294 N.C. App.—No. 4 Pages 551-628

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 11, 2025

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 2 JULY 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Discretionary review denied—recidivist sentence proper under statute—constitutional argument first raised on appeal—In considering defendant's arguments that the trial court erred in finding that he qualified as a recidivist for sentencing purposes, the Court of Appeals dismissed defendant's appeal for lack of appellate jurisdiction after declining to issue a writ of certiorari to review defendant's meritless statutory contention that, after being convicted of and sentenced on one count of indecent liberties with a child in a certain county, his subsequent sentencing on another count of indecent liberties with a child in a different county was not for a reportable offense for purposes of N.C.G.S. § 14-208.6(4). Although both convictions were the result of the same plea agreement, defendant was convicted and sentenced at different times for each count. Further, the appellate court declined to invoke Appellate Rule 2 to reach defendant's related due process argument because defendant raised that constitutional issue for the first time on appeal. **State v. Walston, 622.**

Interlocutory order—order compelling discovery—subject matter jurisdiction raised—subject to review—In a contract dispute, although the trial court's order compelling discovery was appealable as a final judgment because the court enforced the order by entering sanctions, defendant failed to designate the order in its notice of appeal (from the court's order imposing sanctions) as required by Appellate Rule 3(d). However, since defendant challenged the trial court's subject matter jurisdiction, an issue which may be raised for the first time on appeal, the appellate court reviewed the order for the limited purpose of determining whether

contractual obligation to replace windows on the victim's house, Rule of Evidence 404(b) evidence that defendant also accepted several thousand dollars from another homeowner for window replacement at about the same time and, similarly, then failed to do any work or return the money. Taken together, this evidence constituted circumstantial evidence from which a rational juror could infer defendant's intent to defraud the victim. **State v. Horton, 614.**

INDICTMENT AND INFORMATION

Obtaining property by false pretense—intent to defraud—sufficiency of allegations—The trial court had jurisdiction to enter judgment upon a jury's conviction of defendant on a charge of obtaining property by false pretenses (N.C.G.S. § 14-100(a)) where the indictment alleged that defendant "unlawfully and willfully and feloniously did knowingly and designedly, with the intent to cheat and defraud, obtain or attempt to obtain $4,000" from the alleged victim by the false pretense of obtaining the money "as a deposit to replace windows on [the victim's] house" without ever beginning any work on the house or replacing any windows. Language in N.C.G.S. § 14-100(b) stating that "evidence of nonfulfillment of a contract, without more, cannot establish the essential element of intent" pertained only to the sufficiency of evidence at trial necessary for a conviction for false pretenses and was unrelated to the validity of an indictment. Moreover, to confer jurisdiction on the trial court, an indictment for obtaining property by false pretenses must only allege an intent to defraud and is not required to allege all of the evidence tending to prove that element which the State plans to introduce at trial. **State v. Horton, 614.**

KIDNAPPING

Restraint or confinement—beyond that inherent in other crimes—evidence insufficient—In a prosecution that resulted in convictions for attempted discharge of a firearm into an occupied vehicle, attempted robbery with a firearm, and first-degree kidnapping, the trial court erred in denying defendant's motion to dismiss the kidnapping charge for insufficient evidence of restraint or confinement of the victim—an essential element of kidnapping—beyond that inherent in the robbery and firearm offenses. Where the evidence showed that defendant's vehicular pursuit of and shooting toward the victim's car was not a separate and complete act—independent of and apart from defendant's attempt to rob the victim of his car by use of a firearm—a conviction for kidnapping would implicate double jeopardy concerns. **State v. Andrews, 590.**

LANDLORD AND TENANT

Termination notice defective—notice based on lease—notice based on Violence Against Women Act—In an action for eviction from housing covered by a federal subsidy program, the trial court's order granting summary judgment to a landlord based on violations of the tenant's lease—including failure to pay rent, failure to timely cure the non-payment, and changing the locks—was reversed because the termination notice the landlord sent to the tenant was defective: (1) under the lease as to the lock-changing violation in that it did not specifically identify that act as a basis for termination of the tenant's lease; and (2) under the federal Violence Against Women Act (VAWA) in that it failed to include notice of the tenant's VAWA rights in connection to changing the locks—which the tenant claimed she undertook

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.

BAER v. BAER

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

MICHAEL J. BAER, PLAINTIFF
v.
MELISSA B. BAER, DEFENDANT

No. COA23-868

Filed 2 July 2024

Divorce—separation agreement—duress and undue influence—summary judgment not proper

In plaintiff's declaratory judgment action seeking to set aside a separation agreement on grounds that he ratified the agreement under duress and as a result of undue influence, the trial court erred in allowing defendant's motion for summary judgment where, in the light most favorable to plaintiff (the nonmoving party), the forecast of evidence—including affidavits from plaintiff stating that he only entered into and complied with the agreement because of his anxiety over potential reputational harms and from a psychologist who opined that plaintiff likely acted as a result of adjustment disorder—created a genuine issue of material fact as to whether plaintiff's apparent ratification of the agreement was valid.

Appeal by plaintiff-appellant from judgment entered 8 June 2023 by Judge Mark Stevens in Wake County District Court. Heard in the Court of Appeals 1 May 2024.

Connell & Gelb PLLC, by Michelle D. Connell, for plaintiff-appellant.

Tharrington Smith, LLP, by Alice C. Stubbs, Jeffrey R. Russell, and Casey C. Fidler, for the defendant-appellee.

TYSON, Judge.

Michael J. Baer ("Husband") appeals from the trial court's order finding Husband owed Melissa B. Baer ("Wife") a distribution of $587,069.23 pursuant to a separation agreement. Husband was also ordered to transfer title to the car Wife drove. All attorney's fees claims were reserved for a later date. We reverse and remand.

I. Background

Husband and Wife married on 27 December 2014 for four years and officially separated on 19 February 2019 after Wife had filed for and was granted an *ex parte* domestic violence order of protection ("DVPO")

against Husband in Wake County District Court. Husband alleges Wife has claimed similar types of purported abuse during a previous relationship. Husband was 43 years old when the parties married. No children were born of the marriage.

A. Husband's allegations

Husband alleges he was "subjected to psychological, physical, financial, and emotional abuse at the hand of [Wife]" throughout the marriage "by intimidation and threats, withholding affection, giving the 'silent treatment,' insulting him in front of coworkers and friends, repeatedly belittling him, manipulating him, blaming him for her own self-harm, and accusing him of having affairs." Husband alleges Wife regularly abused drugs, overly consumed alcohol, and called him explicit derogatory names.

Wife had initially met with attorney Kristen Ruth ("Ruth") on 26 September 2018. On 20 December 2018, Wife left a notice and demand letter for Husband on the kitchen counter written by Ruth, dated 13 November 2018, which stated "that she [Ruth] had been retained by [Wife] 'to represent her in anticipation of [the parties'] separation and divorce.' " The letter stated Ruth had advised Wife to remain living within and occupying the marital home until a written settlement agreement was reached.

After receiving this letter during Christmas week, Husband alleges he asked Wife to spend the holidays with her family. Wife refused and requested they spend the holidays together. Husband's affidavit avers Wife left notes for him on 21 December 2018 stating, "I LOVE YOU!!" and "THIS IS NOT WHAT I WANT!" Neither party acted on the 13 November 2018 letter from Ruth.

On 15 February 2019 between the hours of 7:07 p.m. and 7:15 p.m., Wife gave Husband a second demand letter from Ruth dated ten days earlier, on 5 February 2019, which stated Ruth "shall assume that you are not interested in sharing financial information in order to determine [Wife]'s financial share of the marital estate." The letter concluded by saying "if I do not hear from you by Friday, February 15, 2019[,] by 5:00 p.m. we will proceed accordingly."

Husband alleges Wife was drinking when she gave him the second demand letter. With the receipt of the letter after its response due date and time had expired, Husband was unable to respond timely or to retain an attorney. Husband called his parents two times that night "because [Wife] was 'drinking alcohol and verbally abusing' him." The parties

discussed on 17 February 2019 whether they could proceed to a resolution without attorneys. Husband alleges Wife claimed, "she deserved half of what we had and [threatened] that she would ruin [his] life and career if [he] didn't comply."

On 19 February 2019, Wife, again with Ruth's assistance, filed a sworn and verified *ex parte* complaint and motion for a DVPO alleging Husband, among other things, had kicked and shoved her causing numerous bruises, had kicked her dog because he knows it hurts her, had put cameras in every room of their home without her knowledge, and had restricted her access to their finances.

Later that day and without prior notice, Husband was first served with an *ex parte* domestic violence protective order ("*ex parte* DVPO order") and escorted out of the marital home by law enforcement officers. Husband claims Wife's sworn allegations were false and perjurious. He asserts she had filed the DVPO because he did not agree to give her half of his assets, and the DVPO was prepared and filed "with the intent to gain an unfair advantage in the separation process to gain an inequitable financial settlement."

Husband also claims, "[Wife] was aware that a DVPO would have dire consequences on [Husband]'s reputation and career." Husband filed an answer and a counterclaim for a DVPO on 22 February 2019.

The ten-day hearing on the *ex parte* DVPO order was continued and scheduled for 13 March 2019. Prior to the hearing, parties participated in mediation with certified Mediator Katherine Frye on 6 March 2019.

Leading up to mediation, and out of fear of violating the *ex parte* DVPO order, Husband did not return to his office, because Wife's father, Jim Bennett ("Bennett"), worked in the same office. Husband alleges Bennett was given the option to relocate immediately to another office in the community, but chose not to do so for over a month, preventing Husband from entering his own office. Husband asserts an internal investigation was initiated by his employer due to Wife's false allegations of domestic violence.

Husband alleges his employer told him to "handle it" and the company could not have someone in a management role with a DVPO against them. Further, Husband asserts the DVPO would prevent him "from ever achieving General Partnership with the Firm which [he] had been working for 25 years to achieve." Husband alleges he was at risk of losing his job as a financial advisor depending on the outcome of the DVPO hearing. Husband alleges Wife was aware of the importance of reputation in

his career and had discussed the impact this *ex parte* claim would have on his income.

Husband asserts Ruth and Husband's attorney, Len Mueller, had agreed to a two-part mediation, in which the parties would first resolve the issues and allegations surrounding the DVPO, and thereafter negotiate a complete resolution to the separation. Husband alleges once in mediation Wife abandoned and reneged on their two-part agreement and was unwilling to resolve the DVPO unless a global resolution and settlement was reached.

Husband avers he had no choice, that he either had to agree to the one-sided terms or take chances at the DVPO hearing. He believed he would be fired from his job and suffer irreparable damages to his reputation and career if the *ex parte* DVPO hearing was not favorable to him.

B. Wife's Allegations

Wife asserts Husband's counsel drafted the Separation and Property Settlement Agreement ("Agreement") at the end of mediation in front of the mediator. Both parties initialed every page of the Agreement, and both parties' signatures were notarized by the Mediator.

The terms of the Agreement include: (1) Husband must transfer a home to Wife; (2) Husband must satisfy the mortgage on Wife's *parents' home*; (3) Husband must pay off Wife's vehicle; (4) Husband must pay Wife $100,000 immediately at mediation; and, (5) Husband must make two payments of $237,500 and transfer business interests to Wife. At mediation, Husband wrote Wife a check for $100,000 and deeded her the home per the Agreement.

The Agreement includes specific language relating to the voluntary execution of the Agreement. Paragraph 20 states: "Each party has read and fully understands each and every provision of the [A]greement, and both parties acknowledge that the Agreement is fair and is not the result of fraud, duress[,] or undue influence exercised by either party upon the other or by any other person or persons upon either."

On 7 March 2019, both parties filed voluntary dismissals of their claims for domestic violence. For months thereafter, both parties complied with the terms of the Agreement. After Husband filed his initial complaint and Wife filed her counterclaim, Husband stopped complying with the terms of the Agreement. By this time, Husband had performed many obligations under the Agreement, including transferring real property to Wife; paying off the loan to Wife's vehicle; dismissing his counterclaim for DVPO against Wife; continuing to provide Wife with medical,

dental, and vison insurance; paying Wife $100,000 of the $575,000 distributive award payment; and filing a 2018 joint income tax return with Wife.

Husband alleges he only signed and complied with Agreement because Wife had threatened him, and he feared Wife would make more claims similar to those in the *ex parte* DVPO order.

Husband's Affidavit asserts:

> Just as was the case in the weeks leading up to mediation, during the weeks and months following mediation, I suffered high levels of stress, anxiety and pressure. The stress did not end with the signing of an [A]greement and dismissal of the DVPO. The DVPO started a domino effect that created stress, tension, and anxiety in all aspects of my life. My reputation with my employer was tarnished and in jeopardy. My relationships, career opportunities, family, and stability were all in jeopardy. After being subject to years of abuse in my marriage and now being subject to this abusive tactic, my emotional trauma was intensified. I struggled with sleeping, eating, and general everyday functioning. I felt as though my life was under a microscope[,] and I had to ensure that [Wife] remained satisfied so that she would not make false claims to my company.

C. Dr. Ludlam's Affidavit

The affidavit of Dr. Julianne Ludlam ("Dr. Ludlam") was filed and presented during the summary judgment hearing. Dr. Ludlam holds a bachelor's degree in psychology from Grinnell College, a master's degree in human development and psychology from Harvard University, and a Ph.D. degree in clinical psychology from Alliant International University.

Dr. Ludlam's affidavit states:

> 5. I have been retained to conduct a psychological evaluation of Michael Baer to assess his mental status during his separation from his former wife, Melissa Baer. Specifically, I have been asked to opine as to whether [Husband] was likely under duress, or experiencing a heightened level of psychological pressure, at the time he executed an [A]greement with [Wife] on March 6, 2019, and whether such duress or heightened pressure is likely to have continued after the [A]greement was executed.
>
> 6. Over the course of several months, I assessed [Husband] through interviews, observation, and testing.

> 7. In my opinion, [Husband] would likely have qualified for a diagnosis of adjustment disorder, with anxiety, during the separation process and that diagnosis would have continued during the time period after the [A]greement was executed and he continued to comply with the [A]greement. Adjustment disorders involve the presence of emotional or behavioral symptoms in response to an identifiable stressor. The particular stressors that affected [Husband] appeared to be continuous and ongoing and appeared to cause [Husband] to experience functional impairment in his decision-making.
>
> 8. It is my opinion that [Husband] did appear likely to have experienced intense psychological pressure both at the time he signed the separation [A]greement and the period of time that he continued to comply with the [A]greement. The pressure felt by [Husband] would have been greater than others based on his particular psychological makeup. [Husband]'s ability to make decisions was likely impaired by the pressure and anxiety he felt both at the signing of the [A]greement and after it was signed and he continued to comply with the separation [A]greement.
>
> 9. It is my opinion that [Husband] felt unable to make a decision and as though he did not have a choice as a result of the pressure and anxiety he likely experienced at the time he signed the separation [A]greement and while he complied with the [A]greement.

This matter was previously before this Court, but was dismissed as interlocutory. The facts from that prior opinion are summarized below:

> In June 2019, [Husband] filed the complaint in this action, seeking a declaratory judgment to set aside the separation [A]greement, alleging that it was unenforceable on the grounds of duress and undue influence. [Wife] answered the complaint and asserted a counterclaim for breach of contract. [Wife] later filed a motion for summary judgment, along with supporting affidavits. [Husband] filed affidavits opposing the motion.
>
> After a hearing, the trial court entered an order granting [Wife]'s motion for summary judgment in part and denying it in part. The court granted summary judgment in [Wife]'s favor on [Husband]'s declaratory judgment claim, ruling as a matter of law that [Husband] ratified the

> separation [A]greement. The trial court also granted partial summary [judgment] in [Wife]'s favor on her breach of contract claim, ruling that "[Wife]'s claim for Breach of Contract is granted as a matter of law in favor of the [Wife]"; that there was "no genuine issue of material fact with respect to damages regarding the distributive award owed to the [Wife] as a result of [Husband]'s breach of contract, and judgment shall be entered against [Husband] in the sum of $475,000 in favor of the [Wife] as a tax-free distributive award owed to date under the terms of the Separation and Property Settlement Agreement"; and that there are "genuine issues of material fact as to the amount and nature of remaining damages resulting from [Husband]'s breach of contract" and the "issue of remaining damages resulting from [Husband]'s breach of contract shall be set for future hearing upon [Wife]'s request."
>
> Plaintiff timely appealed the partial summary judgment order.

Baer v. Baer, 286 N.C. App. 775, 879 S.E.2d 906, 2022 N.C. App. LEXIS 793, 2022 WL 17420125, at *1-2 (2022) (unpublished).

On 8 June 2023, the trial court entered a final judgment awarding Wife damages in the amount of $587,069.23. On 14 June 2023, Husband filed a notice of appeal of the order on summary judgment entered on 14 January 2022 and the final judgment entered on 8 June 2023.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2023). The outstanding issue and purported reservation of attorney's fees is collateral to the final judgment on the merits and does not render an appeal of the substantive order as interlocutory. *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 800 (2013). The appeal is properly before this Court.

III. Issues

Husband contends summary judgment was improper because genuine issues of material fact exist regarding the formation and validity of the Agreement. He argues the trial court erred by granting summary judgment on Wife's motion by concluding as a matter of law Husband had ratified the Agreement, despite forecasted expert evidence and other evidence tending to show the Agreement was executed and complied with under duress and undue influence. If this Court holds issues of

material fact exist, the issue of whether the breach of contract occurred depends upon the Agreement's initial validity.

IV. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Powell v. Kent*, 257 N.C. App. 488, 490, 810 S.E.2d 241, 243 (2018) (citation and quotation marks omitted).

"Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Stevens v. Heller*, 268 N.C. App. 654, 658-59, 836 S.E.2d 675, 679 (2019) (citation and quotation marks omitted).

V. Ratification of Separation Agreement

Husband argues he did not form or ratify the Agreement because it was executed under duress and undue influence and he remained under duress while complying with the terms of the Agreement. Husband further argues the trial court erred in rulings as a matter of law on factual issues for a jury's determination. Husband contends genuine issues of material fact exist of whether he ratified the Agreement, because expert evidence tends to show he was under duress and undue influence.

1. Genuine Issues of Material Fact

First, Husband contends the trial court erred in dismissing his complaint with prejudice, as genuine issues of material fact exist of whether he had voluntarily agreed or ratified the separation Agreement while under duress.

> Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." An issue of material fact is one which may constitute a legal defense or is of such a nature as to affect the result of the action or is so essential that the party against whom it is resolved may not prevail; an issue is genuine if it can be supported by substantial evidence.

Cox v. Cox, 75 N.C. App. 354, 355, 330 S.E.2d 506, 507 (1985) (first quoting N.C. R. Civ. P. 56(c); and then citing *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974)).

2. Stegall v. Stegall

Husband's claim of duress was dismissed on summary judgment after the court decided as a matter of law Husband had ratified the Agreement. Husband argues genuine issues of material fact exist of whether or not he had continued to act under duress while complying with the Agreement because it "is of such a nature as to affect the result of the action[.]" *Id.* This Court has previously held "there is a genuine issue of material fact on the question of duress and coercion concerning [a] separation agreement." *Stegall v. Stegall*, 100 N.C. App. 398, 401, 397 S.E.2d 306, 307 (1990).

This Court in Stegall, regarding an appeal of summary judgment, determined whether a genuine issue of material fact existed surrounding the circumstances when plaintiff entered into a separation agreement. *Id.* at 400, 397 S.E.2d at 307. The Court noted "[t]he moving party has the burden to establish the lack of any triable issue of fact." *Id.* at 401, 397 S.E.2d at 307. In *Stegall*, each party had submitted affidavits to the trial court. *Id.* Plaintiff's affidavit alleged she was forced to sign the separation agreement under duress and coercion, while defendant's affidavit denied her allegations. *Id.* Taking plaintiff's affidavit as true, this court in *Stegall* reversed the trial court's order granting summary judgment and concluded genuine issues of material fact existed regarding the question of plaintiff's duress when executing the separation agreement. *Id.* at 412, 397 S.E.2d at 314.

3. Asher v. Huneycutt

Wife cites the case of *Asher v. Huneycutt*, a cause of action for negligence, and argues a grant of summary judgment "should be affirmed on appeal if there is any ground to support the decision." *Asher v. Huneycutt*, 284 N.C. App. 583, 588, 876 S.E.2d 660, 666 (2022) (quoting *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 204 (2017)) (clarifying when summary judgment is appropriate in a cause of action for negligence).

The present case is distinguishable from Asher, because it does not concern a cause of action for negligence. Considering when summary judgment is appropriate for causes of action to set aside a separation agreement due to duress and coercion, this Court held "when examining whether both parties freely entered into a separation agreement, trial courts should use considerable care because contracts between husbands and wives are special agreements." *Stegall*, 100 N.C. App. at 401, 397 S.E.2d at 307.

Similarly to *Stegall*, Husband submitted both his and Dr. Ludlam's affidavits to the trial court. Taking these affidavits as true and reviewed

in the light most favorable to him, Husband asserts he signed and had partially complied with the Agreement because he "felt unable to make a decision and as though he did not have a choice as a result of the pressure and anxiety he likely experienced at the time he signed the separation [A]greement and while he complied with the [A]greement." Viewed in the light most favorable to Husband, the trial court erred in determining no genuine issue of material fact existed as a matter of law. The order awarding summary judgment is reversed. *See id.*

4. Ratification of the Agreement

This Court has held if plaintiff executes a "separation agreement under duress or fear induced by wrongful acts or threats, the separation agreement is invalid and not a bar to equitable distribution unless the separation agreement was ratified by plaintiff." *Cox*, 75 N.C. App. at 356, 330 S.E.2d at 508. Acknowledging the signed Agreement at mediation and subsequent partial compliance of the same, Husband argues he was coerced and under duress at the time of execution and throughout the time he was partially complying with the terms of the Agreement post-execution, voiding ratification.

Wife argues Husband, "a grown, professional, intelligent, and educated man sitting in mediation with his attorney could [not] genuinely be under duress to sign [the] [A]greement." She further asserts: "more preposterous is the claim that the very same man continued to act under duress after the alleged source of his distress ceased to exist."

Taking Husband's asserted facts in the light most favorable to him as true, Husband could not have ratified the Agreement if he was under duress at the time of execution and subsequently while acting in partial compliance with the Agreement. This Court ruled duress "may exist even though the victim is fully aware of all facts material to his or her decision." *Stegall*, 100 N.C. App. at 401, 397 S.E.2d at 308. "A court of equity will refuse to enforce a separation agreement, like any other contract, which is unconscionable or procured by duress, coercion or fraud." *Id.* at 401, 397 S.E.2d at 307 (citation omitted). Unsupported or falsely verified *ex parte* DVPOs are perjurious, unlawful, sanctionable, and cannot be misused to obtain unfair advantages in settlement negotiations. *See* N.C. Gen. Stat § 50B-1 to 50B-9 (2023); *Johns v. Johns*, 195 N.C. App. 201, 206, 672 S.E.2d 34, 38 (2009) (submitting pleadings not well grounded in fact and for an improper purpose is sanctionable).

Summary judgment is improper if genuine issues of material fact exist. The Agreement cannot be deemed valid as a matter of law because the Agreement could not have been ratified under duress. *Id.*

VI. Breach of Agreement

Courts cannot hold a contract has been breached as a matter of law when genuine issues of material fact exist concerning the underlying formation and validity of such contract. *See Voliva v. Dudley*, 267 N.C. App. 116, 832 S.E.2d 479 (2019) (reversing the trial court's order granting plaintiff's summary judgment motion "[b]ecause genuine issues of material fact exist regarding whether the Note is a valid and enforceable contract"). Because genuine issues of material facts exist regarding the underlying validity of the Agreement, the trial court's decision granting summary judgment on Wife's claim for breach of contract as a matter of law is error and is reversed. *See id.*

VII. Conclusion

Husband provided sufficient evidence tending to show genuine questions of material fact remain of whether he was under duress when the Agreement was executed and during the time he continued to comply with the Agreement. This evidence provides a genuine issue of material fact of whether or not the Agreement could have been ratified by Husband, taken as true and viewed in the light most favorable to the nonmovant.

The trial court erred by concluding as a matter of law Husband was not coerced and had ratified the Agreement, and then finding Husband had breached the potentially invalid Agreement. We reverse the trial court's order granting summary judgment against Husband and in partial favor of Wife and remand for further proceedings. The issues, if any, on attorney's fees are preserved for further review. *It is so ordered.*

REVERSED AND REMANDED.

Judges ARROWOOD and CARPENTER concur.

JESSEY SPORTS, LLC, PLAINTIFF
v.
INTERCOLLEGIATE MEN'S LACROSSE COACHES ASSOCIATION, INC., DEFENDANT

No. COA23-938

Filed 2 July 2024

1. Appeal and Error—interlocutory order—order imposing sanctions—substantial right

In a contract dispute, the trial court's order imposing sanctions for discovery violations was immediately appealable as affecting a substantial right because, in addition to requiring defendant to pay plaintiff $8,500 in attorney's fees, the sanctions order also established plaintiff's claim for breach of contract, deemed particular paragraphs in plaintiff's complaint as true, prohibited defendant from recovering overpayments it allegedly paid to plaintiff, and prohibited defendant from offering an expert witness on particular issues at trial.

2. Appeal and Error—interlocutory order—order compelling discovery—subject matter jurisdiction raised—subject to review

In a contract dispute, although the trial court's order compelling discovery was appealable as a final judgment because the court enforced the order by entering sanctions, defendant failed to designate the order in its notice of appeal (from the court's order imposing sanctions) as required by Appellate Rule 3(d). However, since defendant challenged the trial court's subject matter jurisdiction, an issue which may be raised for the first time on appeal, the appellate court reviewed the order for the limited purpose of determining whether the trial court had jurisdiction to enter the order compelling discovery.

3. Discovery—subject matter jurisdiction—two of four claims dismissed—appeal did not effect remaining two claims

In a contract dispute, in which plaintiff appealed from the trial court's previous order dismissing two of its four causes of action, the trial court had subject matter jurisdiction to enter subsequent orders on plaintiff's motion to compel discovery and motion for sanctions relating to the two remaining claims, which were not part of the judgment appealed from.

4. Discovery—sanctions—trial court's authority—not inhibited by parties' failure to confer

In a contract dispute, the trial court had authority to impose discovery sanctions pursuant to Civil Procedure Rule 37 after determining that defendant failed to answer discovery requests and violated the trial court's orders compelling discovery because defendant provided evasive, incomplete, or untimely responses. Further, although defendant argued that plaintiff's failure to provide in its motion to compel a certificate stating that it conferred or attempted to confer with defendant pursuant to Civil Procedure Rule 37(a)(2), the lack of such a certification was irrelevant to the court's authority to impose sanctions.

5. Discovery—sanctions—selection—establishment of claim—consideration of less severe sanctions

In a contract dispute, the trial court did not abuse its discretion by imposing sanctions (pursuant to Civil Procedure Rule 37(b)(2)) on defendant for its failure to comply with two discovery orders, including: requiring defendant to pay plaintiff $8,500 in attorney's fees, establishing plaintiff's claim for breach of contract, deeming particular paragraphs in plaintiff's complaint as true, prohibiting defendant from recovering overpayments it allegedly paid to plaintiff, and prohibiting defendant from offering an expert witness on particular issues at trial. The trial court stated that it considered lesser sanctions but concluded that they would not be appropriate given the significance of defendant's discovery violations, which materially prejudiced plaintiff.

Appeal by Defendant from an order entered 20 June 2023 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 May 2024.

Devore, Action & Stafford, P.A., by Joseph R. Pellington, for Plaintiff-Appellee.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for Defendant-Appellant.

WOOD, Judge.

Intercollegiate Men's Lacrosse Coaches Association, Inc. ("Defendant") appeals the trial court's order imposing sanctions for what the trial court

found were discovery violations. For the reasons stated herein, we hold the trial court had subject matter jurisdiction to enter the order and was statutorily authorized to impose discovery sanctions against Defendant.

I. Factual and Procedural History

This litigation involves a contract the parties entered into in 2020 pursuant to which Jessey Sports, LLC ("Plaintiff") "would obtain sponsorships, grants, and other sources of revenue for the IMLCA for a term of five years" in return for Defendant's payment to Plaintiff of "$3,000 per month and thirty percent of net revenue received from sponsorships and grants obtained by" Plaintiff. *Jessey Sports, LLC v. Intercollegiate Men's Lacrosse Coaches Ass'n, Inc.*, 289 N.C. App. 166, 167, 888 S.E.2d 677, 679 (2023) ("*Jessey I*").

On 28 October 2021, Plaintiff filed a complaint against Defendant in which it advanced claims of breach of contract, unjust enrichment, unfair and deceptive trade practices ("UDTPA"), and alleged violations of the North Carolina Wage and Hour Act. On 18 January 2022, Defendant filed a motion to dismiss the complaint for failure to state a claim pursuant to N.C. R. Civ. P. 12(b)(6).

On 28 January 2022, Defendant filed a motion seeking an order staying discovery pending the trial court's ruling on Defendant's motion to dismiss. On 29 April 2022, the trial court granted Defendant's motion, ordering "that discovery in this action is stayed until entry of the Court's order on Defendant's Motion to Dismiss." The trial court ordered Defendant to respond to "Plaintiff's pending Discovery requests . . . within forty-five (45) days following the entry of the Court's order on Defendant's Motion to Dismiss."

On 27 May 2022, the trial court entered an order denying Defendant's motion to dismiss the breach of contract and UDTPA claims (the "remaining claims") and granting its motion to dismiss the unjust enrichment and Wage and Hour Act claims (the "dismissed claims"). On 24 June 2022, Plaintiff filed notice of appeal from the trial court's order on the motion to dismiss, specifically seeking appeal of the order "dismissing Plaintiff's claims for unjust enrichment and violation of the Wage and Hour Act."

While Plaintiff's appeal was pending, Defendant purports to have submitted a "Motion to Stay All Proceedings or Set the Scope of the Stay" on 11 July 2022. This motion does not contain a file stamp to indicate the date it was filed or that it was actually filed. Defendant's motion requests "an order staying all proceedings" in the case pending the appeal from the trial court's order on the motion to dismiss or, "[i]n the alternative,

. . . an order setting the scope of the automatic stay pending appeal under N.C.G.S. § 1-294."

On 18 July 2022, Plaintiff filed a motion to compel discovery in accordance with the trial court's 29 April 2022 order. In this motion, Plaintiff represented that its counsel had "reviewed the Mecklenburg County Court file and, as of the time of filing this Motion on July 18, 2022, Defendant's Motion to Stay has still not entered the file."

On 16 September 2022, the trial court entered an order granting Plaintiff's motion to compel discovery and denying Defendant's motion to stay proceedings. The trial court noted its 27 May 2022 order on Defendant's motion to dismiss "triggered the 45-day time period of the stay in discovery, meaning that Defendant was [required] to respond by July 11, 2022." The trial court further found that "Defendant failed to respond to Plaintiff's First Discovery Requests by July 11, 2022," and therefore, the trial court granted Plaintiff's motion to compel and ordered Defendant to "provide its responses to Plaintiff's First Discovery Requests within forty-five (45) days of the entry of this Order." Notwithstanding its order to compel, the trial court denied Plaintiff's request for costs and attorney's fees. It found "that Plaintiff's appeal created sufficient ground for Defendant to dispute the obligation to respond to discovery in good faith, and therefore that Defendant's opposition to the Motion to Compel was substantially justified."

Addressing whether Plaintiff's appeal should operate to stay Plaintiff's remaining claims, the trial court noted "Plaintiff's pending appeal only addresses Plaintiff's claims for Unjust Enrichment and violations of North Carolina's Wage and Hour Act." It further noted "Plaintiff's claims for Breach of Contract and Unfair and Deceptive Trade Practices were not 'part of the judgment appealed from' or the 'matter embraced therein' " pursuant to N.C. Gen. Stat. § 1-294. The trial court reasoned "the parties will need to conduct discovery on the Breach of Contract and Unfair and Deceptive Trade Practices claims regardless of the outcome of the appeal."

On 31 October 2022, Defendant appears to have submitted responses to Plaintiff's first discovery requests, including its first set of interrogatories, its first requests for production of documents, and first requests for admission. The date of 31 October 2022 appeared on the title page, final page, and certificate of service.

On 22 November 2022, Plaintiff filed a motion for sanctions pursuant to N.C. R. Civ. P. 37. In it, Plaintiff stated it did not receive Defendant's responses until 7 November 2022 and argued that they were "deficient

in numerous ways." Among other issues, Plaintiff specifically stated that "Defendant failed to provide a single document in response to Plaintiff's Requests for Production." Plaintiff noted that Defendant stated it "will produce documents," although Defendant "provided no date for compliance." Therefore, Plaintiff requested the trial court issue an order compelling discovery as requested within its first discovery requests, prohibiting Defendant from opposing Plaintiff's breach of contract and UDTPA claims, striking Defendant's pleadings, rendering default judgment against Defendant, waiving Defendant's objections to Plaintiff's first discovery requests, deeming certain matters in Plaintiff's requests for admission as admitted, and awarding attorney's fees and costs in submitting its motion for sanctions and its previous motion to compel.

On 18 January 2023, Defendant submitted its brief in opposition to Plaintiff's motion for sanctions. Defendant attached an email it had sent to Plaintiff in which Defendant requested to confer, as well as Plaintiff's emailed reply stating that such request appeared disingenuous and was "improper and inconsistent with standard discovery practice."

On 31 March 2023, the trial court entered an order for administrative closure of the case without prejudice, noting that the matter commenced on 28 October 2021 and had been inactive for over six months. Thereafter, Mecklenburg County Superior Court removed the case from its active docket.

On 6 June 2023, this Court filed its opinion in *Jessey I* "affirm[ing] the dismissal of the Wage and Hour Act claim and revers[ing] the dismissal of the unjust enrichment claim." 289 N.C. App. at 167, 888 S.E.2d at 679.

The trial court held a hearing on Plaintiff's motion for sanctions and entered its written order granting Plaintiff's the motion on 20 June 2023. The trial court found Defendant had failed "to provide timely discovery" and that Defendant's responses to Plaintiff's first discovery requests did "not remotely comply with the production requests." The trial court further found that "Defendant's failure to obey previous court order(s) constitutes significant discovery violations." The trial court imposed the following sanctions: (1) establishing Plaintiff's breach of contract claim "to the extent supported by the paragraphs in the complaint that are deemed to be true"; (2) deeming true certain paragraphs in the complaint and prohibiting Defendant from challenging the enumerated paragraphs; (3) prohibiting Defendant from recovering "any overpayments Defendant claims that it made to Plaintiff"; (4) prohibiting Defendant "from offering an expert witness during trial to discuss industry practices

regarding payment of commission and the contracted use of persons/companies such as Plaintiff for an entity such as Defendant"; and (5) ordering Defendant to pay "Plaintiff's reasonable attorney fees incurred as a result of advancing and litigating Plaintiff's Motion for Sanctions in the amount of $8,500 within thirty (30) days of the entry of this Order."

On 19 July 2023, Defendant entered written notice of appeal of the 20 June 2023 "order granting Plaintiff's motion for sanctions."

II. Analysis

Defendant argues the trial court lacked subject matter jurisdiction to proceed with discovery matters related to Plaintiff's remaining claims. Defendant further argues the trial court erred in imposing sanctions and also in its selection of the specific sanctions to impose. We address each issue in turn.

A. Appellate Subject Matter Jurisdiction

[1] First, we must determine whether Defendant's appeal from an order imposing sanctions is properly before us. Defendant argues its appeal from both the 16 September 2022 order granting Plaintiff's motion to compel discovery and the 20 June 2023 order imposing sanctions are properly before us. Plaintiff argues Defendant has waived any argument related to the order compelling discovery because Defendant did not timely appeal that order but rather waited until after the trial court entered its order imposing sanctions to enter notice of appeal on 19 July 2023.

First, we consider whether we have subject matter jurisdiction of Defendant's appeal of the order imposing sanctions. An appeal may be taken from a final judgment or from an interlocutory order which "affects a substantial right." N.C. Gen. Stat. § 1-277(a); N.C. Gen. Stat. § 7A-27(b)(1), (3)(a). "No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case." *Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 276 N.C. App. 95, 99, 855 S.E.2d 819, 824 (2021). Generally, this Court may consider two factors when determining whether an appellant's substantial right is implicated—"the right itself must be substantial and the deprivation of that substantial right must potentially work injury to appellant if not corrected before appeal from final judgment." *Estate of Redden ex rel. Morley v. Redden*, 179 N.C. App. 113, 116, 632 S.E.2d 794, 797 (2006) (brackets omitted). A "substantial right is invoked when the sanction ordered is a substantial sum and is immediately payable." *Porters Neck Ltd., LLC*, 276 N.C. App. at 99, 855 S.E.2d at 824.

Here, the trial court ordered Defendant to pay Plaintiff $8,500.00 for attorney's fees. This amount is substantially less than the $48,000.00 sanction imposed in *Porters Neck* and the $150,000.00 award in *Estate of Redden*, and therefore may not affect a substantial right on its own. However, the imposition of attorney's fees does not stand alone. The trial court also established Plaintiff's breach of contract claim, deemed specified paragraphs in Plaintiff's complaint as true, prohibited Defendant from recovering overpayments it allegedly paid to Plaintiff, and prohibited Defendant from offering an expert witness on specified issues at trial. Accordingly, we hold the trial court's order imposing sanctions affects a substantial right and is immediately appealable and properly before this Court.

[2] We now address whether we have subject matter jurisdiction to consider Defendant's appeal of the trial court's order compelling discovery. This Court has "held that orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before the final judgment." *Casey v. Grice*, 60 N.C. App. 273, 274, 298 S.E.2d 744, 745 (1983). In *Walker v. Liberty Mut. Ins. Co.*, this Court answered the question of "whether [an] order granting discovery presents an appealable issue." 84 N.C. App. 552, 554, 353 S.E.2d 425, 426 (1987). The court held, "An order compelling discovery is not a final judgment. Neither does it affect a substantial right. Consequently, it is not appealable. However, when the order is enforced by sanctions pursuant to N.C. R. Civ. P., Rule 37(b), *the order is appealable as a final judgment*." *Id.* at 554–55, 353 S.E.2d at 426 (citations omitted) (emphasis added).

Therefore, the order compelling discovery ordinarily would be appealable as a final judgment. However, an appealing party must specify in its notice of appeal "the judgment or order from which appeal is taken." N.C. R. App. P. 3(d). "An appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347, 666 S.E.2d 127, 133 (2008). Nevertheless, "an issue of subject matter jurisdiction may be raised at any time and may be raised for the first time on appeal." *State v. Osborne*, 275 N.C. App. 323, 327, 853 S.E.2d 241, 245 (2020) (quotation marks omitted). Although Defendant failed to designate the order compelling discovery in its notice of appeal, we review Defendant's purported appeal of the order for the limited purpose of determining whether the trial court had subject matter jurisdiction to enter it.

B. Subject Matter Jurisdiction of the Trial Court

[3] Defendant argues the trial court lacked subject matter jurisdiction to enter any orders related to discovery or sanctions because Plaintiff's appeal of the trial court's order dismissing Plaintiff's unjust enrichment and Wage and Hour Act claims stayed all proceedings before the trial court. Specifically, Defendant argues that although Plaintiff's appeal was docketed before this Court on 4 November 2022, this Court's jurisdiction "related back" to the filing of Plaintiff's appeal on 24 June 2022. Defendant contends this Court retained jurisdiction from 24 June 2022 until 6 June 2023 when this Court issued its opinion in *Jessey I*, and thus, the trial court lacked subject matter jurisdiction to enter any orders during that time period. Defendant further argues that even if Plaintiff's appeal did not operate to stay all proceedings before the trial court, it nevertheless stayed any proceedings related to Plaintiff's motion to compel and the subsequent sanctions order because Plaintiff sought discovery related to the two dismissed claims. By contrast, Plaintiff argues that because its appeal of the order dismissing two of its claims related only to those two claims, its appeal did not operate to stay proceedings related to discovery for the two remaining claims.

"[I]ssues challenging subject matter jurisdiction may be raised at any time, even for the first time on appeal." *Gurganus v. Gurganus*, 252 N.C. App. 1, 4, 796 S.E.2d 811, 814 (2017). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Pursuant to the de novo standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Bradford v. Bradford*, 279 N.C. App. 109, 112, 864 S.E.2d 783, 786 (2021).

N.C. Gen. Stat. § 1-294 provides:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

"When a party gives notice of appeal from an appealable order, the trial court is divested of jurisdiction and *the related proceedings are stayed in the lower court*." *Dalenko v. Peden Gen. Contractors, Inc.*, 197 N.C.

App. 115, 121–22, 676 S.E.2d 625, 630 (2009) (emphasis added); *see also Webb v. Webb*, 50 N.C. App. 677, 678, 274 S.E.2d 888, 889 (1981) ("The trial court is . . . without jurisdiction to proceed upon the very matters which were embraced in and which were directly affected by the order from which the appeal is taken.").

Defendant correctly recognizes that "the question is whether the discovery orders involved matters 'embraced within or affected by' Jessey Sports' . . . Wage & Hour Act or unjust enrichment claims." (Referencing N.C. Gen. Stat. § 1-294). Here, in its 16 September 2022 order granting Plaintiff's motion to compel discovery, the trial court quoted N.C. Gen. Stat. § 1-294 and found:

> 12. Plaintiff's pending appeal only addresses Plaintiff's claims for Unjust Enrichment and violations of North Carolina's Wage and Hour Act. Plaintiff's claims for Breach of Contract and Unfair and Deceptive Trade practices were not "part of the judgment appealed from" or the "matter embraced therein." Rather, they are "other matter[s] included in the action and not affected by the judgment appealed from" for purposes of N.C. Gen. Stat. § 1-294.
>
> 13. The Court finds that the parties will need to conduct discovery on the Breach of Contract and Unfair and Deceptive Trade Practices claims regardless of the outcome of the appeal. A stay would delay this inevitable discovery for no obvious benefit, and to the potential detriment of both parties in the event discoverable information is lost. The Court further notes that the universe of persons subject to discovery includes persons beyond Plaintiff and Defendant, who may not be aware of the needs to preserve information subject to discovery. Proceeding with discovery, meanwhile, will continue to advance the case towards trial while the appeal is being addressed.
>
> . . .
>
> 15. There is no reason to stay discovery or other proceedings that are relevant to the claims of Breach of Contract and Unfair and Deceptive Trade Practices, simply because that discovery may also be relevant to the claims on appeal.

The trial court's findings demonstrated that it considered whether Plaintiff's appeal operated to stay proceedings related to discovery

for the two remaining claims, and it concluded that the appeal did not "embrace" discovery pertaining to the remaining claims within the meaning of N.C. Gen. Stat. § 1-294. Therefore, it was proper for discovery related to the two remaining claims to proceed. We agree.

Defendant argues "the discovery requests at issue in the order to compel and imposing sanctions . . . related directly and only to the two claims on appeal." However, there is no statement nor indication of any kind contained within Plaintiff's first discovery requests that they pertained only to the two dismissed claims. Clearly, all or portions of Plaintiff's first discovery requests were related to its two *remaining* claims. The trial court was not required to stay all discovery proceedings merely because, in providing responses to Plaintiff's discovery requests, Defendant gave answers that also *happened to relate* to the two dismissed claims. The matter from which Plaintiff appealed related to the trial court's order dismissing two of Plaintiff's causes of action. In other words, the issue on appeal, and therefore stayed before the trial court, was whether Plaintiff successfully alleged unjust enrichment and Wage and Hour Act claims in its complaint. Because the parties were still litigating the two remaining claims and both required discovery, the trial court retained subject matter jurisdiction to compel discovery and impose sanctions related to those two claims.

C. Imposition of Sanctions

[4] Defendant argues the trial court erred in imposing sanctions because: (1) it lacked subject matter jurisdiction to enter the order imposing sanctions; (2) Plaintiff failed to satisfy the requirement for it to certify it conferred with Defendant regarding the sought-after discovery; and (3) Defendant complied with the trial court's 16 September 2022 order requiring it to respond to Plaintiff's discovery requests within forty-five days following the entry of that order.

"A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996). "According to well-established North Carolina law, a broad discretion must be given to the trial judge with regard to sanctions." *Batlle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009) (quotation marks omitted).

A "party may serve upon any other party written interrogatories to be answered by the party served." N.C. R. Civ. P. 33(a). A party also "may serve on any other party a request . . . to produce and permit the party making the request . . . to inspect and copy, test, or sample any designated documents [or] electronically stored information . . . which are in

the possession, custody or control of the party upon whom the request is served." N.C. R. Civ. P. 34(a).

N.C. R. Civ. P. 37(a) authorizes a "party, upon reasonable notice to other parties and all persons affected thereby, [to] apply for an order compelling discovery," including the movant's requests for answers to interrogatories pursuant to N.C. R. Civ. P. 33 or requests for inspection pursuant to N.C. R. Civ. P. 34. N.C. R. Civ. P. 37(a)(3) defines "failure to answer" an interrogatory to include "an evasive or incomplete answer."

Rule 37 also includes a "confer" requirement. Specifically, N.C. R. Civ. P. 37(a)(2) states, "The motion [to compel] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material *without court action*." (Emphasis added).

Upon a party's failure to comply with a trial court's discovery order under N.C. R. Civ. P. 26(f), N.C. R. Civ. P. 37(b) expressly authorizes a trial court to "make such orders in regard to the failure as are just." N.C. R. Civ. P. 37(b)(2). When a trial court enters a discovery order and a party fails to comply with that discovery order, the opposing party is entitled to seek sanctions, and the trial court is entitled to enter an order imposing sanctions. "North Carolina cases interpreting Rule 37 have generally held that a party seeking sanctions must first demonstrate a violation of a substantive rule of discovery, based upon Rules 26 through 36, obtain a court order to compel discovery, and *then* Rule 37 sanctions may be imposed." *Myers v. Myers*, 269 N.C. App. 237, 252, 837 S.E.2d 443, 454 (2020).

First, we note Defendant's contention that the trial court lacked subject matter jurisdiction is addressed *supra*.

Second, we turn to Defendant's contention that Plaintiff failed to meet and confer regarding Defendant's allegedly defective discovery responses in accordance with N.C. R. Civ. P. 37(a)(2). Any alleged failure on the part of Plaintiff in either including the certification required by N.C. R. Civ. P. 37(a)(2) or in actually conferring or attempting to confer with Defendant is not relevant to the trial court's authority to impose sanctions. N.C. R. Civ. P. 37(a)(2) indeed requires a party filing a motion to compel to include a certification that it conferred or attempted to confer with the opposing party. However, a trial court may impose sanctions for a party's failure to comply with a preexisting discovery order entered by the trial court. In other words, Plaintiff was entitled to file a motion for sanctions for Defendant's failure to comply with a trial

court's discovery order regardless of whether Plaintiff included a certification in its earlier motion to compel.

Here, Plaintiff's motion to compel was based on Defendant's failure to comply with the trial court's 29 April 2022 order. Plaintiff specifically stated, "Defendant has failed to submit a timely response to Plaintiff's First Discovery Requests, under the N.C. Rules of Civil Procedure and the Court's own April 29 Order." The trial court's 29 April 2022 order on Defendant's motion for protective order required Defendant to serve its responses to Plaintiff's discovery requests within forty-five days of its order on Defendant's motion to dismiss. The trial court entered its order on Defendant's motion to dismiss on 27 May 2022. The entry of this order, in turn, triggered the forty-five day deadline and required Defendant to submit its responses no later than 11 July 2022. On 24 June 2022, Plaintiff filed notice of appeal from the trial court's order on Defendant's motion to dismiss. On 11 July 2022, Defendant purportedly submitted a motion to stay all proceedings or set the scope of a stay pending Plaintiff's appeal. However, Plaintiff asserted its counsel had "reviewed the Mecklenburg County Court file and, as of the time of filing this Motion on July 18, 2022, Defendant's Motion to Stay has still not entered the file." Further, the copy contained in the record does not bear a file stamp. Consequently, Defendant's motion was not pending before the court. On 18 July 2022, Plaintiff filed a motion to compel for Defendant's failure to comply with the court's 29 April 2022 order to submit discovery responses by 11 July 2022.

On 16 September 2022, the trial court entered a combined order on Plaintiff's motion to compel discovery responses and Defendant's motion to stay all proceedings or to set the scope of a stay. In this order, the trial court noted the entry of its order on Defendant's motion to dismiss triggered the forty-five day deadline for Defendant to submit discovery responses due by 11 July 2022. The trial court specifically found, "Defendant failed to respond to Plaintiff's First Discovery Requests by July 11, 2022." The trial court concluded that it would "grant Plaintiff's Motion to Compel" because "Defendant has not timely responded to Plaintiff's First Discovery Requests."

The procedural history timeline demonstrates that the trial court found Defendant had failed to comply with two discovery orders, the 29 April 2022 and 16 September 2022 orders, respectively. First, in its order granting Plaintiff's motion to compel, it noted Defendant failed to comply with its 29 April 2022 order because it had failed to submit discovery responses by 11 July 2022. Second, in the trial court's order

granting Plaintiff's motion for sanctions, it found Defendant had failed to comply with the 16 September 2022 order which required Defendant to submit discovery responses within forty-five days of that order, on or before 31 October 2022. The trial court specifically stated:

> While Defendant contends it timely served interrogatory and requests for admission to Plaintiff's discovery requests by sending them via U.S. Priority Mail on October 31, 2022, Plaintiff contends the responses were not timely as a consequence of his receiving the same on/about 7 November 2022. Even if, assuming arguendo, the responses to interrogatories and requests for admission were timely, *the production of documents was not produced until on/about 22 November 2022* – and the same amounts to a material failure to provide timely discovery *not only because of the date of production but because the production itself does not remotely comply with the production requests*.

(Emphasis added). The trial court noted that Defendant had responded to numerous requests for production by stating, "Defendant will produce responsive documents" but Defendant's discovery responses "did not include any production of documents." The trial court further found that other responses by Defendant were evasive or incomplete. N.C. R. Civ. P. 37(a)(3) defines an evasive and/or incomplete answer as a "failure to answer."

Because the trial court found Defendant failed to comply with two discovery orders, it was authorized by N.C. R. Civ. P. 37(b)(2) to enter an order imposing sanctions. Therefore, Plaintiff's alleged failure to include a certificate that it conferred or attempted to confer pursuant to N.C. R. Civ. P. 37(a)(2) is irrelevant to the question of whether the trial court was authorized to impose sanctions in this case. *See* N.C. R. Civ. P. 37(b)(2).

Finally, Defendant argues it complied with the trial court's 16 September 2022 order because it submitted discovery responses dated 31 October 2022. However, Plaintiff argues it did not receive the responses until 7 November 2022. The trial court noted that even if Defendant's responses to interrogatories and requests for admission were timely, it failed to produce documents until 22 November 2022 and that Defendant's assertions that it would produce documents at a future time constituted a failure to respond to Plaintiff's requests for production. The fact that Defendant merely provided discovery responses does not mean it

complied with the trial court's discovery order regardless of the inadequacies of Defendant's discovery responses. Here, Defendant's discovery responses failed to include responses to requests for production and therefore failed to comply with the 16 September 2022 order.

The trial court was authorized to impose sanctions pursuant to N.C. R. Civ. P. 37(b)(2) because Defendant failed to comply with the discovery orders.

D. Selection of Sanctions

[5] Defendant next argues the trial court erred in its selection of sanctions because it was required to consider less severe sanctions.

A trial court may impose sanctions including designating certain facts as established, "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence," "striking out pleadings or parts thereof," and/or rendering a default judgment. N.C. R. Civ. P. 37(b)(2). If the trial court imposes sanctions pursuant to N.C. R. Civ. P. 37(b), then it "shall," in lieu of or in addition to the enumerated sanctions, require the disobedient party "to pay the reasonable expenses, including attorney's fees" caused by the party's failure to comply with a discovery order. *Id.*

Here, the trial court concluded Plaintiff met its burden in establishing Defendant had failed to comply with the discovery orders. It further concluded "Defendant's failure to obey previous court order(s) constitutes significant discovery violations" and "Defendant's disobedience of previous discovery court order(s) has been materially prejudicial to Plaintiff's ability to advance and pursue its claim(s) against Defendant." The trial court noted it "considered lesser or alternative sanctions and determined they would not be appropriate or sufficient under these circumstances."

Therefore, the trial court imposed sanctions of establishing Plaintiff's breach of contract claim as a matter of law to the extent supported by enumerated paragraphs in Plaintiff's complaint, prohibiting Defendant from recovering any overpayments Defendant claims it made to Plaintiff, prohibiting Defendant from offering an expert witness on certain matters at trial, and requiring Defendant to pay Plaintiff reasonable attorney's fees in the amount of $8,500.00 as a result of litigating Plaintiff's motion for sanctions.

N.C. R. Civ. P. 37(b)(2) specifically authorizes each of the sanctions imposed by the trial court. The trial court stated that it indeed considered less severe alternatives but that such alternatives would not be appropriate or sufficient where Defendant's failures to comply with

discovery orders materially prejudiced Plaintiff. Accordingly, the trial court did not abuse its discretion in its selection of sanctions.

Defendant cites *Goss v. Battle* for the proposition that a trial court must consider less severe sanctions. 111 N.C. App. 173, 432 S.E.2d 156 (1993). In that case, however, this Court considered "whether a trial court must consider less severe sanctions before dismissing a plaintiff's complaint under Rule 37(d) of the North Carolina Rules of Civil Procedure." *Id.* at 176, 432 S.E.2d at 158. *Goss* is distinguishable because it concerns a trial court's dismissal of an action, which is not a sanction imposed by the trial court under the facts of this case. Moreover, N.C. R. Civ. P. 37(d) concerns a trial court's authority to impose sanctions *in the absence of a trial court's order compelling discovery*. Here, the trial court appropriately entered its order pursuant to N.C. R. Civ. P. 37(b)(2).

III. Conclusion

For the reasons explained herein, we hold this Court has subject matter jurisdiction to hear this appeal, and the trial court had subject matter jurisdiction to enter orders on discovery related to Plaintiff's remaining claims. We further hold the trial court did not abuse its discretion in imposing sanctions nor in its selection of sanctions. Therefore, we affirm the trial court's order imposing sanctions.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

L.I.C. ASSOCIATES I, Limited Partnership, Plaintiff
v.
BRANDI L. BROWN, Defendant

No. COA22-1012

Filed 2 July 2024

1. Appeal and Error—mootness—statutory remedies—practical effect on the existing controversy—motion to dismiss appeal denied

In an eviction action, the appeal by a tenant from an order granting summary judgment to a landlord based on the tenant's lease violations—including failure to pay rent, failure to timely cure the non-payment, and changing the locks—was not moot where, although the tenant failed to make timely rental payments as ordered by a stay of execution, resulting in the landlord regaining possession of the property, she may have potential statutory remedies under N.C.G.S. §§ 42-35 and 42-36 if she were to prevail in her appeal.

2. Landlord and Tenant—termination notice defective—notice based on lease—notice based on Violence Against Women Act

In an action for eviction from housing covered by a federal subsidy program, the trial court's order granting summary judgment to a landlord based on violations of the tenant's lease—including failure to pay rent, failure to timely cure the non-payment, and changing the locks—was reversed because the termination notice the landlord sent to the tenant was defective: (1) under the lease as to the lock-changing violation in that it did not specifically identify that act as a basis for termination of the tenant's lease; and (2) under the federal Violence Against Women Act (VAWA) in that it failed to include notice of the tenant's VAWA rights in connection to changing the locks—which the tenant claimed she undertook only after she was unable to obtain assistance from the landlord when an ex-boyfriend stole her keys.

Judge STADING concurring in result only.

Appeal by defendant from order entered 12 August 2022 by Judge Frederick B. Adams in District Court, Forsyth County. Heard in the Court of Appeals 22 August 2023.

Legal Aid of North Carolina, Inc., by Frances J. Sullivan, Edward R. Sharp, Isaac W. Sturgill, and Celia Pistolis, for defendant-appellant.

Blanco Tackabery & Matamoros, PA, by Henry O. Hilston, for plaintiff-appellee.

STROUD, Judge.

Defendant appeals from the trial court's order granting summary judgment in favor of Plaintiff evicting Defendant from the property she leased from Plaintiff. Because Plaintiff's termination notice did not comply with the lease or federal law, the trial court erred by granting summary judgment in favor of Plaintiff but should have granted summary judgment in favor of Defendant.

I. Background

On or about 8 August 2014, Defendant Brandi Brown ("Tenant") entered into a lease with Plaintiff L.I.C. Associates I ("Landlord") for a property in Forsyth County, North Carolina ("the Property"). The Property is managed by Landura Management Associates, which oversees the day-to-day operations of the Property and is responsible for collecting rent and conducting maintenance on behalf of Landlord. Tenant was required to make monthly payments of $27.00 in rent due on the first of each month. The property is federally subsidized by the United States Department of Agriculture ("USDA") Rural Development program, which pays the remaining portion of Tenant's rent.

On or about 15 March 2022, Landlord sent Tenant a "Termination of Lease Notice" ("the Termination Notice") which stated Tenant's lease would be terminated on 15 April 2022 due to late rental payments totaling $111.00 "in accordance with Section 12" of the lease. The Termination Notice also provided Tenant could pay the unpaid balance "prior to the termination date" of 15 April 2022 and the termination would be waived. Further, the Termination Notice identified the Property's management "normal office hours" as Tuesdays and Thursdays between 8:00 AM and 4:00 PM.

After Tenant allegedly failed to "cure" the non-payment of rent, Landlord filed an action for summary ejectment in small claims court on 22 April 2022 alleging only unpaid rent and filed an amended complaint for summary ejectment on 5 May 2022 alleging both unpaid rent and a violation for changing the locks. On 5 May 2022, a magistrate

judge entered a "judgment in action for summary ejectment" in favor of Landlord, ordering Tenant "be removed from and [Landlord] be put in possession" of the Property. Plaintiff timely appealed this judgment to District Court on 9 May 2022. Landlord filed a motion for summary judgment on 26 May 2022.

Landlord contended Tenant violated the lease in two ways: (1) by changing the locks on her door without permission from Landlord or the property management company; and (2) by failing to make timely rental payments in January, February, and March 2022. The relevant provisions of the lease agreement state:

> Section Two – Tenant Contribution
>
> Rent (tenant contribution) . . . is due and payable without demand on or before the first day of each month.
>
> . . . .
>
> If tenant does not pay the full amount of the tenant contribution by the end of the 10th day of the month, a charge of $10 or 5% of Gross Tenant Contribution (whichever is greater) in the amount of $10, will be made for late fee . . . and/or the landlord may terminate this agreement for nonpayment of rent in accordance with state law.
>
> . . . .
>
> Section Eight – Use and Maintenance
>
> . . . .
>
> Tenant agrees:
>
> . . . .
>
> 10. Not to make any alteration, addition, deletion, or improvements to the premises without the prior written consent of landlord.
>
> . . . .
>
> Section Twelve – Termination of Lease
>
> . . . .
>
> Landlord may terminate this lease agreement, with proper notice, for the following reasons:
>
> . . . .

> 2. Tenant's material noncompliance with the terms of the lease such as, but not limited to[:] (a) nonpayment of rent past a 10-day grace period; (b) nonpayment of any other financial obligations beyond the required date of payment; (c) repeated late payment of rent or other financial obligations; (d) admission to, or conviction of, any drug violations as defined in Section 18; (e) permitting unauthorized persons to live in the unit; (f) repeated minor violations of the lease; (g) one or more major violations of the lease.

(Capitalization altered.) The lease also refers to "Rules and Regulations" in an attachment to the lease, which state:

> 13. The Landlord may retain a pass key to the premises. Tenant shall not alter any lock or install new locks without the written consent of the Landlord.
>
> . . . .
>
> 18. All maintenance requests shall be given to the Landlord in writing with the exception of emergencies. The landlord will provide a "Tenant Maintenance Request" (TMR) form for reporting maintenance requests.

(Capitalization altered.)

At the hearing in District Court, Landlord presented the affidavit of Tiffany McKenzie, the property manager for Landlord, supporting the motion for summary judgment and Tenant filed an affidavit in opposition. Essentially, Landlord alleged Tenant did not pay rent for January, February, and March 2022, and never "cured" the non-payment of rent by paying before 15 April 2022, as allowed in the Termination Notice. Tenant disputed this, stating she tried to pay the unpaid rent on 14 April 2022, but no one was in the leasing office to take her payment. Further, Landlord claimed Tenant changed the locks without permission in violation of the lease, failed to change the locks back after a written notice to do so, and never provided Landlord with the key to the new lock. Tenant claimed she changed the locks due to her ex-boyfriend stealing her key. She contended she attempted to contact Landlord multiple times to change the locks; she did not receive a notice alleging she violated her lease by changing the locks; she asked for help from Landlord in changing the locks back once she became aware of the issue; and she provided the new key to the locks to Landlord.

After an 8 July 2022 hearing on the motion for summary judgment, the trial court entered an order on 12 August 2022 granting summary judgment in favor of Landlord. Tenant appeals.

II. Mootness

[1] While Tenant's appeal was pending with this Court, Tenant failed to make timely rental payments as ordered by the stay of execution. As a result, Landlord filed a motion to dismiss the appeal as moot. Specifically, as Landlord regained possession of the Property due to Tenant's failure to pay rent, Landlord contends there is no longer a live issue. Tenant responds that because she has various statutory remedies based upon North Carolina General Statute Sections 42-35 and 42-36 available if she should win on appeal, the appeal is not moot.

We have consistently held "[a] case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Ass'n for Home and Hospice Care of N.C., Inc., v. Div. of Med. Assistance*, 214 N.C. App. 522, 525, 715 S.E.2d 285, 287-88 (2011) (citations and quotation marks omitted). Further, "if the issues before a court or administrative body become moot *at any time during the course of the proceedings*, the usual response should be to dismiss the action." *Id.* at 526-27, 715 S.E.2d at 289 (emphasis in original) (citations and quotation marks omitted).

Tenant cites to an unpublished case to support the proposition that an appeal of an eviction is not moot where the landlord regains possession of the premises due to the tenant's subsequent failure to pay rent as ordered by a stay of execution. *See River Hills Apartments v. Hardy*, No. COA04-1009, 168 N.C. App. 729, 609 S.E.2d 499 (2005) (unpublished). In *River Hills Apartments*, this Court held "the clerk's issuance of a writ of possession or the removal of defendant from the subject apartment [does not] moot [tenant's] appeal *from the magistrate's judgment*, given the statutory remedies [under North Carolina General Statute Sections 42-35 and 42-36] available to her should she prevail." *Id.*, slip op. at 3 (emphasis added). *River Hills Apartments* deals not with an appeal to this Court, but with the appeal from the magistrate to District Court for trial *de novo*, so *River Hills Apartments'* usefulness as persuasive authority is limited. In addition, we have been unable to find any case defining what a claim under North Carolina General Statute Sections 42-35 or 42-36 would require. These statutes were adopted in 1868 but only one reported appellate case has mentioned them. In *Twin City Apartments, Inc. v. Landrum*, the statutes are mentioned, although there were no claims in the case based upon them. 45 N.C. App. 490, 494,

263 S.E.2d 323, 325-26 (1980). These statutes were briefly mentioned in *Twin City Apartments* in this Court's discussion of whether "the summary ejectment procedure as set out in G.S. 42-26(1) and G.S.42-32, is unconstitutional[,]" stating

> [o]nce the estate of the lessee expires, the lessor, by virtue of his superior title, may resume possession by following proper procedures. Defendant's right to possession is protected by virtue of G.S. 42-35 and G.S. 42-36, *which provide a remedy to the tenant if he is evicted, but later restored to possession.*

Id. at 494, 263 S.E.2d at 325-26 (emphasis added). This Court did not interpret the statutes or discuss them any further. *Id.*

The only cases addressing a right of restitution or repossession as mentioned in these statutes are cases from the 1800s and as best we can tell these cases were based upon common law[1] or former North Carolina statutes. *See, e.g.*, *Dulin v. Howard*, 66 N.C. 433, 435 (1872) ("In addition, this duty is expressly prescribed by sec. 27 of the Landlord and Tenant, Act 1868-69, ch. 156, p. 355."). But despite the apparent lack

---

1. When adopted in 1778, before the existence of the United States of America, current N.C.G.S. § 4-1 reaffirmed principles relating to the common law which had first been statutorily recognized for the Colony of North Carolina in 1715. N.C.G.S. § 4-1 provides:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (1986). This statute appears to have survived without amendment for the 221 years from its enactment to this date. The common law to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefore; and is not abrogated, repealed, or obsolete. The common law that remains in force by virtue of N.C.G.S. § 4-1 may be modified or repealed by the General Assembly, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment.

Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 471-72, 515 S.E.2d 675, 690-91 (1999) (citations and quotation marks omitted).

of use of these statutes since their adoption in 1868, the statutes have not been revoked or amended, despite many changes to Chapter 42 over the years.

North Carolina General Statute Section 42-35 states:

> If the proceedings before the magistrate are brought before a district court and quashed, or judgment is given against the plaintiff, the district or other court in which final judgment is given shall, if necessary, restore the defendant to the possession, and issue such writs as are proper for that purpose.

N.C. Gen. Stat. § 42-35 (2023). North Carolina General Statute Section 42-36 states "[i]f, by order of magistrate, the plaintiff is put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal." N.C. Gen. Stat. § 42-36 (2023).

Based on these statutes providing Tenant with potential statutory remedies, we cannot say further litigation "cannot have any practical effect on the existing controversy." *Div. of Med. Assistance*, 214 N.C. App. at 525, 715 S.E.2d at 288; *see id.* Thus, we hold this appeal is not moot and deny the motion to dismiss the appeal.

III. Defective Termination Notice

[2] Tenant raises several arguments on appeal, including arguments that the trial court erred in granting summary judgment because there were genuine issues of material fact as to whether she tendered payment of rent and her violation of the lease as to changing the locks. But since we have determined the defects in the Termination Notice are dispositive, we will limit our opinion to these arguments.

Tenant argues "the trial court erred in granting summary judgment for [Landlord] rather than [Tenant] when the termination of lease notice did not provide the notices required by the lease and federal law, including the Violence Against Women Act." Specifically, Tenant claims the Termination Notice is defective since it "does not inform [Tenant] of her right to access her tenant file, as required by the Lease, and does not include a notice of VAWA [Violence Against Women Act] rights or a VAWA certification form, as required by 34 U.S.C. § 12491(d)(2)(c)."

1. Notice Based on the Lease

First, Tenant contends Landlord's "termination of lease notice does not comply with the lease[,]" (capitalization altered), since the

Termination Notice "does not mention the locks at all, much less identify that alleged violation as a basis for the proposed termination of the lease." As to non-payment of rent, Tenant argues "the [Termination] Notice does not offer [Tenant] access to her file, which her Lease requires."

> A trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though there may be evidence that would support findings to the contrary. However, conclusions of law reached by the trial court are reviewable de novo.
>
> > In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable.
>
> Our courts do not look with favor on lease forfeitures. When termination of a lease depends upon notice, the notice must be given in strict compliance with the contract as to both time and contents.

Lincoln Terrace Assocs., Ltd. v. Kelly, 179 N.C. App. 621, 623, 635 S.E.2d 434, 435-36 (2006) (citations, quotation marks, and brackets omitted).

Here, the lease required:

> Landlord must give Tenant a written notice of any proposed termination of tenancy, stating the grounds for termination, allowing Tenant or his designee access to his file, giving a specific date of the termination and advising the Tenant of their right to defend himself if judicial action is needed. Except as may otherwise be stated, and in accordance with Agency regulations, state or local laws, the above notice shall give at least 10 days for nonpayment of rent, and 30 days in the case of material non compliance.

The Termination Notice was written; identified the date of termination and amount of rent past due; stated the grounds for termination under Section 12 of the lease; and stated judicial action may be taken if

Tenant failed to vacate and that Tenant "may present a defense" at that time. However, the Termination Notice only identifies the grounds for termination as "Non-Payment of Rent" "in accordance with Section 12 of [the] lease[,]" which deals with termination of the lease generally including non-payment of rent and "material non compliance," among other things. While the Termination Notice sufficiently explains to Tenant her ability to "contact the office to arrange a meeting to discuss the proposed termination[,]" which satisfies Landlord's obligation to give Tenant access to her file, the Termination Notice does not comply with the lease as to the lock violation.

This Court has held a termination notice that required the landlord to identify the specific grounds for termination but identified the wrong section of the lease as the basis for termination nonetheless was in strict compliance with the lease. *See Roanoke Chowan Reg'l Hous. Auth. v. Vaughan*, 81 N.C. App. 354, 358, 344 S.E.2d 578, 581 (1986). In *Vaughan*, the termination notice stated the grounds for termination was "Section 7 of Lease Agreement[:] by allowing individuals not named on the lease to reside in your apartment." *Id.* at 356, 344 S.E.2d at 580. But section 7 was not the correct section to terminate the lease for "allowing individuals not named on the lease to reside in your apartment." *Id.* at 358, 344 S.E.2d at 581. Despite this error, this Court held, since the termination notice still identified the ground for termination, "[t]his statement controls and is sufficient to put defendants on notice regarding the specific lease provision deemed to have been violated." *Id.*

In contrast to our holding in *Vaughan*, here the Termination Notice was titled "Termination of Lease Notice[:] Non-Payment of Rent" and specifically states the lease will be terminated "because you failed to pay your rent[.]" While the Termination Notice identifies section 12 of the lease as the basis for termination, section 12 includes non-payment of rent and six other potential bases for termination. As the Termination Notice itself specifically identifies only non-payment of rent as the basis for termination, and does not mention locks or material non-compliance with the lease, the Termination Notice regarding the lock violation is not in strict compliance with the lease. *See id.* We also note Landlord argues the prior written warnings regarding the lock, together with the Termination Notice, are sufficient to comply with the notice requirement. But Landlord cannot rely upon the prior warnings as an addition to the Termination Notice. These warnings are clearly labeled "Tenant Warning" and stated "[s]hould you fail to take this corrective action or if additional violations of the lease occur, action will be taken, up to and including the termination of your lease." As these warnings did not state Landlord was terminating the lease for the lock violation, the warnings

cannot serve as proper termination notices. Thus, the Termination Notice is defective under the lease as to the lock violation.

2. Notice Under the Violence Against Women Act

In addition to alleging a defective notice under the lease, Tenant contends her lease is covered under a federally subsidized housing program and thus the Violence Against Women Act ("VAWA") "require[s] a notice of rights and a VAWA certification form to be included with any notice of lease termination."

The issue of whether Landlord complied with "applicable rules and regulations" in the termination of the lease is a question of law which we review *de novo*:

> In federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible. The construction of an administrative regulation is a question of law. On appeal, conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo*.

Raleigh Hous. Auth. v. Winston, 376 N.C. 790, 794, 855 S.E.2d 209, 212 (citations, quotation marks, and brackets omitted).

Under VAWA:

> Each public housing agency *or owner or manager of housing* assisted under a covered housing program *shall provide the notice* developed under paragraph (1), together with the form described in subsection (c)(3)(A), to . . . tenants of housing assisted under a covered housing program–
>
> . . . .
>
> (c) with any notification of eviction or notification of termination of assistance[.]

34 U.S.C. § 12491(d)(2)(c) (2022) (emphasis added).

Here, Landlord does not dispute that VAWA requires landlords of a federally subsidized housing program to include a notice of VAWA rights in a notice of lease termination but asserts the VAWA statute does not provide a remedy for non-compliance, such as a defense to an eviction. Landlord points us to a Department of Housing and Urban Development ("HUD") regulation, 24 C.F.R. § 5.2005, that Landlord contends is applicable, to argue non-compliance with a notice requirement in an eviction

proceeding is not a defense available to Tenant since Tenant's eviction was "unrelated to domestic violence." *See* 24 C.F.R. § 5.200(d)(2) ("Nothing in this section limits any available authority of a covered housing provider to evict or terminate assistance to a tenant for any violation not premised on an act of domestic violence, dating violence, sexual assault, or stalking that is in question against the tenant or an affiliated individual of the tenant."). In addition, this Court has addressed notice of termination requirements under other provisions of similar federal statutes governing federally subsidized housing programs. *See Timber Ridge v. Caldwell*, 195 N.C. App. 452, 455, 672 S.E.2d 735, 737 (2009) (reversing "the trial court's grant of summary ejectment" since "there is no evidence in the record in the present case that plaintiff complied with the requirements of 24 C.F.R. § 247.4 by providing a proper Notice of Termination").

Although we are unable to find binding North Carolina authority addressing VAWA specifically, our Supreme Court has held a landlord's non-compliance with regulations regarding the notice of termination in an eviction action in housing covered by a federally subsidized housing program merits reversal of judgment in favor of a landlord. *See Winston*, 376 N.C. at 797, 855 S.E.2d at 214 (reversing "the Court of Appeals' decision concerning compliance with 24 C.F.R. § 966.4(l)(3)(ii) and remand[ing] to the Court of Appeals for remand to the trial court for dismissal" since the landlord's termination notice did not comply with federal regulations). In Winston, the specific issue was based upon the landlord Raleigh Housing Authority's notice of lease termination to the tenant, Winston, that "notified her of RHA's intent to terminate her lease due to 'Inappropriate Conduct – Multiple Complaints' and quoted provision 9(F) of the lease agreement." *Id.* at 791, 855 S.E.2d at 211. The termination notice did not identify the specific conduct RHA claimed as "inappropriate conduct" under the lease. *See id.* In the lease agreement, provision 9(F) required the tenant to "[t]o conduct himself/herself and cause other persons who are on the premises with the Resident's consent to conduct themselves in a manner which will not disturb the neighbors' peaceful enjoyment of their accommodations." *Id.* at 796, 855 S.E.2d at 213. RHA argued Winston was "on notice that her alleged lease violation was based on disturbing her neighbors." *Id.* The Supreme Court noted that "a tenant's disturbance of her neighbors encompasses a broad range of conduct, may involve the tenant or other persons on the premises, and, as relevant to this case, may include conduct for which the landlord may not evict the tenant as a matter of law." *Id.* Based on the trial court's findings of fact, the alleged "inappropriate conduct" arose from several noise complaints from Winston's neighbors.

Id. at 793, 855 S.E.2d at 212. The trial court found Winston had claimed she was going to seek a Domestic Violence Protective Order ("DVPO") against a man, although no DVPO had been granted, and she had alleged the man "repeatedly screams profanity at [Winston] and threatens to assault her; repeatedly verbal abuse for 17 years has caused her substantial emotional distress[.]" *Id.* at 793, 855 S.E.2d at 212. Although the Supreme Court's holding was based upon RHA's failure to state the "specific grounds" for the termination of the lease as required by 24 C.F.R. § 966.4(l)(3)(ii), the Court also noted that Winston's alleged "disturbance of her neighbors" might include "conduct for which the landlord may not evict the tenant as a matter of law," noting provisions of VAWA:

> Specifically, as part of the Violence Against Women Act, ch. 322, 108 Stat. 1902 (1994), Congress has prohibited covered housing programs from terminating participation in or evicting a tenant from housing on the basis that the tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, 34 U.S.C. § 12491(b)(1), and mandates that
>
> > an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as—
> >
> > (A) a serious or repeated violation of a lease for housing assisted under a covered housing program by the victim or threatened victim of such incident; or
> >
> > (B) good cause for terminating the assistance, tenancy, or occupancy rights to housing assisted under a covered housing program of the victim or threatened victim of such incident.
>
> 34 U.S.C. § 12491(b)(2); *see also* N.C.G.S. § 42-42.2 (2019) (prohibiting termination of tenancy or retaliation in the rental of a dwelling based substantially on: (i) the tenant, applicant, or a household member's status as a victim of domestic violence, sexual assault, or stalking). The additional statement in the notice of termination – "Inappropriate Conduct – Multiple Complaints" – is similarly broad and vague and subject to the same concerns as provision 9(F) of the lease agreement.

Id. at 796-97, 855 S.E.2d at 214 (quotation marks, ellipsis, and brackets omitted).

In this case, although the trial court did not make any findings of fact but instead granted summary judgment for Landlord, we note Tenant's affidavit stated she had changed the locks because her "ex-boyfriend stole [her] keys to the Leased Premises" and she had attempted several times to get Landlord's Property Manager to change the locks. After she was unable to get assistance from Landlord, she changed the locks.[2] We are thus unable to say, as Landlord contends, that the changed locks violation was "unrelated to domestic violence."

Because Landlord failed to comply with the VAWA termination notice requirements, and Tenant's housing assistance is indisputably covered by VAWA, we must reverse the trial court's grant of summary judgment in favor of Landlord and remand to the trial court for dismissal of the eviction proceeding. *See id.* at 794, 855 S.E.2d at 212 ("We reverse the decision of the Court of Appeals on the first issue presented and remand to the trial court for dismissal.").

IV. Conclusion

Because Landlord failed to comply with the notice requirements under the lease as to the lock violation and under VAWA in the termination notice, we reverse the trial court's grant of summary judgment in favor of Landlord and remand to the trial court for dismissal.

REVERSED AND REMANDED.

Judge FLOOD concurs.

Judge STADING concurs in result only.

2. Had we addressed the issue of whether there were genuine issues of material fact precluding summary judgment in favor of Landlord, we would have reversed based on a factual dispute in the affidavits from Tenant and Landlord as to Tenant's requests to change the locks and Landlord's response. But we note the issue of the changed locks because Tenant's alleged need to change her locks also arose from a situation of the type VAWA is intended to address, just as in *Winston*. *See Winston*, 376 N.C. at 796-97, 855 S.E.2d at 214.

STATE OF NORTH CAROLINA
v.
BRIAN CHRISTOPHER ANDREWS, DEFENDANT

No. COA23-675

Filed 2 July 2024

Kidnapping—restraint or confinement—beyond that inherent in other crimes—evidence insufficient

In a prosecution that resulted in convictions for attempted discharge of a firearm into an occupied vehicle, attempted robbery with a firearm, and first-degree kidnapping, the trial court erred in denying defendant's motion to dismiss the kidnapping charge for insufficient evidence of restraint or confinement of the victim—an essential element of kidnapping—beyond that inherent in the robbery and firearm offenses. Where the evidence showed that defendant's vehicular pursuit of and shooting toward the victim's car was not a separate and complete act—independent of and apart from defendant's attempt to rob the victim of his car by use of a firearm—a conviction for kidnapping would implicate double jeopardy concerns.

Appeal by defendant from judgments entered 6 January 2023 by Judge Lori I. Hamilton in Davie County Superior Court. Heard in the Court of Appeals 21 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Hyrum J. Hemingway, for the State.

Mary McCullers Reece for defendant-appellant.

THOMPSON, Judge.

Defendant Brian Christopher Andrews (defendant) appeals from the trial court's order entered upon a jury's verdict finding him guilty of attempted discharge of a firearm into an occupied vehicle in operation, attempted robbery with a firearm, and first-degree kidnapping. On appeal, defendant contends that the trial court erred in denying his motion to dismiss the charge of first-degree kidnapping for insufficiency of the evidence. After careful review, we reverse defendant's first-degree kidnapping conviction.

I. Factual Background and Procedural History

In September 2019, a silver 2008 Toyota Corolla belonging to Jessica Stewart's (Stewart) mother was stolen. On 13 September 2019, defendant met up with Stewart and two other individuals to locate the missing vehicle. Later that evening, nineteen-year-old Samuel Wyre (victim) was driving his vehicle, a 2004 Toyota Corolla (victim's vehicle), alone at approximately 3:30 a.m. when a van, driven by defendant, pulled in front of the victim, turned right into a parking lot, and then pulled *back* onto the road behind the victim's vehicle. The victim slowed down, and defendant exited the van, approached the victim's vehicle with a firearm in hand, and told the victim to "[g]et the f[***] out of the car." The victim did not comply with defendant's demand and began to drive away. At this point, defendant returned to the van and continued pursuit of the victim's vehicle at a high speed, between ninety and one-hundred miles per hour. During the pursuit, the victim heard gunshots coming from the van as defendant held a shotgun out the driver's window and fired in the direction of the victim's vehicle.

As the pursuit continued, the van pulled alongside the victim's vehicle, driving in the opposite direction of traffic,[1] when the victim observed the barrel of a gun pointed at him out of the van's window. The victim slammed on his brakes, executed a "K-point turn" and began driving in the opposite direction. Initially, the victim saw the van continue in pursuit, testifying that he "saw sparks coming out of the van brakes[,]" but eventually the lights from the van were no longer visible behind him. Shortly thereafter, the victim pulled over at a gas station where he engaged with law enforcement officers and informed them of what had just occurred.

On 8 June 2020, defendant was indicted upon a true bill of indictment for attempting to discharge a firearm into an occupied vehicle, attempted robbery with a firearm, and first-degree kidnapping using a firearm. The matter came on for trial on 3 January 2023 in Davie County Superior Court. On 6 January 2023, the jury returned guilty verdicts against defendant as to all three alleged offenses, and by judgments entered that same day, defendant was sentenced to an active sentence of forty-four to sixty-five months in the custody of the North Carolina Division of Adult Correction, a consecutive sentence of 111 months to 146 months for attempted robbery with a firearm, and a third consecutive sentence of 199 months to 251 months for first-degree kidnapping.

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1. The victim testified that the road was a two-lane road, with "just one [lane] for each direction."

Defendant entered timely oral notice of appeal at the end of his trial. From these judgments, defendant appeals.

II. Discussion

On appeal, defendant argues that the trial court "erred by denying the motion to dismiss the first-degree kidnapping charge" because "the evidence was insufficient to support a finding of restraint or confinement beyond that inherent in the charges for attempted robbery with a firearm and attempted discharge of a firearm into an occupied vehicle." We agree.

A. Standard of Review

A motion to dismiss on the ground of insufficiency of the evidence "presents a question of law and is reviewed de novo on appeal." *State v. Norton*, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011) (italics omitted). "The question for this Court is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

B. First-Degree Kidnapping

Kidnapping is defined by our legislature, in pertinent part as:

> (a) [a]ny person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint, or removal is for the purpose of:
>
> . . . .
>
> > (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
> >
> > (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . . .

N.C. Gen. Stat. § 14-39(a)(2)–(3) (2023). A kidnapping where "the person kidnapped was not released by the defendant in a safe place or had been seriously injured or sexually assaulted" constitutes a first-degree kidnapping. *Id.* § 14-39(b).

However, because some degree of restraint or confinement is inherent in felonies such as robbery with a firearm, kidnapping charges can implicate double jeopardy concerns where the restraint is the basis for both the underlying felony and the kidnapping. *See State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978) ("[M]ak[ing] a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes . . . would violate the constitutional prohibition against double jeopardy."). Therefore, in order to avoid running afoul of double jeopardy violations in seeking convictions for kidnapping, "the restraint, which constitutes the kidnapping, [requires] a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352.

Our precedent is illustrative in applying this principle. In *State v. Irwin*, the Supreme Court of North Carolina reversed the kidnapping conviction of a defendant who forced the victim, at knifepoint, to the rear of a convenience store, so that the victim could open a safe containing prescription drugs. 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). In reversing the kidnapping conviction, the Court reasoned that the victim's "removal to the back of the store was an inherent and integral part of the attempted robbery" because "to accomplish the defendant's objective of obtaining drugs it was necessary that . . . [the victim] go to the back of the store . . . and open the safe." *Id.*

On the other hand, in *State v. China*, our Supreme Court affirmed the defendant's conviction for kidnapping. 370 N.C. 627, 628, 811 S.E.2d 145, 146 (2018). There, the defendant and his accomplice broke into the home of the defendant's ex-girlfriend and began striking his ex-girlfriend's new partner (victim) in the face. *Id.* at 629, 811 S.E.2d at 146. Once the victim was incapacitated, the defendant sexually assaulted him. *Id. After the sexual assault*, the defendant dragged the victim off the bed, causing the victim's head to hit the floor, the defendant and his accomplice then began kicking and stomping the victim. *Id.* at 629, 811 S.E.2d at 146–47. In upholding the defendant's conviction for kidnapping, our Supreme Court reasoned that the defendant had exercised all necessary force to commit the sexual assault when he struck the victim until he was incapacitated. *Id.* at 635–36, 811 S.E.2d at 150–51. The Court concluded that it was the defendant's actions *after* the sexual assault

had ended—dragging the victim off the bed causing his head to hit the floor and kicking and stomping him—that constituted the "additional restraint" necessary to support the conviction for kidnapping. *Id.* at 636, 811 S.E.2d at 151.

Finally, *State v. Allred* provides a stark illustration of these principles in practice. There, the defendant was convicted of three separate counts of kidnapping three separate individuals. 131 N.C. App. 11, 13, 505 S.E.2d 153, 154 (1998). In that case, the defendant and his accomplice entered the living room of a home, where two of the three victims were gathered. *Id.* The defendant robbed the two victims in the living room at gunpoint; while doing so, the defendant's accomplice kicked in a separate door and discovered the third victim, who was sleeping. *Id.* at 13, 505 S.E.2d at 155. The third victim was then, "grabbed . . . by the collar . . . dragged . . . into the living room, and pushed . . . down on the couch." *Id.*

This Court vacated the defendant's kidnapping convictions as to the first two victims who were initially in the living room, reasoning that, "the restraint used against these victims was an inherent part of the armed robbery and did not expose them to any greater danger than that required to complete the robbery." *Id.* at 20, 505 S.E.2d at 159. However, this Court affirmed the defendant's kidnapping conviction as to the third victim who was forced from the bedroom and into the living room; reasoning that, "this removal was not an integral part of [the] robbery committed . . . but a separate course of conduct designed to prevent [the victim] from hindering [the] defendant . . . from perpetrating the robberies against the other occupants." *Id.* at 21, 505 S.E.2d at 159.

Here, upon our careful review of the caselaw on this subject, we conclude that the factual scenario presented in the present case is more analogous to *Irwin* than to *China*; the high-speed pursuit of the victim was not "a separate, complete act, independent of and apart from the" felony of attempted armed robbery, but "an inherent, inevitable feature of" the attempted armed robbery, and if we were to affirm defendant's conviction for kidnapping we "would violate the constitutional prohibition against double jeopardy." *Fulcher*, 294 N.C. at 523–24, 243 S.E.2d at 351–52.

As defendant notes in his appellate brief, "[t]he van's pursuit and stopping of [the victim]'s car was inherent and necessary to the attempted armed robbery"; for defendant to be successful in the armed robbery, he would have needed to "tak[e] the [vehicle] away from [the victim], . . . at the very least, to stop the car, remove [the victim] from

the driver's seat, and then take possession of the car and its keys by threat of the firearm."

Indeed, defendant's pursuit of the victim by vehicle with a firearm was "an inherent, inevitable feature of another felony[,]" armed robbery, whereby defendant had to remove the victim from the victim's vehicle at gunpoint and take the vehicle to accomplish the robbery; the ensuing pursuit to accomplish the armed robbery does not constitute "a separate, complete act, independent of and apart from the other felony." *Id.* In the instant case—like the defendant who led the victim at gunpoint to open the safe in *Irwin*, and the defendant who restrained the two victims initially in the living room in *Allred*——defendant's pursuit of the victim's vehicle was part of the "necessary restraint" to accomplish defendant's objective of taking the victim's vehicle from the victim at gunpoint.

For this reason, we conclude that the trial court erred in denying the motion to dismiss the charge of first-degree kidnapping, because, viewing the evidence in the light most favorable to the State, there was insufficient evidence of a separate, complete restraint or confinement, independent of and apart from the attempted armed robbery, as is necessary to support a conviction for first-degree kidnapping without violating the constitutional prohibition against double jeopardy.

III. Conclusion

We conclude that the trial court erred in denying defendant's motion to dismiss the charge of first-degree kidnapping because the State did not meet its burden of establishing each essential element of the offense charged. For this reason, we reverse defendant's conviction for first-degree kidnapping.

REVERSED IN PART.

Judges COLLINS and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
PHILLIP ANDREW BARKER, DEFENDANT

No. COA23-1090

Filed 2 July 2024

1. Motor Vehicles—misdemeanor death by vehicle—law enforcement exception to speed limit—not applicable

In a prosecution that resulted in a jury verdict finding a police officer (defendant) guilty of misdemeanor death by motor vehicle, the statutory exemption from speed limit regulations for police "in the chase or apprehension of" criminals or suspects (N.C.G.S. § 20-145) did not bar defendant's conviction because the offense only required the State to prove that defendant was speeding when he struck and killed the pedestrian victim while rushing to the scene of an emergency, leaving for defendant the burden of proving the affirmative defense set forth by statute. Defendant thus failed to demonstrate plain error in the trial court's jury instructions regarding the offense and the statute. Moreover, the evidence at trial was sufficient to submit the charge to the jury where defendant was driving 100 miles per hour (mph) in a 35 mph zone and a police training academy driving instructor testified that defendant was not abiding by emergency response directives, including failing to slow down to clear intersections and "outrunning his headlights" due to his high speed of travel.

2. Criminal Law—prosecutor's closing argument—not grossly improper

In a prosecution that resulted in a jury verdict finding a police officer (defendant) guilty of misdemeanor death by motor vehicle for killing a pedestrian as he rushed to the scene of an emergency, the trial court did not err by failing to intervene, even in the absence of defendant's objection, during closing arguments when the prosecutor told the jury that defendant "broke that level of trust that you had a right to expect of him in the performance of his duties" and "potentially [endangered] the citizens [he] swore [he] would protect." While arguments asking the jurors to place themselves in a victim's shoes are prohibited, comments portraying the victim as a "typical community member"—such as occurred here—are allowed.

Appeal by defendant from judgment entered 14 December 2022 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State.

Drew Nelson for defendant-appellant.

DILLON, Chief Judge.

Defendant, a police officer, was convicted of misdemeanor death by motor vehicle for causing the death of a pedestrian he struck with his patrol car while rushing to the scene of an emergency. We conclude Defendant received a fair trial, free of reversible error.

I. Background

At approximately 3:20 A.M. on 8 July 2017, Defendant Phillip Barker, an officer with the Charlotte-Mecklenburg Police Department ("CMPD"), struck and killed a pedestrian with his vehicle as he was driving faster than the posted speed limit while traveling to an emergency scene where he was needed.

Defendant was charged with involuntary manslaughter. He was convicted by a jury of the lesser-included crime of misdemeanor death by vehicle. Defendant was sentenced to sixty days in custody, which was suspended for twelve months of unsupervised probation. He appeals.

II. Analysis

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

A. N.C. Gen. Stat. § 20-145

[1] Defendant's first arguments concern the applicability of N.C. Gen. Stat. § 20-145 ("When speed limit not applicable"), which exempts law enforcement officers from speed limit regulations when they are "in the chase or apprehension of" criminal suspects:

> The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police *in the chase or apprehension of* violators of the law or of persons charged with or suspected of any such violation[.] . . . This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.

N.C. Gen. Stat. § 20-145 (2023) (emphasis added).

Defendant essentially argues that it is legally impossible for him to have been acquitted of involuntary manslaughter but convicted of misdemeanor death by motor vehicle based on his speeding.

Here, the jury was instructed that the difference between the two crimes is that a conviction for involuntary manslaughter required the jury to find Defendant acted with "culpable negligence." A conviction for misdemeanor death by motor vehicle, however, merely required a finding that Defendant caused the victim's death by his act of driving in violation of the law, but *not* in a way which amounted to "gross negligence."

Defendant contends that "culpable negligence" and "gross negligence" are the same *and that*, based on G.S. 20-145, he could not be convicted of speeding unless he acted out of gross negligence. Therefore, he contends the jury should have never been instructed on the misdemeanor, as it is illogical for the jury to find that he was not culpably negligent (in acquitting him for involuntary manslaughter) but to also find that he *did* break a law (speeding) which necessarily requires (based on G.S. 20-145) that the jury to find he acted with culpable/gross negligence in his speeding.

We first address the applicability of G.S. 20-145 in this case. The plain language of the statute suggests that a police officer is not culpable for speeding if he speeds while "in a chase or apprehension" of a suspect, so long as he is driving "with due regard for [the] safety" of others. *Id.* Based on the jurisprudence of our State, as explained below, the statute applies, not only when an officer is in hot pursuit of a suspect, but also when he is hurrying to the scene of an emergency. Further, under our case law interpreting G.S. 20-145, an officer cannot be guilty of speeding if he did not act with gross negligence.

In a 1999 case in which a high-speed pursuit by police resulted in a crash, our Supreme Court stated that, based on G.S. 20-145, "in any civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability." *Parish v. Hill*, 350 N.C. 231, 238, 513 S.E.2d 547, 551 (1999).

In 2014 and again in 2022, our Court held that G.S. 20-145 is "not only applicable to the pursuit of a law violator, but [is] also applicable when an officer is 'emergency response driving' to the scene of an incident." *Est. of Graham v. Lambert*, 282 N.C. App. 269, 275, 871 S.E.2d 382, 387 (2022) (citing *Truhan v. Walston*, 235 N.C. App. 406, 413, 762 S.E.2d 338, 343 (2014)). That is, these decisions suggest that the exemption may apply when an officer is hurrying to a scene, not just when (s)he is in hot pursuit of a suspect. Our 2022 decision involved in part the application

of G.S. 20-145 in a claim against an officer in his individual capacity, as well as in his official capacity and against the city for whom he worked.

In 2024, after briefing was completed in the present case, our Supreme Court issued its opinion in an appeal from our decision in *Graham*. *See Est. of Graham v. Lambert*, 385 N.C. 644, 898 S.E.2d 888 (2024). The Court, though, only considered the claims against the officer in his official capacity and against the city, as our decision regarding the claims against the officer in his individual capacity was not appealed. *Id.* at 646–47, 898 S.E.2d at 892. In reversing our decision, the Supreme Court held that G.S. 20-145 does not apply to claims against a governmental entity or an individual in his official capacity, but only to claims against one in his individual capacity. *See id.* at 658, 898 S.E.2d at 900. In *dicta*, in reminding that G.S. 20-145 does not exempt officers for gross negligence, the Supreme Court arguably suggested that the statute only applies to hot pursuits, and not to situations where an officer is hurrying to a location: "We also clarify the legal framework for suits to which N.C.G.S. § 20-145 (2023) applies. That statute exempts police officers from speed limits when chasing or apprehending criminal absconders. But it does not shield officers for their gross negligence." *Graham*, 385 N.C. at 646, 898 S.E.2d at 892. The Court, though, never *expressly* overruled our Court's holding in *Graham* that expands the application of G.S. 20-145 to situations where an officer is hurrying to a scene. Accordingly, we remain bound by our decisions. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Here, though, we disagree with Defendant's arguments relating to G.S. 20-145. Rather, we conclude that it is logically possible under the law and, therefore, permissible for an officer to be convicted of misdemeanor death by motor vehicle where he causes the death by speeding while in hot pursuit of a suspect or while hurrying to an emergency scene, for the reasoning below.

Admittedly, there are cases which describe "gross negligence" and "culpable negligence" with very similar, if not identical, language. *See, e.g.*, *State v. Blankenship*, 229 N.C. 589, 595, 50 S.E.2d 724, 729 (1948) (describing "culpable negligence" as "an intentional, willful, or wanton violation of a statute"); *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001) (describing "gross negligence" as "willful and wanton conduct"). However, there are cases which suggest that there may be slight differences between the terms. *See Kizer v. Bowman*, 256 N.C.

565, 571, 124 S.E.2d 543, 548 (1962) (recognizing that under Florida law "[g]ross negligence" and "culpable negligence" are not necessarily synonymous). For instance, there are several cases which suggest that culpable negligence is a high form of gross negligence, specifically that "[c]ulpable negligence is such gross negligence or carelessness as 'imports a thoughtless disregard of consequences' or a 'heedless indifference to the safety and rights of others.' " *See State v. Thompson*, 118 N.C. App. 33, 36, 454 S.E.2d 271, 273 (1995) (quoting *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977)).

However, presuming "gross negligence" is the same as "culpable negligence," we conclude that it was logically possible for the jury to convict Defendant of misdemeanor death by motor vehicle based on his speeding, based on a shifting of burden of proof. Indeed, to prove Defendant guilty of involuntary manslaughter, the burden was *on the State* to prove beyond a reasonable doubt that Defendant acted with culpable negligence. However, to prove Defendant guilty of misdemeanor death by motor vehicle, the State only needed to prove that Defendant was speeding. Based on our jurisprudence, the State had no burden to prove that Defendant was *not* acting with gross negligence to show that Defendant was guilty of speeding. Rather, based on our case law, under G.S. 20-145 the burden was *on Defendant* to prove to the satisfaction of the jury (as an affirmative defense to speeding) that he was *not* acting with gross negligence while he was speeding. *See State v. Flaherty*, 55 N.C. App. 14, 22, 284 S.E.2d 565, 571 (1981).

Here, it is possible that the jury was not satisfied that Defendant had met his burden of showing to the jury's satisfaction that he was not grossly negligent, and, therefore, found that Defendant caused the victim's death while violating our laws against speeding. But, at the same time, the jury could still not be convinced beyond a reasonable doubt that the State met its burden of showing Defendant was grossly negligent, thereby justifying their verdict of "not guilty" on the involuntary manslaughter charge.

We note Defendant's challenge to the trial court's jury charge regarding G.S. 20-145 and misdemeanor death by vehicle:

> If you find, ladies and gentlemen, from the evidence beyond a reasonable doubt that on or about the alleged date, *the Defendant violated the law of this State concerning or governing the operation of motor vehicles, if the Defendant has failed to satisfy you that he was exempt from those statutes*, or if the Defendant satisfied you that he was exempt from those statutes [but] that he acted

> with reckless disregard for the safety of others, and that the Defendant's violation proximately caused the death of the alleged victim, then it would be your duty to return a verdict of misdemeanor death by vehicle.
>
> However, if you do not so find, or if you have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty.

(Emphasis added). The instructions properly place the burden on Defendant that he was exempt under G.S. 20-145 for speeding.

In any event, Defendant concedes that he did not object to the instructions at trial, and therefore he asks for plain error review. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). The State argues Defendant has waived appellate review because any error was invited by Defendant. *See State v. Wilkinson*, 344 N.C. 198, 235–36, 474 S.E.2d 375, 396 (1996). Even assuming Defendant did not invite error and reviewing under Defendant's requested standard of review, we conclude any error did not rise to the level of plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (cleaned up).

Defendant also challenges the sufficiency of the evidence to submit the charge of misdemeanor death by vehicle to the jury. We conclude the record contains sufficient evidence showing that Defendant violated North Carolina law by speeding and that he failed to show that he was exempt under G.S. 20-145. The State presented evidence tending to show that Defendant was driving approximately 100 miles per hour in a 35 miles per hour zone. The State also presented evidence concerning the reckless disregard for the safety of others element; for example, a driving instructor from the CMPD training academy testified that Defendant was not abiding by CMPD's directives for emergency response driving because Defendant did not slow down to clear intersections and was "outrunning his headlights" by traveling at a speed faster than his headlights could shine to illuminate potential hazards in the road in front of him.

For the reasoning above, we do not agree with Defendant that the trial court erred by failing to set aside the verdict *ex mero motu*. "Failure to set aside the verdict *ex mero motu* would be reviewable only in the situation where the jury's verdict is manifestly unjust and against

the greater weight of the evidence." *State v. Mack*, 81 N.C. App. 578, 584, 345 S.E.2d 223, 226–27 (1986). Here, the jury's verdict convicting Defendant of misdemeanor death by vehicle is neither manifestly unjust nor against the greater weight of the evidence. Thus, the trial court did not err in sustaining the verdict. For the same reasoning, we disagree with Defendant that his trial counsel provided ineffective assistance of counsel by failing to move to set aside the verdict.

B. The State's Closing Argument

[2] Defendant argues the trial court should have intervened *ex mero motu* during the State's closing argument.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks are so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Parker*, 377 N.C. 466, 471, 858 S.E.2d 595, 599 (2021) (citation omitted).

Defendant contends the State's closing argument was "designed to place the jury in the shoes of the victim . . . by framing the case against [Defendant] as being one in which he had, allegedly, harmed the public, including members of the jury." Specifically, Defendant points to the State's comments that Defendant "broke that level of trust that you had a right to expect of him in the performance of his duties" and "potentially [endangered] the citizens [Defendant] swore [he] would protect" by not following his training.

Our Supreme Court has held that "[a]rguments that ask the jurors to place themselves in the victim's shoes are improper." *State v. Prevatte*, 356 N.C. 178, 244, 570 S.E.2d 440, 476 (2002) (citation omitted). However, comments portraying the victim as a "typical community member" are allowed. *See id.*

Here, the State's comments appear intended to illustrate how the victim in this case was a typical citizen like the jurors. It does not appear that the State was asking the jurors to place themselves in the victim's shoes.

Thus, Defendant fails to meet the high bar required to show that the trial court erred by failing to intervene *ex mero motu* during closing arguments.

NO ERROR.

Judges HAMPSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
ALFREDO TRANSISTO DURAN-RIVAS

No. COA23-743

Filed 2 July 2024

1. Confessions and Incriminating Statements—voluntariness—noncustodial interrogation—evidentiary support

In a prosecution involving multiple sexual offenses with a child, substantial evidence based on the totality of the circumstances supported the trial court's determination that, because defendant was not in custody when he made incriminating statements to law enforcement, his statements were made freely and voluntarily and not under coercion or in violation of his *Miranda* rights. Defendant voluntarily drove to a police station after he was told during a traffic stop that he was wanted for questioning about the contents of an old cell phone turned in by his wife; although defendant's primary language was Spanish, he indicated his understanding of what voluntary meant and that he was free to leave; defendant was offered food and water and left alone in an unlocked room with his other cell phone; defendant was questioned by officers in plain clothes; defendant was not threatened or promised anything in exchange for his statements; and, although officers suggested that defendant should write an apology letter to the victim, he only did so after he was given *Miranda* warnings in Spanish.

2. Search and Seizure—warrantless seizure of cell phones—sexual offense prosecution—consent given by third party—exigent circumstances

In a prosecution involving multiple sexual offenses with a child, the trial court properly denied defendant's motion to suppress evidence obtained from two cell phones where the seizure of each phone fell within a different qualifying exception to the warrant requirement. With regard to the first phone, which defendant had given to his two-year-old son to watch videos, once the son gave the phone to defendant's wife because it stopped working, she had sufficient shared ownership of the phone to give permission to law enforcement to search its contents. As for the second phone, which law enforcement took from defendant during his interrogation at a police station, exigent circumstances existed to prevent defendant from permanently deleting evidence, including that defendant

quickly pulled the phone from an officer's view when the officer tried to access defendant's deleted files; further, officers later obtained a search warrant to conduct a search of that phone.

Appeal by defendant from judgment entered 27 October 2022 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 11 June 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Heaney Law Office, by Christopher J. Heaney, for the defendant-appellant.

TYSON, Judge.

Alfredo Transisto Duran-Rivas ("Defendant") was found guilty by a jury of three counts of statutory rape of a child by an adult, one count of statutory sexual offense with a child by an adult, four counts of taking an indecent liberty with a child, five counts of first-degree sexual exploitation of a minor, and five counts of third-degree sexual exploitation of a minor. Judgment was entered thereon. Our review discerns no prejudicial or reversible error.

I. Background

New Hanover County Sheriff's Deputy Grant Gregory pulled Defendant's vehicle over for exceeding the speed limit on 29 May 2018. Deputy Gregory also recognized Defendant's vehicle matched the description of the "be on the lookout" ("BOLO") warning issued in response to allegations of child sexual abuse. Deputy Gregory concluded the initial stop with a verbal warning to Defendant. Deputy Gregory contacted the Sheriff's office, prompting Jeff Cromer, a detective in general investigations, to arrive on the scene.

Detective Cromer attempted to speak with Defendant. Learning Defendant's native language was Spanish, he used an English-to-Spanish translator program on his cellular phone to communicate with him. Detective Cromer identified himself as a New Hanover County Sheriff's Deputy and stated he wanted to speak with Defendant regarding "pornographic images" Defendant's wife had reported finding on Defendant's old cellular phone, which was silver. Defendant had given the cellular phone to their two-year-old so he could watch videos on the device.

Using the English-to-Spanish translator, Detective Cromer asked Defendant to participate in a voluntary interview. Detective Cromer did not state Defendant's participation was mandatory, nor did he state Defendant was not free to leave. Defendant drove himself to the New Hanover County Sheriff's Office and was taken into a separate room for questioning. Defendant was not restrained and used his cellular phone prior to being questioned.

Sheriff's Detective Justin Blevins initially questioned Defendant, but upon realizing Defendant primarily spoke Spanish, he brought in Sheriff's Detective Jose Lugo to lead the interview. Detective Lugo understands and speaks some Spanish. Defendant informed the detectives he understood some English. Detective Lugo confirmed Defendant had driven himself to the Sheriff's office and had not been handcuffed. Detective Lugo told Defendant his presence at the Sheriff's office was voluntary and confirmed Defendant understood what "voluntary" meant. Defendant responded he understood the word "voluntary" to mean if he wanted to leave, he could leave. Later in the interview, Detective Lugo again confirmed Defendant understood the meaning of "voluntary" by using the English-to-Spanish translator application.

During the course of the interview, Defendant was: (1) offered food and water; (2) left alone in the unlocked room with his cellular phone; and, (3) interviewed by officers in plain clothes. At one point, Sheriff's Lieutenant Swan entered the questioning room and remained for approximately fifteen minutes. Lieutenant Swan raised his voice and told Defendant to apologize to the victim and admit what he had done, so that the victim would be able to begin the healing process. Lieutenant Swan purportedly did not promise Defendant anything in return for his confession.

Later in the interview, Detective Lugo asked Defendant to see his current cellular phone, which was black. Defendant agreed, but he maintained his grip on the cellular phone as Detective Lugo scrolled through his photographs and videos. Detective Lugo also asked Defendant if he could download its contents. Defendant denied this request. Detective Lugo continued to scroll through Defendant's cellular phone, and at a certain point, Defendant hastily pulled it away. Detective Lugo warned Defendant not to delete any photos and placed the black cellular phone out of Defendant's reach.

Defendant told Detective Lugo he had touched the purported six-year-old victim. Hearing this, Detective Lugo left the room and returned with two *Miranda* forms, one in English and the other in Spanish. Detective Lugo asked Defendant to read the Spanish version

and to sign it. Detective Lugo again left the room and returned with an interpreter. As Detective Lugo read Defendant his *Miranda* rights in English, the interpreter translated his recitation into Spanish.

Detective Lugo asked Defendant if he would continue speaking to them without an attorney present. Detective Lugo explained to Defendant he could request an attorney at any time, but Defendant would have to tell him if he wanted to speak to an attorney. Defendant continued to participate in the questioning without requesting an attorney. After having been informed of his *Miranda* rights, Defendant explained the extent of his sexual abuse of his minor step-daughter in further detail.

At this point, Detective Lugo asked Defendant to write an apology letter to the victim. Detective Lugo neither promised anything in return nor threatened Defendant if Defendant chose not to write the confession. Defendant spent approximately forty-five minutes writing the letter.

Defendant's former wife had provided the deputies with possession of Defendant's silver cellular phone. Deputies seized Defendant's black cellular phone, which was in his possession during questioning. Detective Blevins received a search warrant for the contents of both cellular phones. Three videos were found on Defendant's silver cellular phone, dated 24 July 2017, showing an adult male sexually penetrating a female child. Two additional videos were uncovered on Defendant's black cellular phone, dated 24 May 2018 and 26 May 2018, also depicting an adult male sexually penetrating a female child.

Defendant was indicted for: (1) three counts of statutory rape of a child by an adult; (2), one count of statutory sexual offense with a child by an adult; (3) four counts of taking an indecent liberty with a child; (4) five counts of first-degree sexual exploitation of a minor; and, (5) five counts of third-degree sexual exploitation of a minor.

On 30 August 2021, Defendant filed a motion to suppress the oral and written statements he had made to law enforcement officers on 29 May 2018, along with all evidence viewed or seized from Defendant's two cellular phones. Senior Resident Judge Gorham held an evidentiary hearing on 15 December 2021 and later denied Defendant's motions to suppress on 27 January 2022. Defendant filed a motion *in limine* on 24 October 2022, renewing his motion to suppress evidence and further claiming law enforcement officers had illegally detained him. Judge Jason C. Disbrow denied Defendant's motions.

The jury found Defendant guilty of all charges. Defendant was sentenced as a prior record level I offender to four consecutive sentences of 300 to 420 months active terms and three consecutive sentences of

73-148 months of active terms. Defendant entered oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies with this court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023). "A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." N.C. Gen. Stat. § 15A-1444(a).

III. Issues

Defendant contends the trial court erred in denying his motion to suppress the oral and written statements he had made to the New Hanover County Sheriff's Deputies, as well as the evidence seized from his newer, black cellular phone because: (1) his statements were not made voluntarily; (2) he was in custody throughout the entire duration of his discussions with New Hanover County Sheriff's Deputies; (3) he had incriminated himself prior to receiving *Miranda* warnings; (4) his cellular phones were unconstitutionally searched and seized; and, (5) the trial court's admission of evidence retrieved from these devices constituted prejudicial error.

IV. Motion to Suppress

Defendant argues the trial court erred by denying his motion to suppress his statements obtained by New Hanover County Sheriff's Deputies because his statements were involuntary.

A. Standard of Review

In reviewing a motion to suppress, this Court considers "whether the trial court's findings of fact are supported by competent evidence. If competent evidence exists, the findings of fact are binding on appeal." *State v. McKinney*, 153 N.C. App. 369, 372, 570 S.E.2d 238, 242 (2002) (citation omitted). This Court assesses "whether those findings of fact support the trial court's conclusions of law." *Id.* "Any conclusions of law reached by the trial court in determining whether defendant was in custody must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 121 (2002) (citation and quotations omitted).

B. Voluntariness

[1] "A confession is admissible if it was given voluntarily and understandingly." *McKinney*, 153 N.C. App. at 373, 570 S.E.2d at 242 (citation

and quotations omitted). To determine if a confession is voluntary, this Court evaluates the totality of the circumstances to decide whether the confession was a "product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057-58 (1961)).

If "[the defendant's] will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Id.* The Supreme Court of the United States advanced factors to assess the voluntariness of a confession: (1) age of the accused; (2) the accused's "lack of education[;]" (3) "the length of detention[;]" (4) the "prolonged nature of the questioning[;]" and, (5) the threat or "use of physical punishment such as the deprivation of food or sleep[.]" *Id.* at 226, 36 L. Ed. 2d at 862.

Our Supreme Court provided additional factors in evaluating voluntariness: (1) whether defendant was in custody; (2) whether his *Miranda* rights were honored; (3) whether he was deceived; (4) whether he was held incommunicado; (5) the length of the interrogation; (6) whether there were physical threats or shows of violence; (7) the declarant's familiarity with the criminal justice system; (8) the mental condition of the declarant; and, (9) whether promises were made to obtain the confession. *State v. Jackson*, 308 N.C. 549, 582, 304 S.E.2d 134, 152-53 (1983).

1. Finding of Fact Number 16

Defendant challenges a portion of Finding of Fact Number 16: "Detective Lugo asked Defendant if he understood what voluntary meant and Defendant responded that he did and that it meant if he wanted to leave, he could go." Defendant argues this summary mischaracterizes Defendant's responses to the deputies and is not supported by competent evidence.

Finding of Fact 16 summarizes the multiple exchanges that had occurred between the deputies and Defendant during which Defendant purportedly had confirmed an understanding of how he had voluntarily arrived at the Sheriff's Office and that he was free to leave. Both the interview video, along with Detectives Lugo's and Blevin's testimonies regarding this specific exchange, sufficiently support this finding.

Defendant alternatively claims Finding of Fact 16 is a conclusion of law and is subject to *de novo* review. Defendant correctly states this Court reviews legal conclusions *de novo* "regardless of the label applied by the trial court." *State v. Jackson*, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012) (citation omitted).

Finding of Fact 16 is more accurately characterized by our Supreme Court's definition, which holds "a finding of fact [is] a determination made by a judge, jury, or administrative agency of a fact supported by the evidence in the record, usually presented at the trial or hearing." *State v. Bryant*, 361 N.C. 100, 103 n.2, 637 S.E.2d 532, 535 n.2 (2006) (quoting *Black's Law Dictionary* 664 (8th ed. 2004)). Finding of Fact 16 is not a conclusion of law, but a finding of fact that is supported by substantial evidence.

2. Finding of Fact Number 21

Defendant challenges Finding of Fact 21, claiming the statement "[Lieutenant Swan] did not act in a way that rises to coercive pressures" is a conclusion of law rather than a finding of fact. We agree.

"Facts are the basis for conclusions, and to call a 'conclusion' a 'finding of fact' does not make it one." *Peoples v. Peoples*, 10 N.C. App. 402, 408, 179 S.E.2d 138, 142 (1971) (citation omitted). Although Finding of Fact 21 is more accurately characterized as a conclusion of law, the conclusion was sufficiently supported by findings of fact and is ultimately a correct statement of law. *See id.*; *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 827 (2001) (explaining "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it").

In *State v. Johnson*, our Supreme Court held the defendant had voluntarily confessed prior to *Miranda* warnings. 371 N.C. 870, 879, 821 S.E.2d 822, 829 (2018). The defendant in *Johnson* was not restrained or handcuffed, had retained his cellular phone, and was interviewed by officers in plain clothes. *Id.* Here, Defendant was treated similarly, as he was offered food and water, was left alone in the unlocked room with his cellular phone, and was interviewed by officers in plain clothes.

In *Johnson*, law enforcement officers did not make physical threats, but raised their voices at various points during the pre-*Miranda*, five-hour portion of the interview. *Id.* Here, Lieutenant Swan was present in the interview room for approximately fifteen minutes and raised his voice, imploring him to apologize to the victim, while questioning Defendant. From his voluntary arrival until his arrest, twenty-nine-year-old Defendant was voluntarily interviewed at the Sheriff's Office for approximately one and a half hours. Defendant was offered food and drink, was not denied access to the restroom, and stated he understood he was free to leave.

In *Johnson*, the defendant was "told, contradictorily and repeatedly, that officers both could not promise him anything and that the district attorney would 'work with him' and would 'go easier on him' if

he cooperated and gave them truthful information." *Id.* at 879-80, 821 S.E.2d at 830. Here, Defendant offers no evidence of promises made in exchange for his voluntary statements. *See id.*

3. Apology Letter

The deputies' suggestions and requests for Defendant to confess in the form of a written apology letter to the victim to aid in her healing process, if leniency or forgiveness therefrom is promised or insinuated, may constitute illegal or coercive promises. Defendant's "apology letter" was written *after* the administration of *Miranda* warnings, which Defendant read in Spanish, and which were read to him by a certified Spanish language translator.

Miranda warnings are not required during non-custodial interrogations and need only be administered "where there has been such a restriction on a person's freedom as to render him in custody." *State v. Portillo*, 247 N.C. App. 834, 841, 787 S.E.2d 822, 828 (2016) (citation and quotations omitted).

To decide whether and when *Miranda* warnings should have been administered, "a court must initially determine whether a defendant was in custody at the time of questioning." *Id.* (citation and internal quotation marks omitted). Such determination is "based on the totality of the circumstances and is necessarily dependent upon the unique facts surrounding each incriminating statement." *Id.* at 842, 787 S.E.2d at 828 (citation and quotations omitted). The court "must examine whether a reasonable person in defendant's position, under the totality of [the] circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Barden*, 356 N.C. at 337, 572 S.E.2d at 123 (citation and quotations omitted).

In *State v. Barden*, the defendant "voluntarily drove his own car to meet with police for questioning, [and] was repeatedly informed both before he agreed to talk with the investigators and after he arrived for questioning that he was not under arrest and was free to leave at any time." *Id.* at 337, 572 S.E.2d at 123-24. Our Supreme Court held the defendant was not subject to a custodial interrogation. *Id.* at 338-39, 572 S.E.2d at 124.

Here, and in addition to those facts, deputies offered Defendant food and water, left Defendant alone in the unlocked room with his cellular phone, interviewed Defendant in plain clothes, and Defendant's voluntary interview was less than two hours. Defendant had been convicted of second-degree assault less than a year earlier, and he had prior

exposure to law enforcement officers and to the criminal justice system. Defendant's former wife testified no significant language barriers existed between them over the course of their three-year marriage.

Based upon the totality of the circumstances, Defendant has failed to show reversible error in the trial courts' rulings, orders, and judgments regarding denial of Defendant's motions to suppress oral and written statements made on 29 May 2018. The trial court properly concluded Defendant was not in custody when he first voluntarily admitted he had inappropriately touched the victim.

His subsequent oral and written statements providing further details regarding Defendant's actions were made *after* the proper administration of *Miranda* warnings and without a request for counsel. Because this Court holds Defendant was not in custody prior to the administration of *Miranda* warnings, it is unnecessary to address the second and third issues of whether Defendant incriminated himself prior to receiving *Miranda* warnings. *Id.*

C. Cellular Phone Seizure

1. Riley v. California

[2] Defendant argues the trial court erred by denying his motion to suppress evidence obtained from his cellular phones because the cellular phones were unconstitutionally searched and seized.

Generally, "[a] governmental search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement." *Id.* at 340, 572 S.E.2d at 125 (alteration in original) (citation and quotations omitted). Exceptions exist to searching and seizing cellular phones. *Riley v. California*, 573 U.S. 373, 401-02, 189 L. Ed. 2d 430, 451 (2014).

This Court "recognizes consent searches as an exception to the general warrant requirement." *State v. Hagin*, 203 N.C. App. 561, 564, 691 S.E.2d 429, 432 (2010) (citation omitted). In *State v. Kellam*, this Court held "permission may 'be obtained from a third party who possessed common authority or other sufficient relationship to the premises or *effects* sought to be inspected.' " *State v. Kellam*, 48 N.C. App. 391, 397, 269 S.E.2d 197, 200 (1980) (emphasis supplied) (quoting *United States v. Matlock*, 415 U.S. 164, 171, 39 L. Ed. 2d. 242, 250 (1974)).

Defendant's former wife delivered the silver cellular phone and granted permission for deputies to search its contents. "[N.C. Gen. Stat. §15A-222 (2023)] places no express restriction on the authority of a wife

to consent to a search of the premises she shares with her husband." *State v. Worsley*, 336 N.C. 268, 283, 443 S.E.2d 68, 75 (1994). Defendant purportedly had purposely left the older, silver cellular phone in the possession of his minor two-year-old son, so he could watch videos on YouTube Kids. Defendant's son purportedly brought the cellular phone to his mother, i.e., Defendant's wife, because the cellular phone had stopped working, whereupon she discovered the incriminating videos.

Defendant's wife was "clearly a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of [the] premises she shares with her husband." *Id.* at 283, 443 S.E.2d at 76 (alteration in original). Later, Detective Blevins sought and received a search warrant to search the contents of the silver cellular phone and retrieved incriminating videos created on 24 July 2017, purportedly showing an adult male sexually abusing a female child. The video images recovered from the silver cellular phone left in his wife's and minor son's possession were relevant and admissible.

2. Prevent the Imminent Destruction of Evidence

Another exception to the prohibited warrantless seizure of a cellular phone includes "when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonably under the Fourth Amendment." *Riley*, 573 U.S. at 401-02, 189 L. Ed. 2d at 451 (citation and quotations omitted) (alteration in original). The prevention of the imminent destruction of evidence is one of the primary incidents of exigent circumstances justifying a warrantless seizure. *Id.* at 402, 189 L. Ed. 2d at 451.

To determine whether exigent circumstances justify a warrantless seizure, this Court evaluates objective standards of conduct and looks "at the whole record to determine if there were factors reasonably supporting the immediate seizure . . . ." *State v. Grice*, 367 N.C. 753, 763, 767 S.E.2d 312, 320 (2015).

During the interview, Defendant had voluntarily permitted Detective Lugo to scroll through Defendant's photographs and videos while Defendant maintained his grip on the cellular phone. While Lugo was scrolling with Defendant's permission, Defendant pulled his cellular phone away. Detective Lugo testified this action occurred when he attempted to view Defendant's deleted files.

At this point, Detective Lugo warned Defendant not to remove files and images and placed the black cellular phone out of Defendant's reach. Detective Lugo testified this action was to prevent Defendant from permanently deleting the files. Whether evidence could be destroyed with

relative ease has been noted by our Supreme Court as ample justification for warrantless seizure under the exigent circumstances exception. *Id.* at 764, 767 S.E.2d at 321 ("[T]he individual could easily have moved or destroyed the plants if they were left on the property.").

This warrantless seizure falls squarely in the exigent circumstances exception. Detective Blevins later received a search warrant to search the contents of the black cellular phone and retrieved incriminating videos created on 24 May 2018 and 26 May 2018 purportedly showing an adult male sexually abusing a female child. Defendant's arguments are overruled.

V. Conclusion

The trial courts' orders and judgments denying Defendant's motions to suppress evidence retrieved from both of his cellular phones are affirmed. Defendant's constitutional rights were not violated, as the searches and seizures fell within well-defined exceptions to the requirement for a warrant and the search of his black cellular phone was conducted after a search warrant was obtained.

Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. Defendant failed to show prejudicial or reversible error: in the obtainment or the admission of the evidence, in the jury's verdicts, or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges ZACHARY and GRIFFIN concur.

STATE v. HORTON

[294 N.C. App. 614 (2024)]

STATE OF NORTH CAROLINA
v.
WILLIE CARL HORTON, JR., DEFENDANT

No. COA24-29

Filed 2 July 2024

1. Indictment and Information—obtaining property by false pretense—intent to defraud—sufficiency of allegations

The trial court had jurisdiction to enter judgment upon a jury's conviction of defendant on a charge of obtaining property by false pretenses (N.C.G.S. § 14-100(a)) where the indictment alleged that defendant "unlawfully and willfully and feloniously did knowingly and designedly, with the intent to cheat and defraud, obtain or attempt to obtain $4,000" from the alleged victim by the false pretense of obtaining the money "as a deposit to replace windows on [the victim's] house" without ever beginning any work on the house or replacing any windows. Language in N.C.G.S. § 14-100(b) stating that "evidence of nonfulfillment of a contract, without more, cannot establish the essential element of intent" pertained only to the sufficiency of evidence at trial necessary for a conviction for false pretenses and was unrelated to the validity of an indictment. Moreover, to confer jurisdiction on the trial court, an indictment for obtaining property by false pretenses must only allege an intent to defraud and is not required to allege all of the evidence tending to prove that element which the State plans to introduce at trial.

2. False Pretense—intent to defraud—evidence at trial sufficient

In a prosecution which resulted in a jury's conviction of defendant on a charge of obtaining property by false pretenses (N.C.G.S. § 14-100(a)), the evidence at trial—when viewed in the light most favorable to the State—was sufficient on the essential element of intent to defraud where the State presented, in addition to evidence of the nonfulfillment of defendant's contractual obligation to replace windows on the victim's house, Rule of Evidence 404(b) evidence that defendant also accepted several thousand dollars from another homeowner for window replacement at about the same time and, similarly, then failed to do any work or return the money. Taken together, this evidence constituted circumstantial evidence from which a rational juror could infer defendant's intent to defraud the victim.

STATE v. HORTON

[294 N.C. App. 614 (2024)]

Appeal by Defendant from judgment entered 15 June 2022 by Judge Frank Jones in Duplin County Superior Court. Heard in the Court of Appeals 14 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine M. Ryan, for the State.

Wake Forest University School of Law Appellate Advocacy Clinic, by John J. Korzen, for Defendant.

GRIFFIN, Judge.

Defendant appeals from judgment entered after a jury found him guilty of failure to work after being paid and obtaining property by false pretenses. Defendant contends the indictment and the State's evidence at trial were insufficient to sustain a conviction of obtaining property by false pretenses where the indictment and evidence both failed to allege and/or prove the essential element of intent. We find no error.

I. Factual and Procedural Background

On 4 June 2020, L. Britt paid Defendant $4,000 to complete construction work on his home. Britt repeatedly inquired as to when Defendant would begin work on his home. Defendant initially provided excuses for his delay, but after several months, Defendant stopped taking Britt's phone calls.

At some point, Britt's sister, T. Ard, became involved as she often helped her brother handle his business affairs.

On or around 18 September 2020, Ard contacted Duplin County Sheriff's Office who began investigating the matter. Detective Green contacted Defendant and told him Britt and Ard had filed a report but would prefer him to return the $4,000. Defendant agreed to meet Britt and Ard on 25 September 2020 to return the $4,000 but failed to do so.

On 24 May 2021, Defendant was indicted for failing to work after being paid and obtaining property by false pretenses, in violation of N.C. Gen. Stat. §§ 14-104 and 14-100, respectively. An ancillary indictment also charged Defendant with attaining habitual felon status.

On 13 June 2022, the matter came on for trial before Judge Jones in Duplin County Superior Court. On 15 June 2022, the jury found Defendant guilty of failing to work after being paid and obtaining property by false pretenses. Defendant further pled guilty to attaining habitual felon

status. Defendant was sentenced to 63 to 88 months' imprisonment. On 16 June 2022, Defendant noticed appeal in open court.

On 6 June 2023, this Court dismissed Defendant's appeal stating Defendant failed to timely file notice of appeal in violation of Rule 4 of the North Carolina Rules of Appellate Procedure. On 22 June 2023, Defendant filed a petition for writ of certiorari, requesting this Court review the merits of his appeal. On 28 August 2023, this Court granted Defendant's petition to allow this appeal.

II. Analysis

Defendant contends the trial court was without jurisdiction to enter judgment against him as the indictment was insufficient to charge Defendant with obtaining property by false pretenses, in violation of N.C. Gen. Stat. § 14-100. Defendant further contends the trial court erred in denying his motion to dismiss as there was insufficient evidence to sustain Defendant's conviction under N.C. Gen. Stat. § 14-100.

A. Sufficiency of the Indictment

[1] Defendant specifically contends the indictment failed to allege the essential element of intent as the facts asserted only a breach of contract, in violation of N.C. Gen. Stat. § 14-100(b). We disagree.

Although Defendant did not object to the sufficiency of the indictment prior to this appeal, he may raise an issue concerning the sufficiency of an indictment for the first time on appeal. *State v. Ellis*, 368 N.C. 342, 345, 776 S.E.2d 675, 678 (2015). In doing so, Defendant "must show that the indictment contained a statutory or constitutional defect and that such error was prejudicial." *State v. Stewart*, No. 23PA22, slip op. at 6 (N.C. May 23, 2024). We review Defendant's contentions here de novo to determine whether the indictment was sufficient to charge Defendant with obtaining property by false pretenses. *See State v. Pender*, 243 N.C. App. 142, 146, 776 S.E.2d 352, 357 (2015).

An indictment is a formal accusation against a defendant which serves to charge him with committing a criminal offense. *See State v. Abbott*, 217 N.C. App. 614, 617, 720 S.E.2d 437, 439 (2011). The purpose of an indictment is to "identify clearly the crime being charged, thereby putting the [defendant] on reasonable notice to defend against it and prepare for trial, and to protect the [defendant] from being jeopardized by the State more than once for the same crime." *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019) (internal marks and citation omitted).

Generally, "an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or

substantially, or in equivalent words." *State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (internal marks and citation omitted); *see also State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984) ("It is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended."). An indictment must therefore contain:

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

N.C. Gen. Stat. § 15A-924(a)(5) (2023). Still, our Supreme Court recently reiterated, "the plain language and intent of the law has been to move away from common law pleading requirements in criminal cases which were overwrought with technicalities." *State v. Singleton*, 318PA22, slip op. at 1 (N.C. May 23, 2024). Thus, although a valid bill of indictment is essential to confer jurisdiction upon the trial court, "a mere pleading deficiency in an indictment [will] not deprive the courts of jurisdiction." *Singleton*, 318PA22, slip op. at 48. As such, the test used to determine the validity of an indictment is simply, " 'whether the indictment alleges facts supporting the essential elements of the offense to be charged.' " *Stewart*, No. 23PA22, slip op. at 6 (quoting *State v. Newborn*, 384 N.C. 656, 659, 887 S.E.2d 868, 871 (2023)).

North Carolina General Statutes, section 14-100, criminalizes the act of obtaining property by false pretenses, stating:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony.

N.C. Gen. Stat. § 14-100 (2023). Relevant here, the essential elements of the offense include: (1) the defendant made a false representation; (2) the defendant intended the false representation to deceive; (3) the false representation did deceive; and (4) the defendant obtained money from another person as a result of the false representation. *See State*

v. Hussain, 291 N.C. App. 253, 259, 895 S.E.2d 447, 452 (2023) (citation omitted). As to an indictment charging a defendant with obtaining property by false pretenses, N.C. Gen. Stat. § 14-100(a) specifically states, "it shall be sufficient [for the indictment] to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the money[.]" N.C. Gen. Stat. § 14-100(a).

Here, the indictment includes a factual statement as to each essential element of N.C. Gen. Stat. § 14-100 and Defendant's commission thereof:

> [Defendant] [ ] unlawfully and willfully and feloniously did knowingly and designedly, with the intent to cheat and defraud, obtain or attempt to obtain $4,000 US Currency from [victim] by means of false pretense which was calculated to deceive and did deceive.
>
> The false pretense consisted of the following: [D]efendant accepted $4,000 from [victim] as a deposit to replace windows on [victim's] house when [D]efendant did not begin any work on [victim's] house nor did he replace any windows on the home.

Still, Defendant argues the indictment did not sufficiently allege the essential element of intent as the facts asserted allege only a breach of contract in violation of N.C. Gen. Stat. § 14-100(b).

N.C. Gen. Stat. § 14-100(b) notes, "evidence of nonfulfillment of a contract, without more, cannot establish the essential element of intent." N.C. Gen. Stat. § 14-100(b). Despite Defendant's contention, this section in no way relates to what is required in an indictment charging a defendant with obtaining property by false pretenses. Instead, section 14-100(b) directly relates to the sufficiency of the State's evidence offered to prove intent at trial, not the facts to be asserted in the indictment. An indictment is not required to establish the essential elements of the crime charged; rather, an indictment only needs to assert facts supporting each element of the offense. *See* N.C. Gen. Stat. § 15A-924(a)(5). Moreover, as to the essential element of intent, N.C. Gen. Stat. § 14-100(a) specifically states, an indictment charging a defendant with obtaining property by false pretenses need only allege the defendant acted with the intent to defraud. The statute does not require the indictment allege all the evidence the State plans to introduce at trial to prove intent. To do so would directly conflict with our precedent which shows a major deviation from the hyper-technical pleading standards previously required at common law. *See Singleton*, 318PA22, slip op. at 17.

The indictment here contains allegations of facts supporting each essential element of obtaining property by false pretenses, including the element of intent per the requirements provided in N.C. Gen. Stat. § 14-100(a). Thus, the indictment was sufficient to notice Defendant of the charges against him. Because the indictment was sufficient, we hold the trial court maintained jurisdiction to enter judgment against Defendant.

B. Sufficiency of the State's Evidence

[2] Defendant contends there was insufficient evidence to sustain his conviction under N.C. Gen. Stat. § 14-100. Specifically, Defendant argues the State failed to offer substantial evidence to prove he had the requisite intent to obtain property by false pretenses. We disagree.

We review issues concerning the sufficiency of the State's evidence de novo to determine whether, in the light most favorable to the State, there is "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996); *see also State v. Rose*, 339 NC 172, 192, 451 S.E.2d 211, 223 (1994) ("[A]ll evidence admitted, whether competent or incompetent, [is to be viewed] in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor."). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted).

The essential elements of obtaining property by false pretenses are: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Seelig*, 226 N.C. App. 147, 152, 738 S.E.2d 427, 431 (internal marks and citation omitted); *see also* N.C. Gen. Stat. § 14-100(a). Considering the essential element of intent, our Court has repeatedly held, "[i]ntent is seldom provable by direct evidence [and] must ordinarily be proved by circumstances from which it may be inferred." *State v. Bennett*, 84 N.C. App. 689, 691, 353 S.E.2d 690, 691-92 (1987); *see also State v. Hines*, 54 N.C. App. 529, 533, 284 S.E.2d 164, 167 (1981). Circumstantial evidence of the defendant's intent "may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (internal marks and citation omitted). Where the State introduces such evidence, the trial court "must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances." *Id.* "If so, it is for the jury to

decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965).

Our Court has previously held the introduction of circumstantial, Rule 404(b) evidence, tending to establish a pattern or scheme from the defendant's prior wrongs committed within the same general timeframe as the crime charged, may constitute substantial evidence from which a rational juror could infer intent. *See State v. Barker*, 240 N.C. App. 224, 232, 770 S.E.2d 142, 148 (2015); *see also* N.C. Gen. Stat. § 8C-1, Rule 404(b) ("Evidence of other crimes, wrongs, or acts . . . may [ ] be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.").

As to the State's presentation of evidence, N.C. Gen. Stat. § 14-100(b) explicitly provides the State cannot establish the essential element of intent through evidence of nonfulfillment of a contract alone. *See supra* II.A.; *see also* N.C. Gen. Stat. § 14-100(b). To this end, our Court in *State v. Compton* stated, "[N.C. Gen. Stat. § 14-100(b)], [ ] recognizes the danger that juries may improperly infer criminal intent merely from a defendant's failure to carry out his promise, and provides that evidence of the nonfulfillment of a contractual obligation, standing alone, is not sufficient to show an intent to defraud." 90 N.C. App. 101, 104, 367 S.E.2d 353, 355 (1988). Nonetheless, evidence of nonfulfillment of a contract, together with additional Rule 404(b) evidence of the same, is sufficient evidence from which a jury may inter intent. *See State v. Barfield*, 127 N.C. App. 399, 402, 489 S.E.2d 905, 908 (1997) (the defendant's motion to dismiss was properly denied as there was a reasonable inference of intent where the State offered testimony from two other witnesses who contracted with the defendant and obtained the same results—the defendant obtained money for a promise to move their houses, did not move the houses, and retained the money without completing the job).

Here, Defendant contends the State failed, under section 14-100(b), to introduce evidence showing he maintained the requisite intent as the State's evidence only indicated Defendant and the victim entered into a contract, and Defendant failed to take steps to begin fulfilling the contract despite the victim having paid a $4,000 deposit to Defendant.

The State's evidence at trial tended to show Britt and Defendant met at a gas station in Goldsboro. Britt asked Defendant if he was willing to do some construction work on Britt's home and Defendant agreed. Britt initially paid Defendant $2,000 to screen in his front and

back porch. After the work was completed, Britt asked Defendant to install vinyl and windows. Defendant indicated he was willing to do the installation but would need $4,000 for materials. On 4 June 2020, Britt paid Defendant $4,000 and Defendant provided Britt with a signed receipt. Defendant never began work on Britt's home citing several reasons for his delayed performance, including personal illness, the death of his mother, and failure on behalf of Builder's Discount Center to obtain the materials ordered. The manager at Builder's Discount Center was never able to locate an order placed by Defendant. Further, Defendant failed to return the $4,000 to Britt. The State further provided evidence tending to show Defendant conducted a similar scheme at or around the same time he was involved with Britt. At trial, H. Clifton testified she, in July 2020, contracted with Defendant to replace certain windows in her home. Clifton wrote Defendant a check for $2,165 and Defendant provided Clifton with a signed receipt. Defendant never installed the windows and further failed to return the payment.

Although the State did introduce evidence of Defendant's nonfulfillment of the contract with Britt, the State also introduced additional Rule 404(b) evidence suggesting a scheme by which Defendant obtained money upon contracting with individuals to do construction work on their homes, neglected to perform the work, and failed to return payment. This evidence of Defendant's nonfulfillment of the contract with Britt, together with the additional Rule 404(b) evidence of the same, constitutes circumstantial evidence from which a rational juror could infer Defendant's intent. *See Barfield*, 127 N.C. App. at 402, 489 S.E.2d at 908.

Having considered the State's evidence in light most favorable to the State, we hold the State offered substantial evidence of Defendant's intent. Therefore, the trial court did not err in denying Defendant's motions to dismiss.

III. Conclusion

We hold the indictment and the State's evidence were independently sufficient as to the essential element of intent. Thus, the trial court did not err.

NO ERROR.

Judges MURPHY and GORE concur.

STATE OF NORTH CAROLINA
v.
CARLTON GLENN WALSTON

No. COA24-58

Filed 2 July 2024

Appeal and Error—discretionary review denied—recidivist sentence proper under statute—constitutional argument first raised on appeal

In considering defendant's arguments that the trial court erred in finding that he qualified as a recidivist for sentencing purposes, the Court of Appeals dismissed defendant's appeal for lack of appellate jurisdiction after declining to issue a writ of certiorari to review defendant's meritless statutory contention that, after being convicted of and sentenced on one count of indecent liberties with a child in a certain county, his subsequent sentencing on another count of indecent liberties with a child in a different county was not for a reportable offense for purposes of N.C.G.S. § 14-208.6(4). Although both convictions were the result of the same plea agreement, defendant was convicted and sentenced at different times for each count. Further, the appellate court declined to invoke Appellate Rule 2 to reach defendant's related due process argument because defendant raised that constitutional issue for the first time on appeal.

Appeal by Defendant from judgments entered 7 July 2023 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 11 June 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason P. Caccamo, for the State-Appellee.

Drew Nelson for Defendant-Appellant.

COLLINS, Judge.

Defendant Carlton Walston appeals from judgments entered upon his guilty plea to two counts of indecent liberties with a child. Defendant argues that the trial court erred by finding that he qualified as a recidivist, and that this error deprived him of his constitutional right to due process. As the arguments Defendant raises on appeal are either meritless or procedurally barred, in our discretion we decline

to issue a writ of certiorari and dismiss Defendant's appeal for lack of appellate jurisdiction.

I. Background

Pursuant to a plea agreement, Defendant agreed to enter guilty pleas concerning allegations made against him in Duplin County and Wayne County. Defendant pled guilty to two counts of first-degree statutory sexual offense in Duplin County on 9 April 2020 for conduct allegedly occurring between 2017 and 2019. The trial court consolidated the convictions into a single judgment and sentenced Defendant to 180 to 276 months' imprisonment. Defendant pled guilty to two counts of indecent liberties with a minor in Wayne County on 7 July 2023 for conduct allegedly occurring between 2012 and 2013. The trial court sentenced Defendant to two consecutive terms of 25 to 39 months' imprisonment. The trial court found that Defendant qualified as a recidivist based on his prior convictions in Duplin County and ordered him to register as a sex offender for life.

Defendant filed a written notice of appeal on 10 July 2023. Defendant appealed "the Judicial Findings and Order for Sex Offenders entered in the above-captioned case" but did not appeal the underlying judgment. Defendant subsequently filed a petition for writ of certiorari with this Court.

II. Discussion

A. Determination of Recidivism

Defendant argues that the trial court erred by "finding that [he] qualified as a recidivist for purposes of sex-offender registration based on the Duplin County Conviction." Defendant concedes that his written notice of appeal was defective because he did not appeal the underlying judgment, and he therefore asks this Court to issue a writ of certiorari to reach the merits of his appeal.

This Court has discretion to grant a petition for writ of certiorari "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). A petition for writ of certiorari "must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted).

Here, Defendant has not shown that his argument has merit or that error was probably committed below. A recidivist is defined as a "person who has a prior conviction for an offense that is described in [N.C.

Gen. Stat. §] 14-208.6(4)." N.C. Gen. Stat. § 14-208.6(2b) (2023). Under section 14-208.6(4), a reportable conviction includes a conviction for "an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses[.]" *Id.* § 14-208.6(4) (2023). The statute does not define "prior conviction." Defendant argues that his Duplin County convictions for first-degree statutory sexual offense should not constitute prior convictions because they were "joined in the same plea agreement" as the Wayne County charges and "should be treated in the same way as charges that are joined for trial."

Defendant relies on *State v. West*, 180 N.C. App. 664, 638 S.E.2d 508 (2006), *State v. Watlington*, 234 N.C. App. 601, 759 S.E.2d 392 (2014), and *State v. High*, 271 N.C. App. 771, 845 S.E.2d 150 (2020), to support his argument. In *West*, defendant was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering an automobile in a single trial. 180 N.C. App. at 665, 638 S.E.2d at 509. The trial court sentenced defendant for his convictions for larceny and breaking and entering an automobile before recessing for lunch. *Id.* at 669, 638 S.E.2d at 512. After lunch, the trial court "assigned defendant two prior record points for one of the Class H larcenies and proceeded to sentence defendant for second degree murder as a Level II offender." *Id.* This Court held that the trial court erred by doing so because "the assessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly." *Id.* (citation omitted).

In *Watlington*, defendant was charged with twelve offenses that were joined prior to trial. 234 N.C. App. at 608, 759 S.E.2d at 396. The jury returned guilty verdicts on six charges and not guilty verdicts on three charges but could not reach a unanimous verdict on the three remaining charges. *Id.* The trial court declared a mistrial on those three charges, and Defendant was subsequently found guilty of those charges in a second trial. *Id.* The trial court used the six convictions from the first trial in calculating defendant's prior record level. *Id.* This Court held that the trial court erred by doing so because it "would be unjust to punish a defendant more harshly simply because, in his first trial, the jury could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that defendant on some of those same charges." *Id.* at 609, 759 S.E.2d at 397.

In *High*, defendant was convicted of first-degree murder and robbery with a dangerous weapon in a single trial. 271 N.C. App. at 772, 845 S.E.2d at 152. Defendant filed a motion for appropriate relief and, pursuant to a plea agreement, the trial court vacated defendant's first-degree

murder conviction and defendant pled guilty to second-degree murder. *Id*. The trial court considered defendant's robbery with a dangerous weapon conviction in calculating defendant's prior record level. *Id*. This Court held that "considering [d]efendant's robbery conviction as a prior conviction in calculating [d]efendant's prior record level amounted to a legal error requiring reversal" because "using [d]efendant's robbery conviction as a prior conviction 'would be [just as] unjust and in contravention of the intent of the General Assembly' upon [d]efendant's plea to second-degree murder as it would have been had the State sought to use the robbery conviction as a 'prior' conviction when [d]efendant was first sentenced on the joined charges in 2004." *Id*. at 777, 845 S.E.2d at 155 (quoting *West*, 180 N.C. App. at 669-70, 638 S.E.2d at 512).

These cases are readily distinguishable from the present case because the Duplin County charges and Wayne County charges were not joined for trial. At the time Defendant pled guilty to the Wayne County charges, he had already been convicted and sentenced for the Duplin County charges. Thus, Defendant had a prior conviction for a reportable offense at the time the trial court sentenced him for the Wayne County convictions. The fact that Defendant entered into a plea agreement for the Duplin County charges and Wayne County charges at the same time is irrelevant. Defendant was convicted and sentenced at different times for two separate sets of qualifying offenses. Accordingly, Defendant qualified as a recidivist under N.C. Gen. Stat. § 14-208.6(2b), and the trial court properly applied the statute's plain language in this case. *See State v. Bishop*, 255 N.C. App. 767, 770-71, 805 S.E.2d 367, 370 (2017).

Because Defendant's argument lacks merit, in our discretion we decline to issue a writ of certiorari and dismiss his appeal for lack of appellate jurisdiction.

B. Due Process

Defendant also argues that the trial court's finding that he qualified as a recidivist "deprived [him] of his constitutional right to due process" because he "was sentenced in an unjust manner." Defendant failed to raise this constitutional argument in the trial court, and his argument is therefore procedurally barred. *See id*. at 769, 805 S.E.2d at 369. Nonetheless, Defendant asks us to invoke Rule 2 to address his argument on appeal. This Court may suspend the provisions of the Rules of Appellate Procedure to "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.

Bishop, 255 N.C. App. at 770, 805 S.E.2d at 370 (quoting *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

In our discretion, we deny Defendant's petition for a writ of certiorari and dismiss his appeal for lack of jurisdiction.

DISMISSED.

Judges STROUD and STADING concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JULY 2024)

DARROUX v. NOVANT HEALTH, INC. No. 23-947	Mecklenburg (21CVS20262)	Affirmed
FAIRLEY v. MATELSKI No. 23-1166	Nash (22CVD1142)	Affirmed
FRENCH-BROWN v. ALPHA MODUS VENTURES, LLC No. 23-290	Mecklenburg (22CVS5503)	Reversed and Remanded
HASZ v. BRITTAIN No. 23-548	Brunswick (18CVD2294)	Affirmed
IN RE EST. OF JACKSON No. 23-386	Wilson (19E343)	Affirmed
NADENDLA v. WAKEMED No. 23-940	Wake (21CVS4015)	Affirmed
OTTO v. COOPER No. 23-968	Iredell (21CVS3130)	Dismissed in part; Affirmed in part
PIERSON v. SW. AIRLINES No. 23-526	N.C. Industrial Commission (19-029132)	Affirmed
SAINTSING v. JOHNSON No. 23-1150	Randolph (22CVS1870)	Reversed and Remanded
STATE v. BARRETT No. 23-1065	Lincoln (22CRS51499)	No Error
STATE v. BOWLIN No. 23-99	Yadkin (20CRS50649-50) (21CRS167)	No Error
STATE v. GIZZI No. 23-733	Craven (19CRS50335) (19CRS50375-76) (20CRS582) (22CRS269-270)	No Error In Part, Dismissed In Part
STATE v. HARDY No. 23-421	New Hanover (22CRS3153)	Reversed

STATE v. JAMISON No. 23-1064	Alamance (20CRS50257-58)	Dismissed
STATE v. LOCKLEAR No. 23-1044	Robeson (20CRS54015)	Vacated
STATE v. MINGO No. 23-1125	Mecklenburg (19CRS239213)	No Error
STATE v. RICHMOND No. 24-71	Caswell (21CRS50207)	No Error.
STATE v. STRAUSS No. 23-92	Henderson (20CRS265) (20CRS52211-12)	No Error
STATE v. WHITE No. 23-1025	Rutherford (21CRS6)	Vacated and remanded in part; affirmed in part
STATE v. WOLFINGTON No. 23-737	Cleveland (18CRS54854-55) (18CRS54857-60)	No error in part; dismissed in part.
WILSON v. BUTTERBALL, LLC No. 23-1113	Robeson (22CVS3228)	Affirmed

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