding the State failed to link drug paraphernalia to defendant in a home where she exercised nonexclusive control).

2. State v. Rich

The circumstances specifically linking the contraband to Defendant must only be substantial, rather than explicit. *See State v. Rich*, 87 N.C. App. 380, 382-83, 361 S.E.2d 321, 323 (1987). For example, in *Rich*, a defendant, who had previously been seen occupying a home, was found cooking dinner in the home when agents arrived. *Id.* at 382, 361 S.E.2d at 323. Mail addressed to the defendant was found, which included an insurance policy, listing the home as her residence. *Id.* Women's casual

clothes and undergarments were found both in the bedroom and the dresser where the cocaine was found. *Id.* Additional letters were found in the bedroom addressed to the defendant. *Id.*

This Court concluded the defendant had non-exclusive control over the home and there was "sufficient [evidence] to allow the jury to infer th[e] defendant was in constructive possession of the cocaine." *Id.* at 382-83, 361 S.E.2d at 323. This Court rested its conclusion about the presence of other sufficient circumstances on the cumulative evidence presented: the defendant's presence in the same home as the cocaine; the cocaine being found among a women's personal affects; and, letters addressed to the defendant being found in the same room. *Id.*

3. State v. McLaurin

Slight changes in the facts lead to different results. In *State v. McLaurin*, a female defendant was not home but the State provided ample evidence showing her level of nonexclusive control over a property. 320 N.C. at 146, 357 S.E.2d at 638. When searching the home, officers found several pieces of drug paraphernalia throughout the home, including a plastic baggy with traces of cocaine on a bar between the living room and dining room and further evidence inside a men's jacket and underneath the home. *Id.* Further evidence was found in a child's bedroom within a drawer full of children's clothing. *Id.* Our Supreme Court concluded insufficient evidence linked the contraband specifically to the defendant to sustain a conclusion of constructive possession. *Id.* at 147, 357 S.E.2d at 638-39.

The court reasoned the presence of the paraphernalia in adult male and children clothing indicated the defendant held nonexclusive control, and the State had presented no further evidence to establish the defendant as having specific control over the items. *Id.* at 146, 357 S.E.2d at 638.

As noted above, when an item is found in an area where a defendant has nonexclusive control, the State must show other substantial incriminating circumstances linking the item to the defendant, to the extent a reasonable mind might accept the defendant possessed the item. *Compare Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323 *with McLarin*, 320 N.C. at 146-47, 357 S.E.2d at 638-39. For example, a link must exist between the item itself or the location where the item was found, such as a bedroom or wardrobe, to the defendant. *Id.*

Here, presuming *arguendo* Defendant shared nonexclusive control over the premises, the State failed to present such other incriminating circumstances to substantially link Defendant with the gun, to the bedroom, or to the dresser drawer where the gun was found along with

the other items therein. The State's argument rests upon four pieces of information: (1) Defendant was found at the home at the same time as the gun; (2) the mailbox listed Defendant's last name; (3) a non-descript and unspecified piece of paper was found inside a tote bag inside the bedroom with Defendant's name somewhere on it; and, (4) there were both male and female clothes in the closet where the paper was found. These facts must be considered in totality with all others and not in isolation. *See Sharpe*, 289 N.C. App. at 87, 887 S.E.2d at 119.

The bedroom where the gun was found was decorated and contained numerous items that heavily suggested a female occupant, and the gun was found inside a closed drawer containing only feminine products. Ms. Ledford claimed the handgun belonged to her. When the officers requested of Ms. Ledford to search the home without a warrant, she, not Defendant, gave them her permission. She also testified the home was rented to her.

Unlike in *Rich*, the contraband was not found in a closed drawer with items that coincide with Defendant's sex. *Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323. The drawer the gun was found in contained solely female items. The décor and items in the bedroom itself alongside the contents of the closed drawer all heavily refute any inference Defendant was more than an occasional occupant of the bedroom. While the agents in *Rich* found letters addressed to the defendant, including an insurance policy listing defendant as the resident, the only comparable evidence is a non-descript and unspecified piece of paper that had Defendant's name somewhere on it, and that paper is not in the record. *Id.* Without further specificity of the significance attached to such paper, it is purely speculation rather than an inference that the contents of the closed drawer belong to or were under the control of Defendant.

Similar to the paper, Ms. Ledford testified Defendant's last name was listed on the mailbox because his deceased daughter, whose last name was also "Norris," lived with Ms. Ledford for many years. Ms. Ledford testified she was "real good friends growing up [and] all through school" with the biological mother of Defendant's daughter. Defendant's daughter lived with Ms. Ledford before Ms. Ledford began seeing Defendant. Ms. Ledford testified Defendant's daughter had asked for her last name to be listed on the mailbox. The totality of the evidence does not support a conclusion of constructive possession of the gun by Defendant. *See Sumpter*, 318 N.C. at 108, 347 S.E.2d at 399.

Defendant's presence outside of the home at the time of the permissive search does not establish a substantial link between Defendant and the weapon or the bedroom drawer where the weapon was found. *See*

State v. James, 81 N.C. App. 91, 96, 344 S.E.2d 77, 81 (1986) (holding mere presence in the same room where drugs were found was insufficient to support an inference of constructive possession).

The State proffers another theory asserting Defendant had "stashed" the gun in the closed dresser drawer with Ms. Ledford's personal items during the short period he was not being observed by the officers. However, the State offers no evidence tending to show Defendant's actions beyond his entering the home. Any conclusions concerning Defendant's purported actions cannot be inferred from his simple entry into and exit onto the porch of the home. The State's theory regarding Defendant's purported actions during that period constitutes speculation rather than inference and does not support a conclusion of substantial evidence. *See Sumpter*, 318 N.C. at 108, 347 S.E.2d at 399. Nothing regarding ownership, registration, fingerprints, DNA, nor any other evidence ties Defendant to the gun, which Ms. Ledford asserted belonged to her, was located inside a closed drawer, was found with her other property, and was found in a closed drawer in her bedroom located inside the home she rents.

The State has failed to provide sufficient evidence of a link between constructive possession or ownership of the gun, how or where the gun was discovered, or what possessions the gun was discovered with, to allow a reasonable mind to accept as adequate to support a conclusion of Defendant's constructive possession. As the State has failed to carry its burden of production sufficient to survive preserved motions to dismiss, it is unnecessary to examine whether the trial court committed plain error by introducing jury instructions including actual possession alongside with constructive possession.

V. Conclusion

Considering all evidence in the light most favorable to the State, including any reasonable inferences thereon, and only considering Defendant's evidence which does not contradict and is not inconsistent with the State's evidence beyond refuting favorable inferences, the State has failed to carry their required burden to survive a motion to dismiss. The trial court erred by denying Defendant's motion to dismiss for insufficiency of the evidence. We reverse the trial court's denial of Defendant's motion to dismiss and remand for entry of an order of dismissal. *It is so ordered.*

REVERSED AND REMANDED.

Judges MURPHY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY JOHN RAGER

No. COA23-848

Filed 18 June 2024

1. Jurisdiction—superior court—acquittal in district court—lack of jurisdiction for trial de novo on same charge

The superior court lacked jurisdiction to conduct a trial de novo on defendant's charge of being intoxicated and disruptive in public because defendant was acquitted of that charge in district court; therefore, defendant's conviction on that charge was vacated.

2. Criminal Law—waiver of jury trial—statutory inquiry—failure to conduct—new trial granted

Defendant was granted a new trial on a misdemeanor charge of making harassing phone calls because the superior court failed to conduct an inquiry, pursuant to N.C.G.S. § 15A-1201, to determine whether defendant knowingly and voluntarily waived his right to a jury trial. Although the State represented to the trial court that defendant had previously waived his right, there was nothing in the record to indicate that defendant—who appeared pro se in district court for a bench trial—knew or had reason to know that he was entitled to a jury trial in superior court. Further, where the evidence of guilt was not overwhelming, there was a reasonable possibility that a jury would have reached a different result.

3. Appeal and Error—preservation of issues—failure to object to sufficiency of evidence—appeal dismissed

Where defendant did not move to dismiss a misdemeanor charge of making harassing phone calls for lack of sufficient evidence, he failed to preserve for appellate review a sufficiency challenge, and the appellate court declined to invoke Appellate Rule 2 to consider the issue.

Appeal by Defendant from judgment entered 17 February 2023 by Judge Marvin P. Pope, Jr., in Haywood County Superior Court. Heard in the Court of Appeals 20 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ameshia Cooper Chester, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for Defendant-Appellant.

COLLINS, Judge.

Defendant Timothy Rager appeals from judgment entered after a bench trial finding him guilty of making harassing phone calls and being intoxicated and disruptive in public. Defendant argues that the superior court lacked jurisdiction to try him for being intoxicated and disruptive in public, that he did not knowingly and voluntarily waive his right to a jury trial, and that there was insufficient evidence to convict him of making harassing phone calls.

Because the district court acquitted Defendant of being intoxicated and disruptive in public, the superior court lacked jurisdiction to try Defendant for that charge; we vacate Defendant's conviction for being intoxicated and disruptive in public. Furthermore, because the superior court failed to conduct any inquiry to determine whether Defendant knowingly and voluntarily waived his right to a jury trial and Defendant has met his burden of establishing prejudice, Defendant is entitled to a new trial for making harassing phone calls. However, Defendant failed to preserve a challenge to the sufficiency of the evidence of making harassing phone calls, and we therefore dismiss that portion of his appeal.

I. Background

Defendant called the Waynesville Police Department forty-two times in the late evening of 9 April 2022 and nine times in the early morning of 10 April 2022 seeking information about an ongoing investigation concerning an alleged assault of which he was a victim. Dispatchers informed Defendant that the detective investigating the case was not on duty and that he needed to call during business hours. Defendant "used profanity" towards the dispatchers and "requested to speak to the person in charge."

Sergeant Ryan Craig spoke with Defendant and explained that he had no information about the case and that Defendant needed to contact the investigating detective during business hours. During the call, Defendant "sounded [like] he was impaired or intoxicated . . . ." Defendant told Craig "that he was going to walk up to the Waynesville Police Department to talk further[,]" and Craig told Defendant "that [it] was probably not a good idea based on his demeanor, his attitude, [and] the way that he continuously was using profanity[.]"

Approximately thirty minutes later, Craig saw Defendant standing in the parking lot adjacent to the Waynesville Police Department. As Craig approached Defendant, he detected a strong odor of alcohol and observed that Defendant was "visibly unsteady on his feet." Defendant had slurred speech and used profanity towards Craig. Craig explained to Defendant that "if he did not stop and calm down that he would end up going to jail, upon which time [Defendant] again used profanity[.]"

Defendant was arrested for making harassing phone calls and being intoxicated and disruptive in public. Defendant appeared pro se in district court and was found guilty of making harassing phone calls and not guilty of being intoxicated and disruptive in public. The district court entered judgment upon Defendant's conviction for making harassing phone calls, and Defendant appealed to superior court.

Defendant appeared pro se in superior court. Defendant was tried in a bench trial for making harassing phone calls and for being intoxicated and disruptive in public and was found guilty of both charges. The superior court sentenced Defendant to 45 days of imprisonment, suspended for twelve months of supervised probation. Defendant appealed to this Court.

II. Discussion

A. Appellate Jurisdiction

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

"Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2023). An appeal in a criminal case may be taken by either "giving oral notice of appeal at trial" or by "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order[.]" N.C. R. App. P. 4(a). "Written notice of appeal must specify the party or parties taking the appeal, designate the judgment or orders from which appeal is taken and the court to which appeal is taken, and be signed by counsel of record or a *pro se* defendant." *State v. Rowe*, 231 N.C. App. 462, 465, 752 S.E.2d 223, 225 (2013) (citing N.C. R. App. P. 4(b)). When a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005).

Defendant's pro se written notice of appeal did not designate the judgment from which he was appealing or the court to which he was

appealing and did not indicate service upon the State. Acknowledging these defects, Defendant filed a petition for writ of certiorari. This Court may issue a writ of certiorari "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). In our discretion, we grant Defendant's petition for writ of certiorari and reach the merits of his appeal.

B. Superior Court Jurisdiction

[1] Defendant argues, and the State concedes, that the superior court lacked jurisdiction to try him for being intoxicated and disruptive in public because the district court acquitted him of the charge.

"We review issues relating to subject matter jurisdiction de novo." *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (citation omitted).

"Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo." N.C. Gen. Stat. § 7A-290 (2023). The jurisdiction of the superior court is derivative and arises only upon an appeal from a conviction in district court. *State v. Petty*, 212 N.C. App. 368, 372, 711 S.E.2d 509, 512 (2011).

Here, there was significant confusion as to what Defendant had been found guilty of in district court and which charges were before the superior court for a trial de novo. The following exchange took place between the superior court, the State, and Defendant prior to trial:

> THE COURT: You know the statute number right off the bat? 14-232 or something like that, I remember. I just thought it would save time if you had it.
>
> [THE STATE]: 14-196(a)(3) and 14-444.
>
> THE COURT: Okay. There are actually two charges. One is harassing phone call, and the other one is appearing intoxicated in a public place and that you were disruptive.
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: Okay?
>
> Now, was he found guilty of both of those? Is the State appealing both of those or just harassing phone call?
>
> [THE STATE]: Both of them.
>
> THE COURT: It's a trial de novo. Trial de novo means it's a new trial to everything.

> [DEFENDANT]: That's fine.
>
> THE COURT: So you understand -- well, let me make sure I'm telling you right from what they said.
>
> Okay. You were found not guilty of intoxicated and disruptive in district court.
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: And you were found guilty of harassing phone call on September 14, 2022, before Judge Forga.
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: Okay. So you appealed, and it's a trial de novo, so you're facing charges for both things now; okay?
>
> [DEFENDANT]: Understood.

Contrary to the State's assertion, Defendant was not found guilty of both charges in district court; he was only found guilty of making harassing phone calls. Furthermore, the superior court incorrectly explained to Defendant that he was facing a trial de novo for both charges. Because Defendant was found not guilty in district court of being intoxicated and disruptive in public, he was only facing a trial de novo in superior court for making harassing phone calls. As such, the superior court lacked jurisdiction to try Defendant for being intoxicated and disruptive in public, and we vacate Defendant's conviction for this charge.

C. Jury Trial Waiver

[2] Defendant next argues that the superior court erred by conducting a bench trial without complying with N.C. Gen. Stat. § 15A-1201 to ensure Defendant's knowing and voluntary waiver of his constitutional right to a jury trial. Defendant specifically argues that the superior court failed "to address [him] personally or determine whether [he] fully understood and appreciated the consequences of his decision to waive the right to trial by jury."

Our Supreme Court has determined that the superior court's failure to conduct an inquiry pursuant to the procedures set forth in N.C. Gen. Stat. § 15A-1201(d) is merely a statutory violation, as opposed to structural error or a constitutional violation. *See State v. Hamer*, 377 N.C. 502, 507, 858 S.E.2d 777, 781 (2021). Thus, to succeed on a claim that the superior court failed to comply with N.C. Gen. Stat. § 15A 1201, a defendant must show both that the superior court violated the statute and that such violation prejudiced him. *See State v. Swink*, 252 N.C. App.

218, 221, 797 S.E.2d 330, 332 (2017). We review de novo whether the superior court violated the statute. *State v. Mumma*, 257 N.C. App. 829, 836, 811 S.E.2d 215, 220 (2018). To establish prejudice, a defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2023).

Article I, Section 24 of the North Carolina Constitution protects a defendant's right to a jury trial and provides that a defendant may waive that right in limited circumstances:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly.

N.C. Const. art. I, § 24. The right to a jury trial and the exception for a defendant to waive that right is codified by N.C. Gen. Stat. § 15A-1201(a)-(b). The procedures for waiver of a jury trial are codified by N.C. Gen. Stat. § 15A-1201(c)-(f). To waive a jury trial, a defendant must give notice of intent to waive a jury trial by any of the three methods enumerated in N.C. Gen. Stat. § 15A-1201(c).

Upon a defendant's notice of waiver, "the State shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury." N.C. Gen. Stat. § 15A-1201(d) (2023). The judge who will preside over the trial must make the "decision to grant or deny the defendant's request for a bench trial[.]" *Id.* "Before consenting to a defendant's waiver of the right to a trial by jury, the trial judge shall do all of the following:"

> (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

Id. "Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy that should occur between a

superior court judge and a defendant seeking to exercise his right to waive a jury trial." *State v. Rutledge*, 267 N.C. App. 91, 97, 832 S.E.2d 745, 748 (2019).

In *Swink*, the superior court's colloquy with defendant was sufficient to comply with N.C. Gen. Stat. § 15A-1201(d). 252 N.C. App. at 224, 797 S.E.2d at 334. There, the court conducted a hearing on defendant's request to waive his right to a jury trial eight weeks before trial. *Id.* at 219, 797 S.E.2d at 331. The court engaged in the following colloquy with defendant at that hearing:

> THE COURT: Sir, are you able to hear and understand me?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: And are you under the influence of any alcoholic beverages, drugs, narcotics or pills at this time?
>
> [DEFENDANT]: No, sir.
>
> THE COURT: And how old are you?
>
> [DEFENDANT]: 40.
>
> THE COURT: And at what grade level can you read and write?
>
> [DEFENDANT]: Probably 11th grade right now, 11th.
>
> THE COURT: Do you suffer from any mental handicap or physical handicap that would prevent you from understanding what's going on in this courtroom?
>
> [DEFENDANT]: No, sir.
>
> THE COURT: And you are represented by counsel.
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: And you had the opportunity to discuss this waiver with him?
>
> [DEFENDANT]: Yes, Sir.
>
> THE COURT: And he has discussed with you the pros and cons of waiving these Constitutional rights to a jury trial?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: And having balanced those pros and cons, you have made the decision -- and it is your decision, you understand that?

> [DEFENDANT]: Yes, sir.
>
> THE COURT: Not anybody else's.
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: That you prefer to have a judge decide your case as opposed to a jury of 12 individuals?
>
> [DEFENDANT]: Yes, sir.

Id. at 219-20, 797 S.E.2d at 331-32. The court concluded that defendant "knowingly and with advice from counsel . . . made his individual decision to waive his right to a jury trial and will be allowed to go forward with a bench trial." *Id.* at 224, 797 S.E.2d at 334. Defendant signed a written waiver form that same day. *Id.*

At the start of trial eight weeks later, the superior court asked whether defendant still desired to waive his right to a jury trial, and defense counsel affirmatively responded that it was. *Id.* at 224, 797 S.E.2d at 334-35. Defendant and defense counsel then signed a certification form. *Id.* at 224, 797 S.E.2d at 335. Although defendant argued on appeal that the superior court "failed to adequately determine whether defendant made a knowing and voluntary waiver of his right to a jury trial[,]" *id.* at 219, 797 S.E.2d at 331, this Court held that "the record reflect[ed] that [defendant's] waiver was knowing and voluntary." *Id.* at 225, 797 S.E.2d at 335.

Similarly, the superior court's colloquy with defendant in *Rutledge* was sufficient to comply with N.C. Gen. Stat. § 15A-1201(d). 267 N.C. App. at 98, 832 S.E.2d at 749. There, at the beginning of his trial, defendant requested to waive his right to a jury trial. *Id.* at 93, 832 S.E.2d at 746. Defense counsel confirmed to the court that he had "engag[ed] in prior discussions with the prosecutor about the waiver, and asserted the State had no objections." *Id.* The court then conducted the following colloquy with defendant:

> THE COURT: . . . . I'm advised that, by [defense counsel], that it is your desire to waive a jury trial in this matter and have a bench trial; is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you do understand, sir, that you have the right to have 12 jurors, jurors of your peers, selected, that you have the right to participate in their selection pursuant to the rules set forth in our law and that any verdict

> by the jury would have to be a unanimous verdict, unanimous of the 12? Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: You have the right to waive that and instead have a bench trial, which would mean that the judge alone would decide guilt or innocence and the judge alone would determine any aggravating factors that may be present were you to waive your right to a jury trial. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Have you talked with [defense counsel] about your rights in this regard and the ramifications of waiving a jury trial?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Do you have any questions about the jury trial or your rights therein?
>
> DEFENDANT: No, sir.
>
> THE COURT: All right. And, sir, is it your decision then that you wish, and your request, that the jury trial be waived and that you be afforded a bench trial?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. Thank you, sir.

Id. at 93-94, 832 S.E.2d at 746. Although defendant argued on appeal that the superior court failed to "solicit much of the information normally required in order to determine if a waiver is [made] knowing[ly] and voluntar[ily][,]" *id.* at 97, 832 S.E.2d at 748, this Court held that the superior court's colloquy with defendant established that he fully understood and appreciated the consequences of his decision to waive his right to a jury trial. *Id.* at 98, 832 S.E.2d at 749.

In *Hamer*, on the other hand, the superior court's colloquy with defendant failed to comply with N.C. Gen. Stat. § 15A-1201(d) because it was untimely. 377 N.C. at 509, 858 S.E.2d at 782. There, prior to trial, the court discussed waiver with defense counsel in the presence of defendant but did not personally address defendant. *Id.* After the State rested its case, the court revisited the requirements of N.C. Gen. Stat. § 15A-1201(d) and personally addressed defendant in the following exchange:

> THE COURT: . . . I was just reading 20-1250—I'm sorry—15A-1201, we complied completely with that statute with the exception of the fact that I'm supposed to personally address the defendant and ask if he waives a jury trial and understands the consequences of that. Would you just explain that to your client.
>
> (Pause in proceedings while [defense counsel] consulted with the defendant.)
>
> [DEFENSE COUNSEL]: Okay, Your Honor.
>
> THE COURT: Okay. . . .
>
> . . . .
>
> [Defendant], I just have to comply with the law and ask you a couple of questions. That statute allows you to waive a jury trial. That's 15A-1201. Your [defense counsel] has waived it on your behalf. The State has consented to that. Do you consent to that also?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you understand that the State has dismissed the careless and reckless driving. The only allegation against you is the speeding, and that is a Class III misdemeanor. It does carry a possible fine. And under certain circumstances it does carry [a] possibility of a 20 day jail sentence. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. Is that acceptable to you?
>
> DEFENDANT: Yes, sir. I feel confident it was.

Id. at 504-05, 858 S.E.2d at 779-80.

Our Supreme Court noted that "[a]lthough the [superior] court's colloquy was untimely, [N.C. Gen. Stat.] § 15A-1201(d)(1) simply requires the [superior] court to 'determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.' " *Id.* at 509, 858 S.E.2d at 782 (quoting N.C. Gen. Stat. § 15A-1201(d)(1)). The Court determined that "the pretrial exchange between the [superior] court, defense counsel, and the State, coupled with defendant's subsequent clear and unequivocal answers to questions posed by the [superior] court demonstrated that

he understood he was waiving his right to a trial by jury and the consequences of that decision." *Id.* at 509, 858 S.E.2d at 782-83. Ultimately, the Court concluded that there was "no evidence in the record to demonstrate that defendant was not aware of his right to a jury trial or his right to waive the same." *Id.* at 509, 858 S.E.2d at 783. The Court additionally concluded that, because there was overwhelming evidence of defendant's guilt presented at trial, there was no reasonable possibility that, had the error in question not been committed, a different result would have been reached in a jury trial. *Id.* at 510, 858 S.E.2d at 783.

Here, the proceedings began with the following exchange between the State and the superior court:

> [THE STATE]: Your Honor, this is Margin Number 45, Timothy Rager. He's previously waived his right to a jury trial and has requested to proceed on a bench trial.
>
> As a courtesy, I spoke briefly with him and let him know that -- and he is also representing himself, Your Honor. I let him know the rules of evidence would apply, advised him of hearsay and other rules, and that he would be held to the same standard as an attorney. So we've advised him of that, so hopefully we'll have a smooth trial this morning.
>
> THE COURT: Okay. First thing I'll ask you to do, sir, is sign a waiver for a jury trial.
>
> Do we have a form for that?
>
> [THE STATE]: There might be one in the file.
>
> THE COURT: We get one before we start the trial in superior court, and we get another waiver in superior court that he's waiving his right to an attorney.
>
> [THE STATE]: Your Honor, may I approach with the witness list?
>
> THE COURT: Sure.
>
> Mr. Rager, am I saying your name correct?
>
> [DEFENDANT]: Yes, sir. And what was your name?
>
> THE COURT: Tell me why you want to represent yourself.
>
> [DEFENDANT]: Just, I think I can manage my side. I think I've got this.

> THE COURT: Okay. You understand that you have a right to have a lawyer represent you?
>
> [DEFENDANT]: Yes, sir.

The court's subsequent colloquy with Defendant regarding his decision to represent himself comprises fifteen of the forty-one pages of the trial transcript, and the court specifically found "based upon the totality of the circumstances, that the defendant knowingly, intelligently, competently, and voluntarily desires to waive the right to representation by an attorney and to represent himself." Yet, unlike *Swink*, *Rutledge*, and *Hamer*, there is no record evidence that the superior court personally addressed Defendant or conducted any colloquy whatsoever to determine whether he fully understood and appreciated the consequences of his decision to waive his right to a jury trial. Although the State represented to the superior court that Defendant had previously waived his right to a jury trial, there is no record evidence to support this representation. Accordingly, as the State concedes, the superior court erred by failing to comply with the requirements of N.C. Gen. Stat. § 15A-1201(d) "to 'determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.' " *Hamer*, 377 N.C. at 509, 858 S.E.2d at 782 (quoting N.C. Gen. Stat. § 15A-1201(d)(1)).

Also, unlike *Hamer*, there is no record evidence demonstrating that Defendant was aware of his right to a jury trial or his right to waive the same, or that Defendant was aware of the consequences of that decision. Defendant appeared pro se in district court for a bench trial and nothing in the record indicates that Defendant knew or had reason to know that he was entitled to a jury trial in superior court. Although there is a signed waiver of counsel form in the record, neither the transcript nor the form itself indicates whether Defendant signed this form prior to trial. Thus, while the record in *Hamer* "tend[ed] to show that defendant's strategy was to have the merits of his case decided in a bench trial[,]" *Id.* at 509, 858 S.E.2d at 783, the record in the present case is devoid of any such evidence.

Furthermore, unlike *Hamer*, the evidence of Defendant's guilt presented at trial was not overwhelming. Defendant was charged with misdemeanor making harassing phone calls by repeatedly telephoning the Waynesville Police Department "for the purpose of annoying and harassing" the dispatch and officers at that number. *See* N.C. Gen. Stat. § 14-196(a)(3) (2023).

The State's only witness, Sergeant Craig, testified that Defendant had called the Waynesville Police Department's non-emergency number

forty-two times in the late evening of 9 April 2022 and eight times in the early morning of 10 April 2022, seeking information about "a provocation that he was involved in that . . . was being investigated or being handled by Detective Evan Davis." Sergeant Craig did not personally receive any of the phone calls but became aware of the calls by his dispatchers complaining to him about the number of times Defendant had called. Sergeant Craig testified that Defendant was repeatedly told that Detective Davis was not on duty at that time and that he needed to contact during business hours.

Sergeant Craig heard the final phone call but did not hear any of the previous phone calls. During that call, the dispatcher advised Defendant again that Detective Davis was not on duty. When Defendant said that he wanted to speak to someone in charge, the dispatcher said that she would have Sergeant Craig contact him. At that point, Defendant used profanity towards the dispatcher. Sergeant Craig called Defendant in the early morning of 10 April.

On cross-examination, Sergeant Craig acknowledged that Defendant had explained to him that he had been a victim of an assault and was trying to gather information about that case. When asked if Defendant was entitled to information about that case, Sergeant Craig responded, "It's public record, so you're able to access it, if you would like."

Defendant testified that he was calling the police department "searching for records[,]" and that he had "been denied it multiple times." He further testified, "I can't be polite every single time I call. For them to expect me to be is unreasonable. I have been polite. I have called politely and asked for records to no avail, Your Honor." He additionally testified that during the previous week he had "called during regular business hours to no avail[.]"

Based on the evidence presented at trial, there is a reasonable possibility that, had the case been tried before twelve jurors rather than a judge, at least one juror would have found that Defendant's repeated telephone calls were not "for the purpose of annoying and harassing" the dispatch and officers at that number, *see* N.C. Gen. Stat. § 14-196(a)(3), such that the jury would not have convicted Defendant, resulting in a different result reached at trial, *see id.* § 15A-1443(a).

Accordingly, the superior court prejudicially erred by failing to comply with the requirements of N.C. Gen. Stat. § 15A-1201 to determine whether Defendant knowingly and voluntarily waived his right to a jury trial, and Defendant is entitled to a new trial for making harassing phone calls.

D. Sufficiency of the Evidence

[3] Defendant argues that "[t]he evidence was insufficient as a matter of law to convict [him] on the charge of harassing phone calls."

A defendant in a criminal case may not challenge the sufficiency of the evidence on appeal unless a motion to dismiss is made at trial. N.C. R. App. P. 10(a)(3). Defendant concedes that he did not make a motion to dismiss at trial but argues that "[t]his Court should invoke Rule 2, if needed, to resolve these claims on the merits." This Court may suspend the provisions of the Rules of Appellate Procedure "[t]o prevent manifest injustice to a party[.]" N.C. R. App. P. 2.

> As our Supreme Court has instructed, we must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because "inconsistent application" of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not.

State v. Bishop, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017) (citing *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007)). In our discretion, we decline to invoke Rule 2 and dismiss this portion of Defendant's appeal.

III. Conclusion

The superior court lacked jurisdiction to try Defendant for being intoxicated and disruptive in public, and we therefore vacate Defendant's conviction for this charge. Moreover, the superior court prejudicially erred by failing to comply with the requirements of N.C. Gen. Stat. § 15A-1201 to determine whether Defendant knowingly and voluntarily waived his right to a jury trial, and Defendant is entitled to a new trial for making harassing phone calls. Because Defendant failed to preserve a challenge to the sufficiency of the evidence of making harassing phone calls, we dismiss that portion of his appeal.

VACATED IN PART; NEW TRIAL IN PART; DISMISSED IN PART.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
TERRELL AARON SADDLER AKA AARON TERRELL SADDLER, DEFENDANT

No. COA22-989

Filed 18 June 2024

1. Evidence—hearsay statements and defendant's silence—recorded jailhouse telephone calls—no error or plain error

In a prosecution resulting in defendant's conviction for second-degree murder in connection with a fatal shooting, the trial court did not err by admitting recordings of two jailhouse telephone calls between defendant and an unidentified female during which—after an automated message warned that the calls were subject to recording and monitoring—defendant did not offer a denial to the female's report of neighborhood gossip that defendant was the shooter, instead replying that someone had been trying to rob him. The recordings: were relevant under Rule of Evidence 401 as defendant's silence when told that neighbors believed he fired the fatal shot was some evidence of guilt; were not unduly prejudicial under Rule of Evidence 403 because of the female's hearsay reports of neighborhood sentiment in light of the trial court's limiting instruction that the jurors should not consider those reports for the truth of the matter asserted; and did not implicate defendant's constitutional rights to silence, due process, or a fair trial because they were made freely and voluntarily to a private individual rather than to a State actor.

2. Evidence—prosecutorial misconduct—potential impeachment evidence withheld—no prejudice shown

In a prosecution resulting in defendant's conviction for second-degree murder in connection with a fatal shooting from a vehicle that sped away, even if the knowledge of a former district attorney regarding an embezzlement investigation of a law enforcement witness for the State was imputed to the district attorney office employees working on defendant's case, defendant could not demonstrate prejudice where: (1) the witness in question testified that, although gunshot residue was detected in a vehicle, no gunshot residue was detected on defendant or his clothing; and (2) significant other evidence of defendant's guilt was before the jury.

STATE v. SADDLER

[294 N.C. App. 496 (2024)]

Appeal by defendant from judgment entered 11 July 2022 by Judge Stephen Futrell in Scotland County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Marilyn G. Ozer for defendant-appellant.

DILLON, Chief Judge.

Defendant Terrell Aaron Saddler was convicted by a jury of second-degree murder for the fatal shooting of Brandon Morris outside a home in Laurinburg. Defendant appeals from the judgment entered consistent with the jury's verdict.

Several months later, before our Court resolved Defendant's appeal, Defendant filed a motion for appropriate relief ("MAR"), based on Defendant's claim that the State withheld certain evidence from Defendant which would have been helpful to his defense, evidence which Defendant did not learn about until after his trial. Our Court entered an order remanding the matter to the trial court to make findings regarding Defendant's MAR. After a hearing on the matter, the trial court entered findings of fact. Defendant also appeals from that order. We now consider Defendant's arguments concerning his conviction and his MAR in light of the findings made by the trial court.

I. Factual Background

On 28 October 2017, Brandon Morris attended a party at a Laurinburg home. While in the driveway, Mr. Morris was fatally wounded by gunshots fired from inside a Chevrolet Impala parked on the street. Eyewitness testimony identified Defendant as being present in the Chevrolet, which fled the scene following the shooting.

Following an investigation, Defendant was arrested for Mr. Morris's death and charged with first-degree murder. Defendant was found guilty by a jury of second-degree murder and sentenced to a term of imprisonment. Defendant appeals.

II. Analysis

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

A. Jail Telephone Calls

[1] Defendant raises several issues concerning the trial court's admission of two jailhouse phone calls between Defendant and an unidentified female occurring on 30 October 2017, two days after the shooting. An automated message warned that the calls were "subject to recording and monitoring[.]" During those phone calls, Defendant and the female discussed the neighborhood gossip surrounding the shooting, and the female indicated that she had heard from others that Defendant was the shooter. Defendant did not offer any denial to the gossip; rather, Defendant stated that he was being robbed, and Defendant instructed the female caller what to say if asked about his involvement. Pertinent excerpts from the phone calls include the following exchange:

> FEMALE: . . . I was like, he might not even see the light of day if—if it really happened the way they say it happened, you know what I'm saying. He's like, man I understand [inaudible].
>
> DEFENDANT: [crosstalk] rob me!
>
> FEMALE: Huh?
>
> DEFENDANT: They tried to rob me. Don't say nothing else, don't say nothing to nobody. I mean, I'm just letting you know, people think I—I just—he—n**** trying—n**** trying me. But don't say nothing to nobody, you hear me?
>
> FEMALE: Yeah.
>
> DEFENDANT: N**** tried to rob me. That's what they saying, they saying they was trying to rob me. I don't know, you know, I'm just letting you know, they-they—
>
> FEMALE: Yeah, but that's-that's what everybody's saying. That's what everybody's saying at the job.
>
> DEFENDANT: Oh, okay. Okay. All right.
>
> *****
>
> DEFENDANT: . . . Just tell them you can't talk because I told you don't say nothing. That's what you tell him. He told me don't say nothing.
>
> *****
>
> DEFENDANT: . . . But you ain't talked [crosstalk] you ain't—if somebody asked you, I just rolled by and gunshots was fired and I kept going. That's all you say.

FEMALE: All right.

We have reviewed Defendant's arguments and conclude that Defendant has failed to meet his burden of showing reversible error.

First, we consider whether the phone calls were relevant under Rule 401 of our Rules of Evidence, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2023). Our Supreme Court has instructed that this relevancy threshold is "relatively lax." *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988).

Our Supreme Court has explained that we are to review a trial court's Rule 401 relevancy determination *de novo*. *State v. Triplett*, 368 N.C. 172, 175, 775 S.E.2d 805, 807 (2015). But, in the same paragraph of *Triplett*, our Supreme Court reiterates language from one of its prior opinions that the trial court's "rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *Id.* (quoting *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011)).

Here, even giving the trial court no deference on its ruling, we conclude that the phone calls were relevant. In them, Defendant discusses the events surrounding the shooting and shows Defendant's excuse for shooting Mr. Morris (*i.e.*, that he was being robbed). His silence when told by the female caller that others in the neighborhood were saying that he fired the fatal shot is some evidence of guilt. *See State v. Spaulding*, 288 N.C. 397, 406, 219 S.E.2d 178, 184 (1975), *vacated in part on other grounds*, *Spaulding v. North Carolina*, 428 U.S. 904 (1976).

Even though evidence may be relevant under Rule 401, that 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[.]" N.C. Gen. Stat. § 8C-1, Rule 403. We review the trial court's Rule 403 determination for abuse of discretion. *Triplett*, 368 N.C. at 175, 775 S.E.2d at 807.

We have reviewed the record and cannot say that the trial court abused its discretion in allowing the jailhouse phone calls into evidence.

Defendant contends that the calls were unduly prejudicial because of the hearsay statements by the female, especially those suggesting that the word on the street was that Defendant had fired the fatal shot. Here, though, the trial court provided a limiting instruction concerning the hearsay before the jury heard the calls:

> In the course of the recording that you are about to hear, you may hear statements attributed to third parties who are not testifying in this trial. Statements presented in the recordings that originated from non-testifying third parties are not to be considered by you for the truth of the matters asserted.

Defendant, though, contends that "the State's commingling of hearsay statements and the Defendant's silence rendered it impossible for the jurors to follow the court's limiting instruction."

We are persuaded by our Supreme Court's guidance that "[j]urors are presumed to follow the instructions given to them by the court." *State v. Parker*, 377 N.C. 466, 474, 858 S.E.2d 595, 600 (2021).

Defendant, though, further contests the State's characterization of his response and silence to the female caller as an "implied admission of guilt." However, Defendant's contention does not relate to the "hearsay" statements themselves, but rather to his response to those statements. And as any silence of Defendant was not in response to him invoking his Fifth Amendment right during an interrogation by a State actor, we conclude that there was no error in this regard. *See*, *e.g.*, *State v. Etheridge*, 319 N.C. 34, 43, 352 S.E.2d 673, 679 (1987) ("[S]tatements made to private individuals unconnected with law enforcement are admissible so long as they were made freely and voluntarily."). And we again note our Supreme Court's holding in *Spaulding* regarding implied admissions based on silence:

> Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission.

288 N.C. at 406, 219 S.E.2d at 184. *See also State v. Williams*, 333 N.C. 719, 726–27, 430 S.E.2d 888, 891–92 (1993) (recognizing that a defendant's implied admission through silence is an exception to the hearsay rule as an admission).

Next, Defendant contends the admission of the jail calls violated his constitutional rights to silence, due process, and a fair trial. U.S. Const. Amends. V, VI, XIV; N.C. Const. art. I, §§ 19, 23. Because Defendant failed

to repeat his objections, we review under the plain error standard of review. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). We have reviewed Defendant's argument and are not persuaded that Defendant has shown how his constitutional rights were violated by the introduction of the phone calls. Defendant's silence was not in response to questions by State actors. And the jury was free to make reasonable inferences from Defendant's statements and his silence.

B. Alleged Prosecutorial Misconduct

[2] Defendant's second argument concerns certain conduct by the State in withholding allegedly exculpatory information from him.

Specifically, months after Defendant's trial, the prosecutor's office informed Defendant's counsel that a law enforcement officer who testified at the trial was under investigation for embezzlement at the time of the trial. This officer provided testimony at Defendant's trial regarding the investigation by himself and his law enforcement colleagues. Defendant's counsel filed an MAR contending Defendant could have used information about the officer's embezzlement to impeach the officer's testimony. Our Court remanded the case to the trial court to conduct a hearing and make findings of fact. The trial court found that a former district attorney in the office knew of the investigation but that those working on Defendant's case in the office only came to learn of the investigation after Defendant's trial.

It may be that under United States Supreme Court precedent the knowledge of the former district attorney was imputed on the office, including those working on Defendant's case within the office. However, we conclude that Defendant was not prejudiced by the failure to disclose the information about the officer. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (noting that a new trial is warranted if the suppressed evidence was "material"); *see also State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) ("Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed.").

Specifically, we conclude that the testimony of the officer under investigation was not particularly significant in proving Defendant's guilt. Evidence apart from the officer's testimony included: the jailhouse phone calls discussed *supra*; eyewitness testimony that the fatal shot came from within the Impala, that Defendant was driving the Impala, and that the Impala fled the scene immediately after the shooting; and an injury to Defendant's hand consistent with the recoil of a gun. The question, therefore, for the jury to resolve was whether it was Defendant who

fired the fatal shot. Defendant does not point to any testimony from the officer which implicated Defendant specifically as the shooter. Rather, the officer testified that, though gun residue was found in the car, no gun residue was found on Defendant or his clothing.

We conclude that the other evidence was the evidence from which the jury relied to convict Defendant, most notably the jailhouse calls themselves. Aside from Defendant's silence to the female caller's statements that others were saying that he fired the fatal shot, Defendant himself made statements during the calls from which the jury could reasonably infer as an admission that he was the shooter. Indeed, rather than denying firing the fatal shot in response to the female's hearsay statements, he states that he was being robbed. The most reasonable inference from this statement is that Defendant was admitting to firing the shot but was offering an excuse for firing the shot.

We note Defendant's contest to certain findings by the trial court regarding the testifying officer and who within the district attorney's office knew what and when concerning the embezzlement investigation against that officer. However, based on our conclusion that the officer's testimony was not prejudicial anyway, we conclude that any error by the trial court in making these findings in its order was not reversible error.

In conclusion, we find that Defendant received a fair trial, free of reversible error. And based on the trial court's findings of fact and our conclusions, we deny Defendant's MAR.

NO ERROR IN PART, AFFIRM IN PART.

Judges COLLINS and STADING concur.

STATE OF NORTH CAROLINA
v.
JALEN O'KEITH WATLINGTON, DEFENDANT

No. COA22-972

Filed 18 June 2024

Appeal and Error—Court of Appeals—one panel bound by decision of another panel—statutory amendment regarding juror substitutions after deliberations begin unconstitutional—new trial granted

In an appeal from judgment entered upon defendant's convictions on charges of assault by pointing a gun and discharging a weapon into an occupied vehicle, the Court of Appeals was bound by the published decision of an earlier panel to hold that defendant's convictions must be vacated and a new trial granted because, even though defendant failed to object at the time, his right under the North Carolina Constitution to a properly constituted jury was violated when the trial court substituted a juror after the deliberations had commenced, despite the trial court having instructed the newly constituted jury to begin its deliberations anew in accordance with a recent statutory amendment (N.C.G.S. § 15A-1215(a)).

Judge ARROWOOD concurring in result only by separate opinion.

Judge GRIFFIN concurring by separate opinion.

Appeal by defendant from judgment entered on or about 27 April 2022 by Judge David T. Lambeth Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 8 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

Thomas, Ferguson & Beskind, LLP, by Kellie Mannette and Jay H. Ferguson, for defendant-appellant.

STROUD, Judge.

Defendant appeals his judgment for assault by pointing a gun and discharging a weapon into an occupied vehicle. Defendant did not object to the substitution of a juror after deliberations had begun, and the jury was

properly constituted, impaneled, and instructed under North Carolina General Statute Section 15A-1215(a). Nonetheless, on appeal Defendant has challenged North Carolina General Statute Section 15A-1215(a) as unconstitutional, and based on *State v. Chambers*, 292 N.C. App. 459, 898 S.E.2d 86 (2024) and *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), we have no choice but to vacate Defendant's convictions and judgment and remand for a new trial on all charges.

I. Background

The State's evidence tended to show that on 30 November 2017, Mr. Brandon Miles and Ms. Racshell Carr were driving in a Chevrolet. Defendant was driving a Toyota and backed into the Chevrolet's line of travel, causing Mr. Miles to swerve out of the way to avoid a collision. Immediately after this near collision, at a stop light, Defendant and Defendant's passenger both pulled out guns. Ms. Carr called the police. The occupants of the two cars exchanged words at the next light, and by that time, Ms. Carr was on the phone with the police, and they told her to get Defendant's tag number.

The vehicles then separated, driving onto different streets, but Mr. Miles eventually turned around to get Defendant's tag number. When Mr. Miles found the Toyota, Defendant and his passenger were both waiting at a stop sign with their guns displayed. Shots were fired at Mr. Miles and Ms. Carr, who ducked.

On or about 2 July 2018, Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") and discharging a weapon into an occupied vehicle ("firing into a vehicle"). After a seven day trial, the jury found Defendant "guilty of assault by pointing a gun[.]" (Capitalization altered.) The jury also found Defendant guilty of firing into a vehicle. The trial court entered judgment; Defendant appealed.

II. Juror Substitution

After all evidence had been presented in the case, on 25 April 2022 at about 4:11 pm, the jury was sent to the jury room to select a foreperson and begin deliberations. At about 4:50 pm, the jury sent the trial court a request to see some exhibits, and the jury was brought back to the courtroom. The alternate jurors were also present. Three of the State's exhibits were published to the jury, and they were sent home at 5:00 pm and told to return at 9:30 am the next morning.

On 26 April 2022, Juror No. 10 was missing. The clerk contacted Juror No. 10 and she informed the trial court she had recently injured

her foot resulting in swelling, a trip to the emergency room, and doctor's instructions to stay off the foot. The trial court was concerned about the juror's ability to concentrate on the case; the trial court spoke to counsel for the State and Defendant, and neither objected to Juror No. 10 being released and seating the first alternate juror. In deciding to seat the alternate juror, the trial court referred specifically to North Carolina General Statute Section 15A-1215(a), which became effective on 1 October 2021. *See* N.C. Gen. Stat. § 15A-1215 (2023) (Editor's Note).

In accord with North Carolina General Statute Section 15A-1215(a), the trial court instructed the jury to begin deliberations anew. The trial court further instructed, "This means you should disregard entirely any deliberations taking place before the alternative juror was substituted and consider freshly the evidence as if the previous deliberations had never occurred" and

> [a]lthough starting over may seem frustrating, please do not let it discourage you. It is important to our system of justice that each juror has a full and fair opportunity to explore his or her views and respond to the views of others so that you may come to a unanimous verdict. All the previous instructions given to you, including the unanimity requirement for a verdict, remain in effect.

The twelve jurors then started deliberations at 10:17am on 26 April 2022.

Defendant contends "the trial court violated Article I, Section 24 of the North Carolina Constitution when it allowed an alternate juror to substitute for Juror #10 on the second day of deliberations." (Capitalization altered.) Defendant specifically argues a 2021 amendment to North Carolina General Statute Section 15A-1215 allowing a juror to be replaced with an alternate even after deliberation has begun, with instructions to begin deliberations anew, is unconstitutional. The State argues Defendant failed to preserve his constitutional argument because he did not object to the substitution of the juror. The State relied in part upon the only case addressing this issue as of the date the State filed its brief, an unpublished case from this Court in April 2023, *State v. Poole*, which determined the defendant had waived his constitutional argument by failure to object to the juror substitution or to raise any constitutional argument regarding the amendment to North Carolina General Statute Section 15A-1215(a) at trial:

> Effective 1 October 2021, the General Assembly amended N.C. Gen. Stat. §§ 15A-1215 and 15A-1221 to permit an alternate juror to replace a regular juror after

deliberations have begun. 2021 N.C. Sess. Laws 374, 374-75, ch. 94, §§ 1-2. The General Assembly added, among other language, the following: "[i]f an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." N.C. Gen. Stat. § 15A-1215(a) (2021). On appeal, defendant presents the question of whether the 2021 amendment to N.C. Gen. Stat. § 15A-1215(a) permitting substitution of an alternate juror after jury deliberations have begun violates Article I, Section 24 of the North Carolina Constitution.

"It has never been doubted that the Constitution of this State requires a unanimous verdict for a valid conviction for any crime." *State v. Williams*, 286 N.C. 422, 427, 212 S.E.2d 113, 117 (1975). "Article I, Section 24 of the North Carolina Constitution, which guarantees the right to trial by jury, contemplates no more or less than a jury of twelve persons." *State v. Bunning*, 346 N.C. 253, 256, 485 S.E.2d 290, 292 (1997). Defendant's constitutional challenge to N.C. Gen. Stat. § 15A-1215(a) (amended 2021) appears to be an issue of first impression in this State. We first address whether defendant's constitutional claim is preserved for appellate review.

At trial, defendant did not object to the alternate juror substitution, nor did he argue that N.C. Gen. Stat. § 15A-1215(a) (amended 2021) is unconstitutional. "While Appellate Rule 10([a])(1) protects judicial economy and speaks to our adversarial system of justice by requiring the parties to object in the majority of instances, it nevertheless recognizes that some questions may be deemed preserved for review by rule or law." *State v. Wilson*, 363 N.C. 478, 486, 681 S.E.2d 325, 331 (2009). Defendant cites to *State v. Ashe*, for its general rule that where "the error violates [a] defendant's right to a trial by a jury of twelve, [a] defendant's failure to object is not fatal to his right to raise the question on appeal." 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citations omitted).

However, we are not persuaded that the holding in *Ashe* compels a determination that defendant's issue is preserved for review notwithstanding his counsel's failure to object at trial. In *Ashe*, the Court's determination on the issue of preservation was based on the well-established principle that "when a trial court *acts contrary to a*

> *statutory mandate* and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." 314 N.C. at 39, 331 S.E.2d at 659 (emphasis added).
>
> Our Supreme Court's holding in *Ashe* was narrow and specific, stating:
>
> > Both Art. I, § 24 of the North Carolina Constitution and N.C.G.S. § 15A-1233(a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Under the principles stated above, *failure of the trial court to comply with these statutory mandates* entitles defendant to press these points on appeal, notwithstanding a failure to object at trial.
>
> *Id.* at 40, 331 S.E.2d at 659 (emphasis added). We note that this is the only time *Ashe* mentions the North Carolina Constitution. The Court in *Ashe* addressed the question of whether the trial court had failed to comply with the statutory mandate in N.C. Gen. Stat. 15A-1233(a). This mandate, when considered together with Article 1, Section 24 of the North Carolina Constitution, imposed dual requirements on the trial court. The Court did not discuss a constitutional violation; it only addressed a statutory violation.

No. COA22-836 (unpublished) (April 18, 2023) slip op. at *3-5.

Although *State v. Poole* was unpublished and thus has no precedential value, N.C. R. App. P. 30(e)(3) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority."), this Court in *Poole* noted the case appeared to present "an issue of first impression[.]" *Poole* at *4.

Again, in May 2023, this Court issued another unpublished opinion, *State v. Turner*, rejecting the defendant's attempt to

> raise—for the first time on appeal—a belated facial constitutional challenge to N.C. Gen. Stat. § 15A-1215(a). This he is not permitted to do. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.")

No. COA22-887 (unpublished) (May 16, 2023) slip op. at *7.

A few months later, in September 2023, in *State v. Lynn*, a published case, in line with *Poole*, No. COA22-836 and *Turner*, No. COA22-887, determined the defendant failed to preserve his constitutional argument to a juror substitution under North Carolina General Statute Section 15A-1215(a) because the defendant's counsel did not object:

> Defendant asserts the trial court erred by substituting an alternate juror after deliberations began. Specifically, Defendant argues the jury verdict was reached by more than twelve persons, and thus the verdict violates the North Carolina Constitution. Defendant also argues N.C. Gen. Stat. § 15A-1215(a), itself, violates the North Carolina Constitution. After careful consideration, we conclude that Defendant failed to preserve these arguments for appellate review.
>
> A party must timely object to the trial court in order to preserve an issue for appellate review. Generally, constitutional issues not raised in the trial court are abandoned on appeal.
>
> Here, Defendant did not object to the alternate-juror substitution or to the constitutionality of N.C. Gen. Stat. § 15A-1215(a), the statute authorizing the substitution. In fact, when the trial court asked whether there were any concerns regarding the trial court's plan to substitute the alternate juror, Defendant's counsel said no.
>
> Therefore, Defendant failed to preserve this issue for appellate review under Rule 10. Accordingly, we dismiss Defendant's arguments because the asserted alternate-juror issues are not properly before this Court.

State v. Lynn, 290 N.C. App. 532, 536, 892 S.E.2d 883, 886 (2023) (citations, quotation marks, and brackets omitted).

But most recently, in February 2024, in *State v. Chambers*, this Court addressed a defendant's constitutional argument challenging North Carolina General Statute Section 15A-1215(a) on appeal, despite the defendant's failure to object at trial, and determined, mostly based upon *State v. Bunning*, 346 N.C. 253, 485 S.E.2d 290 (1997) and "*Bayard v. Singleton*, 1 N.C. 5 (1787)[,]" that North Carolina General Statute Section 15A-1215(a) is unconstitutional:

> We note that, in 2021, our General Assembly amended a statute to provide that if an alternate juror replaces a juror after deliberations have begun, the court must

> instruct the jury to begin its deliberations anew. In no event shall more than 12 jurors participate in the jury's deliberations. N.C. Gen. Stat. § 15A-1215(a). However, where a statute conflicts with our state constitution, we must follow our state constitution. *Bayard v. Singleton*, 1 N.C. 5 (1787). Our General Assembly cannot overrule a decision by our Supreme Court which interprets our state constitution. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) (Issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by our Supreme Court.).
>
> Under existing precedent, we are compelled to conclude that Defendant's right to a properly constituted jury under our state constitution was violated and that this issue is preserved, notwithstanding Defendant's failure to object at trial. Accordingly, Defendant is entitled to a new trial.

State v. Chambers, 292 N.C. App. 459, 462, 898 S.E.2d 86, 88 (2024) (quotation marks, brackets, heading, and footnote omitted).

Chambers goes on, in footnote 1, to note it conflicts with *Lynn*, 290 N.C. App. 532, 892 S.E.2d 883, but states the issue was controlled by the older case of *State v. Hardin*, 161 N.C. App. 530, 588 S.E.2d 569 (2003). But *Hardin* is a 2003 case, and as noted in *Chambers*, "in *2021*, our General Assembly amended" North Carolina General Statute Section 15A-1215(a). *Chambers*, 292 N.C. App. at 462, 898 S.E.2d at 88 (emphasis added). Thus, *Hardin* was published approximately 18 years *before* the amendment at issue. *See generally* N.C. Gen. Stat. § 15A-1215(a) (2021); *Hardin*, 161 N.C. App. 530, 588 S.E.2d 569 (2003).

Still, without any analysis of the cases or statutory provisions governing juror selection or impaneling the jury, the *Chambers* Court cited to *Hardin* as precedent in footnote 1 and acknowledges *Lynn*, leaving us with a conflict governed by *In re Civil Penalty* which

> stands for the proposition that, where a panel of this Court has decided a legal issue, future panels are bound to follow that precedent. This is so even if the previous panel's decision involved narrowing or distinguishing an earlier controlling precedent—even one from the Supreme Court—as was the case in *In re Civil Penalty*. Importantly, *In re Civil Penalt*y does not authorize panels to overrule

> existing precedent on the basis that it is inconsistent with earlier decisions of this Court.

State v. Gonzalez, 263 N.C. App. 527, 531, 823 S.E.2d 886, 888-89 (2019) (citing *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)).

The *Chambers* Court did not explain *how* or *why* a verdict delivered in open court by a properly constituted and instructed jury of twelve in compliance with North Carolina General Statute Section 15A-1215(a) violates article I, Section 24 of the North Carolina Constitution. *See generally Chambers*, 292 N.C. App. 459, 898 S.E.2d 86. The many issues arising from *Chambers* have been noted by the School of Government with the University of North Carolina at Chapel Hill ("SOG"): "This post will review the holding in *Chambers*, the precedent upon which it relied, and the provisions of G.S. 15A-1215(a) that *Chambers*, if it remains undisturbed, effectively eviscerates." Shea Denning, *Court of Appeals Holds that State Constitution Prohibits Substitution of Alternate Jurors after Deliberations Begin*, N.C. Crim. L.[:] A UNC Sch. of Gov't Blog (Mar. 14 2024), https://nccriminallaw.sog.unc.edu/court-of-appeals-holds-that-state-constitution-prohibits-substitution-of-alternate-jurors-after-deliberations-begin/#more-18388 *as of* 12 April 2024. The SOG article also thoroughly reviews cases addressing juror substitution, the role of *State v. Bunning*, 346 N.C. 253, 485 S.E.2d 290 (1997), and the 2021 amendment to North Carolina General Statute Section 15A-1215(a). *See* Denning.

Even as this panel deliberated on how to attempt to resolve the *In re Civil Penalty* dilemma presented by this case – a difficult task, as evidenced by our three opinions – in April of 2024, this Court issued the unpublished opinion of *State v. White*, relying on *Chambers*.[1] No. COA23-596 (April 2, 2024) (unpublished), slip op. at *8.

We also note that our Supreme Court may soon address the issue of the constitutionality of the statutory amendment allowing substitution of a juror and whether a defendant must object to the substitution to raise an issue on appeal, since a temporary stay was allowed in *Chambers*, 385 N.C. 884, 897 S.E.2d 668 (2024) in March of 2024. Indeed, on 6 March 2024, the State filed a Petition for Writ of Supersedeas and Application for Temporary Stay in the *Chambers* case. In support of the temporary stay, the State alleged in part:

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1. *State v. White*, slip op. at *8, notes *Chambers* as unpublished though at this time it is a published case.

> To allow this Court time to determine whether to accept this case for review under § 7A-31, this Court should issue a temporary stay. Then, pending review, this Court should issue a writ of supersedeas. Absent issuance of such stays, the trial court will vacate Defendant's convictions and conduct a new trial. Such actions would moot the issues the State seeks to bring forward on discretionary review. Moreover, this opinion is the first to directly address the constitutionality of a recent amendment to N.C.G.S. § 15A-1215(a). And the court declared it unconstitutional. Permitting such an opinion to stand pending this Court's review would frustrate and confuse both practitioners and judges faced with a potential juror substitution during deliberations.

On 7 March 2024, the Supreme Court issued a temporary stay in the *Chambers* case. On 26 March 2024, the State filed a petition for discretionary review by the Supreme Court, but as of the date of this opinion, the Supreme Court has not yet granted certiorari and this Court, along with "practitioners and [trial] judges faced with" the issue of a juror substitution, remains bound by *Chambers* as a controlling precedent even though the defendant in *Chambers* may not yet have a new trial due to the stay issued in that case.

In this regard, we will respond to the concurring opinion of Judge Griffin, which begins by attempting to place blame for delay in the filing of this opinion and seeks to minimize the impact *Chambers* may have upon the operation of our trial courts, as rulings from this Court require them to hold new trials in complex criminal cases based upon *Chambers* even as no new trial is yet allowed in the *Chambers* case itself. The initial, simple draft of this Court's opinion was prepared just before *Chambers* was filed and it relied upon *Lynn*, 290 N.C. App. 532, 892 S.E.2d 883. Similar or even the same issues are often pending before different panels of this Court, and here, as is normally the case, one panel is unaware of the details or issues of cases simultaneously being considered by other panels until the final opinion is filed. But before this opinion was completed, *Chambers* was filed, then withdrawn, amended, and refiled, thus necessitating revision of this opinion. Due to the stay of *Chambers* by the Supreme Court of North Carolina, as well as the number of cases presenting the same issue regarding a juror substitution pending before this Court which are controlled by *Chambers*, we considered whether this opinion should be held in abeyance pending a ruling in *Chambers* by the Supreme Court.

This Court has often held cases in abeyance pending resolution of another pending case before this Court presenting the same issue or awaiting a ruling in a case under review by the Supreme Court. *See*, *e.g.*, *State v. Daw*, 277 N.C. App. 240, 245, 860 S.E.2d 1, 7 (2021) ("There are a number of petitions pending with our Court that have been held in abeyance until we issue an opinion in this case. Resolution of the questions presented by this appeal on the merits would therefore clearly affect members of the public beyond just the parties in the immediate case. Accordingly, we hold that the public interest exception applies and will proceed to address the merits of the case." (quotation marks and citation omitted)), *writ of supersedeas and disc. rev. allowed*, 384 N.C. 31, 883 S.E.2d 457 (2023); *State v. Thomsen*, 242 N.C. App. 475, 483, 776 S.E.2d 41, 47 (2015) ("On 24 February 2015, Defendant submitted to this Court a Motion to Hold Appeal in Abeyance Pending Determination of *State v. Stubbs* by the North Carolina Supreme Court. *Stubbs* was heard in the North Carolina Supreme Court on 13 January 2015. In his motion, Defendant contended *Stubbs* will resolve the issue of whether the Court of Appeals has jurisdiction to review an order of the trial court granting appropriate relief via writ of *certiorari*. On 9 March 2015, the State filed a response, opposing Defendant's motion to hold the appeal in abeyance. On 16 March 2015, we granted Defendant's motion, and ordered the appeal held in abeyance pending the resolution of *State v. Stubbs*. On 10 April 2015, the Supreme Court issued its opinion in *State v. Stubbs*, 568A03-02. Following this decision we reviewed this case without further briefing from the parties.").

But as our Supreme Court has not yet taken action in *Chambers* beyond granting the stay, we have no way of knowing if or when a ruling on that case may be forthcoming so we have decided not to hold this case in abeyance. As we remain bound by *Chambers* and *In re Civil Penalty*, we vacate Defendant's judgment and remand for a new trial. *See Chambers*, 292 N.C. App. at 462, 898 S.E.2d at 88 (determining the defendant preserved his issue to juror substitution without objection, concluding North Carolina General Statute Section 15A-1215(a) is unconstitutional, and mandating the defendant receive a new trial); *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30.

III. Conclusion

For the reasons discussed above, Defendant must receive a new trial.

NEW TRIAL.

Judge ARROWOOD concurs in the result only by separate opinion.

Judge GRIFFIN concurs by separate opinion.

ARROWOOD, Judge, concurring in result only.

I concur in the majority opinion because I agree that *State v. Chambers*, 898 S.E.2d 86 (2024) dictates, and we are bound by its result pursuant to *In re Civil Penalty*, 324 N.C. 373 (1989). However, I write to express my opinions regarding the *Chambers* decision, the jurisprudence it was based on, and its implications.

First, I think that *Chambers* itself violated *In re Civil Penalty* when it ignored *State v. Lynn*, 290 N.C. App. 532 (2023) to find that the issue was properly preserved. In my opinion, the *Chambers* panel's reliance on *State v. Hardin*, 161 N.C. App. 530 (2003), to circumvent *Lynn* is without merit. *Hardin*, which was decided years before this issue was before the court *and* before the 2021 amendment, in no way speaks to this issue, much less contradicts *Lynn* and the unpublished opinions it references.

Chambers' reliance on *State v. Bunning*, 346 N.C. 253 (1997) is also notable. In that case, after a day of capital sentencing deliberations, a juror asked to be excused because of an illness. *Bunning*, 346 N.C. at 255. The juror was subsequently replaced with an alternate, and the trial court instructed the jury to begin its deliberations anew—after which the jury recommended the death penalty. *Id.* The defendant appealed, arguing that the trial court erred by substituting an alternate juror for a juror who was excused only after deliberations had commenced. *Id.*

The *Bunning* Court agreed, reasoning the verdict "was reached by more than twelve persons[,]" and it had to be assumed that the excused juror "made some contribution to the verdict." *Id.* at 256. Although *Bunning* began its analysis by citing Article 1, Section 24 of the North Carolina Constitution and *State v. Bindyke*, 288 N.C. 608 (1975),[1] the Court proceeded to discuss the intent of the General Assembly. *See id.* at 256–57. Notably, in analyzing N.C.G.S. § 15A-1215(a) (as it was written at the time) and N.C.G.S. § 15A-2000(a)(2), the *Bunning* Court found

1. In *Bindyke*, the alternate juror was present in the jury room during deliberations, *with the original twelve jurors*, which "negate[d] a defendant's right to trial by jury . . . of twelve in the inviolability, confidentiality and privacy of the jury room." 288 N.C. at 626–27.

these "sections clearly show that the General Assembly did not intend that an alternate can be substituted for a juror after the jury has begun its deliberations." *Id.* at 257.

Although the *Bunning* Court concluded that the substitution was indeed an error and granted the defendant a new sentencing hearing, it is unclear whether our Supreme Court applied a constitutional or statutory rule. *See id.* at 256–57. If the substitution of an alternate juror violates the face of Section 24 of the Constitution, it is unclear to me why the Court proceeded with a lengthy statutory analysis and weighed the General Assembly's intent. However, if we are to consider the General Assembly's intent, the 2021 amendment certainly seems to show that the General Assembly now intends to allow for jury substitution after deliberations begin—at least in the guilt or innocence phase of the trial. Also of note, *Bunning* dealt with a capital proceeding, whereas the 2021 amendment addresses rules governing the substitution of alternate jurors in non-capital proceedings, not capital ones.

I find these facts notable because in North Carolina, the same jury is required to decide both guilt or innocence and then decide if the crime for which they found the defendant guilty warrants the imposition of the death penalty. In *Bunning*, one jury found the defendant guilty of the crime, and because of the substitution during the penalty phase, a different jury determined the penalty. Because guilt had already been determined, the jury could not truly begin deliberations again since eleven of the twelve had already determined guilty, and nothing the substitute juror said or contributed could have changed that. Thus, more than twelve individuals contributed to the verdict. Conversely, in the present case, the jury had not determined defendant's guilt before the substitution; accordingly, in my view, the jury that determined defendant was guilty was properly constituted.

Second, I disagree that N.C.G.S. § 15A-1215(a) as amended violates a defendant's constitutional right to a jury of their peers. I believe the trial court's instructions that deliberation must begin anew once a substitution occurs protect that right. The *Chambers* panel seems to reason that we cannot rely upon a jury to do this. Such reasoning would serve to upend decades of our state's jurisprudence that it is presumed that the jury will follow the trial court's instructions. *E.g.*, *State v. McCarver*, 341 N.C. 364, 384 (1995) ("Jurors are presumed to follow a trial court's instructions."). If we cannot rely upon the jury to do so in this case, how can we presume that juries will do so in other cases?

Thus, I concur in the result only.

GRIFFIN, Judge, concurring by separate opinion.

Although the instant case was heard 8 August 2023, nearly six months prior to *State v. Chambers*, 292 N.C. App. 459, 898 S.E.2d 86 (2024), the Court filed its opinion in *State v. Chambers* first, thereby establishing precedent. *See In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). Thus, the lead opinion, while seemingly displeased with the Court's prior decision in *State v. Chambers*, recognizes that because it was delayed in executing this opinion, it is now bound by the Court's holding in *Chambers*.

I too am bound by the Court's prior decision in *Chambers* and therefore agree with the result of the lead opinion here. Nonetheless, I write separately as I disagree with the lead opinion's disparaging tone and find its interpretation of the Court's opinion in *Chambers* to be at the very least unclear, if not fundamentally misleading.

The lead opinion repeatedly attacks the Court's opinion in *Chambers*, stating the opinion lacks analysis and further fails to "explain *how* or *why* a verdict delivered in open court by a properly constituted and instructed jury of twelve in compliance with [N.C. Gen. Stat. § 15A-1215(a)] violates [Article I, Section 24] of the North Carolina Constitution." I disagree.

The *Chambers* Court, while admittedly weaving the two issues together, clearly addresses: (1) Whether the defendant, despite his failure to object at trial, preserved his contentions regarding the alternate-juror substitution and the constitutionality of N.C. Gen. Stat. § 15A-1215(a) for appellate review; and (2) Whether an alternate-juror substitution after deliberations have begun and/or the General Assembly's 2021 amendment to N.C. Gen. Stat. § 15A-1215(a) violates our State Constitution.

In addressing whether the defendant preserved his contentions for appellate review, the *Chambers* Court specifically noted the existence of a conflict between the Court's opinions in *State v. Hardin*, 161 N.C. App. 530, 588 S.E.2d 569 (2003), and *State v. Lynn*, 290 N.C. App. 532, 892 S.E.2d 883 (2023).

In *State v. Hardin*, the defendant, despite having failed to object at trial, argued the trial court erred in making an alternate-juror substitution after deliberations had begun. 161 N.C. App. at 532, 588 S.E.2d at 571. The *Hardin* Court held a defendant's failure to object to an alternate-juror substitution was of no consequence as "[a] trial by a jury which is improperly constituted is so fundamentally flawed that the

verdict cannot stand." *Id.* at 533, 588 S.E.2d at 571 (internal marks and citation omitted).

In *State v. Lynn*, the Court was faced with a similar issue. The defendant, despite having failed to object at trial, argued the jury verdict against him was reached by more than twelve jurors because the trial court made an alternate-juror substitution after deliberations had begun. 892 S.E.2d at 886, 290 N.C. App. at 537. The defendant also challenged the constitutionality of N.C. Gen. Stat. § 15A-1215(a). However, unlike the *Hardin* Court, the *Lynn* Court held, because the defendant neither objected to the substitution nor the constitutionality of N.C. Gen. Stat. § 15A-1215(a) at trial, he failed to preserve his arguments for appellate review. *Id.*

The *Chambers* Court, in identifying the direct conflict between *Hardin* and *Lynn*, cited to *State v. Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d 886, 888 (2019). In *Gonzalez*, the Court acknowledged that generally, where a panel of this Court has previously decided a legal issue, a subsequent panel of this Court " 'is bound by that precedent, unless it has been overturned by a higher court.' " *Id.* at 531, 823 S.E.2d at 888 (quoting *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). However, *Gonzalez* also recognized our Supreme Court has authorized this Court, when faced with two irreconcilable precedents, to disregard the more recent precedent. *Id.* at 531, 823 S.E.2d at 889 ("These arise when two lines of irreconcilable precedent develop independently—meaning the cases never acknowledge each other or their conflict, as if ships passing in the night.") Thus, it follows that where *Lynn* and *Hardin*—two cases decided by this Court which contemplate the same issue—directly conflict, with *Lynn* failing to acknowledge *Hardin*, the *Chambers* Court was authorized to disregard *Lynn* and follow *Hardin* in deciding whether the defendant's contentions were preserved for appellate review.

The lead opinion seems to suggest the *Chambers* Court erroneously relied on *Hardin*, noting "it was published approximately 18 years *before* the amendment at issue." However, the lead opinion's position here is misleading as the 2021 amendment is irrelevant to the *Chambers* Court's application of *Hardin*. Although *Hardin* was decided on similar issues to those presented in *Chambers*, the *Chambers* Court relied on *Hardin* only in determining whether the defendant had preserved his issues for appellate review, not in determining the constitutionality of the 2021 amendment.

In addressing the defendant's contention regarding the constitutionality of the 2021 amendment, the *Chambers* Court relied primarily on

the Court's decision in *State v. Bunning*, 346 N.C. 253, 485 S.E.2d 290 (1997). In *Bunning*, the trial court made an alternate-juror substitution after deliberations had begun in a sentencing hearing and instructed the jury to begin its deliberations anew. 346 N.C. at 255, 485 S.E.2d at 291. On appeal, the Court stated Article I, Section 24 of the North Carolina Constitution contemplates no more or less than a jury of twelve persons. *Id.* at 256, 485 S.E.2d at 292. Further, the Court held, regardless of the trial court's instruction to begin its deliberations anew, the jury verdict was reached by more than twelve persons as the substitution was made after deliberations had begun and therefore "eleven jurors fully participated in reaching a verdict, and two jurors participated partially in reaching a verdict." *Id.* The Court then proceeded to discuss the intent of the General Assembly in analyzing N.C. Gen. Stat. § 15A-1215(a) and other relevant statutes. *Id.* at 256–57, 485 S.E.2d at 292. However, it is unclear whether the Court intended this statutory analysis to have any implication on its interpretation of Article I, Section 24, or whether it existed as a separate analysis altogether.

Since the Court's opinion in *Bunning*, N.C. Gen. Stat. § 15A-1215(a) has been amended, effectively invalidating the *Bunning* Court's interpretation of the previous version of that statute. Nonetheless, this Court is still seemingly bound by the *Bunning* Court's interpretation of Article I, Section 24, as our Constitution remains unchanged. Thus, insofar as the *Bunning* Court held, based on its interpretation of Article I, Section 24, it was unconstitutional for the trial court to make an alternate-juror substitution after deliberations had begun, the *Chambers* Court was required to hold the same.

For this reason, the *Chambers* Court highlighted the dichotomy between the Court's opinion in *Bunning* and the 2021 amendment to N.C. Gen. Stat. § 15A-1215(a) which allows for an alternate-juror substitution after deliberations have begun. The *Chambers* Court then cited to the Supreme Court's opinion in *Bayard v. Singleton*, 1 N.C. 5, 3 N.C. 42, 1 Martin 48 (1787), and *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989), merely to illustrate the issue before the *Chambers* Court: The 2021 amendment, based on the Court's constitutional interpretation in *Bunning*, impermissibly conflicts with Article I, Section 24, of our State Constitution and effectively overrules the *Bunning* Court's decision. *Chambers* then recognizes, regardless of its holding, the Supreme Court must resolve the issue raised by the appeal, noting: "[I]ssues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by [our Supreme] Court." *Chambers*, 292 N.C. at

462, 898 S.E.2d at 88 (quoting *State ex rel. Martin*, 325 N.C. at 449, 385 S.E.2d at 479 (internal marks omitted)).

As an error-correcting Court, we could have resolved this matter with a brief, unpublished opinion. It is unfortunate the lead opinion chose to use this appeal to attack the *Chambers* Court at the cost of unnecessary delay while arriving at the same result, as we are bound by precedent until it is overruled.

STATE OF NORTH CAROLINA
v.
DIEGO LEANDER YOUNG

No. COA23-608

Filed 18 June 2024

1. Criminal Law—jury instructions—special instruction—not submitted in writing—not an accurate statement of law

In a trial on multiple charges related to a home break-in, the trial court did not err in denying defendant's request for a special jury instruction, namely, that a latent palm print matched to defendant found on the shotgun recovered from the victim's apartment could only be considered evidence of defendant's guilt if the jury believed that the print "was found in the place where the crime was committed under such circumstances and could only have been put there when the crime was committed." The special jury instruction was not submitted to the trial court in writing and did not constitute a correct application of the law to the facts of defendant's case in that, as to the only offense on which defendant was convicted—possession of firearm by a felon—the evidence before the jury demonstrated that defendant could only have placed his palm print on the firearm at a time when he was a felon and, thus, whether that placement occurred during the burglary, robbery, and assault leading to the additional charges (of which defendant was acquitted) was irrelevant.

2. Evidence—pretrial photographic identification—impermissibly suggestive—harmless beyond a reasonable doubt

In a trial on multiple charges related to a home break-in where defendant's identity as the perpetrator was at issue, the trial court's admission of the victim's pretrial identification of defendant was

error in light of its finding of fact that the identification was impermissibly suggestive because law enforcement had provided the victim with defendant's name as an arrested suspect whose palm print matched one recovered from the shotgun used against the victim, and the victim then researched defendant online and attended defendant's bond hearing. However, given defendant's acquittal on all charges other than possession of a firearm by a felon—for which other evidence was introduced, including that defendant was already a felon when he gained access to the gun that had his palm print on it—any error in the identification of defendant as the perpetrator of the burglary, robbery, and assault against the victim was harmless beyond a reasonable doubt as to the firearm possession charge

3. Criminal Law—prosecutor's arguments—reference to excluded evidence

In a trial on charges of first-degree burglary, robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon—only the latter of which resulted in a guilty verdict from the jury—the trial court did not err in failing to intervene in the absence of an objection by defendant when, during closing arguments, the prosecutor described a detective's reference to photographs recovered from defendant's cellphone depicting defendant holding a firearm as "important evidence" even though the trial court had excluded the photographs themselves after determining that their probative value was substantially outweighed by their prejudicial impact. As the detective had been allowed to testify about the photographs without any objection by defendant, the prosecutor's reference to testimony already in evidence was not improper, much less grossly improper and prejudicial.

Appeal by Defendant from judgment entered 16 December 2022 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Gary Adam Moyers, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for Defendant.

WOOD, Judge.

On 16 December 2022, a jury convicted Diego Young ("Defendant") of being a felon in possession of a firearm. Defendant appeals, arguing the trial court erred in denying defense counsel's request for a special instruction, allowing Troy Walker ("Walker") to testify regarding a pre-trial identification of Defendant, and failing to intervene *ex mero motu* during the prosecutor's closing argument. For the reasons stated herein, we hold the trial court committed no prejudicial error.

I. Factual and Procedural History

On the evening of 21 February 2020, Walker was preparing to leave his apartment in Charlotte, North Carolina to play pool with a friend. While Walker was sitting on the edge of his bed watching TV, he heard a loud crash and saw a black man holding a shotgun and standing at the door. The intruder wore a black baseball cap with the brim pushed down low and a bandana mask over his nose and chin and stretching around his ears. Walker could see the intruder's eyes, the top part of his nose, his brow, and part of his cheeks. The intruder shouted commands such as "stay there, don't move," until he came closer to Walker and made more specific demands, asking where money and jewelry were located. Walker complied with the intruder's commands, handing over his wife's jewelry box, his wedding ring, and his Cuban chain necklace.

Walker stated, "you don't have to kill me" because the intruder was pointing the shotgun at his chest and face. Walker felt strange about this home invasion because where he is from, "these guys, they come in, they take what they want, and leave." Walker was "really concerned" about the intruder and was studying his facial features, mannerisms, body language, and voice to see who he was dealing with and, in case he survived, so that he could do a lineup and recognize the intruder. Walker noticed the intruder's eyes were distinct because they were "really dark, kind of like he wear[s] eyeliner or mascara." The intruder forced Walker to request money from a friend on Cash App, so Walker called the friend with whom he was going to meet to play pool. However, the friend told Walker just to come out and play pool and that he could give him money then. The intruder became frustrated and told Walker to hang up. He was close enough to Walker to nudge the phone out of his hand.

The intruder told Walker to turn around, get on his knees, and put his hands behind his head. Walker initially thought this would be the last day of his life, but "something else kicked in," and he decided to take action. Walker stood up from the bed, came face-to-face with the intruder, and then lunged, grabbed the gun, pulled it toward him, and elbowed the intruder in the chin. The intruder fell and fired the shotgun, shooting Walker in the arm and stomach. Although injured, Walker

struggled for the gun and wrestled it away from the intruder, who then ran out of the apartment.

Using the shotgun as a cane to stand up, Walker attempted to chase after the intruder but became weak, so he knocked on a neighbor's door for assistance. Having heard the commotion, a different neighbor had called the police. The Charlotte Fire Department treated Walker's injuries on the sidewalk. Responding officers recovered the shotgun from Walker's front porch. Walker was transported to a hospital where he was treated and hospitalized for seven days. Walker testified that due to the gunshot injuries, his kidneys and lungs collapsed, and he had to have a portion of his intestines removed, and his arm is now numb. After his discharge, he had to return to the hospital for another seven or eight days because his body was shutting down.

Detective Luke Amos ("Detective Amos"), the lead investigator in the case, identified the owner of the shotgun as Alshonda Robinson ("Robinson"). Detective Amos spoke with Robinson at her home and learned that she had a relationship with Defendant. According to Detective Amos, Robinson described the nature of her relationship with Defendant as "somewhat confusing." Specifically, he testified at trial, "There may or may not have been some kind of romantic relationship involved, but they were, at minimum, friends."

Detective Amos also investigated the vehicle reported to be involved in the home invasion, a silver Honda. He became aware of the suspect vehicle due to a "BOLO" ("be on the lookout") bulletin that was sent out to officers after the crime occurred. Detective Amos testified he noticed a silver Honda Accord at Robinson's address while he spoke with her at her home.

Subsequent to the home invasion, Walker attempted to search online to determine if the intruder had been arrested. Approximately a week and a half or two weeks after the home invasion, an officer told Walker that Defendant had been arrested and provided Walker with Defendant's name. Walker did not recall exactly which officer gave him Defendant's name, but he believed it was Detective Amos. Walker was told by law enforcement that viewing a photo lineup would not be in his best interest because:

> it can work against you if you go and pick somebody without seeing their face clear[ly] and it's not them . . . . So we didn't do the lineup or the mugshot at that point because of that because they said it wouldn't be smart, it wouldn't help the case, the situation, if I went and saw a mugshot and didn't pick out anyone or if I did pick out the wrong one. So I just excluded the option of a mugshot.

Detective Amos believed he was the one who told Walker that a suspect was arrested, although he did not recall giving Defendant's name to Walker. At trial, he testified why a photo lineup was not conducted in this case:

> Because of the description that was given by [Walker], a hat pulled low and a mask across the face, that's not something that would be viable for us in this situation.
>
> . . .
>
> It would not be practical. It would -- most people, no matter who they are, are not going to be able to pick out just a set of eyes, which is what basically is what he sawduring this incident.
>
> . . .
>
> I say "most," I would say almost no one unless it was a person that they already knew, and if they already knew that person, there would be no purpose for a photo lineup.

After being told Defendant's name, Walker searched the name online, found Defendant's picture, and was "100 percent" certain the picture of Defendant portrayed the man who had broken into his apartment. Walker focused on Defendant's eyes and was sure they belonged to the man who broke into his home. However, prior to a detective giving Walker Defendant's name, Walker never told law enforcement that he would be able to identify Defendant by his eyes.

On 25 September 2020, Walker attended Defendant's bond hearing. According to Walker, he immediately recognized Defendant as the intruder even though Defendant wore a mask in the courtroom due to the implementation of COVID-19 procedures. Walker told the prosecutor at the hearing that he recognized Defendant as the person who had invaded his home with a shotgun. The prosecutor, in turn, had Walker provide a statement detailing Walker's identification of Defendant. The statement noted Walker was present at the bond hearing and stated:

> Unsolicited from . . . myself, Mr. Walker commented that when he saw the defendant come into the courtroom they locked eyes and he knew 100% that it was the individual that assaulted him with a shotgun and attacked him. He went on to explain that although the attacker had a mask covering part of his face that night, he could see his eyes and the features around his eyes and during their struggle

> got a good opportunity to see that part of his face. He was clear that he was 100% sure that the defendant was the person who attacked him that night. The Defendant had also spoken in the courtroom when asked by the Judge questions regarding counsel and Mr. Walker also indicated he had heard the defendant's voice and recognized that voice to be the same voice of his attacker.

On 6 April 2020, a warrant was issued for Defendant's arrest for possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. On 15 June 2020, a grand jury indicted Defendant on the same offense. On 14 June 2021, Defendant was separately indicted for attaining habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1. Defendant was also indicted on the charges of first-degree burglary, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury.[1]

Defendant's case came on for trial at the 12 December 2022 criminal session of Mecklenburg County Superior Court. At trial, William Trantham ("Trantham"), a latent fingerprint examiner at the Charlotte Mecklenburg Police Department's crime laboratory, was tendered as an expert in the field of fingerprint analysis without objection. Trantham testified that a latent print is one that is hidden and needs processing to become visible to the human eye. Trantham testified he discovered a latent palm print on the shotgun recovered at Walker's apartment. The palm print was an "AFIS value print," meaning the print "contains sufficient quality and quantity of ridge features that allow it to be searched through" the AFIS ("Automated Fingerprint Identification System") database. Trantham searched the print through the AFIS database, and it returned the top five potential donors, or sources, of the print. Upon closer analysis of the palm print and Defendant's exemplar print, Trantham formed an opinion that they matched.[2] On cross-examination, he testified he could not ascertain from his analysis of the palm print whether it was imprinted the day of the break-in.

During jury deliberations, the jury submitted a note to the trial court in which it asked, "Does the charge Firearm by [a] Felon mean that the

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1. These indictments do not appear in the Record. However, the trial court included those indictments when it listed the charged offenses. The jury reached a verdict of not guilty on these charges.

2. Trantham testified that an exemplar print is a "known fingerprint," in other words, "a known reproduction of the friction ridge skin on the palms of the hands. . . . It's an intentional recording of friction ridge skin."

defendant cannot even touch a firearm?" In response to the jury's question, the trial court brought the jury back into the courtroom and reread the pattern jury instructions on possession of a firearm by a felon. The trial court also read the definition of actual possession: "A person has actual possession of an article if the person has it on the person, is aware of its presence, and either alone or together with others has both the power and intent to control its disposition or use."

The jury convicted Defendant of the offenses of possession of a firearm by a felon and of attaining habitual felon status and acquitted Defendant of the remaining charges. Defendant entered oral notice of appeal in open court. Other relevant facts are provided as necessary in our analysis.

II. Analysis

Defendant argues the trial court erred in: (1) failing to provide a jury instruction stating that a palm print found on the shotgun could only be considered if placed there when the crime was committed; (2) allowing Walker to testify regarding his pretrial identification of Defendant despite the trial court's determination that the pretrial identification procedure was impermissibly suggestive; and (3) failing to intervene *ex mero motu* when the State argued in its closing argument that photos discovered on Defendant's phone depicting him holding firearms were "important evidence."[3] We address each argument in turn.

A. Jury Instruction Regarding Fingerprints

[1] Defendant argues the trial court erred in failing to give a jury instruction that the jury could only consider "evidence about fingerprints" if the jury found the fingerprints were "found in the place the crime was committed" and were "put there when the crime was committed." The State argues the trial court did not err in denying defense counsel's request for the jury instruction and Defendant failed to preserve this issue for appeal because such a jury instruction constitutes a special instruction and therefore was required to be requested in writing, which defense counsel did not do.

A request for a special instruction which deviates from the pattern jury instruction qualifies as a special instruction. *State v. Brichikov*, 281 N.C. App. 408, 414, 869 S.E.2d 339, 344 (2022); *see also State v. McNeill*, 346 N.C. 233, 239–40, 485 S.E.2d 284, 288 (1997) (defendant's oral request

3. The trial court excluded the photographs from evidence, though Detective Amos had testified without objection that the photographs depicted Defendant with firearms in his possession.

to modify pattern jury instruction for premeditation and deliberation was "tantamount to a request for special instructions"). "In North Carolina, requests for special jury instructions are allowable under N.C.G.S. §§ 1-181 and 1A-1, Rule 51(b) of the North Carolina General Statutes." *State v. McNeil*, 196 N.C. App. 394, 405, 674 S.E.2d 813, 820 (2009). Requests for special instructions *must* be in writing, entitled in the cause, and signed by the counsel or party submitting them. N.C. Gen. Stat. § 1-181(a); N.C. R. Civ. P. 51(b).[4] Rule 21 of the General Rules of Practice for the Superior and District Courts also addresses special instructions, directing that they be submitted in writing, though this rule does not appear to be explicitly mandatory: "If special instructions are desired, they *should be* submitted in writing to the trial judge at or before the jury instruction conference." N.C. Super. Ct. & Dist. Ct. R. 21 (emphasis added).

"This Court has held that a trial court's ruling denying requested instructions is not error where the defendant fails to submit his request for instructions in writing." *McNeill*, 346 N.C. at 240, 485 S.E.2d at 288 ("Defendant here did not submit either of his proposed modifications in writing, and therefore it was not error for the trial court to fail to charge as requested"); *see also Brichikov*, 281 N.C. App. at 414, 869 S.E.2d at 344 ("A request for a culpable omission instruction would be a deviation from the pattern jury instruction, qualify as a special instruction, and would have needed to be submitted to the trial court in writing"); *State v. Martin*, 322 N.C. 229, 236–37, 367 S.E.2d 618, 622–23 (1988) (defendant failed to request special instruction in writing and therefore, the issue was not preserved on appeal, and the trial court did not err in failing to give the requested instruction in the absence of a written request).

Here, during the charge conference, defense counsel stated, "the only other *special instruction* I would ask for is one regarding fingerprint evidence and fingerprints. . . . It's one that was created, so I can read it." (Emphasis added). The prosecutor asked defense counsel, "You said one that was created?" Defense counsel responded, "Uh-huh. *A special jury*

4. We note the mandatory language ("must") is employed in both N.C. Gen. Stat. § 1-181 and N.C. R. Civ. P. 51(b). The State cites N.C. Gen. Stat. § 15A-1231 for the proposition that the statute "governs the procedure for instructing the jury in a criminal case." Specifically, the State quotes from the statute, "At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish copies to the other parties at the time he tenders them to the judge." N.C. Gen. Stat. § 15A-1231(a). However, N.C. Gen. Stat. § 15A-1231(a) does not specifically address special instructions; rather, it simply states that at the appropriate time, a party "may" tender written instructions.

instruction." (Emphasis added). Defense counsel read the requested instruction aloud to the prosecutor and the trial court:

> The prosecutor has introduced evidence about fingerprints. You may consider this evidence when you decide whether the prosecutor has proved beyond a reasonable doubt that the defendant was the person who committed the alleged crime. However, fingerprints matching the defendant's fingerprints must have been found in the place the crime was committed under such circumstances and could only have been put there when the crime was committed.

The prosecutor asked defense counsel, "Where is this?" Defense counsel responded, "[W]e created the special instruction."

Defendant did not submit the request for a special instruction in writing. Therefore, Defendant failed to comply with N.C. Gen. Stat. § 1-181(a) and N.C. R. Civ. P. 51(b).

Defendant argues that "[t]here is no indication that the trial court, the State or defense counsel was confused as to what was being requested." More specifically, Defendant argues that the cases in which our appellate courts have required special instructions to be submitted in writing, "the content of the instruction requested was debated but never specified." We disagree.

For example, our Supreme Court in *McNeill* did not indicate there was any confusion as to what special instruction defense counsel was requesting: "During the charge conference, defense counsel requested that the trial court delete all of the listed examples of things from which premeditation and deliberation may be inferred." 346 N.C. at 239, 485 S.E.2d at 288 (citing the specific pattern jury instruction which defense counsel sought to modify). The court in *McNeill* then *quoted* other requests for modifications to jury instructions orally requested by defense counsel. *Id.* The court held, "Defendant here did not submit either of his proposed modifications in writing, and therefore it was not error for the trial court to fail to charge as requested." *Id.* at 240, 485 S.E.2d at 288.

In *State v. Augustine*, our Supreme Court noted that the defendant orally requested "a special jury instruction concerning the testimony and credibility of [a] prosecution witness." 359 N.C. 709, 728, 616 S.E.2d 515, 529 (2005). The court in *Augustine* specifically noted that the defendant "requested the trial court to instruct the jury that at the time of the trial, [a witness] could be facing habitual felon status if he were convicted of a pending felony cocaine charge" and that the trial court should

instruct the jury on the witness' "potential status so it could determine whether that has an impact on his testimony in that case, whether it makes him interested or not." *Id.* (quotation marks omitted). The trial court denied the defendant's oral request for the special instruction but agreed to allow defense counsel "to tender an instruction for the record the next court day." *Id.* (quotation marks omitted). However, defense counsel never submitted a written instruction, and our Supreme Court concluded that where "defendant made no such tender[,] . . . we find no error in the trial court's denial of defendant's oral request." *Id.* at 728–29, 616 S.E.2d at 529–30. As in *McNeill*, the court in *Augustine* was not confused about what instruction defense counsel requested.

Accordingly, we conclude that the trial court and the parties having actual knowledge of the contents of a defendant's requested special instruction does not obviate the requirement that a defendant actually submit a request for a special instruction in writing. Defendant's argument hints at the proposition that orally stating the contents of a requested special instruction constitutes substantial compliance with the requirement to submit such a request in writing and therefore should be accepted in place of actual compliance. However, Defendant cites no rule of law or controlling precedents indicating this Court may accept substantial compliance in place of actual compliance, and we decline to do so.

Defendant further argues that where "[t]he purpose of N.C. R. App. [P.] 10(a)(2) was met," this Court should consider a purported error involving jury instruction preserved. Rule 10 of the Appellate Rules of Procedure states in pertinent part:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2). Defendant cites *State v. Rowe* for the proposition that a request for a jury instruction constitutes an objection, and therefore, requesting a jury instruction preserves the issue for appeal. 231 N.C. App. 462, 752 S.E.2d 223 (2013). Indeed, in *Rowe*, this Court stated, "For the purposes of Rule 10(a)(2), a request for instructions constitutes an objection." *Id.* at 469, 752 S.E.2d at 227. The defendant in *Rowe* specifically requested the trial court to instruct the jury "on

the lesser-included offense of simple assault in addition to the crime of assault inflicting serious injury." *Id.* at 468, 752 S.E.2d at 227. The court held that the defendant preserved the issue for appellate review by requesting the jury instruction on the lesser-included offense.

However, this case is distinguishable from *Rowe*. A request for an instruction on a lesser-included offense is not a request for a deviation from a pattern instruction. *Brichikov*, 281 N.C. App. at 414, 869 S.E.2d at 344; *McNeill*, 346 N.C. at 239–40, 485 S.E.2d at 288. We are unpersuaded by Defendant's argument and hold that the trial court did not err in denying Defendant's request for a special jury instruction regarding fingerprints where he failed to submit such a request in writing. *McNeill*, 346 N.C. at 240, 485 S.E.2d at 288; *Brichikov*, 281 N.C. App. at 414–15, 869 S.E.2d at 344; *Martin*, 322 N.C. at 236–37, 367 S.E.2d at 622–23.

Even if we were to overlook the failure to request the special instruction in writing, we disagree with Defendant's argument that the requested instruction is a correct application of the law to the facts of this case. When a defendant submits an oral request for a special instruction, "it is within the discretion of the court to give or refuse such instruction." *State v. Harris*, 67 N.C. App. 97, 102, 312 S.E.2d 541, 544 (1984). Even if a trial court abuses its discretion in denying such a request, a defendant "is entitled to a new trial only if there is a reasonable probability that, had the abuse of discretion not occurred, a different result would have been reached at trial." *State v. Mewborn*, 178 N.C. App. 281, 292, 631 S.E.2d 224, 231 (2006).

Here, the prosecutor objected to defense counsel's request for the special instruction regarding fingerprints. The trial court asked the prosecutor if she wished to be heard on defense counsel's request, and the prosecutor replied:

> The State absolutely objects to that, Your Honor. It implies that the only way the fingerprints could be considered is some belief that it was put there at the time. That's not necessary to prove the case. It's not necessary that the fingerprints happened there, just like it's not necessary that DNA ends up on a T-shirt that's now placed somewhere. So the State would object to that instruction.

The trial court sustained the prosecutor's objection and denied defense counsel's request for the special instruction.

The requested special instruction would have prohibited the jury from considering Defendant's palm print as evidence that Defendant

"was the person who committed the alleged crime" unless the jury found that the fingerprints were "found in the place the crime was committed under such circumstances and could only have been put there when the crime was committed." Although Defendant argues that without this instruction, it was not "clear that the fingerprints had to be placed on the gun on February 21, 2020 as charged in the indictment and as Mr. Walker alleged," it is not at all clear that defense counsel intended the instruction to pertain specifically to the charged offense of felon in possession of a firearm. During the colloquy on the matter, defense counsel did not specify the offense to which she wished the instruction to be applied. Again, the requested special instruction states:

> The prosecutor has introduced evidence about fingerprints. You may consider this evidence when you decide whether the prosecutor has proved beyond a reasonable doubt that the defendant was the person who committed the alleged *crime*. However, fingerprints matching the defendant's fingerprints must have been found in the place the *crime* was committed under such circumstances and could only have been put there when the *crime* was committed.

(Emphasis added). It is unclear *which* crime the jury was allowed to find Defendant to be the perpetrator of if it found the fingerprints were placed on the shotgun at the place and time the "crime" was committed. It is equally, and perhaps more, reasonable to believe defense counsel intended this instruction to be applied to the offenses of first-degree burglary, robbery with a dangerous weapon, and/or assault with a deadly weapon with intent to kill inflicting serious injury than felon in possession of a firearm. Understood this way, the instruction would have allowed the jury to use the fingerprint evidence as evidence that Defendant was the perpetrator of the home invasion (and, in turn, the offenses specifically related to the home invasion) only if it found that Defendant placed the palm print on the shotgun at the location and time of the home invasion itself. If that were the case, we could not hold the trial court's denial of the special instruction prejudiced Defendant because the jury did not convict him of those offenses.

Even presuming defense counsel intended the requested instruction to apply to the offense of felon in possession of a firearm, the instruction was not a proper application of the law to the facts of the case. Defendant argues, "There was no admissible evidence that [Defendant] possessed a firearm at any time after June 13, 2014, the last conviction for the third underlying felony, and before February 21, 2020, the date of the charge in the indictment." The indictment for possession of a

firearm by a felon states "that *on or about* the 21st day of February, 2020," Defendant possessed a shotgun. (Emphasis added). The date of Defendant's most recent felony is 13 June 2014. Detective Amos testified that Robinson, the original owner of the shotgun, purchased it in 2015. Therefore, Defendant could not have placed his palm print on the shotgun prior to 2015. Trantham testified that he determined the palm print found on the shotgun matched Defendant's exemplar prints, which constitutes substantial evidence tending to show Defendant possessed the shotgun. Moreover, Defendant had a friendship and possible romantic relationship with Robinson, and Detective Amos observed the vehicle suspected to belong to the perpetrator of the offense near Robinson's home. Admissible evidence tended to show Defendant possessed a firearm after 13 June 2014 and on or before 21 February 2020.

A conviction on the charge of possession of a firearm by a felon was not contingent on a conviction for any of the other charged offenses, nor did the trial court instruct the jury in such a manner. Rather, the trial court instructed the jury that to reach a guilty verdict on the offense of felon in possession of a firearm, it had to find: "First, that the defendant was convicted of a felony in violation of the laws of the State of North Carolina. And second, that after the date of his conviction, the defendant possessed a firearm." Nothing about the manner in which the indictment charged Defendant with the offense nor the manner in which the trial court instructed the jury on the offense required the jury to return guilty verdicts on any other offense in order for it to find Defendant guilty of the felon in possession of a firearm offense. Therefore, the jury was not required to find that Defendant placed his palm print on the shotgun at the location or time of the home invasion. Accordingly, we hold the trial court did not abuse its discretion in denying Defendant's request for a special instruction on fingerprints.

Finally, Defendant argues this Court's opinion in *State v. Bradley* is controlling in this case because this Court awarded a new trial where the trial court denied the defendant's request for "an instruction to the effect that fingerprints corresponding to those of the accused were without probative force unless the circumstances showed that they could have only been impressed at the time the crime was committed." 65 N.C. App. 359, 363–64, 309 S.E.2d 510, 513 (1983). In *Bradley*, the defendant was charged with felonious breaking and entering and felonious larceny. *Id.* at 360, 309 S.E.2d at 511. The State's evidence tended to show that between 6:00 p.m. and the early morning hours of the next day, "someone" broke into an accounting office. One of the items stolen was a bulky television set which would have required two people to carry.

An investigator found a latent print on a broken window at the accounting office, and the State's expert witness found that the palm print on the windowpane matched the defendant's. The expert witness "testified that under ideal conditions, the palm print could have remained on the window for six months." *Id.* at 360–61, 309 S.E.2d at 511.

The court in *Bradley* held, "When a requested instruction . . . is correct in law and supported by the evidence, the Court must give the instruction in substance. The requested instruction in the instant case was a correct application of the law to the evidence." *Id.* at 363, 309 S.E.2d at 513 (citation omitted). The court reasoned that the "State relied primarily on fingerprint evidence to prove defendant's guilt" and that the defendant "was entitled to have the jury instructed on the probative value of such evidence." *Id.*

Bradley is distinguishable from the case *sub judice*. For the defendant to be convicted of a larceny that occurred at a particular time and in a particular place, the defendant was entitled to have the jury make a determination whether or not it believed he was physically present at the time and place the crime occurred. In other words, in order to convict the defendant of breaking and entering and larceny, the jury was required to determine whether he broke the window at the time the charged offenses occurred. Here, the language used in the indictment and in the trial court's instruction on the offense of felon in possession of a firearm did not require the jury to find Defendant was at or in Walker's home at the time he possessed the shotgun. Therefore, as explained *supra*, the jury was not required to convict Defendant of any of the charged offenses pertaining directly to the home invasion; rather, it was entitled to convict Defendant of felon in possession of a firearm even if it did not find that he was present at the time and location of the invasion of Walker's home.[5]

B. Walker's Testimony Regarding an Out-of-Court Identification of Defendant

[2] Defendant argues the trial court erred in allowing Walker to testify regarding his out-of-court identification of Defendant because the trial court had ruled that such an identification was so impermissibly suggestive that it prohibited Walker from providing an in-court identification of Defendant.

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5. We note the jury could have acquitted Defendant of the offenses related to the home invasion even if it found that Defendant was in the vicinity of Walker's home at the time the home invasion occurred.

Our Supreme Court has stated:

> Appellate review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. Findings of fact not challenged on appeal are deemed to be supported by competent evidence and are binding on appeal. Even when challenged, a trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.
>
> *Conclusions of law are reviewed de novo and are subject to full review.*

State v. Tripp, 381 N.C. 617, 625, 873 S.E.2d 298, 305 (2022) (citations and quotation marks omitted) (emphasis added).

"Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983); *State v. Hammond*, 307 N.C. 662, 667, 300 S.E.2d 361, 364 (1983); *State v. White*, 307 N.C. 42, 45–46, 296 S.E.2d 267, 269 (1982). In *Harris*, our Supreme Court explained that a trial court must consider "[w]hether a pretrial identification procedure is so suggestive as to give rise to a very substantial likelihood of irreparable misidentification," stating that the determination should be based on "all the circumstances in each case." *Harris*, 308 N.C. at 164, 301 S.E.2d at 95. Even if a pretrial identification procedure is suggestive, "it will be *impermissibly* suggestive only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification." *Id.* (emphasis in original). Specifically, the court enumerated a non-exhaustive list of five "factors to be considered in evaluating the likelihood of irreparable misidentification":

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Id.

In the case *sub judice*, the trial court noted there was a "motion in limine to prohibit in-court identification of Defendant"[6] and stated that the State and defense counsel could conduct a *voir dire* of Walker during the trial. During trial, the State requested the *voir dire* of Walker "as to the issue of ID," and the trial court excused the jury to allow counsel to conduct the *voir dire*. Without the jury in the courtroom, Walker testified to law enforcement providing him Defendant's name, searching Defendant's name online and finding a picture of him, attending Defendant's bond hearing, identifying him at the bond hearing, and providing a statement to the prosecutor regarding the identification. The State introduced Walker's statement as State's Exhibit C ("Exhibit C").

After hearing arguments from counsel on whether Walker should be permitted to make an in-court identification, the trial court questioned the State on the issue and why no lineup was conducted in this case:

> [L]et me ask you this question. You gave me a preview of your case on Monday because the question, at the heart of the case, is identification. And so the question I posed to you is: How was [Defendant] identified as the perpetrator in this case? And I know you mentioned in addition to an identification by the witness, that there was a . . . . palm print. And so I believe – you've told me this, but I believe the evidence will likely show that based on the palm print, that's how [Defendant's] name came into being in this case; is that correct?
>
> [THE STATE]: Yes.
>
> THE COURT: So if law enforcement had his name, why didn't they do a photo lineup?
>
> [THE STATE]: Your Honor, I genuinely cannot answer that question.
>
> THE COURT: Because that's the question of the day. If they had the name on this -- from the palm print, wouldn't it make sense to just put [Defendant's] face in the midst of the six or eight, like they typically do, and then present it and let the chips fall where they may?
>
> [THE STATE]: Certainly.
>
> THE COURT: Versus Mr. Walker saying that he was told that they couldn't do a photo lineup because they didn't

6. The Record does not contain a written motion.

> want to pick the wrong person. Well, that's a good thing. You don't want to pick the wrong person. And so I just don't understand how we got here. I don't think I've ever seen a case where you've been given a name, they know a name of a palm print, they really believe that's a suspect, then why not just put it in a photo lineup and see what happens? I mean, that's what a lineup is for is to make sure there is no misidentification, make sure that someone's rights aren't trampled, to make sure that they're trying to get it right. And here we are, two years later, so it's not like there was some hurry to get to trial, so I just don't know how we got here. I guess the question is probably for Detective Amos or whomever because I don't know how we end up not doing a photo lineup in a case of such magnitude. Somebody got shot and said he almost died but for a surgery, and so I don't know why there was no follow-up with a photo lineup.
>
> . . .
>
> [THE STATE]: You're raising a question that I don't have an answer for, but what we are addressing is whether or not Mr. Walker's identification has probative value or is unduly prejudicial.

The trial court then noted it had analyzed Defendant's motion in limine as an issue of whether the procedure leading to Walker's pretrial identification of Defendant was so impermissibly suggestive as to lead to a witness's misidentification of the purported perpetrator:

> Well, in looking at the case law, knowing that this issue was coming, the issue of in-court identification, you know, does have certain standards that have to be met before the Court can allow the witness to make an in-court identification. . . . [T]his issue arise[s] mostly with photo lineups or show ups, and *not as often with in-court identifications that may have a possibility of misidentification.* And so in my research and reading, the courts will look at what's called the Harris factors to determine whether there is a substantial likelihood of irreparable misidentification. In other words, trying to determine whether a procedure was impermissibly suggestive, and in this case, there really was no procedure because detective just simply gave a name and then Mr. Walker, like any person, he was curious as a victim of a crime, did as he Googled it or

> just looked it up and came up with the face that ended up being [Defendant's] face because he was given the name of [Defendant]. There was no, it could be one of ten people, one of whatever, and then he looked it up. He was given only one name, then looked the face up, then saw [Defendant] come in the courtroom for a bond hearing and said, yes, that's him.

(Emphasis added.) The State pointed out to the trial court that Walker also testified to looking up other names prior to receiving Defendant's name, to which the trial court responded:

> He says, yes [to looking up other names], but what corroborates that? What do I have to tell me that he did that? What says that he looked up five faces, 50 faces, or just one? I don't know. Credibility is always at play. And so I hear what he said, but I really don't have anything that corroborates what he said, and that's my concern.

The trial court made findings regarding the possibility of Walker misidentifying Defendant as the perpetrator, referring to the *Harris* factors, 308 N.C. at 164, 301 S.E.2d at 95:

> [T]he Court has to look at five factors to the extent that you're talking about likelihood of misidentification and view of the totality of the circumstances. The first one we have to look at is opportunity of the witness to view the person at the time of the offense, the second thing we have to look at is the witness's degree of attention, the third thing is the accuracy of the witness's prior description of the perpetrator, the fourth thing is the level of certainty demonstrated by the witness at the confrontation, and the fifth thing is the length of time between the crime and the confrontation. In this case, I can clearly find that the witness, Mr. Walker, did have an opportunity to view the perpetrator. He says his attention was focused on the defendant's eyes. I'll skip the third factor. It says accuracy of the witness's prior description of the perpetrator, third factor. I don't recall hearing any prior description of the perpetrator prior to what he said in court regarding [Defendant] having distinct eyes that appeared to be that of a female or soft eyes or with mascara on I believe he said. The fourth thing is the certainty of the witness at the time of the confrontation. Mr. Walker has said he's 100 percent sure that was him who he encountered the

> night, the same person who's here today. And then the final thing is the time that has elapsed from the time of crime and confrontation. It's been, I guess, two years since . . . . September 2020 [the date of the bond hearing]. And so I've considered those things, but I'll also have to consider based on totality of the circumstances, the role of law enforcement. It's not a factor that's listed in here, but it needs to be considered because I have to make a finding based on clear and convincing evidence, not beyond a reasonable doubt standard. And the factor so far as accuracy of the witness's prior description, well, there was no prior description that I'm hearing of. The description of the eyes is something that's coming up more recently and the prior descriptions also, in my opinion, *tainted by the fact that law enforcement gave Mr. Walker a name that he subsequently looked up* and then attended the bond hearing and then told the officer and Assistant District Attorney Minton, yes, that's the guy. Only after he was given the name, *one name*, *not five*, *one name*, *and then looked it up*. That's highly suggestive, and there is a strong likelihood that he could easily have gotten that wrong because he was only given one name and then subsequent that person comes out with the same name, there is no surprise that he says this is the guy, after learning of the fingerprint on the weapon matching [Defendant] and then attending a bond hearing for [Defendant].
>
> So the Court has concerns that despite the fact that Mr. Walker has said that he's a 100 percent certain that [Defendant] was the perpetrator, that *his level of certainty has been tainted by the fact that he was given a name to highly suggest that it was [Defendant]*. The name of [Defendant] was provided to him. And so I do believe there is a substantial likelihood of irreparable misidentification if I allow Mr. Walker to come in here and point out [Defendant] as being the assailant. It is -- the process leading up to that identification was unnecessarily suggestive, and therefore, I cannot allow the identification to occur in court.

(Emphasis added). Accordingly, the trial court granted Defendant's motion in limine to exclude an in-court identification of Defendant: "So the motion in limine to exclude -- or a motion to suppress to exclude Mr.

Walker's in-court identification of [Defendant] as the perpetrator will be granted."

The State then asked the trial court for clarification regarding its ruling. Specifically, the State asked:

> So the Court has already ruled that the witness will not be able to make an in-court identification. Does that also include during the voir dire the victim testified that he was given [Defendant's name], does that include that portion of the testimony as well as to what he was told by police officers?

The trial court responded:

> Well, I think that's ultimately going to be corroborated by the fingerprint testimony, so when that comes in, the fingerprint goes back -- or palm print goes back to [Defendant], that he was given the name [of Defendant], and so I'm not excluding that. I am excluding him being able to positively identify him in court as the perpetrator, but whatever he learned that you're going to bring in anyway, I don't have any concerns about that.
>
> . . .
>
> That goes to belief as to who he believed did it, but as to certainty and pointing up and saying, yes, he did it, that's what I cannot --

The State then questioned whether it could ask Walker about his identification of Defendant at the bond hearing. The trial court responded:

> You can. And [Defense counsel] will be allowed to cross-examine about the circumstances, which she did on the voir dire.
>
> . . .
>
> If you want to give the -- if you want to make the statement, it needs to be told in its totality as to how he got to that statement. In other words, law enforcement gave him a name, he looked it up. It wasn't based on him telling someone I recognize his eyes, I saw his eyes because that's not what happened. He was given a name, then had a bond hearing, and said that's him.

Defense counsel argued, "It's all tainted and it's prejudicial." The trial court asked the State to clarify how it intended to use the statement, asking, "And so you want to use this statement to present it through . . . Mr. Walker to say that this, essentially, was his statement then, is his statement now, taken down by [the prosecutor at the bond hearing] and adopted by [Walker]." The State responded, "Correct." The trial court then told defense counsel:

> [Y]ou'll be in a position to cross-examine the circumstances about this, how this came to be. . . . I mean, I guess what I'm saying is the statement is what it is, but through cross-examination, I don't see what prohibits you and limits you from giving the circumstances around which this statement was provided.

Defense counsel argued, "the Court has already ruled and granted the motion in limine, he shouldn't be able to talk about any of this stuff anyway." Defense counsel further argued Exhibit C constituted hearsay. The trial court responded:

> But it corroborates – it's corroborating what he said here, and so it's a hearsay exception. And I guess what I'm also saying is [your] motion in limine or motion to suppress was to exclude in-court identification of your client as the perpetrator. I've granted the motion, which means he cannot make an in-court identification. That doesn't speak to whatever else Mr. Walker would say regarding why he believes he's the perpetrator, but him saying he is the perpetrator, pointing him out, that is the in-court identification that I'm excluding. But how he came up with the idea that he may be the perpetrator, you're free to explore any of that, but for him to point him out and say with 100 percent certainty, yes, that's the man who did it, I'm not allowing that because of the level of suggestiveness that was involved on the front end before he said any of this, and that's why I said that you're open to cross-examine him as to any of this, how he came up with these ideas that [Defendant] was the perpetrator. But for him to be able to positively identify him in court, based on what I've heard, that's been tainted, and therefore, I will not allow him to do it in court in front of the jury. But if the State wants to go into the question as to why he believes it was him, I didn't exclude that. But to be able to, yes, that's him, that's what's being excluded, the in-court

> identification. Why he believes that's him, that's one thing, but saying it's him, that's something else.

As for Defendant's argument that an in-court identification by Walker was equally as tainted as his testimony regarding his pretrial identification, the trial court stated:

> He's going to testify that he identified him previously, and this statement corroborates that, but the idea of him coming in today and saying, yes, that is him, I'm not allowing that because that's the basis of the motion is can he make an in-court identification during the course of this trial. Has there been a previous in-court identification, no, that's not what this is. That was a bond hearing. That was not before a jury, that was not a statement under oath, it was at a bond hearing.
>
> . . .
>
> And I see it maybe it's tomato/tomato to you, same thing, but it's not an in-court identification. It's a statement he made at the time, and the context to me is very relevant as the circumstances under which he made that statement.

With the trial court having established the parameters of how Walker could testify, the jury re-entered the courtroom, and Defendant testified to: his Internet searches attempting to find out whether the intruder had been arrested; that he was given Defendant's name, searched it online, and recognized the corresponding image as the face he had seen the night of the crime; his attendance at Defendant's bond hearing; and how he gave a statement to the prosecutor at the bond hearing. Specifically, Walker testified that at the bond hearing, he spoke with someone about recognizing a person in the courtroom that day and that he gave a written statement about his "opinion on the defendant, who he was, that it was him that actually assaulted me." The State then sought admission of State's Exhibit C into evidence, and the trial court allowed it, overruling Defendant's objection. The State published Exhibit C to the jury.

The trial court determined the "procedure" of Walker's pretrial identification of Defendant was impermissibly suggestive based mainly on the fact that law enforcement provided Defendant's name to Walker. Walker, therefore, had one name in mind when he searched online and saw a picture of Defendant. The trial court either did not find as credible Walker's contention that he searched multiple names or, even if Walker did search multiple names, such "procedure" was insufficient to

overcome the suggestiveness of Walker being provided only one name by law enforcement and then attending Defendant's bond hearing and communicating his identification to the prosecutor. We note that of the five *Harris* factors, the trial court stated at least two of them weighed in favor of a finding that the pretrial identification procedure did not result in a substantial likelihood of irreparable misidentification: (1) Walker had an opportunity to view the perpetrator during the crime; and (2) Walker was "100 percent" certain Defendant was the perpetrator. *See Harris*, 308 N.C. at 164, 301 S.E.2d at 95 (listing the five factors). However, the trial court determined the most significant problem was that law enforcement provided only one name to Defendant, which likely influenced Walker's belief at the bond hearing that Defendant was the perpetrator.

Next, the parties debate whether there was indeed a State-initiated "procedure" as such. The State argues Walker's pretrial identification cannot really be considered an identification *procedure* because Defendant began searching online of his own accord, attended the bond hearing of his own accord, and approached the prosecutor at the bond hearing of his own accord. Specifically, the State argues, "as the *sine qua non* to [Defendant's] due process claim, a pre-trial identification procedure by law enforcement or the prosecution did not occur here." However, as the trial court noted, a law enforcement officer provided Defendant's name to Walker, and a prosecutor recorded Walker's statement identifying Defendant as his assailant. The State further argues the trial court did not in fact decide that law enforcement used an unnecessarily suggestive identification procedure. We find this contention impossible to reconcile with the trial court's finding that "the process leading up to that identification was unnecessarily suggestive, and therefore, [the trial court] cannot allow the identification to occur in court." It is particularly relevant, as the State admits, that the State does not appeal the trial court's determination of whether the pretrial identification was impermissibly suggestive, and "[i]t is not the responsibility of this Court to construct arguments for a party." *Foster v. Crandell*, 181 N.C. App. 152, 173, 638 S.E.2d 526, 540 (2007). Accordingly, the propriety of the trial court's ruling on the motion in limine is not before us. Rather, we must determine whether the trial court prejudicially erred in allowing Walker to testify about the pretrial identification that it had found was impermissibly suggestive.

Our Supreme Court has stated explicitly that "[i]dentification evidence *must be excluded* as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable

misidentification." *Harris*, 308 N.C. at 162, 301 S.E.2d at 94 (emphasis added). In the trial court's ruling on the motion in limine, it found the officer's provision of only one name to Walker:

> *highly suggestive*, and there is a strong likelihood that he could easily have gotten that wrong because he was only given one name and then subsequent that person comes out with the same name, there is no surprise that he says this is the guy, after learning of the fingerprint on the weapon matching [Defendant] and then attending a bond hearing for [Defendant].
>
> So the Court has concerns that despite the fact that Mr. Walker has said that he's a 100 percent certain that [Defendant] was the perpetrator, that his level of certainty has been tainted by the fact that he was given a name to highly suggest that it was [Defendant]. The name of [Defendant] was provided to him. And so I do believe *there is a substantial likelihood of irreparable misidentification* if I allow Mr. Walker to come in here and point out [Defendant] as being the assailant. It is -- the process leading up to that identification was unnecessarily suggestive, and therefore, I cannot allow the identification to occur in court.

(Emphasis added.) Therefore, the trial court did make a finding that the pretrial identification was impermissibly suggestive, leading to a substantial likelihood of irreparable misidentification. Once the trial court made that finding, it was required to exclude the identification evidence which it found was impermissibly suggestive. *Harris*, 308 N.C. at 162, 301 S.E.2d at 94. In other words, the trial court's factual findings did not support its conclusion of law that Walker's testimony regarding pretrial identification was admissible. *Tripp*, 381 N.C. at 625, 873 S.E.2d at 305. Accordingly, we are constrained to hold that the trial court erred in allowing Walker to testify regarding the pretrial identification after finding it to be impermissibly suggestive.

We reach this conclusion notwithstanding the trial court's attempt to differentiate between Walker's pretrial identification of Defendant and an in-court identification. The admission of the written statement identifying Defendant as the person who attacked Walker was a *de facto* in-court identification. Further, although the trial court referred to Defendant's motion as a "motion in limine to prohibit *in-court* identification," the trial court made it clear it was addressing the motion as one attempting to exclude an impermissibly suggestive pretrial identification

under *Harris*. The trial court used the specific language from *Harris*, listing the five factors delineated in the case for "evaluating the likelihood of irreparable misidentification." 308 N.C. at 164, 301 S.E.2d at 95. Therefore, we cannot avoid the conclusion that the motion in limine and the trial court's ruling on it triggered the analysis, as well as the possible exclusion of evidence, as required by *Harris*. Accordingly, we are constrained to hold the trial court erred in prohibiting an in-court identification but thereafter allowing testimony about the pretrial identification.

We now address whether the trial court's error was prejudicial error. Defendant argues the testimony regarding Walker's pretrial identification prejudiced him because it is the only evidence besides that of his palm print on the shotgun tending to identify him as the perpetrator.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b). An error involving an impermissibly suggestive pretrial identification implicates a defendant's federal due process rights. *State v. Juene*, 263 N.C. App. 543, 544–45, 823 S.E.2d 889, 891 (2019). Accordingly, we must determine whether the error was harmless beyond a reasonable doubt.

The State argues any error is harmless beyond a reasonable doubt because there was evidence submitted other than Walker's pretrial identification which links Defendant to possession of the shotgun. Specifically, the State argues the jury would have returned a guilty verdict even without the testimony of Walker's identification of Defendant because: (1) Defendant's palm print was discovered on the shotgun; (2) Defendant knew Robinson, the owner of the shotgun; and (3) Detective Amos observed a vehicle matching the description of the suspect vehicle which was sent out in the BOLO the night of the incident. We agree.

Clearly, the palm print's link to Defendant is the strongest evidence that at some point Defendant had possessed the shotgun. The State's expert witness in fingerprint analysis, Trantham, testified he formed an opinion that the palm print on the shotgun matched Defendant's exemplar print. Specifically, Trantham explained that upon his original search of the latent palm print in the AFIS database, the database returned results for "the top five potential donors." Trantham determined that Defendant's exemplar print needed further comparison with the latent palm print. Therefore, he more closely analyzed Defendant's exemplar print. Comparing Defendant's exemplar print to the latent palm print discovered on the shotgun, Trantham formed an opinion that they

originated from the same source—Defendant. Upon cross-examination, Trantham noted that an analysis of the latent palm print did not reveal on what precise date Defendant imprinted his palm print on the shotgun.

Trantham's testimony that the palm print on the shotgun matched Defendant's exemplar print is substantial evidence, separate and apart from Walker's identification of Defendant as the perpetrator of the home invasion, that Defendant possessed the shotgun. The fact that Defendant's palm print was imprinted on the shotgun constitutes evidence that he possessed or held the shotgun at some point. This is true even though Trantham conceded he could not tell when Defendant left his palm print on the shotgun. The indictment for felon in possession of a firearm alleges Defendant possessed the shotgun "*on or about* the 21st day of February, 2020." (Emphasis added.) In accordance with the indictment, the trial court did not instruct the jury that it was required to find Defendant possessed the shotgun on 21 February 2020, the date of the home invasion.[7] The trial court instructed the jury that it had to find two elements existed in order to convict Defendant of feloniously possessing a firearm: "First, that the defendant was convicted of a felony in violation of the laws of the State of North Carolina. And second, that after the date of his conviction, the defendant possessed a firearm." Therefore, given the testimony at trial—that Defendant, on an unknown date in or after 2015, imprinted his palm print on the shotgun—the jury had substantial and convincing evidence allowing it to convict Defendant for feloniously possessing a firearm.

Moreover, although the evidence that Defendant imprinted his palm print on the shotgun is the *strongest* evidence he possessed it, it is not the *only* such evidence. Circumstantial evidence also links Defendant to possession of the shotgun. Detective Amos testified that Robinson was the original purchaser of the shotgun, and that Robinson and Defendant were, at a minimum, friends, and may have been involved in a romantic relationship. Detective Amos further testified that while he was speaking with Robinson at her home, he noticed a silver Honda Accord, the

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7. We note that for every other charged offense, the trial court instructed the jury that it was required to return a conviction if it found "from the evidence beyond a reasonable doubt that *on or about the alleged date*," the Defendant committed the charged offense. (Emphasis added.) Instead of including such language in its instruction on the offense of felon in possession of a firearm, the trial court instructed, "If you find from the evidence beyond a reasonable doubt that the defendant was convicted of a felony that was committed in violation of the laws of the State of North Carolina, and that the defendant, after February 21, 2020, possessed a firearm, it would be your duty – I'm sorry, *after June 13, 2014, possessed a firearm*, it would be your duty to return a verdict of guilty." (Emphasis added.)

vehicle suspected to belong to the perpetrator of the home invasion, at or near Robinson's address. Detective Amos' testimony serves as independent evidence, apart from Walker's identification of Defendant, linking Defendant with possession of the shotgun. The logical connection is that Defendant could have obtained, or in some manner taken, the shotgun from Robinson. Furthermore, although the jury acquitted Defendant of all other charged crimes, the jury could have believed that because Defendant had a relationship with Robinson, he could have had access to the car suspected to belong to the perpetrator of the home invasion because of his palm print on the shotgun and the location of the vehicle near Robinson's home.

Although Walker's identification of Defendant may have been prejudicial to the other charged crimes of first-degree burglary, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury, the jury acquitted Defendant of those charged offenses.

Walker identified Defendant as the intruder of his home and as the one who had robbed and assaulted him. Clearly, the jury either did not find Walker's identification of Defendant as the perpetrator credible, or it retained a reasonable doubt that Defendant was the perpetrator of those crimes. It is not this Court's duty to determine why the jury would have convicted Defendant for feloniously possessing a firearm but not guilty of the other charged crimes. *See State v. Mumford*, 364 N.C. 394, 399, 699 S.E.2d 911, 915 (2010) ("verdicts cannot be upset by speculation or inquiry into" how juries reach a verdict). Substantial evidence apart from Walker's identification of Defendant supported the jury's guilty verdict for the offense of feloniously possessing a firearm.

Accordingly, we are satisfied that the trial court's error in prohibiting Walker from identifying Defendant in court yet allowing Walker to testify regarding his pretrial identification was harmless beyond a reasonable doubt in light of other substantial evidence demonstrating Defendant feloniously possessed a firearm. *See* N.C. Gen. Stat. § 15A-1443(b).

C. The Prosecutor's Closing Argument

[3] Defendant argues the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing argument. Defendant contends the trial court should have intervened when the prosecutor mentioned that photographs from Defendant's cellphone showing him holding a firearm were "important evidence," even though the trial court had prohibited the prosecutor from showing the photographs to the jury and entering them into evidence.

When a party makes allegedly improper closing arguments without provoking an objection, our standard of review when assessing the remarks is whether they

> strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). In determining whether an argument is grossly improper, appellate courts consider "the context in which the remarks were made, as well as their brevity relative to the closing argument as a whole." *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) (citation omitted). We will not "review the exercise of the trial judge's discretion in controlling jury arguments unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *State v. Taylor*, 289 N.C. 223, 227, 221 S.E.2d 359, 362 (1976). Further, "[i]t is not enough that the prosecutor's remarks were undesirable or even universally condemned." *State v. Huey*, 370 N.C. 174, 180, 804 S.E.2d 464, 471 (2017) (quotation marks omitted).

Even if a closing argument is grossly improper, the effect of it also must be prejudicial. A defendant is required to demonstrate that "the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Specifically, defendant has the burden to show a reasonable possibility that, had the error[ ] in question not been committed, a different result would have been reached at trial." *State v. Goins*, 377 N.C. 475, 478, 858 S.E.2d 590, 593 (2021) (citation and quotation marks omitted).

At trial, Detective Amos testified that when Defendant was arrested in connection with the invasion of Walker's home, he had a cellphone in his possession. Detective Amos obtained a search warrant and searched the device for text messages, photographs, social media posts, or any other information "that might be related to guns and/or robberies." Detective Amos found several photographs of firearms, with and without Defendant in them. The prosecutor then sought to admit the photographs into evidence for the stated purpose of highlighting Defendant's height and weight at the time the photographs were taken. Specifically, the prosecutor sought to corroborate Detective Amos' testimony that

the photographs were taken in March 2020, which in turn would corroborate Walker's testimony regarding what Defendant looked like at the time the alleged crimes occurred.

The trial court concluded that although some of the information from the photographs might be relevant, they were more prejudicial than probative. The trial court reasoned that although it might be possible to ascertain someone's weight from a photograph, it is not possible to tell someone's height without some sort of reference to height in the photograph. Further, the trial court stated that the photograph of Defendant shirtless with a firearm was irrelevant because the firearm in the photograph was not the shotgun alleged to have been used in the charged offenses. The trial court did not allow the photographs into evidence, preventing the prosecutor from submitting them to the jury.

In her closing argument, the prosecutor told the jury:

> When [Detective Amos] searched the defendant's phone and found pictures of him, this further bolstered his belief because he testified he saw pictures of the defendant with a gun, and he saw pictures of the defendant. I think that's important. He saw pictures of the defendant, and he already has a general idea of his height and weight. He's looking at pictures of the defendant and still does not believe that there's any issues with what the victim said and what he's looking at.

Defendant cites N.C. Gen. Stat. § 15A-1230, which states, "[d]uring a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C. Gen. Stat. 15A-1230(a). Defendant argues that because the trial court excluded the photographs from Defendant's phone for having more prejudicial than probative effect, information about the photographs also should have been excluded from the closing argument. Defendant further argues that the inclusion of this information in the prosecutor's closing argument was prejudicial to Defendant because the prosecutor's remarks on the photographs allowed the jury to believe that it could consider the photographs as evidence, even though the trial court had excluded them earlier.

The State argues that the identification of Defendant was a contested issue throughout the course of the trial. Specifically, the State argues that although the photographs were excluded from evidence, Detective Amos already had testified that he found photographs of firearms on Defendant's cellphone, some with and some without Defendant

depicted in them. Defense counsel did not object to his testimony about the photographs. Moreover, Detective Amos testified about the contents of the photographs before the trial court ruled that the prosecutor could not admit them into evidence due to their potential prejudicial effect outweighing their probative value. During her closing argument, the prosecutor referenced the photographs from Defendant's phone as supporting Detective Amos's—and by extension, Walker's—credibility on the issue of Defendant matching the description given by Walker. Although the prosecutor should not have implied that the jury could consider the contents of the photographs in corroborating Walker's testimony regarding Defendant's physical appearance at the time of the home invasion, the evidence was already admitted without objection through the testimony of Detective Amos. Because the prosecutor was referring to testimony already in evidence, admitted without objection, there was a basis for the prosecutor's arguments.

We hold that the prosecutor's remarks were not so grossly improper as to require the trial court to intervene *ex mero motu*, and therefore, the trial court did not err in failing to so intervene. Thus, we need not conduct a prejudice analysis.

III. Conclusion

The trial court did not err in denying Defendant's request for a special jury instruction regarding fingerprints where he failed to submit such a request in writing. Further, the requested jury instruction was an incorrect application of the law to the facts of this case.

After the trial court determined Walker's pretrial identification of Defendant was impermissibly suggestive, it erred in allowing him to testify regarding the identification. However, the State carried its burden in demonstrating such error was harmless beyond a reasonable doubt due to the other substantial evidence which the jury most likely used to convict Defendant of the offense of felon in possession of a firearm.

Finally, we hold the trial court did not err in failing to intervene *ex mero motu* during the prosecutor's closing argument.

Having considered all of Defendant's arguments, we hold Defendant received a fair trial, free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges TYSON and STADING concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JUNE 2024)

ARNOLD v. TRADEWIND FLIGHT SERVS., INC. No. 23-1041	Craven (22CVS1525)	Affirmed
CONSOL. DISTRIB. CORP. v. HARKINS BUILDERS, INC. No. 23-914	Mecklenburg (21CVS9185)	Affirmed
HORNER v. IPP, LLC No. 23-1051	Alamance (21CVS2060)	Affirmed
IN RE A.A. No. 23-1127	Wake (22JA212)	Affirmed
IN RE A.M.D. No. 23-1085	Montgomery (21JA8)	Affirmed
IN RE A.Z. No. 23-1151	Surry (20JT140) (20JT141)	Affirmed
IN RE C.J.S. No. 23-1056	Cabarrus (22JT130)	Affirmed
IN RE C.L. No. 23-1080	Onslow (23JA21-23)	Affirmed
IN RE D.J.N. No. 24-82	Henderson (21JT83)	Affirmed.
IN RE E.H.J. No. 23-1146	Guilford (20JT661)	Affirmed
IN RE G.L.B. No. 24-97	Burke (22JT150)	Affirmed
IN RE J.G. No. 23-1163	Guilford (19JT271) (19JT272)	Affirmed.
IN RE K.R.M-A. No. 23-769	New Hanover (21JA200)	Affirmed
IN RE Q.Y. No. 23-698	Alamance (21JT40)	Affirmed
IN RE Z.M.C.B. No. 23-1024	Mecklenburg (20JT60)	Affirmed

KHOURI v. AFFORDABLE AUTO PROT., LLC No. 23-284	Forsyth (22CVS1172)	Affirmed in Part, Reversed in Part, and Remanded
SCOTT v. RADEAS LLC No. 23-1121	Cumberland (22CVS2435)	Affirmed
SMITH v. SMITH No. 23-653	Dare (17CVD454)	Affirmed in Part; Reversed in Part; Vacated in Part
STATE v. BRYANT No. 23-988	Columbus (20CRS51837)	No Error in Part; No Plain Error in Part
STATE v. HEGWOOD No. 23-1040	Pitt (22CRS53319-20)	No Error
STATE v. INGRAM No. 23-748	Caswell (19CRS50409) (19CRS50454) (21CRS33)	New Trial
STATE v. MORTON No. 23-677	Wake (20CRS219569-70)	No Error
STATE v. MOSELEY No. 23-1021	Cumberland (22CRS50202)	No Error
STATE v. NORIEGA No. 23-724	Wake (21CRS200812-13)	Affirmed
STATE v. POTTER No. 23-1112	Forsyth (22CRS366847) (22CRS366850)	No Error
STATE v. POTTS No. 23-699	Mecklenburg (19CRS246495) (19CRS246499) (22CRS215049)	No Error
STATE v. SIMMONS No. 23-1019	Madison (22CRS50173)	No Error
STATE v. SINCLAIR No. 24-85	Beaufort (20CRS51117-18) (21CRS160) (21CRS51040) (22CRS50491)	Affirmed
STATE v. STRICKLAND No. 23-812	Wake (19CRS216568)	Remanded for Resentencing

STATE v. TEASLEY No. 23-600	Iredell (19CRS50847) (19CRS50848) (19CRS50850)	No Error; Vacated in Part and Remanded.
STATE v. TILGHMAN No. 23-1149	Pitt (21CRS51335)	AFFIRMED AND REMANDED FOR CORRECTION OF CLERICAL ERROR.
STATE v. WILLIAMS No. 22-1035	Rockingham (20CRS51985-87) (20CRS559) (21CRS275)	No Error in Part; Vacated in Part; Remanded
WOLF v. SWIFT No. 23-1137	Rockingham (21CVS3158)	Dismissed
WOODY v. VICKREY No. 22-776	Chatham (17CVS921)	Dismissed in part; Affirmed in part

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