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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 19, 2025

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APPEAL AND ERROR

Appellate jurisdiction—juvenile neglect case—orders appointing guardian ad litem—denial of request to representation by retained counsel—In a neglect matter, where the trial court denied respondent-mother's request to be represented by her privately retained counsel, respondent-mother could not challenge on appeal the court's appointment of a guardian ad litem (GAL) to represent her, since she did not appeal from either of the two interlocutory orders appointing the GAL, and, at any rate, neither of those orders qualified as appealable orders under the Juvenile Code (N.C.G.S. § 7B-1001). Although the appellate court was inclined to review the GAL appointment issue by invoking Appellate Rule 2, it could not do so because the record lacked a transcript of the hearing where the GAL was appointed and, therefore, there was no way to determine if respondent-mother objected to the appointment at that hearing. However, with respect to respondent-mother's argument

regarding the denial of her right to representation by her retained counsel, appellate review was proper because the adjudication order clearly addressed the issue, respondent-mother adequately gave notice of appeal of that order, and a transcript of the adjudication hearing was available. **In re A.K., 115.**

Interlocutory order—claims dismissed—counterclaims remained pending—Rule 54(b) certification—In an action for damages arising from the delayed disbursement of a small business loan, the trial court's order of summary judgment dismissing plaintiffs' claims against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention was immediately appealable where, although the order was interlocutory because it left the city's counterclaims pending, the trial court certified that there was "no just reason for delay" of immediate review pursuant to Civil Procedure Rule 54(b). **Flomeh-Mawutor v. City of Winston-Salem, 104.**

Interlocutory order—partial summary judgment—substantial right—danger of inconsistent verdicts—In a dispute over whether a former owner of a piece of property (defendant, a construction company) could legally dump debris on the property (now owned by plaintiffs) pursuant to an easement purporting to give defendant that right, the trial court's interlocutory order granting partial summary judgment to defendant on two of plaintiffs' causes of action—plaintiffs having been granted partial summary judgment on their other three causes of action—was immediately reviewable because it affected a substantial right. Given that future proceedings could lead to separate trials on the different causes of action—which all involved the single fundamental question of whether defendant illegally dumped debris on plaintiffs' property—there was a danger of separate juries reaching inconsistent verdicts, particularly on the question of when plaintiffs' various causes of action accrued (in accordance with each relevant statute of limitation) based on competing accrual evidence. **Shannon v. Rouse Builders, Inc., 144.**

Oral notice of appeal—Appellate Rule 4 "at trial" interpreted—next day during same session of court sufficient—Defendant's oral notice of appeal from a criminal judgment was timely made pursuant to Appellate Rule 4(a) (requiring that a party seeking appeal may give oral notice "at trial") even though it was given the day after his trial, because it was made, through counsel, during the same session of court and before the same judge who entered the judgment. Therefore, the appellate court had jurisdiction over the matter, and defendant's petition for writ of certiorari was dismissed as moot. **State v. McLean, 254.**

Petition for writ of certiorari—guilty plea—error in probation sentence—extraordinary circumstances—In an appeal from judgments entered after defendant pleaded guilty to four counts of second-degree exploitation of a minor, although defendant's notice of appeal was deficient (because he failed to specify which court he was appealing to and did not reference the judgments from which he appealed), defendant's petition for writ of certiorari was granted based on a showing of extraordinary circumstances, since the trial court likely erred concerning defendant's probation sentence, and an unwarranted extension of probation constitutes substantial harm. **State v. Barton, 182.**

Petition for writ of certiorari—satellite-based monitoring order—meritorious argument—extraordinary circumstances—In an appeal from orders requiring defendant to submit to satellite-based monitoring (SBM), although defendant's notice of appeal was deficient (because he failed to specify which court he was

appealing to and did not reference the orders from which he appealed), defendant's petition for writ of certiorari was granted based on a showing of extraordinary circumstances, since the trial court likely erred concerning the SBM orders, and unwarranted SBM constitutes substantial harm. **State v. Barton, 182.**

Preservation of issues—waiver—constitutional challenge—evidence in murder trial—collected pursuant to allegedly tainted warrants—no motion to suppress—In a prosecution for first-degree murder, defendant did not preserve for appellate review his argument that the trial court committed plain error by failing to suppress evidence obtained pursuant to multiple search warrants, which defendant alleged were tainted by law enforcement's unlawful search of his residence. Defendant did not file a motion to suppress the evidence, and therefore he waived his constitutional challenge to the search warrants. His petition for a writ of certiorari was denied on appeal, as was his request for review pursuant to Appellate Rule 2. **State v. Corrothers, 192.**

Statutory review of life imprisonment without parole—recommendation to parole commission—insufficient findings—After a resident superior court judge reviewed defendant's sentence for life imprisonment without parole (for first-degree murder) pursuant to N.C.G.S. § 15A-1380.5 (now repealed) upon defendant's motion, the trial court's order making its recommendation to the Parole Commission—that defendant should not be granted parole and that his sentence should not be altered or commuted—was vacated where the trial court's findings mostly consisted of mere recitations of procedural history and were insufficient as a whole to allow for meaningful appellate review of the court's reasoning in reaching its recommendation. The matter was remanded for the trial court to make additional findings, reconsider its recommendation, or, in its discretion, to consider additional information provided by the State. **State v. Dawson, 203.**

Statutory review of life imprisonment without parole—recommendation to parole commission—right to appeal—After a resident superior court judge reviewed defendant's sentence for life imprisonment without parole (for first-degree murder committed in 1997) pursuant to N.C.G.S. § 15A-1380.5 (a statute enacted in 1994 and repealed in 1998) upon defendant's motion, defendant had the right to appeal the trial court's recommendation to the Parole Commission that defendant should not be granted parole and that his sentence should not be altered or commuted. Although the relief available under section 15A-1380.5 was very slight, the court's recommendation was a final judgment, and language contained in subsection (f) of that statute reflected legislative intent to provide a defendant with the right to appeal from a recommendation. **State v. Dawson, 203.**

ASSAULT

Inflicting physical injury on employee of state detention facility—jury instructions—lesser included offense not warranted—In a trial for assault inflicting physical injury on an employee of a state detention facility, defendant was not entitled to a jury instruction on the lesser included offense of assault on an officer or employee of the state (which does not include a physical injury element), where the State presented sufficient evidence of each essential element of the greater offense—including that the officer assaulted by defendant was struck multiple times and sustained bruising and swelling on his face and scrapes and bruises on his arm as a result—and where defendant did not introduce any conflicting evidence. **State v. McLean, 254.**

BAIL AND PRETRIAL RELEASE

Motion to set aside bond forfeiture—mandatory reason to set aside per statute—denial erroneous—The trial court erred in denying a surety's motion to set aside a bond forfeiture where the court's order did not explain the denial but the circumstances suggested that the reason was the surety's failure to appear at the motion hearing. Pursuant to N.C.G.S. § 15A-544.5, the surety was not required to appear at the hearing, and, moreover, its motion cited a valid reason to set aside the the bond forfeiture under subsection (b)(4) of the statute—"defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record"—and no evidence to the contrary was presented. **State v. Maye, 248.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Breaking or entering a motor vehicle—larceny—lack of consent—evidence sufficient—In a prosecution on charges including breaking and entering a motor vehicle and larceny arising from the theft of items from a van, the trial court did not err in denying defendant's motion to dismiss for insufficient evidence that defendant acted without the consent of the victim—an essential element of both offenses—where, despite the absence of testimony from the victim or evidence of forced entry, circumstantial evidence in the form of video surveillance footage showing defendant's demeanor (including turning off his headlights when parking near the van; constantly looking around as he checked the van's door, rifled through its contents, and placed items in his pockets and car; and keeping his headlights off as he drove away from the van), taken in the light most favorable to the State, was sufficient to permit a reasonable inference by the jurors that defendant both entered the van and took the items without the victim's consent. **State v. Thomas, 269.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Felony child abuse—jury instruction on lawful corporal punishment—exemption not applicable—plain error not shown—In a felony child abuse prosecution, the trial court did not plainly err in failing to instruct the jury regarding lawful corporal punishment by a parent where the evidence was insufficient that defendant, the fiancée of the victim's mother, was acting in loco parentis; moreover, even assuming that she had been acting in that capacity, overwhelming evidence was presented from which a jury could conclude that defendant's punishments—including making the five-year-old victim run in place for long periods of time three to four times in a week, resulting in bruised and swollen feet so painful the child could not walk normally—were rooted in malice, thus making any potential exemption under the lawful corporal punishment principle inapplicable. **State v. Freeman, 209.**

Right to representation by retained counsel—statutory mandate—qualifications for retained counsel—The adjudication and disposition orders in a neglect matter were vacated—and the matter was remanded—because the trial court violated the statutory mandate in N.C.G.S. § 7B-602(a) by denying respondent-mother's request to release her court-appointed counsel and to be represented by her privately retained counsel, who had made an appearance in the case, after determining that the retained counsel's representation would be detrimental to respondent-mother because he lacked experience representing parents in abuse, neglect, and dependency proceedings. The court did not address the requirements of section 7B-602(a) when making its determination, and although a lack of specific experience with

juvenile cases would have disqualified a court-appointed counsel from representing respondent-mother, the rules for qualifying court-appointed attorneys to represent parents in Chapter 7B cases do not apply to privately retained attorneys, who only require a valid license to practice law to appear in such cases. **In re A.K., 115.**

CHILD CUSTODY AND SUPPORT

Permanent custody order—best interest determination—no abuse of discretion—In a child custody case between two active-duty members of the military, there was no abuse of discretion in the district court's award of primary physical custody to the mother where, although the findings of fact would have supported either the mother or the father receiving primary physical custody, it was for the court to consider and weigh its findings of fact to determine what award of custody would be in the juvenile's best interest. **Madison v. Gonzalez-Madison, 131.**

Permanent custody order—self-executing modification provisions—speculative—abuse of discretion—In a child custody case, the district court's alternative visitation schedule, set to self-execute in the event that one or both of the parents—each an active-duty member of the United States Army—received a permanent change of station (PCS), constituted an abuse of discretion where the potential change in circumstances (that is, a physical relocation of one or both parents) was too speculative. Accordingly, that portion of the order was vacated, with the parents maintaining the right to seek a custody modification when either received a PCS (or if any other change of circumstances arose). **Madison v. Gonzalez-Madison, 131.**

CIVIL PROCEDURE

Motion for judgment notwithstanding the verdict—negligent entrustment—In a wrongful death action arising from a head-on, two-car collision allegedly caused by an impaired driver who had been allowed to operate a vehicle by its owner, the trial court did not err in denying the owner's motion for judgment notwithstanding the verdict of guilty returned by the jury on a charge of negligent entrustment because that tort required evidence only that the owner consented (expressly or impliedly) to the use of her vehicle and knew or reasonably should have known that the driver was likely to cause injury to others by her driving. Taken in the light most favorable to the nonmoving party (plaintiff), the evidence—including the owner's admission in her answer to the complaint that the driver had operated her vehicle with her express knowledge, consent, and authorization; and documentation of the vehicle's ownership which, by statute (N.C.G.S. § 20-71.1(a)), is prima facie evidence of a vehicle owner's consent in a wrongful death case—supported the challenged element of consent. **Chappell v. Webb, 13.**

CRIMINAL LAW

Prosecutor's closing argument—improper statement of law—Evidence Rule 404(b)—prejudice—At defendant's trial for sexual offenses committed against his two minor daughters, the trial court was not required to intervene ex mero motu when the prosecutor improperly explained Evidence Rule 404(b)(allowing evidence of prior bad acts for reasons other than to show defendant's propensity to commit an offense) during closing arguments, stating that the "best predictor of future behavior is past behavior" and that "[o]ne of the things that tells you . . . how somebody acts is some things that they've done in the past." Although the prosecutor's statements

were grossly improper, they did not prejudice defendant where, given the State's overwhelming evidence of defendant's guilt, there was no reasonable possibility that the jury would have acquitted defendant absent the improper statements. **State v. Anderson, 168.**

DAMAGES AND REMEDIES

Compensatory and punitive damages—amount not excessive—motion for new trial properly denied—In a wrongful death action arising from a head-on, two-car collision allegedly caused by an impaired driver who had been allowed to operate a vehicle by its owner (together, defendants), the trial court did not abuse its discretion in denying defendants' motion for a new trial pursuant to Civil Procedure Rule 59 based upon allegedly excessive damages "given under the influence of passion or prejudice" where, although the total verdict appeared to be the largest impaired driving award in the state and despite the absence of evidence regarding economic damages, the jury was presented with evidence regarding: the victim's pain and suffering prior to her death, the non-income-related losses experienced by her family, and the wanton behavior of both defendants, including that the driver had five years previously been cited for operating the owner's vehicle while impaired (and pled guilty to that offense). Moreover, the punitive damages awarded did not exceed the statutory limit of three times the compensatory damages. **Chappell v. Webb, 13.**

DRUGS

Possession of methamphetamine—constructive possession—defendant absent—drug located in bedroom—In defendant's trial for drug and firearm offenses, the State presented substantial evidence from which a jury could conclude that defendant constructively possessed methamphetamine, which was found in a trailer that defendant owned and lived in, even though defendant was not present when law enforcement conducted the search. The drug was found on a mirror table at the foot of defendant's bed along with digital scales, drug paraphernalia, and a glass smoke pipe; further, defendant told a visitor while in jail that officers probably "found something on that mirror." **State v. Jones, 234.**

EVIDENCE

Felony child abuse—serious physical injury—reckless disregard for human life—substantial evidence—motion to dismiss properly denied—The trial court did not err in denying defendant's motion to dismiss a charge of felony child abuse for insufficient evidence of "serious physical injury" and "reckless disregard for human life" where the evidence, viewed in the light most favorable to the State, was substantial on each challenged element, in that: (1) the repeated punishments defendant inflicted on the five-year-old victim resulted in bruised and swollen feet so painful the child had difficulty walking, causing him great pain and suffering; and (2) defendant's provision of water, foot soaks, and lotion to the victim did not assuage her indifference to the child's health and safety. **State v. Freeman, 209.**

Hearsay—business records exception—authentication—affidavit—not notarized—signed under penalty of perjury—After defendant made several unauthorized purchases using corporate credit cards she received through her employment, the trial court in the resulting embezzlement prosecution properly admitted records

of defendant's purchases—from the credit card company and from a vendor—under the business records exception to the rule against hearsay (Evidence Rule 803(6)), where the records were accompanied by letters from employees of the credit card company and the vendor stating that the records met the requirements listed in Rule 803(6). Although the letters were not notarized, they still qualified as "affidavits" because they were signed under penalty of perjury; therefore, the letters were sufficient to authenticate the evidence under Rule 803(6). **State v. Hollis, 224.**

Hearsay—exceptions—statements made for medical diagnosis or treatment—eyewitness account of abuse—reasonably pertinent to diagnosis—At defendant's trial for sexual offenses committed against his two minor daughters, where a pediatrician specializing in child maltreatment testified about her medical examination of one of the daughters, the trial court properly admitted the daughter's hearsay statement to the pediatrician that defendant had inappropriately touched her sister. The daughter's statement qualified as one "made for purposes of medical diagnosis or treatment" under the hearsay exception in Evidence Rule 803(4), since the daughter made the statement during her own medical exam, which was not limited to a physical examination but also involved assessing her mental health. Therefore, although the statement seemingly had more to do with what happened to her sister, the statement was reasonably pertinent to the daughter's diagnosis by the pediatrician because her eyewitness account of her sister's sexual abuse would undoubtedly have affected her mental health. **State v. Anderson, 168.**

Lay opinion testimony—identification of defendant in videos and photographs—plain error—prejudice not shown—In a prosecution on charges arising from the theft of a purse containing a credit card from a car and the use of the card at a Walmart, the trial court did not commit plain error in allowing lay opinion testimony from a law enforcement officer who identified defendant as the person depicted in surveillance video footage from the store and in photographs derived from the footage. Even assuming, without deciding, that admission of the testimony was error—in that it was not "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony or the determination of a fact in issue" (Evidence Rule 701)—defendant failed to demonstrate that the testimony had a probable impact on the jury's verdicts given the overwhelming evidence, both direct and circumstantial, of his guilt. **State v. Thomas, 269.**

Prior bad acts—sexual offense trial—child victims—uncharged acts against one sibling—common plan or scheme—In a trial for multiple sex offenses committed against each of two child victims (siblings whose mother defendant dated off and on for ten years), there was no error in the trial court's decision to allow the State to introduce evidence of sexual acts allegedly committed by defendant against the older victim for which defendant was not charged and which were alleged to have taken place a few years prior to the charged offenses. The evidence was admissible under Evidence Rule 404(b) to show a common plan, intent, or scheme to abuse both of the siblings because the acts were sufficiently similar and not so remote in time to the charged acts. Further, the trial court did not abuse its discretion by determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence for purposes of Rule 403, where the court carefully considered the evidence first outside the presence of the jury and admitted a limited amount of testimony regarding the uncharged acts. **State v. Lopez, 239.**

Prior consistent statement—improper corroboration—objection waived—evidence of similar character—At defendant's trial for sexual offenses committed

against his two minor daughters, the trial court erred by allowing defendant's half-brother to testify that his stepsister mentioned seeing defendant sexually abusing the half-brother's then-five-year-old daughter, where the trial court did so "to corroborate." The stepsister did not testify at defendant's trial, so her out-of-court statement was inadmissible as a prior consistent statement because there was no in-court testimony to corroborate. Nevertheless, the court's error did not prejudice defendant because he had waived any objection to that testimony by failing to object to other evidence of a similar character, including in-court testimony from the half-brother's daughter and defendant's written statement to law enforcement, both of which described the stepsister witnessing the abuse referred to in her out-of-court statement. **State v. Anderson, 168.**

Prior conviction elicited on cross despite stipulation—relevancy—impeachment of witness—In defendant's trial for multiple offenses including possession of a firearm by a felon, in which he asserted that the guns found in his home were not his, the trial court did not abuse its discretion by allowing the State to ask defendant's mother on cross-examination about her knowledge of defendant's prior conviction (also for possession of a firearm by a felon) even though defendant had already conceded that he was a convicted felon in order to avoid the prior conviction being heard by the jury. The prior conviction was relevant to impeach the mother's credibility as a witness after she stated that she had "never known" defendant to have any guns, since she admitted being present in the courtroom when defendant pleaded guilty to the older charge. Although there was a chance that the jury would use the information to defendant's detriment in deciding whether defendant was the owner of the guns in the present case, the possibility of undue prejudice did not outweigh the legitimate probative value of the evidence. **State v. Jones, 234.**

HOMICIDE

First-degree murder—motions to dismiss and to set aside verdict—substantial evidence—The trial court in a first-degree murder prosecution properly denied defendant's motion to dismiss during trial and his subsequent motion to set aside the guilty verdict, because the State presented substantial evidence from which a jury could reasonably infer defendant's guilt, including: a long exchange of text messages between defendant and the victim, some of which were sent the day that the victim went missing, in which the victim agreed to purchase drugs from defendant; cellular phone records placing both the victim and defendant at defendant's residence during the time of the murder; and evidence that the projectiles removed from the victim's body were consistent with the shotgun shell casing and gun found inside defendant's residence. **State v. Corrothers, 192.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need application—conditional approval—conformance with statutory criteria—no error—In a contested case hearing in which a certificate of need (CON) application for a freestanding emergency department was conditionally approved, the administrative law judge (ALJ) did not err by affirming the decision of the CON Section of the N.C. Department of Health and Human Services (the Agency) on all substantive grounds, including that the CON application complied with the statutory criteria in N.C.G.S. § 131E-183(a)(3), (6), and (18a). The Agency was not required to conduct a comparative review between the instant CON application and one that was submitted—and rejected—a year earlier, nor was it required to perform

an adverse impact assessment by the proposed project on competitors other than evaluating whether that the project would result in unnecessary duplication of existing services. **Fletcher Hosp., Inc. v. N.C. Dep't of Health & Hum. Servs., 82.**

Certificate of need application—determination of competitive review—agency's discretion—In a contested case hearing in which a certificate of need (CON) application for a freestanding emergency department was conditionally approved, the CON Section of the N.C. Department of Health and Human Services (the Agency) did not err by determining that CON applications submitted by other healthcare providers in the same timeframe were not subject to competitive review, as defined by 10A N.C.A.C. 14C.0202, where the Agency was given a broad delegation of authority to decide whether multiple applications were in competition (such that the approval of one application may require denial of another). Where there was no showing that the Agency abused its discretion during its review process, there was no error in the Agency's decisions regarding the denial of discovery and the exclusion of evidence regarding unrelated third-party applications. **Fletcher Hosp., Inc. v. N.C. Dep't of Health & Hum. Servs., 82.**

Certificate of need—competing proposals—geographic accessibility—decision affirmed—In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding geographic accessibility where substantial evidence supported the ALJ's findings that intervenor's proposed site, while located in a zip code without any residents, was immediately adjacent to and accessible from densely populated zip codes in Durham County. **Duke Univ. Health Sys. Inc. v. N.C. Dep't of Health & Hum. Servs., 25.**

Certificate of need—competing proposals—population to be served—underserved groups—decision affirmed—In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding intervenor's compliance with a statutory requirement (N.C.G.S. § 131E-183(a)(3)) that it identify the population to be served, particularly "underserved groups," where substantial evidence supported the ALJ's more than 80 findings of fact—including those that addressed alleged unrealistic projections identified by petitioner—because the weighing of evidence was for the ALJ rather than the appellate court. **Duke Univ. Health Sys. Inc. v. N.C. Dep't of Health & Hum. Servs., 25.**

Certificate of need—competing proposals—reasonableness of cost, design, and means of construction—remanded for further findings—In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the reasoning of the administrative law judge (ALJ) was unsound as to respondent's conclusions of law that intervenor complied with a statutory requirement (N.C.G.S. § 131E-183(a)(12)) that it demonstrate the reasonableness of the cost,

design, and means of construction of the facility on the proposed site. Specifically, the ALJ treated restrictive covenants and zoning requirements applicable to the site as unproblematic and, moreover, considered an alternative site not included in intervenor's application—which, in any event, was itself impaired by a proposed highway extension as well as power lines, a greenway, and water hazards. Given the possibility that the ALJ might not have awarded the CON to intervenor but for its contemplation of the alternative site, the matter was remanded for consideration of intervenor's application taking into account only the site proposed therein. **Duke Univ. Health Sys. Inc. v. N.C. Dep't of Health & Hum. Servs., 25.**

Certificate of need—competing proposals—relative impact on competition—decision affirmed—In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding the relative impact on competition of each CON application because the alleged error argued by petitioner on appeal—a categorical preference for a new market competitor—was (1) not evident in the ALJ's decision, and (2) even if it were present, would be unavailing given the undisputed fact that petitioner controlled 98% of acute care beds in the county at the time of its CON application. **Duke Univ. Health Sys. Inc. v. N.C. Dep't of Health & Hum. Servs., 25.**

Certification of need application—failure to hold hearing—substantial prejudice not shown—An administrative law judge (ALJ) correctly determined that, in providing a written comment period in lieu of holding a public hearing on a certificate of need (CON) application (due to public health concerns during a pandemic), the N.C. Department of Health and Human Services failed to follow proper procedure because the public hearing requirement in N.C.G.S. § 131E-185(a1)(2) was mandatory. The ALJ erred, however, when it reversed the agency's decision (conditionally approving the CON application) on the sole basis that the failure constituted substantial prejudice as a matter of law rather than evaluating specific evidence of concrete harm—other than generalized market competition—to the two other healthcare providers who filed petitions for a contested case hearing. This portion of the ALJ's decision was reversed and the matter was remanded for additional consideration. **Fletcher Hosp., Inc. v. N.C. Dep't of Health & Hum. Servs., 82.**

IMMUNITY

Governmental—breach of contract—operation of small business loan program—lack of valid contract—In plaintiffs' action against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention (in which plaintiffs alleged damages arising from the delayed disbursement of a small business loan), the trial court properly granted summary judgment in favor of the city on plaintiffs' breach of contract claim based on the city's affirmative defense of governmental immunity. Plaintiffs failed to show that a letter sent to them from a small business development specialist for the city—promising to close the loan within a certain timeframe—constituted a valid contract since the specialist did not have actual authority to bind the city to a contract; therefore, the city had not waived its governmental immunity from suit. **Flomeh-Mawutor v. City of Winston-Salem, 104.**

IMMUNITY—Continued

Governmental—tort claims—operation of small business loan program—governmental function—lack of waiver—In plaintiffs' action against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention (in which plaintiffs alleged damages arising from the delayed disbursement of a small business loan), the trial court properly granted summary judgment in favor of the city on plaintiffs' tort claims based on the city's affirmative defense of governmental immunity. The city's operation of its small business loan program constituted a governmental, rather than a proprietary, function, based in part on the fact that the program was funded by federal block grants and was designed to provide loans to businesses that could not secure loans from traditional lenders. Therefore, the city was immune from suit for the negligence of its employees in the operation of the program, and plaintiff failed to allege any waiver of that immunity. **Flomeh-Mawutor v. City of Winston-Salem, 104.**

JURY

Instruction not requested—lesser-included offense—plain error standard proper—not shown—Where a defendant failed to request an instruction on the lesser-included offense of misdemeanor child abuse (N.C.G.S. § 14-318.2(a)), the proper appellate standard of review was plain error (rather than invited error), a standard defendant did not meet in light of evidence that repeated punishments she inflicted on the five-year-old victim resulted in bruised and swollen feet so painful the child had difficulty walking—clear and positive evidence of great pain and suffering that constituted "serious physical injury," an essential element of the greater offense charged (felony child abuse resulting in serious physical injury pursuant to N.C.G.S. § 14-318.4(a5)). **State v. Freeman, 209.**

OPEN MEETINGS

Quo warranto action—appointment of sheriff—validity up for judicial review—suit under N.C.G.S. § 143-318.16A—unnecessary—In a quo warranto action brought by plaintiff after defendant county board of commissioners appointed him as sheriff (to fill a vacancy resulting from the prior sheriff's death) but subsequently replaced him with defendant interim sheriff (who had already served the rest of the deceased sheriff's term), plaintiff placed up for judicial review the validity of his appointment by arguing that, since nobody challenged his appointment through a "proper proceeding" under N.C.G.S. § 143-318.16A, the appointment was presumptively valid, and therefore defendants had "usurped" plaintiff's position as sheriff. Consequently, defendants were not required to challenge plaintiff's appointment by filing a separate suit under section 143-318.16A (setting forth the procedure for challenging violations of the Open Meetings Law). **State ex rel. Cannon v. Anson Cnty., 152.**

Quo warranto action—emergency appointment of sheriff—improper meeting procedure—lack of notice—lack of quorum—In a quo warranto action brought by plaintiff after defendant county board of commissioners convened a meeting to appoint him as sheriff (to fill a vacancy resulting from the prior sheriff's death) but subsequently replaced him with defendant interim sheriff (who had already served the rest of the deceased sheriff's term), the trial court properly granted judgment on the pleadings in favor of defendants because the face of plaintiff's complaint showed that plaintiff's initial appointment was unlawful. First, the board's meeting did not qualify as an emergency meeting under the Open Meetings Laws (N.C.G.S. § 143-318.12(f))

because, at a previous meeting, the board had already expressed its awareness of the looming sheriff vacancy and determined that no immediate action was necessary; absent a true emergency, the board was statutorily required to give notice to the public of the meeting forty-eight hours in advance, which it did not do. Additionally, although four out of the seven commissioners voted to appoint plaintiff, because there was no "emergency" that would have allowed remote participation pursuant to section 166A-19.24(a), the two votes that were cast via conference call were invalid, and therefore the board did not have the quorum necessary to appoint plaintiff. **State ex rel. Cannon v. Anson Cnty., 152.**

PROBATION AND PAROLE

Probation ordered to run consecutive to post-release supervision—rule of lenity—improper increase in penalty—In a criminal matter in which, because defendant pleaded guilty to four counts of second-degree exploitation of a minor—an offense requiring registration—defendant was given a post-release supervision period of five years, the trial court erred by sentencing defendant's probation (also five years) to run consecutively to his post-release supervision. Where the relevant statute, N.C.G.S. § 15A-1346, generally required probation to run concurrently with periods of probation, parole, or imprisonment (with an exception for imprisonment as determined by a trial court), but was silent as to post-release supervision, the appellate court applied the rule of lenity to conclude that the trial court's sentence impermissibly increased the penalty placed on defendant in the absence of clear legislative intent. The probation judgments were vacated and the matter was remanded to the trial court for the parties to enter into a new plea agreement or for the matter to proceed to trial. **State v. Barton, 182.**

Probation revocation—after end of probationary period—lack of finding of "good cause"—remand required—Where the trial court revoked defendant's probation after the term of his probation expired without finding that "good cause" existed to do so, but where sufficient evidence existed from which the trial court could have made such a finding, the judgment revoking probation was vacated and the matter was remanded to the trial court for re-consideration. **State v. Siler, 262.**

REAL PROPERTY

Good faith purchaser for value—badges of fraud present—good faith exception inapplicable—Where a creditor (plaintiff) alleged that defendant was liable to plaintiff for the amount of a judgment plaintiff had obtained against another entity (debtor) following debtor's sale of real property—its only asset—to defendant, the trial court properly determined that the transfer was voidable pursuant to N.C.G.S. § 39-23.4 (the Uniform Voidable Transactions Act). The court's unchallenged findings of fact (1) invoked multiple "badges of fraud" in the sale—including that the transfer was concealed from plaintiff, was made to an insider while a lawsuit was pending, and left debtor without assets sufficient to pay its existing liabilities—and (2) supported the court's conclusion of law that the good faith exception to the Act (N.C.G.S. § 39-23.8(a)) was inapplicable because neither debtor nor defendant undertook the sale in good faith. **Anhui Omi Vinyl Co., Ltd. v. USA Opel Flooring, Inc., 1.**

SATELLITE-BASED MONITORING

Period of five years—defendant scored in low risk range—no supporting evidence—orders reversed without remand—In a criminal matter in which defendant

pleaded guilty to four counts of second-degree exploitation of a minor, where defendant scored a "1" on the STATIC-99R—which placed him in the low risk range for sexual recidivism—the trial court erred by ordering defendant to submit to five years of satellite-based monitoring (SBM) without making additional findings of fact regarding the need for the highest possible level of supervision. Where the State presented no evidence to support findings of a higher level of risk or to support SBM, the trial court's orders were reversed without remand. **State v. Barton, 182.**

SEARCH AND SEIZURE

Effective assistance of counsel—no motion to suppress filed—evidence obtained pursuant to warrants—taint purged—In a first-degree murder case, where law enforcement applied for warrants to search defendant's residence and phone after an officer observed a hole in the ground (where the victim's body was later found) within the curtilage of defendant's house, defendant did not receive ineffective assistance of counsel where his trial attorney did not move to suppress evidence seized pursuant to the search warrants. Even if the officer's warrantless search of the curtilage at defendant's home had been unlawful, the warrants were still supported by probable cause based on information acquired independently of the officer's unlawful entry, including phone records placing defendant and the victim at defendant's house at the time of the murder, thereby purging the warrants of any taint. **State v. Corrothers, 192.**

Unlabeled pill bottle—probable cause—officer's observations and prior knowledge—In a drug prosecution, the trial court properly denied defendant's motion to suppress opioids found in an unlabeled orange pill bottle in defendant's car despite improperly basing its decision on a reasonable suspicion standard because the officer who encountered defendant at a gas station had probable cause to believe that the bottle containing white pills (which defendant hid from view inside his car upon seeing the officer) contained illegal drugs, justifying a search of defendant's vehicle. Although the officer did not know that defendant was then on supervised probation (and subject to searches based on a lower standard—reasonable suspicion), the officer recognized defendant from previous encounters, knew that defendant had been involved with illegal drugs in the past, and remembered defendant trying to hide drugs from an officer who served him with an indictment on a prior occasion. Further, when the officer asked defendant about the unlabeled orange pill bottle, defendant repeatedly lied about its existence. **State v. Siler, 262.**

SENTENCING

New trial following appellate review—more severe sentence imposed—no lesser sentence statutorily authorized—The statutory prohibition in N.C.G.S. § 15A-1335 on imposing a sentence, following appellate review, "for the same offense . . . which is more severe than the prior sentence" was not implicated where, in defendant's new trial, the trial court added an additional prior record level point pursuant to N.C.G.S. § 15A-1340.14(b)(6) (one point assigned "[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted"), with the result that defendant's prior record level was raised from III to IV. The trial court sentenced defendant at the bottom of the presumptive range applicable to a prior record level IV offender with habitual felon status in the absence of any mitigating factors for the convictions consolidated in the judgment and was not statutorily authorized to impose any lesser sentence—the sole exception to the provisions of N.C.G.S. § 15A-1335. **State v. Thomas, 269.**

SEXUAL OFFENSES

Child victim—date of offenses—variance between indictments and evidence—time not essential element—In a prosecution for multiple sexual offenses committed against a child victim, the trial court did not err by denying defendant's motion to dismiss the indictments. Although the indictments alleged that the offenses occurred within one calendar year but testimony from the victim regarding her age when the acts occurred indicated an earlier timeframe than the one alleged, defendant could not demonstrate prejudice from any variance between the indictments and the evidence produced at trial because the time of the offenses was not an essential element and there was no showing that defendant was deprived of a defense due to lack of specificity. **State v. Lopez, 239.**

UNFAIR TRADE PRACTICES

Easement dispute—dumping on property—activity not in or affecting commerce—In a property dispute in which plaintiffs sued defendant (a construction company that previously owned plaintiffs' property) to stop it from dumping timber and natural debris on their land (a right purportedly granted in an easement), the trial court properly granted partial summary judgment to defendant on plaintiffs' claim for unfair and deceptive trade practices (UDTP) because defendant's activity was not "in or affecting commerce." Although defendant's dumping was indirectly part of its day-to-day operations, it did not involve transactions between businesses or between a business and consumers since plaintiffs were not a business or a consumer of defendant's business and, therefore, plaintiffs were precluded from recovering under a UDTP cause of action. **Shannon v. Rouse Builders, Inc., 144.**

ZONING

Violation of sign ordinance—single location at specific time—opportunity to cure—failure to re-inspect—The owners of a business (petitioners) timely cured their violation of a city ordinance prohibiting signs or advertisements on vehicles "parked or located for the primary purpose of displaying said sign" by notifying the code enforcement official that they had promptly moved their vehicle on the same day they received notice of the violation. The plain language of the ordinance, the evidence of the violation as shown by three photos attached to the notice, and legal principles requiring interpretation of ordinances in favor of the free use of property all supported a determination that the violation occurred at a single location at a specific time, and was not an ongoing violation as the city later contended (based on petitioners continuing to drive their truck with the sign on it around the city for more than two years after the initial notice). The city had the burden of showing the existence of a violation, and its failure to re-inspect the site of the violation after being notified of abatement could not defeat petitioners' timely notice of cure. Therefore, the city's action to enforce the violation was rendered moot, and the matter was remanded to the trial court for dismissal. **MR Ent., LLC v. City of Asheville, 136.**

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 Wednesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ANHUI OMI VINYL CO., LTD., PLAINTIFF
v.
USA OPEL FLOORING, INC. F/K/A USA FLOORING IMPORTERS, INC.
F/K/A USA OPEL FLOORING IMPORTERS, LLC, DEFENDANT

No. COA23-993

Filed 6 August 2024

Real Property—good faith purchaser for value—badges of fraud present—good faith exception inapplicable

Where a creditor (plaintiff) alleged that defendant was liable to plaintiff for the amount of a judgment plaintiff had obtained against another entity (debtor) following debtor's sale of real property—its only asset—to defendant, the trial court properly determined that the transfer was voidable pursuant to N.C.G.S. § 39-23.4 (the Uniform Voidable Transactions Act). The court's unchallenged findings of fact (1) invoked multiple "badges of fraud" in the sale—including that the transfer was concealed from plaintiff, was made to an insider while a lawsuit was pending, and left debtor without assets sufficient to pay its existing liabilities—and (2) supported the court's conclusion of law that the good faith exception to the Act (N.C.G.S. § 39-23.8(a)) was inapplicable because neither debtor nor defendant undertook the sale in good faith.

Appeal by defendant from order entered 6 March 2023 by Judge George C. Bell in Davidson County Superior Court. Heard in the Court of Appeals 16 April 2024.

Wyatt Early Harris Wheeler, by Donavan J. Hylarides, James R. Hundley, and Molly R. Ciaccio, for plaintiff-appellee.

Williams Mullen, by Camden R. Webb and Killian K. Wyatt, for defendant-appellant.

ZACHARY, Judge.

This case concerns the transfer of real property from Surface Source USA NC, Inc. ("Surface Source"), to Defendant USA Opel Flooring, Inc. ("Opel"). The trial court determined, *inter alia*, that this transfer was voidable as to Opel's creditor, Plaintiff Anhui Omi Vinyl Co. Ltd. ("Omi"), because the transfer "was done with the intent to hinder, delay, or defraud" Omi in contravention of the Uniform Voidable Transactions Act. *See* N.C. Gen. Stat. § 39-23.4(a) (2023). Opel appeals from the trial court's order entering judgment in favor of Omi in the amount of $1,139,971.21 plus interest. After careful review, we affirm.

I. Background

Omi is a Chinese corporation that manufactures and exports luxury vinyl tile flooring to companies in the United States. One of Omi's customers was Surface Source, a North Carolina corporation that sold and distributed vinyl flooring from a building that it owned in Lexington, North Carolina (the "Surface Source Building"). Surface Source's President, CEO, Director, and Registered Agent Miao "Richard" Yu owned 10% of the stock of Surface Source. At all times relevant to this appeal, the Surface Source Building has been encumbered by a lien in favor of Davidson County, securing an economic-development loan from the county.

In 2017, Surface Source experienced financial difficulty and failed to pay more than $1,000,000.00 owed to Omi for goods sold and delivered to Surface Source. In March 2017, Yu directed Surface Source employees to form a new North Carolina corporation—Opel[1]—via LegalZoom.[2] Opel was formed to engage in the same business as Surface Source. Yu initially owned 60% of Opel's stock.

On 1 June 2017, Omi filed suit against Surface Source, alleging that Surface Source owed Omi more than $1,000,000.00 for goods sold and

1. When it was first incorporated, Opel was named "USA Flooring Importers, Inc." It has subsequently been renamed. For ease of reading, we refer to this corporation as "Opel" throughout.

2. "LegalZoom.com provides an online legal portal to give visitors a general understanding of the law and to provide an automated software solution to individuals who choose to prepare their own legal documents." *LegalZoom Terms of Use*, LegalZoom https://www.legalzoom.com/legal/general-terms/terms-of-use (last updated Sept. 19, 2023).

delivered. Surface Source actively defended Omi's suit, including filing an answer and counterclaim on 1 August 2017.

On 21 November 2017, Surface Source sold the Surface Source Building to Opel for $1,030,000.00 "plus additional consideration." At the time of the transfer, Opel was aware that the Surface Source Building was the only asset that Surface Source owned and that a secured creditor of Surface Source had already foreclosed on and sold all of Surface Source's other assets.[3] As the transaction was being finalized, Surface Source's new counsel sent a letter to Davidson County requesting that the county subordinate its deed of trust against the Surface Source Building to a new deed of trust. In the letter, Surface Source's counsel represented that Surface Source was "transitioning to a new entity" that would eventually become Opel and that the "new entity" would fulfill the existing loan obligations owed to the county. The signed subordination agreement was recorded on 29 November 2017 and identified Opel as the original borrower of the loan from Davidson County, rather than Surface Source.

That same day, Surface Source's attorneys filed a motion to withdraw from the Omi litigation, stating that Surface Source had terminated their representation agreement and obtained new counsel. Before Omi's lawsuit against Surface Source came on for trial, Surface Source's new counsel informed the court that no representative of Surface Source intended to appear at trial. Indeed, when the matter came on for trial on 14 February 2018, no representative of Surface Source was present.

On 14 February 2018, the trial court entered judgment in favor of Omi in the amount of $1,139,971.21 plus interest. However, Omi was unable to collect on its judgment against Surface Source; the Davidson County Sheriff's Office returned Omi's writ of execution as unsatisfied because it "did not locate property on which to levy."

On 29 November 2018, Omi filed a complaint against Opel, alleging that Opel was liable to Omi in the amount of the judgment against Surface Source. Omi alleged that Opel was liable (1) as a "mere continuation" of Surface Source under the doctrine of successor liability or, in the alternative, (2) because the transfer of assets from Surface Source to Opel was a fraudulent transfer pursuant to the Uniform Voidable Transactions Act. On 28 January 2019, Opel filed its answer.

Omi filed a motion for summary judgment on 30 March 2021, and on 23 June 2021, Opel filed a motion for summary judgment as well. On

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3. According to one of Opel's managers, Surface Source's secured creditor "even took the mop away."

6 July 2021, the trial court entered an order denying both summary judgment motions.

On 5 December 2022, the matter came on for bench trial in Davidson County Superior Court. On 6 March 2023, the trial court entered an order concluding that the transfer of the Surface Source Building from Surface Source to Opel was voidable as a fraudulent transfer pursuant to N.C. Gen. Stat. § 39-23.4(a). The trial court alternatively concluded that Opel was a mere continuation of Surface Source and, as such, was liable to Omi. Consequently, the trial court entered judgment in favor of Omi in the amount of $1,139,971.21 plus interest.

Opel filed timely notice of appeal.[4]

II. Discussion

Opel argues on appeal that the trial court erred by entering judgment in favor of Omi on both theories of liability: fraudulent transfer and mere continuation.

A. Standard of Review

"[W]hen the trial court sits without a jury, as it did in this case, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 251–52, 871 S.E.2d 706, 717 (cleaned up), *reh'g denied*, 382 N.C. 328, 873 S.E.2d 411 (2022). "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. Otherwise, a trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *Id.* at 246, 871 S.E.2d at 714 (cleaned up). The trial court's supported findings are conclusive on appeal "even though the evidence might sustain findings to the contrary." *Wurlitzer Distrib. Corp. v. Schofield*, 44 N.C. App. 520, 526, 261 S.E.2d 688, 692 (1980) (citation omitted).

B. Analysis

Opel contends that the trial court erred by concluding that "[t]he transfer of the Surface Source Building from Surface Source to [Opel]

4. In its notice of appeal, Opel initially appealed from the trial court's order denying its motion for summary judgment as well as the order entering judgment. During the settling of the record on appeal, Opel withdrew its notice of appeal, in part, as to the summary judgment order. The parties stipulated that Opel only appeals from the trial court's 6 March 2023 order entering judgment.

was done with the intent to hinder, delay, or defraud" Omi and that, therefore, the transfer was "voidable as to [Omi] under N.C. Gen. Stat. [§] 39-23.4(a)." We disagree.

1. Applicable Legal Principles

From "an early period in the judicial history of this State," North Carolina has recognized the voidability of fraudulent transactions. *Helms v. Green*, 105 N.C. 251, 259, 11 S.E. 470, 472–73 (1890); *see also* N.C. Gen. Stat. § 39-23.4 uniform law cmt. 1 (tracing lineage of the doctrine to "the Statute of 13 Elizabeth, c. 5 (1571)"). "The declared object in enacting 13 Eliz. was to avoid and abolish feigned gifts, grants, alienations, &c., which may be contrived and devised of fraud, to the purpose and intent to delay, hinder, and defraud creditors and others of their just and lawful actions and debts." *Helms*, 105 N.C. at 262, 11 S.E. at 474 (cleaned up).

Our Supreme Court has long recognized the general principle that a transaction tainted by the intent to defraud a creditor may be voidable as to that creditor:

> [T]he *whole* purpose of the parties to such conveyance must be the devotion of the property *bona fide* to the satisfaction of the preferred creditors, and no part of that purpose the hindering or delaying of creditors, except so far as such hindrance or delay is the unavoidable consequence of the preference so given. Every contrivance *to the intent* to hinder creditors—*directed to that end*—is "malicious" that is to say, wicked. . . . But if the hindrance of creditors form any part of the actual intent of the act done, so far the act is as against them a wicked or malicious contrivance—and it is not to be questioned that a conveyance or assurance, tainted in part with a malicious or fraudulent intent, is by the statute made void as against creditors *in toto*.

Hafner v. Irwin, 23 N.C. 490, 498 (1841).

Moreover, it is well established that the presence of certain "badges of fraud" may indicate that a transaction that is not void on its face may nevertheless be found to be voidable as fraudulent. *See State ex rel. Brown v. Mitchell*, 102 N.C. 347, 370, 9 S.E. 702, 703–04 (1889) ("[C]ertain combinations of the several badges of fraud . . . will raise a presumption of fraudulent intent, and make it incumbent on the party benefited by the alleged fraud to show the *bona fides* of the transaction.").

As articulated by our Supreme Court, these badges of fraud included:

> failure to register a conveyance required by law to be registered within a reasonable time after its execution; the embarrassment of a grantor and his failure to reserve sufficient property to satisfy his indebtedness; inadequacy of price; unusual credit given by one in failing circumstances; secrecy in the execution of a conveyance; the fact that one involved in debt makes a conveyance to a near relation.

Id. at 369, 9 S.E. at 703.

Consistent with this centuries-old precedent, the modern-day Uniform Voidable Transactions Act sets forth, in pertinent part, the following ground for determining that a transfer is voidable as fraudulent:

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With intent to hinder, delay, or defraud any creditor of the debtor . . . .

N.C. Gen. Stat. § 39-23.4(a)(1). This contemporary legislation "was not designed to permit those dealing in the commercial world to obtain rights by an absence of inquiry under circumstances amounting to an intentional closing of the eyes and mind to defects in or defenses to the transaction." *Cherry Cmty. Org.*, 381 N.C. at 247, 871 S.E.2d at 714 (citation omitted). Rather, the Act "renders voidable as to a creditor any transfer made or obligation incurred when that transfer—in this case, the conveyance of the subject property—is consummated by a debtor with the intent to defraud any creditor of the debtor." *Id.* (cleaned up).

When determining whether a transfer was made with the "intent to hinder, delay, or defraud any creditor of the debtor" under the Uniform Voidable Transactions Act, N.C. Gen. Stat. § 39-23.4(a)(1), the trial court may consider any of the following non-exclusive list of factors, which follow the spirit of the traditional badges of fraud:

> (1) The transfer or obligation was to an insider;
>
> (2) The debtor retained possession or control of the property transferred after the transfer;
>
> (3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) The debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor;

(12) The debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due; and

(13) The debtor transferred the assets in the course of legitimate estate or tax planning.

Id. § 39-23.4(b).

2. Badges of Fraud

In this case, the trial court made numerous findings of fact to support its conclusion that "[t]he transfer of the Surface Source Building from Surface Source to [Opel] was done with the intent to hinder, delay, or defraud" Omi and that, consequently, the transfer was "voidable as to [Omi] under N.C. Gen. Stat. [§] 39-23.4(a)." The trial court's findings of fact, which Opel does not challenge on appeal and are thus binding, *Cherry Cmty. Org.*, 381 N.C. at 246, 871 S.E.2d at 714, include:

3. Surface Source's President and CEO was Miao "Richard" Yu (hereinafter "Yu"), who also owned 10% of Surface Source.

4. By 2017, Surface Source ran into financial difficulty and failed to pay more than $1,000,000 to Omi for goods sold and delivered to Surface Source.

5. In March 2017, Mr. Yu directed Surface Source employees to form a new company called USA Flooring Importers, Inc., which was done by employee Jason Reich through LegalZoom. Mr. Reich also assisted Mr. Yu in setting up a bank account for USA Flooring Importers, Inc.

6. USA Flooring Importers, Inc. later changed its name to USA Opel Flooring Importers, LLC, and then to [Opel] . . . .

7. Opel was formed to conduct exactly the same type of business that Surface Source was engaged in – distribution of vinyl flooring. Opel also operates its business out of the Surface Source Building.

8. At the time of . . . Opel's creation, Yu owned 60% of its stock.

9. On June 1, 2017, Omi filed suit against Surface Source in Wake County . . . for its outstanding debt. The Summons and Complaint were served on Mr. Yu as Surface Source's CEO.

10. At first, Surface Source actively defended the suit, even filing a counterclaim against Omi. However, on or about November 28, 2017, Surface Source abruptly ceased its defense when its legal counsel withdrew from the case. Surface Source did not appear at the trial of the case on February 14, 2018. Omi was awarded a judgment against Surface Source in the amount of $1,1[39],971.21 on February 14, 2018 . . . . Omi then attempted to execute on its judgment against Surface Source, but the Writ of Execution was returned by the Davidson County Sheriff's Department unsatisfied.

11. While Omi's lawsuit against Surface Source was pending, Surface Source transferred the Surface Source Building to Opel in a transaction which closed on November 21, 2017. Opel had knowledge that Surface Source's only asset at that time was the Surface Source Building.

12. As a result of Surface Source's transfer of the Surface Source Building to Opel prior to Omi obtaining its judgement, Omi was not able to obtain a judgment lien against the Surface Source Building.

. . . .

14. When Surface Source transferred the Surface Source Building to Opel, Surface Source's attorney, Adam Gottsegen, sent Davidson County a letter requesting Davidson County to subordinate its deed of trust against the Surface Source Building to the new deed of trust in favor of Bank OZK, Opel's lender. The letter represented that Surface Source was "transitioning to a new entity . . . ." The Subordination Agreement, which Davidson County signed in reliance on the representation made in attorney Gottsegen's letter, identifies *Opel* as the "Borrower" which signed the original 2015 Note and Deed of Trust . . . in favor of Davidson County. . . . Opel has admitted it owes the debt under the loan to Davidson County.

Although the trial court did not specifically discuss the factors enumerated in N.C. Gen. Stat. § 39-23.4(b), these unchallenged findings of fact clearly implicate several of those factors. Yu was the President, CEO, and 10% owner of Surface Source, and he directed Surface Source employees to form Opel—of which he also owned a percentage—and establish its bank account. *See* N.C. Gen. Stat. § 39-23.4(b)(1) (whether the transfer "was to an insider"). Surface Source transferred the Surface Source Building while the Omi suit was pending. *See id.* § 39-23.4(b)(4) (whether "the debtor had been sued or threatened with suit" prior to the transfer). And the transfer was made without Omi's knowledge. *See id.* § 39-23.4(b)(3) (whether "[t]he transfer or obligation was disclosed or concealed"); *see also Cherry Cmty. Org.*, 381 N.C. at 252–53, 871 S.E.2d at 718 (invoking N.C. Gen. Stat. § 39-23.4(b)(3) where the grantor "concealed its sale of the subject property" and where the grantor's "eventual disclosure to [its creditor] of the transfer was performed in order for [the grantor] to gain an advantage in the reactivated litigation").

In addition to those statutory badges of fraud, the trial court's findings of fact also invoke the badges of fraud present when a "debtor does not retain property sufficient to pay [its] then-existing debts." *Edwards v. Nw. Bank*, 39 N.C. App. 261, 272, 250 S.E.2d 651, 659 (1979). The trial court found as fact that the Surface Source Building was "Surface

Source's only asset" at the time of the transaction, *see* N.C. Gen. Stat. § 39-23.4(b)(5) (whether "[t]he transfer was of substantially all the debtor's assets"), and Surface Source became insolvent upon the transfer of its only asset, *see id.* § 39-23.4(b)(9) (whether "[t]he debtor . . . became insolvent shortly after the transfer was made").

Opel does not challenge any of these findings of fact, which renders them binding on appeal. *Cherry Cmty. Org.*, 381 N.C. at 246, 871 S.E.2d at 714. Consequently, the existence of these "several badges of fraud" found by the trial court "raise[s] a presumption of fraudulent intent, and make[s] it incumbent on the party benefited by the alleged fraud to show the *bona fides* of the transaction." *Brown*, 102 N.C. at 370, 9 S.E. at 703–04. This brings us to Opel's main argument regarding this issue: the Uniform Voidable Transactions Act's good-faith exception.

3. The Good-Faith Exception

Under the Uniform Voidable Transactions Act, even though a transfer is voidable as to a creditor against the transferor, the same transfer may not be voidable against the transferee under the good-faith exception. "A transfer or obligation is not voidable under [N.C. Gen. Stat. §] 39-23.4(a)(1) against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee." N.C. Gen. Stat. § 39-23.8(a). The party seeking to invoke the defense of § 39-23.8(a) bears the burden of proving the applicability of the good-faith exception. *Id.* § 39-23.8(g)(1).

Because the two elements of this exception—"a person that took in good faith *and* for a reasonably equivalent value"—are joined by the conjunctive "and," they must both be satisfied for the defense provided in § 39-23.8 to be applicable. *Id.* § 39-23.8(a) (emphasis added); *see also Lithium Corp. of Am., Inc. v. Town of Bessemer City*, 261 N.C. 532, 535, 135 S.E.2d 574, 577 (1964) ("Ordinarily, when the conjunctive 'and' connects words, phrases or clauses of a statutory sentence, they are to be considered jointly."). This, too, is in accord with our longstanding precedents, as it is well settled that a transfer for reasonable consideration may nonetheless be voidable when the transfer is not made in good faith. *See, e.g.*, *Aman v. Walker*, 165 N.C. 224, 227, 81 S.E. 162, 164 (1914) ("If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor*, participated in by the *grantee*, or of which he has notice, it is void.").

Opel contends that the trial court erred by failing to apply the N.C. Gen. Stat. § 39-23.8(a) defense, because the transfer of the Surface Source Building was made in good faith and for reasonably equivalent

value. In its appellate brief, Opel discusses many of the factors enumerated in § 39-23.4(b) that it claims "would have weighed heavily in favor" of a finding that the transfer to Opel was made in good faith. In so doing, however, Opel merely suggests that the trial court failed to make findings of fact that *could* have supported its position; Opel does not specifically challenge any of the findings of fact that the trial court *did* make in its analysis.

"Whether a party has acted in good faith is a question of fact for the trier of fact . . . ." *Cherry Cmty. Org.*, 381 N.C. at 247, 871 S.E.2d at 714 (citation omitted). By raising and discussing several of the other factors enumerated in N.C. Gen. Stat. § 39-23.4(b), about which the trial court made no findings of fact, Opel essentially asks this Court to impermissibly reweigh the evidence in the record so as to "sustain findings to the contrary" of the trial court's findings. *Wurlitzer*, 44 N.C. App. at 526, 261 S.E.2d at 692. This we cannot—and will not—do. Ours is merely to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Cherry Cmty. Org.*, 381 N.C. at 251–52, 871 S.E.2d at 717 (citation omitted). Opel does not challenge the substance of the trial court's findings of fact, which are thus binding on appeal, *id.* at 246, 871 S.E.2d at 714, and which in turn support the trial court's conclusion that the transfer of the Surface Source Building was voidable as to Omi, notwithstanding Opel's assertion of good faith. Therefore, the trial court's judgment "will not be disturbed" on this basis. *Wurlitzer*, 44 N.C. App. at 526, 261 S.E.2d at 692.

As discussed above, Opel bore the burden of establishing both elements of N.C. Gen. Stat. § 39-23.8(a) in order to avail itself of that statutory defense. *See* N.C. Gen. Stat. § 39-23.8(g)(1). Because the trial court's binding findings of fact support the conclusion that neither Surface Source nor Opel acted in good faith in transferring the Surface Source Building, we need not address whether the transfer was made for "reasonably equivalent value[.]" *Id.* § 39-23.8(a). "The facts, as found by the trial court, compel the imputation of knowledge to [Opel] of [Surface Source]'s fraudulent activities as [Opel] knew these activities to be fraudulent at the time of their commission," which consequently renders the transfer of the Surface Source Building to Opel "voidable as to [Omi] and thus denying [Opel's] ability, under these facts and circumstances, to be a good faith purchaser for value of the subject property." *Cherry Cmty. Org.*, 381 N.C. at 255, 871 S.E.2d at 719.

In light of our holding regarding the fraudulent transfer, we do not reach Opel's challenge to the trial court's alternative conclusion that

Opel was a mere continuation of Surface Source. *See Law Offices of Peter H. Priest, PLLC v. Coch*, 244 N.C. App. 53, 63 n.5, 780 S.E.2d 163, 169 n.5 (2015) (declining to reach arguments concerning the trial court's "alternative holdings" where one issue was dispositive), *disc. review and cert. denied*, 368 N.C. 689, 781 S.E.2d 479 (2016).

C. Remedy

Finally, Opel alleges that the trial court's order "suffers from a fatal logical flaw." Opel asserts that "[v]oiding the transaction cannot permit Omi to recover because the [Surface Source Building] was fully encumbered to secured creditors who had priority over Omi." Not only is this assertion irrelevant, Opel misapprehends the nature of the relief that the trial court ordered.

The trial court did not, in fact, void the transfer of the Surface Source Building. The trial court merely entered "a judgment against [Opel] in an amount equal to [Omi]'s judgment against Surface Source." This is a remedy that the trial court is indisputably authorized to enter by statute. *See* N.C. Gen. Stat. § 39-23.8(b)(1).

Further, the fact that the Surface Source Building was encumbered by liens held by secured creditors does not create "a fatal logical flaw" in the trial court's order sufficient to mandate reversal. Rather, as Omi notes, the trial court's entry of judgment against Opel—in the same amount as Omi's judgment against Surface Source—merely restores Omi to its status quo position: as a judgment creditor, no more and no less.

III. Conclusion

For the foregoing reasons, the trial court's order is affirmed.

AFFIRMED.

Judges COLLINS and FLOOD concur.

CHAPPELL v. WEBB

[295 N.C. App. 13 (2024)]

SANDRA CHAPPELL, ADMINISTRATOR OF THE ESTATE OF SUSAN RENEE CHAPPELL (DECEASED), PLAINTIFF
v.
SHEMARO DEANN WEBB AND LADOROTHY BREANNA FOREMAN, DEFENDANTS

No. COA24-23

Filed 6 August 2024

1. Civil Procedure—motion for judgment notwithstanding the verdict—negligent entrustment

In a wrongful death action arising from a head-on, two-car collision allegedly caused by an impaired driver who had been allowed to operate a vehicle by its owner, the trial court did not err in denying the owner's motion for judgment notwithstanding the verdict of guilty returned by the jury on a charge of negligent entrustment because that tort required evidence only that the owner consented (expressly or impliedly) to the use of her vehicle and knew or reasonably should have known that the driver was likely to cause injury to others by her driving. Taken in the light most favorable to the nonmoving party (plaintiff), the evidence—including the owner's admission in her answer to the complaint that the driver had operated her vehicle with her express knowledge, consent, and authorization; and documentation of the vehicle's ownership which, by statute (N.C.G.S. § 20-71.1(a)), is prima facie evidence of a vehicle owner's consent in a wrongful death case—supported the challenged element of consent.

2. Damages and Remedies—compensatory and punitive damages—amount not excessive—motion for new trial properly denied

In a wrongful death action arising from a head-on, two-car collision allegedly caused by an impaired driver who had been allowed to operate a vehicle by its owner (together, defendants), the trial court did not abuse its discretion in denying defendants' motion for a new trial pursuant to Civil Procedure Rule 59 based upon allegedly excessive damages "given under the influence of passion or prejudice" where, although the total verdict appeared to be the largest impaired driving award in the state and despite the absence of evidence regarding economic damages, the jury was presented with evidence regarding: the victim's pain and suffering prior to her death, the non-income-related losses experienced by her family, and the wanton behavior of both defendants, including that the

driver had five years previously been cited for operating the owner's vehicle while impaired (and pled guilty to that offense). Moreover, the punitive damages awarded did not exceed the statutory limit of three times the compensatory damages.

Appeal by defendants from judgment entered 28 April 2023 by Judge Cynthia K. Sturges in Franklin County Superior Court. Heard in the Court of Appeals 15 May 2024.

Bennett Guthrie PLLC, by Mitchell H. Blankenship, Rodney A. Guthrie, and Joshua H. Bennett, for defendants-appellants.

White & Stradley, PLLC, by J. David Stradley and Ann C. Ochsner, and Henson Fuerst, P.A., by Thomas Henson, Jr., for plaintiff-appellee.

DILLON, Chief Judge.

This case arises from a tragic two-vehicle accident resulting in the fatality of the driver of one of the vehicles. At the conclusion of the trial, the estate of the deceased victim was awarded $40 million in compensatory and punitive damages from two defendants: the intoxicated driver of the other vehicle and the owner of that other vehicle. After careful review, we conclude the trial was free from reversible error and affirm the trial court's rulings on Defendants' post-trial motions.

I. Background

On the evening of 18 September 2020, Defendant Shemaro Deann Webb was driving a Nissan Altima southbound on US Highway 401 toward Raleigh while under the influence of alcohol. Defendant LaDorothy Breanna Foreman was a passenger and owned the Nissan Altima.

On the same highway, Susan Renee Chappell was driving northbound.

At some point, Defendant Webb crossed the center line of the highway while attempting to pass another southbound vehicle in a no-passing zone. Her vehicle collided head-on with Ms. Chappell's vehicle in the northbound lane. Ms. Chappell died later that night due to injuries sustained in the accident.

Plaintiff Sandra Chappell, as the administrator of Ms. Chappell's estate, brought a wrongful death suit against Defendants, seeking to recover damages pursuant to North Carolina's wrongful death statutes. Plaintiff alleged that Defendant Webb was negligent in driving

the vehicle and that Defendant Foreman was negligent by entrusting Defendant Webb with her vehicle.

At the conclusion of the trial, the jury returned verdicts against Defendants. The jury found Defendants jointly and severally liable for $15 million in compensatory damages. The jury found the driver Defendant Webb liable for $5 million in punitive damages and the vehicle owner Defendant Foreman liable for $20 million in punitive damages. The trial court entered a judgment consistent with the verdicts. Defendants moved for post-trial relief from the judgment. Defendant Foreman separately moved for a judgment notwithstanding the verdict ("JNOV"). The trial court denied both motions. Defendants appeal.

II. Analysis

On appeal, Defendant Foreman argues that the trial court erred in denying her motion for JNOV. And both Defendants argue that the trial court erred in denying their other post-trial motions for relief from the large jury verdicts. We address each argument in turn.

A. Negligent Entrustment Claim & Motion for JNOV

[1] We first address the vehicle owner Defendant Foreman's argument that she was entitled to JNOV. She contends Plaintiff did not present sufficient evidence to prove negligent entrustment. Alternatively, she contends that, even if there was sufficient evidence to show she was liable for negligent entrustment, there was insufficient evidence warranting an award of punitive damages against her.

Whether a party is entitled to a motion for JNOV is a question of law, which we review *de novo*. *Est. of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 293, 847 S.E.2d 677, 681 (2020). As our Supreme Court has instructed:

> In making its determination of whether to grant the motion, the trial court must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence. If, after undertaking such an analysis of the evidence, the trial judge finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for [JNOV] should be denied.

Abels v. Renfro Corp., 335 N.C. 209, 214–15, 436 S.E.2d 822, 825 (1993) (internal marks omitted).

Here, Defendant Foreman contends Plaintiff failed to prove her negligent entrustment claim. Our Supreme Court has explained that to prove negligent entrustment, the plaintiff must show two things, namely that (1) the defendant car owner entrusted her car to another *and* (2) the car owner knew or reasonably should have known the other person was in a condition where she was likely to cause injury to others in her driving:

> Negligent entrustment is established when the owner of an automobile entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, who is likely to cause injury to others in its use. Based on his own negligence, the owner is liable for any resulting injury or damage proximately caused by the borrower's negligence.

Tart v. Martin, 353 N.C. 252, 254, 540 S.E.2d 332, 334 (2000) (internal citations and marks omitted). The entrustment element "requires *consent from the defendant*, either express or implied, for the third party to use the instrumentality in question." *Bridges v. Parrish*, 222 N.C. App. 320, 327, 731 S.E.2d 262, 267 (2012) (emphasis added), *aff'd*, 366 N.C. 539, 540, 742 S.E.2d 794, 796 (2013).

Regarding the entrustment element, Defendant Foreman suggests that Plaintiff must show more than that Defendant Foreman simply *consented* to allowing Defendant Webb to drive her car: Plaintiff must show that Defendant Foreman *voluntarily delivered possession* of her vehicle to Defendant Webb. Defendant Foreman cites to North Carolina Pattern Jury Instruction 102.68, which the trial court gave to the jury and which includes a requirement that the jury find that a negligent entruster "voluntarily gave possession" of her motor vehicle to the driver.[1] Our Supreme Court's jurisprudence, however, does not suggest that there is a heightened burden beyond that the owner consented, either expressed or implied, to allowing one she knew or should have known to be incompetent/reckless to drive her car. *See Bridges*, 222 N.C. App. at 327, 731 S.E.2d at 267 (holding that a plaintiff show the defendant-owner gave express or implied consent); *Swicegood v. Cooper*, 341 N.C. 178, 179, 459 S.E.2d 206, 206 (1995) (holding that the entrustment element is met where it is shown the owner "had given [the driver] permission to drive the automobile"). *See also State v. Warren*, 348 N.C. 80, 119, 499

1. N.C.P.I. Civil 102.68 is titled "Negligence of Owner Entrusting Motor Vehicle to Incompetent, Careless or Reckless Person."

S.E.2d 431, 453 (1998) (recognizing that a "pattern jury instruction . . . has neither the force nor the effect of law[.]").

We conclude that the issue of Defendant Foreman's negligent entrustment was properly given to the jury. In so holding, we note that in answering Plaintiff's complaint, Defendant Foreman admitted that Defendant Webb drove her vehicle "with [her] express knowledge, express consent, and express authorization[.]" *See Champion v. Waller*, 268 N.C. 426, 428, 150 S.E.2d 783, 785 (1966) ("Facts alleged in the complaint and admitted in the answer are conclusively established by the admission, it not being necessary to introduce such allegations in evidence."). In other words, there is no requirement that a plaintiff provide proof that the entruster handed the keys to the driver but rather merely that the entruster at least impliedly consented to the driver driving her car.

We further note that our General Assembly has provided that evidence of vehicle ownership (here, Defendant Foreman's ownership of the vehicle) is "prima facie evidence" that the driver (here, Defendant Webb) was driving the vehicle with the owner's consent and knowledge:

> In all actions to recover damages for . . . the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.

N.C. Gen. Stat. § 20-71.1(a) (2023).

Finally, we note there was sufficient evidence offered from which the jury could infer that Defendant Foreman entrusted her vehicle to Defendant Webb. Indeed, the evidence showed that Defendant Webb was in the backseat of the vehicle sometime prior to the accident but that at some point prior to the accident she became the driver while Defendant Foreman came to be in the backseat.

Accordingly, the trial court did not err in denying Defendant Foreman's motion for JNOV.

B. Amount of Damages/Motion for New Trial

Defendants jointly make arguments concerning the *amount* of compensatory and punitive damages awarded by the jury.

[2] First, Defendants contend that the trial court abused its discretion in denying Defendants' request for a new trial. Rule 59 of our Rules of Civil Procedure allows the trial court to grant a new trial on the grounds that "excessive or inadequate damages appear[ ] to have been given under the influence of passion or prejudice" or "insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(6)–(7) (2023).

We review a trial court's refusal to grant a new trial based on an argument that the damages awarded were excessive for an abuse of discretion:

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.

Worthington v. Bynum, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605.

Defendants argue that the awards must have been the result of passion or prejudice because "[c]ases with similar evidence have produced verdicts several orders of magnitude lower." Indeed, the $40,000,000 *total* verdict appears to be the largest drunk driving verdict in North Carolina history.

In analyzing the verdict, we consider the compensatory and punitive awards separately.

The jury awarded $15 million in compensatory damages.

Defendants direct us to a federal defamation case arising out of North Carolina that was heard in the Fourth Circuit: *Eshelman v. Puma Biotechnology, Inc.* 2 F.4th 276 (2021). In *Eshelman*, the Fourth Circuit concluded that the trial court abused its discretion in denying the defendant's motion for a new trial. *Id.* at 285. The court held that "the jury awarded excessive damages that the evidence could not justify." *Id.* at 283. In determining that the damages were excessive, the court compared the case's damages award to the damages awarded in similar defamation cases, noting that "[o]ne would expect ample evidence of the

harm suffered by [the plaintiff] to support a jury award ten times the size of the largest defamation awards in North Carolina history." *Id.*

Defendants ask us to employ *Eshelman*'s "damages norm" test to determine if the verdict here was excessive when compared to the evidence presented and the typical damages awarded in these cases. Defendants point to other wrongful death cases in which the plaintiffs presented more evidence than presented here, but where the verdict total was much lower than the verdict total here. *See*, *e.g.*, *Haarhuis v. Cheek*, 255 N.C. App. 471, 805 S.E.2d 720 (2017) ($4.25 million compensatory damages award for drunk driving incident); *Boyd v. L.G. DeWitt Trucking Co., Inc.*, 103 N.C. App. 396, 405 S.E.2d 914 (1991) ($869,200 compensatory damages award for drunk driving incident). Defendants argue that a comparison of this case to other similar cases demonstrates that the compensatory damages award here was the influence of passion and prejudice.

Our Supreme Court, however, has previously disapproved of the implementation of a test similar to Defendants' proposed "damages norm" test:

> It would serve no purpose to engage in a great debate over the various policies which might or might not favor the adoption of a specific standard to evaluate and limit a trial judge's discretionary power to grant a new trial if he believes the jury has awarded inadequate or excessive damages. It suffices to say that the overwhelming precedent of this court discloses no compelling reason or need for the implementation of such a rule in North Carolina. Moreover, we are not persuaded that the appellate use of a vague test to measure the "reasonable range" of a given verdict's amount would provide a more effective, consistent or precise method of determining whether a trial judge has exceeded the bounds of discretion in the grant or denial of a new trial.

Worthington, 305 N.C. at 485, 290 S.E.2d at 604 (cleaned up). Accordingly, we cannot adopt such a test.

Further, we note the federal case applying North Carolina law cited by Plaintiff, where a $32.7 million compensatory damages award in a wrongful death action was sustained though there was a lack of evidence concerning the economic damages suffered. *See Finch v. Covil Corp.*, 972 F.3d 507, 516–18 (4th Cir. 2020) (applying North Carolina law and upholding the jury verdict).

And though Plaintiff did not present evidence of Ms. Chappell's anticipated future income nor of her medical and funeral expenses, Plaintiff did present other evidence to justify a compensatory award.

For instance, there was evidence concerning the pain and suffering Ms. Chappell suffered during the last hour of her life. She suffered numerous bodily injuries, including multiple open fractures (bones protruding through her skin); she was conscious and experiencing pain while trapped in her vehicle (extrication by firefighters took approximately thirty minutes) and for part of the ambulance ride; she suffered from respiratory distress and repeatedly expressed an inability to breathe, which would have been "extremely terrifying," "panic inducing," and caused "an impending sense of doom"; and she suffered a traumatic cardiac arrest in the ambulance en route to the hospital.

Also, Plaintiff presented evidence of Ms. Chappell's family's loss, particularly the loss suffered by her two children. The jury was free to award damages based on this evidence. Our Supreme Court has instructed that the award is not limited to "income-focused measure[s] of damages" as may have been the case in the distant past, but may be based on services, society, and companionship, including victims who may not have produced an income, like "a child, homemaker or handicapped person." *DiDonato v. Wortman*, 320 N.C. 423, 429, 358 S.E.2d 489, 492 (1987).

Our Court has previously stated that the size of the award itself cannot establish that the jury was influenced by passion or prejudice. *See Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 161, 683 S.E.2d 728, 742 (2009). Moreover,

> [t]he present monetary value of the decedent to the persons entitled to receive the damages recovered will usually defy any precise mathematical computation. Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury—subject, of course, to the discretionary power of the judge to set its verdict aside when, in his opinion, equity and justice so require.

Brown v. Moore, 286 N.C. 664, 673, 213 S.E.2d 342, 248–49 (1975) (citations omitted).

The structure of the trial itself in this case cuts against Defendants' argument that the jury was influenced by passion or prejudice (in determining the compensatory damages award). The trial was *not* bifurcated. Rather, this jury was responsible for awarding both compensatory *and*

punitive damages during one stage. Thus, the jury knew it would have the opportunity to punish Defendants with its punitive damages award and, therefore, would not need to (inappropriately) punish Defendants with its compensatory damages award.

To be sure, to some people, and perhaps even to some judges, a compensatory damages award of $15 million based on a death involving less than an hour of suffering and where no "economic damages" evidence was introduced is excessive. However, based on the foregoing, our review of the record, and the relevant case law, we cannot say that the trial court abused its discretion in refusing to set aside the compensatory damages award and grant a new trial on that issue. *See Justus v. Rosner*, 371 N.C. 818, 832, 821 S.E.2d 765, 774 (2018) ("[T]he plain language of [Rule 59] states explicitly that . . . the only relief that the trial court may award to plaintiff [based on an excessive or inadequate compensatory damage award] is a new trial.").

We also disagree with Defendants' arguments concerning Plaintiff's counsel's alleged "repeated inflammatory statements" as evidence that the jury awarded high damages under the influence of passion or prejudice.

Defendants failed to object at trial to any statement made during Plaintiff's opening statement and closing argument that they now contest on appeal. Thus, we review only whether the trial court committed reversible error by failing to intervene *ex mero motu* because the argument "strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord[.]" *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (citations omitted). *See also State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685 (1986) (extending this standard of review to opening statements where no timely objection was made).

Defendants take issue with the opening statement, in which Plaintiff's counsel stated, "Four hundred and twelve. That is how many North Carolina citizens are slaughtered every year by drunk drivers on our highways." Defendants also contest counsel's statement that "if it wasn't [Ms. Chappell], it could have been anybody."

Here, we conclude these statements did not exceed the "wide latitude" afforded to trial counsel during opening statements. *See Gladden*, 315 N.C. at 417, 340 S.E.2d at 685 ("Trial counsel is generally afforded wide latitude in the scope of the opening statement and is generally allowed to state what he intends to show so long as the matter may be proved by admissible evidence."). Perhaps these statements are some

evidence that the jury's verdict was based, at least in part, on passion and prejudice rather than on the evidence. However, we cannot say that the trial court abused its discretion in not making that determination based on the record before us.

The jury awarded Plaintiff $25 million in punitive damages.

We hold that that trial court did not err in failing to disturb the jury's finding Defendants liable for punitive damages or for the amounts awarded.

First, the evidence presented supports the jury's finding of liability with respect to both Defendants, as explained below.

Our General Assembly has provided that "[p]unitive damages may be awarded . . . *to punish* a defendant for egregiously wrongful acts and *to deter* the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1 (emphasis added). That body has further provided that punitive damages may be awarded where it has been proven that a defendant "is liable for compensatory damages" and that the defendant engaged in "willful or wanton conduct" by "clear and convincing evidence." *Id.* § 1D-15.

Defendant Foreman argues that the issue of punitive damages based on *her negligent entrustment* should not have been presented to the jury. Specifically, Defendant argues that the evidence presented at trial did not prove by *clear and convincing evidence* that Defendant Foreman knew Defendant Webb was drunk when she allowed Webb to drive her vehicle. We disagree. Rather, we conclude there was evidence from which the jury could infer that Defendant Foreman knew Defendant Webb was drunk and that Defendant Foreman acted wantonly or willfully in negligently entrusting the vehicle to Defendant Webb.

For instance, a trooper who investigated the accident testified that she observed open beer cans outside and inside the Nissan Altima and smelled a strong odor of alcohol before even sticking her head inside the vehicle. An expert in blood alcohol physiology, pharmacology, and the effects of alcohol on human performance and behavior testified that, in his opinion, Defendant Webb was "significantly impaired, to the point of being intoxicated" at the time of the wreck and would have shown "very obvious signs of intoxication" at the time of the wreck and in the fifteen to twenty minutes prior to the wreck, such as slurred speech and difficulty in locomoting (*e.g.*, walking, picking up items, standing upright). Defendant Webb herself testified regarding how much she drank and admitted to smoking marijuana as well, much of which was consumed in Defendant Foreman's presence. Also, there was evidence that in

2016, five years prior to the accident, Defendant Webb had been pulled over and cited for drunk driving (to which she pleaded guilty) while driving Defendant Foreman's vehicle and while Defendant Foreman was a passenger.

And there is no question that there was sufficient evidence to show Defendant Webb's liability for punitive damages. She drove the vehicle in an impaired state after consuming a large amount of alcohol.

Second, regarding *the amount* of the punitive damages awarded, we note that our General Assembly has *not* placed a cap on such awards where the conduct involves impaired driving. *See* N.C. Gen. Stat. § 1D-26. In any event, the awards in this case total $25,000,000 and do not exceed the statutory limit of three times the compensatory damages award for cases generally. *See* N.C. Gen. Stat. § 1D-25(b).

In setting the amount, the jury must consider the purposes contained in Section 1D-1 and may consider other matters set forth in Section 1D-35. *See* N.C. Gen. Stat. §§ 1D-1, 1D-35.

The evidence offered here showed that *punishing* these Defendants was appropriate since they had engaged in similar drunk driving/negligent entrustment conduct before, as shown by the 2016 drunk driving incident. This evidence supports a determination that a punitive damages award may be necessary *to deter others as well as these* Defendants from engaging in similar conduct in the future.

As to the factors which may be considered by the jury, evidence showed that Defendants' conduct was "reprehensib[le,]" as the conduct involved drunk driving and allowing one obviously impaired to drive; that there was a "likelihood . . . of serious harm"; that Defendants had an "awareness of the probable consequences of [their] conduct," based on the 2016 drunk driving incident and a common sense understanding that one should not drive while impaired; that Defendants had engaged in "similar past conduct" based on the 2016 incident; that "the duration of [Defendants'] conduct was not momentary, but rather, they had been drinking for several hours prior to driving; that "[t]he actual damages suffered" by Ms. Chappell were high, as she lost her life; and that Defendant Foreman "conceal[ed]" her culpability by never admitting she bore any blame. *See* N.C. Gen. Stat. § 1D-35(2).

Defendants take issue with a statement made by Plaintiff's counsel during closing, urging the jury to "speak loud" with their verdict:

> The size of your verdict is the volume with which you speak. A million dollars? That won't carry out those doors

> back there. A few million dollars might be heard at the town limits, but if you want your voices to be heard in Raleigh, and Durham, and Oxford, and Smithfield, or across the state, or across the nation, you're going to have to speak louder.

Here, counsel's statement was limited to punitive damages. We conclude that this statement did not cross the line. The jury is entitled to "speak loud" with its punitive damages award by sending a message of deterrence to people who consider drunk driving or negligently entrusting a vehicle to a drunk driver. *See* N.C. Gen. Stat. § 1D-1 ("Punitive damages may be awarded . . . to deter the defendant and others from committing similar wrongful acts."). And again, we cannot say that the trial court erred by not disturbing the punitive awards of the jury based on the record before us.

Finally, Defendant Foreman argues that her liability for punitive damages ($20 million) is disproportionately higher than that of the driver Defendant Webb ($5 million). However, there are several possible reasons why Defendant Foreman's punitive damages are four times the amount of Defendant Webb's. For instance, Defendant Webb pleaded guilty to criminal charges arising from this accident and is currently serving a term of imprisonment for thirteen to sixteen years, whereas Defendant Foreman was not criminally punished. Additionally, Defendant Webb expressed some remorse during her testimony, whereas Defendant Foreman did not take any responsibility. We, therefore, cannot say the jury's awards were unlawful.[2]

III. Conclusion

Defendants received a fair trial. There was sufficient evidence presented to submit the issues of liability for compensatory and punitive damages to both Defendants. The jury rendered its verdict. The trial court did not err by denying Defendant Foreman's motion for JNOV and it did not abuse its discretion by denying Defendants' motion for a new trial.

AFFIRMED.

Judges ARROWOOD and STADING concur.

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2. We note that the United States Supreme Court has held that punitive damages awards implicate Due Process concerns. *See*, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003); *Lacey v. Kirk*, 238 N.C. App. 376, 395, 767 S.E.2d 632, 646 (2014). However, Defendants made no express argument as to how the award violated their Due Process rights; and, therefore, we do not consider any such argument.

DUKE UNIVERSITY HEALTH SYSTEM INC., PETITIONER
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED SECTION, RESPONDENT
AND
UNIVERSITY OF NORTH CAROLINA HOSPITALS AT CHAPEL HILL AND UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM, RESPONDENT-INTERVENORS

No. COA23-351

Filed 6 August 2024

1. Hospitals and Other Medical Facilities—certificate of need—competing proposals—geographic accessibility—decision affirmed

In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding geographic accessibility where substantial evidence supported the ALJ's findings that intervenor's proposed site, while located in a zip code without any residents, was immediately adjacent to and accessible from densely populated zip codes in Durham County.

2. Hospitals and Other Medical Facilities—certificate of need—competing proposals—relative impact on competition—decision affirmed

In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding the relative impact on competition of each CON application because the alleged error argued by petitioner on appeal—a categorical preference for a new market competitor—was (1) not evident in the ALJ's decision, and (2) even if it were present, would be unavailing given the undisputed fact that petitioner controlled 98% of acute care beds in the county at the time of its CON application.

3. Hospitals and Other Medical Facilities—certificate of need—competing proposals—population to be served—underserved groups—decision affirmed

In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the administrative law judge (ALJ) properly affirmed respondent's conclusions of law regarding intervenor's compliance with a statutory requirement (N.C.G.S. § 131E-183(a)(3)) that it identify the population to be served, particularly "underserved groups," where substantial evidence supported the ALJ's more than 80 findings of fact—including those that addressed alleged unrealistic projections identified by petitioner—because the weighing of evidence was for the ALJ rather than the appellate court.

4. Hospitals and Other Medical Facilities—certificate of need—competing proposals—reasonableness of cost, design, and means of construction—remanded for further findings

In a contested case initiated by a health system (petitioner) after the N.C. Department of Health & Human Services (respondent) denied in part petitioner's application for a certificate of need (CON) for acute care beds and operating rooms in Durham County while approving a CON for similar services proposed by another health system (intervenor), the reasoning of the administrative law judge (ALJ) was unsound as to respondent's conclusions of law that intervenor complied with a statutory requirement (N.C.G.S. § 131E-183(a)(12)) that it demonstrate the reasonableness of the cost, design, and means of construction of the facility on the proposed site. Specifically, the ALJ treated restrictive covenants and zoning requirements applicable to the site as unproblematic and, moreover, considered an alternative site not included in intervenor's application—which, in any event, was itself impaired by a proposed highway extension as well as power lines, a greenway, and water hazards. Given the possibility that the ALJ might not have awarded the CON to intervenor but for its contemplation of the alternative site, the matter was remanded for consideration of intervenor's application taking into account only the site proposed therein.

Judge GRIFFIN concurring in part and dissenting in part.

Appeal by Petitioner from final decision entered on 9 December 2022 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 15 November 2023.

Baker, Donelson, Bearman, Caldwell & Berkowitz, a Professional Corporation, by Kenneth L. Burgess, Matthew A. Fisher, Iain M. Stauffer, and William F. Maddrey, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for respondent-appellee.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Candace S. Friel, Lorin J. Lapidus, Nathaniel J. Pencook, and D. Martin Warf, for respondent-intervenor.

MURPHY, Judge.

When an appellant challenges the substantive determinations of an administrative law judge ("ALJ") on appeal from a contested case hearing for a certificate of need, we review the decision for substantial evidence on the whole record. However, where our statutes dictate the proper scope of administrative review, the ALJ may not exceed that scope. Here, although we affirm the ALJ in almost all respects, we must remand for further findings insofar as the final decision granting the certificate of need relied upon a site other than that presented in the respondent's application.

BACKGROUND

Petitioner-Appellant Duke University Health System, Inc. ("Duke") challenges on appeal the 9 December 2022 final decision of the ALJ to uphold the conditional approval of a certificate of need ("CON") granted to Respondents-Intervenors-Appellees University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System (collectively "UNC") by the North Carolina Department of Health and Human Services (the "Agency").

Pursuant to N.C.G.S § 131E-183(a)(1) and chapters 5 and 6 of the 2021 State Medical Facilities Plan ("SMFP"), the Agency determined the need to develop 40 acute care beds and four operating rooms for the Durham/Caswell County health service areas. The "new acute care beds [and operating rooms] [could not] be developed without a CON issued by the Agency." On 15 April 2021, in response to the need determinations

of the SMFP, five applications to develop additional acute care beds and operating rooms for the Durham County area were submitted to and reviewed by the Agency. Applications were submitted by Duke and North Carolina Specialty hospital/Southpoint Surgery Center, two Durham County health systems. Additionally, UNC applied as a new provider in Durham County.

On 1 May 2021, the Agency independently reviewed all applications against the statutory review criteria found in N.C.G.S. § 131E-183(a)[1] and the applicable regulatory review criteria found in 10A NCAC 14C. Southpoint Surgery Center submitted an application to add four operation rooms based on the need determination in the 2021 SMFP; UNC Hospitals submitted an application to develop 40 acute care beds and two operating rooms in the Research Triangle Park area. Meanwhile, Duke submitted three applications: the first was to add 40 acute care beds and two operating rooms to its existing Durham facility; the second

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1. In pertinent part, N.C.G.S. § 131E-183(a) provides:

> (a) The Department shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued.
>
> (1) The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.
>
> . . . .
>
> (3) The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.
>
> . . . .
>
> (12) Applications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

N.C.G.S. § 131E-183(a)(1), (3), (12) (2023).

was to develop two operating rooms; and a final application sought to develop two more operating rooms at its Ambulatory Surgery Center. The Agency found that Southpoint Surgery Center failed to demonstrate financial feasibility and failed to show that its application was not unnecessarily duplicative of existing or approved services, among other criteria, while it found both Duke and UNCs applications conforming to all the review criteria. As a result, the Agency denied Southpoint's CON application.

Since the need determination in the SMFP places limits on the number of acute care beds that can be approved by the Agency—40 acute care beds and two other operating rooms—accepting both the Duke and UNC applications would have resulted in more acute care beds and operating rooms than the SMFP need determination for Durham County allowed. The Agency therefore concluded that, because the SMFP allowed for only 40 acute beds in the Durham County area, granting Duke's application would require the denial of UNC's application and *vice versa*. Pursuant to the review criteria under N.C.G.S. § 131E-183, the Agency conducted a comparative analysis review of both Duke and UNC CON applications for 40 acute care beds, as well as another for the two operating rooms.

On 21 September 2021, "[b]y decision and Required State Agency Findings[,] the Agency (1) conditionally approved the UNC Hospitals-RTP Application; (2) conditionally approved [Duke's Ambulatory Surgery Center's] Application [for two additional operating rooms]; (3) denied [Duke's] [two operating rooms] Application; (4) denied [Duke's acute care beds] Application; and (5) denied the Southpoint Application [for two operating rooms]." By letter and Required State Agency Findings dated 21 September 2021, the Agency informed Duke that its application for 40 acute care beds and two operating rooms had been denied. Also on 21 September 2021, the Agency issued the Required State Agency Findings containing the findings and conclusions upon which it based its decisions.

On 21 October 2021, Duke filed a petition for contested case hearing pursuant to N.C.G.S § 150B-23 alleging that the Agency had erroneously approved the CON application of UNC in which UNC sought to develop two operating rooms and 40 acute care beds in Durham County. On 10 November 2021, the OAH issued an order, by consent of all parties, to grant UNC the right to intervene in the contested case hearing. The ALJ issued a final decision in which it affirmed the Agency's decision finding UNC's application to be comparatively superior to Duke's application. Duke appealed.

ANALYSIS

On appeal, Duke challenges the ALJ's final decision on four distinct bases, all of which, in substance, challenge the original determinations of the Agency and only derivatively challenge the ALJ's final decision insofar as it did not reverse the Agency. The bases for its challenges on appeal are (A) that the ALJ incorrectly affirmed the Agency's determination that UNC's application was superior to Duke's with respect to geographic accessibility; (B) that the ALJ incorrectly affirmed the Agency's determination that UNC's application was superior to Duke's on the basis of competition; (C) that the ALJ incorrectly affirmed the Agency's finding that UNC's application conformed with N.C.G.S. § 131E-183(a)(3); and (D) the ALJ incorrectly affirmed the Agency's finding that UNC's application conformed with N.C.G.S. § 131E-183(a)(12).

In reviewing the ALJ's determinations, our standard of review is governed by N.C.G.S. § 150B-51, which permits a party seeking judicial review to challenge an ALJ's final decision

> if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C.G.S. §] 150B-29(a), [N.C.G.S. §] 150B-30, or [N.C.G.S. §] 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b) (2023). "With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of [N.C.G.S. § 150B-51], the court shall conduct its review of the final decision using the whole record standard of review." N.C.G.S. § 150B-51(c) (2023).

"In applying the whole record test, the reviewing court is required to examine all competent evidence in order to determine whether the [final] decision is supported by substantial evidence." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Hum. Servs.*, 235 N.C. App. 620, 622-23 (2014) (marks omitted), *disc. rev. denied*, 368 N.C. 242 (2015). "Substantial evidence is such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion." *Id.* at 623. "This test does not allow the reviewing court to replace the [ALJ's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Mills v. N.C. Dep't of Health & Hum. Servs.*, 251 N.C. App. 182, 189 (2016) (marks omitted).

A. Relative Geographic Accessibility

[1] We first address whether the ALJ properly affirmed the Agency's conclusions as to geographic accessibility. Duke contends that the ALJ's decision was erroneous because the Agency had favorably evaluated the UNC application on the basis of geographic accessibility despite being located in Research Triangle Park, a nonresidential area of Durham, and had analyzed the geographic access factor in a manner that lacked a coherent guiding principle and deviated from the methodology of previous reviews. We disagree.

While analyzing the geographic access factor, the ALJ's final decision acknowledged many of the issues Duke raises before us and nonetheless affirmed the Agency's determination in favor of UNC:

> 420. The Agency utilized the comparative factor of Geographic Accessibility in its comparative analysis of the UNC and Duke Applications. (Jt. Ex. 1, pp. 1609, 1619).
>
> 421. In analyzing this comparative factor, the Agency looked at where each applicant proposes to place the proposed services. (Meyer, Vol. 7, p. 1299). An application placing the services at issue in a location where there are not any such services is deemed the more effective alternative under this factor. (Jt. Ex. 1, p. 253; Carter, Vol. 11, pp. 1874-75).
>
> 422. Ms. Sandlin opined that the Agency erred in its analysis of this comparative factor as having geographic dispersal of these need determined assets is not critical because Durham has less land mass than other counties in North Carolina. (Sandlin, Vol. 6, pp. 1058-67).
>
> 423. Mr. Meyer opined that this factor is important because it is related to access, a foundational principle of the CON Law. The CON Law seeks to avoid geographic maldistribution of services, and North Carolina has a "compelling interest in helping to ensure that all North Carolinians have access to [. . .] healthcare services[.]" (Meyer, Vol. 7, p. 1299).

424. In the acute care beds review, the Agency noted there were 1,388 existing and approved acute care beds in the Durham/Caswell County service area, all of which are located in the central area of Durham County, illustrated by the following table:

Facility	**Total AC Beds**	**Address**	**Location**
Duke University Hospital	1,048	2301 Erwin Rd, Durham 27710	Central Durham County
Duke Regional Hospital	316	3643 N. Roxboro Rd, Durham 27704	Central Durham County
North Carolina Specialty Hospital	24	3916 Ben Franklin Blvd, Durham 27704	Central Durham County

(Jt. Ex. 1, p. 1609; see also Meyer, Vol. 7, p. 1300).

425. Similarly, in the ORs review, the Agency noted that there were 93 existing and approved ORs in Durham County, the vast majority of which were concentrated in the central area of Durham County, illustrated by the following table:

Facility	**Type**	**Durham SA OR System**	**Total ORs**	**Address**	**Location**
NCSH	Existing Hospital	NCSH	4	3916 Ben Franklin Blvd, Durham 27704	Central Durham County
DUH	Existing Hospital	Duke	66	2301 Erwin Rd, Durham 27710	Central Durham County

DRH	Existing Hospital	Duke	13	3643 N. Roxboro Rd, Durham 27704	Central Durham County
DASC	Existing ASF	Duke	4	2400 Pratt St, Durham 27710	Central Durham County
Arringdon	Existing ASF	Duke	4	5601 Arringdon Park Dr, Morrisville 27560	South Durham, near I540 at I40
SSC	Approved ASF	NCSH	2	7810 NC Hwy 751, Durham 27713	South Durham, near Hwy 147
UNC-RTP	Proposed Hospital	UNC	2	Parcels in [RTP] 27709	South Durham, just below I40

(Jt. Ex. 1, p. 1620).

426. For both the acute care beds and ORs comparative analyses, the Agency determined that the UNC Application was the more effective alternative, and Duke's Applications were the less effective alternatives for geographic accessibility. (Jt. Ex. 1, pp. 1609, 1620; Hale, Vol. 1, p. 188).

427. UNC proposed placing the acute care beds in this Review in the southern area of Durham County, where there were no existing acute care beds, while Duke proposed placing additional beds at DUH where there were already over one thousand existing or approved acute care beds. (Jt. Ex. 1, p. 1609; Hale, Vol. 1, p. 188). The Agency also found UNC Hospitals-RTP, Duke Arringdon, and Southpoint Surgery Center to be more effective

because they "propose to develop ORs in South Durham County where there are currently only six of 93 existing/approved Durham County ORs[,]" as opposed to the Duke ORs Application which proposed placing additional ORs at DUH where there were already sixty-six existing and approved ORs. (Jt. Ex. 1, p. 1620).

428. Mr. Meyer agreed with the Agency's analysis of this comparative factor. (Meyer, Vol. 7, pp. 1299-1300, 1330-31). In the beds analysis, the existing facilities in Durham are concentrated in the center of the county. (Jt. Ex. 97, p. 11; Meyer, Vol. 7, p. 1301). Mr. Meyer analyzed the locations of hospitals in certain populous counties in North Carolina, including Wake, Mecklenburg, Guilford, and Forsyth counties, all of which have hospitals in the perimeter of the county and generally have good geographic dispersal of hospitals. (Jt. Ex. 103; Meyer, Vol. 7, pp. 1302-1305). His analysis showed that compared to these highly populated counties, Durham County as another highly populated county, "does not have an acute care hospital that's located anywhere but in the center of the county," (Meyer, Vol. 7, p. 1305).

429. Similarly, both Mr. Meyer and Mr. Carter observed that both the UNC Application and the Duke Arringdon application proposed to place ORs in south Durham County, and both were deemed the more effective alternative as to this comparative factor, which they agree was the correct decision. (Meyer, Vol. 7, pp. 1330-31; Carter, Vol. 11, pp. 1886-87).

430. While Durham County has relatively small land mass compared to other counties, Durham County is the third most densely populated county in the state, and such density leads to traffic congestion that can make geographic dispersion of healthcare facilities more important. (Meyer, Vol. 7, pp. 1306-07, 1309-10).

431. Ms. Sandlin produced two maps showing different amounts of population density in Durham County. In Sandlin's initial expert report, the map showing population density illustrated that UNC Hospitals-RTP would be located in a densely-populated area of the county where there are no existing hospitals. (Jt. Ex. 54, p. 12; Meyer, Vol. 7, p. 1309). However, in Sandlin's rebuttal report,

the map showing population density illustrated there is no population in the zip code where UNC Hospitals-RTP would be located, but still showed that the surrounding zip codes are densely populated. (Jt. Ex. 212; Meyer, Vol. 7, pp. 1307-09).[] [A footnote affixed to this finding in the original text reads as follows: "Similarly, there is no population in the zip code that comprises DUH. (Jt. Ex. 4, p. 242; Sandlin, Vol. 7, p. 1201; Carter, Vol. 11, p. 1903)."]

432. Mr. Meyer opined that despite the lack of population in UNC Hospitals-RTP's zip code, UNC's primary site is easily accessible by "the largest, most significant traffic arteries in that part of the county" such that residents in densely-populated southern Durham County would have easy access. (Meyer, Vol. 7, pp. 1308-09).

433. Mr. Carter likewise explained that the UNC Application illustrated that UNC Hospitals-RTP is located along prominent roadways in addition to being located near the heavily populated southern Durham zip codes. (Carter, Vol. 10, p. 1703; *see also* Jt. Ex. 4, pp. 51-58).

434. Ms. Sandlin also opined that UNC Hospitals-RTP is not near a majority of Durham County zip codes and that this does not improve geographic access for the majority of the service area zip codes. (Sandlin, Vol. 6, p. 1061).

435. In contradiction, Mr. Meyer noted that it is more important for a healthcare facility to be proximate to more people, rather than more zip codes. (Meyer, Vol. 7, p. 1310). The zip codes in southern Durham County which are near UNC Hospitals-RTP "comprise more than half of the population of Durham County." (Jt. Ex. 4, p. 55; Meyer, Vol. 7, p. 1310; Sandlin, Vol. 7, pp. 1205-06).

436. When looking at population rather than zip codes, UNC Hospitals-RTP was proximate to over half of the population of Durham County. (Meyer, Vol. 7, p. 1311-12).

437. Mr. Carter added that UNC Hospitals-RTP's primary site is "on the border of RTP" and is "near where a lot of people live." (Carter, Vol. 11, pp. 1904-05). He further opined that UNC Hospitals-RTP's location being in the southern region of Durham County improves access by providing another option for those residents. While some

of those residents may still choose one of the existing facilities, they have another option that may be closer to where they live. (Carter, Vol. 10, p. 1733). Furthermore, compared to DUH, UNC Hospitals-RTP would be easier to find parking and navigate as a smaller facility. (*Id.* at pp. 1733-34).

438. The fact that DUH may be closer to some residents in Caswell County and northern Durham County does not change the Agency's analysis that UNC Hospitals-RTP enhances geographic accessibility. In Mr. Meyer's opinion:

> [R]esidents of northern Durham County are not going to be disadvantaged by this proposal. They will continue to have the same access to any of those existing acute care hospitals that they do currently. This doesn't take away from their access.

(Meyer, Vol. 7, pp. 1313-14). Instead, UNC's proposal "enhances access for south Durham County residents," which is where the greatest need exists for these services due to the population growth in that area. (*Id.* at p. 1314).

439. As a small hospital, "the intent is not to serve each and every patient within Durham County," because UNC Hospitals-RTP does not "have the capacity to do that." (Carter, Vol. 10, pp. 1703-04).

440. Ms. Sandlin testified that the Agency's analysis of this comparative factor was inconsistent with the way the Agency analyzed it in prior reviews. (Sandlin, Vol. 6, pp. 1045-46).

441. Mr. Meyer disagreed with Ms. Sandlin of the Agency's prior reviews. While he interpreted Ms. Sandlin's testimony as opining that the Agency needs to analyze geographic accessibility based on municipalities, Mr. Meyer noted that there is no rule requiring that. Moreover, analyzing geographic accessibility based on municipalities is impractical in Durham County, where there is only one incorporated municipality, the City of Durham. (Meyer, Vol. 7, pp. 1314-15). More importantly, the geographic accessibility comparative factor should look at where people live compared to the existing and proposed services. (*Id.* at 1315-16).

442. Likewise, Mr. Carter disagreed with Ms. Sandlin. In his opinion, the 2020 Forsyth Acute Care Beds Review mentioned by Ms. Sandlin was an inapt comparison, where the existing hospitals were more dispersed than the existing facilities within Durham that are contained in a five-mile radius. (Carter, Vol. 11, p. 1877)

443. Ms. Sandlin testified that UNC's analysis splitting Durham into different regions based on zip codes "seemed manufactured and illogical." (Sandlin, Vol. 6, p. 1017).

444. However, Ms. Sandlin's testimony ignores the fact that Duke itself, assisted by Keystone Planning while Ms. Sandlin was still with that company, analyzed geographic accessibility in this same "manufactured" manner in its 2018 application to develop the Duke Arringdon facility. In its 2018 application, Duke described the same four zip codes (27703, 27709, 27707 and 27713) as "South Durham" that UNC described as south Durham in its application in this Review. (*Compare* Jt. Ex. 106, p. 30 *with* Jt. Ex. 4, p. 54; *see also* Meyer, Vol. 7, pp. 1317-18; Sandlin, Vol. 6, pp. 1120-22).

445. Mr. Carter explained the process by which UNC determined to split Durham County into regions and concluded that UNC divided Durham County into three regions by zip codes so it could analyze where in the county a new hospital should be located, which the SMFP does not discuss in any detail. (Carter, Vol. 10, pp. 1704-06). Mr. Carter further opined that not all patients within the City of Durham were equally served by the existing hospitals due to the lack of available facilities in southern Durham. In other words, "there aren't enough facilities to serve residents in Durham County notwithstanding the fact that the municipality of Durham may go well into the southern part of the county." (*Id*. at p. 1708).

446. Ultimately, Mr. Meyer agreed with the Agency's analysis of this comparative factor, describing it as "an easy call for the Agency." (Meyer, Vol. 7, p. 1318).

447. Mr. Carter agreed that the Agency was correct in determining the UNC was the more effective alternative, and that it was consistent with other findings he has seen. (Carter, Vol. 11, pp. 1874, 1886). Mr. Carter further opined that he did not believe "the Agency's analysis or

> conclusions would have been any different if UNC had proposed a different site really anywhere else in the county that was not within five miles of another hospital." (*Id.* at p. 1877).

Reviewing the record for substantial evidence, *see Surgical Care Affiliates*, 235 N.C. App. at 622-23, we affirm the ALJ's decision with respect to this factor.

At the threshold, we note that Duke has primarily framed its arguments as though our task on appeal were to review the determinations of the Agency rather than the ALJ. However, this is incorrect. While the statute governing judicial review of administrative decisions, N.C.G.S. § 150B-51, used to contemplate direct judicial review of Agency determinations, revisions by our General Assembly in 2011 have refocused our substantive review on the final decision of the ALJ:

> In 2011, the General Assembly amended the Administrative Procedure Act ("APA"), conferring upon administrative law judges the authority to render final decisions in challenges to agency actions, a power that had previously been held by the agencies themselves. *See* 2011 N.C. Sess. Laws 1678, 1685-97, ch. 398, §§ 15-55. Prior to the enactment of the 2011 amendments, an ALJ hearing a contested case would issue a recommended decision to the agency, and the agency would then issue a final decision. In its final decision, the agency could adopt the ALJ's recommended decision *in toto*, reject certain portions of the decision if it specifically set forth its reasons for doing so, or reject the ALJ's recommended decision in full if it was clearly contrary to the preponderance of the evidence. *See* [N.C.G.S.] § 150B36, *repealed by* 2011 N.C. Sess. Laws 1678, 1687, ch. 398, § 20. As a result of the 2011 amendments, however, the ALJ's decision is no longer a recommendation to the agency but is instead the final decision in the contested case. [N.C.G.S.] § 150B–34(a).
>
> Under this new statutory framework, an ALJ must "make a final decision . . . that contains findings of fact and conclusions of law" and "decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." *Id.*

AH N.C. Owner LLC v. N.C. Dep't of Health & Hum. Servs., 240 N.C. App. 92, 98-99 (2015). Thus, our review of substantive issues will be based on the ALJ's final decision.

Having established the proper scope of our review, we are entirely satisfied that substantial evidence exists to support each of the arguments Duke raises on appeal. While Duke argues that the ALJ's decision was reversible insofar as it found UNC's application favorable on the basis of geographic access in a zip code with no residents, the ALJ cited substantial evidence indicating that the immediately adjacent zip codes are densely populated—to say nothing of the potential usage the proposed location may receive from those who work, rather than reside, in the proposed location of the UNC facility. As to Duke's allegation that the Agency deviated from its mode of analysis in previous reviews, rendering its decision arbitrary and capricious, we cannot say a deviation without a more specific argument as to why the analysis employed in *this* case was deficient that such an alleged deviation constitutes reversible error, especially absent any directly binding law on point to support such a proposition. The task before the Agency is multifaceted, and the CON review process does not demand that it apply a fixed lens to every case, especially where some considerations may be more salient in a given case than in others. The ALJ's findings and conclusions with respect to geographic access are affirmed.

B. Relative Impact on Competition

[2] Second, we address whether the ALJ properly affirmed the Agency's conclusions as to the Duke and UNC applications' relative impact on competition. Duke argues that the ALJ erroneously affirmed the Agency's decision with respect to this comparative factor because the Agency believed the comparative factor of promoting market competition would always favor a new market entrant and because the Agency failed to consider "quality, cost, and access" as part of the competition factor. With these arguments, too, we disagree.

While the ALJ's final decision does discuss this factor, we note that Duke's stance on this issue takes the form of a broad methodological critique rather than an allegation that a specific analytical error occurred, making reproduction of this portion of the record unnecessary. To the extent this argument constitutes an allegation of legal error, we apply the de novo, rather than whole record, standard of review. N.C.G.S. § 150B-51(c) (2023) ("With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, [subsection (b)(4) referring to "other error[s] of law[,]"] the court shall conduct its review of the final decision using the de novo standard of review.").

At the threshold, we note once again that Duke's arguments principally concern the determinations of the Agency and not the ALJ. However, as the ALJ's final decision is the proper object of our review, *see AH*, 240 N.C. App. at 98-99, we base our analysis primarily on that decision. Bearing that in mind, very few of the issues raised by Duke on appeal directly apply to the ALJ's final decision. The alleged defect that the Agency believed the competition factor would always favor a new market entrant—a view found neither in the Agency's written decision nor the final decision of the ALJ, but sourced to testimony by Agency employees before the Office of Administrative Hearings—was not present in the reasoning of the ALJ, who indicated a typical preference for a new market competitor rather than a categorical one.

However, even if the ALJ's view had been as categorical as the view Duke imputes to the Agency, this would hardly be a case where such reasoning would merit reversal on appeal. Duke has not disputed the ALJ's finding that, of the 1,388 acute care beds in Durham County, only twenty are outside Duke's control. Nor has Duke otherwise presented us with any reason to believe UNC's facility would present more of a threat to competition for this service in Durham County than its own market dominance.[2] Rather, its arguments largely reduce to a contention that it could not realistically "win" the competition factor. Barring radically extenuating circumstances, we do not think an entity controlling more than 98% of a service within a county should realistically expect to "win" when a neutral third party considers whether a new market entrant would be the healthier choice for competition. *Cf. Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App. 46, 57 (2006) ("[The petitioner]'s argument appears to be that if it operated all three of the MRI scanners this would somehow foster competition rather than if a competitor operated one of the MRI scanners. [The petitioner], in effect, argues that giving it a monopoly in the service area would increase competition. We decline to adopt this incongruous line of reasoning.").

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2. Duke points out that UNC, despite currently operating no acute care beds in Durham County, is already a major medical provider in the greater triangle region, and it further contests the adequacy of the ALJ's analysis as to competition on this basis. While we recognize Duke's concern insofar as a regional oligopoly may be unhealthy for the state of market competition in the absolute sense, the ALJ's assessment of competition was relative, not absolute. Thus, we cannot say the ALJ erred in its determination that, as between the two regionally dominant providers being considered in the competitive application process, the one not currently operating acute care beds within Durham County creates a *more* favorable impact on competition within the county than the one currently wielding a near-monopoly for that service.

Duke also argues that the failure to consider cost and quality of care within the scope of the competition factor rendered its decision reversibly arbitrary. This argument is meritless. Impact on the health of market competition is one of eleven factors considered in the competitive CON review process, several others of which account for cost and quality of care. We affirm the ALJ's determinations as to relative impact on competition.

C. UNC's Compliance with Criterion 3

[3] We next address whether the ALJ properly affirmed the Agency's conclusions as to UNC's compliance with N.C.G.S. § 131E-183(a)(3). N.C.G.S. § 131E-183(a)(3), or "Criterion 3," provides that a certificate of need applicant

> shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

N.C.G.S. § 131E-183(a)(3) (2023). With respect to Criterion 3, Duke argues that UNC's application was insufficient because it relied on unrealistically low projections for the number of out-of-county patients the proposed facility could be expected to attract and because UNC's application allegedly failed to account for the absence of high-acuity care at the proposed facility.[3] As these arguments are derived from factual disagreements with the Agency findings—which, in the ALJ review, were supported by substantial evidence, *see Surgical Care Affiliates*, 235 N.C. App. at 622-23—we affirm the ALJ.

In its final decision, the ALJ affirmed the Agency's conclusion that UNC's CON application was in compliance with criterion 3, finding, in relevant part, as follows:

> 85. Criterion (3) requires the applicant to "identify the population to be served by the proposed project" and to "demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area,

3. Duke also argues that UNC's alleged nonconformity with criterion 3 brings it out of conformity with criteria 1, 4, 5, 6, and 18(a). However, because we determine below that Duke's arguments with respect to criterion 3 are without merit, we need not independently evaluate this argument.

and, in particular, low-income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed." ([N.C.G.S.] § 131E-183(a)(3); Jt. Ex. 1, p. 1502).

86. To find an applicant conforming with this Criterion, the Agency engages in a four-part analysis: (1) the applicant must identify the population to be served, also referred to as the patient origin; (2) the applicant must demonstrate the need of the identified population for the services proposed; (3) the applicant must project the utilization of these services by the identified population in the first three operating years of the project; and (4) the applicant must project the extent to which the projected population, and particularly those in medically underserved groups, have access to the proposed services. (Jt. Ex. 1, p. 1502; Hale, Vol. 2, p. 224; see also Meyer, Vol. 5, p. 936). To be found conforming, the information provided by the applicant must be reasonable and adequately supported. (Hale, Vol. 2, pp. 223-24).

i. Patient Origin

87. The first element of Criterion (3) discusses patient origin, which is where the applicant projects patients will come from to utilize the proposed services. (Jt. Ex. 1, p. 1509; Hale, Vol. 2, p. 225). To analyze patient origin, the Agency reviews the information provided by the applicant and determines whether that information is reasonable and adequately supported. (Hale, Vol. 2, pp. 225-26).

88. The UNC Application provided that the patient origin for UNC Hospitals-RTP would include 90 percent Durham County residents, with some in-migration from Wake, Chatham, and Caswell Counties. (Jt. Ex. 4, p. 43; Carter, Vol. 10, pp. 1690-92).

89. To determine its projected patient origin, UNC considered the limited size of the facility and the overwhelming need in Durham County. While UNC could have used a higher percentage of in-migration in its projections, doing so would have been more aggressive, especially given that a small hospital would be less likely to attract patients from outside of the county. (Carter, Vol. 10, pp. 1692-93).

90. Ms. Sandlin acknowledged that her opinions regarding UNC's projected patient origin, in-migration, and patient population were not based on any Duke facilities of similar size, since there are none. She also did not perform any analysis of the patient origin of a hospital of similar size developed by UNC in developing her opinions. (Sandlin, Vol. 7, pp. 1165-66).

91. Daniel Carter, one of UNC's expert witnesses, opined that UNC's 10 percent in-migration assumption was well-supported, reasonable, and conservative. (Carter, Vol. 10, pp. 1695-96). The UNC Application analyzed in-migration at all 116 acute care hospitals in North Carolina to reach its 10 percent in-migration assumption, and it also accounted for UNC Hospitals-RTP's smaller size and densely populated location. (Jt. Ex. 4, pp. 146-47; Carter, Vol. 10, pp. 1693, 1695).

92. Mr. Carter analogized UNC Hospitals-RTP to UNC Johnston Health in Clayton, a 50-bed community hospital which is approximately the same distance from Wake County as UNC Hospitals-RTP would be. At UNC Johnston Health, there is approximately 9 percent in-migration from Wake County despite its proximity. (Carter, Vol. 10, pp. 1693-94).

93. Mr. Carter also noted that had UNC proposed higher in-migration, it would also have the effect of increasing UNC Hospitals-RTP's utilization and the financial feasibility of the project, which would strengthen its application for both Criteria (3) and (5). (Id. at p. 1693). Furthermore, he noted that UNC could have supported an assumption of 20 percent or even 30 percent in-migration without going beyond its maximum utilization. (Id. at pp. 1694-95).

94. Based upon the information provided in the UNC Application, the Agency determined that UNC adequately identified the patient origin for the population it proposed to serve. (Jt. Ex. 1, p. 1511; Hale, Vol. 2, pp. 226-27).

ii. Demonstration of Need

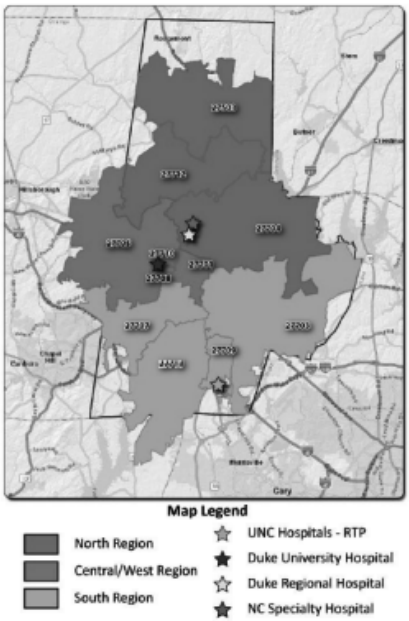
95. The second element of Criterion (3) analyzes whether the applicant demonstrates that the population proposed to be served needs the proposed services. (Jt. Ex. 1, p. 1511;

Hale, Vol. 2, p. 231-32). To conduct its analysis of need, the Agency reviews the information provided by the applicant and assesses whether that information is reasonable and adequately supported. (Hale, Vol. 2, pp. 231-32). This differs from the need determination of Criterion (1), which focuses on the need determination in the SMFP, rather than the needs of patients for the proposed services.

96. UNC provided several reasons why the patients it proposed to serve at UNC Hospitals-RTP needed the proposed services. The Agency determined that UNC's methodology and resulting projections were both reasonable and adequately supported. (Sandlin, Vol. 7, p. 1214).

97. The first reason provided by UNC is the population growth and aging in Durham County. (Jt. Ex. 4, pp. 48-50). UNC noted that Durham County is the sixth most populous county and the third fastest growing county in North Carolina, with the growth rate expected to continue into the next decade. (Id. at 48-49). This growth, combined with the aging of the population, demonstrated that there will be more patients needing acute care services. (Id. at 49-50; Carter, Vol. 10, pp. 1700-01).

98. The second reason provided by UNC is the need for a new hospital in Durham County. As of the date the applications were submitted, there were no acute care beds in the southernmost zip codes in Durham County, where most of the population and growth exists within the county. (Jt. Ex. 4, pp. 51-55). The UNC Application contained the following map illustrating the location of existing hospitals in Durham County and the proposed UNC Hospitals-RTP location:



(Id. at 51; see also id. at 53; Carter, Vol. 10, pp. 1710-11).

99. Additionally, UNC demonstrated that its proposed services were needed because (1) there has not been a new hospital opened in Durham County in over 45 years and (2) Durham County lacks a full-service community hospital. (Jt. Ex. 4, pp. 51-52).

100. The UNC Application included a table which displayed UNC's existing market share of certain zip codes within Durham County. This table showed that UNC already has a strong market presence in southern Durham County (including zip codes 27703, 27713, 27707, 27709) despite not having any facilities there. (Id. at 54; Carter, Vol. 10, pp. 1711-12).

101. The UNC Application also included a table which displayed the historical population growth by region and zip code within Durham County. This table showed that a majority of the Durham County population lives in the southern zip codes. As of 2020, 165,824 out of 326,262 people live in the southern zip codes. In addition, those southern zip codes are the fastest growing zip codes with a

compound annual growth rate ("CAGR") of 2.4% between 2015 and 2020 and expected CAGR of 1.9% between 2020 and 2025. (Jt. Ex. 4, p. 55).

102. In further support of the need for a community hospital in southern Durham County, UNC described the development of roadways and businesses in southern Durham County to emphasize the "sustained growth and development" of southern Durham County that supports the need for UNC Hospitals-RTP. (Id. at pp. 56-58; Carter, Vol. 10, pp. 1713-14).

103. While the SMFP never states that there is a need for any hospital, the fact that there is a need for both beds and ORs in the same area offers the potential for a new hospital. Combined with the need for low acuity services in southern Durham County, there is a need for a community hospital in Durham County. (Carter, Vol. 10, pp. 1696-98).

104. UNC examined the entire Durham/Caswell service area when deciding where to locate its hospital. UNC determined that Caswell County was not an ideal location for a hospital due to its relative lack of population and determined that southern Durham County was ideal based on the need in those densely populated zip codes that lacked a hospital. (Id. at pp. 1699-702; Jt. Ex. 4, pp. 50-55).

105. A third reason provided by UNC is the need for UNC Hospitals hospital-based services in Durham County. A significant number of patients from Durham County use UNC Health facilities and developing a community hospital closer to them would meet their needs for higher frequency, lower acuity services. (Jt. Ex. 4, pp. 58-60; Carter, Vol. 10, pp. 1714-15).

106. UNC already has physicians in Durham County that are part of UNC Health. UNC is focused on meeting the physician needs in the area and would recruit physicians to meet those needs. (Carter, Vol. 10, pp. 1715-16; see also Jt. Ex. 4, pp. 58-59, 382-511). Moreover, UNC Hospitals-RTP would have the same provider number as UNC Hospitals, so the same medical staff that performs surgery in Chapel Hill could do so at UNC Hospitals-RTP. (Carter, Vol. 10, pp. 1716-17; see also Jt. Ex. 4, p. 152; Hadar consistent testimony at Vol. 8, pp. 1464-65).

107. UNC already serves a large number of Durham County residents even without having a hospital in Durham County. Moreover, around one-half of patients in a hospital may not need surgery, and the hospitalists that would provide those services at UNC Hospitals could also provide those services at UNC Hospitals-RTP. (Carter, Vol. 10, pp. 1718-19).

108. The UNC Application further supported the need for UNC Hospitals services in Durham County by describing how UNC Hospitals-RTP "represents an exciting opportunity to develop a new hospital facility with innovation as a central design tenet." (Jt. Ex. 4, p. 59). Mr. Carter explained that UNC felt that this opportunity to build a new hospital in Durham County, which had not presented itself for over 40 years, would allow UNC to provide care in a more modern, unique, and innovative way, as it described doing at its other facilities. (Carter, Vol. 10, p. 1720; Jt. Ex. 4, pp. 58-61).

109. The UNC Application provided examples of its "long history of embracing innovation to deliver the highest quality care with the best patient experience." (Jt. Ex. 4, pp. 60-61). In developing this application, administrators of REX Holly Springs and Johnston Health Clayton provided input of lessons learned from the development of these relatively new hospitals that could be incorporated into the development of UNC Hospitals-RTP. (Carter, Vol. 10, pp. 1721-23; Jt. Ex. 4, pp. 60-61).

110. As a fourth supporting reason, UNC explained that UNC Hospitals-RTP meets the need for acute care beds by providing lower acuity community hospital beds in particular, as it projected that convenient, local access to community hospital services was the primary driver of need for additional acute care beds in the service area. (Jt. Ex. 4, pp. 62-69; Carter, Vol. 10, pp. 1723-30).

111. UNC identified certain lower acuity, high volume services as "selected services," and then analyzed Truven data to illustrate how, "despite the growth at existing tertiary and quaternary facilities in Durham, the basis of this growth was the need for lower acuity, community hospital services." (Jt. Ex. 4, p. 65; Carter, Vol. 10, p. 1726).

112. UNC demonstrated that of the existing hospitals in Durham County, Duke Regional is the fastest growing. (Jt. Ex. 4, p. 64; Carter, Vol. 10, p. 1727). UNC then showed that the selected services were experiencing greater growth than other services in the existing Durham hospitals as a whole, and at DUH and Duke Regional in particular. (Jt. Ex. 4, p. 65; Carter, Vol. 10, pp. 1727-29).

113. UNC further demonstrated that south Durham County residents are seeking lower acuity services more than the central and north regions of Durham County, with over 94 patients daily seeking lower acuity services at existing hospitals. (Jt. Ex. 4, p. 66; Carter, Vol. 10, pp. 1731-33).

114. The UNC Application showed that UNC currently provides the most days of care and experiences the greatest growth for Durham County residents out of all other hospitals except for Duke facilities, and that out of those patients, the highest volume originates from the south region of Durham County. (Jt. Ex. 4, pp. 68-69; Carter, Vol. 10, pp. 1734-36).

115. The UNC Application further showed that UNC Hospitals-RTP meets the need for ORs by providing additional hospital-based ORs, which are well-utilized and provide flexibility and capacity not otherwise available when those ORs are placed in an ambulatory surgical facility. (Jt. Ex. 4, pp. 69-71). Notably, UNC pointed out that while inpatient surgeries have grown at a slower rate than outpatient surgeries statewide, that trend is the opposite in Durham County. (Id. at pp. 69-70; Carter, Vol. 10, pp. 1736-37). UNC also indicated that there has been significant growth in outpatient ORs at ASCs, but that hospital-based ORs would provide the flexibility to meet the need for inpatient surgeries while still allowing for outpatient surgeries to be performed as well. (Jt. Ex. 4, pp. 70-71; Carter, Vol. 10, pp. 1737-38).

116. UNC also supported the need for other services at UNC Hospitals-RTP, including observation beds, procedure rooms, C-Section rooms, imaging, laboratory, and other services, which are needed to support the patients to be seen at UNC Hospitals-RTP. (Jt. Ex. 4, p. 71; Carter, Vol. 10, p. 1738).

117. Based on the information UNC provided, the Agency found UNC's analysis of need to be reasonable and adequately supported. (Jt. Ex. 1, []p. 1512; Hale, Vol. 2, pp. 232-34).

. . . .

iii. Projected Utilization

125. The third element of Criterion (3) evaluates the reasonableness and adequacy of the support for the applicant's projected utilization. (Hale, Vol. 2, p. 235).

126. The Agency does not require applicants to use particular assumptions or methodologies to develop their utilization projections; instead, the assumptions and methodology used by each applicant must be reasonable and adequately supported. (Cummer, Vol. 4, p. 670; Sandlin, Vol. 6, pp. 1115-16).

127. Ms. Sandlin acknowledged that projected utilization at a facility may not necessarily line up with an applicant's actual experience for various reasons. (Sandlin, Vol. 7, pp. 1193-94).

128. The need methodology and projected utilization for the UNC Application were contained in Form C Utilization – Assumptions and Methodology in Section Q of the application. (Jt. Ex. 4, pp. 141-60). UNC projected utilization for the acute care services, surgical services, and ancillary and support services proposed in its application. (Jt. Ex. 1, pp. 1512-20; Hale, Vol. 2, pp. 236-39).

129. UNC used Truven data as the basis for its utilization projections, which both the Agency witness and expert witnesses agreed is frequently utilized by applicants and is a reliable source of data. (Hale, Tr. pp. 237-38; Meyer, Vol. 5, pp. 941-43; Carter, Vol. 11, pp. 1953-55).

130. At the hearing, Mr. Carter explained in detail the assumptions and methodologies used in the UNC Application. The UNC Application began by describing the service area and emphasizing the focus on Durham County, which "sets the stage for" UNC's focus on Durham County in the methodology. (Jt. Ex. 4, pp. 141-42; Carter, Vol. 10, pp. 1739-40).

a. Selected Services

131. The UNC Application next discussed acute care bed utilization, looking first to all days of care for Durham County residents statewide. (Jt. Ex. 4, p. 142; Carter, Vol. 10, p. 1740). Mr. Carter notes that while many methodologies look no further than this, the UNC Application took the extra step of identifying certain high acuity services that it would exclude from the potential days of care to be provided at UNC Hospitals-RTP, as UNC did not propose to provide high acuity, tertiary and quaternary services at UNC Hospitals-RTP. (Jt. Ex. 4, pp. 142-43; Carter, Vol. 10, pp. 1740-41).

132. The remaining services utilized by UNC were called the Selected Services. (See Jt. Ex. 4, p. 143).

133. The decision to exclude certain services was the product of discussions within UNC and the expertise of Mr. Carter. Certain services like cardiac catheterization were excluded because there was no need for a cardiac catheterization unit in the SMFP; other services like neurosurgery could have been included, but given that UNC Hospitals is located nearby, it made sense not to duplicate those services. Moreover, given that UNC Hospitals-RTP is proposed to be a community hospital, UNC prioritized lower-acuity, high-frequency, high-volume cases. (Carter, Vol. 10, pp. 1744-45).

134. UNC decided not to include ICU services at UNC Hospitals-RTP in part based on its recent experience developing community hospitals in Wake and Johnston Counties. Through those facilities, UNC learned that it did not make sense to develop ICU units due to the low volume of patients needing those services compared to the resource-intensive staffing that is required for those beds. (Id. at pp. 1763-65).

135. As explained in the UNC Application, the rooms at UNC Hospitals-RTP were designed to be flexible spaces that would be built to standards such that they could provide ICU-level care as needed. (Jt. Ex. 4, p. 38). If UNC Hospitals-RTP learns as it begins operating that more ICU beds are needed, it could decide to make those beds permanent ICU beds, which would not require any additional

construction or renovation, or any CON approval. (Carter, Vol. 10, pp. 1761-62, 1765).

136. UNC accomplished the exclusion of high acuity services from its analysis by removing diagnosis related groups ("DRGs") associated with the excluded high acuity services from the dataset. (Carter, Vol. 10, pp. 1741-42, Vol. 11, pp. 1897-98). The exclusion of these services resulted in a 31.1 percent reduction in 2019 days of care for Durham County residents. (Jt. Ex. 4, p. 143; Carter, Vol. 10, pp. 1742-44).

137. While the Agency does not require applicants to exclude services in its methodology, UNC chose to do so to underscore the conservativeness of its projections and to reiterate UNC's intention not to develop a quaternary academic medical center in Durham County. (Carter, Vol. 10, pp. 1742-43).

138. Ms. Sandlin did not conduct any analysis utilizing DRG weights to determine the reasonableness of UNC's projections. (Sandlin, Vol. 7, p. 1222; Carter, Vol. 10, pp. 1767-68). She also opined that there is no specific cutoff or threshold for DRG weights that are associated with ICU level of care. (Sandlin, Vol. 7, p. 1223).

139. Mr. Carter likewise opined that there is no bright-line rule for a DRG weight for ICU services. (Carter, Vol. 10, pp. 1756-58).

140. Mr. Carter even analyzed the data UNC relied upon in its analysis and discovered that had UNC applied a bright-line rule excluding DRG weights of over 3.5, only approximately ten percent of the patient days of care for UNC Hospitals-RTP were over that threshold. (Id. at pp. 1759-61).

141. Moreover, those patients without exception had a comorbid condition or major complication that led their condition to progress beyond a 3.5 DRG weight. In those cases, if UNC Hospitals-RTP could not provide the higher level of care needed, they could be transferred to an appropriate facility. (Id. at pp. 1760-61).

142. Ultimately, even if there were ICU patients that were not excluded from UNC Hospitals-RTP's selected services

patients, the projections in the UNC Application would not be impacted. (Id. at p. 1762).

143. Ms. Sandlin created and utilized a Venn diagram as a demonstrative exhibit to show the alleged overlap between UNC's selected services, ICU, post-ICU, and pediatric patients. (Duke Ex. 227). On cross-examination, however, Ms. Sandlin admitted that she did not know what percentage each of the "bubbles" or "circles" on her diagram represented for each service and that her exhibit was not drawn to scale. (Sandlin, Vol. 7, pp. 1218-20). Ms. Sandlin further acknowledged that she did not quantify the numbers or percentage of patients that the diagram was intended to represent. (Sandlin, Vol. 7, p. 1220; Carter, Vol. 10, pp. 1765-67).

144. Regardless of the exclusion of certain high acuity services, UNC Hospitals-RTP will be able to stabilize high acuity patients in an emergency in need of tertiary or quaternary care and transfer them to another hospital that can treat their condition, as it does at its other community hospitals in the greater Triangle area. (Carter, Vol. 10, pp. 1745-46; Hadar, Vol. 8, p. 1454).

b. Methodology

145. Next, UNC projected potential days of care for the selected services in Medicine, Surgery, and Obstetrics through 2029, which is the third project year, using a CAGR based on historical growth rate for those services. (Jt. Ex. 4, pp. 143-44; Carter, Vol. 10, pp. 1746-47). Duke, in its expert testimony, did not criticize UNC's growth rates or methodology included on page 144 of the UNC Application. Mr. Carter opined the growth rates and methodology to be reasonable based on the historical growth rates for Durham County. (Carter, Vol. 10, p. 1747). UNC then showed the potential days of care for Durham County residents for the first three fiscal years of the project. (Jt. Ex. 4, p. 144; Carter, Vol. 10, p. 1747).

146. After that, UNC discussed its market share assumptions for UNC Hospitals-RTP, which is typically analyzed for any new healthcare facility that needs to project a volume of services to be provided. (Carter, Vol. 10, pp. 1747-48). Since UNC already treats many Durham County

patients at its existing facilities outside of Durham County, UNC conservatively projected that UNC Hospitals-RTP would serve three-fourths of UNC's existing market share of Durham County residents. (Jt. Ex. 4, p. 145; Carter, Vol. 10, pp. 1748-50). In the third full project year, this results in a 7.7 percent market share of Durham County patient days for the selected services, leaving 92.3 percent of Durham County patient days to be treated at any other facility in the state. (Carter, Vol. 10, pp. 1750-52).

147. After isolating Durham County and narrowing down days of care based on selected services and UNC's market share of Durham County patient days, UNC was then able to project the patient days by service for Durham County residents, yielding an average daily census ("ADC") of 26.5 patients in the third project year. (Jt. Ex. 4, p. 146; Carter, Vol. 10, pp. 1768-69).

148. The next part of the methodology in the UNC Application demonstrated why the 26.5 ADC was reasonable. UNC noted that its 2019 ADC for Durham County residents for selected services at its existing facilities was 24.4. This highlighted how reasonable and conservative it is to project that UNC Hospitals-RTP would serve only about two more patients per day than UNC currently serves, after UNC Hospitals-RTP is open and operational. (Jt. Ex. 4, p. 146; Carter, Vol. 10, p. 1769). UNC also provided more information about its in-migration assumptions. (Jt. Ex. 4, pp. 146-47; Carter, Vol. 10, pp. 1769-70).

149. UNC further highlighted the conservativeness of its methodology by noting that the amount of patients UNC Hospitals-RTP projects to serve is only part of the projected growth of Durham County residents over the next ten years. (Jt. Ex. 4, p. 148; Carter, Vol. 10, pp. 1770-71). In comparison, the Duke Beds Application proposed to increase patient days by roughly 40,000 in less than ten years. (Jt. Ex. 2, p. 95; Carter, Vol. 10, pp. 1771-72). Based on this observation, Mr. Carter opined that it was not unreasonable for the UNC Application to project to reach 10,700 patient days over a ten-year period of time, especially since UNC already had more patient days for these lower acuity services at hospitals outside of Durham County. (Carter, Vol. 10, pp. 1772-73).

150. In its Comments, Duke claimed that UNC relied on a shift in volume to support its projections. (Jt. Ex. 1, pp. 176-78; Sandlin, Vol. 6, p. 990). UNC responded, however, that this claim was incorrect, because UNC was taking a portion of the new growth in patient days in Durham County. (Jt. Ex. 1, pp. 309-12; Carter, Vol. 10, pp. 1773-75). Regardless, Ms. Sandlin acknowledged that it is reasonable in theory to assume that developing a facility in an area where patients live will cause the existing market share for that provider to increase. (Sandlin, Vol. 6, pp. 1115-16).[4]

151. Ms. Sandlin testified that UNC's projections were unreasonable because the patients that UNC currently treats are going to UNC Hospitals for specialty services. (Id. at pp. 994-96). Mr. Carter refuted Ms. Sandlin's testimony, opining that Ms. Sandlin ignored UNC's exclusion of high acuity patients in its methodology. (Carter, Vol. 10, pp. 1775-76). Moreover, Ms. Sandlin acknowledged that she had not done any analysis of the acuity level of services provided to Durham County patients currently seeking care at UNC. (Sandlin, Vol. 7, pp. 1159-60).

152. UNC also projected emergency department ("ED") utilization in its assumptions and methodologies. (Jt. Ex. 4, pp. 149-51; Carter, Vol. 10, pp. 1776-77). A hospital is required to have an emergency department in North Carolina, though there are no statutes or rules that apply to emergency department projections. (Sandlin, Vol. 7, p. 1215; Carter, Vol. 10, pp. 1778-79).

153. UNC's ED utilization projections were not based solely on ED admissions in Durham County; rather, it analyzed all ED admissions of Durham County residents receiving care throughout the state. (Jt. Ex. 4, p. 150; Carter, Vol. 10, pp. 1777-78). As Mr. Carter opined, even

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4. At several points in its final decision—most notably, findings 150 and 155—the ALJ used language that signaled the existence of conflicts in the evidence without explicitly clarifying which testimony it deemed more credible. While these areas of the final decision were not specifically challenged on the basis of indecisive wording, we note that, in other areas of our caselaw, a gesture to conflicts in the evidence without an explicit resolution by the factfinder may support a challenge on appeal to the finding in question. We therefore note that the better practice for a factfinder is to explicitly, rather than implicitly, signal how it resolves conflicts in evidence.

if the ED utilization projection methodology was wrong, as a hospital, UNC Hospitals-RTP is required to include an ED, and there is no standard the Agency applies to ED utilization that would cause the UNC Application to not be approvable. (Carter, Vol. 10, pp. 1778-79).

154. UNC began projecting OR utilization by assuming that each surgical inpatient is one surgical inpatient case. (Jt. Ex. 4, pp. 155-56; Carter, Vol. 10, p. 1779). UNC then analyzed projected outpatient cases and concluded that there would be 1.5 outpatient surgeries for every inpatient surgery. (Jt. Ex. 4, p. 155; Carter, Vol. 10, pp. 1779-80).

155. Although Duke's expert witness testified that UNC's OR utilization projections were unreasonable because its acute care beds projections were unreasonable, both of UNC's expert witnesses refuted this testimony. Mr. Carter opined that UNC's OR utilization projections were conservative. The projections showed that some of the surgical cases would need to be performed in procedure rooms based on the relatively small capacity of 2 ORs in UNC's proposal. (Carter, Vol. 10, p. 1781). Mr. Meyer opined that UNC's projections were reasonable, and conservative based on his experience in healthcare planning. (Meyer, Vol. 5, pp. 943-44).

156. UNC similarly projected utilization for imaging and ancillary services, observation beds, procedure rooms, and LDR and C-Section rooms. (Jt. Ex. 4, pp. 151-55, 159-60).

157. Based on the information provided by UNC, the Agency found UNC's projected utilization to be reasonable and adequately supported, because UNC:

(1) used publicly available data to determine Durham County residents' potential days of care for UNC Hospitals-RTP's projected services,

(2) used an historical 2-yr compound annual growth rate ("CAGR") to project days of care going forward, and

(3) based its projected surgical, obstetrics, emergency, imaging/ancillary, and observation bed services on historical Truven data for Durham County

> residents, relevant historical UNC Hillsborough experience, or UNC Health services for Durham County residents.
>
> (Jt. Ex. 1, p. 1520; Hale, Vol. 2, pp. 239-40).
>
> 158. The Agency also found UNC's projection that 90 percent of its patient population would come from Durham County to be reasonable because the southern part of Durham County was highly populated, and any nearby Wake County residents have a number of healthcare and hospital choices in Wake County. (Hale, Vol. 2, p. 317).

In light of these findings, the ALJ made the following conclusions of law:

> 45. To conform with Criterion (3), an applicant's projected patient origin, demonstration of need, and projected utilization must be reasonable and adequately supported.
>
> 46. The Agency correctly determined that UNC's projected patient origin for UNC Hospitals-RTP, including 90 percent Durham County residents and its conservative 10 percent in-migration assumption, was reasonable and adequately supported.
>
> 47. The Agency also correctly determined that UNC's demonstration of need for UNC Hospitals-RTP based on the population growth and aging of the population in Durham County, the need for a new hospital in Durham County (particularly the southern area), the need for UNC-Hospitals' hospital-based services in Durham County, and the need for acute care beds (especially community hospital beds) and ORs in Durham County, was reasonable and adequately supported.
>
> 48. The Agency further correctly determined that UNC's projected utilization for all service components at UNC Hospitals-RTP was reasonable and adequately supported.
>
> 49. Substantial evidence in the record of this case supports the Agency's determination that the UNC Application was conforming with Criterion (3).

As reproduced above, these findings and conclusions demonstrate that the ALJ extensively considered UNC's proposal with respect to the service of in-county patients. While we will not belabor the issue by reciting the support for each of the more than eighty findings by the ALJ

pertaining to Criterion 3 generally, we specifically note that the alleged underprediction of patient days provided by UNC's proposed facility in light of the absence of high-acuity services—one of the primary issues raised by Duke in this appeal—was considered and rejected at finding 151, *et seq*. This finding was supported by testimony in the record indicating that, despite Duke's expert having opined that UNC overestimated its patient day projections at the new facility, UNC's projection methodology specifically accounted for the absence of high-acuity services at the new facility—a projected patient reduction of 31 percent. Similarly, Duke's argument on appeal that the UNC application unrealistically projected the number of patients originating from Durham County to be served was also addressed and rejected by the ALJ on the basis that UNC statistically grounded its claims about the relative need for the facilities in Durham County and in-migration rates at comparable UNC facilities, with the ALJ consistently noting that UNC conservatively projected its Durham-resident patient volume to account for such considerations. These findings, too, were supported by testimony on the record.

Despite this evidentiary support in the ALJ's final decision, Duke asks us to overturn the result below on the basis of alleged failures in the reasoning of the Agency. However, our task on appeal is not to evaluate the reasoning of the Agency, but the reasoning of the ALJ. *Compare* N.C.G.S. § 150B-51 (2023) (governing appeals from the Office of Administrative Hearings to the Court of Appeals) *with* N.C.G.S. § 150B-23 (2023) (governing appeals from the Agency to the Office of Administrative Hearings); *see also AH*, 240 N.C. App. at 98. Where the reasoning of the ALJ is supported by substantial evidence, we will not overturn the ALJ's final decision simply because the ALJ weighed the evidence in a manner unfavorable to the appellant, *Mills*, 251 N.C. App. at 189; and, here, the ALJ's decision was amply supported. We will not, therefore, overturn its determination that UNC's application conformed with Criterion 3.

D. UNC's Compliance with Criterion 12

[4] Finally, we address whether the ALJ properly affirmed the Agency's conclusions as to UNC's compliance with N.C.G.S. § 131E-183(a)(12). N.C.G.S. § 131E-183(a)(12), or "Criterion 12," provides that a certificate of need applicant

> shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and

> charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

N.C.G.S. § 131E-183(a)(12) (2023). Duke argues that UNC's proposal was nonconforming with Criterion 12 in that the hospital's primary proposed location in RTP was subject to restrictive covenants not accounted for in the application, while the alternate proposed site occupies a property that straddles proposed expansion of a highway and is otherwise limited by power lines, a public greenway trail, and water hazards.

In its final decision, the ALJ affirmed the Agency's conclusion that UNC's CON application was in compliance with Criterion 12, making the following findings of fact:

> 200. Analysis of this Criterion contains three elements: (1) whether the cost, design, and means of construction proposed represent the most reasonable alternative; (2) whether the construction project will not unduly increase the cost of providing health services by the person proposing the project; and (3) whether energy-saving features have been incorporated into the construction plans. (Id.; Meyer, Vol. 7, pp. 1271-72).
>
> 201. The UNC Application satisfied the first element by (1) providing drawings of its site plan and floor plan in Exhibit C.1 and (2) explaining that the proposed construction and layout for the hospital was based on a "configuration that provides the most efficient circulation and throughput for patients and caregivers," based on "best practice methodologies," as well as "relationships and adjacencies to support functions while also preventing unnecessary costs." (Jt. Ex. 4, pp. 112-13, 233-39; Meyer, Vol. 7, p. 1273).
>
> 202. UNC satisfied the second element of Criterion (12) by explaining that while the UNC Hospitals-RTP project would be capital intensive, UNC set aside excess revenues to fund the project, such that the project could be completed without increasing costs or charges to the public to help fund it. (Jt. Ex. 4, p. 113). UNC provided a letter from the Chief Financial Officer of UNC Hospitals certifying the availability of accumulated cash reserves to fund the project. (Id. at p. 292; Meyer, Vol. 7, pp. 1273-74).
>
> 203. Finally, UNC satisfied the third element of Criterion (12) by showing that its proposed hospital would be energy

efficient and conserve water, and that UNC would develop and implement an Energy Efficiency and Sustainability Plan. (Jt. Ex. 4, p. 113; Meyer, Vol. 7, p. 1274).

i. Zoning of UNC's Primary Site

204. Because a CON is "valid only for the . . . physical location . . . named in the application," applicants also are required to identify a proposed site for a new facility. (N.C. Gen. Stat. § 131E-181(a); Jt. Ex. 4, p. 114; Meyer, Vol. 7, pp. 1272, 1282). The applicant should specify an address, a parcel number, or intersection of roads. (Meyer, Vol. 7, p. 1272).

205. The primary site for UNC Hospitals-RTP identified in the UNC Application is located in southern Durham County in the Research Triangle Park ("RTP") at the convergence of North Carolina Highway 54 and North Carolina Highway 147, also known as the Triangle Expressway. (Jt. Ex. 4, p. 114). At the time of the filing of the UNC Application, the property, also known as the Highwoods Site, was owned by Highwoods Realty Limited Partnership ("Highwoods"). (Id. at 115). UNC provided a Letter of Intent for UNC Health to purchase the property from Highwoods along with its application. (Id.at 517-23).

206. The CON Law does not regulate or even mention zoning. (Meyer, Vol. 7, p. 1281). Nonetheless, Section 4(c) of Criterion (12) in the Agency's application form is entitled "Zoning and Special Use Permits." (Hale, Vol. 2, p. 244). This Section requires an applicant to first describe the current zoning at the proposed site, and then, "[i]f the proposed site will require rezoning, describe how the applicant anticipates having it rezoned[.]" (Jt. Ex. 4, p. 115; Hale, Vol. 2, pp. 266-67).

207. The Agency contemplates that a proposed site for a project may not be properly zoned for the proposed project at the time the application is submitted, by asking applicants the questions posed in Section 4(c). (Hale, Vol. 2, pp. 246, 267).

208. The fact that a site identified in an application may need rezoning does not make an application nonconforming with Criterion (12) or non-approvable. (Id. at p. 267; Meyer, Vol. 7, pp. 1281-82, Vol. 8, p. 1398). The Agency

frequently approves applications that propose projects to be developed on sites that require rezoning before they can be used to develop the proposed services. (Hale, Vol. 2, p. 246; Meyer, Vol. 7, pp. 1277-78). In Mr. Meyer's 25 years of healthcare planning experience, he cannot recall a time when the Agency denied an application due to the fact that a site needed to be rezoned. (Meyer, Vol. 7, p. 1278).

209. Moreover, the Agency is tasked with applying the CON Law and related rules, not with considering an applicant's compliance with other laws like zoning ordinances. Therefore, the Agency does not review applicable zoning laws or restrictive covenants when it reviews an application. (Hale, Vol. 2, p. 266; *see also Craven Reg'l Med. Auth.* [*v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App. 46, 57-58 (2006)]).

210. Rezoning of sites identified in CON applications typically does not occur until after a CON has been awarded. (Meyer, Vol. 7, p. 1277).

211. According to the UNC Application, UNC's primary proposed site "will require rezoning." UNC noted that it anticipated having the property rezoned:

> The proposed site is located in Research Triangle Park across the street from the Research Triangle Foundations Frontier and HUB RTP developments that have an SRP-C zoning designation. UNC Hospitals currently is working with land use counsel, the property owner, and Research Triangle Foundation management to have the property rezoned to permit hospital use. With the guidance of land use counsel, UNC Hospitals will engage with Durham Planning staff, the Durham Planning Commission, and the Durham Board of County Commissioners to complete the rezoning process. Additionally, UNC Hospitals will, with the cooperation of the Research Triangle Foundation, work with the Research Triangle Park Owners and Tenants Association (O&T) to amend the Research Triangle Park Covenants, Restrictions, and Reservations by resolution to permit hospital use. . . .

(Jt. Ex. 4, p. 115; Hale, Vol. 2, pp. 268-69).

212. Applicants are not required to submit letters of support with their CON application; however, it is common for CON applicants to do so. (Hale, Vol. 2, p. 260; Carter, Vol. 10, pp. 1790-91). The UNC Application included a letter of support from Scott Levitan, CEO of the Research Triangle Foundation ("RTF"). (Jt. Ex. 4, p. 512). Mr. Levitan's letter indicated that the RTF supported the UNC Application; however, it did not make any reference to the property being rezoned or restrictive covenants being amended. (Id.; Hale, Vol. 2, pp. 280-82).

213. UNC was not required to submit the letter of support from Mr. Levitan or anyone else on behalf of RTF to be approvable. (Hale, Vol. 2, pp. 280-81; Carter, Vol. 10, p. 1791).

ii. UNC's Primary Site in the Research Triangle Park

214. The RTP is an approximately 7000-acre university research park located in Durham and Wake Counties, with 5,600 acres, or 80 percent, located in Durham County. (Levitan, Vol. 5, pp. 774, 799-800). There are currently no people living in the RTP. (Id. at 897).

215. Scott Levitan is the President and CEO of the Research Triangle Foundation ("RTF"), a position he has held for approximately five years. (Id. at 769). In this position, Mr. Levitan reports to the RTF Board, which includes representatives of UNC, Duke, NC State University, and North Carolina Central University. (Id. at 773-74).

216. The RTF is a 501(c)(4) entity founded approximately 63 years ago for the purpose of facilitating coordination among UNC, Duke, and NC State University and to enhance the wellbeing of the residents of North Carolina. (Id. at 769-70). The RTF administers the activities of the RTP Owners and Tenants Association ("O&T"). (Id. at 770). The RTF also owns certain property within the RTP. (Id.).

217. There are two types of zoning within the RTP: Science Research Park ("SRP") and Science Research Park – Commercial ("SRP-C"). (Id. at 777-78). SRP-C zoning is more lenient than SRP zoning but only covers 101 acres in RTP known as the RTP Hub, which is a mixed-use development intended to serve as a "town center" for RTP. (Id. at 780-81). The Hub includes Boxyard, a retail center

containing food and retail vendors; Frontier, an innovation campus for startups and emerging companies; residential multi-family apartments; and other businesses not focused on scientific research. (Id. at 781, 829-31).

218. There are also restrictive covenants covering RTP that restrict the property to certain uses. (Jt. Ex. 1, pp. 191-255). According to Mr. Levitan, these restrictive covenants do not currently permit the development of a hospital at UNC's primary site. (Levitan, Vol. 5, p. 785).

219. The primary site for UNC Hospitals-RTP is adjacent to the RTP Hub. (Id. at 783-84). In the recent past, the RTF allowed a parcel of property adjacent to the RTP Hub to be rezoned from SRP to SRP-C to allow the development of a fire station in Durham County. The RTP also allowed a text amendment to the RTP restrictive covenants to allow a school on a particular parcel in Wake County. (Id. at 782-83, 895-96).

220. David Meyer is a 35-year resident of Durham County in addition to his healthcare planning expertise. Mr. Meyer opined that UNC's location adjacent to the RTP Hub made sense from a health planning perspective. He likened UNC Hospitals-RTP to REX Hospital's adjacency to Cameron Village in Raleigh, now known as the Village District, to support the notion that a hospital being adjacent to a multi-use district in the midst of a highly populated area is sensible. (Meyer, Vol. 7, pp. 1274-76, Vol. 8, pp. 1389-91).

221. Initially, UNC explored purchasing a site owned by Keith Corp. within the RTP, but not adjacent to the RTP Hub, and having the site rezoned to allow UNC to build a hospital there. When approached by Keith Corp. about this proposal, Mr. Levitan was not comfortable setting a precedent of SRP-C zoning in areas other than the Hub; however, Mr. Levitan eventually suggested that UNC approach Highwoods about purchasing its property adjacent to the Hub. (Levitan, Vol. 5, pp. 832, 839-42).

222. Mr. Levitan discussed UNC using the Highwoods Site for its proposed hospital at a [11 February] 2021, RTF Development Committee meeting. (Jt. Ex. 119; Levitan, Vol. 5, pp. 843-44). Following that meeting, Mr. Levitan emailed members of the RTF Development Committee

who were not affiliated with either Duke or UNC and obtained their approval to continue cooperating with UNC's proposal. (Jt. Ex. 117; Levitan, Vol. 5, pp. 844-49).

223. In particular, RTF Board member Smedes York stated: "I believe this could be positive as it 'anchors' the location without changing the 'sizzle' of the Hub area. We need the 'personality' of Boxyard and other parts of what we have planned. Rex Hospital's previous location was adjacent to Cameron Village which was a positive." (Jt. Ex. 117).

224. To change the zoning of the primary site, UNC would need to seek approval for rezoning from Durham County and would also need to seek approval from the RTP O&T to amend the restrictive covenants. (Levitan, Vol. 5, p. 785, 798). To Mr. Levitan's knowledge, there has never been a healthcare facility like a hospital permitted in the RTP. (Id.).

225. Although the ultimate decision to allow the development of UNC Hospitals-RTP on the Highwoods Site is up to the RTP's O&T, Mr. Levitan has already begun the process of running the proposal through the relevant committees for a recommendation to the RTP's O&T. UNC's proposal was first brought before the RTF Development Committee. Mr. Levitan believed he "had the imprimatur of the Development Committee to continue conversations in support of the hospital application on the part of the foundation . . . ." (Id. at 796-97). Based on this direction from the Development Committee, Mr. Levitan cooperated with UNC in its efforts to build a hospital within the RTP. (Jt. Exs. 15, 42; Levitan, Vol. 5, pp. 837-38).

226. Mr. Levitan did not discuss his letter of support with the RTF Board or Development Committee before signing it, as he is frequently asked to sign letters of support and does not generally bring those to the RTF Board or other committees for review. (Levitan, Vol. 5, p. 799).

227. Mr. Levitan gave conflicting testimony about whether he was aware Duke might be applying for the same need determined assets in Durham County as UNC. (Compare Levitan, Vol. 5, pp. 786-87 with pp. 822-23). Despite Mr. Levitan's apparent confusion, this Tribunal finds that Mr. Levitan appears to have been aware that Duke may have a conflicting interest with UNC's proposed hospital,

based on his [11 February] 2021 email to certain members of the RTF Development Committee. In this email, Mr. Levitan noted he was "[k]eeping conflicted folks out of the conversation"—i.e., people who were affiliated with either Duke or UNC—and sought their approval to recommend the Highwoods site to UNC. (See Jt. Ex. 119).

228. Mr. Levitan's Letter of Support indicated that the RTF supported UNC's Application; however, it did not make any reference to the property being rezoned or restrictive covenants being amended. (Id.; Hale, Vol. 2, pp. 280-82). At the time the letter was submitted, Mr. Levitan understood the letter would be used "as support for UNC's certificate of need application for a hospital in RTP." (Levitan, Vol. 5, pp. 790-92).

229. UNC reasonably believed its statements regarding the zoning of the primary site were accurate at the time UNC submitted its Application. In an email to Scott Selig and Tallman Trask, Levitan stated, "I think Duke is going to need to pursue its interests in this matter, but based on the direction from the DevComm meeting, we have cooperated with this initiative." (Jt. Ex. 42; Hale, Vol. 2, pp. 283-287). Similarly, in a [20 May] 2021 meeting of the RTF Development Committee, the meeting minutes reflected that at a prior meeting, that "committee suggested to UNC that they could pursue extending the SRP-C zoning across the street if Highwoods was interested in selling their land." (Jt. Ex. 15; Hale, Vol. 2, pp. 287-88).

230. The Agency's Team Leader Ms. Hale did not review any documents prior to the Agency decision that suggested UNC would not be able to have the primary site rezoned or the restrictive covenants amended. (Hale, Vol. 2, p. 291).

231. On or about [13 May] 2021, the Triangle Business Journal published an article discussing UNC's proposed new hospital in the RTP. (Jt. Ex. 130; Levitan, Vol. 5, p. 808). Following the publication of this article, Mr. Levitan was asked by the RTF Executive Committee to clarify his letter of support. (Levitan, Vol. 5, pp. 804, 816). The Executive Committee gave Mr. Levitan the language to include in his second letter verbatim. (Levitan, Vol. 5, pp. 808, 813-14, 827-28).

232. At the hearing and at his deposition, Mr. Levitan used the terms "clarify," "rescind," and "withdraw" interchangeably to mean the same thing. (Levitan, Vol. 5, p. 816). Given the text of the [12 July] 2021 Letter and Mr. Levitan's testimony, the [12 July] 2021 Letter was a clarification of the RTF's position on the UNC Application, rather than a rescission or withdrawal of support.

233. After the RTF Executive Committee decided a clarifying letter should be sent to the Agency, Mr. Levitan sent an email to the Agency stating that his letter of support, which he described as "an outdated correspondence" was included in the UNC Application. In that email, Mr. Levitan asked to speak with either Ms. Inman or Lisa Pittman, the Agency's Assistant Chief of Certificate of Need, regarding "the process and deadlines for submitting comment on UNC Health's application." (Duke Ex. 200; Hale, Vol. 3, pp. 332-33; Levitan, Vol. 5, pp. 810, 812-13).

234. Mr. Levitan subsequently spoke with Ms. Inman, who informed him that the deadline for submitting public comments to the CON Section had passed. Ms. Inman told Mr. Levitan he could still submit a letter and that she would "make every effort" to ensure it was seen by the CON Section. (Levitan, Vol. 5, p. 810).

235. After speaking with Ms. Inman, Mr. Levitan sent his second letter, dated [12 July] 2021 to the Agency. (Jt. Ex. 46). Mr. Levitan submitted his [12 July] 2021 letter to the Agency after the end of the public comment period in this Review. (Hale, Vol. 2, pp. 283, 308-09, 336). Mr. Levitan stated in the [12 July] 2021 Letter, in relevant part, that he was "writing to clarify [his] prior letter dated 13 April 2021," and that "[u]ntil a certificate of need has been awarded and any appeals to the determination of the Healthcare Planning and Certificate of Need Section have been exhausted, RTF will not consider a zoning change for the proposed site in RTP." (Jt. Ex. 46; Levitan, Vol. 5, pp. 818-19).

236. In a [3 September] 2021, letter to Jud Bowman, Chairman of the RTF Board, Vincent Price, President of Duke University, characterized Duke's position on the [12 July] 2021 Letter as follows:

> [Mr. Levitan] then sent a follow up letter on July 12th to the State CON analyst stating that the Foundation would not consider a zoning change until after the CON determination and any appeals. This second letter is also deeply troubling. It did not withdraw the endorsement by RTF of UNC's application. It continued to support placing a hospital within the RTP. It was also provided outside the prescribed public comment period, so cannot by law be considered by the State; thus, its purpose is unclear to me.

(Jt. Ex. 25).

237. Though the Agency received Mr. Levitan's [12 July] 2021 Letter, the Agency did not consider Mr. Levitan's second letter, and did not include the letter as part of the Agency File because the letter was submitted after the end of the public comment period. (Jt. Ex. 91; Hale, Vol. 1, pp. 177-78, 308-09, 336, 339). Mr. Levitan advised the RTF Executive Committee that he had submitted the clarifying letter and that it was submitted outside the public comment period. (Levitan, Vol. 5, pp. 814-15).

238. At the hearing, Mr. Levitan opined that UNC's description on page 115 of the UNC Application regarding the zoning of the primary site was accurate. (Id. at pp. 833-38).

iii. Issues Raised by Duke Regarding UNC's Proposed Sites

239. Duke's Comments raised issues regarding UNC's primary site and pointed to UNC's statement that rezoning was needed. Duke indicated that "the rezoning will require not only Durham County approval but also compliance with the applicable covenants and restrictions affecting Research Triangle Park to which the site is subject," and attached the RTP restrictive covenants to its comments. (Jt. Ex. 1, pp. 185, 191-255).

240. Duke had no knowledge or factual basis to support its comments regarding the UNC Application's primary site or conformity with Criterion (12).

241. Duke provided no expert testimony in support of its contention that the UNC Application was nonconforming with Criterion 12. (Sandlin, Vol. 6, p. 955).

242. Catharine Cummer was the only fact witness Duke called in its case. Ms. Cummer serves dual roles as regulatory counsel and in strategic planning for Duke and has primary responsibility for ensuring the preparation of all CON applications submitted by Duke. (Cummer, Vol. 3, pp. 410-11). Ms. Cummer was not tendered or accepted as an expert witness in this case. Ms. Cummer has never been qualified as an expert witness in any kind of case. She has no expertise in finance, is not a clinician and has never served as a healthcare or certificate of need consultant. Ms. Cummer has never been employed as a project analyst or in any other capacity by the Agency. She has never served on the SHCC or its subcommittees. (Cummer, Vol. 4, pp. 579-82). Ms. Cummer is not on the Real Estate Development Committee or any other committee of the RTF Board. She is not a member of the RTF Board of Directors. (Id. at p. 647).

243. Duke included multiple pages of comments regarding the primary and alternative sites proposed by UNC and its conformity with Criterion 12. Duke also included a copy of the RTP Restrictive Covenants in its Comments against the UNC Application. (Id. at pp. 638-39; Jt. Ex. 1, pp. 191-255). Ms. Cummer was sent a copy of the RTP Restrictive Covenants from Dr. Monte Brown. (Cummer, Vol. 4, p. 645).

244. Duke relied heavily upon its Comments filed against the UNC project as a purported basis for alleging Agency error in this matter and argued that the Agency failed to appropriately consider its Comments, in particular those comments regarding Criterion 12. In its Comments, Duke alleged:

> Notably, the Board [Research Triangle Foundation Board] has historically denied all rezoning applications to allow for health care facilities. In fact, DUHS is informed and believes that UNC has previously asked for permission to put a healthcare facility on the RTP campus itself, which was denied.

(Jt. Ex. 1, p. 185).

245. Ms. Cummer was primarily responsible for the preparation of the Duke Comments regarding Criterion (12). On

cross-examination, contrary to the above Comment, Ms. Cummer admitted she had no personal knowledge regarding any prior applications for rezoning related to healthcare facilities at the RTP and had no personal knowledge regarding what other applications, if any, had been submitted by UNC to the RTP. (Cummer, Vol. 4, pp. 646-49).

246. Instead, Ms. Cummer relied upon a discussion with Scott Selig, Vice President of Real Estate and Capital Assets for Duke University and a designated member of the Real Estate Development Committee of the RTF, for the factual basis of Duke's contentions in its Comments to the Agency. (Cummer, Vol. 4, pp. 646-47).

247. On cross-examination, Ms. Cummer's testimony was impeached by the following deposition testimony of Mr. Selig:

> Question: Okay. Well, regardless of who prepared it, there's a statement in here, right here it says, 'Notably, the board has historically denied all rezoning applications to allow for healthcare facilities.' Is that accurate?
>
> Answer: I have no idea.
>
> Question: Okay. Can you recall a time when the RTF board has denied rezoning for a healthcare facility?
>
> Answer: No.
>
> Question: Okay. The following sentence says, 'In fact, UNC has previously asked for permission to put a facility on the RTP campus itself, which was denied.' Is that accurate?
>
> Answer: I have no idea.
>
> Question: Do you know anything about UNC asking permission to put a facility on the RTP campus itself being denied?
>
> Answer: No.

(Jt. Ex. 157, p. 140; Cummer, Vol. 4, pp. 646-51). After such impeachment, Ms. Cummer agreed that she would defer to Mr. Selig's personal knowledge of such questions regarding

the history of the RTF and any submissions, approvals or denials made for zoning. (Cummer, Vol. 4, p. 652).

248. Ms. Cummer then testified that Dr. Monte Brown, Vice President of Administration for the Duke University Health System, had provided her with the factual basis for those representations made by Duke to the Agency. However, on cross-examination, Ms. Cummer's testimony was impeached with the following deposition testimony of Dr. Brown:

> Question: And with respect to the primary site in the RTP, why do you say that was not a viable site?
>
> Answer: Because we had always been told, the entire time I was here at Duke, that you can't put healthcare in the RTP.
>
> Question: Who had told you that?
>
> Answer: I don't know. It's kind of folklore. Scott [Selig], Tallman [Trask], my predecessor, we had always stayed out of it.

(Jt. Ex. 147, p. 39; Cummer, Vol. 4, p. 654). Ms. Cummer acknowledged that she did not speak with any other persons regarding the content of this section of the Comments. (Cummer, Vol. 4, p. 655).

249. At hearing, Dr. Brown could not recall the factual basis supporting Duke's contention in this regard. (Brown, Vol. 10, pp. 1630, 1634).

250. Despite Duke's comments opposing the proposed site for UNC Hospitals-RTP, Dr. Brown sent an email communication to other Duke representatives calling the UNC primary location a "prime location." (Jt. Ex. 12). Dr. Brown also sent an email stating that "DUHS honored the RTP rules and has purchased land at Page Road and Green Level Road to accomplish its goals outside the RTP. Had the RTP allowed for medical, we likely would have chosen differently." (Jt. Ex. 17).

251. Dr. Brown acknowledged he made no investigation or inquiry whether the zoning for the primary site proposed by UNC could be modified by the Durham County zoning authorities. (Brown, Vol. 10, p. 1633).

252. The unrefuted factual testimony from UNC established that there was no factual basis supporting Duke's contention that UNC had previously sought permission to put a healthcare facility on the RTP campus and was denied. In its Response to Comments, UNC disputed Duke's statements regarding UNC's primary site as UNC was "not aware of the Research Triangle Foundation Board purportedly historically denying all rezoning applications to allow for healthcare facilities[,]" nor was UNC "aware of any situation in which it asked for permission to put a healthcare facility on campus." (Jt. Ex. 1, p. 320). Ms. Hadar testified unequivocally, that UNC has *not* previously sought to put a facility on the RTP campus prior to the UNC Hospitals-RTP Application. (Hadar, Vol. 8, p. 1467).

253. Moreover, Ms. Hale's testimony established that a project analyst may, but is not required to, research information outside of the application to understand what is contained in an application. (Hale, Vol. 1, p. 193). Ms. Hale was aware of the Agency doing such additional research in one other review—the 2016 Wake County MRI Review. (Hale, Vol. 1, pp. 194-97). While zoning ordinances, real estate deeds, and restrictive covenants may be public documents that the Agency could locate and review, the Agency was not required to do so and did not feel the need to do so with respect to UNC's primary site. (Hale, Vol. 1, pp. 197-98, Vol. 2, pp. 300-01). Further, the Agency does not request additional information from applicants who are involved in a competitive review. (Hale, Vol. 2, pp. 277-78).

iv. The Alternate Site Identified in the UNC Application

254. UNC also identified an alternate site for its proposed new hospital. (Jt. Ex. 4, p. 114, n. 30). The alternate site is located along Highway 70 in Durham County and would not require any rezoning. (Id. at 515-16). The alternate site is also close to power, water, and sewer services. (Id. at 516).

255. Duke raised concerns about UNC's alternate site in its Comments alleging the following: "However, that site has even more fundamental obstacles to development than the primary site. . . . The bigger issue, however, is that the alternate site will be rendered unavailable for the

proposed use by a NCDOT highway project in planning stages. . . ." (Jt. Ex. 1, p. 186). For that reason, Duke took the position in its Comments that UNC's alternate site is not a viable possible location for UNC Hospitals-RTP. (Cummer, Vol. 4, p. 661).

256. By letter dated [3 September] 2021, during the Agency's review of the UNC and Duke Applications, Dr. Vincent Price, President of Duke University, sent a four-page letter to the Chair of the Board of Directors for the Research Triangle Foundation, Jud Bowman ("Dr. Price Letter"). (Jt. Ex. 25). In his letter, Dr. Price aired several grievances regarding the UNC Hospitals-RTP project, its proposed primary site in the RTP, and the support letters from Mr. Levitan regarding the same. Dr. Price's Letter represented to the RTF that:

> It seems to me that the only cure for this highly concerning matter is for the Board to recuse itself going forward from any decision that relates to the CON application or eventual award, regardless of who is successful in the CON process. Note that UNC's application does include an alternate site that does not require RTF action that does not require RTF rezoning.

(Id. at 3).

257. Thus, while the Comments filed by Duke represent that the alternate site is "not viable," the Dr. Price letter to the RTF makes no reference to Duke's public position on the alternate site and implies that the alternate site is viable.

258. Duke attempted to distinguish its position in these two documents by claiming that it was merely pointing out that UNC had represented the alternate location to be viable and that the "alternate site has nothing to do with the Research Triangle Park or Research Triangle Foundation, so there would be nothing for the board to do as to the viability or not of an alternate site." (Cummer, Vol. 4, p. 668). Dr. Brown confirmed in his testimony that he did not discuss whether this representation by Dr. Price was inconsistent with the representations in Duke's Comments. (Brown, Vol. 10, p. 1645). Though it could cite

no factual support for the same, Duke continued to stand by its Comments in Opposition. (Id. at 1652). Nonetheless, this answer did not explain why Dr. Price addressed UNC's alternate site at all if its existence was not relevant to the RTF.

259. Ms. Cummer, the author of the Comments, also reviewed and provided comments on a draft of Dr. Price's Letter prior to it being sent to the RTF (Cummer, Vol. 4, p. 666), and was therefore aware of the inconsistent representations made by Duke to the Agency regarding the alternate site and those made to the RTF regarding the same.

260. At hearing, Dr. Brown acknowledged that he provided the information in Duke's Comments about the proposed NCDOT highway project on UNC's alternate site. Yet, he also conceded that he did not investigate whether (1) the proposed alternate site had actually been acquired for the highway project or (2) whether there were any restrictions on what UNC could do with the alternate site property if it had not been acquired by NC DOT or if UNC had acquired the property. (Brown, Vol. 10, pp. 1635-36). Dr. Brown also testified that UNC admitted, in its application, that a highway project was planned for its alternate site. (Id. at p. 1635).

261. However, Mr. Carter clarified that the UNC Application provided information about the alternate site but did not speculate "as to the future of that parcel of land or how it may be used other than for a proposed hospital." (Carter, Vol. 10, p. 1792).

v. UNC Can Make a Material Compliance Request if it Ultimately Cannot Develop a Hospital at its Primary Site

262. A material compliance request is a letter to the Agency stating why the applicant cannot proceed with the project exactly as described in its application. (Hale, Vol. 2, pp. 247, 276-77; Meyer, Vol. 7, p. 1283). The applicant would include in its request the reasons why they could not develop the project at the site and identify an alternate site for the Agency to consider as a location for the assets awarded in the CON. (Hale, Vol. 2, pp. 247-48; Meyer, Vol. 7, p. 1283). Through this process, a modification in plans can

be deemed by the Agency to be in "material compliance" with the representations in the approved application.

263. The Agency routinely approves material compliance requests and has approved material compliance requests to develop projects at alternate sites. (Hale, Vol. 2, p. 248; Cummer, Vol. 4, pp. 680-81; Meyer, Vol. 7, p. 1283). For example, in 2018, Mr. Meyer assisted an ASC in making a material compliance request to the Agency seeking to develop its ASC in a location within Brunswick County at a different site. The Agency approved this request. (Jt. Ex. 100; Meyer, Vol. 7, pp. 1284-85).

264. Regardless of whether UNC develops UNC Hospitals-RTP at the primary site, UNC would be able to submit a material compliance request to the Agency to approve a new location for the facility. UNC could make a similar request if it ultimately was unable to have the primary site rezoned appropriately. (Meyer, Vol. 7, pp. 1285-86).

265. Notably, Duke itself experienced issues with a site identified in a 2018 CON application for ORs in Orange County. (Id. at p. 1286). The 2018 Orange County OR Review was a competitive review in which Duke and UNC both applied for 2 ORs in Orange County. (Cummer, Vol. 4, p. 681). The Agency ultimately awarded the CON to Duke, and UNC challenged this award in a contested case. (Id. at p. 681-82). Duke engaged Keystone Planning, Mr. Meyer's company, to develop Duke's application, and later serve as an expert witness, in that review. (Meyer, Vol. 7, pp. 1286-87).

266. In that review, Duke had leased a location on Sage Road, which location was approved by the Agency. However, during the course of the Agency's review of the application, Duke identified certain remediation and code issues that it believed made it financially more favorable for the project to be developed at a different location. In response, Duke determined that it could make a successful request for a material compliance determination to change the location. (Cummer, Vol. 4, pp. 685-88; Meyer, Vol. 7, pp. 1286-87).

267. Duke did not inform the Agency during the course of the review that it had identified potential issues with

its proposed site. (Cummer, Vol. 4, p. 691). Because the original site was still available to Duke during the course of the review, the "information in the application that the site was available was correct." (Id. at p. 693). According to Ms. Cummer, "[s]o unless an[d] until we were interested in seeking a different site or doing anything else, there was nothing to inform the agency of." (Id.)

268. In both his expert report and deposition testimony in the 2018 Orange County OR Review, Mr. Meyer emphasized that the issues with Duke's ASC site in its CON application were immaterial, as Duke could submit a material compliance request, which the Agency routinely approves. (Jt. Exs. 101, 102; Meyer, Vol. 7, pp. 1287-89).

269. Ms. Cummer also cited to an occasion when Duke previously withdrew a CON application after learning it had relied upon incorrect and overstated data. She explained that the data error was so significant that it made the application infeasible as presented. (Id. at pp. 697-98).

270. Mr. Meyer's opinion concerning UNC's conformity with Criterion (12) and the ability of an approved applicant to submit a material compliance request in the event of site issues is consistent between this Review on behalf of UNC and the 2018 Orange County OR Review on behalf of Duke. (Id.).

271. Mr. Carter agreed with the Agency's conclusion that the UNC Application was conforming with Criterion (12), as UNC provided all information requested by the Agency for this Criterion. (Carter, Vol. 10, p. 1790). Mr. Carter opined that the Agency's analysis of this Criterion was consistent with the way the Agency has analyzed Criterion (12) in previous reviews. (Id. at 1792). Mr. Carter also opined that the specific location of UNC Hospitals-RTP was not material to UNC's demonstration of need for this project, but rather the location of the facility within the southern region of Durham. (Carter, Vol. 11, pp. 1982-83).

272. Ms. Sandlin offered no opinions with respect to UNC's conformity with Criterion (12). (Sandlin, Vol. 6, p. 955; see also Jt. Exs. 54, 146).

273. The Agency considered Duke's Comments in its analysis of UNC's conformity with Criterion (12). In its analysis

> of Criterion (12), the Agency noted "there is some question as to whether or not the first site can be rezoned for a hospital" and indicated it had reviewed Duke's Comments. (Jt. Ex. 1, pp. 1575-76; Meyer, Vol. 7, pp. 1280-81, Vol. 8, pp. 1393-94). The Agency was aware that the site has not yet been rezoned and that Duke questioned the possibility of rezoning the site. (Id.).
>
> 274. Ultimately, the Agency found that UNC had adequately explained its proposed project and its plans for accomplishing the required rezoning, such that it was conforming with Criterion (12). (Jt. Ex. 1, pp. 1575-76; Hale, Vol. 2, pp. 274-75).

In light of these findings, the ALJ made the following conclusions of law:

> 73. The Agency correctly determined that the UNC Application identified a proposed site and adequately demonstrated that the cost, design, and means of construction of UNC Hospitals-RTP represent the most reasonable alternative, will not unduly increase the cost of service to the public, and incorporates energy saving features.
>
> 74. UNC provided adequate information requested by the Agency in the application related to Criterion (12), including describing how it anticipated having the property rezoned.
>
> 75. The Agency reasonably assessed potential zoning and restrictive covenant issues with the primary site for UNC Hospitals-RTP and correctly determined that the UNC Application was conforming with Criterion (12) nonetheless. Moreover, the Agency did not err in not seeking additional information regarding the zoning and restrictive covenants at the primary site. "There is no provision in [N.C.G.S.] § 131E-183, nor Chapter 131E, which permits the Agency to independently assess whether the applicant is conforming to other statutes." (Hale, Vol. 2, p. 266; see also *Craven Reg'l Med. Auth.*, 176 N.C. App. at 58[] . . .). Therefore, the Agency did not err in not engaging in further analysis of the zoning or restrictive covenants beyond what was contained in the Agency findings.
>
> 76. The letter of support from Mr. Levitan was not necessary to the approval of the UNC Application; nonetheless, Mr. Levitan's support letter was consistent with UNC's

> representations in the UNC Application and its Responses to Comments.
>
> 77. The Agency was correct to exclude Mr. Levitan's clarifying letter of [12 July] 2021 from the Agency File because it was submitted after the end of the public comment period. Had the Agency considered that letter and used it as a basis to deny the UNC Application, it would have been reversible error.
>
> 78. Mr. Levitan's clarifying [12 July] 2021 Letter did not state that the RTF would deny any efforts to rezone the primary site; instead, it simply noted that the RTF would not take action until a CON has been awarded and any appeals exhausted. (Jt. Ex. 46; see also Jt. Ex. 25). Thus, had the Agency considered the [12 July] 2021 Letter, the Agency would have been incorrect to use it as a basis for UNC's nonconformity with Criterion (12).
>
> 79. While Duke raised questions about UNC's alternate site, Duke presented no competent evidence as to the unavailability of that site. Neither Ms. Cummer nor Dr. Brown are qualified as an expert in real estate, condemnation, or highway construction. Their testimony suggesting UNC could not develop a hospital at the alternate site is unreliable, and the undersigned gives it no weight.
>
> 80. If UNC is ultimately unable to develop a hospital at the UNC Hospitals-RTP primary site due to zoning or restrictive covenant issues, UNC may submit a material compliance request for another suitable site, consistent with prior Agency decisions approving alternate sites following issuance of a CON. (See [N.C.G.S.] § 131E-181; Hale, Vol. 2, p. 248; Meyer, Vol. 7, pp. 1283-89; Jt. Exs. 100-102). The Agency has the discretion to evaluate any request to develop the proposed hospital at a different location and determine whether such project would be in material compliance with UNC's representations in the UNC Application. [N.C.G.S.] § 131E-189(b).
>
> 81. Substantial evidence in the record supports the Agency's determination that the UNC Application was conforming with Criterion (12).

Here, while the ALJ's decision critiques at length Duke's failure to ground its contentions concerning medical providers' historical inability

to create facilities in RTP in fact, it does admit that the primary location is currently subject to zoning requirements and restrictive covenants that would, as they stand currently, prevent the construction of the proposed facility. Moreover, under N.C.G.S. § 131E-181(a), "[a] certificate of need shall be valid only for the defined scope, physical location, and person named in the application." N.C.G.S. § 131E-181(a) (2023). The application in this case concerned only the RTP location and not the proposed alternative location discussed by the ALJ, so the scope of the consideration should have been limited to the primary proposed location.[5] Thus, much of the ALJ's reasoning was unsound insofar as it treated the presence of the zoning requirements and covenants as unproblematic and considered the alternative site in the determination of whether the CON should issue.[6]

As we review the determination as to Criterion 12 only for substantial evidence on the record and do not interfere with the credibility and weighting determinations of the ALJ, *Surgical Care Affiliates*, 235 N.C. App. at 622-23, we note that the reasoning of the ALJ concerning UNC's compliance with Criterion 12 may have been independently supported, but not definitively so. Namely, even setting aside the ALJ's reasoning concerning the alternate location and its qualms with the support proffered by Duke for its challenge to UNC's CON application, the ALJ's invocation of prior cases where certificates of need have been awarded prior to zoning amendments and finding that RTP has recently altered

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5. In so holding, we express no opinion on whether the ALJ could have permissibly considered an alternate site for the proposed facility if that alternate site had been included in UNC's application.

6. Moreover, to the extent the ALJ used the subsequent possibility of UNC filing a material compliance request to justify its reliance on the availability of the alternate site, we have treated the material compliance request process arising under N.C.G.S. § 131E-181(b) as analytically independent of, and distinct from, the grant or denial of a CON *ab initio*. *See Craven*, 176 N.C. App. at 59 ("The CON Section granted [the] request for a material compliance determination after the CON was issued. [The petitioner] is asking this Court to review events which occurred after the issuance of the final agency decision."); *see also* N.C.G.S. § 131E-181(b) (2023). We understand the possibility of rectifying issues with a proposed facility as a remedial mechanism, not an invitation to lower the threshold at which an initial proposal is deemed satisfactory under our statutory criteria, and the absence of any caselaw in the course of our research in which the future possibility of a material compliance request has constituted substantial evidence to grant a CON appears to confirm this view. While the ordinary rule is that the ALJ is "authorized to establish its own standards in assessing whether an applicant" conforms with the criteria in N.C.G.S. § 131E-183(a), this rule only applies where review requirements have not been specified by our General Assembly. *AH*, 240 N.C. App. at 100; *see also* N.C.G.S. § 131E-177(1) (2023). In this case, our General Assembly clarified in N.C.G.S. § 131E-181(a) that an application's consideration is limited to the physical location described. N.C.G.S. § 131E-181(a) (2023).

its zoning restrictions to accommodate a fire station and its covenants to accommodate a school suggests it found the proposal at the location listed in UNC's application satisfactory under Criterion 12. However, given the possibility that the ALJ would not have awarded UNC the CON without the additional consideration of the proposed alternative site and a future material compliance request, we have no way of knowing whether the ALJ's conclusion would have followed from only the allowable considerations.

Under N.C.G.S. § 150B-51(b), "[t]he court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are[,]" *inter alia*, "[u]nsupported by substantial evidence . . . ." N.C.G.S. § 150B-51(b) (2023). For the reasons explained above, the ALJ's decisions as to Criterion 12 were, for purposes of our review, supported by substantial evidence. However, the use of considerations outside the scope of the ALJ's review casts doubt on whether the ALJ herself would have reached the same conclusions as to Criterion 12 when taking only the proposed location in the application into account. Accordingly, we remand to the ALJ for consideration of whether UNC's application, taking into account only the site proposed in its application and setting aside the possibility of a future material compliance request, satisfied Criterion 12.

In particular, the ALJ should give due consideration to the possibility that a potential inability to change RTP's applicable covenants could result in substantial cost being passed to patients. While the ALJ appears to have been satisfied with the likelihood that both the zoning restrictions and applicable covenants could be amended as necessary to accommodate the proposed UNC facility given a recent history of amendments to permit the construction of a fire station and a school, the final decision makes no meaningful reference to the financial ramifications of a failure to amend either. This is especially troubling with respect to the restrictive covenants, the termination of which requires the consent of the owners of 90% of the subject property and the amendment of which is subject to judicial scrutiny to ensure any changes are "reasonable in light of the contracting parties' original intent" in the event one of the affected property owners is dissatisfied with the amendment. *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 559 (2006); *but see Kerik v. Davidson Cnty.*, 145 N.C. App. 222, 228 (2001) ("[A]doption, amendment, or repeal of a *zoning ordinance* is a legislative decision that must be made by the elected governing board[.]" (emphasis added)). When considering the potential for property owners with an interest in

maintaining these covenants to disallow the construction of the new facility[7] in isolation of UNC's ability to pivot to a location not listed in its application, the ALJ may make a new determination in accordance with whether it is satisfied that UNC has demonstrated that the project "will not unduly increase the costs of providing health services" at the site proposed in the application. N.C.G.S. § 131E-183(a)(12) (2023).

CONCLUSION

We affirm the ALJ with respect to geographic access, competition, and Criterion 3; however, because we cannot determine whether the ALJ would have found UNC's application in conformity with Criterion 12 without considering matters outside the scope of its CON application, we remand to the Office of Administrative Hearings for further findings.

AFFIRMED IN PART; REMANDED IN PART.

Judge STADING concurs.

Judge GRIFFIN concurring in part and dissenting in part by separate opinion.

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

I concur with Parts A, B, and C of the majority opinion. However, I dissent from Part D because there was substantial evidence that UNC's application conformed with Criterion 12 and I would therefore affirm the ALJ's decision.

Criterion 12 provides that

> [a]pplications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

7. Or, perhaps more concerningly, consent only for an exorbitant price.

N.C. Gen. Stat. § 131E-183(a)(12) (2023); *see* N.C. Gen. Stat. § 131E-183(a)(1), (3). The majority holds the ALJ erred by considering evidence regarding a secondary location that was not included on UNC's CON application when determining whether the application for the RTP location conformed to Criterion 12.

The standard of review is set forth by section 150B-51 of the North Carolina General Statutes. "With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of [N.C.G.S. § 150B-51], the court shall conduct its review of the final decision using the whole record standard of review." N.C. Gen. Stat. § 150B-51(c) (2023). The whole-record test requires this Court to determine whether the Agency's decision is supported by substantial evidence. *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App 46, 52, 625 S.E.2d 837, 841 (2006) (internal citations omitted). Substantial evidence is relevant evidence that a reasonable mind could conclude supports a decision. *Parkway Urology, P.A. v. N.C. Dep't. of Health & Hum. Servs.*, 205 N.C. App. 529, 535, 696 S.E.2d 187, 192 (2010) (internal marks and citations omitted).

This Court may not "replace the agency's judgment as between two reasonably conflicting views" even if it may be possible to reach a different result if the matter were reviewed de novo. *Id.* "Rather, a court must examine all the record evidence – that which detracts from the agency's findings and conclusions as well as that which tends to support them – to determine whether there is substantial evidence to justify the agency's decision." *N.C. Dep't. of Env't. & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (internal marks and citations omitted). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Dialysis Care of N.C., LLC v N.C. Dep't of Health & Hum. Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000) (internal marks and citations omitted).

The majority correctly points out that a CON is specific to what is listed on the application. N.C. Gen. Stat. § 131E-181(a) (2023) ("A certificate of need shall be valid only for the defined scope, physical location, and person named in the application."). While an ALJ may generally "establish standards and criteria or plans required to carry out the provisions and purposes of [a CON]", N.C. Gen. Stat. § 131E-177(1) (2023), the ALJ may not utilize requirements that conflict with what has been specified by our General Assembly, *AH N.C. Owner LLC v. N.C. Dept. of Health & Hum. Servs.*, 240 N.C. App. 92, 100, 771 S.E.2d 537, 542 (2015) (internal citations omitted).

Here, the ALJ considered a secondary location not included on the application. These considerations were error. However, as the majority states, the ALJ's decisions concerning Criterion 12 were supported by other allowable substantial evidence.

UNC provided drawings of its site plan and floor plan and explained how the construction was designed to be efficient for the provision of services based on "best practice methodologies" while preventing unnecessary costs. UNC also explained that even though the project would be capital intensive, there was funding set aside to ensure the project could be completed without increasing costs. A letter from the Chief Financial Officer of UNC Hospitals was included to certify the availability of funds to be used on this project. Additionally, UNC showed that it would design and implement an Energy Efficiency and Sustainability Plan to demonstrate that the proposed hospital would be energy efficient and conserve water. Although UNC's proposed site required rezoning, UNC anticipated having the property rezoned and indicated that it would work with Durham County and the Research Triangle Foundation to achieve the rezoning required. UNC also supplied a letter of support from the CEO of the Research Triangle Foundation. There was also testimony at the hearing indicating CON applications are almost never denied due to the fact that a site needs to be rezoned.

All of this evidence is permissible as it relates only to the primary site that is included on the application. *See Living Centers-Southeast, Inc. v. N.C. Dep't. of Health & Hum. Servs.*, 138 N.C. App. 572, 580, 532 S.E.2d 192, 197 (2000) ("Our review of the individual statutes within the CON Statute . . . indicates that this article grants applicants a full contested case hearing at which they are allowed to present testimony and *evidence contained in their applications*." (emphasis added)). I would hold that this is substantial evidence as a reasonable mind may accept this evidence as adequate in support of the conclusion that UNC's application conforms with Criterion 12.

Our standard of review demands we stop here. N.C. Gen. Stat. § 150B-51(b) (2023) ("The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are . . . *[u]nsupported by substantial evidence*." (emphasis added)). As UNC's application provided substantial evidence supporting the ALJ's decisions regarding Criterion 12, I would affirm that part of the ALJ's decision, as well.

FLETCHER HOSP., INC. v. N.C. DEP'T OF HEALTH & HUM. SERVS.

[295 N.C. App. 82 (2024)]

FLETCHER HOSPITAL, INC., D/B/A ADVENTHEALTH HENDERSONVILLE,
PETITIONER-APPELLANT AND CROSS-APPELLEE
AND
HENDERSON COUNTY HOSPITAL CORPORATION D/B/A PARDEE HOSPITAL,
PETITIONER-INTERVENOR-APPELLANT AND CROSS-APPELLEE
V.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLANT AND CROSS-APPELLEE
AND
MH MISSION HOSPITAL LLLP, RESPONDENT-INTERVENOR-APPELLANT AND CROSS-APPELLEE

No. COA23-1037

Filed 6 August 2024

1. Hospitals and Other Medical Facilities—certification of need application—failure to hold hearing—substantial prejudice not shown

An administrative law judge (ALJ) correctly determined that, in providing a written comment period in lieu of holding a public hearing on a certificate of need (CON) application (due to public health concerns during a pandemic), the N.C. Department of Health and Human Services failed to follow proper procedure because the public hearing requirement in N.C.G.S. § 131E-185(a1)(2) was mandatory. The ALJ erred, however, when it reversed the agency's decision (conditionally approving the CON application) on the sole basis that the failure constituted substantial prejudice as a matter of law rather than evaluating specific evidence of concrete harm—other than generalized market competition—to the two other healthcare providers who filed petitions for a contested case hearing. This portion of the ALJ's decision was reversed and the matter was remanded for additional consideration.

2. Hospitals and Other Medical Facilities—certificate of need application—determination of competitive review—agency's discretion

In a contested case hearing in which a certificate of need (CON) application for a freestanding emergency department was conditionally approved, the CON Section of the N.C. Department of Health and Human Services (the Agency) did not err by determining that CON applications submitted by other healthcare providers in the same timeframe were not subject to competitive review, as defined by 10A N.C.A.C. 14C.0202, where the Agency was given a broad delegation of authority to decide whether multiple applications were in

competition (such that the approval of one application may require denial of another). Where there was no showing that the Agency abused its discretion during its review process, there was no error in the Agency's decisions regarding the denial of discovery and the exclusion of evidence regarding unrelated third-party applications.

3. Hospitals and Other Medical Facilities—certificate of need application—conditional approval—conformance with statutory criteria—no error

In a contested case hearing in which a certificate of need (CON) application for a freestanding emergency department was conditionally approved, the administrative law judge (ALJ) did not err by affirming the decision of the CON Section of the N.C. Department of Health and Human Services (the Agency) on all substantive grounds, including that the CON application complied with the statutory criteria in N.C.G.S. § 131E-183(a)(3), (6), and (18a). The Agency was not required to conduct a comparative review between the instant CON application and one that was submitted—and rejected—a year earlier, nor was it required to perform an adverse impact assessment by the proposed project on competitors other than evaluating whether that the project would result in unnecessary duplication of existing services.

Judge GRIFFIN concurring in the result without separate opinion.

Appeal by Petitioner, Respondent, and Intervenors from final decision entered on 22 June 2023 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 14 May 2024.

Wyrick Robbins Yates & Ponton LLP, by Charles George, Frank S. Kirschbaum, and Trevor Presler, for petitioner-appellant.

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Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for respondent-appellant.

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MURPHY, Judge.

Under N.C.G.S. § 131E-185, the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning and Certificate of Need Section ("the Agency") must hold a public hearing when the proponent proposes to spend five million dollars or more on a proposed facility. However, a challenge to the procedure before the Agency under N.C.G.S. § 150B-23 requires more than a showing of error; a petitioner must also show that substantial prejudice occurred as a result of that error. Here, where an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings reversed the conditional approval of a certificate of need ("CON") by the Agency solely based on the reasoning that the failure to hold a public hearing constituted substantial prejudice *per se* and the final decision is otherwise free of error on review, we reverse and remand the final decision.

BACKGROUND

This appeal arises from a CON application filed with the Agency on 15 February 2022 by Respondent-Intervenor-Appellant MH Mission Hospital, LLLP ("Mission") for the development of a freestanding emergency department in Arden, Buncombe County, conditionally approved by the Agency on 24 May 2022. Purporting to act out of concern arising from the pandemic, the Agency did not hold a public hearing pursuant to N.C.G.S. § 131E-185(a1)(2), instead attempting to substitute the required public hearing with an expanded opportunity for written comments. Petitioner-Appellees Fletcher Hospital Inc. d/b/a AdventHealth Hendersonville ("Advent" or "AdventHealth") and Henderson County Hospital Corp. d/b/a Pardee Hospital ("Pardee"), two other healthcare providers in the same region as the proposed facility, filed petitions for a contested case hearing in the Office of Administrative Hearings on 23 June 2022.

The ALJ, in an 85-page final decision, affirmed the Agency on all substantive grounds but nonetheless reversed the conditional approval on the basis that the Agency failed to conduct a public hearing. Advent, Pardee, Mission, and the Agency all appeal.

ANALYSIS

On appeal, the parties' arguments reduce to three broad categories. First, (A) all parties contest the ALJ's determinations as to the Agency's

failure to hold a public hearing during the pandemic. Mission and the Agency argue the procedures during the pandemic were, contrary to the ALJ's holding, legally adequate, while Advent and Pardee argue the ALJ erred in its determination that they did not suffer substantial prejudice. Second, (B) Pardee argues the ALJ erred both in conducting discovery and in its determinations as to the adequacy of discovery before the Agency, impermissibly disallowing evidence pertaining to two applications Pardee alleged should have been subject to a competitive review process alongside Mission's. Finally, (C) Advent and Pardee both argue the ALJ erred in finding Mission's application was compliant with three statutory CON criteria arising under N.C.G.S. § 131E-183(a); namely, Criteria 3, 6, and 18(a).

Our standard of review when reviewing an ALJ's final decision is governed by N.C.G.S. § 150B-51, which dictates that we apply either de novo review or the whole record test depending on the scope of the challenge:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
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> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
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> (3) Made upon unlawful procedure;
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> (4) Affected by other error of law;
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> (5) Unsupported by substantial evidence admissible under [N.C.G.S. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
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> (6) Arbitrary, capricious, or an abuse of discretion.
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> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C.G.S. § 150B-51(b)-(c) (2023). Moreover, especially when applying the whole record standard of review, we are cognizant of the fact that, while an ALJ's final decision is the sole object of our review, the ALJ often sets out its findings and conclusions in relation to those of the Agency pursuant to its own contested case procedures in N.C.G.S. § 150B-23. *See* N.C.G.S. § 150B-23 (2023) (authorizing ALJ review of the Agency in a contested case in the event the Agency "(1) [e]xceeded its authority or jurisdiction[,] (2) [a]cted erroneously[,] (3) [f]ailed to use proper procedure[,] (4) [a]cted arbitrarily or capriciously[,] (5) [f]ailed to act as required by law or rule."). Given the challenge-dependent nature of the standard of review, we will specify before each subsection which standard we employ.

A. Failure to Hold a Hearing

[1] First, we address whether the Agency erred in failing to hold a public hearing concerning the Mission application, whether the absence of such a hearing substantially prejudiced Advent and Pardee, and what remedy, if any, applies. This argument is raised on appeal primarily by Mission and the Agency, but is also contested in part by Advent and Pardee in that the ALJ ruled that they did not suffer substantial prejudice due to the lack of a public hearing. As this issue is an alleged error of law in the ALJ's final decision, committed in its capacity reviewing the Agency for improper procedure, we review the matter de novo. N.C.G.S. § 150B-51(b)(4), (c) (2023).

As to Mission and the Agency's argument that a public hearing was not required during the pandemic, although the Agency concedes that a public hearing was required under the letter of N.C.G.S. § 131E-185(a1)(2), it nonetheless argues that such a hearing should not have been required in this case because of the exigent public health circumstances. While the Agency argues that it provided a period for the public to provide written comments in lieu of a public hearing and outlines the steps it took to communicate the availability of this alternative process to both interested parties and the public, it does not meaningfully contend that this alternative procedure satisfied the statutory requirement. Instead, it argues that providing a public hearing during the pandemic would have rendered it derelict in its statutory duties under N.C.G.S. § 143B-137.1.

N.C.G.S. § 131E-185(a1)(2) provides that, "[n]o more than 20 days from the conclusion of the written comment period, the Department [of Health and Human Services] shall ensure that a public hearing is conducted at a place within the appropriate service area if . . . the proponent proposes to spend five million dollars ($5,000,000) or more . . . ." N.C.G.S. § 131E-185(a1)(2) (2023). Meanwhile, under N.C.G.S. § 143B-137.1,

> [i]t shall be the duty of the Department [of Health and Human Services] to provide the necessary management, development of policy, and establishment and enforcement of standards for the provisions of services in the fields of public and mental health and rehabilitation with the intent to assist all citizens—as individuals, families, and communities—to achieve and maintain an adequate level of health, social and economic well-being, and dignity. Whenever possible, the Department shall emphasize preventive measures to avoid or to reduce the need for costly emergency treatments that often result from lack of forethought. The Department shall establish priorities to eliminate those excessive expenses incurred by the State for lack of adequate funding or careful planning of preventive measures.

N.C.G.S. § 143B-137.1 (2023). Even if the use of mandatory language in this general directive to the department could, under different circumstances, constitute a colorable basis for its failure to provide a public hearing during the pandemic, it is well established that, "when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322 (2012). "And[,] when that specific statute is clear and unambiguous, we are not permitted to engage in statutory construction in any form." *Id.* Regardless of the Agency's invocation of its general statutory duties under N.C.G.S. § 143B-137.1, we cannot ignore the statutory requirement of N.C.G.S. § 131E-185(a1)(2) that it hold a public hearing.[1] We therefore affirm the ALJ's determination that the Agency utilized improper procedure. *Cf. Fletcher Hosp. Inc. v. N.C. Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Health Care Plan. & Certificate of Need Section*, 293 N.C. App. 41, 47 (2024) ("[T]he Agency was required to hold a public hearing under the facts in this case, and its failure to do so was error.").

In the alternative, Mission and the Agency argue that the failure to hold a public hearing during the pandemic did not constitute reversible error per se before the ALJ because the failure to hold a public hearing did not substantially prejudice Pardee and Advent. They base

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1. Nor, as a practical matter, do we see written communications as equivalent to a public hearing. Anyone who lived, worked, and communicated through the pandemic can attest to the qualitative shortcomings of written communication relative to face-to-face contact. Even as a necessary evil during the height of COVID's spread, distanced engagement was never a true replacement.

this argument primarily on N.C.G.S. § 150B-23, which dictates that, in a contested case, a petitioner must "state facts tending to establish that the agency . . . has [] substantially prejudiced the petitioner's rights and that the agency, [*inter alia*,] [f]ailed to use proper procedure." N.C.G.S. § 150B-23 (2023). They also argue the ALJ misinterpreted caselaw in reversing the Agency's determination on this basis.

In its order, the ALJ ruled that the "[d]eprivation of AdventHealth's and Pardee's right to speak at a public hearing in and of itself is substantial prejudice." Mission and the Agency contest this ruling on the basis that, in our CON caselaw, "[t]he harm required to establish substantial prejudice cannot be conjectural or hypothetical. It must be concrete, particularized, and 'actual' or imminent." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Certificate of Need Section*, 235 N.C. App. 620, 631 (2014), *disc. rev. denied*, 368 N.C. 242 (2015). In particular, they argue the ALJ incorrectly relied on *Hospice at Greensboro, Inc. v. N.C. Dep't of Human Resources, Division of Facility Services*, 185 N.C. App. 1, *disc. rev. denied*, 361 N.C. 692 (2007), in making the determination that the deprivation of the right to a public hearing itself constituted substantial prejudice.

In *Hospice*, the matter at issue was whether the Agency's issuance of a "No Review" determination—a path to the approval of a medical facility exempt from the CON process—substantially prejudiced the appellant. *Id.* at 3, 7. In that case, we held that "the issuance of a 'No Review' letter, which results in the establishment of 'a new institutional health service' without a prior determination of need, substantially prejudices a licensed, pre-existing competing health service provider as a matter of law." *Id.* at 16. We explained our reasoning for the holding as follows:

> Because an applicant for a CON must "demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities," this interest (which the General Assembly has also determined to be a public interest) is vetted during the CON application process. Competing hospice providers, like HGI, may participate in the CON application process by filing "written comments and exhibits concerning a proposal [for a new institutional health service] under review with the Department." [N.C.G.S.] § 131E-185(a1) (2005). Such comments may include
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> > a. Facts relating to the service area proposed in the application;

> b. Facts relating to the representations made by the applicant in its application, and its ability to perform or fulfill the representations made;
>
> c. Discussion and argument regarding whether, in light of the material contained in the application and other relevant factual material, the application complies with relevant review criteria, plans, and standards.

Id.

> Here, HGI was denied any opportunity to comment on the CON application, because there was no CON process. In fact, the CON Section's issuance of a "No Review" letter to Liberty effectively prevented any existing health service provider or other prospective applicant from challenging Liberty's proposal at the agency level, except by filing a petition for a contested case. We hold that the issuance of a "No Review" letter, which resulted in the establishment of a "new institutional health service" in HGIs service area without a prior determination of need was prejudicial as a matter of law.

Id. at 16-17. In other words, while we did not elaborate on whether and to what extent the denial of statutorily-required proceedings short of the total denial of an appellant's participation in the certificate of need process could constitute prejudice as a matter of law, we considered the written portion of the process particularly significant and emphasized the functional exercise of discussion and argument. *Id.* This renders *Hospice*'s application disanalogous to the instant case, as the holding in *Hospice* primarily concerns the availability of a substantive discussion process and the ability to receive comment, not the specific procedure utilized. In light of this limitation on the application of *Hospice*, we hold that the ALJ's reliance on this case was in error. *Hospice*'s analytical emphasis was placed on the availability of a commentary process to gather facts and hear argumentation, which was still present here. *Cf. Fletcher*, 293 N.C. App. at 49 ("Our determination in *Hospice at Greensboro* represents a narrow holding in a fact-specific case, and its guidelines apply to such instances where a petitioner is deprived of *any* opportunity to contest the applicant's proposal at the Agency level.").

Here, Advent and Pardee do not satisfy their burden to show substantial prejudice occurred. Setting aside the procedural harm done to Advent, Pardee, and the public when the Agency failed to hold a public hearing, the ALJ did not evaluate specific evidence on the record which

would indicate whether or not any concrete harm came to Advent and Pardee that was not the result of generalized market competition. As we have repeatedly held, "*mere* competitive advantage [is] an insufficient basis upon which to argue prejudice." *CaroMont Health, Inc. v. N.C. Dep't of Health & Hum. Servs. Div. of Health Serv. Regul., Certificate of Need Section*, 231 N.C. App. 1, 9 (2013) (emphasis added); *see also Parkway Urology, P.A. v. N.C. Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Certificate of Need Section*, 205 N.C. App. 529, 539 (2010) ("Rex's argument, in essence, would have us treat any increase in competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in [N.C.G.S.] § 150B-23(a). . . . Rex was required to provide specific evidence of harm resulting from the award of the CON to CCNC that went beyond any harm that necessarily resulted from additional LINAC competition in Area 20, and NCDHHS concluded that it failed to do so."), *disc. rev. denied*, 365 N.C. 78 (2011).

Given the clarity with which the ALJ signaled that the sole basis for the reversal below was its application of *Hospice* and *ipso facto* substantial prejudice result, we reverse this portion of the final decision. However, just as the absence of a hearing does not automatically constitute substantial prejudice, our caselaw does not categorically preclude increased competition from constituting substantial prejudice; rather, to constitute substantial prejudice, a market competitor appealing to the ALJ must make a *specific* argument as to how that increased competition concretely affects their provision of services. *See Parkway*, 205 N.C. App. at 539 ("Rex reasons[] [that] any additional LINAC capacity at CCNC would necessarily lower the number of LINAC treatments performed at Rex and, as a result, have a substantial impact on Rex's revenues. Rex did not, however, quantify this financial harm in any specific way, other than testimony regarding the amount of revenue Rex receives from its LINAC treatments."). Here, as we are cognizant that our reversal of the ALJ's holding with respect to *Hospice* is likely to have an impact on its overall analysis with respect to substantial prejudice, we remand this case to the ALJ for further consideration of whether substantial prejudice existed on a basis other than per se substantial prejudice due to the hearing's absence.

B. Discovery and Evidentiary Rulings

[2] Next, we address Advent and Pardee's contentions that the ALJ both erred in its own discovery process and in its review of the adequacy

of discovery before the Agency, as well as errors in excluding purportedly relevant evidence. All of these alleged errors stem from the same underlying argument concerning the interpretation of an Agency regulation; namely, that the Agency should have treated two CON applications by third parties in the same timeframe as subject to competitive review alongside the Mission application. As we review issues of law in an administrative appeal de novo, *see* N.C.G.S. § 150B-51(b)-(c) (2023); *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Hum. Servs.*, 242 N.C. App. 666, 672 (2015), we evaluate anew whether the Agency misapplied the applicable regulation and whether, by extension, the ALJ erred in rejecting Advent and Pardee's allegations of error below. To the extent any further aspects of this issue remain after resolution of the interpretive component, "orders regarding discovery matters . . . will not be upset on appeal absent a showing of abuse of [] discretion[,]" *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 27, *disc. rev. denied*, 353 N.C. 371 (2001), nor will rulings concerning the exclusion of evidence. *Williams v. Bell*, 167 N.C. App. 674, 678, *disc. rev. denied*, 359 N.C. 414 (2005).

For their argument that the Agency should have treated two third-party applications as competitive, Advent and Pardee cite 10A NCAC 14C.0202, which defines "competitive review" as review in which "two or more applications [are] submitted to begin review in the same review period proposing the same new institutional health service in the same service area and the CON Section determines that approval of one application may require denial of another application included in the same review period." 10A NCAC 14C.0202 (2023). According to Advent and Pardee, the Agency—and, in reviewing the Agency, the ALJ—incorrectly determined that the applications of Mission and its alleged competitor could be reviewed individually, having cursorily "dismissed the possibility" that either application's approval could be mutually exclusive with the others'.

At the threshold, we note that, despite Advent and Pardee's characterization, the record reflects that the Agency does, in fact, implement an intake process for determining whether any given subset of CON applications are in competition. During a deposition while this case was before the ALJ, Agency staff offered testimony explaining why the Agency determined Mission's application and that of its alleged competitor were not in competition:

> Q. When did you refer to or think about this Rule 10A NCAC 14.0202 with regard to review of the [alleged competitor's] application?

A. Well, first I noticed that they weren't considered competitive reviews. At least I was not told they were competitive reviews when they were assigned to me. And during the course of the review I did not see anything in the two applications that would change that.

Q. How is the determination typically made by the agency for when applications are considered competitive? You mentioned you weren't told that it was competitive when assigned to you. Can you explain that to us, please?

A. Right. Initially, when two applications come in for the same review period for the same service in the same service area, an initial assessment is made by the management team checking the applications in about whether or not they appear like they could be competitive.

Q. Do you know who did that assessment concerning the two freestanding emergency department applications in Buncombe County?

A. No.

Q. Is there any formal documentation of that assessment in the agency file?

A. No.

Q. Looking at Deposition Exhibit 17, at the definition of "competitive review," Mr. McKillip, does the definition include at the end that approval of one application may require denial of another application included in the same review period?

A. Yes.

Q. If two applications could, at least theoretically, be approved, does the agency consider them not to be competitive?

A. As far as the initial review, it would depend—if it was clear they were not competitive, then they would be, as it was in this case, identified as non-competitive applications. If it's not clear at the initial check-in, then they might provisionally be considered competitive, and then the analyst would make the determination later, during the course of the review.

Q. Did you assume at the beginning of the review that these applications had been determined to be non-competitive by CON section management?

A. Yes.

Q. Did you do any analysis when you reviewed the Candler and Arden 2022 applications concerning whether they were competitive?

A. I did not see anything in the applications that would indicate that they had to be considered competitive applications.

Q. Does the agency frequently in reviews look at other information filed by an applicant in other applications?

. . . .

A. No.

Q. Does the agency look at other decisions that relate to the same type of service, like a freestanding emergency department, when reviewing an application for that service?

A. An analyst has discretion to look at prior findings.

Q. Mr. McKillip, the definition of "competitive review" does not state the agency is prohibited from looking at another application for the same service filed in the same review period if it determines the applications are not competitive; does it?

A. No.

Q. So in other words, there's no requirement, for example, that two different analysts be assigned to the review of those applications so that one analyst doesn't see both?

A. Correct.

Q. Would you agree that the definition of "competitive review" does not circumscribe the scope of what the project analyst can consider when reviewing the two applications during the review when they're non-competitive?

A. Yes.

Q. [] [W]hen you were reviewing the [alleged competitor's] application, what was your general approach to the review?

> A. I reviewed the application against the statutory criteria. There were comments after drafting an initial draft of the findings. I read the comments and response to comments and then make final edits to the first draft and I submit that to my cosigner.
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> Q. If I understood your response, your sequence is to review the application first and to do initial draft of the findings and then look at the comments and response to comments; did I hear you correctly?
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> A. Yes.

Agency staff then went on to conduct a review of both applications, observed that there was overlap in the proposed service area's zip codes, but nonetheless determined that the overlap did not cause the Agency to deviate from its initial determination that the two applications were not in competition.

Bearing this in mind, nothing in the language of 10A NCAC 14C.0202 mandates that the Agency employ a different procedure in determining whether two applications must be reviewed in tandem per the competitive review process. While Advent and Pardee argue that the language indicating competitive, in-tandem review of two applications occurs if "approval of one application may require denial of another application" required the Agency to employ such review if even the slightest chance of mutual exclusivity between the applications existed, this interpretation ignores the broad delegation of authority to the Agency authorized by the very same section. A full reading of the section reflects that competitive review occurs when "two or more applications [are] submitted to begin review in the same review period proposing the same new institutional health service in the same service area *and the CON Section determines that approval of one application may require denial of another application included in the same review period*." 10A NCAC 14C.0202 (2023) (emphasis added). In other words, the language makes clear that the determination of likelihood is entrusted to the discretion of the Agency, not fixed as a matter of law. While we do not foreclose the possibility that the Agency could abuse this delegation of authority, no such showing has been made here. Consequently, no error occurred under 10A NCAC 14C.0202.

Having so held, we are also satisfied that no further error occurred, as the Agency's adequate procedure for determining whether competitive review is warranted under 10A NCAC 14C.0202 rendered the denial of discovery and the exclusion of evidence concerning unrelated third-party applications appropriate.

C. Substantive Challenges

[3] Finally, we address Advent and Pardee's substantive challenges to the final decision arising under Criteria 3, 6, and 18(a) of N.C.G.S. § 131E-183(a). N.C.G.S. § 131E-183(a) provides, in pertinent part, as follows:

> (a) The Department shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued.
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> . . . .
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> (3) The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.
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> . . . .
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> (6) The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.
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> . . . .
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> (18a) The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; and in the case of applications for services where competition between providers will not have a favorable impact on cost effectiveness, quality, and access to the services proposed, the applicant shall demonstrate that its application is for a service on which competition will not have a favorable impact.

N.C.G.S. § 131E-183(a)(3), (6), (18a) (2023). As evaluating whether the ALJ erred in finding the Mission application compliant with these criteria is a substantive evaluation of the application by the ALJ, we "conduct [our] review of the final decision using the whole record standard of review." N.C.G.S. § 150B-51(c) (2023). "In applying the whole record

test, the reviewing court is required to examine all competent evidence in order to determine whether the [final] decision is supported by substantial evidence." *Surgical Care*, 235 N.C. App. at 622-23 (marks omitted).

Here, while we technically review the determination of the ALJ for substantial evidence on the record, we note that some of Advent and Pardee's arguments are better characterized as methodological critiques of the ALJ—and, indirectly,[2] the Agency—rather than challenges to the sufficiency of the evidence *per se*. Specifically, they contend that the Agency, which had found a CON application by Mission from one year earlier nonconforming with respect to Criteria 3 and 18(a), erred in determining that Mission's 2022 application *did* conform with Criteria 3 and 18(a) without conducting a comparative evaluation between the 2022 application and a similar, rejected application submitted by Mission in 2021. As this argument is unrelated to any specific finding

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2. While the statute governing judicial review of administrative decisions, N.C.G.S. § 150B-51, used to contemplate direct judicial review of this type of Agency determination, revisions by our General Assembly in 2011 have refocused our review on the final decision of the ALJ:

> In 2011, the General Assembly amended the Administrative Procedure Act ("APA"), conferring upon administrative law judges the authority to render final decisions in challenges to agency actions, a power that had previously been held by the agencies themselves. *See* 2011 N.C. Sess. Laws 1678, 1685-97, ch. 398, §§ 15-55. Prior to the enactment of the 2011 amendments, an ALJ hearing a contested case would issue a recommended decision to the agency, and the agency would then issue a final decision. In its final decision, the agency could adopt the ALJ's recommended decision *in toto*, reject certain portions of the decision if it specifically set forth its reasons for doing so, or reject the ALJ's recommended decision in full if it was clearly contrary to the preponderance of the evidence. *See* [N.C.G.S.] § 150B-36, *repealed by* 2011 N.C. Sess. Laws 1678, 1687, ch. 398, § 20. As a result of the 2011 amendments, however, the ALJ's decision is no longer a recommendation to the agency but is instead the final decision in the contested case. [N.C.G.S.] § 150B-34(a).
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> Under this new statutory framework, an ALJ must "make a final decision . . . that contains findings of fact and conclusions of law" and "decide the case based upon the preponderance of the evidence, giving due regard to the respect to facts and inferences within the specialized knowledge of the agency." *Id.*

AH N.C. Owner LLC v. N.C. Dep't of Health & Hum. Servs., 240 N.C. App. 92, 98-99 (2015). Our review of substantive issues will therefore be based on the ALJ's final decision, with occasional references as necessary to the ALJ's determinations as they pertain to its review of the Agency.

the ALJ reached, we cannot meaningfully review it for substantial evidence on the record.

However, as a general attribution that the ALJ erred by failing to conduct a comparative evaluation between the adjacent years' applications, this argument still fails. Aside from a general citation indicating that an abuse of discretion occurs when an administrative decision "lack[s] [] fair and careful consideration," *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 420 (1980), *abrogated by Matter of Redmond by & through Nichols*, 369 N.C. 490 (2017), Advent and Pardee point us to no binding authority justifying the position that the absence of such a comparative analysis constitutes reversible error. Moreover, we think the determination that applications may be best reviewed in isolation of similar applications from current years, while discretionary, is eminently reasonable insofar as it frees the decisionmaker from any biases it may have for or against the applicant and allows it to better evaluate the current-year application in light of a community's changing needs.

Advent and Pardee also argue that the ALJ misapplied Criterion 18(a) in that the Agency did not specifically conduct an "evaluation of the effects or impact of the [proposed facility] on AdventHealth or Pardee, or on Mission's monopoly status" and the ALJ did not, in reviewing the Agency, find that the Agency had any obligation to do so. As to this argument, we affirm the ALJ in all respects. Advent and Pardee have not directed us to—and we have not discovered—any binding law indicating that Criterion 18(a) requires an administrative decision maker to examine the effects of a new facility on specific competitors as part of a broader inquiry concerning impact on competition, and the plain language of the criterion refers to competition in the abstract, not competitor-specific, sense.[3] *See* N.C.G.S. § 131E-183(a)(18a) (2023) ("The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed[.]"). Furthermore,

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3. To the extent Advent and Pardee's argument rests on our reading "competition" as a collective noun referring to a group of competitors for purposes of N.C.G.S. § 131E-183(a)(18a), we reject this interpretation. At time of writing, "competition" is typically used as a collective noun in that sense relatively informally and outside of legal settings. *See Competition*, *Black's Law Dictionary* 355 (11th Ed. 2019) (defining "competition" as "[t]he struggle for commercial advantage" or "the effort or action of two or more commercial interests to obtain the same business from third parties" and omitting any definition referring collectively to competitors); *Competition*, *American Heritage Dictionary* 284 (3rd Ed. 1993) (omitting mention of "competition" as referring collectively to competitors).

while the applicable caselaw does treat particular providers' monopoly or near-monopoly status as salient, *see Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App. 46, 57 (2006) ("[The petitioner], in effect, argues that giving it a monopoly in the service area would increase competition. We decline to adopt this incongruous line of reasoning."),[4] we will not treat "monopoly" as a "magic word" without which the ALJ's otherwise sound reasoning becomes reversibly erroneous.[5]

As for the arguments that are better conceptualized in terms of whole record review, Advent and Pardee contend that the ALJ misapplied Criterion 6 insofar as it did not reverse the Agency for failing to "do a substantive assessment of the existing or approved service capabilities" in the area. Under Criterion 6, "[t]he applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C.G.S. § 131E-183(a)(18a) (2023). As employees of the Agency who testified before the ALJ indicated that the Agency did not specifically analyze allegedly comparable services offered at Advent and Pardee, Advent and Pardee seek to overturn the ALJ's final decision. However, in its review of the Agency, the ALJ reasoned, in a section entitled "Agency Review of Statutory Criterion 6," that the Agency abided by all statutorily-prescribed duties during the review process and that Advent and Pardee had not otherwise presented a basis to overturn the Agency decision:

> 203. Criterion 6 applied to the Mission Application. Statutory Review Criterion 6 requires that an applicant demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities. (Jt. Ex. 2, Agency File AF 511; *see also* N.C. Gen. Stat. § 131E-183(a)(6)) (Tr. Vol. 15, Platt, p. 2414) (Tr. Vol. 10, Sandlin, p. 1616).
>
> 204. Statutory Review Criterion 6 requires the applicant to identify the other providers who provide the same services in the proposed service area. (Tr. Vol. 2, McKillip, p. 225).

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4. We further note that, in *Craven*, the issue before us was a challenge *by* an entity holding a monopoly to a *competitor's* compliance with Criterion 18(a), not a challenge to a monopoly-holder's compliance with Criterion 18(a). *Id.* at 56-57. To the extent Advent and Pardee cite *Craven* for the proposition that monopoly status threatens an applicant's compliance with Criterion 18(a) by default or alters the required analytical framework, this is an acontextual reading of our precedent.

5. This is to say nothing of the substantial evidence on the record to support the ALJ's position that Mission did not, in fact, have a monopoly in the proposed service area.

205. After identifying the other providers in the service area, the applicant must then explain why the proposed project will not be an unnecessary duplication of services. (Tr. Vol. 2, McKillip, p. 225) (Tr. Vol. 15, Platt, p. 2415).

206. The Agency, when reviewing an application, decides if the information provided by the applicant demonstrates that the proposed project will result in an unnecessary duplication of existing or approved services. (Tr. Vol. 2, McKillip, pp. 225-26).

207. Regarding Statutory Review Criterion 6, Ms. Pittman testified, "You just have to demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." (Tr. Vol. 5, Pittman, p. 895).

208. Statutory Review Criterion 6 does not require that the Agency look at how other providers currently providing the same services will be impacted by the proposed service. (Tr. Vol. 5, Pittman, p. 867).

209. In evaluating Mission's CON application under Statutory Review Criterion 6, it was not necessary for the Agency to conduct a capacity evaluation of either Pardee or AdventHealth because it is not relevant to the Agency's evaluation of Criterion 6. (Tr. Vol. 1, McKillip, p. 138).

210. When reviewing the Mission Application under Statutory Review Criterion 6, the Agency reviewed both the written comments of Petitioners in opposition to the Mission Application and Mission's response to those comments regarding drive times and access to emergency departments. (Tr. Vol. 1., McKillip, p. 140).

211. Section G of the Mission Application relates to its conformity with Statutory Review Criterion 6. (Tr. Vol. 15, Platt, p. 2414) (Jt. Ex. 1, Mission Application MH-97-98).

212. Section G of the Mission Application states, "The proposed FSER will provide more timely access to critical care services in the South Buncombe County market and to patients in North Henderson County." (Jt. Ex. 1, Mission Application MH-97).

213. Section G of the Mission Application identifies the existing providers in the proposed service area that

provide the same service components proposed in the Mission Application as: Pardee, AdventHealth, and Mission Main Hospital. (Jt. Ex. 1, Mission Application MH-97) (Tr. Vol. 15, Platt, pp. 2414-15).

214. The Agency reviewed and applied Statutory Review Criterion 6 to the Mission Application. Following its review, the Agency found Mission's Application to be conforming to Statutory Review Criterion 6. (Jt. Ex. 2, Agency File AF 512) (Tr. Vol. 15, Platt, pp. 2427-28) (Tr. Vol. 1, McKillip, pp. 130-31).

215. The Agency determined that Mission's Application was conforming to Statutory Review Criterion 6 because it adequately demonstrated that the proposal would not result in an unnecessary duplication of existing or approved services in the service area based on:

a. The fact there are no other FSEDs in the proposed service area; and

b. Mission adequately demonstrated that the proposed FSED is needed in addition to the existing or approved providers of emergency services in the service area.

(Jt. Ex. 2, Agency File AF 512).

216. AdventHealth argued that the Agency erred in determining that the Mission Application was conforming to Statutory Review Criterion 6 because the proposed service would unnecessarily duplicate existing services. Ms. Sandlin opined that Mission's Application was nonconforming to Statutory Review Criterion 6 because the proposed project is an unnecessary duplication of already existing services. (Tr. Vol. 10, Sandlin, p. 1636) (Jt. Ex. 144).

217. Ms. Sandlin was questioned several times regarding her assertion that either Mission or the Agency were required to perform an analysis of the impact of Mission's proposed FSED on other providers in terms of lost patients, market share or revenues. (Tr. Vol. 10, Sandlin, pp. 1761-62). Ms. Sandlin did not affirmatively state that the statute required that analysis. *Id.* Ms. Sandlin only stated, "The Agency was responsible for applying Criterion 6 and 18a in this review." *Id.*

218. Pardee argued that the Agency erred in determining that the Mission Application was conforming to Statutory Review Criterion 6 because the project will result in unnecessary duplication of services. (Jt. Ex. 116). Ms. Carter opined regarding Statutory Review Criterion 6: "And in my opinion, the statute is very clear that that is the purpose of Criterion 6 to evaluate unnecessary duplication of the existing facilities and providers." (Tr. Vol. 7, Carter, p. 1258). Ms. Carter further stated the Agency did not conduct an analysis regarding unnecessary duplication under Statutory Review Criterion 6. (*Id*. at p. 1259).

219. The key determination in the analysis of unnecessary duplication under Criterion 6 is whether the proposed service is unnecessary. (Tr. Vol. 15, Platt, p. 2415).

220. Ms. Platt opined that the Agency's application form is specific and that it asks the applicant to identify the existing and approved providers that are either in the service area or near the proposed service area. (Tr. Vol. 15, Platt, p. 2414-15).

221. Mission provided in its application a narrative describing why the proposed Arden FSED was not unnecessarily duplicative of existing and approved providers related to capacity constraints at the Mission Hospital main emergency department in downtown Asheville, population growth in the area that will increase demand for emergency department services, and existing demand for the services. (Tr. Vol. 15, Platt, pp. 2415-16, 2427).

222. Mission, through its expert Ms. Platt, demonstrated that the Agency reviewed the Mission Application in the same manner it has reviewed prior applications when evaluating Criterion 6. (Tr. Vol. 15, Platt, pp. 2418-21) (Jt. Ex. 140, 141). The Atrium Health Ballantyne ED Agency Findings ("Ballantyne Findings") were issued on [22 October] 2021, in which the Agency approved the Ballantyne FSED project. In the Ballantyne Findings, the Agency's analysis of Criterion 6 consisted of the identification of the service area, identification of the existing and approved providers of the same service in the service area, and a summary of the narrative the applicant provided addressing why there is no unnecessary duplication

of services. The analysis by the Agency of the Mission Application was consistent with the Agency's analysis in the Ballantyne Findings. In both the Ballantyne and Concord Agency Findings, the Agency reviewed the providers in or around the service area, summarized the narratives provided by the applicants, and reached a similar conclusion regarding conformity. (Tr. Vol. 15, pp. 2418-19) (Jt. Ex. 140, pp. 22-24) (Jt. Ex. 2, Agency File AF 511-12).

223. Similarly, the Atrium Health Concord ED Agency Findings ("Concord Findings") were issued on [21 April] 2022 and approved a FSED. In analyzing Criterion 6, the Concord Findings show that the Agency identified the service area defined by the applicant, identified the existing and approved providers of the same service in the service area, and quoted the narrative explanation provided by the applicant of why the project was not unnecessarily duplicative. Again, the analysis and approach used for Criterion 6 in the Mission Application was consistent with the approach and analysis by the Agency in the Concord Findings. (Tr. Vol. 15, pp. 2419-21) (Jt. Ex. 141, pp. 15-16) (Jt. Ex. 2, AF 511-12).

224. Further, Statutory Review Criterion 6 does not require that an applicant perform any adverse impact assessment or analysis of a proposed project's impact on other providers. (Tr. Vol. 15, Platt, p. 2415). Ms. Platt, Ms. Pittman, and Mr. McKillip all affirmatively testified that Statutory Review Criterion 6 does not require that an applicant demonstrate the impact the proposed services in its application will have on existing providers. (Tr. Vol. 15, Platt, p. 2415) (Tr. Vol. 1, McKillip, p. 138) (Tr. Vol. 5, Pittman, p. 867).

225. Ms. Platt agreed with the Agency and opined that the Mission Application was conforming to Statutory Review Criterion 6. (Tr. Vol. 15, Platt, p. 2428) (Jt. Ex. 160, p. 6).

226. The Tribunal finds that the testimony of Ms. Pittman, Mr. McKillip and Ms. Platt regarding the Agency's determination that the Mission Application was conforming to Statutory Review Criterion 6 was credible, reliable and persuasive.

227. This Tribunal finds that the Agency's application of Statutory Review Criterion 6 was reasonable and

> adequately supported. Statutory Review Criterion 6 does not require that an applicant perform any adverse impact assessment or analysis of a proposed project's impact on other providers.

On appeal, Advent and Pardee do not specify what substantive analysis they contend the Agency was required to make, what legal authority supports this position, or in what way the Mission application was, in fact, duplicative of their services. Instead, their argument is predicated solely on the absence of this "substantive assessment" and a recitation of several of their other criterion-based arguments. If Advent and Pardee believed the specifics of their existing services were so salient to the Agency's or the ALJ's analysis of Criterion 6, they were perfectly capable of producing positive evidence to support that argument at an earlier stage of these proceedings. For our part, there is neither legal nor factual support for any allegations of administrative error before us, and we will not overturn the ALJ's final decision on such an unmoored basis.

Finally, Advent and Pardee contend that Mission's application should have been deemed nonconforming with Criteria 3, 6, and 18(a) on the basis of Mission's alleged lack of candor to the Agency as to its purpose. The basis for this argument is that the purpose of the new facility as articulated in an internal business memorandum by Mission's parent company was different than the statement of purpose provided to the Agency. Were it not the immediate subject of this sub-issue, we would find it obvious beyond the need for explanation that the operation of a service can be justified on the basis of both public utility and the desire for business growth—in much the same way that litigation can both raise legitimate legal issues and act as a tool to drive potential competitors from a market. Suffice it to say, this argument, even if true, would not merit reversal, as we see no mutual exclusivity between these two types of justifications.[6]

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6. Advent and Pardee also point to a difference in projections regarding anticipated market share and patient traffic between the two memoranda; however, we find it unremarkable that projections might also be more or less conservative depending on the methodologies used and the points they service. Tragically, the gathering and sharing of data is rarely an activity undertaken for the mere love of truth, and it would be impractical for this (or any) tribunal to police the influence of agendas in the presentation of information—only to ensure that they not bleed into or otherwise corrupt the integrity of neutral decisionmakers. Without a more specific allegation that the projections offered to the Agency were fraudulent or deceptive, we do not assume from the mere discrepancy that any reversible error occurred.

CONCLUSION

While the ALJ correctly determined the Agency erred in failing to hold a public hearing, it misapplied *Hospice* in determining that the error substantially prejudiced Advent and Pardee. As the ALJ's reversal of the Agency's conditional approval of a CON to Mission was solely predicated on this legal error, we reverse the ALJ's final decision. N.C.G.S. § 150B-51(b) (2023) (permitting reversal on appeal if, *inter alia*, the final decision on review contains an error of law). However, because we also do not express any opinion on whether the competition-based harm alleged by Advent and Pardee below were sufficiently specific to constitute substantial prejudice, we remand to the ALJ for further proceedings to determine whether Advent and Pardee's allegations of prejudice were based on the mere fact of competition or a specific, concrete harm. *Parkway*, 205 N.C. App. at 539. Advent and Pardee's remaining challenges to the final decision are without merit.

AFFIRMED IN PART; REVERSED, VACATED, AND REMANDED IN PART.

Judge GORE concurs.

Judge GRIFFIN concurs in result.

LIVINGSTONE FLOMEH-MAWUTOR, GEORGINA MICHAEL SHENJERE AND KONSIKRATED MORINGA FARMS D/B/A MORE THAN MANNA, PLAINTIFFS

v.

CITY OF WINSTON-SALEM, DEFENDANT

No. COA23-809

Filed 6 August 2024

1. Appeal and Error—interlocutory order—claims dismissed—counterclaims remained pending—Rule 54(b) certification

In an action for damages arising from the delayed disbursement of a small business loan, the trial court's order of summary judgment dismissing plaintiffs' claims against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention was immediately appealable where, although the order was interlocutory because it left the city's counterclaims pending, the trial court certified that there was "no just reason for delay" of immediate review pursuant to Civil Procedure Rule 54(b).

2. Immunity—governmental—tort claims—operation of small business loan program—governmental function—lack of waiver

In plaintiffs' action against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention (in which plaintiffs alleged damages arising from the delayed disbursement of a small business loan), the trial court properly granted summary judgment in favor of the city on plaintiffs' tort claims based on the city's affirmative defense of governmental immunity. The city's operation of its small business loan program constituted a governmental, rather than a proprietary, function, based in part on the fact that the program was funded by federal block grants and was designed to provide loans to businesses that could not secure loans from traditional lenders. Therefore, the city was immune from suit for the negligence of its employees in the operation of the program, and plaintiff failed to allege any waiver of that immunity.

3. Immunity—governmental—breach of contract—operation of small business loan program—lack of valid contract

In plaintiffs' action against a city for breach of contract, negligent misrepresentation, and negligent hiring and retention (in which plaintiffs alleged damages arising from the delayed disbursement of a small business loan), the trial court properly granted summary judgment in favor of the city on plaintiffs' breach of contract claim based on the city's affirmative defense of governmental immunity. Plaintiffs failed to show that a letter sent to them from a small business development specialist for the city—promising to close the loan within a certain timeframe—constituted a valid contract since the specialist did not have actual authority to bind the city to a contract; therefore, the city had not waived its governmental immunity from suit.

Appeal by plaintiffs from order entered 1 June 2023 by Judge Robert A. Broadie in Forsyth County Superior Court. Heard in the Court of Appeals 5 March 2024.

TLG Law, by Sean A. McLeod and Ty K. McTier, for plaintiffs-appellants.

Womble Bond Dickinson (US) LLP, by James R. Morgan, Jr., and City of Winston-Salem, by City Attorney Angela I. Carmon, for defendant-appellee.

ZACHARY, Judge.

Plaintiffs Livingstone Flomeh-Mawutor, Georgina Michael Shenjere, and Konsikrated Moringa Farms d/b/a More than Manna appeal from the trial court's order granting summary judgment in favor of Defendant, the City of Winston-Salem ("the City"). After careful review, we affirm.

I. Background

In the summer of 2019, Plaintiffs applied for a $100,000 loan via the City's small business loan program. Funded by the federal government, the City's small business loan program is intended "to address the problem of urban decline within the City by focusing on revitalization, development, and/or redevelopment" of Neighborhood Revitalization Strategy Areas, as defined by the United States Department of Housing and Urban Development ("HUD").

In August 2019, Flomeh-Mawutor allegedly received verbal confirmation from Steven Harrison, a small business development specialist for the City, that Plaintiffs' loan request had been approved and that a written letter of approval would be sent the following week. Plaintiffs allege that "Harrison was . . . in routine communication" with Plaintiffs over the ensuing months and repeatedly promised that the loan would close soon.

On 17 February 2020, Harrison sent Plaintiffs a letter ("the Letter") stating that the City had "conditionally approved" Plaintiffs' loan, providing the preliminary terms for the loan, and requiring that the loan be closed within 90 days. The loan eventually closed on 2 July 2020, when Plaintiffs signed, *inter alia*, a loan agreement with the City. On 14 August 2020, the City disbursed the loan proceeds to Plaintiffs. However, Plaintiffs claim to have lost significant business opportunities and goodwill as a result of the delay in their receipt of the funds.

Accordingly, on 9 August 2022, Plaintiffs filed a complaint against the City, advancing claims for: (1) breach of contract, (2) negligent misrepresentation, and (3) negligent hiring and retention. On 17 October 2022, the City filed its answer and counterclaim, in which the City raised the affirmative defense of governmental immunity and advanced counterclaims for breach of contract and unjust enrichment.[1] On 21 December 2022, Plaintiffs filed their reply to the City's counterclaims.

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1. We decline to address the factual basis underlying the City's counterclaims, which remain pending before the trial court.

On 5 May 2023, the City filed a motion for summary judgment on Plaintiffs' claims. The City principally relied upon its assertion that it was "entitled to governmental immunity and/or sovereign immunity as to all claims brought by Plaintiffs[.]" Both sides filed affidavits in support of their competing positions on this issue.

On 15 May 2023, the City's motion came on for hearing in Forsyth County Superior Court. On 1 June 2023, the trial court entered an order granting the City's motion and dismissing Plaintiffs' claims; it also certified the interlocutory order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Plaintiffs timely filed notice of appeal.

II. Grounds for Appellate Review

[1] Generally, this Court only reviews appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2) (2023). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Conversely, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381. Because an interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

However, an interlocutory order that disposes of fewer than all claims or parties in an action may be immediately appealed if "the trial court certifies, pursuant to [N.C. Gen. Stat.] § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal[.]" *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). Rule 54(b) provides, in relevant part:

> When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C. Gen. Stat. § 1A-1, Rule 54(b).

A trial court's "[c]ertification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013). Proper certification of an interlocutory order pursuant to Rule 54(b) requires:

> (1) that the case involve multiple parties or multiple claims; (2) that the challenged order finally resolve at least one claim against at least one party; (3) that the trial court certify that there is no just reason for delaying an appeal of the order; and (4) that the challenged order itself contain this certification.

Asher v. Huneycutt, 284 N.C. App. 583, 587, 876 S.E.2d 660, 665 (2022).

Here, the trial court granted summary judgment in favor of the City on Plaintiffs' claims, and dismissed Plaintiffs' claims accordingly. This ruling left the City's counterclaims pending before the court, rendering interlocutory the summary judgment order from which Plaintiffs appealed. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Nevertheless, the trial court's proper Rule 54(b) certification effectively vests jurisdiction in this Court because the case involves multiple parties with multiple claims; the order on appeal finally resolved all claims against the City; and the trial court certified that "there is no just reason for delay" of an immediate appeal, and included this certification on the face of the order from which Plaintiffs appeal. *See Asher*, 284 N.C. App. at 587, 876 S.E.2d at 665. We therefore conclude that this Court has jurisdiction over this matter and proceed to the merits of Plaintiffs' appeal.

III. Discussion

Plaintiffs argue on appeal that the trial court erred by granting the City's motion for summary judgment and dismissing their claims. For the reasons that follow, we disagree.

A. Standard of Review

Summary judgment is appropriate "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 a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). Our appellate courts "review a trial court's order denying a motion for summary judgment de novo." *Meinck v. City of Gastonia*, 371 N.C. 497, 502, 819 S.E.2d 353, 357 (2018).

B. Tort Claims

[2] As discussed below, contract claims raise unique issues regarding the doctrine of governmental immunity. We therefore begin with Plaintiffs' tort claims, each of which involves allegations of the City's negligent operation of its small business loan program.

"Under the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the negligence of its employees in the exercise of *governmental functions* absent waiver of immunity." *Id.* (cleaned up). "When, however, a county or municipality is engaged in a *proprietary function*, governmental immunity does not apply." *Id.* at 503, 819 S.E.2d at 358 (cleaned up). "As a result, the determination of whether an entity is entitled to governmental immunity turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature." *Id.* (cleaned up).

Our Supreme Court has repeatedly explained that "a governmental function is an activity that is discretionary, political, legislative, or public in nature and performed for the public good [on] behalf of the State rather than for itself, while a proprietary function is one that is commercial or chiefly for the private advantage of the compact community." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 212, 876 S.E.2d 453, 462 (2022) (cleaned up). In recent years, our Supreme Court has "adopted a three-step method of analysis for use in determining whether a municipality's action was governmental or proprietary in nature." *Id.* at 212–13, 876 S.E.2d at 462.

"The first step, or threshold inquiry, in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue." *Id.* at 213, 876 S.E.2d at 462 (cleaned up). Notably, this inquiry considers "not merely whether the legislature has explicitly provided that a specific activity is governmental but rather, *whether, and to what degree*, the legislature has addressed the issue." *Meinck*, 371 N.C. at 511, 819 S.E.2d at 362 (cleaned up). Nevertheless, "[i]f an action has been designated as governmental or proprietary in nature by the legislature, that is the end of the inquiry[.]" *Providence*, 382 N.C. at 213, 876 S.E.2d at 462 (cleaned up).

If the first step does not yield a definitive answer, the reviewing court proceeds to the second step: "determin[ing] whether the activity is one in which only a governmental agency could engage or provide, in which case it is perforce governmental in nature." *Id.* (cleaned up). However, in light of "our changing world" in which "many services once

thought to be the sole purview of the public sector have been privatized in full or in part[,]" our Supreme Court recognized that a third step may be necessary "when the particular service can be performed both privately and publicly[.]" *Id.* (citation omitted). This third step "involves consideration of a number of additional factors, of which no single factor is dispositive." *Id.* (citation omitted). "Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* (citation omitted).

Applying this three-step method to the case at bar, we begin with the "threshold inquiry"—reviewing "whether, and to what degree, the legislature has addressed the issue." *Id.* (cleaned up). The City asserts that "at the time that the City's small business loan program loaned the $100,000 to Plaintiffs, the North Carolina [General Assembly] had specifically indicated, in N.C. Gen. Stat. § 160A-456, that this expenditure of funds for 'community development' was a governmental activity." Before considering this statutory argument, we must first address recent legislative changes.

Plaintiffs argue that the City is "misleading" this Court with a "wholly incorrect" statutory citation, because our General Assembly has repealed § 160A-456. However, our General Assembly did not repeal this grant of authority; rather, it merely reorganized our local planning and development regulation statutes. "Although Chapter 160A, Article 19 ([N.C. Gen. Stat.] §§ 160A-441 *et seq.*) was repealed and substantively recodified in Chapter 160D, Article 12 ([N.C. Gen. Stat.] § 160D-1201 *et seq.*), the provisions upon which [Plaintiffs] rel[y] are virtually unchanged." *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 645 n.17, 881 S.E.2d 32, 57 n.17 (2022). *Compare* N.C. Gen. Stat. § 160A-456 (2019) (authorizing cities "to engage in, to accept federal and State grants and loans for, and to appropriate and expend funds for community development programs and activities"), *with id.* § 160D-1311 (2023) (authorizing "local government[s]" to do the same).

Accordingly, to the extent that any actions by the City pertinent to this appeal took place after the recodification of § 160A-456 as § 160D-1311, Plaintiffs' argument lacks merit because the applicable statutory authorization has been in effect at all times relevant to this appeal. *See An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State*, S.L. 2019-111, § 2.4, 2019 N.C. Sess. Laws 424, 530–31. As the former § 160A-456 was in effect at the

occurrence of the complained-of actions in this case, and recognizing that the statutory language remains substantially unchanged despite its recodification, we will refer to § 160A-456 in our analysis.

The City compares this case to *Meinck*, in which the defendant-municipality "purchased [a] historic and vacant property and entered into [a] lease as part of its efforts at urban redevelopment and downtown revitalization." 371 N.C. at 504, 819 S.E.2d at 359. Our Supreme Court recognized that "several statutes [we]re relevant to" this effort. *Id.* at 505, 819 S.E.2d at 359; *see also id.* at 505–10, 819 S.E.2d at 359–62 (surveying various statutes). The *Meinck* Court concluded that undertaking "an urban redevelopment project . . . in accordance with these statutes and for the purpose of promoting the health, safety, and welfare of the inhabitants of the State of North Carolina is a governmental function." *Id.* at 513, 819 S.E.2d at 364 (cleaned up).

However, the *Meinck* Court further recognized that "the legislature has not deemed all urban redevelopment and downtown revitalization projects governmental functions that are immune from suit." *Id.* "[E]ven when the legislature has designated a general activity to be a governmental function by statute, the question remains whether the specific activity at issue, in this case and under these circumstances, is a governmental function." *Id.* at 513–14, 819 S.E.2d at 364 (cleaned up). Consequently, the Court concluded that "while the applicable statutory provisions [we]re clearly relevant, . . . the legislature ha[d] not directly resolved whether" the defendant-municipality's purchase and lease of the historic building "as part of its downtown revitalization efforts [wa]s governmental or proprietary in nature[.]" *Id.* at 514, 819 S.E.2d at 364 (cleaned up).

We agree with the City that N.C. Gen. Stat. § 160A-456 is "clearly relevant" to our analysis of the instant case. Mindful that this first step, though not determinative, at least weighs in the City's favor, we follow the careful example of our Supreme Court. "Assuming, without deciding, that the initial step . . . is not determinative of the inquiry that we must undertake in this case, we proceed to the next step, at which we are required to determine whether the activity is one in which only a governmental agency could engage." *Providence*, 382 N.C. at 217, 876 S.E.2d at 465 (cleaned up).

Regarding this second step, the City asserts that "[t]he money to operate the City's small business loan program comes from HUD block grants relating to [Neighborhood Revitalization Strategy Areas]. These kinds of grants only go to governmental entities." The City adds that

"loans from the City's small business loan program are only available to businesses [that] are unable to secure full financing from conventional lending sources, such as private banks." Consequently, the City argues that "programs such as the City's small business loan program, financed by the HUD block grants relating to [Neighborhood Revitalization Strategy Areas], [are] something only a governmental entity could administer." "Since the program or activity in this case can only be provided by a governmental agency," the City concludes that it "is necessarily governmental[.]"

On the other hand, Plaintiffs contend that "the receipt of the [HUD] grant may be governmental in nature, but the loaning of those funds to private citizens is proprietary in nature." While Plaintiffs acknowledge that "it is certainly a public purpose for a city to develop its community[,]" they nonetheless claim that "it is not a governmental purpose for a city to loan money to its citizens." In this respect, whether the loan at issue constituted governmental or proprietary activity depends on how narrowly the activity is defined. Cognizant of our Supreme Court's recognition that "many services once thought to be the sole purview of the public sector have been privatized in full or in part[,]" making it "increasingly difficult to identify services that can only be rendered by a governmental entity[,]" *id.* at 213, 876 S.E.2d at 462 (citation omitted), it is prudent to consider the additional factors of the third step.

As stated above, our Supreme Court has articulated a non-exhaustive list of additional factors to consider, "of which no single factor is dispositive." *Id.* (citation omitted). This list includes "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* (citation omitted).

Again, the City persuasively notes that "the small business loan program, being a program funded by HUD block grants relating to [Neighborhood Revitalization Strategy Areas], is a program that only a governmental entity could administer." Further, the City suggests that "since [its] small business loan program only loans to businesses that cannot secure loans from traditional lenders such as banks, and is designed to operate at a loss, it is not a program that would be undertaken by a traditional private business such as a bank." Each of these points is supported in the record by the affidavit of Ken Millett, the Director of the City's Office of Business Inclusion and Advancement.

Plaintiffs disagree with the City's claim that its program is "designed to operate at a loss," and instead contend that "the City stands to make a

profit from this contract." This argument—which appears derived from Plaintiffs' unsupported proposition that "the City retain[ed] the initial $100,000.00 in funds"—is unavailing.

After carefully considering the three steps established by our Supreme Court, we conclude that each step favors a determination that the City's activities in this case constitute governmental, rather than proprietary, activity. This leaves one remaining issue with respect to Plaintiffs' tort claims: whether the City waived its claim of governmental immunity. *See Meinck*, 371 N.C. at 502, 819 S.E.2d at 357.

It is well established that "a city can waive its immunity by purchasing liability insurance." *Reid v. Town of Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000); *see also* N.C. Gen. Stat. § 160A-485(a). However, the City's risk manager averred that "the City had neither purchased nor had in effect any liability insurance to cover such claims as are alleged in Plaintiffs' [c]omplaint." Moreover, "[t]his Court has consistently disallowed claims based on tort against governmental entities when the complaint failed to allege a waiver of immunity." *Paquette v. Cty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). As Plaintiffs' complaint failed to allege that the City waived its governmental immunity, their tort claims cannot survive the City's assertion of this affirmative defense. *Id.*

In sum, as to Plaintiffs' tort claims: the City's activity here constituted a governmental function, thus entitling the City to governmental immunity absent a waiver of that immunity. But Plaintiffs did not allege such a waiver by the City, and moreover, nothing in the record indicates that the City in fact waived its immunity. Therefore, the trial court properly granted summary judgment in the City's favor as to Plaintiffs' tort claims.

C. Breach of Contract

[3] We next address Plaintiffs' breach of contract claim. In contrast to claims sounding in tort, a "local government . . . waives [its governmental] immunity when it enters into a valid contract, to the extent of that contract." *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 899 (2017). "Specifically, [our Supreme] Court has held that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Id.* (cleaned up). "Likewise, a city or county waives immunity when it enters into a valid contract." *Id.* (cleaned up).

Generally, "to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Id.* (citation omitted). However, "[b]ecause in contract actions the doctrine of sovereign immunity will not be a defense, a waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim." *Id.* at 48, 802 S.E.2d at 899 (cleaned up). "Thus, an allegation of a valid contract is an allegation of waiver of governmental immunity." *Id.*

Accordingly, we begin by assessing Plaintiffs' allegation of a valid contract. In their complaint, Plaintiffs did not specifically identify or describe the contract that they assert was breached. Plaintiffs initially suggested that Harrison breached several of his "promise[s] to close the loan" in 2019, but then only allege that "Plaintiffs and [the City] entered into a valid contract by . . . signing and accepting the terms of the small business loan from" the City. However, the City observes that "in their discovery responses, and in the deposition of Plaintiff Livingstone Flomeh-Mawutor, Plaintiffs specifically identified the [Letter] as the contract that they allege was breached."

The City persuasively argues that the Letter does not constitute a valid contract for several reasons. For example, the City explains that "Harrison did not have the actual authority to bind the City to a contract[.]" *See L&S Leasing, Inc. v. City of Winston-Salem*, 122 N.C. App. 619, 622, 471 S.E.2d 118, 120 (1996) (affirming summary judgment in favor of city where employee who signed an alleged contract "was not vested with actual authority to bind the city . . . to a contract" under the Winston-Salem Code). This Court recognized that "the law holds those dealing with a [c]ity to a knowledge of the extent of the power and of any restrictions imposed[.] . . . This is because the scope of such authority is a matter of public record." *Id.* (cleaned up).

Therefore, Plaintiffs are "charged with notice of all limitations upon the authority of [Harrison]" to enter into a contract binding the City. *Id.* Beverly Whitt, the City's senior financial analyst, stated in her affidavit that Harrison "does not have – and has never had – the actual authority to enter into a contract on behalf of the City of Winston-Salem." This argument, one among several raised in the City's appellate brief, definitively supports the trial court's grant of summary judgment on Plaintiffs' contract claim.

Given that Plaintiffs failed to prove that the Letter was a valid contract, the City has not waived its governmental immunity from suit, and

Plaintiffs cannot overcome the City's affirmative defense. *See Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247–48 (2001). Accordingly, the trial court properly granted the City's motion for summary judgment with regard to Plaintiffs' contract claim, as well.

IV. Conclusion

For the foregoing reasons, the trial court's order granting summary judgment in the City's favor is affirmed.

AFFIRMED.

Judges WOOD and THOMPSON concur.

IN THE MATTER OF A.K., L.K.

No. COA23-898

Filed 6 August 2024

1. Appeal and Error—appellate jurisdiction—juvenile neglect case—orders appointing guardian ad litem—denial of request to representation by retained counsel

In a neglect matter, where the trial court denied respondent-mother's request to be represented by her privately retained counsel, respondent-mother could not challenge on appeal the court's appointment of a guardian ad litem (GAL) to represent her, since she did not appeal from either of the two interlocutory orders appointing the GAL, and, at any rate, neither of those orders qualified as appealable orders under the Juvenile Code (N.C.G.S. § 7B-1001). Although the appellate court was inclined to review the GAL appointment issue by invoking Appellate Rule 2, it could not do so because the record lacked a transcript of the hearing where the GAL was appointed and, therefore, there was no way to determine if respondent-mother objected to the appointment at that hearing. However, with respect to respondent-mother's argument regarding the denial of her right to representation by her retained counsel, appellate review was proper because the adjudication order clearly addressed the issue, respondent-mother adequately gave notice of appeal of that order, and a transcript of the adjudication hearing was available.

2. Child Abuse, Dependency, and Neglect—right to representation by retained counsel—statutory mandate—qualifications for retained counsel

The adjudication and disposition orders in a neglect matter were vacated—and the matter was remanded—because the trial court violated the statutory mandate in N.C.G.S. § 7B-602(a) by denying respondent-mother's request to release her court-appointed counsel and to be represented by her privately retained counsel, who had made an appearance in the case, after determining that the retained counsel's representation would be detrimental to respondent-mother because he lacked experience representing parents in abuse, neglect, and dependency proceedings. The court did not address the requirements of section 7B-602(a) when making its determination, and although a lack of specific experience with juvenile cases would have disqualified a court-appointed counsel from representing respondent-mother, the rules for qualifying court-appointed attorneys to represent parents in Chapter 7B cases do not apply to privately retained attorneys, who only require a valid license to practice law to appear in such cases.

Appeal by respondent-appellant-mother from orders entered 8 February 2023 and 14 June 2023 by Judge Angela Foster in District Court, Guilford County. Heard in the Court of Appeals 17 June 2024.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Alexandria G. Hill for the guardian ad litem.

Emily Sutton Dezio for respondent-appellant-mother.

J. Thomas Diepenbrock for respondent-appellee-father.

STROUD, Judge.

Respondent-appellant-mother raises several arguments on appeal from an order adjudicating her children neglected juveniles and the resulting disposition order. As the trial court erred by denying Respondent-appellant-mother's request to release her appointed counsel and to be represented by her retained counsel, we must vacate the Adjudication and Disposition Orders.

I. Factual Background & Procedural History

The Guilford County Department of Health and Human Services ("DHHS") became involved with this family on 1 September 2022 when DHHS received a report that Respondent-appellant-mother ("Mother") threw plates and broke furniture in the presence of her minor children, "Link,"[1] then age 7 years, and "Ady," then age 4 years. According to the petition, the report alleged the Greensboro Police had responded to a "family disturbance" at Mother's home "where there were plates and chairs found broken." The report also alleged that Mother suffered from mental health issues, including delusions, and had been keeping both children confined to their rooms without access to education or medical care, such that Link and Ady displayed poor language and social skills. The petition further alleged that a social worker attempted to visit the home on 1 September 2022, and she had been informed that Mother spoke Albanian, so she contacted the language line in case she needed assistance in communication. No one was at the home on that day. A social worker attempted to visit the next day also, but again no one was at home.

On 7 September 2022, the social worker visited the home again and was able to speak to some of the family members at their residence. Mother refused to come out of her bedroom during the social worker's visit, and when the social worker tried to obtain information about the juveniles, Mother refused and yelled for the social worker to leave. When Mother threatened to call law enforcement, the social worker went outside and called law enforcement herself. While awaiting assistance, the social worker observed Mother step outside the home, "shouting [and] saying that she was fearful of her life" and acting "paranoid" and "confused."

Mother was back inside her bedroom when officers arrived. Eventually the officers were able to persuade Mother to allow them to see and speak to the juveniles, who were largely uncommunicative and only gave the officers their names. The social worker was required to stand at the edge of the home's driveway, too far away to assess the appearance of the children or speak to them. The social worker did talk to the juveniles' maternal grandmother, who initially seemed coherent and expressed concern about the children's wellbeing but later appeared to become confused. The maternal uncle, also a resident in

1. Pseudonyms are used to protect the identities of the juveniles and for ease of reading.

the family home, told the social worker that the grandmother suffered from schizophrenia.

Due to the social worker's inability to investigate the report adequately, she did not believe the juveniles could safely remain in the home. The social worker's supervisor contacted the juveniles' father, who wanted to retrieve Ady and Link, but he was living in Michigan and not immediately able take custody of the children. As a result, on 8 September 2022 the social worker filed juvenile petitions alleging neglect and obtained orders placing both children in the nonsecure custody of DHHS. On the Summons issued to Mother, a hearing date for 9 September 2022 was set and a provisional attorney for Mother, Brett Moore, was appointed by the trial court.

On 9 September, the trial court held a hearing on continued nonsecure custody; the order from this hearing was filed on 10 October 2022, continued nonsecure custody of the children with DHHS, and also included several provisions including some addressing the cultural needs of the children. For example, the continued nonsecure custody order provided that "the children are of the Islamic/Muslim faith and do not eat pork," that "the juveniles shall not attend any religious services other than Islamic services," and that "all visits are to be conducted in English." The "pre-adjudication, adjudication, and disposition" hearing was scheduled for 9 November 2022.

Mother retained Mr. Amro Elsayed, an attorney from Forsyth County, to represent her and on 7 November 2022, he filed a notice of appearance to represent Mother and served the notice by fax and email on opposing counsel and the GAL.

On 9 November 2022, Mother, Father, court-appointed counsel for both, and Mr. Elsayed were present[2] for the scheduled hearing on "pre-adjudication, adjudication, and disposition." The trial court entered an order to continue ("Continuance Order") this hearing, noting it was continued with the consent of all parties. The Continuance Order indicates the trial court had *sua sponte* appointed a GAL for Mother. The Continuance Order does not indicate an evidentiary hearing was held on 9 November 2022. The Continuance Order was filed on 9 December 2022 and states it was "so Ordered this the 9th day of November, 2022; Signed this the 7 day of Dec., 2022." According to this Continuance Order:

2. Father lives in Michigan and participated by way of video conference.

> Preadjudication, Adjudication and Disposition hearing scheduled on this date pursuant to G.S § 7B-803 and based upon a review of the court file and the argument of counsel, the Court finds and concludes as follows:
>
> . . . .
>
> [x] The parties consent to continue this matter.
>
> . . . .
>
> [x] For good cause shown, and justice requires, the matter should be continued for hearing.
>
> . . . .
>
> [x] For extraordinary circumstances (N.C.G.S. § 7B-803) necessary for:
>
> (a) [x] the proper administration of justice; and/or
>
> (b) [x] in the best interests of the juvenile(s).
>
> [x] **Other:** The court finds that based on the allegations in the petition and the mother's inability to understand the proceedings and cultural barriers the mother is in need of a Rule 17 GAL to assist the mother in these proceedings. Lisa Grigley is appointed as Rule 17 GAL for mother [ ]."
>
> **IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:**
>
> 1. This matter is hereby continued and placed on the **December 9, 2022,** Session of District Juvenile Court for Guilford County **(Greensboro Division) for Pre-Adjudication & Adjudication** hearing.

Therefore, according to the Continuance Order, the trial court considered only "the court file and the argument of counsel" in the decision to continue the hearing and to appoint a GAL for Mother. We presume the trial court's order reflects the proceedings on 9 November 2022 correctly, and according to the order, no evidentiary hearing was held but the hearing scheduled for 9 November 2022 was *continued*. The trial court heard arguments from counsel and considered documents in the court file, but arguments of counsel are not evidence. *See Blue v. Bhiro*, 381 N.C. 1, 6, 871 S.E.2d 691, 695 (2022) ("Notably, it is axiomatic that the arguments of counsel are not evidence." (citations and quotation marks omitted)).

On 17 November 2022, the trial court entered an "Order to Appoint, Deny, or Release Guardian ad Litem (for respondent)[;]" ("GAL Order") this order was on a form, AOC-J-206, Rev. 10/13. (Capitalization altered.) The typed date on the GAL Order is 9 November 2022, so it appears this order is a more formal order memorializing the appointment of the GAL as stated in the Continuance Order, although the GAL Order does not indicate that it was based upon any specific hearing date. The GAL Order has no added text other than the case caption, name of Mother, date, name of the appointed GAL, and "cc: Lisa Grigley" and marking the boxes on the form; it states:

> Relevant to the inquiry regarding appointment of a Guardian ad Litem for the above-named respondent, the Court finds as follows:
>
> 1. The Court has jurisdiction over the parties and subject matter.
>
> 2. Based on the evidence presented, the Court makes the following findings of fact:
>
> . . . .
>
> b. [Mother] is incompetent in accordance with G.S. 1A-1, Rule 17, based upon the following:

The blank area of the form for findings of fact is entirely empty. The trial court made a conclusion of law by marking box 2, concluding "[Mother] is incompetent in accordance with G.S. 1A-1, Rule 17."

The pre-adjudication and adjudication hearing was held on 9 December 2022. At the start of the hearing, the trial court addressed Mother's request to replace her appointed counsel with Mr. Elsayed. Mr. Elsayed was present at the hearing and participated in this portion of the hearing. Mr. Elsayed had filed his notice of appearance before the 9 November 2022 court date and had appeared on that date. Counsel and the trial court put on the record the discussions they had at the 9 November court date regarding Mother's request to be represented by Mr. Elsayed. The district court denied Mother's request to be represented by Mr. Elsayed. The adjudication hearing on the neglect petitions immediately followed.

In an order entered 8 February 2023, the court adjudicated Ady and Link to be neglected juveniles. The disposition hearing was originally set for 3 February 2023 but was continued several times and was conducted on 26 and 28 April 2023; the court entered an order on 14 June

2023 that kept the juveniles in DHHS custody with a plan for reunification. Mother gave timely notice of appeal from the Adjudication and Disposition Orders.[3]

II. Analysis

Mother makes several arguments on appeal: (1) the district court erred in appointing a GAL for Mother; (2) the district court erred by refusing to permit Mother to be represented by retained counsel instead of her court-appointed counsel; and (3) several findings of fact in the Adjudication Order are unsupported by the evidence, and there are insufficient findings to support a conclusion of neglect. As we must vacate the Adjudication and Disposition Orders based upon the trial court's denial of Mother's right to be represented by her privately retained counsel instead of her court-appointed counsel, we need not address the merits of the Adjudication or Disposition Order but must vacate both and remand for new hearing.

A. Jurisdiction

[1] Mother filed timely notice of appeal from the Pre-adjudication and Adjudication Order and the Disposition Order and we have jurisdiction to review these orders under North Carolina General Statute Section 7B-1001(3). *See* N.C. Gen. Stat. § 7B-1001(3) (2023) ("Right to appeal. (a) In a juvenile matter under this Subchapter, only the following final orders may be appealed directly to the Court of Appeals: . . . (3) Any initial order of disposition and the adjudication order upon which it is based."). DHHS and Father contend Mother did not appeal from the orders appointing the GAL, noting both the Continuance Order and the GAL Order are not appealable under North Carolina General Statute Section 7B-1001(3). DHHS also contends that "Mother's efforts to cast those orders as invalid because they lack proper findings and conclusions lack merit."

It is correct that interlocutory orders such as a Continuance Order and the GAL Order are not appealable orders under North Carolina General Statute Section 7B-1001(3). *See generally* N.C. Gen. Stat. § 7B-1001 (listing which orders in a juvenile matter are appealable directly to this Court, which does not include a continuance order or order appointing a GAL). However, Rule 2 of our Rules of Appellate Procedure "allows an appellate court to suspend the Rules of Appellate Procedure and reach the merits of

3. Respondent-father participated in the hearing but did not give notice of appeal. Instead, Father has filed an appellee brief, asking this Court to uphold the adjudication and disposition orders.

an unpreserved issue in a case pending before the court." *State v. Ricks*, 378 N.C. 737, 740, 862 S.E.2d 835, 838 (2021) (citations, quotation marks, and brackets omitted). "An appellate court, however, may only invoke Rule 2 in exceptional circumstances when injustice appears manifest to the court or when the case presents significant issues of importance in the public interest." *Id.* (citations, quotation marks, ellipses, and brackets omitted).

Although we would be inclined to invoke Rule 2 to address Mother's argument as to the appointment of her GAL, given the importance of her rights as a parent and the complete absence of findings of fact or evidence to support appointment of a GAL, we are unable to review this issue without a transcript of the 9 November 2022 hearing as we are unable to determine if Mother objected to the appointment of the GAL. But we note Mother's concern regarding the appointment of the GAL is intertwined with her argument regarding the trial court's refusal to allow her to be represented by retained counsel of her choice.

However, the trial court's ruling regarding counsel is clearly addressed in the Adjudication Order which was properly noticed for appeal, and we have the transcript for this hearing. The issues regarding appointment of the GAL and representation by retained counsel are somewhat related. Mr. Elsayed filed his notice of appearance on 7 November 2022, and he first appeared in court at the 9 November 2022 hearing. The GAL Order was not filed until 17 November 2022, also after Mr. Elsayed filed his notice of appearance and appeared in court on 9 November. Thus, before the trial court entered the GAL Order for Mother on 17 November 2022, Mother had retained an attorney to represent her, but the trial court refused to allow Mr. Elsayed to represent her, based in part upon the opinion of Mother's GAL that Mother should be represented by Mr. Moore, her court-appointed attorney, despite the fact Mother had retained Mr. Elsayed before the issue of appointment of a GAL for her had come up. But in summary, because we do not have a transcript of the 9 November 2022 court date, our review will be limited to the trial court's denial of Mother's right to be represented by retained counsel of her choice.

B. Refusal to Permit Retained Counsel to Represent Mother

[2] Mother contends that "[t]he right for a litigant to select her own attorney is protected by N.C.G.S. 7B-602(a). The trial court's requirement that [Mother's] counsel be approved by the Court was error and violated [her] due process rights." Mother argues the denial to be represented by Mr. Elsayed was also a violation of her constitutional rights.

The GAL for the children contends Mother is not entitled to review of this issue because

> the Pre-adjudication Order reflects a notice of appearance was filed by Amaro Eslayed. (sic) There the court inquired into the substitution of counsel for . . . Mother. . . . Mother, however, has not appealed the Pre-Adjudication Order. And the parties have not been provided a transcript of that portion of the proceedings.

DHHS also contends that "the trial court addressed Mr. Elsayed's qualifications and denied her request to substitute him for her court-appointed counsel . . . in the 9 November 2022 hearing" for which we do not have a transcript. But the record page cited by GAL as the "Pre-adjudication Order" is actually the "Pre-Adjudication *and* Adjudication Order;" there was no separate pre-adjudication order entered. Mother did properly file notice of appeal from the Adjudication Order. In addition, the record shows Mr. Elsayed did appear at the 9 November 2022 hearing, and at the beginning of the 9 December 2022 hearing Mr. Elsayed renewed his request to represent Mother, and the trial court and counsel placed on the record a description of the 9 November discussion regarding Mr. Elsayed's appearance as well as the trial court's rationale for denying his request. We have a transcript for this portion of the proceedings and the trial court made findings of fact on Mother's request for Mr. Elsayed to represent her.

We have been unable to find any prior cases addressing a trial court's refusal to allow a respondent-parent to be represented by retained counsel where the retained counsel has filed a notice of appearance and appeared in court for a hearing. But in *In re K.M.W.*, addressing a parent's right to counsel based on statutory criteria, our Supreme Court has stated the standard of review is *de novo*:

> A trial court's determination concerning whether a parent has waived his or her right to counsel is a conclusion of law that must be made in light of the statutorily prescribed criteria, so we review the question of whether the trial court erroneously determined that a parent waived or forfeited his or her statutory right to counsel in a termination of parental rights proceeding using a *de novo* standard of review.

376 N.C. 195, 209-10, 851 S.E.2d 849, 860 (2020).

As noted, Mother also contends the trial court's refusal to allow her to be represented by retained counsel violated her constitutional due

process rights. The standard of review "where constitutional rights are implicated" is also *de novo*:

> The general rule that *de novo* review is appropriate in cases where constitutional rights are implicated, as they are here, reinforces our determination that the de novo standard of review applies here. *See Piedmont Triad Regional Water Authority v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated."). Under the *de novo* standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

Hall v. Wilmington Health, PLLC, 282 N.C. App. 463, 475, 872 S.E.2d 347, 359 (2022) (citations and quotation marks omitted).

The GAL argues we review this issue for abuse of discretion. The GAL cites several unpublished cases to support this claim, without compliance with North Carolina Rule of Appellate Procedure 30(e)(3). *See* N.C. R. App. P. 30(e)(3) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. . . . When citing an unpublished opinion, a party must indicate the opinion[']s unpublished status."). In addition, all of the cases cited, published or unpublished, address a respondent's (or criminal defendant's) request to substitute new appointed counsel for the appointed counsel already representing the respondent. We do review the trial court's ruling on a request for substitution of appointed counsel for abuse of discretion, but that is not the issue in this case. *See State v. Glenn*, 221 N.C. App. 143, 148, 726 S.E.2d 185, 189 (2012) ("Absent a showing of a Sixth Amendment violation, we review the denial of a motion to appoint substitute counsel under an abuse of discretion." (citations, quotation marks, and brackets omitted)). The GAL also relies on cases addressing a defendant's motion to continue a case to have time to retain a private attorney, where the defendant was already represented by appointed counsel. Again, we review that type of ruling for abuse of discretion, *see State v. Holloman*, 231 N.C. App. 426, 429-30, 751 S.E.2d 638, 641 (2013) (reviewing a defendant's motion to substitute counsel from an appointed attorney to a retained one under an abuse of discretion standard), but Mother did not move to continue the hearing. Mr. Elsayed was present for court on 9 November 2022 and again on 9 December 2022 and neither he nor Mother requested continuance of the 9 December 2022 hearing.

Here, Mother's argument is primarily based upon North Carolina General Statute Section 7B-602(a) as she contends the trial court failed to comply with a statutory mandate and thus deprived her of her right to be represented by retained counsel. We therefore review this issue *de novo*. *See* N.C. Gen. Stat. § 7B-602(a)(3) (2023); *see also In re N.L.M.*, 283 N.C. App. 356, 377, 873 S.E.2d 640, 652 (2022) ("This Court reviews de novo whether a trial court correctly adhered to a statutory mandate and, if there was error, whether such error was harmless." (citation omitted)).

It is well-established that a parent in an adjudication or termination of parental rights case is entitled to counsel of their choice. *See* N.C. Gen. Stat. § 7B-602(a)(3). North Carolina General Statute Section 7B-602 sets out the right to counsel, including the right to be represented by retained counsel:

> (a) In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right. When a petition is filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall appoint provisional counsel for each parent named in the petition in accordance with rules adopted by the Office of Indigent Defense Services, shall indicate the appointment on the juvenile summons or attached notice, and shall provide a copy of the petition and summons or notice to the attorney. At the first hearing, the court shall dismiss the provisional counsel if the respondent parent:
>
> (1) Does not appear at the hearing;
>
> (2) Does not qualify for court-appointed counsel;
>
> (3) Has retained counsel; or
>
> (4) Waives the right to counsel.
>
> The court shall confirm the appointment of counsel if subdivisions (1) through (4) of this subsection are not applicable to the respondent parent.

N.C. Gen. Stat. § 7B-602(a). "The use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error." *In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005).

After the filing of the petitions for Link and Ady, Mother was assigned provisional appointed counsel, Mr. Moore. Before the first scheduled hearing after the initial nonsecure custody hearings, on 7 November 2022, Attorney Amro Elsayed filed a notice of appearance for Mother. Mr. Elsayed also appeared at the 9 November 2022 court date. At the 9 December hearing, Mother's court-appointed counsel "put on the record how we got here with three attorneys." Mr. Moore said that "upon filing of the petition" on 8 September, he was "appointed to be provisional counsel for the mother, went through a nonsecure custody hearing, and at the subsequent nonsecure custody hearing, an Attorney Elsayed had made it known to myself that he would intend to enter the case" and then he filed a notice of appearance and appeared in court at the next nonsecure custody hearing.

The trial court made several findings of fact in the Adjudication Order regarding Mother's request to substitute counsel. These findings of fact are not challenged and are binding on appeal. *See In re J.S.*, 374 N.C. 811, 814, 845 S.E.2d 66, 71 (2020) ("Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal." (citation and quotation marks omitted)).

> 7. After inquiry of the Court, the court makes the following findings regarding Attorney Elsayed's appearance in this matter:
>
> a. The Court made an inquiry of counsel's experience representing parents in Abuse Neglect and Dependency (A/N/D) cases.
>
> b. Upon inquiry, the Court found Mr. Elsayed did not have any requisite experience or basic knowledge of Chapter 7B of the North Carolina General Statu[t]es to represent parents in A/N/D cases.
>
> c. The Court has concerns if Attorney Elsayed were to represent [Mother], [Mother] would suffer irreparable harm to her parental rights and would be in danger of having her parental rights terminated which is not the intent of the Department at this time.
>
> d. The Department has indicated that the current plan for the family is reunification.
>
> e. That given Attorney Elsayed's inexperience representing clients in A/N/D cases and the Department's intent

> to reunify the family, Mr. Elsayed's representation of [M]other would most likely not be the desired outcome.
>
> f. That Court finds despite the fact that Attorney Elsayed is retained, that his representation would be detrimental to [M]other in this case due to his inexperience representing parents in A/N/D cases.
>
> g. That Rule 17-GAL attorney, Lisa Grigley requested Attorney Brett Moore remain counsel for [M]other.
>
> h. Therefore, the court finds Attorney Elsayed does not require the requisite experience or competence to represent parents in A/N/D cases.
>
> i. The court finds that it is in the best interest of [M]other that Attorney Brett Moore remains the court appointed attorney for [M]other and Attorney Amaro (sic) Elsayed is released from this case.

Thus the trial court determined Mr. Elsayed was not *qualified* to represent Mother and did not allow Mother to be represented by her retained counsel. The trial court explained that after the 9 November 2022 hearing when Mr. Elsayed first appeared to represent Mother, it had determined he was "not qualified" to represent Mother:

> This Court made an inquiry as to the experience to work in this courtroom because not anyone is allowed to work in here because of its specialized nature. It is extremely different from any courtroom in this building. Upon inquiry, the Court discovered that counsel had not had any experience in working a DSS case, which is what this courtroom is, and the Court became quite concerned that the possibility of moving to TPR within a year, which is the termination of parental rights would get there if we did not have an experienced attorney representing the mother in this case.
>
> Therefore, the Court made a decision that Mr. Moore would continue representing the mother in reference to this case and the attorney would not be appointed to represent the mother in this case, that even though the attorney stated that he is retained, he lacks the experience to work this case. And the Court felt that and continues to feel that that could be extremely, not could be, would be detrimental to the mother in this case, and we could end

> up and most likely would end up terminating her parental rights, which is not the intent of the Department of Health and Services at this time.
>
> The Department has made it known that reunification, the children's reunification with the mother is of utmost importance, and that is what they want to do. The Court found that given that the attorney has no experience in representing DSS clients that that most likely would not be the outcome and, therefore, the Court made the decision that he is unqualified to work in this courtroom without meeting the requirements of the local rules in reference to working in DSS court.

Mr. Elsayed specifically argued to the trial court that "I'm not appointed, I'm retained, and there is no standards to qualify me."

Mr. Elsayed was correct. While the trial court did not state a specific "local rule" it was relying on, the 18th Judicial District has "Local Rules Governing Abuse, Neglect, and Dependency and Termination of Parental Rights Cases." *See generally* Administrative Order Amending Local Rules Governing Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings, Guilford Cnty. (Apr. 1, 2021). Rule 4, "Appointment of Counsel, Guardian ad Litem for Parent, and Conflict Guardian Ad Litem – Attorney Advocate Lists[,]" contains over three pages of rules governing the requirements, experience, and training for an attorney to be on the "list" of court-appointed attorneys for indigent parents in that district. *See id.*, Rule 4. But these requirements apply only to qualification for an attorney to be on the court-appointed list; these rules do not apply to privately retained counsel. *See id.* Rule 4.01 states "[t]he clerk of court shall maintain the list of attorneys *eligible to be appointed* to represent parents[.]" *See id.*, Rule 4.01 (emphasis added). Further, Rule 6 is titled "Court Appointed Attorney – Continuation of Representation" and is again clearly applicable to court-appointed attorneys, not privately retained ones. *See id.*, Rule 6. Mr. Elsayed was not requesting to be appointed by the trial court to represent Mother; he was retained by her. The only required credential or qualification for an attorney to represent a respondent-parent is a valid license to practice law in North Carolina, and there is no dispute that Mr. Elsayed is an attorney licensed to practice in North Carolina.

A large part of DHHS' argument is that the trial court did not err by refusing to allow Mr. Elsayed to represent Mother because trial courts have "the inherent authority or power to regulate the attorneys appearing before them." However, the two cases cited by DHHS, *Rosenthal*

Furs, Inc. v. Fine, 282 N.C. App. 530, 540, 871 S.E.2d 153, 160 (2022), and *Sick v. Transylvania Cnty. Hosp.*, 364 N.C. 172, 182, 695 S.E.2d 429, 426 (2010), involve attorneys where they were "engaged in unethical or potentially unethical conduct[.]" But there is no argument or indication that Mr. Elsayed acted unethically in any manner. Our record indicates Mr. Elsayed acted appropriately in his court appearances in this case and nothing indicates he would be acting unethically by representing Mother, even assuming he lacked the specific experience in juvenile cases as would be required by the Local Rules for an attorney on a court-appointed list.

DHHS also contends it was possible Mr. Elsayed's representation of Mother could violate the North Carolina Rules of Professional Conduct, Rule 1.1, as his lack of experience could render him incompetent to handle such a case. *See* N.C. R. Prof'l Conduct 1.1 ("Competence"). However, merely asserting an attorney is inexperienced, although licensed to practice law in this State, and may not provide competent legal services is not a sufficient basis to deny a motion to substitute counsel. Every attorney has a first case in any specific area of law. If the trial court had unrestrained inherent authority to deny a party's request for representation by a privately *retained* attorney based only on an attorney's lack of a certain amount of experience in a particular field of law, a trial court could essentially require all attorneys appearing in that court to have some specific level of experience to appear as counsel for a client who has privately retained them; inherent authority simply does not go this far. We do not disagree with the trial court's statements regarding the specialized nature of abuse, neglect, and dependency proceedings, but the standards for court-appointed attorneys are simply not applicable to privately retained attorneys. Thus, the cases cited by DHHS involving the trial court's inherent authority are inapposite to this case.

We also note that the trial court found that "the Rule 17-GAL attorney, Lisa Grigley requested Attorney Brett Moore remain counsel for [M]other." We have serious concerns regarding the appointment of a GAL for Mother, without prior notice or an opportunity to be heard, but as noted, due to the lack of a transcript for 9 November 2022 we are unable to review the GAL Order. But as relevant to the issue of Mother's choice of counsel, Mother's Rule 17 GAL also objected to allowing Mr. Elsayed to represent Mother. Even if we assume that the appointment of the GAL was proper, the GAL based her objection to Mr. Elsayed's representation on the same basis as the trial court – Mr. Elsayed's lack of experience in A/N/D cases based upon his lack of qualification under the Local Rules to serve as court-appointed counsel. Further, the trial court found that Mother was unable to choose her counsel because she was

incompetent; the trial court found Mr. Elsayed did not have the requisite training and experience to represent Mother in a juvenile case under the local rules. Since the trial court made no findings at all in the GAL Order, we are unable to ascertain exactly why Mother needed a GAL or if her incapacity would have interfered with her ability to select counsel.[4] In addition, since Mother had not yet had a full evaluation of her mental health and did not testify, we have no information in the record upon which to assess why the trial court determined Mother needed a GAL.

The trial court did not address the requirements of North Carolina General Statute Section 7B-602, which provides that "[a]t the first hearing, the court *shall* dismiss the provisional counsel if the respondent parent . . . [h]as retained counsel." N.C. Gen. Stat. § 7B-602(a)(3) (emphasis added). Whether the trial court took this statute in account or not, the trial court's stated reason for denying Mr. Elsayed's request to represent Mother was his failure to comply with the requirement of the Local Rules applicable to court-appointed attorneys for abuse, neglect, or dependency cases. Whether the trial court's denial of Mother's motion to substitute counsel was based on a misapprehension of law that Mr. Elsayed must have a certain level of experience in A/N/D court before being allowed to represent Mother or whether the trial court simply failed to comply with the statutory mandate of North Carolina General Statute Section 7B-602, the trial court erred by not allowing Mother to be represented by her retained counsel. For this reason, we must vacate the Pre-adjudication and Adjudication Order and Disposition Order.

III. Conclusion

As the trial court erred by failing to comply with North Carolina General Statute Section 7B-602(a) and to allow Mother to be represented by her retained counsel, we vacate the Pre-adjudication and Adjudication Order and the Disposition Order and remand for further proceedings. On remand, upon the request of any party, the trial court shall hold a hearing to consider whether Mother is still in need of a Rule

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4. According to the Continuance Order, the trial court determined Mother needed a GAL based upon her "inability to understand the proceedings and cultural barriers." The record also shows Mother is Albanian and Muslim, and English is not her first language. The trial court did not note any type of incompetency as defined by North Carolina General Statute Section 35A-1101(7). *See generally In re M.S.E.*, 378 N.C. 40, 44, 859 S.E.2d 196, 203 (2021) ("An 'incompetent adult' is defined as one 'who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.' N.C.G.S. § 35A-1101(7) (2019).").

17 GAL and if the trial court determines Mother is still in need of a Rule 17 GAL, the trial court shall enter an order with findings of fact to support its conclusion of law.

VACATED.

Judges FLOOD and STADING concur.

BREAL MADISON, III, PLAINTIFF
v.
ABIGAIL GONZALEZ-MADISON, DEFENDANT

No. COA23-1032

Filed 6 August 2024

1. Child Custody and Support—permanent custody order—best interest determination—no abuse of discretion

In a child custody case between two active-duty members of the military, there was no abuse of discretion in the district court's award of primary physical custody to the mother where, although the findings of fact would have supported either the mother or the father receiving primary physical custody, it was for the court to consider and weigh its findings of fact to determine what award of custody would be in the juvenile's best interest.

2. Child Custody and Support—permanent custody order—self-executing modification provisions—speculative—abuse of discretion

In a child custody case, the district court's alternative visitation schedule, set to self-execute in the event that one or both of the parents—each an active-duty member of the United States Army—received a permanent change of station (PCS), constituted an abuse of discretion where the potential change in circumstances (that is, a physical relocation of one or both parents) was too speculative. Accordingly, that portion of the order was vacated, with the parents maintaining the right to seek a custody modification when either received a PCS (or if any other change of circumstances arose).

Appeal by plaintiff from order entered 16 June 2023 by Judge Stephen C. Stokes in Cumberland County District Court. Heard in the Court of Appeals 12 June 2024.

Tharrington Smith, LLP, by Jaye Meyer and Sarah Izzell-Cutler, for plaintiff-appellant.

The Law Office of Michael A. Simmons, PLLC, by Michael A. Simmons, for defendant-appellee.

DILLON, Chief Judge.

In this appeal, Plaintiff Breal Madison, III, ("Father") appeals the trial court's order granting primary physical care, custody, and control to Defendant Abigail Gonzalez-Madison ("Mother").

I. Background

Father and Mother (collectively, "Parents") are both active-duty members of the United States Army. In 2019, they became the biological parents of minor child Liam while both were stationed at Ft. Bragg.[1] Parents separated following Liam's birth and consented to a temporary custody order, granting Parents joint legal and physical custody.

In 2022, both Parents were re-stationed in Hawaii. Father moved to Hawaii in February. Three months later, in May, Mother and Liam moved to Hawaii.

In February 2023, while in Hawaii, the trial court in Cumberland County held a Webex hearing to determine permanent custody. In June 2023, the trial court entered an order granting Parents joint legal custody of Liam, but awarded Mother primary physical care, custody, and control of Liam. Father appeals.

II. Analysis

"It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998). "This discretion is based upon the trial court's opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (cleaned up). Accordingly, we review a trial court's custody determination for an abuse of discretion, meaning that a trial court's decision must "be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not

1. Pseudonym used for protection of the minor child's identity.

have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Father makes three arguments on appeal, which we address in turn.

A. Best Interest Determination

[1] First, Father contests the trial court's determination that it is in Liam's best interest for Mother to have primary physical custody.

> Before awarding primary physical custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party will be in the best interest of the child. Such a conclusion must be supported by findings of fact. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.

Hall v. Hall, 188 N.C. App. 527, 532, 655 S.E.2d 901, 905 (2008) (internal marks omitted). In child custody cases, the trial court has "broad discretion as to which facts to consider and how much weight to accord them." *In re A.K.*, 360 N.C. 449, 456, 628 S.E.2d 753, 757 (2006).

Father points to several findings of fact which he believes show the "inevitable conclusion" that awarding him primary physical custody "would better promote the minor child's best interest." For instance, the trial court made several findings regarding Parents' "notable communication issues" and appeared to suggest that Mother was at fault for those issues. However, the court also found that "[n]otwithstanding the communications, Father and Mother have assisted each other in the care and custody of the minor child." The trial court also made findings regarding the interactions between Father and Liam. In particular, the trial court found that "Father retains a consistent daily routine of dropping off and picking up the minor child from daycare. Father enjoys date nights and extracurricular activities with the minor child to include reading, swimming, [and] going to the park." The trial court did not make comparable findings regarding Mother's routine and activities with Liam. And we note that Father showed a great involvement in Liam's speech therapy, with Father attending seventeen sessions and Mother attending only three sessions.

Accordingly, some of the trial court's findings of fact may suggest that it would be in the child's best interest for Father to have primary physical custody. Yet, other findings suggest that it would be in the child's best interest for Mother to have primary physical custody, such as the

findings tending to show that Mother has greater financial resources to support Liam, that Mother has previously taken on the responsibility of physically caring for Liam full-time when her move to Hawaii was delayed, and that Mother has a live-in boyfriend who helps take care of Liam.

Here, the trial court had discretion to determine how much weight to give each finding of fact, and its best interest conclusion is supported by those findings of fact. Based on the record before us, therefore, we cannot say that the trial court abused its discretion in awarding primary physical care, custody, and control to Mother.

B. "Self-Executing" Modification Provisions

[2] Father contests provisions within the custody order which will not take effect, if at all, until Parents, or either of them, are relocated by the Army from Hawaii.

At the time of the February 2023 custody hearing, Parents had several years left on their current military orders in Hawaii. The trial court found that each parent was expected to have a permanent change of station ("PCS") once his/her current assignment ended in 2025. Mother plans to remain in the Army but hopes to relocate closer to her family in Texas. Father may or may not have a PCS to the same location as Mother. The trial court ordered an alternative visitation schedule to commence, if at all, following either parent's PCS. This alternative schedule includes provisions that depend on Parents' physical proximity to each other (*e.g.*, whether Parents are living farther than 100 miles apart from each other).

We agree with Father that the trial court abused its discretion by including these "self-executing" modification provisions for the reasoning below.

A "self-executing" modification provision within a custody order is one which modifies the custody arrangement upon the occurrence of an event which may occur in the future. Several states have held that self-executing modification orders are generally illegal, at least one state has held them to be legal, and their legality is unclear in other states. *See generally* Helen R. Davis, *Self-Executing Modifications of Custody Orders: Are They Legal?*, 24 J. Am. Acad. Matrim. Laws. 53, 56 (2021).

Our Supreme Court has held that "the trial court is vested with broad discretion in cases involving child custody," *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 902, and that "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [its order] was so arbitrary

that it could not have been the result of a reasoned decision," *White*, 312 N.C. at 777, 324 S.E.2d at 833.

That Court has also stated that "[a] judgment awarding custody is based upon the conditions found to exist *at the time it is entered* [and that the] judgment is subject to change as is necessary to make it *conform to changed conditions when they occur*." *Stanback v. Stanback*, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965) (emphasis added).

Our Court has held that "evidence of speculation or conjecture that a detrimental change may take place sometime in the future will not support a change in custody." *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000) (internal citations and quotations omitted).[2]

However, in 2015, our Court held that it was not an abuse of discretion by the trial court to include a provision in a custody order (entered when the child was under two years of age) which changed the father's visitation years in the future when the child entered kindergarten. *See Burger v. Smith*, 243 N.C. App. 233, 246–48, 776 S.E.2d 886, 895–96 (2015). We concluded that, based on the facts in that case, "rather than being arbitrary, the visitation schedule was an appropriate response to the parties' unusual living situation." *Id.* at 248, 776 S.E.2d at 895–96. We noted the father's argument that the future visitation schedule "may prove incompatible with" whatever the future might hold, such as the "extracurricular activities in which the child might participate" in high school. *Id.* at 248, 776 S.E.2d at 896. Addressing the father's concern, we reminded that if the future held something unexpected, the father could seek a modification based on the unexpected changed conditions. *Id.*

In the present case, though, the change of circumstances which may occur based on a PCS are much more speculative than that in *Burger*. Here, the trial court made a call regarding visitation in the future without knowing when either parent may be transferred from Hawaii or where either may be transferred or how far apart Mother and Father would be living from each other. A PCS could create either a slight change or a drastic change which could uproot Liam to *any* United States Army base. We, therefore, conclude the trial court abused its discretion by incorporating the "self-executing" provisions in its order, provisions which do not take effect until after either parent receives a PCS transferring him/her from Hawaii, where the time and place of such transfer is unknown.

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2. We note that both detrimental and beneficial changes in circumstances may warrant a change in custody. *See Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900 (disapproving of a line of Court of Appeals cases that "require[d] a showing of adversity to the child as a result of changed circumstances to justify a change of custody.").

When a PCS order is received by either parent, the trial court may *at that time* consider the nature and particulars of the changed conditions occasioned by the PCS and determine *then* what custody arrangement would be in the best interest of the child. (Of course, either parent may seek a modification based on other changed circumstances as they may arise.)

C. Decretal Paragraphs

Father contests several provisions in the decretal order. Specifically, he argues that the trial court failed to make findings of fact or conclusions of law to support its judgment. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980) ("Evidence must support findings; findings must support conclusions; conclusions must support the judgment.").

As we have concluded that the trial court erred in decreeing any change to take effect, if at all, post-PCS, we need not again address the decretal paragraphs addressing post-PCS custody/visitation. As to the other decretal provisions, we conclude the trial court did not abuse its discretion and affirm the order as to those provisions.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges GORE and THOMPSON concur.

MR ENTERTAINMENT, LLC D/B/A OFF THE WAGON DUELING PIANO BAR, JESS T. MILLS, IV AND BENJAMIN O. REESE, PETITIONERS
v.
THE CITY OF ASHEVILLE AND THE CITY OF ASHEVILLE BOARD OF ADJUSTMENT, RESPONDENTS

No. COA23-1109

Filed 6 August 2024

Zoning—violation of sign ordinance—single location at specific time—opportunity to cure—failure to re-inspect

The owners of a business (petitioners) timely cured their violation of a city ordinance prohibiting signs or advertisements on vehicles "parked or located for the primary purpose of displaying said sign" by notifying the code enforcement official that they had promptly moved their vehicle on the same day they received notice of the violation. The plain language of the ordinance, the evidence

of the violation as shown by three photos attached to the notice, and legal principles requiring interpretation of ordinances in favor of the free use of property all supported a determination that the violation occurred at a single location at a specific time, and was not an ongoing violation as the city later contended (based on petitioners continuing to drive their truck with the sign on it around the city for more than two years after the initial notice). The city had the burden of showing the existence of a violation, and its failure to re-inspect the site of the violation after being notified of abatement could not defeat petitioners' timely notice of cure. Therefore, the city's action to enforce the violation was rendered moot, and the matter was remanded to the trial court for dismissal.

Appeal by respondents from judgment entered 3 August 2023 by Judge Jacquline D. Grant in Buncombe County Superior Court. Heard in the Court of Appeals 11 June 2024.

Ferikes Bleynat & Cannon, PLLC, by Edward L. Bleynat, Jr., for the petitioner-appellants.

City Attorney's Office, by Sr. Assistant City Attorney Eric P. Edgerton, for the defendant-appellees.

TYSON, Judge.

MR Entertainment, LLC d/b/a Off the Wagon Dueling Piano Bar, Jess T. Mills, IV, and Benjamin O. Reese ("Petitioners") appeal from an order, which affirmed a decision of the City of Asheville Board of Adjustment ("the Board") and denied their motions. This case was consolidated by order with *City of Asheville v. MR Entertainment*, COA 23-1110. We vacate and remand.

I. Background

Shannon Morgan, a City Code Enforcement Officer, issued a Sign Violation Notice to Petitioners on 17 September 2014. Petitioners were served with the Notice of Violation on both the 23 and 24 of September 2014. The notice asserted Petitioners were in violation of City of Asheville Code of Ordinances Section 7-13-3(3). Section 7-13-3(3) reads, "Sign or advertisements placed on vehicles or trailers that are *parked or located for the primary purpose of displaying said sign* are prohibited." The City of Asheville UDO § 7-13-3(3) (emphasis supplied). Three photos were attached to the notice, taken less than an hour apart of Petitioners'

vehicle, with sign in the bed, parked behind their business. Under the notice, Petitioners had either twenty-four hours to correct and abate the violation *or* thirty days to appeal. Failure to comply results in "a civil penalty of one hundred dollars . . . per day for the number of days the violation[] continues."

Under the notice, the violation may only be considered corrected if Petitioners "notif[y] the Code Enforcement Official . . . and the site is inspected and determined to be in compliance by the Code Enforcement staff." On 25 September 2014, Petitioner Reese engaged in an email exchange with Officer Morgan. Petitioner Reese requested further information about appealing the notice, but additionally indicated any violation concerning Petitioners' vehicle parked behind their business had been corrected and abated the same day as the vehicle had only been parked at the site that afternoon. Petitioners did not appeal the notice within thirty days. No follow-up inspection was performed by Code Enforcement staff. The Board found: "no inspection was ever performed, and no determination was issued by the City that the [Petitioners] had corrected the conditions giving rise to the" notice.

Two and a half years later, on 17 January 2017, Harry Gillis, another City Code Enforcement Officer, issued a citation purportedly based on the original notice, alleging the continuous violation of Section 7-13-3(3) since 17 September 2014. Following the citation, Petitioner Reese sent multiple letters to Officer Gillis informing him the truck had been promptly moved back in 2014, and asserted Petitioners were not in violation of Section 7-13-3(3) for a variety of reasons.

A letter from Robin Curry, then City Attorney, purportedly clarified the situation by alleging the "continuous violation" was due to Petitioners driving the truck containing the sign "throughout Asheville for the purpose of displaying the [s]ign" rather than for the singular parking incident, as documented in the 17 September 2014 notice.

On 22 August 2018, the City of Asheville ("the City") filed a complaint against Petitioners seeking injunctive relief to enjoin further use of the truck with the sign and the collection of civil penalties purportedly amounting to $57,500 from September 2014, with fines continuing to accrue at one-hundred dollars per day ("the Enforcement Action").

On 12 April 2019, Petitioners initiated an appeal, separate from the Enforcement Action, of the 2014 notice to the City of Asheville Board of Adjustment. The Board dismissed Petitioners' appeal on 28 October 2019 for lack of subject matter jurisdiction, citing Petitioners' failure to appeal the 2014 notice within the prescribed thirty-day period from

issuance. Petitioners appealed the Board's dismissal through a Writ of *Certiorari* to the Buncombe County Superior Court, wherein it was joined with the City's Enforcement Action.

Petitioners filed a Motion to Dismiss for lack of subject matter jurisdiction and a Motion for Summary Judgment in the Enforcement Action. The City filed a Rule 12(c) Motion for Judgment on the Pleadings and Motion to Strike the Affidavit of Benjamin Reese. The trial court granted both of the City's motions and denied both of Petitioners' motions. Concerning Petitioners' appeal of the Notice of the Violation, the trial court affirmed the Board's dismissal for lack of subject matter jurisdiction. Petitioner appealed the Enforcement Action and the dismissal separately.

II. Jurisdiction

Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

Petitioners argue the trial court erred in affirming the Board's dismissal for subject matter jurisdiction as: (1) the trial court misapplied the *de novo* standard of review; and, (2) enforcement of the notice as-applied would violate Petitioners' due process rights.

A. Standard of Review

When reviewing a superior court's order regarding a zoning board of adjustment's decision, this Court is tasked with "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Harding v. Bd. of Adjustment of Davie Cnty.*, 170 N.C. App. 392, 395, 612 S.E.2d 431, 434 (2005)) (citations omitted). When reviewing whether a superior court's order regarding "a zoning board of adjustment's decision [was proper], [t]he scope of our review is the same as that of the trial court." *Id.*

The proper standard of review "depends upon the particular issues presented on appeal." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002). Where the petitioner has alleged "the [b]oard's decision was based on an error of law, *de novo* review is proper." *Id.* "Under *de novo* review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011).

B. Analysis

The City issued the 2014 Notice of Violation pursuant to the City of Asheville UDO § 7-18-3, which specifies "[t]he notice of violation shall include an opportunity to cure the violation within a prescribed period of time." The 2014 Notice of Violation facially complied with this requirement, providing Petitioners the opportunity to *either* cure the violation "within twenty-four (24) hours *or* file an appeal to the board of adjustment within thirty (30) days." (emphasis supplied). However, the notice continues, stating the violation can only be considered cured when Petitioners had notified the Code Enforcement Official and a subsequent inspection had determined the site to be in compliance.

"[W]ords should be given their natural and ordinary meaning[.]" *Grassy Creek Neighborhood All. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citation omitted). "In its elementary sense the word 'or' . . . is a disjunctive particle indicating that the various members of the sentence are to be taken separately . . . ." *Id.* Concerning the 2014 notice, the applicability of the two clauses "is not limited to cases falling within both clauses, but will apply to cases falling within either of them." *Id.* at 296, 542 S.E.2d at 300.

Petitioners do not allege the notice was appealed within the requisite thirty days prescribed in the notice, as required by N.C. Gen. Stat. § 160D-405(d) (2023). However, the ordinance specifically allows Petitioners "the opportunity" to cure and abate the violation within the twenty-four-hour period specified in the notice and to render the 2014 notice moot. The City of Asheville UDO § 7-18-3.

North Carolina courts decline to answer moot questions as an exercise of judicial restraint." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). Under the traditional analysis, "[a] case is considered moot when 'a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.' Typically, '[c]ourts will not entertain such cases because it is not the responsibility of courts to decide abstract propositions of law.' " *Citizens Addressing Reassignment & Educ., Inc. v. Wake Cnty. Bd. of Educ.*, 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007) (citations omitted). Due to the disjunctive language within the ordinance and notice and the statutory requirement that Petitioners be afforded an "opportunity to cure the violation," Petitioners had *either* the option to appeal the notice *or* to cure and abate the violation. If Petitioners cured the violation within the twenty-four-hour period prescribed in the notice, any lingering question over the validity of the 2014 Notice of Violation is moot. The City of Asheville UDO § 7-18-3.

1. The Violation

To determine whether Petitioners cured the violation requires consideration of the specifics of the violation alleged within the notice and the ordinance Petitioners allegedly violated, the City of Asheville UDO § 7-13-3(3). The notice states, "[t]he nature of the violation is the use of a vehicle for the primary purpose of displaying off-premise signage . . . ." Further, Section 7-13-3(3) reads, "Signs or advertisements placed on vehicles or trailers that are parked or located for the primary purpose of displaying said sign are prohibited." The City of Asheville UDO § 7-13-3(3).

Petitioners and the City disagree about the nature of the violation cited within the notice. The City argues Petitioners violated section 7-13-3(3) by continuously driving the truck identified in the notice within city limits for over two years after the cited violation. Petitioners argue the violation cited the specific instance of their truck being parked behind their business. We agree with Petitioners.

"The general rule is that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property." *Innovative 55, LLC v. Robeson Cnty.*, 253 N.C. App. 714, 720, 801 S.E.2d 671, 676 (2017) (citations omitted). Further, "words should be given their natural and ordinary meaning, and need not be interpreted when they speak for themselves." *Grassy Creek*, 142 N.C. App. at 297, 542 S.E.2d at 301 (citations omitted).

The City contends the inherently mobile nature of a vehicle expands the scope of Section 7-13-3(3) to include the vehicle's operation throughout the city, not only in a singular location at a specified time. However, the plain language of Section 7-13-3(3) states it does not apply to every vehicle in "operation throughout the city" but only to those "that are *parked or located* for the primary purpose of displaying [advertisements]." The City of Asheville UDO § 7-13-3(3) (emphasis supplied).

North Carolina courts have long distinguished such language from the general acts of driving. *See, e.g.*, *Morris v. Jenrette Transp. Co.*, 235 N.C. 568, 575, 70 S.E.2d 845, 850 (1952) (" 'park' or 'leave standing' . . . mean[] 'something more than a mere temporary or momentary stop on the road for a necessary purpose.' "). The plain language of UDO Section 7-13-3(3), "narrowly" or "strictly" "construed in favor of the free use of property," precludes an interpretation of the specific violation alleged within the notice as being Petitioners driving the identified truck in "operation throughout the city" in 2014 and for two and a half years thereafter. *Innovative 55, LLC*, 253 N.C. App. at 720, 801 S.E.2d at 676.

In addition to the statutory language of the ordinance, there are several other indications to support an interpretation of the 2014 notice as alleging a violation only in the singular instance and place, as was documented within the notice: (1) attached to the notice were three photos taken less than an hour apart of Petitioners' vehicle, with sign attached, and all three photos were of a singular instance of Petitioners' vehicle being parked behind their business at a specified date and time; (2) no other evidence or documentation of separate instances were included within the notice; and, (3) the notice explicitly requires a site inspection to abate and cure. The notice's requirement of a site inspection further supports an inference the notice specifies a violation at a singular location at a specific time.

Based upon the ordinance's plain language and the evidence contained within the notice, along with the legal principles of construction favoring free property rights, we conclude the violation specified within the notice to be the specific instance of Petitioners' truck being parked behind their business at a specific time and date in 2014. *Id.*

2. The Cure

Under the notice, Petitioners had twenty-four hours to cure the violation. Further, the violation alleged within the notice could only be "considered corrected . . . when [Petitioners] ha[d] notified the Code Enforcement Official . . . and the site [was] inspected and determined to be in compliance[.]"

Petitioners confirmed to the code official the vehicle was moved the same afternoon long before they actually received notice, as the vehicle was only parked behind their business for a limited time. Upon receiving the notice, Petitioner Reese promptly emailed Shannon Morgan, the City Code Enforcement Officer who had issued the Sign Violation Notice to Petitioners. Petitioner Reese requested further information regarding appealing the notice, but additionally and specifically asserted any purported violation concerning Petitioners' vehicle being parked behind their business had been corrected, as the vehicle had only been parked behind their business on that date and was moved. Petitioners' email to Officer Morgan satisfies the requirement for Petitioners to notify the Code Enforcement Official of their abatement of the violation. Petitioners' further requests for information or other documents regarding the alternative right of appealing the notice is immaterial.

Upon receiving notice of the abatement from Petitioners, the 2014 Notice of Violation additionally requires "the site [be] inspected and determined to be in compliance" by a Code Enforcement Officer.

Despite Petitioners notifying Officer Morgan the vehicle was no longer at the site, the record does not show Officer Morgan performed a site inspection or made a determination regarding whether the violation had been abated. The City's own failure to re-inspect the site cannot defeat Petitioner's timely notice of cure. The Board specifically found "no inspection was ever performed" after Reece's email to Morgan.

3. The City's Burden

The City carries the burden of proving the existence of a violation of a local zoning ordinance. *City of Winston-Salem v. Hoots Concrete Co.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980). The uncontested evidence shows Petitioners moved their vehicle the same day the initial photographs contained in the notice were taken, and they had removed their vehicle before they had received the 2014 notice. Petitioners timely notified the City of their removal and abatement. Under these circumstances, the burden of proving Petitioner's continued violation of the local zoning ordinance remains upon the City. *See id.* For the 2014 notice to support any further action, the City was required to show evidence of and prove the continuing specified violation past Petitioners' notice of removal and abatement. *Id.*

Under the City of Asheville UDO § 7-18-3, the City is also required to provide an opportunity for Petitioners to cure their violation: "[t]he notice of violation *shall include an opportunity to cure the violation* within a prescribed period of time." The City of Asheville UDO § 7-18-3 (emphasis supplied). No evidence tends to show Petitioners' vehicle remained in violation after the initial photographs contained in the specified notice were taken. The record shows Petitioners promptly removed the vehicle and notified the City of their abatement. The only remaining step was for the City to re-inspect the site and confirm the abatement. The Board found as fact the City had failed to re-inspect the site. In light of our holding, we need not reach Petitioners' remaining arguments.

IV. Conclusion

The trial court erred in affirming the Asheville Board of Adjustment's order dismissing Petitioners' claim, granting the City's motion for judgment on the pleadings, and denying Petitioners' motions. The City's action was rendered moot by Petitioners' notice and abatement as a means to cure the violation under the ordinance. *Id.* We vacate and remand for dismissal. *It is so ordered.*

VACATED AND REMANDED.

Judges ZACHARY and GRIFFIN concur.

WILLIAM B. SHANNON AND NANCY P. SHANNON, PLAINTIFFS
v.
ROUSE BUILDERS, INC., DEFENDANT

No. COA23-318

Filed 6 August 2024

1. Appeal and Error—interlocutory order—partial summary judgment—substantial right—danger of inconsistent verdicts

In a dispute over whether a former owner of a piece of property (defendant, a construction company) could legally dump debris on the property (now owned by plaintiffs) pursuant to an easement purporting to give defendant that right, the trial court's interlocutory order granting partial summary judgment to defendant on two of plaintiffs' causes of action—plaintiffs having been granted partial summary judgment on their other three causes of action—was immediately reviewable because it affected a substantial right. Given that future proceedings could lead to separate trials on the different causes of action—which all involved the single fundamental question of whether defendant illegally dumped debris on plaintiffs' property—there was a danger of separate juries reaching inconsistent verdicts, particularly on the question of when plaintiffs' various causes of action accrued (in accordance with each relevant statute of limitation) based on competing accrual evidence.

2. Unfair Trade Practices—easement dispute—dumping on property—activity not in or affecting commerce

In a property dispute in which plaintiffs sued defendant (a construction company that previously owned plaintiffs' property) to stop it from dumping timber and natural debris on their land (a right purportedly granted in an easement), the trial court properly granted partial summary judgment to defendant on plaintiffs' claim for unfair and deceptive trade practices (UDTP) because defendant's activity was not "in or affecting commerce." Although defendant's dumping was indirectly part of its day-to-day operations, it did not involve transactions between businesses or between a business and consumers since plaintiffs were not a business or a consumer of defendant's business and, therefore, plaintiffs were precluded from recovering under a UDTP cause of action.

Appeal by Plaintiffs from order entered 15 November 2022 by Judge James W. Morgan in Gaston County Superior Court. Heard in the Court of Appeals 15 November 2023.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for Plaintiffs-Appellants.

McAngus Goudelock & Courie, PLLC, by James D. McAlister, for Defendant-Appellee.

Arthurs & Foltz, by Douglas P. Arthurs, for Defendant-Appellee.

CARPENTER, Judge.

William and Nancy Shannon ("Plaintiffs") appeal from an order (the "Order") granting in part and denying in part a motion for summary judgment filed by Rouse Builders, Inc. ("Defendant"). After careful review, we affirm the Order.

I. Factual & Procedural Background

This case concerns a dispute over an easement used for dumping construction debris. Plaintiffs originally sued Defendant on 3 November 2017, but Plaintiffs voluntarily dismissed their complaint without prejudice on 13 November 2019. On 10 November 2020, Plaintiffs sued Defendant again, asserting the following causes of action: breach of contract, nuisance, trespass, negligence, negligence per se, and unfair and deceptive trade practices ("UDTP"). Plaintiffs sought damages, declaratory judgment, injunctive relief, and attorneys' fees. On 4 October 2022, Defendant filed a motion for summary judgment concerning all of Plaintiffs' causes of action. The trial court heard the motion on 31 October 2022, and hearing evidence tended to show the following.

Defendant is a construction company and a previous owner of real property in Gaston County (the "Property"), which Plaintiffs now own. In 2003, Defendant sold the Property to David and Heather Mercer via a general warranty deed (the "Deed"). The Deed includes an easement for Defendant's continued use of the Property to "dump[ ] timber and natural land debris." On 15 August 2005, Plaintiffs purchased the Property from the Mercers.

Plaintiffs asserted that Defendant illegally used the Property as a construction dump. On 18 August 2005, Plaintiffs blocked Defendant's access to the Property with a chain. In response, Defendant assured Plaintiffs that the Deed allowed it to dump debris on the Property, and that its dumping was proper. After reviewing the Deed, Plaintiffs contacted the Gaston County Planning Department ("Gaston County"). Based on the Deed and discussions with Defendant and Gaston County, Plaintiffs believed that Defendant's dumping was proper.

But on 2 June 2015, Plaintiffs received a notice of violation from Gaston County concerning Defendant's dumping. In the notice, Gaston County alleged that Plaintiffs were responsible for Defendant's dumping, and Gaston County threatened to take civil action if Defendant did not obtain the required permit or stop the dumping. Plaintiffs stated that this notice from Gaston County was their first indication that Defendant's dumping was illegal, or that Defendant's prior representations about the dumping were false.

Defendant, on the other hand, claimed that it properly used the Property for dumping, as prescribed in the Deed. Regardless, Defendant argued that Plaintiffs had actual knowledge of the extent of its dumping in 2005, and that Defendant did not change its dumping practices between 2005 and 2015.

On 15 November 2022, the trial court entered the Order, which partly granted and partly denied Defendant's motion for summary judgment. The Order denied Defendant's motion concerning Plaintiffs' trespass, nuisance, and negligence, theories. The Order granted Defendant's motion concerning Plaintiffs' breach-of-contract and UDTP theories. On 14 December 2022, Plaintiffs filed notice of appeal.

II. Jurisdiction

[1] "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Cap., L.C.*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) (citing *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Orders granting partial summary judgment are interlocutory. *Country Boys Auction & Realty Co. v. Carolina Warehouse, Inc.*, 180 N.C. App. 141, 144, 636 S.E.2d 309, 312 (2006).

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

Here, the Order is interlocutory because it grants partial summary judgment. *See Country Boys Auction & Realty Co.*, 180 N.C. App. at 144,

636 S.E.2d at 312. But Plaintiffs argue that we have jurisdiction via the substantial-right exception. Specifically, Plaintiffs argue that the Order affects a substantial right because it creates the possibility of inconsistent verdicts on common questions of fact.

Plaintiffs' argument is as follows: If we do not review the Order now, we can only review it after trial. If we review and reverse the Order after trial, a different jury will then decide the remanded UDTP theory, which according to Plaintiffs, hinges on the same facts as its other causes of action. And the second jury could potentially view the facts differently than the first jury, thus leaving Plaintiffs with inconsistent verdicts on common questions of fact.

We have granted review under this exception before. *See*, *e.g.*, *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989). Under this exception, the appellant "must 'show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.' " *See Clements v. Clements*, 219 N.C. App. 581, 585, 725 S.E.2d 373, 376 (2012) (quoting *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995)).

Plaintiffs' case involves one fundamental claim: that Defendant illegally dumped debris on the Property. Plaintiffs seek relief for this claim through multiple causes of action. The trial court, however, dismissed two theories at summary judgment, while allowing the others to proceed to trial. So potentially, one jury could resolve the theories for which the trial court denied summary judgment, and another jury could resolve the theories for which the trial court granted summary judgment. *See Davidson*, 93 N.C. App. at 25, 376 S.E.2d at 491. Under this scenario, the juries will review the same factual issues, and each jury could resolve the issues differently.

For example, both trespass and UDTP are subject to statutes of limitation. *See* N.C. Gen. Stat. §§ 1-52(3), 75-16.2 (2023). Both of these statutes of limitation begin to run when the cause of action accrues, which is when Plaintiffs knew or should have known, whichever is earlier, about the alleged illegal activity. *See Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302 (1998) (citing N.C. Gen. Stat. § 1-52(16)) (providing that a trespass theory accrues when "it becomes apparent or ought reasonably to have become apparent to claimant"); *Nash v. Motorola*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989) (holding that a UDTP theory based on fraud accrues when the plaintiff discovered or should have discovered the fraud).

When parties dispute facts about accrual, "the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 679 (2001). And "[w]hen the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury." *Id.* at 319, 555 S.E.2d at 679 (citing *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974)).

Here, Defendant affirmatively pleaded statute-of-limitations defenses to all of Plaintiffs' causes of action. In response, Plaintiffs argued that they did not know, and had no reason to know, about the illegality of Defendant's dumping until 2015. On the other hand, Defendant asserted that Plaintiffs knew about the extent of its dumping in 2005. If Plaintiffs are correct, neither their trespass nor their UDTP theories would be time barred; but if Defendant is correct, both theories would be time barred.[1] *See* N.C. Gen. Stat. §§ 1-52(3), 75-16.2.

When Plaintiffs knew, or should have known, about the alleged illegality of Defendant's dumping is a question of fact. *See Everts*, 147 N.C. App. at 319, 555 S.E.2d at 679. So if Plaintiffs' trespass and UDTP causes of action are resolved at separate trials, separate juries will answer the accrual question, and both juries will analyze the same factual issues. *See Clements*, 219 N.C. App. at 585, 725 S.E.2d at 376. Further, it is possible for the juries to reach inconsistent accrual conclusions because there is competing accrual evidence. *See id.* at 585, 725 S.E.2d at 376. Therefore, the Order affects a substantial right, and we have jurisdiction over this appeal. *See* N.C. Gen. Stat. § 7A-27(b)(3).

III. Issue

[2] The issue on appeal is whether the trial court erred by partially granting Defendant summary judgment.

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1. Plaintiffs filed their initial complaint on 3 November 2017. Therefore, if Plaintiffs' causes accrued on 2 June 2015, as they assert, then they filed their complaint within the applicable statutes of limitation for trespass and UDTP. *See* N.C. Gen. Stat. §§ 1-52(3) (three years), 75-16.2 (four years). Plaintiffs later dismissed their complaint without prejudice on 13 November 2019. Under Rule 41 of our Rules of Civil Procedure, when a plaintiff voluntarily dismisses a complaint without prejudice, the plaintiff may file a "new action based on the same claim . . . within one year after such dismissal." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2023). Voluntary dismissal under Rule 41 also "extend[s] the statute of limitations by one year after a voluntary dismissal." *Staley v. Lingerfelt*, 134 N.C. App. 294, 298, 517 S.E.2d 392, 395 (1999) (citing *Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973)). So if Plaintiffs' accrual assertion is correct, their theories are still within the applicable statutes of limitation because Plaintiffs refiled their complaint within one year of their voluntary dismissal.

IV. Analysis

The Order granted Defendant summary judgment concerning Plaintiffs' breach-of-contract and UDTP causes of action. On appeal, however, Plaintiffs only challenge the Order concerning UDTP. Because Plaintiffs do not challenge the Order concerning breach of contract, we will not analyze that portion of the Order. *See Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) ("It is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal." (citing N.C. R. App. P. 28(b)(6))).

A. Standard of Review

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

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

B. UDTP

North Carolina's UDTP cause of action is codified in Article 1 of Chapter 75. *See* N.C. Gen. Stat. § 75-1.1 (2023). Under subsection 75-1.1(a), "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* § 75-1.1(a). UDTP "requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 738, 659 S.E.2d 483, 488 (2008) (quoting *Craven v. SEIU COPE*, 188 N.C. App. 814, 818, 656 S.E.2d 729, 733–34 (2008)).

We begin and end with the second element of UDTP: "in or affecting commerce." Commerce "includes all business activities, however

denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). Although the statutory language is expansive, the North Carolina Supreme Court has narrowed its scope. *See*, *e.g.*, *Nobel v. Foxmoor Grp.*, 380 N.C. 116, 121, 868 S.E.2d 30, 34 (2022).

The Court has defined business activities as the "regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms*, *Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). But the Court has since limited business activity to "two types of business transactions: '(1) interactions between businesses, and (2) interactions between businesses and consumers.' " *See Nobel*, 380 N.C. at 121, 868 S.E.2d at 34 (quoting *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010)). In other words, internal business operations are not covered by subsection 75-1.1(b). *See id.* at 121, 868 S.E.2d at 34.

"Consumer" is not unlimited. *See id.* at 121–22, 868 S.E.2d at 34–35. Rather, to be a consumer under the second *White* category, the plaintiff must consume the defendant's product or service. *See id.* at 121–22, 868 S.E.2d at 34–35 (citing *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981)) (declaring that a transaction was not "in or affecting commerce" because although "a personal relationship existed between plaintiff and defendant, there [was] no evidence that plaintiff was a consumer of Foxmoor, nor engaged in any commercial transaction with the company").

Here, Defendant's dumping does not fit squarely into either of the *White* categories. *See White*, 364 N.C. at 52, 691 S.E.2d at 679. The transaction that is alleged to have harmed Plaintiffs was Defendant's dumping, and indeed, the parties disagree about the legality of Defendant's dumping. But as the dumping relates to the second prong of UDTP, the parties do not dispute any material facts. The Defendant is a construction business, and Plaintiffs are not a business. Moreover, Defendant did not build or remodel a home for Plaintiffs. Further, Plaintiffs did not pay Defendant to dump on the Property, and Defendant did not pay Plaintiffs in order to dump on the Property.

As Plaintiffs are not a business, the dumping does not fit into the first *White* category because it was not an interaction between businesses. *See id.* at 52, 691 S.E.2d at 679. The dumping does not fit into the second *White* category either, because Plaintiffs are not "consumers" of Defendant. *See Nobel*, 380 N.C. at 121–22, 868 S.E.2d at 34–35. Plaintiffs

are not Defendant's consumers because Defendant, a construction company, did not build or remodel their home, and Plaintiffs did not buy any other goods or services from Defendant.[2] *See id.* at 121–22, 868 S.E.2d at 34–35. Therefore, the dumping was not an interaction between a business and its consumer. *See id.* at 121–22, 868 S.E.2d at 34–35.

Because Defendant is a construction company, however, dumping construction debris was at least indirectly part of Defendant's day-to-day operations. *See HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493. Nonetheless, Defendant's dumping was more akin to an internal business operation than an external business transaction. *See Nobel*, 380 N.C. at 121, 868 S.E.2d at 34. So although Defendant's dumping may have harmed Plaintiffs, Defendant's dumping was not "in or affecting commerce." *See Nucor Corp.*, 189 N.C. App. at 738, 659 S.E.2d at 488. This does not preclude Plaintiffs from seeking a remedy through other legal theories, but it does preclude Plaintiffs from seeking a UDTP remedy. *See Nobel*, 380 N.C. at 121, 868 S.E.2d at 34.

In sum, because the parties do not dispute any material facts concerning the second element of UDTP, summary judgment is appropriate "as a matter of law." *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). And even viewing the evidence in Plaintiffs' favor, *see Dalton*, 353 N.C. at 651, 548 S.E.2d at 707, they cannot establish that Defendant's dumping was "in or affect[ed] commerce," *see Nucor Corp.*, 189 N.C. App. at 738, 659 S.E.2d at 488. Therefore, the trial court correctly granted Defendant summary judgment concerning UDTP. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

V. Conclusion

We conclude that the trial court correctly granted Defendant summary judgment concerning UDTP. Therefore, we affirm the Order.

AFFIRMED.

Judges GORE and FLOOD concur.

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2. To be sure, if Plaintiffs complained about the sale of the Property, as such, they could potentially satisfy the second UDTP prong. *See Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 584, 473 S.E.2d 680, 688 (1996) (holding "that indirect purchasers have standing under N.C. [Gen. Stat.] § 75-16 to sue for Chapter 75 violations"). Plaintiffs, however, do not complain about the sale of the Property. Rather, they argue that Defendant's dumping on the Property "occurred with such frequency as to indicate a general business practice."

STATE OF NORTH CAROLINA ex rel. GERALD CANNON, in his individual capacity and his official capacity As Sheriff of Anson County, Plaintiff

v.

ANSON COUNTY; ANSON COUNTY BOARD OF COMMISSIONERS; JARVIS T. WOODBURN, in his official capacity; JEFFREY BRICKEN, in his official capacity; ROBERT MIMS, JR., in his official capacity; LAWRENCE GATEWOOD, in his official capacity; JAMES CAUDLE, in his official capacity; PRISCILLA LITTLE, in her official capacity; DAVID HAROLD C. SMITH, in his official capacity; SCOTT HOWELL, Defendants

No. COA23-1069

Filed 6 August 2024

1. Open Meetings—quo warranto action—appointment of sheriff—validity up for judicial review—suit under N.C.G.S. § 143-318.16A—unnecessary

In a quo warranto action brought by plaintiff after defendant county board of commissioners appointed him as sheriff (to fill a vacancy resulting from the prior sheriff's death) but subsequently replaced him with defendant interim sheriff (who had already served the rest of the deceased sheriff's term), plaintiff placed up for judicial review the validity of his appointment by arguing that, since nobody challenged his appointment through a "proper proceeding" under N.C.G.S. § 143-318.16A, the appointment was presumptively valid, and therefore defendants had "usurped" plaintiff's position as sheriff. Consequently, defendants were not required to challenge plaintiff's appointment by filing a separate suit under section 143-318.16A (setting forth the procedure for challenging violations of the Open Meetings Law).

2. Open Meetings—quo warranto action—emergency appointment of sheriff—improper meeting procedure—lack of notice—lack of quorum

In a quo warranto action brought by plaintiff after defendant county board of commissioners convened a meeting to appoint him as sheriff (to fill a vacancy resulting from the prior sheriff's death) but subsequently replaced him with defendant interim sheriff (who had already served the rest of the deceased sheriff's term), the trial court properly granted judgment on the pleadings in favor of defendants because the face of plaintiff's complaint showed that plaintiff's initial appointment was unlawful. First, the board's meeting did not qualify as an emergency meeting under the Open Meetings Laws (N.C.G.S. § 143-318.12(f)) because, at a previous meeting, the board

had already expressed its awareness of the looming sheriff vacancy and determined that no immediate action was necessary; absent a true emergency, the board was statutorily required to give notice to the public of the meeting forty-eight hours in advance, which it did not do. Additionally, although four out of the seven commissioners voted to appoint plaintiff, because there was no "emergency" that would have allowed remote participation pursuant to section 166A-19.24(a), the two votes that were cast via conference call were invalid, and therefore the board did not have the quorum necessary to appoint plaintiff.

Judge THOMPSON dissenting.

Appeal by plaintiff from order entered 10 May 2023 by Judge Stephan R. Futrell in Anson County Superior Court. Heard in the Court of Appeals 28 May 2024.

Leitner, Bragg & Griffin, PLLC, by Ellen A. Bragg and Thomas Leitner, for plaintiff-appellant.

Ellis & Winters LLP, by Jonathan D. Sasser and Jeffrey Steven Warren, for defendant-appellee Scott Howell.

Cranfill Sumner LLP, by Patrick H. Flanagan and Steven A. Bader, for defendant-appellee Anson County, et al.

Scott Forbes, for defendant-appellee Anson County, et al.

FLOOD, Judge.

Gerald Cannon ("Plaintiff") appeals from an order granting Defendants' motions for judgment on the pleadings. After careful review, we conclude the trial court did not err by granting Defendants' motions for judgment on the pleadings because the face of Plaintiff's quo warranto complaint shows the Anson County Board of Commissioners (the "Board") unlawfully appointed Plaintiff as Anson County Sheriff.

I. Factual and Procedural Background

On 21 September 2022, Anson County Sheriff Landric Reid passed away during his term of office. On 4 October 2022, the Board appointed Chief Deputy Scott Howell ("Defendant Howell") to fulfill the remainder

of Sheriff Reid's term, which was set to expire on 5 December 2022.[1] Prior to his death, Sheriff Reid had won the Democratic nomination for Sheriff and was on the 8 November 2022 general election ballot for Sheriff. Due to the short amount of time between Sheriff Reid's death and the general election, Sheriff Reid was unable to be removed from the ballot and won re-election in November 2022, thereby creating a vacancy for his second term.

On 1 December 2022, the Board convened for a "special meeting" to discuss the looming Sheriff vacancy. The commissioners present during the special meeting were Chairman Jarvis T. Woodburn, Vice Chair Robert Mims, Vancine Sturdivant, Harold C. Smith, Dr. Sims, Lawrence Gatewood, and J.D. Bricken. During the special meeting, Commissioner Bricken asked the Anson County Attorney, Scott Forbes, whether the Board had "authority to appoint a sheriff to fulfill an upcoming vacancy." According to the minutes from the special meeting, "Attorney Forbes advised that [a] Closed Session would be the more appropriate venue to answer this question as it is a legal matter from which he assumes litigation is likely to follow." Due to the attorney-client privilege between Attorney Forbes and the Board, Attorney Forbes advised that the Board would need to vote before having him address the question in an open session. The Board subsequently voted to go into a closed session. After the Board came out of the closed session, the Board voted six to one to conclude the special meeting, as they had determined in the closed session that the issue of appointing a sheriff could wait until the Board's regularly scheduled meeting to be held on 6 December 2022. Following the vote, Commissioner Woodburn announced to the open session audience that there "would be no action taken today and 'this matter will be resolved on December 6.' "

On 3 December 2022, the Democratic Party of Anson County (the "Democratic Party") selected Plaintiff to fill the vacancy of the Anson County Sheriff. The Democratic Party was operating under the belief that, pursuant to N.C. Gen. Stat. § 162-5.1 (b) (2021), the Board was required to appoint the person recommended by the Democratic Party, as Sheriff Reid had been elected as the Democratic nominee. This section of the statute, however, applies only to select counties, of which Anson County is not included.

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1. Plaintiff's quo warranto complaint indicated that the term expired at midnight on 4 December 2022, but deposition testimony confirmed the term expired at midnight on 5 December 2022.

Despite the Board concluding at the special meeting on 1 December 2022 that no action needed to be taken until the 6 December 2022 regular meeting, Commissioner Woodburn called for an "emergency meeting" on 5 December 2022 to address the vacancy for Sheriff. Commissioner Woodburn called the 5 December meeting after he was contacted by Commissioner Smith, who represented that a board member of the Democratic Party had "told him that the sheriff's position needed to be dealt with[.]" Commissioner Woodburn thought that "made sense" as there would be a vacancy as of 5 December 2022.[2] On 5 December 2022, at 5:29 p.m. the Clerk to the Board—Denise Cannon—sent an email to all six commissioners, notifying them that Commissioner Woodburn had called the 5 December meeting. Cannon also called all six board members between 4:56 p.m. and 5:42 p.m. on 5 December 2022, and made contact with five commissioners, but was unable to reach Commissioner Gatewood. The 5 December meeting began at 5:45 p.m. at the Anson County Government Center.

Commissioners Sturdivant and Smith were present in person at the 5 December meeting, and Commissioners Woodburn and Sims were present via conference call. Commissioner Bricken is not included on the list of commissioners who were present, but the meeting minutes reflect that he participated in the meeting via conference call; however, he lost contact at some point prior to the vote. Commissioners Smith, Sturdivant, Sims, and Woodburn voted to appoint Plaintiff to fill the vacant Sheriff's position. Commissioner Bricken was called to vote, but was unresponsive. Plaintiff won the nomination with four out of seven votes and was sworn in as Anson County Sheriff at the close of the 5 December meeting.

Later that evening, Attorney Forbes contacted Plaintiff and Defendant Howell. Attorney Forbes notified Plaintiff that he interpreted the 5 December meeting as an illegal meeting because there was no "emergency," and Plaintiff's appointment was therefore invalid. Attorney Forbes told Defendant Howell that because the meeting was unlawful, Defendant Howell was still the Sheriff.

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2. Complicating the vacancy timing and date, Commissioner Woodburn stated in his deposition that after being contacted by Commissioner Smith on 5 December, Commissioner Woodburn thought the meeting was necessary because "the sheriff's position needed to be dealt with because, you know, as of midnight on the 5th, we wouldn't have a sheriff." As this occurred on 5 December, a term expiring at midnight would be later that same night.

On 6 December 2022, Plaintiff filed a complaint in Anson County Superior Court seeking a declaratory judgment. He also filed a motion for a preliminary injunction. In his complaint and motion, Plaintiff requested that the trial court declare him as Sheriff and prohibit the Board from preventing him from taking office as Sheriff. A hearing was held in which Attorney Forbes informed the trial court that he had "retracted" the statement that he made to Plaintiff the previous evening because the "[c]ounty was not going to take a position as to this issue and it was for the court" to decide. In a subsequent deposition, Attorney Forbes represented that he did not "know that [he necessarily] retracted" the statement, but only meant to convey that he did not have the authority to make the statement because it was for the courts to decide.

Following the hearing on Plaintiff's motion for a preliminary injunction, the trial court denied Plaintiff's motion.

Later that day, at 6:00 p.m., the Board convened for their regularly scheduled meeting. Present at this meeting were Commissioners Bricken, Mims, Woodburn, Smith, and Gatewood. Also present were Commissioners Priscilla Little and Jamie Caudle, who had been sworn in at the start of the meeting, replacing out-going Commissioners Sims and Sturdivant.

During the meeting, Commissioner Gatewood motioned to appoint Defendant Howell as Anson County Sheriff "effective immediately and extending through the next four years." Commissioner Caudle seconded this motion. Commissioner Smith questioned the legality of the motion and inquired as to whether there was even a vacancy given Plaintiff's appointment the previous day, but no further discussion was had.[3] The Board voted six to one—Commissioner Smith being the one—to bring to a vote the motion to appoint Defendant Howell as Sheriff. The motion to appoint Defendant Howell as Sheriff was repeated, and the Board voted four to three to appoint Defendant Howell as Anson County Sheriff.

On 7 December 2023, Plaintiff filed an amended complaint for declaratory judgment, and motion for preliminary injunction and permanent

3. The minutes from the 6 December meeting indicate the Board went into a closed session to consult with Attorney Forbes about "a potential or actual claim, administrative procedure, or judicial action" that could be brought pursuant to N.C. Gen. Stat. § 143-318.11(a)(3). As this was a closed session, however, there is no evidence in the Record showing what was said during that discussion or whether it addressed Commissioner Smith's concerns.

injunction, again requesting the trial court declare him Anson County Sheriff. The amended complaint alleged that Attorney Forbes informed Plaintiff that the 5 December "meeting was not illegal, and that Plaintiff was appointed as Sheriff for Anson County[.] . . . Further, [Attorney Forbes] stated . . . that the [5 December meeting] was valid and legal and that was the reasoning for retracting his previous statements." During Attorney Forbes' deposition, however, he emphatically denied ever stating that the 5 December meeting was "valid and legal."

The trial court denied Plaintiff's request to declare him Anson County Sheriff, and Defendant Howell was sworn in as Sheriff. In denying Plaintiff's request, the trial court advised Plaintiff that the appropriate action would be a quo warranto.

On 19 December 2023, Plaintiff requested that the North Carolina Attorney General grant Plaintiff leave to file a quo warranto action. On 4 January 2023, the North Carolina Department of Justice declined to bring a quo warranto action against Defendant Howell on behalf of Plaintiff but permitted Plaintiff to file such an action in the name of the State.

On 10 February 2023, Plaintiff filed a quo warranto complaint in Anson County Superior Court against Anson County, the Board, all seven commissioners in their official capacities (collectively "Defendant Anson County"), and Defendant Howell (collectively "Defendants"). The quo warranto complaint alleged that the Board did not have the authority to appoint Defendant Howell to the office of Anson County Sheriff because no vacancy existed after the 5 December meeting.

On 16 March 2023, Defendant Howell filed an answer to Plaintiff's quo warranto complaint, asserting Plaintiff failed to state a claim upon which relief could be granted. On 28 March 2023, Defendant Anson County filed an amended answer and asserted a counterclaim for declaratory judgment, arguing the 5 December meeting was not in fact an "emergency meeting," and as such, the meeting was not properly noticed.

On 17 April 2023, Defendant Howell filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. On 21 April 2023, Defendant Anson County filed a separate motion for judgment on the pleadings. Defendants argued the 5 December meeting was not properly noticed, and the Board did not have a proper quorum because only two commissioners attended in person; therefore, Plaintiff's appointment to Sheriff was unlawful.

On 26 April 2023, Plaintiff filed a motion for summary judgment arguing there were no genuine issues of material fact, and he was

entitled to judgment as a matter of law. Plaintiff also filed a motion to dismiss Defendant Anson County's counterclaim.

On 8 May 2023, the trial court held a hearing on Defendants' motions for judgment on the pleadings, Plaintiff's motion to dismiss Defendant Anson County's counterclaim for declaratory judgment, and Plaintiff's motion for summary judgment. At the hearing, all parties agreed that whichever motion the trial court ruled on would be dispositive of all of the motions. On 10 May 2023, the trial court issued an order granting Defendants' motions for judgment on the pleadings. On 5 June 2023, Plaintiff filed a notice of appeal to this Court.

II. Jurisdiction

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

III. Analysis

On appeal, Plaintiff argues that it was an error for the trial court to grant Defendants' motions for judgment on the pleadings. Plaintiff also argues it was an error to deny Plaintiff's motion to dismiss Defendant Anson County's counterclaim and Plaintiff's motion for summary judgment. We conclude that the trial court did not err in granting judgment on the pleadings in favor of Defendants, as the face of Plaintiff's quo warranto complaint shows he was appointed at an unlawful meeting where there was neither a true "emergency" nor a quorum. We therefore do not reach Plaintiff's motion to dismiss Defendant Anson County's counterclaim nor his motion for summary judgment.

A. Quo Warranto Action

[1] Plaintiff argues the Board's 5 December appointment of Plaintiff to fill the term of Sheriff "should be deemed valid until and only if a proper proceeding is initiated and a court concludes that the appointment shall be declared void." Plaintiff further argues that in order to initiate the proper proceeding to contest an action of the Board, a person must file suit under N.C. Gen. Stat. § 143-318.16A and, as no person ever filed such a suit to challenge Plaintiff's appointment, he remains the lawful Sheriff. We disagree.

A quo warranto action may be brought by the Attorney General in the name of the State, or the Attorney General may grant a private person leave to bring an action in the name of the State, "[w]hen a person usurps, intrudes into, or unlawfully holds or exercises any public office . . . ." N.C. Gen. Stat. § 1-515(1) (2023); *see also Swaringen v. Poplin*,

211 N.C. 700, 702, 191 S.E. 746, 747 (1937) ("One of the chief purposes of quo warranto . . . is to try the title to an office."). "A usurper is one who undertakes to act officially without any actual or apparent authority." *In re Wingler*, 231 N.C. 560, 564, 58 S.E.2d 372, 375 (1950).

Here, Plaintiff filed a quo warranto complaint arguing Defendant Howell's appointment to Anson County Sheriff was "void and of no effect" because no one challenged Plaintiff's 5 December appointment to Sheriff, and there was therefore no vacancy for Defendant Howell to fill. Moreover, in his appellate brief, Plaintiff represented—without citing to legal support—that a quo warranto action is "used to resolve a dispute over whether a specific person has the legal right to hold the public office that he or she occupies; in this instance, this action was brought because [Defendant] Howell and Anson County were usurping the office of [] Sheriff." In Plaintiff's own words, when the trial court reviewed Plaintiff's quo warranto complaint, it was required to "resolve a dispute over whether a specific person has the legal right to hold" the title of Sheriff, *i.e.*, to determine whether Defendant Howell usurped Plaintiff's position as Sheriff. To make this determination, the trial court would have to determine if Plaintiff was in fact lawfully appointed to the position of Sheriff during the 5 December meeting. If Plaintiff was not lawfully appointed, Defendant Howell could not have usurped Plaintiff's position. If, on the other hand, Plaintiff had been lawfully appointed, Defendant Howell's appointment would have usurped Plaintiff's position. *See In re Wingler*, 231 N.C. at 564, 58 S.E.2d at 375.

Accordingly, because Plaintiff placed the issue of his appointment up for judicial review by filing the quo warranto complaint, Defendants were not required to challenge Plaintiff's 5 December appointment by filing suit pursuant to N. C. Gen. Stat. § 143-318.16A. Having concluded the trial court could determine whether Plaintiff was lawfully appointed to Sheriff, and Defendants were not required to file their own suit challenging Plaintiff's 5 December appointment, we now turn to whether the trial court erred by granting Defendants' motions for judgment on the pleadings.

B. Judgment on the Pleadings

[2] In challenging the trial court's order granting Defendants' motions for judgment on the pleadings, Plaintiff makes no arguments explaining why his 5 December appointment was lawful. Instead, he again argues that Defendants were required to challenge Plaintiff's appointment under N.C. Gen. Stat. § 143-318.16A, and absent any such challenge, Plaintiff's quo warranto complaint shows he was entitled to assume the

role of Anson County Sheriff. As Plaintiff has generally challenged the trial court's order, we will conduct our review to determine whether the order was made in error.

Defendants argue the trial court did not err in granting judgment on the pleadings because the face of Plaintiff's quo warranto complaint shows that he is not entitled to the relief sought because his appointment to the position of Sheriff occurred at an unlawful meeting in which improper procedure was followed. We agree.

1. Standard of Review

We review a trial court's decision on a grant of judgment on the pleadings *de novo*. *N.C. Farm Bureau Mut. Ins. Co. Inc. v. Hebert*, 385 N.C. 705, 711, 898 S.E.2d 718, 724 (2024) (alterations in original) (citations omitted). A party who files for a judgment on the pleadings "must show that 'the [pleadings] . . . fail[] to allege facts sufficient to state a cause of action or admit[] facts which constitute a complete legal bar' to a cause of action." *Id.*

> In determining whether to grant a motion for judgment on the pleadings, [t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial are deemed admitted by the movant for the purposes of the motion.

Benigno v. Sumner Constr., Inc., 278 N.C. App. 1, 4, 862 S.E.2d 46, 49–50 (2021) (alteration in original) (citation omitted). When considering a motion for judgment on the pleadings, "[t]he trial judge is to consider only the pleadings and any attached exhibits, which become part of the pleadings." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984).

2. Lawfulness of the 5 December Meeting

In arguing that the 5 December meeting was procedurally improper, Defendants contend, more specifically, that the Board acted unlawfully when it called an "emergency meeting" without a true emergency existing and when it appointed Plaintiff without a quorum.

"In order to take valid action, a board of county commissioners must act . . . in a meeting duly held as prescribed by law." *Land-of-Sky*

Reg'l Council v. Henderson Cnty., 78 N.C. App. 85, 89, 336 S.E.2d 653, 656 (1985).

a. *Nature of the 5 December Meeting*

We first address Defendants' argument that there was no "emergency" when the meeting was called.

As defined by the Open Meetings Laws, "an 'emergency meeting' is one called because of generally unexpected circumstances that require immediate consideration by the public body." N.C. Gen. Stat. § 143-318.12(f) (2023).

> For any other meeting, except for an emergency meeting, the public body shall cause written notice of the meeting stating its purpose (i) to be posted on the principal bulletin board of the public body or . . . at the door of its usual meeting room, and (ii) to be mailed, e-mailed, or delivered to each newspaper, wire service, radio state, and television station that has filed a written request for notice with the clerk or secretary of the public body[.] . . . This notice shall be posted and mailed, e-mailed, or delivered at least 48 hours before the time of the meeting.

N.C. Gen. Stat. § 143-318.12(b)(2).

"If any vacancy occurs in the office of sheriff, the coroner of the county shall execute all process directed to the sheriff until the first meeting of the board of county commissioners next succeeding such vacancy[.]" N.C. Gen. Stat. § 162-5(a) (2023). "In those counties where the office of coroner has been abolished, the chief deputy sheriff . . . shall perform all the duties of the sheriff until the board of county commissioners appoint some person to fill the unexpired term." N.C. Gen. Stat. § 162-5(b).

Here, the face of Plaintiff's quo warranto complaint shows that the 5 December meeting was not an "emergency meeting" because, first, it states that the Board met on 1 December 2022 to discuss the looming Anson County Sheriff vacancy. Attached to the quo warranto complaint were the 1 December meeting's minutes, which show the Board was aware that there would be a vacancy as of 5 December, but determined no action was needed on the subject until the regularly scheduled 6 December meeting. Thus, there was not a "generally unexpected circumstance" that required immediate consideration by the Board. *See* N.C. Gen. Stat. § 143-318.12(f).

Second, the quo warranto complaint represented that Defendant Howell had been appointed to assume the role of interim Sheriff following Sheriff Reid's untimely death. Defendant Howell, therefore, would have remained in the interim role of Sheriff until such time when the Board met at their next regularly scheduled meeting and appointed someone to the office of Anson County Sheriff. *See* N.C. Gen. Stat. § 162-5(a).

As the 5 December meeting was not an "emergency meeting," the Board was required to give notice of the meeting forty-eight hours in advance. Attached to Plaintiff's quo warranto complaint is an email sent by Clerk Cannon on 5 December at 5:29 p.m. notifying the commissioners that Commissioner Woodburn had called an "emergency meeting." The meeting's minutes reflect that the meeting began just sixteen minutes later—far short of the required forty-eight hours. *See* N.C. Gen. Stat. § 143-318.12(b)(2).

Accordingly, the face of Plaintiff's quo warranto complaint shows that the 5 December meeting was not an "emergency meeting" as no unexpected circumstances existed, and the public therefore was not properly noticed. *See* N.C. Gen. Stat. § 143-318.12(b), (f). Thus, the trial court did not err in granting Defendants' motions for judgment on the pleadings. *See Hebert*, 385 N.C. at 711, 898 S.E.2d at 724.

b. *Quorum*

Even if the 5 December meeting had qualified as an emergency meeting, the Board lacked the quorum necessary to lawfully appoint Plaintiff to Sheriff. Plaintiff pled in his quo warranto complaint that the Board voted on his appointment with a quorum because he received four out of seven votes. In Defendant Howell's motion for judgment on the pleadings, he argued, conversely, that the "face of the [c]omplaint, together with the exhibits attached, reveals Plaintiff is not entitled to the relief he seeks" because, in relevant part, "[t]his hastily-called meeting was personally attended by only two members of the seven-member Board. Chairman Woodburn himself failed to show up." Defendant Anson County likewise argued in its motion for judgment on the pleadings that "[t]he [Board] did not have a proper quorum to vote during the [5 December meeting] with only two of the seven [] Commissioners present at the meeting."

"A majority of the membership of the board of commissioners constitutes a quorum[,]" which is required for an action of a public board to be valid. N.C. Gen. Stat. § 153A-43(a) (2023); *see also Cleveland Cotton Mills v. Comm'rs of Cleveland Cnty.*, 108 N.C. 678, 680–81, 13 S.E.2d

271, 272 (1891) ("[A]n act . . . done by an indefinite body . . . is valid if passed by a majority of those present at a legal meeting."). In Anson County, there are seven members of the Board of Commissioners. A quorum therefore consists of a majority, or four commissioners. *See* N.C. Gen. Stat. § 153A-43(a).

Pursuant to Section 166A-19.24, "[n]otwithstanding any other provision of law, upon issuance of a declaration of emergency under [N.C. Gen. Stat. §] 166A-19.20, any public body within the emergency area may conduct remote meetings[.]" N.C. Gen. Stat. § 166A-19.24(a) (2023). A "remote meeting" is "[a]n official meeting . . . with between one and all of the members of the public body participating by simultaneous communications[,]" *i.e.* by telephone. N.C. Gen. Stat. § 166A-19.24 (i)(3)–(4). If a member participates in a meeting remotely during a state of emergency pursuant to N.C. Gen. Stat. § 166A-19.24(a), that member "shall be counted as present for the purposes of whether a quorum is present[.]" N.C. Gen. Stat. § 153A-43(b).

In this case, the 5 December meeting minutes Plaintiff attached to the quo warranto complaint as an exhibit do not lend legal or factual support to the contention that the Board had a quorum. To have a proper quorum on 5 December 2022, the Board was required to have four commissioners physically present to appoint Plaintiff to the office of Anson County Sheriff because there was no state of emergency in effect that would have permitted remote participation. *See* Exec. Order No. 267 (August 15, 2020) (rescinding Executive Order 116 that put in place a state of emergency in March 2020 and "[a]ll other provisions of Executive Order No. 116, and all other Executive Orders conditioned upon the State of Emergency declared in Executive Order No. 116"); *see also* N.C. Gen. Stat. § 166A-19.24(a). Despite this, only two of the seven total commissioners—Commissioners Sturdivant and Smith—were physically present at the 5 December meeting. The 5 December meeting minutes clearly show that Commissioners Woodburn, Sims, and Bricken participated in the 5 December meeting by conference call, thus rendering it a "remote meeting" because three of the participants were using simultaneous communication to participate. *See* N.C. Gen. Stat. § 166A-19.24 (i)(3)–(4). Plaintiff's appointment, therefore, passed with only two out of seven votes present—which is not a quorum. Without a quorum, Plaintiff was not lawfully appointed to the position of Anson County Sheriff, and the Board therefore had a vacancy in which to appoint Defendant Howell to fill. *See Cleveland Cotton Mills*, 108 N.C. at 680–81, 13 S.E.2d at 272.

Accordingly, the face of Plaintiff's quo warranto complaint, along with the attached exhibits, show Plaintiff was not appointed to Sheriff

by a quorum of the Board, in violation of N.C. Gen. Stat. § 153A-43(a). The trial court, therefore, did not err in granting Defendants' motion for judgment on the pleadings. *See Hebert*, 385 N.C. at 711, 898 S.E.2d at 724.

As Plaintiff's quo warranto complaint demonstrates that the 5 December meeting was not an emergency meeting, nor did the Board have a quorum, Defendants have sufficiently shown that Plaintiff's quo warranto complaint "admits facts which constitute a complete legal bar." *See id*. The trial court therefore did not err by granting Defendants' motions for judgment on the pleadings.

IV. Conclusion

We conclude the trial court did not err in granting Defendants' motions for judgment on the pleadings because the face of Plaintiff's quo warranto complaint demonstrated that he was not lawfully appointed to the position of Anson County Sheriff on 5 December 2022 as there was no emergency necessitating the meeting and the Board lacked a quorum at the meeting.

AFFIRMED.

Judge GRIFFIN concurs.

Judge THOMPSON dissents in a separate writing.

THOMPSON, Judge, dissenting.

The dispositive question presented by this case is not who holds the title of Anson County Sheriff, but whether the Anson County Board of Commissioners violated the North Carolina Open Meetings Law by appointing and swearing in plaintiff Cannon as the Anson County Sheriff absent an emergency and, therefore, a quorum on 5 December 2022. Because there has been no challenge to the *presumably lawful* actions of "the proper authority" to fill the vacancy, the Anson County Board of Commissioners, "upon a proper proceeding," the statutory remedies set forth in N.C. Gen. Stat. §§ 143-318.16 or 143-318.16A for alleged violations of the Open Meetings Law, I would conclude that the trial court erred in granting defendants' motion on the pleadings, and I respectfully dissent.

North Carolina law presumes that, "[a]ny person who shall, by the proper authority, be admitted and sworn into any office, shall be held,

deemed, and taken, by force of such admission, *to be rightfully in such office until*, by judicial sentence, *upon a proper proceeding*, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void." N.C. Gen. Stat. § 128-6 (2023) (emphases added). It is the public policy of our State that the "public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions . . . exist solely to conduct the people's business . . . [and] that the hearings, deliberations, and actions of these bodies be conducted openly." *Id.* § 143-318.9. Our legislature has provided for *two* remedies for alleged violations of the Open Meetings Law, N.C. Gen. Stat. §§ 143-318.16 and 143-318.16A.

The first remedy allows for "mandatory or prohibitory *injunctions* to enjoin (i) threatened violations of this Article, (ii) the recurrence of past violations of this Article, or (iii) continuing violations of this Article." *Id.* § 143-318.16 (emphasis added). Alternatively, "[a]ny person may institute *a suit* in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void." *Id.* § 143-318.16A(a) (emphasis added). Moreover, "[a] suit seeking declaratory relief under this section *must be commenced within 45 days* following the initial disclosure of the action that the suit seeks to have declared null and void." *Id.* § 143-318.16A(b) (emphasis added). "If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection." *Id.* (emphasis added).

Finally, "[i]n making the determination whether to declare the challenged action null and void, the court *shall consider the following and any other relevant factors*" including:

> (1) The extent to which the violation affected the substance of the challenged action;
>
> (2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;
>
> (3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;
>
> (4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;

> (5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;
>
> (6) *Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.*

Id. § 143-318.16A(c) (emphases added).

The majority asserts that "the face of [p]laintiff's quo warranto complaint shows he was appointed at an unlawful meeting where there was neither a true 'emergency' nor a quorum" and "therefore [the majority] do[es] not reach [p]laintiff's motion to dismiss [d]efendant Anson County's counterclaim nor his motion for summary judgment." However, the deficiency in the majority's analysis lies in the fact—established by our legislature— that once an individual has been sworn into public office by the proper authority, they are presumed to be in that office lawfully.

To declare that the action of a public body, the Anson County Board of Commissioners' appointment of plaintiff Cannon as Anson County Sheriff on 5 December 2022, was taken, considered, discussed, or deliberated in violation of the Open Meetings Law, *somebody* needed to allege so by seeking relief through the appropriate proceedings. Those "proper proceeding[s]," *id.* § 128-6, are an injunction pursuant to N.C. Gen. Stat. § 143-318.16, or "[a] suit seeking declaratory relief under this section [that] must be commenced within 45 days following the initial disclosure of the actions the suit seeks to have declared null and void" pursuant to N.C. Gen. Stat. §143-318.16A(a)-(b). These remedies were not pursued *by anyone*.

Today's majority opinion misapprehends the dispositive issue raised by this case: whether the Anson County Board of Commissioners violated the Open Meetings Law on 5 December 2022 by appointing and swearing in plaintiff Cannon as Anson County Sheriff absent an emergency and, therefore, a quorum? Again, as noted above, our legislature has determined, as a matter of public policy, that the actions of a public body are presumed to be lawful; one who seeks to challenge the actions of a public body for violating the Open Meetings Law has two avenues to do so: by *seeking an injunction* pursuant to N.C. Gen. Stat. § 143-318.16, or by *bringing suit* within the appropriate period of time—forty-five days—pursuant to N.C. Gen. Stat. § 143-318.16A.

Applying the *mandatory* considerations from N.C. Gen. Stat. § 143-318.16A(c), it is possible that the majority is correct, that plaintiff

Cannon *may not* have lawfully been sworn in as the Anson County Sheriff because there *may not* have been an emergency,[1] and thereby not a quorum, at the 5 December 2022 meeting of the Anson County Board of Commissioners. However, this is not the dispositive issue raised by this case, as we need not determine, *at this juncture*, whether Anson County *not having a sheriff* for a period of time, albeit just one day in the instant case, constituted an emergency such that remote attendance of the commissioners at the 5 December 2022 meeting counted for purposes of a quorum,[2] because *nobody pursued the appropriate remedies* for us to address this question.

A proper resolution of plaintiff Cannon's quo warranto action—which alleged that the 6 December 2022 Board of Commissioners "did not have the authority to make any appointment to the office of Anson County Sheriff as no vacancy existed after the [5 December] 2022, appointment of [plaintiff Cannon] to the office of the Anson County Sheriff"—would have agreed with plaintiff Cannon's position. *Even if* plaintiff Cannon was not lawfully appointed and sworn in as Anson County Sheriff on 5 December 2022, there was no legal challenge to plaintiff Cannon's appointment and swearing in pursuant to the appropriate statutory remedies for an alleged violation of the Open Meetings Law.

Because no challenge was brought to the *presumably lawful* actions of a *public body*, the Anson County Board of Commissioners, through the proper proceedings—an injunction, or a suit seeking declaratory relief brought within forty-five days following the initial disclosure of the actions the suit seeks to have declared null and void—plaintiff Cannon is the Anson County Sheriff. He became the Anson County Sheriff upon his appointment and swearing in by the proper authority, the Anson County Board of Commissioners, on 5 December 2022; he maintains that title absent a challenge thereto. For these reasons, I would vacate the order of the trial court, award summary judgment in plaintiff Cannon's favor, and I respectfully dissent.

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1. I would posit that the majority's analysis is not correct, that there was an "emergency"; I also note that the statute does not require a "true emergency" as the majority asserts, but simply an "emergency," which the statute defines as "generally unexpected circumstances." N.C. Gen. Stat. § 143-318.12(f).

2. This question is more appropriately addressed under the mandatory statutory considerations set forth by our legislature to challenges of the actions of a public body; for example, actions that were "committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article." N.C. Gen. Stat. § 143-318.16A(c)(6).

STATE OF NORTH CAROLINA
v.
RUSTY RYAN ANDERSON, DEFENDANT

No. COA23-821

Filed 6 August 2024

1. Evidence—hearsay—exceptions—statements made for medical diagnosis or treatment—eyewitness account of abuse—reasonably pertinent to diagnosis

At defendant's trial for sexual offenses committed against his two minor daughters, where a pediatrician specializing in child maltreatment testified about her medical examination of one of the daughters, the trial court properly admitted the daughter's hearsay statement to the pediatrician that defendant had inappropriately touched her sister. The daughter's statement qualified as one "made for purposes of medical diagnosis or treatment" under the hearsay exception in Evidence Rule 803(4), since the daughter made the statement during her own medical exam, which was not limited to a physical examination but also involved assessing her mental health. Therefore, although the statement seemingly had more to do with what happened to her sister, the statement was reasonably pertinent to the daughter's diagnosis by the pediatrician because her eyewitness account of her sister's sexual abuse would undoubtedly have affected her mental health.

2. Evidence—prior consistent statement—improper corroboration—objection waived—evidence of similar character

At defendant's trial for sexual offenses committed against his two minor daughters, the trial court erred by allowing defendant's half-brother to testify that his stepsister mentioned seeing defendant sexually abusing the half-brother's then-five-year-old daughter, where the trial court did so "to corroborate." The stepsister did not testify at defendant's trial, so her out-of-court statement was inadmissible as a prior consistent statement because there was no in-court testimony to corroborate. Nevertheless, the court's error did not prejudice defendant because he had waived any objection to that testimony by failing to object to other evidence of a similar character, including in-court testimony from the half-brother's daughter and defendant's written statement to law enforcement, both of which described the stepsister witnessing the abuse referred to in her out-of-court statement.

3. Criminal Law—prosecutor's closing argument—improper statement of law—Evidence Rule 404(b)—prejudice

At defendant's trial for sexual offenses committed against his two minor daughters, the trial court was not required to intervene ex mero motu when the prosecutor improperly explained Evidence Rule 404(b) (allowing evidence of prior bad acts for reasons other than to show defendant's propensity to commit an offense) during closing arguments, stating that the "best predictor of future behavior is past behavior" and that "[o]ne of the things that tells you . . . how somebody acts is some things that they've done in the past." Although the prosecutor's statements were grossly improper, they did not prejudice defendant where, given the State's overwhelming evidence of defendant's guilt, there was no reasonable possibility that the jury would have acquitted defendant absent the improper statements.

Appeal by Defendant from judgment entered 3 February 2023 by Judge W. Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 17 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tracy Nayer, for the State.

Phoebe W. Dee, for Defendant-Appellant.

CARPENTER, Judge.

Rusty Ryan Anderson ("Defendant") appeals from judgment after a jury convicted him of one count of statutory sexual offense with a child by an adult and one count of taking indecent liberties with a child. On appeal, Defendant argues the trial court erred by: (1) admitting Dr. Calabro's testimony; (2) admitting Christopher Anderson's testimony; and (3) failing to intervene *ex mero motu* during the State's closing argument. After careful review, we discern no prejudicial error.

I. Factual & Procedural Background

On 2 August 2021, a grand jury indicted Defendant for three counts of statutory sexual offense with a child by an adult. On 10 October 2022, a grand jury indicted Defendant for three counts of taking indecent liberties with a child. These charges alleged the victims to be Lana and Anna,[1]

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

Defendant's daughters. The State began trying Defendant on 30 January 2023 in Cleveland County Superior Court, and trial evidence tended to show the following.

Teresa Vick, a social worker for the Cleveland County Department of Social Services, investigated sexual-abuse allegations made against Defendant. Lana told Vick that Defendant "put his finger in her and did it to [Anna]. [Lana] stated that [Defendant] put his finger in [her] front privates, but it was a long time ago when [she] was four." Lana told Vick that Defendant did the same to Anna when she was three years old.

Vick also spoke with Anna and asked her if anyone ever touched her between her legs. Anna said "yes" and "pointed to her back—her bottom and said, '[Defendant] put his finger in my butt,' and she told—and she told her mommy. And then she said he put his finger in her butt again, and her mommy kicked [Defendant] out."

Anna testified and described how Defendant "touched [her] no-no spot," which is "[s]omething really bad," and "where [she] pee[s]," and said that "[i]t hurt" and "made [her] body feel bad." Lana also testified that she was in the room and saw Defendant touch Anna in her "no-no spot," and that his finger made Anna's clothes rise up "like when you pull them up."

Dr. Michelle Calabro, a pediatrician, examined both Lana and Anna at the Children's Advocacy Center of Cleveland County. The State tendered Dr. Calabro as "an expert in the field of pediatrics with a concentration in child maltreatment." Dr. Calabro first testified about her examination of Lana. Dr. Calabro's examination of Lana was "a medical exam." In these examinations, Dr. Calabro "treat[s] it as an expanded medical exam like you would receive in the office." These examinations include an "interview."

Concerning recommended treatments after these examinations, Dr. Calabro "usually recommend[s] when kids have gone through a traumatic event such as something like sexual abuse or even changes in family, where they live, [she] recommend[s] some counseling. [She] do[es] typically like the trauma-focused cognitive therapy." The challenged portion of Dr. Calabro's testimony includes the following:

> **The State**: Did you interview [Lana] alone, as is your habit?
>
> **Dr. Calabro**: I did.
>
> **The State**: What did [Lana] tell you about why she was there for the exam that day?
>
> . . . .

> **Dr. Calabro**: You know, we started off traditionally that, you know, she was, you know, in second grade and at school she was an A student, and it was actually advanced. When she said—when I got kind of to the specifics of why she was here, she did say that "Dad"—and she identified "Dad" as [Defendant]—
>
> **Defense Counsel**: Objection to the hearsay.
>
> **The State**: Your Honor, I would contend, A, that it's not hearsay; that it's substantive evidence; the statement was made for the purposes of medical diagnosis and treatment and admissible for that purpose.
>
> **Trial Court**: All right. It's overruled. You may continue.
>
> **The State**: Go ahead.
>
> **Dr. Calabro**: She said that he touched [Anna] in what she called the no-no spot.

Dr. Calabro then discussed Anna's examination. Anna told Dr. Calabro that Defendant touched her "no-no spot" with his finger and pointed to her genital area as her "no-no spot." Anna told Dr. Calabro that Defendant "touched it" two times and said that Defendant would "touch it when [s]he was taking a bath." Anna told Dr. Calabro that Defendant "touched both no-no spots, meaning the front and the back," said that Defendant "put his finger inside her bottom," and said that "it hurt and made it bleed." Anna told Dr. Calabro that Defendant "touched her sister as well."

Defendant's half brother, Christopher Anderson, testified about events concerning Defendant and Christopher's daughter, Hailie, when she was five years old:

> **The State**: How did you find out about that?
>
> **Christopher**: I was told by Skylar.
>
> **The State**: And what did Skylar tell you?
>
> **Christopher**: That—
>
> **Defense Counsel**: Objection to the hearsay.
>
> **Christopher**: —she was—
>
> **Trial Court**: Hold on.
>
> **The State**: Hold on one second.
>
> **Trial Court:** The objection is overruled. It's being offered to corroborate, as the previous instruction indicated. You may continue.

First, "Skylar" is Christopher's stepsister. Second, the trial court's "previous instruction" was as follows:

> when evidence has been received tending to show that an earlier time a witness made a statement which may be consistent or may conflict with the testimony at this trial, you must not consider such earlier statement. You are simply examining whether or not the statement is consistent, corroborates or impeaches the testimony of another witness. You're only to use it for that purpose.

Christopher then testified that Skylar told him that "she had witnessed [Defendant] do inappropriate things" to Hailie. After hearing this, Christopher reported Defendant to the Lincoln County Sheriff's Office. Skylar did not testify at trial.

Hailie, who was nineteen years old during trial, testified that Defendant, her uncle, sexually assaulted her when she was five years old. Hailie said that she and Defendant were on the couch at her grandparents' house when Defendant "put his hands in [her] pants and did put a finger in [her] vagina." When asked what made Defendant stop touching her, Hailie said: "I don't really remember. I know Skylar was there." Defendant did not object to this testimony.

The State entered State's Exhibit 4 into evidence without objection. State's Exhibit 4 was a statement written by Defendant; Defendant wrote the statement in the Lincoln County Sheriff's Office on 5 March 2009, after Christopher reported Defendant's abuse.

In the signed statement Defendant recounted, among other things: "I put my hands inside Hailie's pants and touched Hailie's vagina. I put my finger inside her vagina a little. The next thing I remember, Skylar was coming around the corner. I knew she saw me, but she didn't say anything to me." Defendant continued: "I touched Hailie one other time with my hand on the outside of her vagina, but I don't remember when. I don't know why I did these things, but I need some help. I'm sorry to everybody."

Defendant offered no evidence.

During the State's closing argument, the prosecutor explained to the jury that evidence "about someone's past" is called "404(b) evidence." The prosecutor posed the following rhetorical questions to the jury:

> So why is it that it matters if [Defendant] stuck his finger in his five-year-old niece in her no-no spot, what she called her private? Why does it matter if he licked the vagina of

> his four-year-old niece . . . years ago? What does that tell you about whether he did something to [Anna] when she was five years old or three or four? What does that tell you?

The prosecutor continued:

> Well, it's something that in fact does help you make that determination. The best predictor of future behavior is past behavior. One of the things that tells you what—how somebody acts is some things that they've done in the past. Now, you don't convict somebody of something just because they've been in trouble in the past, but you look at the circumstances of what they've done in the past and see if they help you see a pattern, a common scheme, if they help you determine what somebody's intent is.

Defendant did not object to the State's closing argument.

On 3 February 2023, the jury convicted Defendant of one count of statutory sexual offense with a child by an adult and one count of taking indecent liberties with a child. The trial court sentenced Defendant to one term of between 339 and 467 months of imprisonment, followed by a consecutive term of between 25 and 39 months of imprisonment. The trial court also ordered Defendant to register as a sex offender for the rest of his life, and if Defendant is ever released, to enroll in satellite-based monitoring for ten years after his release. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

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

III. Issues

The issues on appeal are whether the trial court erred by: (1) admitting Dr. Calabro's testimony; (2) admitting Christopher Anderson's testimony; and (3) failing to intervene *ex mero motu* during the State's closing argument.

IV. Analysis

A. Dr. Calabro's Testimony

[1] On appeal, Defendant first argues that the trial court erred by allowing Dr. Calabro to testify about an out-of-court statement made by Lana. But before addressing the merits of Defendant's argument,

we must address the State's assertion that Defendant failed to preserve this argument.

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

Here, while testifying about her examination of Lana, Dr. Calabro stated that "[Lana] did say that 'Dad'—and she identified 'Dad' as [Defendant]." Defendant's counsel then "[o]bject[ed] to the hearsay." This objection "clearly presented the alleged error"—that Dr. Calabro's testimony was hearsay—and the objection clearly concerned Dr. Calabro's recitation of Lana's statements. *See* N.C. Gen. Stat. § 8C-1, Rule 103(a)(1). Therefore, Defendant's hearsay argument concerning Dr. Calabro's testimony is preserved for our review. *See id.*

We review a trial court's hearsay rulings de novo. *State v. Miller*, 197 N.C. App. 78, 87–88, 676 S.E.2d 546, 552 (2009). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). Said another way, hearsay is "(1) an out-of-court statement (2) offered for proof of the matter asserted." *State v. Kelly*, 75 N.C. App. 461, 465, 331 S.E.2d 227, 231 (1985). Hearsay is generally inadmissible. N.C. Gen. Stat. § 8C-1, Rule 802 (2023).

There are exceptions, however, to the general exclusion of hearsay. *See*, *e.g.*, N.C. Gen. Stat. § 8C-1, Rule 803(4) (2023). Under Rule 803(4), "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are "not excluded by the hearsay rule." *Id.*

Put differently, "Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis

or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000) (citing *State v. Aguallo*, 318 N.C. 590, 595–97, 350 S.E.2d 76, 80–81 (1986)). But Rule 803(4) does not apply to all declarants: It is "quite clear that only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay." *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 842 (1994).

Here, Dr. Calabro testified about her examination of Lana, and the challenged portion of Dr. Calabro's testimony includes the following:

> **State**: Did you interview [Lana] alone, as is your habit?
>
> **Dr. Calabro**: I did.
>
> **State**: What did [Lana] tell you about why she was there for the exam that day?
>
> . . . .
>
> **Dr. Calabro**: You know, we started off traditionally that, you know, she was, you know, in second grade and at school she was an A student, and it was actually advanced. When she said—When I got kind of to the specifics of why she was here, she did say that "Dad"—and she identified "Dad" as [Defendant]—
>
> **Defense Counsel**: Objection to the hearsay.
>
> **State**: Your Honor, I would contend, A, that it's not hearsay; that it's substantive evidence; the statement was made for the purposes of medical diagnosis and treatment and admissible for that purpose.
>
> **Trial Court**: All right. It's overruled. You may continue.
>
> **Dr. Calabro**: She said that [Defendant] touched [Anna] in what she called the no-no spot.

First, Dr. Calabro's testimony concerning Lana's statement about Anna was hearsay. Lana made this statement out of court because she made it at the Children's Advocacy Center of Cleveland County. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c). And because the State tried to admit the testimony under an exception to hearsay, the State was attempting to offer it for the truth of the matter asserted. *See id.* § 8C-1, Rule 803. Put another way: The statement was offered for its truth because if it was not, it would not be hearsay—and if the statement was not hearsay, offering it as an *exception* to hearsay would be pointless. *See id.* Therefore, Dr. Calabro's testimony about Lana's statement concerning Anna was hearsay because Lana made the statement out of court, and

the State offered it for the truth of the matter asserted. *See Kelly*, 75 N.C. App. at 465, 331 S.E.2d at 231.

Nonetheless, the trial court properly admitted Lana's statement under Rule 803(4). Lana's challenged statement, however, involved Anna, which raises a concern: Perhaps Lana's statement was not made by "the person being diagnosed or treated," thus making Rule 803(4) inapplicable. *See Jones*, 339 N.C. at 146, 451 S.E.2d at 842. At first glance, Lana's statement about what happened to *Anna* seems irrelevant to a medical diagnosis of *Lana*. *See id.* at 146, 451 S.E.2d at 842. From there, it follows that in order for Lana's statement about Anna to be "reasonably pertinent to diagnosis or treatment," the diagnosis or treatment must have been for Anna. *See Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667. Otherwise, the hearsay is barred under *Jones* because it was not made by "the person being diagnosed or treated." *See Jones*, 339 N.C. at 146, 451 S.E.2d at 842.

But this concern is misplaced, as Lana was indeed the person being diagnosed. Dr. Calabro, "an expert in the field of pediatrics with a concentration in child maltreatment," examined Lana. Dr. Calabro's examination of Lana was "a medical exam," which Dr. Calabro "treat[s] . . . as an expanded medical exam like you would receive in the office." These examinations include an interview.

Concerning common follow-up treatments, Dr. Calabro "usually recommend[s] when kids have gone through a traumatic event, such as something like sexual abuse or even changes in family, where they live, [she] recommend[s] some counseling. [She] do[es] typically like the trauma-focused cognitive therapy." In other words, Dr. Calabro's exams are not limited to physical examination. Rather, as illustrated by her interview process and her recommended counseling, Dr. Calabro also examines a patient's mental health.

Accordingly, Lana's statement about Anna was "made for purposes of medical diagnosis or treatment," *see Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667, because Lana made the statement during her own medical exam, which was not limited to physical examination. And Lana's statement was "reasonably pertinent to diagnosis," *see id.* at 284, 523 S.E.2d at 667, because her statement concerned an eyewitness account of her sister's sexual abuse, which undoubtedly affected Lana's mental health.

Therefore, as stated above, the trial court properly admitted Lana's statement under Rule 803(4) because Lana was "the person being diagnosed or treated," *see Jones*, 339 N.C. at 146, 451 S.E.2d at 842, and her statement was "made for purposes of medical diagnosis" and was

"reasonably pertinent to diagnosis," *see Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667.

B. Skylar's Statements

[2] Next, Defendant argues that the trial court erred by allowing Christopher to testify about out-of-court statements made by Skylar. In sum, we agree with Defendant; the trial court erred. Nonetheless, Defendant was not prejudiced by this error because he waived any objection to Christopher's testimony.

As detailed above, hearsay is "(1) an out-of-court statement (2) offered for proof of the matter asserted." *Kelly*, 75 N.C. App. at 465, 331 S.E.2d at 231. A witness's out-of-court statements offered to corroborate his own testimony, however, is not offered "for the truth of the matter asserted." *See*, *e.g.*, *State v. Holden*, 321 N.C. 125, 143, 362 S.E.2d 513, 526 (1987) ("Prior consistent statements made by a witness are admissible for purposes of corroborating the testimony of that witness, if it does in fact corroborate his testimony."); *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303 (1991) ("A witness's prior consistent statements may be admitted to corroborate the witness's courtroom testimony.").[2]

"Corroboration is the process of persuading the trier of the facts that a witness is credible." *State v. Ramey*, 318 N.C. 457, 468, 349 S.E.2d 566, 573 (1986) (quoting *State v. Riddle*, 316 N.C. 152, 156–57, 340 S.E.2d 75, 77–78 (1986)). "Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached." *Id.* at 468, 349 S.E.2d at 573 (quoting *Riddle*, 316 N.C. at 156–57, 340 S.E.2d at 77–78).

Here, Christopher testified about what Defendant did to Hailie when she was five years old. The relevant testimony is as follows:

The State: How did you find out about that?

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2. A similar rule is codified in the Federal Rules of Evidence. *See* Fed. R. Evid. 801(d)(1)(B) (explaining that a statement is "not hearsay" if the "declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . is consistent with the declarant's testimony and is offered . . . to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying"). The General Assembly has not codified our corroboration rule, however. *See* N.C. Gen. Stat. §§ 8C-1, Rules 801–06. Rather, our corroboration rule, concluding that an out-of-court statement offered to corroborate testimony is not offered for the "truth of the matter asserted," is a creature of caselaw. *See State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739–40 (2009). How a statement can be offered to "corroborate," yet not be offered for its truth, is unclear. Nonetheless, we are bound by stare decisis. *See In re Civ. Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

> **Christopher**: I was told by Skylar.
>
> **The State**: And what did Skylar tell you?
>
> **Christopher**: That—
>
> **Defense Counsel**: Objection to the hearsay.
>
> **Christopher**: —she was—
>
> **Trial Court**: Hold on.
>
> **The State**: Hold on one second.
>
> **Trial Court**: The objection is overruled. It's being offered to corroborate, as the previous instruction indicated. You may continue.

Christopher then testified that Skylar told him that "she had witnessed [Defendant] do inappropriate things" to Hailie. After hearing this, Christopher reported Defendant to the Lincoln County Sheriff's Office.

Christopher testified about Skylar's out-of-court statement, and the trial court admitted Christopher's testimony "to corroborate." But the out-of-court statement offered for corroboration was made by Skylar. Skylar, though, did not testify at trial. Because Skylar did not testify at trial, there was nothing for her to corroborate: "A witness's prior consistent statements may be admitted to corroborate the witness's *courtroom testimony*." *See Harrison*, 328 N.C. at 681, 403 S.E.2d at 303 (emphasis added). Skylar did not give courtroom testimony, so her out-of-court statements could not be offered to corroborate. *See id.* at 681, 403 S.E.2d at 303. Accordingly, the trial court erred by admitting testimony about Skylar's out-of-court statements.

The State, however, argues that Defendant waived any objection to Christopher's testimony about Skylar's statements because the State properly admitted, without objection, other evidence that supported Skylar's statements to Christopher. For this argument, the State points to two pieces of evidence: (1) Hailie's testimony that she "kn[e]w Skylar was there" when Defendant sexually assaulted her; and (2) State's Exhibit 4, in which Defendant admitted to sexually assaulting Hailie, and that "[Skylar] saw [him], but she didn't say anything to [him]."

"Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Anthony*, 354 N.C. 372, 409, 555 S.E.2d 557, 582 (2001) (quoting *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995)). "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Hudson*, 331 N.C.

122, 151, 415 S.E.2d 732, 747–48 (1992) (quoting *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979)).

Here, the trial court erred by admitting the following testimony from Christopher: that Skylar told him that "she had witnessed [Defendant] do inappropriate things" to Hailie. But Defendant did not object to Hailie's own testimony—in which she testified that she "kn[e]w Skylar was there" when Defendant sexually assaulted her. Further, Defendant did not object to State's Exhibit 4, in which he admitted to sexually assaulting Hailie, and that "[Skylar] saw [him], but she didn't say anything to [him]."

Both Hailie's testimony and State's Exhibit 4 are "of a similar character" to Christopher's challenged testimony. *See Hudson*, 331 N.C. at 151, 415 S.E.2d at 747–48. Indeed, Hailie's testimony and State's Exhibit 4 support the same proposition as Christopher's challenged testimony: Defendant sexually assaulted Hailie, and Skylar witnessed the assault. Therefore, despite the trial court's error, Defendant waived any objection to Christopher's challenged testimony concerning Skylar. *See Anthony*, 354 N.C. at 409, 555 S.E.2d at 582.

C. The State's Closing Argument

[3] In his final argument, Defendant asserts that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*."[3] *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998)). "[I]n order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial." *Id.* at 133, 558 S.E.2d at 107–08.

To establish prejudice, "the defendant must show that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *State v. Fletcher*, 370 N.C. 313, 320, 807 S.E.2d 528, 534 (2017) (citing *State v. Ratliff*, 341 N.C. 610, 617, 461 S.E.2d 325, 329 (1995)). To clear the prejudice hurdle, a defendant

3. *Ex mero motu* is analogous to *sua sponte*. A court intervenes *ex mero motu* when it does so "voluntarily," without prompting from counsel. *Ex mero motu*, Black's Law Dictionary (11th ed. 2019).

must overcome the presumption that juries follow a trial court's legal instructions. *See State v. Prevatte*, 356 N.C. 178, 254, 570 S.E.2d 440, 482 (2002) (quoting *State v. McCarver*, 341 N.C. 364, 384, 462 S.E.2d 25, 36 (1995)) ("Jurors are presumed to follow a trial court's instructions.").

"As a general proposition, parties are given wide latitude in their closing arguments to the jury, with the State being entitled to argue to the jury the law, the facts in evidence and all reasonable inferences drawn therefrom." *Fletcher*, 370 N.C. at 319, 807 S.E.2d at 534 (*purgandum*). Nonetheless, incorrect statements of law are improper. *Id.* at 319, 807 S.E.2d at 534.

Defendant's specific claim concerning the State's closing argument is that the prosecutor incorrectly explained Rule 404(b) to the jury. Under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023). But Rule 404(b) allows evidence of "[o]ther crimes, wrongs, or acts" for purposes other than to show the defendant "acted in conformity therewith." *Id.* Such purposes include attempting to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*

Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). "[Rule 404(b) evidence] 'is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.' " *State v. Davis*, 239 N.C. App. 522, 532, 768 S.E.2d 903, 910 (2015) (alteration in original) (quoting *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012)).

Here, during the State's closing argument, the prosecutor explained to the jury that evidence "about someone's past" is called "404(b) evidence." The prosecutor posed the following rhetorical questions to the jury:

> So why is it that it matters if [Defendant] stuck his finger in his five-year-old niece in her no-no spot, what she called her private? Why does it matter if he licked the vagina of his four-year-old niece . . . years ago? What does that tell you about whether he did something to [Anna] when she was five years old or three or four? What does that tell you?

The prosecutor continued:

> Well, it's something that in fact does help you make that determination. The best predictor of future behavior is past behavior. One of the things that tells you what—how somebody acts is some things that they've done in the past. Now, you don't convict somebody of something just because they've been in trouble in the past, but you look at the circumstances of what they've done in the past and see if they help you see a pattern, a common scheme, if they help you determine what somebody's intent is.

The prosecutor attempted to align her closing with Rule 404(b) by telling the jury that they could "look at the circumstances of what [Defendant has] done" in order to "see a pattern, a common scheme," or "determine what [Defendant's] intent [was]." And under our caselaw, Rule 404(b) is indeed a "general rule of inclusion," *see Coffey*, 326 N.C. at 278–79, 389 S.E.2d at 54, allowing evidence of a prior act so "long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime," *see Davis*, 239 N.C. App. at 532, 768 S.E.2d at 910.

Nonetheless, the prosecutor erred when she said: "The best predictor of future behavior is past behavior. One of the things that tells you what—how somebody acts is some things that they've done in the past." This is the exact propensity purpose prohibited by Rule 404. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b). Therefore, the prosecutor's closing argument here was improper. *See Fletcher*, 370 N.C. at 319, 807 S.E.2d at 534. The next question, then, is whether the prosecutor's closing remarks were prejudicial. *See Jones*, 355 N.C. at 133, 558 S.E.2d at 107–08.

First, Defendant must rebut the presumption that the jury followed the trial court's legal instructions, which Defendant does not challenge. *See Prevatte*, 356 N.C. at 254, 570 S.E.2d at 482. Second, Defendant must counter the ample evidence in this case. Social worker Teresa Vick testified that Lana and Anna told Vick about Defendant's repeated sexual abuse. Further, Dr. Calabro testified about the same. And indeed, both Lana and Anna, themselves, testified about Defendant's repeated sexual abuse. Defendant, who admittedly "need[s] some help," offered no evidence at trial. Considering the State's evidence of guilt, and Defendant's dearth of evidence to the contrary, there is not a "reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted." *See Fletcher*, 370 N.C. at 320, 807 S.E.2d at 534.

In sum, although the prosecutor's closing argument was improper, Defendant has failed to show that he was prejudiced by it. *See Jones*,

355 N.C. at 133, 558 S.E.2d at 107–08. Accordingly, the trial court did not err by failing to intervene *ex mero motu* during the State's closing argument. *See id.* at 133, 558 S.E.2d at 107.

V. Conclusion

We conclude that the trial court did not err by admitting Dr. Calabro's testimony, that Defendant waived his argument concerning Christopher's testimony, and that, although the State's closing was improper, the trial court did not err by failing to intervene *ex mero motu*.

NO PREJUDICIAL ERROR.

Judges WOOD and GORE concur.

STATE OF NORTH CAROLINA
v.
CHAD DAVID BARTON, DEFENDANT

No. COA23-1148

Filed 6 August 2024

1. Appeal and Error—petition for writ of certiorari—satellite-based monitoring order—meritorious argument—extraordinary circumstances

In an appeal from orders requiring defendant to submit to satellite-based monitoring (SBM), although defendant's notice of appeal was deficient (because he failed to specify which court he was appealing to and did not reference the orders from which he appealed), defendant's petition for writ of certiorari was granted based on a showing of extraordinary circumstances, since the trial court likely erred concerning the SBM orders, and unwarranted SBM constitutes substantial harm.

2. Appeal and Error—petition for writ of certiorari—guilty plea—error in probation sentence—extraordinary circumstances

In an appeal from judgments entered after defendant pleaded guilty to four counts of second-degree exploitation of a minor, although defendant's notice of appeal was deficient (because he failed to specify which court he was appealing to and did not reference the judgments from which he appealed), defendant's petition for writ of certiorari was granted based on a showing of

extraordinary circumstances, since the trial court likely erred concerning defendant's probation sentence, and an unwarranted extension of probation constitutes substantial harm.

3. Satellite-Based Monitoring—period of five years—defendant scored in low risk range—no supporting evidence—orders reversed without remand

In a criminal matter in which defendant pleaded guilty to four counts of second-degree exploitation of a minor, where defendant scored a "1" on the STATIC-99R—which placed him in the low risk range for sexual recidivism—the trial court erred by ordering defendant to submit to five years of satellite-based monitoring (SBM) without making additional findings of fact regarding the need for the highest possible level of supervision. Where the State presented no evidence to support findings of a higher level of risk or to support SBM, the trial court's orders were reversed without remand.

4. Probation and Parole—probation ordered to run consecutive to post-release supervision—rule of lenity—improper increase in penalty

In a criminal matter in which, because defendant pleaded guilty to four counts of second-degree exploitation of a minor—an offense requiring registration—defendant was given a post-release supervision period of five years, the trial court erred by sentencing defendant's probation (also five years) to run consecutively to his post-release supervision. Where the relevant statute, N.C.G.S. § 15A-1346, generally required probation to run concurrently with periods of probation, parole, or imprisonment (with an exception for imprisonment as determined by a trial court), but was silent as to post-release supervision, the appellate court applied the rule of lenity to conclude that the trial court's sentence impermissibly increased the penalty placed on defendant in the absence of clear legislative intent. The probation judgments were vacated and the matter was remanded to the trial court for the parties to enter into a new plea agreement or for the matter to proceed to trial.

Appeal by Defendant from judgments entered 1 May 2023 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 14 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon B. Mayes, for Defendant-Appellee.

CARPENTER, Judge.

Chad David Barton ("Defendant") appeals from the trial court's final judgments and the trial court's satellite-based monitoring ("SBM") orders. On appeal, Defendant argues that the trial court erred by: (1) ordering Defendant to submit to SBM; and (2) sentencing Defendant to probation after his post-release supervision. After careful review, we agree with Defendant. We therefore reverse the SBM orders without remand, and we vacate the probation judgments and remand to the trial court.

I. Factual & Procedural Background

During the 1 May 2023 criminal session of Brunswick County Superior Court, Defendant pleaded guilty to four counts of second-degree exploitation of a minor. The trial court entered four judgments. In the first judgment, the trial court sentenced Defendant to an active sentence of between twenty-five and ninety months of imprisonment. Second-degree exploitation of a minor is a reportable offense under section 14-208.6, so the first judgment required Defendant to submit to five years of post-release supervision. *See* N.C. Gen. Stat. §§ 14-208.6(4), 15A-1368.2(c) (2023).

In the next three judgments, the trial court suspended each active sentence for sixty months of probation, to run consecutively with the first judgment. In these judgments, the trial court specified that probation would begin "at the expiration of the sentence" imposed in the first judgment, as opposed to "when the defendant is released from incarceration." The trial court orally reiterated that "probation is not going to begin to run until the conclusion of his post-release supervision."

The trial court then moved to an SBM hearing. SBM is a system that provides (1) "[t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology" and (2) "[r]eporting of [the] subject's violations of prescriptive and proscriptive schedule or location requirements." N.C. Gen. Stat. § 14-208.40(c)(1)–(2) (2023). Other than Defendant's STATIC-99R results, the State offered no evidence concerning SBM.

A STATIC-99R "is an actuarial instrument designed to estimate the probability of sexual and violent recidivism among male offenders who have already been convicted of at least one sexual offense against

a child or non-consenting adult." *State v. Morrow*, 200 N.C. App. 123, 125 n.3, 683 S.E.2d 754, 757 n.3 (2009) (quoting N.C. Dep't of Correction Policies–Procedures, No. VII.F Sex Offender Management Interim Policy 9 (2007)). Defendant scored a "1" on his STATIC-99R, placing him in the "low risk range" for recidivism.

Based on Defendant's STATIC-99R, the trial court orally ordered Defendant to submit to five years of SBM. Specifically, the trial court said:

> That based on a risk assessment by the Department of Adult Correction and Juvenile Justice, specifically, the Static-99R, which is incorporated herein by reference, the Court finds that the defendant received a total score of 1, which indicates that the defendant is at average risk for sexual recidivism. That based on this, the Court finds that the defendant requires the highest possible level of supervision and monitoring, and satellite-based monitoring constitutes a reasonable search of the defendant in this case. The Court therefore orders that upon release from imprisonment, the defendant shall enroll in satellite-based monitoring for a period of five years. And the same findings, obviously, on the suspended sentence.

The trial court then entered two written SBM orders, which required Defendant to submit to a total of five years of SBM after his release from prison. The trial court did not make additional findings concerning SBM.

On 12 May 2023, Defendant filed written notice of appeal. The notice, however, did not state that the appeal was to this Court, and the notice did not reference the judgment or order from which Defendant appealed. On 2 June 2023, Defendant filed a proper notice of appeal. On 22 January 2024, Defendant filed a petition for writ of certiorari ("PWC"), addressing his appeal from the SBM proceeding. On 6 May 2024, Defendant filed an additional PWC, addressing his appeal from the plea proceeding.

II. Jurisdiction

Here, Defendant filed two PWCs: the first addressing the SBM proceeding, and the second addressing the plea proceeding. We will address our jurisdiction in that order.

A. SBM Proceeding

[1] SBM proceedings are civil. *State v. Brooks*, 204 N.C. App. 193, 194–95, 693 S.E.2d 204, 206 (2010). Therefore Appellate Rule 3, rather than Rule

4, applies to SBM proceedings. *See* N.C. R. App. P. 3. Generally under Rule 3, an appellant must file a notice of appeal "within thirty days after entry of judgment." N.C. R. App. P. 3(c)(1). The notice must "designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 3(d). Timely filing a proper notice of appeal is a jurisdictional requirement. *See Whitlock v. Triangle Grading Contractors Dev., Inc.*, 205 N.C. App. 444, 446, 696 S.E.2d 543, 545 (2010).

We may sanction parties for failing to adhere to our Rules of Appellate Procedure, N.C. R. App. P. 25(b), and we may do so by dismissing their appeal, N.C. R. App. P. 34(b)(1). Dismissal is proper when the appellant's rule violations are jurisdictional. *See Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

We lack jurisdiction over Defendant's appeal from the SBM orders because Defendant did not timely file a proper notice of appeal. *See Whitlock*, 205 N.C. App. at 446, 696 S.E.2d at 545. So without jurisdictional relief, we must dismiss Defendant's appeal concerning SBM. *See Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365. Defendant, however, requested relief by filing a PWC.

A PWC is a "prerogative writ" that we may issue to expand our jurisdiction. *See* N.C. Gen. Stat. § 7A-32(c) (2023). But issuing a PWC is an extraordinary measure. *See Cryan v. Nat'l Council of YMCAs of the U.S.*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023). Accordingly, a petitioner must satisfy a two-part test before we will issue the writ. *Id.* at 572, 887 S.E.2d at 851. "First, a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Id.* at 572, 887 S.E.2d at 851 (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021)). "Second, a writ of certiorari should issue only if there are 'extraordinary circumstances' to justify it." *Id.* at 572–73, 887 S.E.2d at 851 (quoting *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811, 812 (1982)).

"We require extraordinary circumstances because a writ of certiorari 'is not intended as a substitute for a notice of appeal.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d at 839). "If courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d at 839). An extraordinary circumstance "generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice.' " *Id.* at 573, 887

S.E.2d at 851 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020)).

Here, Defendant has shown that the trial court likely erred concerning SBM, and unwarranted SBM is a substantial harm. Therefore, we grant Defendant's first PWC. *See id.* at 572, 887 S.E.2d at 851.

B. Plea Proceeding

[2] Plea proceedings are criminal. *See* N.C. Gen. Stat. § 15A-1444 (2023). Generally, a defendant "is entitled to appeal as a matter of right when final judgment has been entered." *Id.* § 15A-1444(a). But when a defendant enters a guilty plea, his right to appeal is limited. *See id.* § 15A-1444(a2). A defendant, however, "may petition the appellate division for review by writ of certiorari." *Id.* § 15A-1444(e).

Defendant has shown that the trial court likely erred concerning his probation sentence. And like SBM, an unwarranted extension of probation is a substantial harm. Therefore, we also grant Defendant's second PWC. *See Cryan*, 384 N.C. at 573, 887 S.E.2d at 851.

III. Issues

The issues on appeal are whether the trial court erred by: (1) ordering Defendant to submit to SBM; and (2) sentencing Defendant to probation after his post-release supervision.

IV. Analysis

A. SBM

[3] In his first argument, Defendant asserts that the trial court erred by ordering him to submit to SBM without making additional findings of fact. We agree.

When reviewing SBM orders, "this Court reviews the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Harding*, 258 N.C. App. 306, 321, 813 S.E.2d 254, 265 (2018) (quoting *State v. Springle*, 244 N.C. App. 760, 765, 781 S.E.2d 518, 521–22 (2016)).

When a STATIC-99R places a defendant in the "low risk range," a trial court must make additional findings in order to impose SBM. *See State v. Jones*, 234 N.C. App. 239, 243, 758 S.E.2d 444, 447–48 (2014) (requiring additional findings concerning a " 'moderate-low' risk" defendant, which applies *a fortiori* to a "low risk" defendant). Specifically,

a trial court may order a low-risk defendant to submit to SBM only if the trial court "makes 'additional findings' regarding the need for the highest possible level of supervision and where there is competent record evidence to support those additional findings." *See id.* at 239, 243, 758 S.E.2d at 447–48 (quoting *State v. Green*, 211 N.C. App. 599, 601, 710 S.E.2d 292, 294 (2011)).

A trial court's order requiring SBM must be reversed, without remand, if the defendant is low risk, and "the State presented no evidence to support findings of a higher level of risk or to support [SBM]." *See id.* at 243, 758 S.E.2d at 448 (quoting *State v. Kilby*, 198 N.C. App. 363, 370–71, 679 S.E.2d 430, 434 (2009)).

Here, Defendant scored a "1" on his STATIC-99R, placing him in the "low risk range" for recidivism. Therefore, the trial court needed to make additional findings supporting the need for SBM. *See id.* at 243, 758 S.E.2d at 447–48. The State, however, presented no evidence concerning SBM, and the trial court failed to make additional findings. Accordingly, we reverse the SBM orders without remand. *See id.* at 243, 758 S.E.2d at 448.

B. Probation After Post-Release Supervision

[4] In his second and final argument, Defendant asserts that the trial court erred by sentencing Defendant's probation to run consecutively with his post-release supervision. Defendant offers two separate statutory arguments for his position: (1) that section 15A-1368.5 requires his post-release supervision to run concurrently with his probation; and (2) that section 15A-1346 requires his probation to run concurrently with his post-release supervision. *See* N.C. Gen. Stat. §§ 15A-1368.5, -1346 (2023). We agree with Defendant's second argument: Section 15A-1346 requires probation to run concurrently with post-release supervision. *See id.* § 15A-1346.

We review sentencing questions de novo. *State v. Patterson*, 269 N.C. App. 640, 645, 839 S.E.2d 68, 73 (2020). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Probation and post-release supervision are distinct. Probation is served in lieu of imprisonment. *See State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). Post-release supervision, on the other hand, is served after the supervisee is released from prison. N.C. Gen. Stat.

§ 15A-1368(a)(1) (2023). But probation and post-release supervision are similar because both are forms of supervision. *See id.* §§ 15A-1343; 15A-1368(a)(1).

Here, Defendant's offenses require registration, so his period of post-release supervision is five years. *Id.* § 15A-1368.2(c) ("For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years."). And here, the trial court sentenced Defendant to five years of probation to begin at the end of Defendant's post-release supervision. Therefore, the trial court sentenced Defendant to be "supervised" for ten years: five under post-release supervision, and five under probation. The question is whether sections 1368.5 or 1346 prohibit this.

Under section 15A-1368.5:

> A period of post-release supervision begins on the day the prisoner is released from imprisonment. Periods of post-release supervision run concurrently with any federal or State prison, jail, probation, or parole terms to which the prisoner is subject during the period, only if the jurisdiction which sentenced the prisoner to prison, jail, probation, or parole permits concurrent crediting of supervision time.

Id. § 15A-1368.5.

"[P]eriod" refers to "[p]eriods of post-release supervision." *See id.* Here, the trial court sentenced Defendant to begin his probation after his post-release supervision. So, assuming the trial court had authority to do this, Defendant is not subject to probation "during the period" of post-release supervision. *See id.* If the assumption is accurate, the "run concurrently" clause is inapplicable to Defendant's sentence. *See id.*

To test the assumption, we must look to section 15A-1346, which details when probation commences. *Id.* § 15A-1346(a)–(b). Under section 15A-1346:

> (a) Commencement of Probation. – Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.
>
> (b) Consecutive and Concurrent Sentences. – If a period of probation is being imposed at the same time a period of

> imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.

Id.

"Except as provided in subsection (b)," subsection (a) clearly says that probation "runs *concurrently with any other period of probation, parole, or imprisonment*." *Id.* (emphasis added). And subsection (b) clearly says that "probation may run either concurrently or consecutively with the term of *imprisonment*, as determined by the court." *Id.* (emphasis added). We have held that the consecutive caveat in subsection (b) only applies to imprisonment—not probation. *State v. Canady*, 153 N.C. App. 455, 459–60, 570 S.E.2d 262, 265–66 (2002).

So the general rule is that probation must run concurrently with other periods of "probation, parole, or imprisonment." N.C. Gen. Stat. § 15A-1346. And there is an exception—but only for imprisonment. *See Canady*, 153 N.C. App. at 459–60, 570 S.E.2d at 265–66. Section 15A-1346, however, does not mention post-release supervision, *see* N.C. Gen. Stat. § 15A-1346, and no caselaw directly answers whether probation can run consecutively with post-release supervision.

We recognize that a missing statutory provision "does not justify judicial legislation." *Ebert v. Poston*, 266 U.S. 548, 554, 45 S. Ct. 188, 190, 69 L. Ed. 435, 438 (1925). But this case presents an unavoidable binary problem: Either (1) probation can run consecutively with post-release supervision, or (2) probation cannot run consecutively with post-release supervision. We cannot decline to resolve this issue, and leave Defendant in limbo, simply because the General Assembly failed to speak on the matter.

Section 15A-1346 is not ambiguous; it simply does not mention post-release supervision, let alone whether probation can run consecutively with post-release supervision. *See* N.C. Gen. Stat. § 15A-1346. In other words, the General Assembly has not clearly stated whether probation can run consecutively with post-release supervision. *See id.* And under the rule of lenity, we cannot "interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985).

Therefore, we cannot interpret section 15A-1346 to allow probation to run consecutively with post-release supervision because doing so would "increase the penalty that it places on" Defendant. *See id.* at 577, 337 S.E.2d at 681. Accordingly, the trial court erred when it sentenced Defendant to submit to probation after post-release supervision; Defendant's probation must run concurrently with his post-release supervision. *See* N.C. Gen. Stat. § 15A-1346. The General Assembly may certainly address this issue by statute if it deems our analysis to be contrary to its intent. This Court, however, declines to enter the legislative lane when the General Assembly has not clearly stated its preference.

On remand, "the parties must return to their respective positions prior to entering into the [plea] agreement." *State v. High*, 271 N.C. App. 771, 845 S.E.2d 150 (2020) (citing *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) ("Where a sentence is imposed in error as part of a plea agreement, the proper remedy is rescission of the entire plea agreement, and the parties must return to their respective positions prior to entering into the agreement and may choose to negotiate a new plea agreement."), *rev'd per curiam for the reasons stated in the dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012)). Accordingly, "the plea agreement must be set aside in its entirety, and the parties may either agree to a new plea agreement or the matter should proceed to trial on the original charges in the indictments." *State v. Green*, 266 N.C. App. 382, 392, 831 S.E.2d 611, 618 (2019).

V. Conclusion

We conclude that the trial court erred by imposing SBM on Defendant and by sentencing Defendant's probation to run consecutively with his post-release supervision. We reverse the SBM orders without remand, and we vacate the probation judgments and remand to the trial court.

REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges STROUD and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
DAQUON ROLLO CORROTHERS

No. COA23-865

Filed 6 August 2024

1. Appeal and Error—preservation of issues—waiver—constitutional challenge—evidence in murder trial—collected pursuant to allegedly tainted warrants—no motion to suppress

In a prosecution for first-degree murder, defendant did not preserve for appellate review his argument that the trial court committed plain error by failing to suppress evidence obtained pursuant to multiple search warrants, which defendant alleged were tainted by law enforcement's unlawful search of his residence. Defendant did not file a motion to suppress the evidence, and therefore he waived his constitutional challenge to the search warrants. His petition for a writ of certiorari was denied on appeal, as was his request for review pursuant to Appellate Rule 2.

2. Search and Seizure—effective assistance of counsel—no motion to suppress filed—evidence obtained pursuant to warrants—taint purged

In a first-degree murder case, where law enforcement applied for warrants to search defendant's residence and phone after an officer observed a hole in the ground (where the victim's body was later found) within the curtilage of defendant's house, defendant did not receive ineffective assistance of counsel where his trial attorney did not move to suppress evidence seized pursuant to the search warrants. Even if the officer's warrantless search of the curtilage at defendant's home had been unlawful, the warrants were still supported by probable cause based on information acquired independently of the officer's unlawful entry, including phone records placing defendant and the victim at defendant's house at the time of the murder, thereby purging the warrants of any taint.

3. Homicide—first-degree murder—motions to dismiss and to set aside verdict—substantial evidence

The trial court in a first-degree murder prosecution properly denied defendant's motion to dismiss during trial and his subsequent motion to set aside the guilty verdict, because the State presented substantial evidence from which a jury could reasonably infer defendant's guilt, including: a long exchange of text messages

between defendant and the victim, some of which were sent the day that the victim went missing, in which the victim agreed to purchase drugs from defendant; cellular phone records placing both the victim and defendant at defendant's residence during the time of the murder; and evidence that the projectiles removed from the victim's body were consistent with the shotgun shell casing and gun found inside defendant's residence.

Appeal by defendant from judgments entered 10 October 2022 by Judge Tiffany Peguise-Powers in Columbus County Superior Court. Heard in the Court of Appeals 5 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for the State.

Drew Nelson for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from the judgments entered upon a jury's verdicts finding him guilty of first-degree murder and robbery with a dangerous weapon. On appeal, Defendant argues that the trial court committed plain error in admitting certain evidence at trial, and that he received ineffective assistance of counsel as a result of his trial counsel's failure to file a motion to suppress that evidence. Defendant also contends that the trial court erroneously denied his motions to dismiss and motion to set aside the jury's verdict. After careful review, we dismiss Defendant's appeal in part, and conclude that he received a fair trial, free from error.

BACKGROUND

At a social gathering on the evening of 27 January 2020 at Derby's, a hangout in Columbus County, the victim Alex Moore asked Regina Spaulding, a family friend of Moore's, to lend him $400.00 in cash to help him "get his four-wheeler fixed and whatnot[.]" Spaulding understood this "to mean a drug deal, to be honest[,]" and lent Moore the money. Moore told her that he was going to Defendant's home, less than five minutes away, and then would return. Moore also texted Spaulding a screenshot of Defendant's phone number.

Spaulding became concerned when Moore failed to return after a couple of hours. She called Moore, who told her that he "was coming home." But Moore "never showed back up[,]" so Spaulding continued to call him. However, her calls went straight to voicemail, then automated

text messages were sent to her cellular phone from Moore's cellular phone saying, "I'll call you back."

After several hours, Spaulding called Marcus Solomon, another friend, told him what happened, and asked him to call Moore. When Moore did not answer Solomon's calls, Spaulding went to Moore's residence; however, neither Moore nor his truck were there. Spaulding told Moore's father that they were looking for Moore.

Early the next morning, on 28 January 2020, Spaulding discovered Moore's empty truck parked at a cemetery. Moore's father reported him to authorities as missing that day.

On 4 February 2020, Columbus County Sheriff's Detective Paul D. Rockenbach "initiated the assistance of Special Agent J. Bain with the North Carolina State Bureau of Investigation[,] who was able to pin-point a more accurate last known location of the cellular phone belonging to [Moore]." Agent Bain identified Defendant's Clarkton residence ("the Property") as the last location of Moore's cellular phone and determined that Moore's cellular phone "was at this location for approximately thirty minutes prior to going offline" on the evening of 27 January 2020.

Detective Rockenbach traveled to the Property that same day, 4 February 2020. He knocked on the door, but no one answered. Detective Rockenbach observed that there were four vehicles parked outside the house and a wheelchair on the front porch. Solomon had opined to Detective Rockenbach that Defendant should not have been "physically able to hurt" Moore. From this, Detective Rockenbach concluded that the wheelchair may have belonged to "the individual . . . Moore was going to see to complete [the] drug transaction[,]" i.e., Defendant. While at the Property, Detective Rockenbach walked about the front and rear of the house, "look[ing] around the curtilage[.]" Around the rear of the house, Detective Rockenbach noticed a hole in the ground.

On 5 February 2020, Detective Rockenbach secured a search warrant for the Property. Officers executed the search warrant that day and located Moore's body inside a "hole approximately six feet in length, maybe three to four feet in width, and . . . filled with water[.]" The hole "[a]ppeared to be manmade [and] dug by hand[.]" Officers extracted Moore's body after pumping the water out of the hole. They also located "two burn piles in the back part of the residence."

An autopsy revealed that Moore suffered gunshot wounds to several areas of the body, including his head, abdomen, ribs, and forearm, as well as blunt-force injuries. The associate chief medical examiner

testified that the cause of Moore's death was multiple gunshot wounds, most of which likely would have been fatal in isolation.

On 6 February 2020, Detective Rockenbach obtained a search warrant for Defendant's cellular phone records.

On 3 June 2020, a grand jury returned a true bill of indictment charging Defendant with murder. On 9 December 2020, a grand jury returned a second true bill of indictment charging Defendant with robbery with a dangerous weapon based on the allegation that Defendant stole "$400.00 from the person . . . of Alex Moore."

On 9 September 2022, FBI Special Agent Harrison Putnam obtained the cellular phone records in this case, including for Defendant's AT&T cellular phone and Moore's Verizon cellular phone. The records showed that Moore's Verizon cellular phone entered the coverage area of the Property and vehicle-recovery location at approximately 6:11 p.m. on the evening of 27 January 2020. From approximately 6:12 to 6:34 p.m., Moore's cellular phone remained "right in the area of [the Property]," and was "definitely there or near that location" during this period.

Records from Defendant's AT&T cellular phone likewise revealed that "sometime between 6:23 and 6:38 [p.m.], [Defendant's] AT&T phone traveled . . . to the coverage area of the Emerson tower[,]" which Special Agent Putnam described as "the cell site [he] would most expect to provide coverage to the vehicle recovery location and the [Property]." Special Agent Putnam testified that Defendant's AT&T cellular phone remained in the coverage area of the Emerson tower until approximately 6:47 p.m. on the evening of 27 January 2020.

This matter came on for a jury trial on 29 September 2022. On 10 October 2022, the jury returned verdicts finding Defendant guilty of first-degree murder and robbery with a dangerous weapon. The trial court sentenced Defendant to life imprisonment without parole for the first-degree murder conviction, and a concurrent, active term of 64 to 89 months for the robbery with a dangerous weapon conviction.

Defendant gave oral and written notice of appeal.

DISCUSSION

Defendant argues that "the trial court committed plain error by failing to suppress the evidence collected pursuant to the search warrant issued for . . . [the Property], the search warrant related to [Defendant's] phone, and the follow-on warrants[,]" in that the search warrants were tainted by Detective Rockenbach's alleged unlawful 4 February search of the curtilage of Defendant's residence. However, Defendant neglected to

file a motion to suppress this evidence. Accordingly, on 19 October 2023, Defendant filed in this Court a petition for writ of certiorari requesting that we invoke Rule 2 of our Rules of Appellate Procedure to allow review of his unpreserved constitutional arguments.

Defendant further argues that "[s]hould this Court decline to exercise its authority under Rule 2 or determine that the trial court did not commit plain error, this Court should hold that [Defendant] received ineffective assistance of counsel" due to trial counsel's failure to file a motion to suppress the evidence seized pursuant to the search warrants.

Lastly, Defendant contends that the trial court erred by denying his motions to dismiss the first-degree murder charge and his motion to set aside the jury's verdict finding him guilty of first-degree murder.

I. Plain Error Review

[1] Defendant first argues that "the trial court committed plain error by failing to suppress the evidence collected pursuant to the search warrant issued" for the Property, as well as "the search warrant related to [Defendant's] phone, and the follow-on warrants."

During Defendant's trial, Detective Rockenbach testified that, on 4 February 2020, he traveled to the Property and attempted to conduct a "knock and talk." He explained: "I knocked on the door. There were several cars there, and nobody came to the door, so I went back out, and . . . I noticed a hole." As Detective Rockenbach recalled, "we got to go out [to the Property] on the 4th, check it out, and nobody comes to the place. I see an area of interest as I'm walking around the curtilage, and I go and apply for a search warrant."

In light of this admission by Detective Rockenbach that he observed a hole on the Property prior to applying for the search warrants, Defendant contends that all subsequent evidence required suppression by the trial court, and that the trial court committed plain error in not suppressing the evidence.

In *State v. Miller*, our Supreme Court "h[e]ld that [the] defendant's Fourth Amendment claims [were] not reviewable on direct appeal, even for plain error, because he completely waived them by not moving to suppress [the] evidence . . . before or at trial." 371 N.C. 266, 267, 814 S.E.2d 81, 82 (2018). "Fact-intensive Fourth Amendment claims like these require an evidentiary record developed at a suppression hearing. Without a fully developed record, an appellate court simply lacks the information necessary to assess the merits of a defendant's plain error arguments." *Id.* at 270, 814 S.E.2d at 83–84.

As the *Miller* Court explained:

> When a defendant does not move to suppress . . . the State does not get the opportunity to develop a record pertaining to the defendant's Fourth Amendment claims. Developing a record is one of the main purposes of a suppression hearing. At a suppression hearing, both the defendant and the State can proffer testimony and any other admissible evidence that they deem relevant to the trial court's suppression determination.

Id. at 270, 814 S.E.2d at 84.

In light of the holding in *Miller*, we cannot review for plain error the merits of Defendant's arguments concerning the trial court's failure to suppress evidence. *See id.* at 273, 814 S.E.2d at 85–86 (remanding to this Court "for consideration of [the] defendant's ineffective assistance of counsel claim" where "the Court of Appeals should not have conducted plain error review in the first place").

Accordingly, we deny Defendant's petition for writ of certiorari and his request that we invoke Rule 2 of our Rules of Appellate Procedure to review for plain error Defendant's unpreserved constitutional challenge, and we dismiss this portion of his appeal.

II. Ineffective Assistance of Counsel

[2] Next, Defendant argues that his trial counsel "provided ineffective assistance by failing to file a motion to suppress the evidence" obtained pursuant to the search warrants issued after Detective Rockenbach's observation of the hole behind the Property.

"In order to show ineffective assistance of counsel, a defendant must satisfy the two-prong test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, [. . .] 80 L. Ed. 2d 674 (1984)[,]" which was adopted by our Supreme Court in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). *State v. Harris*, 255 N.C. App. 653, 657, 805 S.E.2d 729, 733 (2017). "First, the defendant must show that counsel's performance was deficient." *Id.* (citation omitted). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* (citation omitted). "Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 658, 805 S.E.2d at 733 (cleaned up).

"[A]n ineffective assistance of counsel claim brought on direct review will be decided on the merits when the cold record reveals that

no further investigation is required." *Id.* (cleaned up); *e.g.*, *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (providing, for example, that the cold appellate record may be sufficient to decide a claim of ineffective assistance of counsel that "may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing"), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

To demonstrate that counsel's performance was deficient, a defendant must show that his attorney committed such serious errors during trial that the attorney "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Harris*, 255 N.C. App. at 657, 805 S.E.2d at 733 (citation omitted), in other words, that "counsel's conduct fell below an objective standard of reasonableness[,]" *Braswell*, 312 N.C. at 561–62, 324 S.E.2d at 248. Trial counsel's decision not to file a motion to suppress evidence does not fall below "an objective standard of reasonableness[,]" *State v. Canty*, 224 N.C. App. 514, 517, 736 S.E.2d 532, 535 (2012) (citation omitted), *disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013), and therefore, does not evince that the attorney's performance was deficient "where the search . . . that led to the discovery of the evidence was lawful[,]" *id.*

In this case, Defendant asserts that "the central question raised in [his] brief" is "whether the warrant application was 'prompted by' the illegal search" of the curtilage when Detective Rockenbach first visited the Property. By contrast, the State contends that "[g]iven that Moore's last known location was Defendant's residence and he had been missing for approximately one week, there was probable cause to search Defendant's residence."

We conclude that the cold record establishes that Detective Rockenbach's observation of the hole during his walk about the Property after his unsuccessful "knock and talk" on 4 February 2020 did not prompt the warrant applications when viewed in light of the totality of the circumstances, which supported the trial court's determinations of probable cause. Accordingly, we agree with the State on this issue.

"The Fourth Amendment to the United States Constitution protects the people from unreasonable searches and seizures." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302 (2016) (citation omitted). Article I, Section 20 of the North Carolina Constitution "likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause." *Id.* at 293, 794 S.E.2d at 302–03.

"At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable

governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31, 150 L. Ed. 2d 94, 100 (2001) (cleaned up). This heightened expectation of privacy extends not only to the home itself, but also to the home's curtilage. *See State v. Grice*, 367 N.C. 753, 759–60, 767 S.E.2d 312, 317–18, *cert. denied*, 576 U.S. 1025, 192 L. Ed. 2d 882 (2015). As our Supreme Court has explained, "the curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *Id.* at 759, 767 S.E.2d at 317 (citation omitted).

A "knock and talk" investigation does not implicate the Fourth Amendment: "no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as the front door of a house." *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011). Nonetheless, the "curtilage . . . protects the privacies of life inside the home[,]" *Grice*, 367 N.C. at 760, 767 S.E.2d at 318 (cleaned up), and the Fourth Amendment therefore protects the curtilage of one's home, absent the existence of circumstances permitting an exception to the warrant requirement. *See, e.g.*, *id.* ("On one end of the [Fourth Amendment] spectrum, we have the home, which is protected by the highest constitutional threshold and thus may only be breached in specific, narrow circumstances. On the other end, we have open fields, which even though they may be private property may be reasonably traversed by law enforcement under the Fourth Amendment."); *State v. Marrero*, 248 N.C. App. 787, 794, 789 S.E.2d 560, 566 (2016) (explaining that "[a]n exigent circumstance is found to exist in the presence of an emergency or dangerous situation" (cleaned up)).

"[A] warrant may be issued only on a showing of probable cause." *Allman*, 369 N.C. at 293, 794 S.E.2d at 302 (cleaned up). "[A]n application for a search warrant must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items . . . are in the place to be searched." *Id.* at 294, 794 S.E.2d at 303 (cleaned up).

Probable cause exists when the supporting affidavit "gives the magistrate reasonable cause to believe that the search will reveal the presence of the items sought on the premises described in the warrant application, and that those items will aid in the apprehension or conviction of the offender." *Id.* (cleaned up). The magistrate is permitted to "draw reasonable inferences from the available observations" in the affidavits. *Id.* (cleaned up). As long as the totality of the circumstances "yield[s] a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue [the] warrant." *Id.*

Moreover, a search warrant is valid despite a prior unlawful entry "where the information used to obtain the search warrant was not derived from an initial unlawful entry, but rather came from sources wholly unconnected with the unlawful entry and was known to the agents well before the initial unlawful entry." *State v. Robinson*, 148 N.C. App. 422, 430, 560 S.E.2d 154, 160 (2002). Accordingly, "the dispositive question is whether the search warrant . . . was based on, or prompted by, information obtained from the officers' warrantless entry," or whether it was "based on information acquired independently of the warrantless entry so as to purge the search warrant of the primary taint." *Id.*

Here, we need not consider whether Detective Rockenbach unlawfully entered the rear curtilage of the home. It is plain that the affidavit attached to the initial search warrant application provides abundant support for the issuance of a search warrant, even absent an allegation regarding Detective Rockenbach's observation of the hole. The initial warrant application established that Moore had been missing for approximately one week; that he was last known to be headed to the Property to conduct a drug deal; that Moore's cellular phone was pinpointed at the Property, where it went offline after 30 minutes; and that individuals at the Property were not answering the door. For the subsequent search warrants, Detective Rockenbach additionally averred that "Moore's remains were found on the property in which [Defendant] lives." Detective Rockenbach's affidavit supporting the application to search the Property makes no reference to the hole, and the facts alleged in the application reveal that the allegations "came from sources wholly unconnected with the [alleged] unlawful entry and w[ere] known to [Detective Rockenbach] before the initial [alleged] unlawful" walk about the curtilage of the Property. *Id.*

The search warrants were supported by probable cause—they were not "based on, or prompted by, information obtained from" Detective Rockenbach's alleged unlawful entry, but rather "on information acquired independently of the warrantless entry so as to purge the search warrant of [any] primary taint." *Id.*

"[F]ailure to file a motion to suppress is not ineffective assistance of counsel where the search . . . that led to the discovery of the evidence was lawful." *Canty*, 224 N.C. App. at 517, 736 S.E.2d at 535. Accordingly, Defendant has failed to demonstrate that he received ineffective assistance of counsel, and we dismiss this claim.

III. Motions to Dismiss and Motion to Set Aside Verdict

[3] Lastly, Defendant contends that the "trial court erred by failing to grant the motions to dismiss made during the trial and the motion to set

aside the verdict" for the charge of murder because, even "viewing the evidence in the light most favorable to the [S]tate, there was not substantial evidence that [he] murdered Alex Moore."

A. Standard of Review

"We review the denial of a motion to dismiss based on an insufficiency of evidence de novo." *State v. Steele*, 281 N.C. App. 472, 476, 868 S.E.2d 876, 880, *disc. review denied*, 382 N.C. 719, 878 S.E.2d 809 (2022).

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Osborne*, 372 N.C. 619, 626, 831 S.E.2d 328, 333 (2019) (citation omitted). "Substantial evidence" is simply that amount of evidence "necessary to persuade a rational juror to accept a conclusion." *Id.* (citation omitted). The evidence is "considered in the light most favorable to the State[,]" and "the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (cleaned up). Evidence unfavorable to the State "is not to be taken into consideration." *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 637 (2000).

"[I]f the record developed before the trial court contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Osborne*, 372 N.C. at 626, 831 S.E.2d at 333 (cleaned up).

"The standard of review of a trial court's denial of a motion to set aside a verdict for lack of substantial evidence is the same as reviewing its denial of a motion to dismiss, i.e., whether there is substantial evidence of each essential element of the crime." *State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000).

B. Analysis

In the present case, the State charged Defendant with murder pursuant to N.C. Gen. Stat. § 14-17. Section 14-17 provides, in pertinent part, that "[a] murder which shall be perpetrated by means of a . . . willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any . . . robbery . . . shall be deemed to be murder in the first degree[.]" N.C. Gen. Stat. § 14-17(a) (2023). The jury found Defendant guilty of first-degree murder on the basis of both "malice, premeditation and deliberation" as well as "[u]nder the first[-]degree felony murder rule[.]"

"When viewed in the light most favorable to the State, sufficient evidence supported the inference that Defendant" committed the first-degree murder of Moore. *State v. Rogers*, 255 N.C. App. 413, 416, 805 S.E.2d 172, 174 (2017). Spaulding testified that Moore left on the evening that he went missing to conduct "a drug deal" with Defendant at Defendant's home. Before he left, Moore sent Spaulding a screenshot of Defendant's contact information.

The State introduced into evidence a long exchange of text messages between Defendant and Moore, including texts from the day that Moore went missing. In these texts, the two men arranged the details of Moore's pending drug purchase from Defendant. Detective Rockenbach testified that the "last exchange to" Defendant was Moore saying that he was "outside" at 6:14 p.m., and that "[t]he rest of the messages are just from [Defendant] to [Moore]'s phone." Special Agent Putnam also analyzed Moore's Verizon cellular phone records, which showed that Moore's cellular phone entered the coverage area of the Property and vehicle-recovery location at approximately 6:11 p.m. on the evening of 27 January 2020. From approximately 6:12 to 6:34 p.m., Moore's cellular phone remained "right in the area of the [Property]" and was "definitely there or near that location" during this period.

Special Agent Putnam also provided evidence regarding Defendant's AT&T cellular phone data, which showed that "sometime between 6:23 and 6:38 [p.m.], [Defendant's] AT&T phone traveled . . . to the coverage area of the Emerson tower[,]" which Special Agent Putnam described as "the cell site [that he] would most expect to provide coverage to the vehicle recovery location and the [Property]." Special Agent Putnam also testified that Defendant's AT&T cellular phone remained within the coverage area of the Emerson tower until approximately 6:47 p.m. on the evening of 27 January 2020.

Additionally, the State presented evidence that upon searching Defendant's home, officers discovered one shotgun shell casing under the couch and another on a space heater, as well as a long gun. In Defendant's bedroom, officers discovered additional 9-millimeter ammunition. Forensic firearms examiner Kelby Glass of the Cumberland County Sheriff's Office testified "that the projectiles that were removed from the body of" Moore were "consistent with the ammo that was found in [Defendant's] room[.]"

We conclude that, viewed in the light most favorable to the State, this constitutes substantial evidence from which a jury could reasonably infer Defendant's guilt of murder. *See Rogers*, 255 N.C. App. at 416, 805

S.E.2d at 174–75. Accordingly, the trial court did not err when it denied Defendant's motions to dismiss or motion to set aside the jury's verdict. *See Osborne*, 372 N.C. at 626, 831 S.E.2d at 333; *Duncan*, 136 N.C. App. at 520, 524 S.E.2d at 811.

CONCLUSION

Defendant failed to preserve for appellate review his constitutional challenge to the search warrants in this case. We deny his petition for writ of certiorari and dismiss that portion of Defendant's appeal. In addition, Defendant has not shown that trial counsel's performance was deficient, and we dismiss Defendant's claim of ineffective assistance of counsel. Finally, the trial court did not err in denying Defendant's motions to dismiss or motion to set aside the jury's verdict.

DISMISSED IN PART; NO ERROR IN PART.

Judges WOOD and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
WILLIAM DAWSON, DEFENDANT

No. COA23-801

Filed 6 August 2024

1. Appeal and Error—statutory review of life imprisonment without parole—recommendation to parole commission—right to appeal

After a resident superior court judge reviewed defendant's sentence for life imprisonment without parole (for first-degree murder committed in 1997) pursuant to N.C.G.S. § 15A-1380.5 (a statute enacted in 1994 and repealed in 1998) upon defendant's motion, defendant had the right to appeal the trial court's recommendation to the Parole Commission that defendant should not be granted parole and that his sentence should not be altered or commuted. Although the relief available under section 15A-1380.5 was very slight, the court's recommendation was a final judgment, and language contained in subsection (f) of that statute reflected legislative intent to provide a defendant with the right to appeal from a recommendation.

2. Appeal and Error—statutory review of life imprisonment without parole—recommendation to parole commission—insufficient findings

After a resident superior court judge reviewed defendant's sentence for life imprisonment without parole (for first-degree murder) pursuant to N.C.G.S. § 15A-1380.5 (now repealed) upon defendant's motion, the trial court's order making its recommendation to the Parole Commission—that defendant should not be granted parole and that his sentence should not be altered or commuted—was vacated where the trial court's findings mostly consisted of mere recitations of procedural history and were insufficient as a whole to allow for meaningful appellate review of the court's reasoning in reaching its recommendation. The matter was remanded for the trial court to make additional findings, reconsider its recommendation, or, in its discretion, to consider additional information provided by the State.

Appeal by Defendant from order entered 16 January 2023 by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant.

DILLON, Chief Judge.

In 1999, Defendant William Dawson was sentenced to life without parole. In 2022, he sought review of his criminal sentence pursuant to N.C. Gen. Stat. § 15A-1380.5 (now repealed). He appeals the trial court's recommendation to the parole board pursuant to that statute that he "not be granted parole nor should his judgment be altered or commuted." We vacate and remand for further proceedings.

I. Background

This appeal concerns the proper application of G.S. 15A-1380.5, which was enacted by our General Assembly in 1994, but repealed in 1998.

In 1994, our General Assembly enacted legislation which allowed a defendant to be sentenced to life without parole ("LWOP") for

first-degree murder. To mitigate the otherwise finality of an LWOP sentence, our General Assembly also enacted G.S. 15A-1380.5, which provides a defendant sentenced to LWOP and who has served 25 years, the opportunity to have his sentence reviewed. Under that statute (hereinafter the "Statute"), a resident superior court judge is to review the defendant's case and make a recommendation to the Governor or agency designated by the Governor as to whether the defendant's LWOP sentence should be altered or commuted. In 2019, Governor Roy Cooper designated the Post-Release Supervision and Parole Commission (the "Parole Commission") to be the recipients of such recommendations.

In 1998, our General Assembly repealed the Statute. Notwithstanding, the Statute remains available for defendants sentenced to LWOP for crimes committed between 1 October 1994 and 1 December 1998. *See State v. Young*, 369 N.C. 118, 794 S.E.2d 274 (2016) (discussing the process under the Statute for which a defendant sentenced to LWOP for a crime committed between 1994 and 1998 may seek review).

Defendant was indicted for first-degree murder in 1997 for allegedly killing an individual that same year. In 1999, a jury found him guilty of first-degree murder, and the trial court sentenced him to LWOP.

In July 2022, Defendant filed a motion in the trial court requesting that his sentence be reviewed by a resident superior court judge pursuant to the Statute.

After reviewing Defendant's case, by order entered 16 January 2023 (the "Order"), the trial court recommended to the Parole Commission that Defendant should not be granted parole, nor should his 1999 LWOP sentence be altered or commuted. Defendant appeals.

II. The Statute

As this appeal concerns the proper interpretation of a statute that has been repealed, the text of the Statute is reproduced below:

> (a) For the purposes of this Article the term "life imprisonment without parole" shall include a sentence imposed for "the remainder of the prisoner's natural life."
>
> (b) A defendant sentenced to life imprisonment without parole is entitled to review of that sentence by a resident superior court judge for the county in which the defendant was convicted after the defendant has served 25 years of imprisonment. The defendant's sentence shall be reviewed again every two years as provided by this section, unless the sentence is altered or commuted before that time.

> (c) In reviewing the sentence the judge shall consider the trial record and may review the defendant's record from the Department of Correction, the position of any members of the victim's immediate family, the health condition of the defendant, the degree of risk to society posed by the defendant, and any other information that the judge, in his or her discretion, deems appropriate.
>
> (d) After completing the review required by this section, the judge shall recommend to the Governor or to any executive agency or board designated by the Governor whether or not the sentence of the defendant should be altered or commuted. The decision of what to recommend is in the judge's discretion.
>
> (e) The Governor or an executive agency designated under this section shall consider the recommendation made by the judge.
>
> (f) The recommendation of a judge made in accordance with this section may be reviewed on appeal only for an abuse of discretion.

N.C. Gen. Stat. § 15A-1380.5 (1995) (repealed 1998).

III. Analysis

A. Defendant's Right to Appeal

[1] We first consider whether Defendant has the right to appeal from a recommendation made by a trial court to the Parole Commission under the Statute concerning his LWOP sentence. For the reasoning below, we conclude that he does.

It is true that, as explained by our Supreme Court, the recommendation by a trial court to the Parole Commission is not binding on anyone:

> Ultimately, "[t]he decision of what to recommend is in the judge's discretion," and the only effect of the judge's recommendation is that "[t]he Governor or an executive agency designated under this section" must "consider" it.

Young, 369 N.C. at 124–25, 794 S.E.2d at 279 (citing § 15A–1380.5(e)).

The only language in the Statute which references appellate procedure is in its last subsection, providing that "[t]he recommendation of a judge made in accordance with this section may be reviewed on appeal only for an abuse of discretion." N.C. Gen. Stat. § 15A-1380.5(f). This

language states the legal standard we are to use when reviewing a trial court's recommendation on appeal. However, it does not expressly provide a defendant the *right* to an appeal. We conclude, though, from this and statutory provisions that our General Assembly intended to provide a defendant with the right to an appeal from a recommendation.

In reaching our conclusion, we note that our General Assembly has provided our Court with "jurisdiction to review upon appeal *decisions* of" a trial court. N.C. Gen. Stat. § 7A-26 (2023) (emphasis added). We further note that the Statute refers to the trial court's recommendation to the Parole Commission as a "decision" by that court. N.C. Gen. Stat. § 15A-1380.5(d).

Further, a defendant has *the right* to appeal to our Court from a decision that is a "final judgment of a superior court[.]" N.C. Gen. Stat. § 7A-27(b)(1) (2023). Here, the Statute provides Defendant the right to seek a type of relief in the superior court, though admittedly this relief is *extremely slight*. *See Young*, 369 N.C. at 124, 794 S.E.2d at 279 (stating that a positive recommendation by a trial court to the Parole Commission "might increase the chance that [an LWOP] sentence will be altered or commuted[.]"). That is, under the Statute a defendant is *not* entitled to a decision from the trial court whether his LWOP sentence should be altered or commuted. Rather, the Statute only provides an entitlement to a decision by the trial court whether to *recommend* to the Parole Commission that his LWOP sentence be altered or commuted, a recommendation which the Parole Commission "must 'consider[.]' " *Id.* at 125, 794 S.E.2d at 279.

Though the relief available is slight, it is relief that our General Assembly made available to certain defendants. We, therefore, construe a trial court's recommendation to the Parole Commission under the Statute to be a final judgment, as it "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them *in the trial court*." *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) (emphasis added). Accordingly, Defendant is entitled to a review of the trial court's action for an abuse of discretion.

B. Abuse of Discretion

[2] We now review the trial court's recommendation to the Parole Commission that Defendant's LWOP sentence not be altered or commuted at this time.

An abuse of discretion "occurs where the trial judge's determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *State v. Reed*, 355 N.C.

150, 155, 558 S.E.2d 167, 171 (2002) (citations and internal quotation marks omitted).

Under subsection (c) of the Statute, the trial court "*shall* consider the trial record[.]" N.C. Gen. Stat. § 15A-1380.5(c) (emphasis added). Therefore, a trial court's refusal to consider the trial record before making a recommendation would be an abuse of discretion. *See*, *e.g.*, *Harris v. Harris*, 91 N.C. App. 699, 705–06, 373 S.E.2d 312, 316 (1988) (concluding failure to follow a statutory mandate is an abuse of discretion).

The Statute also provides that the reviewing judge "*may* review . . . the health condition of the defendant" and "any other information as the judge, in his or her discretion, deems appropriate." N.C. Gen. Stat. § 15A-1380.5(c) (emphasis added).

Defendant argues that the trial court failed to make adequate findings to support its recommendation to the Parole Commission.

The absence of sufficient findings of fact in an order may prevent our Court from conducting meaningful appellate review. *See Martin v. Martin*, 263 N.C. 86, 138 S.E.2d 801 (1964). As our Supreme Court has explained:

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

Here, most of the trial court's findings contained in the Order were mere recitations of procedural history, including a list of the materials the trial court considered. Specifically, the Order states that the court considered the record from Defendant's trial, as required by the Statute. The Order also states that the court considered other information, including letters from the victim's family, Defendant's criminal history, Defendant's prison record, letters from Defendant's family, and evidence from Defendant concerning his poor health.

However, the only finding in the Order concerning the information the trial court reviewed was that Defendant was in poor health and suffered from multiple health issues, a finding which would support an opposite recommendation than that ultimately made by the trial court. There certainly was information before the trial court from which it could have made findings to support its recommendation to the Parole Board. However, we conclude the findings in the Order are insufficient for us to conduct a meaningful review of the trial court's reasoning.

We, therefore, vacate the Order and remand the matter to the trial court. On remand, the trial court may make additional findings to support its recommendation or may reconsider its recommendation. Further, the trial court may, in its discretion, consider additional information as allowed by the Statute.

VACATED AND REMANDED.

Judges STADING and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
KRISTA MARIE FREEMAN

No. COA24-120

Filed 6 August 2024

1. Jury—instruction not requested—lesser-included offense—plain error standard proper—not shown

Where a defendant failed to request an instruction on the lesser-included offense of misdemeanor child abuse (N.C.G.S. § 14-318.2(a)), the proper appellate standard of review was plain error (rather than invited error), a standard defendant did not meet in light of evidence that repeated punishments she inflicted on the five-year-old victim resulted in bruised and swollen feet so painful the child had difficulty walking—clear and positive evidence of great pain and suffering that constituted "serious physical injury," an essential element of the greater offense charged (felony child abuse resulting in serious physical injury pursuant to N.C.G.S. § 14-318.4(a5)).

2. Evidence—felony child abuse—serious physical injury—reckless disregard for human life—substantial evidence—motion to dismiss properly denied

The trial court did not err in denying defendant's motion to dismiss a charge of felony child abuse for insufficient evidence of "serious physical injury" and "reckless disregard for human life" where the evidence, viewed in the light most favorable to the State, was substantial on each challenged element, in that: (1) the repeated punishments defendant inflicted on the five-year-old victim resulted in bruised and swollen feet so painful the child had difficulty walking, causing him great pain and suffering; and (2) defendant's provision of water, foot soaks, and lotion to the victim did not assuage her indifference to the child's health and safety.

3. Child Abuse, Dependency, and Neglect—felony child abuse—jury instruction on lawful corporal punishment—exemption not applicable—plain error not shown

In a felony child abuse prosecution, the trial court did not plainly err in failing to instruct the jury regarding lawful corporal punishment by a parent where the evidence was insufficient that defendant, the fiancée of the victim's mother, was acting in loco parentis; moreover, even assuming that she had been acting in that capacity, overwhelming evidence was presented from which a jury could conclude that defendant's punishments—including making the five-year-old victim run in place for long periods of time three to four times in a week, resulting in bruised and swollen feet so painful the child could not walk normally—were rooted in malice, thus making any potential exemption under the lawful corporal punishment principle inapplicable.

Appeal by Defendant from judgment entered 27 March 2023 by Judge Patrick Thomas Nadolski in Montgomery County Superior Court. Heard in the Court of Appeals 12 June 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

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

WOOD, Judge.

Krista Freeman ("Defendant") appeals from a judgment entered upon a jury verdict finding her guilty of felony child abuse resulting in serious physical injury. On appeal, Defendant raises three issues, including the challenge of two unpreserved objections to the jury instructions, and that the trial court erred when it denied her motion to dismiss. For the reasons that follow, we hold Defendant received a fair trial free from error.

I. Factual and Procedural Background

This appeal stems from injuries sustained by the minor child, Brandon,[1] who was five years old and in the first grade at the time of the abuse. Brandon lived with his biological mother, Tiffani Pike, and Tiffani's fiancée, Defendant. Despite no biological relation, Brandon called Defendant "momma" and seemingly regarded her as his second mom. On 21 September 2021, Brandon got into an altercation with another student at the end of the school day. As he waited to board the school bus, Brandon kicked the student, and the children began pushing one another. Brandon's teacher separated the students and then ensured they loaded the bus safely. Once the children left, his teacher called Brandon's home to discuss the incident; Defendant answered the phone. She informed Defendant of what had happened that afternoon and that she continuously had behavioral issues with him in class. Defendant apologized for Brandon's behavior, stated they were having similar issues at home, and that Ms. Pike would be upset to hear about this situation.

When Brandon arrived at his bus stop, Defendant was waiting. The bus monitor, known as "Ms. Mollie" around school, observed Brandon exit the bus and heard Defendant say to Brandon "get your ass in the car." As punishment for the events at school, Defendant made Brandon run in place for at least forty-five minutes. Brandon did not attend school the next day but returned to school the following day on 23 September 2021. On the morning of his return to school, his bus monitor Ms. Mollie noticed Brandon was moving very slowly as he walked up the steps of the school bus and that it hurt him to get up the stairs. She approached him and he stated, "Ms. Mollie, I'm in so much pain." Once at school, Brandon's teacher also made similar observations. She observed that Brandon looked very uncomfortable walking, was not walking flat footed, and kept saying that his feet hurt. The teacher notified the

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

guidance counselor about the situation who then reported the matter to Montgomery County Department of Social Services ("DSS").

Na'La Brown, a social worker with DSS, came to the school to assess Brandon. Initially, she noticed him walking on his heels in a "waddle." The bottoms of his feet were red and swollen. When asked about his feet, Brandon told Ms. Brown that he had been running in place from lunchtime until dinner time. She further observed bruises on his cheeks; knots on his cheeks and cheekbones; darkened under-eyes; a cut on his eyebrow; knots on the top of his head; and a large, scabbed knot on the back of his head. When asked about those injuries, Brandon stated one of the knots on his face was from a time when he slipped and fell while getting a drink out of the refrigerator for "momma." He also told Ms. Brown that the knot on the center of his head was from an incident when "a ghost hit him in the head with a broom" and the name of the ghost was "Michael Freeman." Ms. Brown asked Brandon to undress so she could check for more injuries and photograph his condition. She discovered more bruises on his legs and a larger, puffy bruise spanning from the bottom of his buttock to the back of his knee. Afterwards, Brandon returned to his classroom and Ms. Brown left the school to visit Brandon's residence.

Ms. Brown arrived at the home and spoke with Ms. Pike and Defendant. She informed them that DSS received a call about Brandon's injuries and appearance at school and needed them to come into the DSS office to have a conversation with Brandon present. Despite some resistance from Ms. Pike, Defendant informed Ms. Brown that they would get ready and meet her at the DSS office. Ms. Brown returned to the school to get Brandon and take him to the DSS office. As they were driving, Brandon complained that his feet hurt and asked if she could carry him when they arrived. Upon arrival, Brandon met with two law enforcement officers who made similar observations to Ms. Brown. The officers observed wounds and bruises on his face; a wound on the back of his head; red and swollen feet; him standing with his right leg and foot pointed outward bearing the majority of his weight on his left leg; he waddled when he walked; and that he needed assistance to stand up, undress, dress, and sit down. The officers photographed Brandon's injuries and recorded a video of him walking.

After the officer's examination, Brandon sat in Ms. Brown's office where he ate and watched videos while she completed paperwork. Ms. Pike and Defendant arrived at the DSS office where they were asked by the officers if they were willing to speak at the Sheriff's office. They agreed. Defendant was interviewed first and was questioned about

Brandon's injuries and the form of punishment used when Brandon misbehaved. Defendant admitted to using several forms of punishment, including running in place; running laps around the house; standing in a corner and holding one foot up if he cried, lasting between five minutes to an hour and a half; doing "yard work" which consisted of throwing objects in the dumpster; and flipping cinder blocks across the yard until he reached the dumpster. The time per punishment varied, with the time increasing by five-minute intervals if Brandon cried. Defendant further admitted that on the night prior, Brandon's punishment had been to run in place for forty-five minutes and that this form of punishment had been used the previous week approximately three to four times. Defendant also stated that she would make Brandon walk to the bus stop less than one mile from their home, while she drove her vehicle in front of him. She explained that Brandon sustained the injury on the back of his head while he was walking to the bus stop because he fell on the gravel. She reported that some of the bruising on his leg was from a time when he got stuck in the dumpster while throwing objects away. Lastly, Defendant stated she had spanked him before, but he responded by laughing, so now she just threatens him with a "butt whooping." After Defendant and Ms. Pike were interviewed, the officer placed them both under arrest. Defendant was charged with felony child abuse resulting in serious injury.

Thereafter, Brandon was taken to the hospital for an assessment of his injuries. The doctor who evaluated Brandon noted excessive bruising, an abrasion on his head, and swelling on his feet. The doctor reported that Brandon's evaluation raised "some red flags" and while his bruising did not seem "accidental," he could not definitively say what caused his injuries. He was also concerned about the swelling on Brandon's feet, as that was unusual for a five-year-old. Ultimately, after a series of tests and scans, the doctor advised that Brandon receive "supportive care, Tylenol, Motrin, [and] icing." After his evaluation, Brandon was taken to his first foster care placement.

On 4 October 2021, approximately two weeks after Brandon came into DSS care, Ms. Brown took Brandon to the Butterfly House Child Advocacy Center for physical and mental evaluation. During his physical examination, Brandon told the nurse "momma hit him with a belt," that both parents would shut his door so that he could not get food, that he felt "a little bit scared" at home, and that his parents instructed him to not say that he had been hit. The nurse described his physical appearance as slender with some overall bruising indicative of non-accidental trauma. After reviewing all the information in Brandon's

case and information from her own examination, the nurse concluded that Brandon was physically and emotionally abused. She further concluded that there may be grounds for neglect based on the number of cavities Brandon had and how he, at times, was not allowed to access food. The nurse recommended dental care and trauma-focused behavioral therapy counseling.

He began therapy on 28 September 2022 at Sandhills Pediatrics, where he saw Ms. Willms for post-traumatic stress treatment. During the sessions, Brandon expressed love and protection towards his parents, but also trouble with how his parents treated him. During one particular session, Brandon explained that he was nervous about beginning unsupervised visits and was worried about Ms. Pike and Defendant getting angry at him. During another session he shared that "bad things happen for bad behavior" and "if he would cry, he would get hit with a belt."

On 4 October 2021, Defendant was indicted for felony child abuse inflicting serious physical injury to Brandon, including bruised, swollen, unmoving feet and legs, resulting in pain. Defendant came on for trial during the 20 March 2023 session of Montgomery County Superior court. At trial, after the State rested its case, Defendant moved to dismiss based on insufficiency of evidence. The trial court denied the motion. Following the close of Defendant's evidence, Defendant renewed the motion to dismiss, and the trial court again denied the motion. At the charge conference, neither party objected to the proposed jury instructions nor requested that a lesser-included instruction be submitted to the jury. The trial court instructed the jury in accordance with the pattern jury instructions on felony child abuse by reckless disregard for human life in the care of a child resulting in serious physical injury. N.C.P.I.-Crim. 239.55D. The jury returned a verdict of guilty to felony child abuse resulting in serious physical injury. The trial court sentenced Defendant to 13 to 25 months of imprisonment. The trial court suspended Defendant's sentence with the condition that she serve four months in the local jail and five years on probation following release. Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant argues the trial court erred (1) in failing to instruct the jury on the lesser-included offense of misdemeanor child abuse; (2) in denying Defendant's motion to dismiss the charge of felony child abuse resulting in serious injury; and (3) by failing to instruct on a parent's right to administer corporal punishment.

A. Misdemeanor Child Abuse

[1] Defendant first asserts that the trial court plainly erred when it failed to instruct the jury on misdemeanor child abuse as a lesser-included offense of felony child abuse resulting in serious injury. The State contends because Defendant did not request an instruction on the lesser-included offense, did not object to the proposed instructions, and did not request any special instructions, such failure amounts to invited error, precluding plain error review. We disagree. Defendant's failure to request the jury instruction does not equate to invited error.

"Our courts have consistently applied the invited error doctrine when a defendant's affirmative actions directly precipitate error." *State v. Miller*, 289 N.C. App. 429, 433, 889 S.E.2d 231, 234 (2023) (citations omitted). However, "our courts have declined to apply the invited error doctrine where such specific and affirmative actions are absent." *Id.* (citations omitted). In *State v. Hooks*, the defendant was given "numerous opportunities" to object to the proposed jury instructions and each time "indicated his satisfaction with the trial court's instructions." 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001). In that case, our Supreme Court reviewed the instructional error under the plain error standard, rather than under the invited error doctrine. Here, Defendant did not object to the jury instructions and did not request an instruction on the lesser-included offense. Like *Hooks*, Defendant had the opportunity to object and ultimately indicated her assent to the instructions. However, this does not constitute an affirmative act; rather, it is the failure to object that is considered on appeal. Accordingly, we decline to apply the invited error doctrine and review Defendant's argument under the plain error standard.

Under plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (cleaned up). Stated differently, a defendant must establish that "absent the error the jury probably would have reached a different verdict." *Id.* (cleaned up). Moreover, "it must be probable, not just possible" that a different verdict would have been reached. *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016) (citation omitted). The standard is applied "cautiously and only in the exceptional case," which "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (cleaned up).

To determine whether Defendant was entitled to an instruction on the lesser-included offense of misdemeanor child abuse, we must assess if "the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citations omitted). However, "when the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct [the jury] on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980) (citation omitted). Moreover, the trial judge must instruct the jury as to the lesser-included offense if: "(1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified." *State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982) (citation omitted).

Here, Defendant was charged under N.C. Gen. Stat. § 14-318.4(a5) for felonious child abuse resulting in serious physical injury, which is defined as:

> (a5) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class G felony if the act or omission results in serious physical injury to the child.

By contrast, the separate, lesser offense of felony child abuse inflicting serious physical injury is misdemeanor child abuse, which states:

> (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2(a). Thus, one difference between the two offenses is the degree of injury to the child. "Serious physical injury" is defined as "[p]hysical injury that causes great pain and suffering. The term includes serious mental injury." N.C. Gen. Stat. § 14-318.4(d)(2). This Court has outlined factors to determine whether an injury is a "serious physical injury," including: (1) hospitalization, (2) pain, (3) loss

of blood, and (4) time lost from work. *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208, 210 (2004) (citation omitted). If it is injury to a child, "courts should also review whether the child was unable to attend school or other activities." *State v. Williams*, 184 N.C. App. 351, 356, 646 S.E.2d 613, 616 (2007). Determining whether an injury satisfies the "serious physical injury" standard is generally a decision for the jury. *Id.* (citations omitted).

Defendant argues that Brandon's injuries satisfied the "physical injury" standard under misdemeanor child abuse rather than the "serious physical injury" standard under felony child abuse. Specifically, Defendant asserts that Brandon's injuries of "swollen feet and a bruise" are insufficient to meet the serious physical injury threshold because the injuries did not require hospitalization, result in a loss of blood, nor led to great pain and suffering. Further, Defendant points to evidence tending to show that Brandon self-reported a pain level of zero at the hospital and the doctor only recommended "supportive care, Tylenol, Motrin, [and] icing, if needed." Therefore, Defendant contends the evidence was equivocal on whether Brandon's injuries were "serious physical injuries" or "physical injuries" such that the jury likely would have found Defendant guilty of misdemeanor, rather than felonious, child abuse.

We first note, "[t]here is no requirement in the statute or in our case law that an injury require immediate medical attention in order to be a 'serious physical injury.' " *Williams*, 154 N.C. App. 176, 180, 571 S.E.2d 619, 622 (2002). The need for medical attention may be considered but it is not an element that the State is required to prove. *See Hardy*, 299 N.C. at 456, 263 S.E.2d at 718-19. Instead, the evidence must be "clear and positive" that Brandon sustained injuries that resulted in "great pain and suffering." *Id.*; *see also* N.C. Gen. Stat. § 14-318.4(d)(2). We hold that the evidence presented at trial sufficiently satisfied this requirement.

Defendant admitted that she punished Brandon by forcing him to run in place for forty-five minutes on the day before he was taken into DSS' care. She further informed law enforcement that this type of punishment was used approximately three to four times the week prior. Brandon did not attend school the next day, *and* upon his return to school the following day, the bus monitor observed that Brandon moved slowly and was in pain when he climbed the stairs. Brandon told the bus monitor "I'm in so much pain." Brandon's teacher testified that he looked uncomfortable when he walked and that he continuously complained that his feet hurt. Ms. Brown, the social worker, noticed that Brandon walked with a "waddle" and that his feet were red and swollen. Later, Brandon asked Ms. Brown to carry him into the DSS office because it

hurt to walk. Law enforcement officers observed that Brandon's right leg and foot were pointed outward, and that he put most of his weight on his left leg. Additionally, Brandon needed help to stand up, undress, dress, and sit down. When Brandon was evaluated at the hospital, the doctor noted that his injuries raised "red flags," the bruising appeared nonaccidental, and the swelling on his feet was unusual for a five-year-old child. Further, at trial the jury was shown photographs of Brandon's injuries and the video taken by law enforcement that showed Brandon's inability to walk correctly.

Defendant also admitted to other types of punishment that may have contributed to Brandon's injuries. Some punishments included flipping cinder blocks across the yard to a dumpster, standing in the corner lifting one foot up at a time, doing laps around the house, and walking to the bus stop as she drove her vehicle in front of him. Defendant acknowledged that the length of the punishment was dependent upon whether Brandon cried. Crying extended the time. Defendant argues that because the indictment only lists "bruised, swollen, unmoving feet and legs," the other injuries and forms of punishment should not be considered when analyzing the severity of Brandon's injuries. However, Defendant disclosed to law enforcement the different forms of punishment she used, which are all relevant when considering Brandon's condition.

"Injuries are serious as a matter of law when the evidence is not conflicting and is such that reasonable minds could not differ on the serious nature of the injuries inflicted." *State v. Church*, 99 N.C. App. 647, 656, 394 S.E.2d 468, 473 (1990) (citation omitted). In totality, the evidence here demonstrated Brandon experienced "great pain and suffering" and that his injuries were such that a reasonable mind could not differ on the serious nature of Brandon's condition. N.C. Gen. Stat. § 14-318.4(d)(2); *Id.* The undisputed testimonial evidence provided by the bus monitor, his teacher, the DSS social worker, and law enforcement officers, revealed Brandon was in great pain and could not walk properly. Brandon confided in these individuals, expressing the amount of pain he was in, and even asked to be carried because it hurt him to walk. The video and photographs shown to the jury depicted bruising, swelling, the outward direction that his right leg faced when standing, and showed him struggling to walk. A punishment that results in a child being unable to walk normally and repeatedly expressing to others that he was in pain is undoubtedly of a "serious nature." *Id.* For these reasons, we hold that the injuries Brandon sustained, as a result of punishment by Defendant, are within the scope and level of severity of a "serious physical injury." N.C. Gen. Stat. § 14-318.4(a5). Thus, because the evidence is clear as to the elements of felony child abuse inflicting

serious physical injury, a lesser-included instruction on misdemeanor child abuse was unwarranted. The trial court did not err, much less plainly err, in not instructing the jury on misdemeanor child abuse as a lesser-included offense of felony child abuse resulting in serious injury.

B. Motion to Dismiss

[2] Defendant next challenges the trial court's denial of her motion to dismiss the charge of felonious child abuse based on insufficient evidence of "serious physical injury" and "reckless disregard for human life." We review the denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). When ruling on a motion to dismiss, the trial court assesses whether the State presented substantial evidence of each essential element of the offenses charged. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Wilkins*, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809 (2010) (citation omitted). "[T]he trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455–56 (2000) (citation omitted). "The evidence must be viewed in the light most favorable to the State. Contradiction and discrepancies in the evidence are to be resolved by the jury." *State v. Wilson*, 181 N.C. App. 540, 542, 640 S.E.2d 403, 405 (2007) (cleaned up).

As discussed above, Defendant was convicted of felonious child abuse under N.C. Gen. Stat. § 14-318.4(a5). "Under § 14–318.4(a5), a parent of a young child is guilty of [felony] child abuse if the parent's willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life *and* the parent's act or omission results in serious [physical] injury to the child." *State v. Frazier*, 251 N.C. App. 840, 841, 795 S.E.2d 654, 656 (2017) (cleaned up). As noted previously in our discussion of the "serious physical injury," the State presented sufficient evidence that Brandon sustained injuries that resulted in "great pain and suffering." N.C. Gen. Stat. § 14-318.4(d)(2). Likewise, the State presented sufficient evidence to allow a reasonable jury to infer that Brandon suffered a serious physical injury as a result of Defendant's actions. Therefore, we hold the trial court did not err in denying Defendant's motion to dismiss as to this element under N.C. Gen. Stat. § 14-318.4(a5).

Defendant further argues that her actions do not rise to the level of "reckless disregard for human life." *Id.* The child abuse statute does not explicitly define what is considered "reckless disregard." However, in

Oakman, this Court held "culpable or criminal negligence may satisfy the intent requirement of felonious child abuse." *State v. Oakman*, 191 N.C. App. 796, 801, 663 S.E.2d 453, 457 (2008). Further, "[c]ulpable or criminal negligence has been defined as such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Id.* (citation omitted).

In the present case, Defendant contends "[w]hile [she] did discipline Brandon, she remained attentive as to his medical condition by providing water [breaks while running] and the aftermath of this running in place did not require any medical care beyond foot soaks and lotion." We are unpersuaded. When viewing the evidence in the light most favorable to the State, it shows that Brandon suffered injuries due to Defendant's carelessness and indifference towards Brandon's well-being. This is exhibited by Defendant's forcing Brandon to run in place upwards of forty-five minutes as a form of punishment the day before and "three to four times" the week prior to him being taken into DSS' care with additional time being added if he cried during the punishment. Defendant's actions ultimately resulted in Brandon being temporarily unable to walk normally. Providing Brandon with water breaks and the remedy of foot soaks and lotion does not assuage Defendant's indifference towards Brandon's health and safety. Furthermore, with the crime of felony child abuse, "[t]he evil the legislature seeks to prevent is the performance of a act upon a child, by one charged with the care of the child, inflicting serious bodily injury." *Oakman*, 191 N.C. App. at 799, 663 S.E.2d at 456 (citations omitted). Consistent with this purpose, Defendant was entrusted with the care of Brandon, but chose to administer various types of punishments which were reckless, unsafe, and led to Brandon experiencing injuries and pain. Thus, we hold the State presented substantial evidence of "serious physical injury" and "reckless disregard for human life." Accordingly, the trial court did not err when it denied Defendant's motion to dismiss the charge of felony child abuse.

C. Corporal Punishment Instruction

[3] Defendant's final argument on appeal is that the trial court plainly erred when it failed to provide the jury with an instruction on lawful corporal punishment. Defendant did not preserve this challenge during trial; therefore, this unpreserved objection is reviewed under the plain error standard. *State v. Williams*, 291 N.C. App. 497, 501, 895 S.E.2d 912, 916 (2023) (citation omitted). "[E]ven when the plain error rule is applied, [i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in

the trial court." *State v. Collington*, 375 N.C. 401, 411, 847 S.E.2d 691, 698 (2020) (cleaned up).

"Parents have a constitutional right to raise their children as they see fit, including, in this State, using corporal punishment within certain limits." *State v. Demick*, 288 N.C. App. 415, 437, 886 S.E.2d 602, 618 (2023). Accordingly, "as a general rule, a parent (or one acting *in loco parentis*) is *not* criminally liable for inflicting physical injury on a child in the course of lawfully administering corporal punishment." *Id.* (citation omitted). However, a parent is not exempt under this principle when:

> (1) where the parent administers punishment which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other permanent injury; (2) where the parent does not administer the punishment honestly but rather to gratify his own evil passions, irrespective of the physical injury inflicted; or (3) where the parent uses cruel or grossly inappropriate procedures or devices to modify a child's behavior.

State v. Varner, 252 N.C. App. 226, 228, 796 S.E.2d 834, 836 (2017) (cleaned up). Within these limitations, a parent may still be held criminally responsible if, from the evidence, it would lead a jury to infer "a conviction in their minds that the defendant did not act honestly in the performance of duty, according to a sense of right, but rather under the pretext of duty, for the purpose of gratifying malice." *Id.* at 229, 796 S.E.2d at 836 (cleaned up).

As a preliminary matter, the constitutional protection for parents to raise their children "as they see fit," including the limited use of corporal punishment, may be raised by a parent or one acting in *loco parentis*. *Demick*, 288 N.C. App. at 437, 886 S.E.2d at 618. The *loco parentis* relationship is "established where the person intends to assume the status of a parent—by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance." *Gibson v. Lopez*, 273 N.C. App. 514, 521, 849 S.E.2d 302, 306 (2020) (cleaned up). However, one is not in *loco parentis* "from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child" rather, "it is a question of intent to assume parental status." *Id.* at 519, 849 S.E.2d at 305 (cleaned up). Here, Defendant is not Brandon's biological parent and there is insufficient evidence to support the conclusion that at the time of the abuse she was acting in *loco parentis*. Defendant is the fiancée of Brandon's mother, but the evidence presented does not indicate whether she intended to assume the status

as Brandon's mother nor if she provided support and maintenance to Brandon. Accordingly, Defendant is not afforded this constitutional protection and the doctrine of corporal punishment is inapplicable here.

Assuming *arguendo* that Defendant was acting in *loco parentis*, Defendant's argument still fails. Defendant urges this Court to grant a new trial based on the trial court's failure to instruct on a parent's right to administer corporal punishment. In doing so, Defendant analogizes her case to *Varner*, where this Court reversed the defendant's conviction and remanded the case to the trial court, based on the trial court's failure to fully instruct the jury on corporal punishment. *Varner*, at 230, 796 S.E.2d at 837. In *Varner*, the trial court instructed the jury that it could find the defendant guilty if it determined that the type of discipline was not "moderate", but it failed to explain that "moderate" meant "any punishment that did not produce a 'lasting' injury. *Id.* Thus, the jury was required to use their own "reason and common sense" when interpreting the term. *Id.* The court in *Varner* also explained that there was insufficient evidence from which a jury could have concluded that the defendant's form of punishment was "calculated to cause permanent injury." *Id.* However, the Court further stated there was sufficient evidence from which a jury may have found that the defendant acted with malice. *Id.* ("Defendant cursed and yelled at his son prior to administering the paddling . . . which is *some* evidence of malice . . . [however] a jury could [also] reasonably find . . . [d]efendant administered the paddling without malice"). Thus, the Court, based on a preserved objection, granted the defendant a new trial because the trial court did not adequately instruct the jury. Significantly, the Court noted that the State could have, but failed to, request an instruction on malice; if so, the jury could have convicted the defendant based on malice "irrespective of the extent of the physical injuries." *Id.* at 230-31, 796 S.E.2d at 837.

In the present case, we hold that a jury could reasonably infer that Defendant acted with malice; therefore, the absence of a jury instruction on corporal punishment did not prejudice Defendant. ("For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *Juarez*, 369 N.C. at 358, 794 S.E.2d at 300 (citation omitted)). The following evidence of malice was presented at trial: Defendant punished Brandon by forcing him to run in place for forty-five minutes, however, Brandon stated that it lasted from lunchtime to dinner time; Defendant extended the punishment if he cried; Defendant additionally disciplined Brandon by forcing him to run laps around the house, stand on one foot, throw items in a dumpster, including cinder blocks, walk nearly a mile to the bus stop, and threatened him with a "butt whooping." Brandon

informed a nurse he had been hit with a belt, was occasionally locked in his room so he could not eat, and was instructed by his parents not to say he had been hit. He further shared during therapy that "bad things happen for bad behavior" and "if he [cried], he would get hit with a belt."

Thus, overwhelming evidence was presented at trial from which a jury could conclude that Defendant's disciplinary punishments were rooted in malice. Defendant made Brandon run in place for long periods of time, which occurred approximately three to four times that week. The jury was shown photographs and video evidence of Brandon's injuries, which made it clear that this type of punishment was continuously used to the point where it became painful for Brandon to walk. The extended use of this punishment, along with the aforementioned forms of discipline, tends to demonstrate that Defendant acted "for the purpose of gratifying malice." *Demick*, 288 N.C. App. at 438, 886 S.E.2d at 619 (citation omitted). Accordingly, since "[o]verwhelming evidence of guilt can defeat a plain error claim on prejudice grounds[,]" we hold Defendant cannot show the required prejudice under this standard of review. *Id.* (cleaned up).

III. Conclusion

Defendant was not entitled to a jury instruction on the lesser-included offense of misdemeanor child abuse because the evidence presented at trial satisfied all the elements of felony child abuse inflicting serious injury under N.C. Gen. Stat. § 14-318.4(a5). Additionally, the trial court did not err when it denied Defendant's motion to dismiss the charge of felony child abuse as the State presented substantial evidence as to each element of the offense. Lastly, the trial court did not plainly err by not providing the jury with an instruction on lawful corporal punishment. We hold Defendant received a fair trial free from error.

NO ERROR.

Judge HAMPSON concurs.

Judge MURPHY concurs in Part II-B and concurs in result only in Parts II-A and II-C.

STATE OF NORTH CAROLINA
v.
ABIGAIL LYNN HOLLIS, DEFENDANT

No. COA23-838

Filed 6 August 2024

Evidence—hearsay—business records exception—authentication—affidavit—not notarized—signed under penalty of perjury

After defendant made several unauthorized purchases using corporate credit cards she received through her employment, the trial court in the resulting embezzlement prosecution properly admitted records of defendant's purchases—from the credit card company and from a vendor—under the business records exception to the rule against hearsay (Evidence Rule 803(6)), where the records were accompanied by letters from employees of the credit card company and the vendor stating that the records met the requirements listed in Rule 803(6). Although the letters were not notarized, they still qualified as "affidavits" because they were signed under penalty of perjury; therefore, the letters were sufficient to authenticate the evidence under Rule 803(6).

Appeal by Defendant from Judgment entered 1 November 2022 by Judge Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 15 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Torrey D. Dixon, for the State.

Patterson Harkavy LLP, by Christopher A. Brook, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Abigail Lynn Hollis (Defendant) appeals from her conviction for Embezzlement of Property Received by Virtue of Office or Employment in the Amount of $100,000 or More. The Record before us tends to reflect the following:

Defendant worked for American Fire Technologies (AFT) beginning in 2006. Her responsibilities included managing company purchases,

billing, coordinating accounting functions, and data entry, including entering credit card purchases into AFT's accounting system. As part of these responsibilities she would review AFT employees' monthly expenses on their respective corporate credit cards and submit approved purchases for payment by the company.

AFT issued Defendant a corporate SunTrust credit card to use for purchases which were authorized by the company. Defendant was also issued an Amazon card and could make approved expenditures on Amazon's website. Unlike other employees, Defendant reconciled her own records of payments with these cards and was not overseen by the company's Controller.

While making travel reservations for the company, Diane Coffin, an AFT administrative assistant, discovered records of two unusual airline tickets. These tickets, purchased with Defendant's corporate SunTrust credit card, were for first-class flights to the Bahamas and were in the name of Defendant's daughter and Defendant's daughter's fiancé. Coffin reported the tickets to her supervisor, Amanda Holtz, who served as AFT's Controller at the time.

Holtz noted that Defendant at times would fail to file statements for her corporate SunTrust credit card or would file PDF versions that looked different from the statements filed by other employees. When asked for clarification on these statements, Defendant sometimes responded vaguely or aggressively. After being notified of the purchase of the airline tickets, Holtz reviewed banking statements obtained from SunTrust and compared them to the spending reports and statements Defendant had entered into the company records. Her review revealed discrepancies between the monthly statements obtained directly from SunTrust and those filed by Defendant, as well as additional expenses that did not appear to her to be justifiable business expenses. Holtz identified a total of $360,480.84 of suspicious transactions made between 2013 and 2018.

Paul Hayes, an owner of AFT, continued the investigation alongside his wife Paula, who was hired by the company to further evaluate the SunTrust and Amazon records. They compared the statements received from SunTrust and Amazon to those filed by Defendant, noting whether each individual record was for a legitimate business expense and to where purchased goods had been shipped. Statements submitted by Defendant to the company appeared to have been altered in multiple ways, including descriptions of purchases and the digits in the amounts of charges. Amazon purchases not authorized by the company included pet accessories, clothing, and furniture, totaling $23,335.58

in unauthorized purchases. Unauthorized purchases made with the SunTrust card included, among others, clothing, pet supplies, boat and vehicle expenses, and travel expenses. In total, the investigation revealed $188,815.35 of unauthorized purchases made with the SunTrust card.

Defendant was charged with Embezzlement in the Amount of $100,000 or More. Her case went to trial on 24 October 2022.

At trial, the State proffered the SunTrust and Amazon records of Defendant's credit card purchases, both of which were produced directly from the companies. In lieu of testimony of the records' custodians, each of these records was accompanied by documents intended to authenticate them. The SunTrust records were accompanied by a "certification" signed by Nellie Robertson, described as "the custodian of records for SunTrust bank." The Amazon records were accompanied by a "Certificate of Authenticity" from Amazon Law Enforcement Response Specialist Anne Kurle. Each of these documents indicated it was signed under penalty of perjury, but neither was notarized or otherwise confirmed by oath or affirmation before an officer with the authority to administer such an oath.

The SunTrust records were initially admitted without objection. The State subsequently proffered the Amazon records, which Defendant objected to on authentication grounds. Defendant at that time also noted the same objection to the admission of the SunTrust records, while acknowledging they had already been admitted as evidence. The trial court admitted both sets of records into evidence.

The jury found Defendant guilty of Embezzlement, and the trial court sentenced her to 76-93 months' imprisonment. Defendant gave oral notice of appeal.

Issue

The sole issue in this case is whether hearsay evidence presented under the business records exception—the SunTrust and Amazon records—may be properly authenticated by an affidavit made under penalty of perjury when that affidavit was not sworn before a notary public or other official authorized to administer oaths.

Analysis

Generally, we review trial court decisions to admit or exclude evidence for abuse of discretion. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006). But we review *de novo* a trial court's admission of evidence over a party's hearsay objection. *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015).

However, there is an apparent conflict in our caselaw as to our standard of review when the hearsay objection is rooted in the authentication of the proffered evidence. Under one line of cases, we have reviewed authentication of documentary evidence under the same *de novo* standard as the trial court's admission of such evidence. *See State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) ("A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law.") (citing *State v. Owen*, 130 N.C. App. 505, 510, 503 S.E.2d 426, 430 (1998)); *State v. Watlington*, 234 N.C. App. 580, 590, 759 S.E.2d 116, 124 (2014) (citing *Crawley*). In other cases, we have reviewed similar rulings for abuse of discretion. *See In re Foreclosure by Goddard & Peterson, PLLC*, 248 N.C. App. 190, 198, 789 S.E.2d 835, 842 (2016); *State v. Mobley*, 206 N.C. App. 285, 696 S.E.2d 862 (2010) (reviewing for abuse of discretion trial court's admission of jailhouse phone call over authentication objection).

We need not resolve this apparent conflict because this case hinges on a single question of law: whether a signed, but not notarized, document, made under penalty of perjury, is sufficient to authenticate evidence admitted under the business records exception to the rule against hearsay. A trial court abuses its discretion when it acts under a misapprehension of law. *Cash v. Cash*, 284 N.C. App. 1, 7, 874 S.E.2d 653, 658 (2022). Thus, our analysis is the same whether reviewing under a *de novo* standard or for abuse of discretion.

The State argues that Defendant failed to preserve her arguments for appeal. Defendant timely objected to the admission of the Amazon records, preserving that issue for our review. Defendant in her brief concedes that her counsel failed to timely object to the admission of the SunTrust records but "specifically and distinctly" requests that we review that admission for plain error. N.C. R. App. P. 10(c)(4). Therefore, both evidentiary issues are properly before this Court on appeal, albeit under separate standards of review: harmless error for the Amazon records and plain error for SunTrust. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Before applying these separate standards of prejudice, however, we must first determine if the trial court erred by admitting the hearsay evidence in question.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). Hearsay statements are generally inadmissible unless they fall within an exception enumerated by our General Statutes or Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802.

One such exception to the general rule against hearsay is the business records exception, under which certain records of regularly conducted activity are admissible whether or not the declarant is available as a witness. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2021).[1] These records are admissible if they are "(i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation[.]" *Id.* The records must be authenticated by a witness who is familiar with them and the system under which they are made. *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985). That witness need not be the person who originally made the records. *In re S.D.J.*, 192 N.C. App. 478, 482-83, 665 S.E.2d 818, 821 (2008). Nor must that foundation be laid through testimony of a live witness: the foundational requirements of Rule 803(6) may be satisfied "by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal of Rule 902 of the Rules of Evidence." N.C. Gen. Stat. § 8C-1, Rule 803(6). In lieu of live testimony, the proponent may submit:

> [a]n affidavit from the custodian of the records in question that states that the records are true and correct copies of records made, to the best of the affiant's knowledge, by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded[.]

In re S.W., 175 N.C. App. 719, 725, 625 S.E.2d 594, 598 (2006); N.C. Gen. Stat. § 8C-1, Rule 803(6).

The State laid the foundation for both the Amazon and SunTrust records by presenting letters from employees of each company. The letter accompanying the SunTrust records is signed by Nellie Robinson and states that she is the custodian of records for SunTrust bank, the attached documents are true and accurate copies of business records made and kept in the course of regularly conducted business activity, made at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters. The Amazon records are accompanied by an email from Anne Kurle, a "Law Enforcement

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1. We note that our General Assembly has modified this rule subsequent to Defendant's trial. S.L. 2023-151. The rule now explicitly allows for authentication of business records "by a certification that complies with 28 U.S.C. § 1746 made by the custodian or witness." 28 U.S.C. § 1746 grants unsworn written statements made under penalty of perjury the same legal effect as a statement sworn to before a notary public. The modified Rule 803(6) went into effect 1 March 2024.

Response Specialist" who states the records are made in the ordinary course of business, were created at or near the time of the transactions or events reflected, were and kept as a part of a regular business activity. Each of these letters thus includes the statements necessary to authenticate their respective records.

Each letter also acknowledges that it was made under penalty of perjury. However, neither letter is notarized or otherwise indicates that it was sworn to before a notary or other public official. The question before us is whether these letters qualify as an "affidavit," as required by Rule 803(6), despite lacking a notarial seal.

The traditional definition of an affidavit requires that it be sworn to and subscribed before a notary public: "An affidavit is '(a) written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.' " *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972) (quoting *Affidavit*, *Black's Law Dictionary* (Rev. 4th ed. 1968). Generally, "[d]ocuments which are not under oath may not be considered as affidavits." *In re Ingram*, 74 N.C. App. 579, 580, 328 S.E.2d 588, 589 (1985).

This requirement is not universal, however, and our courts have recently begun to recognize circumstances under which affidavits are valid without having been witnessed by a notary. In *Gyger v. Clement*, our Supreme Court held that affidavits presented under N.C. Gen. Stat. § 52C-3-315(b), which applies to child support cases involving parties residing out of state, were not required to be notarized. 375 N.C. 80, 846 S.E.2d 496 (2020).

As the Court noted in that case, notarial signature is not required in all circumstances in all jurisdictions, and there are signs of a trend away from that requirement, particularly when statements are made under penalty of perjury. 375 N.C. at 85, 856 S.E.2d at 500. The Black's Law Dictionary definition of affidavit, for example, was modified in the Tenth Edition to define it as "a voluntary declaration of fact written down and sworn by a declarant, *usu*[*ally*] before an officer authorized to administer oaths." *Affidavit*, *Black's Law Dictionary* (10th ed. 2014) (emphasis added). Likewise, in federal proceedings, "written declarations made under penalty of perjury are permissible in lieu of a sworn affidavit subscribed to before a notary public." 375 N.C. at 85, 846 S.E.2d at 500; *see* 28 U.S.C. § 1746. A statement given under penalty of perjury "alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not." *Id.*

In holding Section 52C-3-315(b) did not require affidavits to be notarized if given under penalty of perjury, the Court noted that the legislature had enacted the statutory scheme to address "the challenges of interstate and international document production." 375 N.C. at 82, 846 S.E.2d at 499. The statute in question in that case is a subsection of N.C. Gen. Stat. § 52C-3-315, which creates "Special rules of evidence and procedure" for child support proceedings involving out-of-state parties. It provides:

> An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this State.

N.C. Gen. Stat. § 52C-3-315(b).

The Court rejected the argument that this provision required affidavits filed under it to be notarized, recognizing that the plain language of "the provision instead simply requires an 'affidavit' to be 'given under penalty of perjury.' " 375 N.C. at 83, 846 S.E.2d at 499. It noted this was an exception to the general rule under our caselaw, which "expects affidavits to be notarized if they are to be admissible." *Id.* (citing *Alford v. McCormac*, 90 N.C. at 152-53 (1884)). The Official Commentary to the statutory scheme emphasized that it represented a "deviation from the ordinary rules of evidence" in order to facilitate interstate and international proceedings. *Id.* (citing N.C. Gen. Stat. § 52C-3-315 (2019), Official Comment (2015)). The statute also mirrors the Uniform Interstate Family Support Act, which explicitly "replace[d] the necessity of swearing to a document 'under oath' with the simpler requirement that the document be provided 'under penalty of perjury.' Unif. Interstate Fam. Support Act § 316 (2001). The legislature recognized the difficulty of obtaining affidavits from international witnesses for use in child support claims, given that other nations have different legal practices than ours and "in certain locations obtaining notarization of affidavits may be impractical or impossible." *Gyger* at 84, 846 S.E.2d at 499. "If notarization were required for affidavits involving international parties, many relevant and helpful materials likely would not be presentable before the court." *Id.* at 84, 846 S.E.2d at 500.

Unlike in *Gyger*, this case does not "involve special rules of evidence due to special circumstances." 375 N.C. at 86, 846 S.E.2d at 501. However, it does involve affidavits made under penalty of perjury, which

the court in *Gyger* recognized as a similar indicium of credibility as an oath before a notary:

> [A]ffidavits may be valid and acceptable in some circumstances even when not sworn to in the presence of an authorized officer.
>
> One such circumstance is when an affidavit is submitted under penalty of perjury. Affidavits without notarization may still be substantially credible. When a statement is given under penalty of perjury, it alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not. *The form of the administration of the oath is immaterial*, provided that it involves the mind of the witness, the bringing to bear [of the] apprehension of punishment [for untruthful testimony].

375 N.C. at 85, 846 S.E.2d at 500 (emphasis added).

In a case virtually identical to this one, albeit unpublished and therefore uncontrolling, we have interpreted *Gyger* to allow authentication of business records via unnotarized affidavit made under the penalty of perjury. In *State v. Wilson*, the defendant was charged with embezzlement for writing unauthorized checks drawn on her employer's account. 286 N.C. App. 381, 878 S.E.2d 683, 2022 WL 16557419 at *1 (2022) (unpublished). The State introduced Wells Fargo bank records documenting the transactions, accompanied by "declarations from Wells Fargo employees declaring under penalty of perjury that the business records were accurate." *Id.* at *2. We held that, in light of *Gyger*, it was not error to admit the bank records. *Id.* at *3. We also recognized that, even if the trial court had erred, admitting the bank records was not an error so fundamental as to constitute plain error. *Id.*

Although *Wilson* does not control our decision in this case, we agree with its reasoning. The purpose of authentication is to show that "the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901. Defendant's argument that the affidavits in this case do not do so rests in the assumption that they are insufficiently credible if not sworn before a notary. However, each of the affidavits at issue in this case acknowledge that they were made under penalty of perjury, "bringing to bear the apprehension of punishment for untruthful testimony." *Gyger*, 375 N.C. at 85, 846 S.E.2d at 500. The purpose of an oath before a notary is to impart to the affiant the importance of stating the truth, and explicit acknowledgement of the penalty of perjury evinces a similar level of credibility.

As the Court recognized, the legislature can explicitly require an affidavit be made under oath before an official and has done so when it deems it necessary in a particular context. *Gyger*, 375 N.C. at 85, 846 S.E.2d at 500 (citing N.C. Gen. Stat. § 52C-3-311 (2019)). Not only does Rule 803(6) contain no such explicit requirement, but the legislature has subsequently modified the statute to explicitly allow authentication via statements made under penalty of perjury, in accord with 28 U.S.C. § 1746. S.L. 2023-151; N.C. Gen. Stat. § 8C-1, Rule 803(6) (2024). While our analysis is performed under the previous version of the statute, the legislature has made clear that notarization is not necessary to show an affidavit has the requisite credibility to authenticate business records.

We recognize that, following *Gyger*, our Supreme Court maintained that its opinion did not greenlight a general expansion of our definition of "affidavit" in all contexts. In *In re S.E.T.*, the petitioner in a termination of parental rights case attempted service by publication but failed to file an affidavit showing the "circumstances warranting the use of service by publication" as required by Rule 4(j1) of our Rules of Civil Procedure. 375 N.C. 665, 670, 850 S.E.2d 342, 346 (2020). She argued on appeal that her attorney's signature on the motion for leave to serve by publication satisfied the affidavit requirement because pleadings need not be accompanied by an affidavit but only signed by an attorney, and that signature certifies that the attorney "has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . ." N.C. Gen. Stat. § 1A-1, Rule 11(a). The Court held that this did not obviate the requirement of an affidavit where that affidavit was specifically required by statute, and that despite the attorney's signature the motion could not be treated as an affidavit because it was not confirmed by an oath or affirmation. *S.E.T.*, 375 N.C. at 672, 850 S.E.2d at 347 n. 4 "(Unlike the situation before the Court in our recent decision in *Gyger* . . . nothing in the statutory provisions at issue in this case in any way suggests that the term 'affidavit' as used in N.C.G.S. § 1A-1, Rule 4(j1), should be understood in any way other than in its traditional sense.").

S.E.T. is distinct from this case in at least two specific ways. First, the motion in *S.E.T.* did not explicitly acknowledge that it was made under penalty of perjury. Second, it was made in the context of service by publication, a method of service that is "in derogation of the common law," and therefore statutes authorizing it are strictly construed. *Harrison v. Hanvey*, 265 N.C. 243, 247, 143 S.E.2d 593, 596 (1965).

Similarly, un-notarized affidavits held insufficient in other cases, including those cited by Defendant, did not include an acknowledgement that they were made under penalty of perjury. In *State v. Lester* we held the trial court correctly excluded cell phone records that the State attempted to authenticate via signed affidavits from Verizon employees. 291 N.C. App. 480, 489, 895 S.E.2d 905, 911 (2023). None of the affidavits indicated they were made under penalty of perjury. *See also In re Ingram*, 74 N.C. App. 579, 328 S.E.2d 588 (1985) (petition for involuntary commitment not made under oath could not be considered affidavit). Given *Gyger*'s recognition that the penalty of perjury "alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not," thereby making an un-notarized affidavit "substantially credible," 375 N.C. at 85, 846 S.E.2d at 500, this case is distinguishable from those.

The letters from SunTrust and Amazon employees, made under penalty of perjury and communicating that the records were made in the course of a regularly conducted business activity, made at or near the time of the activity by a person with knowledge of it, and that it was the regular practice of the business to make such a record, fulfill the purpose of authentication. The trial court did not reversibly err by admitting the records into evidence. Therefore, the records were properly considered by the jury in reaching its verdict. Consequently, the trial court did not err in entering judgment upon the jury verdict.

Conclusion

Accordingly, for the foregoing reasons, there was no error at trial and the Judgment is affirmed.

NO ERROR.

Judges WOOD and STADING concur.

STATE v. JONES

[295 N.C. App. 234 (2024)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
JOSEPH CLAYTON JONES, DEFENDANT

No. COA23-1062

Filed 6 August 2024

1. Evidence—prior conviction elicited on cross despite stipulation—relevancy—impeachment of witness

In defendant's trial for multiple offenses including possession of a firearm by a felon, in which he asserted that the guns found in his home were not his, the trial court did not abuse its discretion by allowing the State to ask defendant's mother on cross-examination about her knowledge of defendant's prior conviction (also for possession of a firearm by a felon) even though defendant had already conceded that he was a convicted felon in order to avoid the prior conviction being heard by the jury. The prior conviction was relevant to impeach the mother's credibility as a witness after she stated that she had "never known" defendant to have any guns, since she admitted being present in the courtroom when defendant pleaded guilty to the older charge. Although there was a chance that the jury would use the information to defendant's detriment in deciding whether defendant was the owner of the guns in the present case, the possibility of undue prejudice did not outweigh the legitimate probative value of the evidence.

2. Drugs—possession of methamphetamine—constructive possession—defendant absent—drug located in bedroom

In defendant's trial for drug and firearm offenses, the State presented substantial evidence from which a jury could conclude that defendant constructively possessed methamphetamine, which was found in a trailer that defendant owned and lived in, even though defendant was not present when law enforcement conducted the search. The drug was found on a mirror table at the foot of defendant's bed along with digital scales, drug paraphernalia, and a glass smoke pipe; further, defendant told a visitor while in jail that officers probably "found something on that mirror."

Appeal by defendant from a judgment entered 24 February 2023 by Judge Julia Lynn Gullett in Cleveland County Superior Court. Heard in the Court of Appeals 15 May 2024.

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

W. Michael Spivey for defendant-appellant.

DILLON, Chief Judge.

Defendant Joseph Clay Jones appeals from a judgment entered upon a jury's verdict convicting him of possession of a firearm by a felon, possession of a weapon of mass destruction, and possession of methamphetamine. We conclude that he received a fair trial, free of reversible error.

I. Background

Defendant argues that the trial court erred by allowing improper character evidence to be admitted and by denying Defendant's motion to dismiss for insufficiency of the evidence.

The evidence presented at trial tends to show: On 25 January 2022, Defendant's girlfriend reported to the police that Defendant, a convicted felon, had guns in his house. Upon obtaining a search warrant for Defendant's house, officers found firearms and methamphetamine in Defendant's bedroom. As a result, Defendant was charged with three crimes: (1) possession of a firearm by a felon; (2) possession of a weapon of mass destruction; and (3) possession of methamphetamine.

At trial, Defendant objected to the admission of evidence concerning his prior conviction and renewed his objection when the State sought to elicit the evidence before the jury. At the close of evidence, Defendant made a motion to dismiss for insufficiency of the evidence, which the trial court denied. Both issues were preserved for appellate review.

The jury found Defendant guilty on all charges, and the trial court entered a judgment consistent with the jury's verdict. Defendant appeals.

II. Analysis

A. Prior Conviction Evidence

[1] Defendant argues that the trial court abused its discretion when it allowed, over Defendant's objection, the State's cross-examination of one of Defendant's witnesses about Defendant's prior conviction for possession of a firearm by a felon.

At trial, Defendant conceded that he was a convicted felon, thus satisfying the State's burden on one of the elements of the firearm

possession charge. Defendant conceded this fact because he did not want the jury to hear that the felony for which he had previously been convicted (in 2018) was also for possession of a firearm by a felon. His defense in the trial in the present case was that the firearms found in his home were not his. Accordingly, evidence that he had been previously convicted of possession of firearms would cut against his defense.

In his defense, Defendant called his mother as a witness. She testified that she had never known Defendant to possess firearms—specifically stating that she knew Defendant would "know better," that "[h]e would never do something like that," that she had "never seen [Defendant] have any guns at all, ever," that she had "never known [Defendant] to have any guns, period," and that she had "never known him to possess a gun."

However, she admitted that she was in the courtroom in 2018 when her son pleaded guilty to his prior felony and had spoken to Defendant's attorney at that time, though she also testified she did not know for what felony he had pleaded guilty.

During cross-examination, the State sought to question Defendant's mother about Defendant's 2018 conviction for possession of a firearm by a felon. The State argued, in part, that the mother's testimony, that she had "never known" Defendant to possess a firearm, opened the door for cross-examination about her knowledge of his 2018 conviction. Specifically, the State wanted to impeach her testimony by showing she was not being truthful, as she admitted being in the courtroom when Defendant essentially admitted (by pleading guilty) to possessing a firearm at some point in the past.

The trial court ruled that Defendant's prior conviction was relevant, in part, for "regular cross-examination," such as to show bias, knowledge, etc.

Accordingly, the State was permitted to cross-examine Defendant's mother, asking her, "Are you aware that on November 6th of 2018, your son was convicted of possession of a firearm by a convicted felon?"

Defendant argues that—because he initially stipulated to the fact that he was a convicted felon—the evidence of his prior conviction was not relevant and should have been excluded under N.C. Gen. Stat. § 8C-1, Rule 404(a) (2024) ("Evidence of a person's character . . . is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]").

We first consider whether the 2018 conviction was relevant evidence. N.C. Gen. Stat. § 8C-1, Rule 402 (stating that relevant evidence is

generally admissible). Whether evidence is relevant is a question of law, the admission of which we review *de novo*. *See State v. Hightower*, 168 N.C. App. 661, 667, 609 S.E.2d 235, 239, *disc. review denied*, 359 N.C. 639, 614 S.E.2d 533 (2005).

We conclude the evidence that Defendant had pleaded guilty in his mother's presence to possessing firearms was relevant *to impeach her credibility* as a witness; specifically, to impeach her testimony that she had never known her son to possess guns. *See* N.C. Gen. Stat. § 8C-1, Rule 607 ("The credibility of a witness may be attacked by any party[.]").

Notwithstanding, not all relevant evidence is admissible. The trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403. We review the trial court's Rule 403 determination for an abuse of discretion. *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015); *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (holding that under Rule 403 the trial court judge has sound discretion regarding whether to exclude evidence as unduly prejudicial).

Evidence of Defendant's pleading guilty in 2018 with his mother in the courtroom is probative to show that Defendant's mother was not being truthful during her direct testimony. There is, however, a chance that Defendant would be unduly prejudiced by the jury hearing about his 2018 plea/admission to possessing a firearm. That is, there is a chance the jury would use that information to help form their belief that he must have been the owner of the guns found in his home for which he was being tried in this case. However, we cannot say that the trial court abused its discretion by failing to determine that any undue prejudice outweighed the legitimate probative value for which the 2018 plea was offered, to impeach Defendant's witness.

B. Motion to Dismiss

[2] Defendant also argues that the trial court erred in denying his motion to dismiss the charge of possession of methamphetamine for insufficiency of the evidence. Specifically, he argues that the evidence presented against him was not sufficient to show his constructive possession of the methamphetamine found.

We review a trial court's denial of a motion to dismiss *de novo*. *See State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018). So long as there is substantial evidence to support a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied "even if the evidence likewise permits a reasonable inference of the defendant's innocence." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002).

"Evidence of constructive possession is sufficient if it would allow a reasonable mind to conclude that the defendant had the intent and capability to maintain control and dominion over the contraband." *State v. Earhart*, 134 N.C. App. 130, 136, 516 S.E.2d 883, 888 (1999) (citing *State v. Beaver*, 317 N.C. 643, 346 S.E.2d 476 (1986)). Constructive possession "can be reasonably inferred from the fact of ownership of the premises where contraband is found." *State v. Thorpe*, 326 N.C. 451, 455, 390 S.E.2d 311, 314 (1990). The defendant may have the requisite power to control, either "acting alone or in combination with others." *State v. Fuqua*, 234 N.C. 168, 170–71, 66 S.E.2d 667, 668 (1951).

Here, evidence showed that Defendant owned and inhabited a trailer in which officers discovered a substance that Defendant stipulated to be methamphetamine. Officers searched the trailer on a day that Defendant was not present. The drug was discovered on a mirror table at the foot of Defendant's bed. On Defendant's bedside table, officers also found digital scales, drug paraphernalia, and a glass smoke pipe. Additionally, the State presented evidence that, while on a jail phone call, Defendant told his visitor that the officers probably "found something on that mirror."

Since Defendant owned the premises on which the methamphetamine was found, the substance was found in his bedroom, and his statement in jail about "something on the mirror" seemed to suggest that he was aware of the presence and specific location of drugs in his home, we conclude that there was sufficient evidence from which the jury could find Defendant constructively possessed methamphetamine.

Defendant argues that because he was not home on the day that the methamphetamine was found, and because other individuals sometimes visited the home, the State cannot prove constructive possession. However, our Supreme Court has found the evidence to be sufficient to support a jury's finding of constructive possession where the defendant was absent at the time of the search and three other individuals were present. *See State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971).

III. Conclusion

We conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges ZACHARY and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
ALEJANDRO GONZALEZ LOPEZ

No. COA23-726

Filed 6 August 2024

1. **Evidence—prior bad acts—sexual offense trial—child victims—uncharged acts against one sibling—common plan or scheme**

   In a trial for multiple sex offenses committed against each of two child victims (siblings whose mother defendant dated off and on for ten years), there was no error in the trial court's decision to allow the State to introduce evidence of sexual acts allegedly committed by defendant against the older victim for which defendant was not charged and which were alleged to have taken place a few years prior to the charged offenses. The evidence was admissible under Evidence Rule 404(b) to show a common plan, intent, or scheme to abuse both of the siblings because the acts were sufficiently similar and not so remote in time to the charged acts. Further, the trial court did not abuse its discretion by determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence for purposes of Rule 403, where the court carefully considered the evidence first outside the presence of the jury and admitted a limited amount of testimony regarding the uncharged acts.

2. **Sexual Offenses—child victim—date of offenses—variance between indictments and evidence—time not essential element**

   In a prosecution for multiple sexual offenses committed against a child victim, the trial court did not err by denying defendant's motion to dismiss the indictments. Although the indictments alleged that the offenses occurred within one calendar year but testimony from the victim regarding her age when the acts occurred indicated an earlier timeframe than the one alleged, defendant could not demonstrate prejudice from any variance between the indictments and the evidence produced at trial because the time of the offenses was not an essential element and there was no showing that defendant was deprived of a defense due to lack of specificity.

Appeal by defendant from judgments entered 6 September 2022 by Judge Michael D. Duncan in Rowan County Superior Court. Heard in the Court of Appeals 16 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Caryn Strickland for defendant-appellant.

ZACHARY, Judge.

Defendant Alejandro Gonzalez Lopez appeals from the trial court's judgments entered upon a jury's verdicts finding him guilty of one count each of statutory rape of a child by an adult, statutory sex offense with a child by an adult, statutory sexual offense with a person 15 years of age or younger, sexual offense with a child, and rape of a child, as well as two counts of taking indecent liberties with a child. After careful review, we conclude that Defendant received a fair trial, free from error.

BACKGROUND

The evidence at trial showed the following: Defendant sporadically dated the mother of D.M. and S.M.[1] from 2007 until 2017, and he lived with the family during various periods over that time. S.M. was born in July of 2000 and D.M. was born in October of 2005. The sisters alleged that Defendant sexually abused them.

According to D.M., during the summer before fifth grade when she was nine years old, Defendant "made [her] suck his penis[.]" A "short period of time" later, Defendant also attempted to "stick his penis into [D.M.'s] vagina[.]" Roughly one month after that first attempt, Defendant succeeded in "put[ting] his penis into [her] vagina[,]" causing D.M. "immense pain." D.M. also recalled an incident when Defendant followed her into the bathroom and "started to kiss" her. Defendant sexually abused D.M. "a lot of times" while her mother was at work.

In September of 2019, D.M. reported Defendant's sexual abuse to her pediatric physician's assistant, telling her that "things were better now because [Defendant] was out of the home[,]" but that "before fifth grade and during fifth grade . . . he was sexually abusing her." The physician's assistant notified the Rowan County Department of Social Services.

Subsequently, S.M. reported that Defendant had also engaged in sexual acts with her. Specifically, S.M. testified that in 2010, when she was ten years old, she and Defendant had intercourse in the home. According to S.M., she did not tell anyone about that assault because

1. We use the initials adopted by the parties to protect the identities of the minor victims.

Defendant convinced her that they "were in a relationship[.]" S.M. also recounted that when she was approximately 11 years old, Defendant "put his penis in [her] mouth[.]" She recalled a third incident in 2011 or 2012 during which Defendant "caress[ed] [her] breasts" and then became angry when she "wasn't acting pleased[,]" as well as another incident of digital penetration. Defendant regularly engaged in sexual acts with S.M. from 2012 until 2014.

On 17 February 2020, a Rowan County grand jury indicted Defendant for two counts of statutory rape of a child by an adult, two counts of statutory sex offense of a child by an adult, two counts of taking indecent liberties with a child, and one count of statutory sex offense with a person 15 years old or younger.

This matter came on for jury trial on 29 August 2022. On 6 September 2022, the jury found Defendant guilty of three offenses against D.M.—statutory rape of a child by an adult, statutory sex offense with a child by an adult, and taking indecent liberties with a child; and four offenses against S.M.—statutory sexual offense with a person who is under 15 years, taking indecent liberties with a child, sexual offense with a child, and rape of a child.

The same day, the trial court entered seven judgments, including two judgments sentencing Defendant to consecutive terms of 300 to 420 months in the custody of the North Carolina Division of Adult Correction for rape of a child and statutory rape of a child by an adult. The trial court sentenced Defendant to two additional consecutive terms of 16 to 29 months for each charge of indecent liberties with a child. The trial court also sentenced Defendant to three concurrent terms: 240 to 348 months for statutory sexual offense with a person under 15, and two terms each of 300 to 420 months for statutory sex offense with a child by an adult and sexual offense with a child.

Defendant gave oral notice of appeal.

DISCUSSION

On appeal, Defendant argues that "[t]he trial court erred by denying [his] motion to exclude other bad acts regarding an uncharged prior 2007 incident," because the evidence was inadmissible under Rule 404(b) of the North Carolina Rules of Evidence and "was unduly prejudicial under Rule 403." Additionally, Defendant argues that the trial court erroneously denied his motion to dismiss "the indictments regarding D.M. because the State failed to produce substantial evidence to prove the dates of the alleged offenses, which prejudiced [his] defense."

I. Evidence of Prior Bad Acts

[1] At trial, the State sought to introduce evidence of Defendant's uncharged acts of sexual abuse of S.M., which allegedly occurred in Cabarrus County beginning in 2007 when S.M. was seven or eight years old. On voir dire, S.M. testified that Defendant sexually abused her from 2007 to 2012, but that she had "blocked out" the specific details of those individual acts of sexual abuse:

> Q. Back when you lived [there] when you were seven years old [in 2007], can you tell the Court what, if anything, happened between you and [Defendant] sexually[?]
>
> A. While I was living in the [Cabarrus County apartment], I clearly remember [Defendant] putting blankets on the living room floor, and I clearly remember [him] laying down with me on the floor and rubbing his penis on my vagina. . . . I remember trying to get away but not being able to because [he] was holding me so hard. And I remember after [Defendant] was done ejaculating he let me go . . . .
>
> . . . .
>
> Q. . . . Was this the first time this happened or was there another time before this?
>
> A. I don't remember if this was the first time, but I do remember it happening many times.
>
> . . . .
>
> Q. So I just want to clarify then, from 2007 to 2009, did any type of sexual abuse occur between you and [Defendant]?
>
> A. Yes.
>
> Q. Do you recall how many times?
>
> A. Not exactly.
>
> Q. More than once?
>
> A. Yes.
>
> . . . .
>
> Q. Okay. And [this is] your first clear memory?
>
> A. Yes.

> Q. When you were interviewed by Sergeant DeSantis, did you describe for him all the events that happened from 2007 to 2009?
>
> A. No.
>
> Q. Why not?
>
> A. Because I blocked it all away.
>
> . . . .
>
> Q. . . . If you don't remember specific details, that's fine, but what I'm asking is from this incident in 2007 to the next clear memory that you have in 2010 did the sexual abuse stop?
>
> A. No.
>
> Q. So from this incident in 2007 up until your next clear memory in 2010, do I understand you correctly the sexual abuse continued, you have just blocked out specifics about those?
>
> A. Yes.

Upon its determination that this evidence was admissible to show Defendant's plan, intent, or scheme—in that the acts were sufficiently similar and not so remote that the probative value of the evidence outweighed any prejudicial effect—the trial court allowed S.M. to testify before the jury regarding these uncharged acts of sexual abuse.

A. Standard of Review

Rules of Evidence 404(b) and 403 have different standards of review, which on appellate review require "distinct inquiries." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). If the trial court has made findings of fact and conclusions of law regarding its Rule 404(b) ruling, then "we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *Id.*

This Court then reviews the trial court's Rule 403 determination—whether the danger of unfair prejudice substantially outweighs the probative value of the evidence—for abuse of discretion. *Id.* "The balancing of these factors lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling

was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Thaggard*, 168 N.C. App. 263, 269, 608 S.E.2d 774, 779 (2005) (cleaned up).

B. Analysis

Defendant first contends that the trial court erroneously concluded that "the evidence of uncharged conduct beginning in 2007 was admissible to show [Defendant's] 'plan, intent, or scheme' in abusing young girls." In addition, Defendant argues that "the admission of the evidence was highly prejudicial and outweighed any probative value under Rule 403."

Rule 404(b) of the North Carolina Rules of Evidence provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023). Rule 404(b) "is a clear general rule of *inclusion*," and thus "such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (emphasis added) (cleaned up). Specifically, evidence of prior bad acts is relevant and admissible for purposes other than to show the defendant's criminal propensity, including as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b).

Upon determining that evidence is admissible under Rule 404(b), "the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403." *State v. Carpenter*, 361 N.C. 382, 389, 646 S.E.2d 105, 110 (2007). Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403.

Our courts have "liberal[ly] . . . allow[ed] evidence of similar offenses in trials on sexual crime charges." *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996). "The test for determining whether such evidence is admissible is whether the incidents establishing the common plan or scheme are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403." *Id.* at 615, 476 S.E.2d at 299.

"[P]rior acts are considered sufficiently similar . . . if there are some unusual facts present in both crimes[,]" although these facts need not

"rise to the level of the unique and bizarre." *State v. Pabon*, 380 N.C. 241, 259, 867 S.E.2d 632, 644 (2022) (cleaned up). "[W]hen otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking . . . ." *State v. Badgett*, 361 N.C. 234, 243, 644 S.E.2d 206, 212, *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007). Nonetheless, our Supreme Court has "permitted testimony as to prior acts of sexual misconduct which occurred more than seven years" prior to the offenses for which the defendant was being tried. *Frazier*, 344 N.C. at 615, 476 S.E.2d at 300; *see, e.g.*, *State v. Penland*, 343 N.C. 634, 654–55, 472 S.E.2d 734, 745 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725, *reh'g denied*, 520 U.S. 1140, 137 L. Ed. 2d 366 (1997).

In the case at bar, "the testimony in question tended to prove that [D]efendant's prior acts of sexual abuse occurred continuously over a period of [several] years and in a strikingly similar pattern." *Frazier*, 344 N.C. at 616, 476 S.E.2d at 300. Both S.M. and D.M. were elementary-school-aged children when Defendant began sexually abusing them. The record shows that both victims considered Defendant to be their stepfather, and that D.M. and S.M. were the only children living in the home not biologically related to Defendant. Defendant had unfettered access to both victims most evenings while their mother worked.

We conclude that "this evidence presents a classic example of a common plan or scheme." *Id.*; *see also State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) ("When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan."). Thus, the 2007 conduct was "not too remote to be considered as evidence of [D]efendant's common plan or scheme to sexually abuse female family members, including the victims here." *Frazier*, 344 N.C. at 616, 476 S.E.2d at 300.

Based on the similarity of the allegations and the temporal proximity, we conclude that the trial court admitted S.M.'s testimony regarding Defendant's uncharged acts for a proper purpose pursuant to Rule 404(b): to show a common plan or scheme.

Upon careful review, we also conclude that the trial court did not abuse its discretion in its Rule 403 analysis. The court acknowledged that the admission of this testimony would be prejudicial to Defendant; nevertheless, it determined after its full analysis that "the probative value outweighs any prejudicial effect[.]" Therefore, it is plain that "the trial court was aware of the potential danger of unfair prejudice to [D]efendant[.]" *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160 (citation omitted). "The trial judge first heard the testimony of the 404(b) witness outside the presence of the jury, then heard arguments from

the attorneys and ruled on its admissibility . . . ." *Id.* at 133, 726 S.E.2d at 160–61. Moreover, the court only admitted "a limited amount of testimony as it relates to the prior act[s,]" which indicates its "careful consideration of the evidence." *Id.* at 133, 726 S.E.2d at 161. Therefore, the trial court did not abuse its discretion in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

Defendant has failed to demonstrate that the trial court erred by admitting the challenged testimony concerning his uncharged sexual abuse of S.M. Accordingly, Defendant's argument is overruled.

II. Motion to Dismiss

[2] Next, Defendant argues that "[t]he trial court erred in denying [his] motion to dismiss the indictments regarding D.M. because the State failed to produce substantial evidence to prove the dates of the alleged offenses" or, in the alternative, "because there was a fatal variance between the indictment[s] and the proof at trial" with regard to the dates of the alleged offenses.

A. Standard of Review

This Court has held that "any fatal variance argument is, essentially, an argument regarding the sufficiency of the State's evidence." *State v. Gettleman*, 275 N.C. App. 260, 271, 853 S.E.2d 447, 454 (2020), *disc. review denied*, 377 N.C. 557, 858 S.E.2d 286 (2021). Accordingly, "we employ de novo review." *State v. Tarlton*, 279 N.C. App. 249, 253, 864 S.E.2d 810, 813 (citation omitted), *appeal dismissed and disc. review denied*, 379 N.C. 684, 865 S.E.2d 846 (2021).

B. Analysis

Defendant contends that the trial court erred by denying his motion to dismiss because the State failed to present evidence that the offenses occurred within the time period alleged in the indictments, that is, during the period from 1 January 2016 to 31 December 2016. Defendant notes that "[i]t is undisputed that D.M. was born [in] 2005[,]" and that D.M. testified that the offenses "occurred during a period when she was nine years old." Defendant then argues that "D.M. would have been nine years old in 2014–2015, not 2016," and consequently, "the State failed to prove that the offenses occurred during the date range specified in the indictment[s][.]" Accordingly, he maintains that the trial court erred by denying Defendant's motion to dismiss.

A variance between an indictment and the evidence produced at trial "is not material, and is therefore not fatal, if it does not involve

an essential element of the crime charged." *Id.* (citation omitted). "Generally, the time listed in the indictment is not an essential element of the crime charged[,]" *State v. Stewart*, 353 N.C. 516, 517–18, 546 S.E.2d 568, 569 (2001), and "the State may prove that it was in fact committed on some other date[,]" *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961). "Statutory and case law both reflect the policy of this jurisdiction that an inaccurate statement of the date of the offense charged in an indictment is of negligible importance except under certain circumstances." *State v. Hicks*, 319 N.C. 84, 91, 352 S.E.2d 424, 428 (1987). Nonetheless, "a variance as to time becomes material and of the essence when it deprives [the] defendant of an opportunity to adequately present his defense." *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569 (cleaned up).

In cases involving sexual assaults of children, our Supreme Court has explicitly relaxed the temporal specificity requirements that the State must allege. *State v. Burton*, 114 N.C. App. 610, 613, 442 S.E.2d 384, 386 (1994). "Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where . . . the allegations concern instances of child sex abuse occurring years before." *Id.* (emphasis omitted). Thus, "a child's uncertainty as to the time . . . the offense charged was committed shall not be grounds for [dismissal] where there is sufficient evidence that the defendant committed each essential act of the offense." *Hicks*, 319 N.C. at 91, 352 S.E.2d at 428 (cleaned up). Because "some leniency surrounding the child's memory of specific dates is allowed[,]" "[u]nless the defendant demonstrates that he was deprived of his defense because of lack of specificity, th[e] policy of leniency governs." *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569 (citation omitted).

This policy of leniency is supported by our statutes. N.C. Gen. Stat. § 15-155 provides that "[n]o judgment upon any indictment for felony or misdemeanor . . . shall be stayed or reversed . . . for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly[.]" N.C. Gen. Stat. § 15-155. Additionally, "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." *State v. Blackmon*, 130 N.C. App. 692, 696, 507 S.E.2d 42, 45 (citation omitted), *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998).

In the instant case, Defendant does not demonstrate any prejudice to his defense arising from the variance in the dates of the alleged

offenses. Although Defendant argues that his relationship with the girls' mother was volatile and that he frequently left the home, "Defendant did not assert an alibi defense regarding the dates of the [charged] offenses or rely in any other manner upon the dates in the indictments in preparing his defense." *State v. Poston*, 162 N.C. App. 642, 648, 591 S.E.2d 898, 902 (2004). "Under the general rule, any variance between the dates in the indictments and the evidence would, therefore, not be material." *Id.*

Accordingly, the trial court did not err in denying Defendant's motion to dismiss the indictments, and his arguments on this ground are overruled. *See id.*

CONCLUSION

For the reasons stated herein, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges COLLINS and FLOOD concur.

STATE OF NORTH CAROLINA
v.
LEON MAYE A.K.A. DANNY BROWN, DEFENDANT

KENYA L. RODGERS, BAIL AGENT
AND
1ST ATLANTIC SURETY COMPANY, SURETY

No. COA24-77

Filed 6 August 2024

Bail and Pretrial Release—motion to set aside bond forfeiture—mandatory reason to set aside per statute—denial erroneous

The trial court erred in denying a surety's motion to set aside a bond forfeiture where the court's order did not explain the denial but the circumstances suggested that the reason was the surety's failure to appear at the motion hearing. Pursuant to N.C.G.S. § 15A-544.5, the surety was not required to appear at the hearing, and, moreover, its motion cited a valid reason to set aside the the bond forfeiture under subsection (b)(4) of the statute—"defendant has been served with an Order for Arrest for the Failure to Appear on the criminal

charge in the case in question as evidenced by a copy of an official court record"—and no evidence to the contrary was presented.

Appeal by Surety from order entered 28 September 2023 by Judge Imelda J. Pate in Lenoir County Superior Court. Heard in the Court of Appeals 29 May 2024.

Practus, LLP, by M. Brad Hill, for Other-Appellant 1st Atlantic Surety Company.

Mintz Law Firm, PLLC, by Rudolph I. Mintz, III, for Other-Appellee Lenoir County Board of Education.

Tharrington Smith LLP, by Stephen G. Rawson, for Other-Appellee Lenoir County Board of Education.

CARPENTER, Judge.

1st Atlantic Surety Company ("ASC") appeals from the trial court's order denying ASC's motion to set aside its bond forfeiture. After careful review, we agree with ASC: The trial court erred by denying ASC's motion to set aside. We reverse and remand.

I. Factual & Procedural Background

On 17 October 2018 in Lenoir County Superior Court, ASC posted a $35,000 bail bond for Leon Maye ("Defendant"). On 30 January 2023, Defendant failed to appear for court, so the trial court entered a bond-forfeiture notice.

On 13 July 2023, ASC filed a motion to set aside the bond forfeiture. The motion included several copies of orders for Defendant's arrest. On 2 August 2023, the Lenoir County School Board (the "Board")[1] filed an objection to ASC's motion. The objection included a notice of hearing, which incorrectly listed the hearing date as 2 August 2023; the hearing date was actually 30 August 2023. In an affidavit attached to its motion to dismiss this appeal, the Board asserts that it remedied its mistake by mailing ASC a corrected notice of hearing.

On 30 August 2023, the trial court heard this matter, but ASC did not appear. On 28 September 2023, the trial court entered an order (the

1. A local board of education is authorized to act in place of the State concerning objections to bond forfeitures. *See* N.C. Gen. Stat. § 15A-544.5(d)(3) (2023).

"Order") denying ASC's motion to set aside. In the Order, the trial court found that: the Board properly mailed copies of the objection and notice of hearing; all parties were properly served; and ASC did not appear at the hearing. The trial court concluded by denying ASC's motion to set aside. The Order does not state why the trial court denied the motion to set aside, but a narrative from the hearing states that the trial court "reviewed the court file, and in the absence of any representative of [ASC], denied the motion to set aside and asked [the Board] to prepare a written order to that effect."

On 27 October 2023, ASC filed notice of appeal. On 11 March 2024, the Board filed a motion to dismiss this appeal. That same day, the Board also filed a motion to amend the record.

In its motion to dismiss, the Board argues that ASC violated Rules 9 and 11 of our Rules of Appellate Procedure. Concerning Rule 11, the Board asserts that ASC never served it with a proposed record. Nonetheless, on 26 January 2024, ASC served and filed a purportedly settled record. ASC, however, argues that it did serve a proposed record on 11 December 2023, and thus, the record was necessarily settled on 13 January 2024.

Concerning Rule 9, the Board complains that the purportedly settled record lacks an amended notice of hearing that the Board mailed to ASC on 4 August 2023. The Board also complains that the record lacks a transcript or a narrative from the objection hearing.

In its motion to amend, the Board asks to amend the record to include: three letters containing the amended notice of hearing; an appearance bond for Defendant; documentation of a power of attorney concerning Defendant's bond; and a narrative from the objection hearing. In response, ASC says that it "does not object to [the Board] seeking to amend the Record on Appeal."

II. Jurisdiction

We have jurisdiction over this case under N.C. Gen. Stat. § 7A-27(b)(1) (2023). We may, however, sanction parties for failing to adhere to our Rules of Appellate Procedure, N.C. R. App. P. 25(b), and we may do so by dismissing their appeal, N.C. R. App. P. 34(b)(1). But "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). Rather, "only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate." *Id.* at 200, 657 S.E.2d at 366.

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

Rule 9 requires the record to contain what is "necessary for an understanding of all issues presented on appeal," N.C. R. App. P. 9(a)(1)(e), which may include either a transcript or narration of the relevant trial-court proceeding, N.C. R. App. P. 9(c)(1)–(2). Rule 9 is not jurisdictional. *See In re Foreclosure of a Deed of Tr. Executed by Moretz*, 287 N.C. App. 117, 124, 882 S.E.2d 572, 577 (2022).

Under Rule 11, "[i]f the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal . . . ." N.C. R. App. P. 11(b). Rule 11 is also not jurisdictional. *See Day v. Day*, 180 N.C. App. 685, 688, 637 S.E.2d 906, 908 (2006).

Here, the parties disagree concerning service of the proposed record and the record's necessary materials. But ASC "does not object to [the Board's motion] seeking to amend the Record on Appeal," so we grant the Board's motion to amend the record. Because we grant the Board's motion to amend the record, our review of this case is not impaired, and ASC's alleged rule violations do not frustrate the adversarial process. *See Expert Discovery*, 287 N.C. App. at 84, 882 S.E.2d at 668–69. Therefore, without resolving whether ASC indeed violated Rules 9 or 11, we deny the Board's motion to dismiss.

III. Issue

The issue on appeal is whether the trial court erred by denying ASC's motion to set aside its bond forfeiture.

IV. Analysis

A. Standard of Review

"On appeal from an order denying a motion to set aside a bond forfeiture, 'the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *State v. Cash*,

270 N.C. App. 433, 435, 841 S.E.2d 589, 590 (2020) (quoting *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009)). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176, (2016) (quoting *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013)).

B. Preservation

In order to preserve an argument for appellate review, the moving party must "clearly present[] the alleged error to the trial court." N.C. Gen. Stat. § 8C-1, Rule 103(a)(1) (2023); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Further, the "specific grounds for objection raised before the trial court must be the theory argued on appeal because 'the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court].' " *State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

C. Motion to Set Aside a Bond Forfeiture

Bail is a "security such as cash, a bond, or property," which is "required by a court for the release of a criminal defendant who must appear in court at a future time." *Bail*, Black's Law Dictionary (11th ed. 2019). Bail is typically a sum certain. *See State v. Corl*, 58 N.C. App. 107, 111, 293 S.E.2d 264, 267 (1982).

A bail bond is a contract between a defendant, a bondsman, and the State. *See id.* at 111, 293 S.E.2d at 267. In this contract, the bondsman agrees to post bond, which is a portion of the bail; the defendant agrees to pay the bondsman a fee and to appear in court; and the State agrees to release the defendant until he is scheduled to appear in court. *See State v. Vikre*, 86 N.C. App. 196, 199, 356 S.E.2d 802, 804–05 (1987).

If the defendant fails to appear in court, the trial court enters a forfeiture of the bond. *State v. Escobar*, 187 N.C. App. 267, 270, 652 S.E.2d 694, 697 (2007). From there, the trial court mails a forfeiture notice to the bondsman. *Id.* at 270, 652 S.E.2d at 697. If the bondsman then fails to file a motion to set aside the forfeiture, the forfeiture order becomes a final judgment. *Id.* at 270, 652 S.E.2d at 697. Proceeds from bond forfeitures go to the local school board. *See* N.C. Const. art. IX, § 7.

If, however, the bondsman files a motion to set aside the forfeiture, the local school board may then file an objection to the motion to set aside. N.C. Gen. Stat. § 15A-544.5(d)(3) (2023). If the school board files an objection, the trial court must hold a hearing. *Id.* § 15A-544.5(d)(5).

When the bondsman files a motion to set aside, the "forfeiture *shall* be set aside for any" of the reasons enumerated in subsection 15A-544.5(b). *Id.* § 15A-544.5(b) (emphasis added). So when a "motion to set aside cites to at least one statutory reason, supported by evidence, the trial court must grant the motion." *State v. Isaacs*, 261 N.C. App. 696, 702, 821 S.E.2d 300, 305 (2018) (citing N.C. Gen. Stat. § 15A-544.5(b)). One enumerated reason for relief is if the "defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record . . . ." N.C. Gen. Stat. § 15A-544.5(b)(4).

D. Failure to Appear

A party's failure to appear at a motion hearing does not give the trial court absolute discretion to deny the absent party's motion. This is because, as stated by the North Carolina Supreme Court, there is no "statute, rule of court or decision which mandates the presence of a party to a civil action or proceeding at the trial of, or a hearing in connection with, the action or proceeding unless the party is specifically ordered to appear." *Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 385 (1981).

E. Application

Here, ASC argues that the trial court erred by denying its motion to set aside because ASC complied with subsection 15A-544.5(b)(4). *See* N.C. Gen. Stat. § 15A-544.5(b)(4). On the other hand, the Board argues that the trial court correctly denied ASC's motion to set aside because ASC failed to appear at the motion hearing, and alternatively, the Board argues that the trial court correctly denied ASC's motion to set aside because the motion was improperly signed. We agree with ASC.

First, nothing in the record—including the Board's additional narrative of the motion hearing—shows that the Board contested the validity of ASC's motion signature. Therefore, any arguments concerning ASC's motion signature are unpreserved, *see* N.C. Gen. Stat. § 8C-1, Rule 103(a)(1), and we will not consider them, *see Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

Second, the Order does not specify why the trial court denied ASC's motion. We can reasonably infer, however, that the trial court denied

ASC's motion because ASC failed to appear at the motion hearing. Although it was in ASC's best interests to appear at the hearing—nothing compelled ASC to do so. *See Hamlin*, 302 N.C. at 482, 276 S.E.2d at 385; N.C. Gen. Stat. § 15A-544.5. Moreover, ASC's motion cited a valid reason to set aside the forfeiture, *see* N.C. Gen. Stat. § 15A-544.5(b)(4), and ASC attached copies of Defendant's arrest orders to its motion. Therefore, without any contradictory evidence from the Board, the trial court should have set aside the forfeiture. *See Isaacs*, 261 N.C. App. at 702, 821 S.E.2d at 305.

V. Conclusion

We conclude that the trial court erred by denying ASC's motion to set aside the forfeiture, despite ASC's absence from the motion hearing. Therefore, we reverse the Order and remand.

REVERSED AND REMANDED.

Judges TYSON and MURPHY concur.

STATE OF NORTH CAROLINA
v.
HABIMANA LISIMBA McLEAN

No. COA23-1100

Filed 6 August 2024

1. Appeal and Error—oral notice of appeal—Appellate Rule 4 "at trial" interpreted—next day during same session of court sufficient

Defendant's oral notice of appeal from a criminal judgment was timely made pursuant to Appellate Rule 4(a) (requiring that a party seeking appeal may give oral notice "at trial") even though it was given the day after his trial, because it was made, through counsel, during the same session of court and before the same judge who entered the judgment. Therefore, the appellate court had jurisdiction over the matter, and defendant's petition for writ of certiorari was dismissed as moot.

2. Assault—inflicting physical injury on employee of state detention facility—jury instructions—lesser included offense not warranted

In a trial for assault inflicting physical injury on an employee of a state detention facility, defendant was not entitled to a jury instruction on the lesser included offense of assault on an officer or employee of the state (which does not include a physical injury element), where the State presented sufficient evidence of each essential element of the greater offense—including that the officer assaulted by defendant was struck multiple times and sustained bruising and swelling on his face and scrapes and bruises on his arm as a result—and where defendant did not introduce any conflicting evidence.

Appeal by Defendant from judgment entered 7 June 2023 by Judge Michael S. Adkins in Rowan County Superior Court. Heard in the Court of Appeals 30 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Samuel R. Gray, for the State.

Irons & Irons, PA, by Ben G. Irons, II, for the Defendant.

WOOD, Judge.

Habimana Lisimba McLean ("Defendant") appeals from a jury verdict finding him guilty of assault inflicting physical injury on an employee of a state detention facility. Defendant pleaded guilty to attaining habitual felon status and thereafter was sentenced to 42 to 63 months of imprisonment. On appeal, Defendant argues the jury should have been instructed on the lesser included offense of assault on an officer or employee of the State. For the reasons stated below, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

During the time relevant to this appeal, Defendant was incarcerated at Piedmont Correctional Center, and the officers at the Correctional Center are State employees. On 1 March 2021, Defendant spoke with Officer Lynch about certain events that occurred over the prior weekend. Defendant expressed his belief that he was treated unfairly because he did not receive his "personal hygiene stuff." Officer Lynch told Defendant she would assist him after completing a count of the prisoners. Officer Lynch then went to the control booth to report the count. While there, Officer Lynch noticed on the surveillance cameras that Defendant had taken off his shirt, was pacing in a circle around his cell, and appeared to be visibly upset.

Officer Lynch felt that she had built a good relationship with Defendant, so she went to his cell to speak with him about what transpired over the weekend. During their conversation, Defendant complained that he did not receive his hygiene items or his medication. Officer Logan, who is also a correctional officer, then entered Defendant's cell to assist Officer Lynch. As Officer Logan approached, Defendant stood up, stepped toward Officer Lynch, but then backed away. Officer Logan told Defendant that she did not appreciate Defendant stepping towards Officer Lynch, to which Defendant stated, "I wouldn't dare hit [Officer Lynch], she's trying to help me." He then stated that he was "done talking" and shut his door. Following this encounter, Sergeant Lackey and Captain Harris were summoned to the cell block and briefed about Defendant's situation by Officer Lynch. Officer Lynch recommended that Sergeant Lackey speak with Defendant alone to try to calm him down.

Sergeant Lackey went to Defendant's cell and asked him to come out, but Defendant refused. He asked again and Defendant exited. Defendant walked down the hall with Sergeant Lackey following behind him. As they were walking to a more private area to speak, Defendant turned around and struck Sergeant Lackey in the face above his left eye with his fist. Sergeant Lackey and Defendant then tussled back and forth as Sergeant Lackey attempted to restrain Defendant onto a picnic table. Officer Logan witnessed the incident and stepped in to pepper spray Defendant. Sergeant Lackey was also sprayed during the incident. After subduing and handcuffing Defendant, Sergeant Lackey left to wash off the pepper spray. During the altercation, Sergeant Lackey sustained bruising and swelling on his forehead and scrapes and bruises on his arm. Officer Lynch testified that Sergeant Lackey's face appeared red immediately following the incident and that he had a "knot" on his head the following day. At trial, video footage from the prison cameras was shown to the jury. The video footage confirmed that Defendant instigated the altercation by hitting Sergeant Lackey in the face. Sergeant Lackey testified that he was hit multiple times in the face, around six to ten times, and was also struck in the body.

Defendant was indicted for assault inflicting physical injury on an employee of a state detention facility and attaining habitual felon status on 13 June 2022. At the charge conference, Defense counsel requested a jury instruction on a lesser included offense on the assault charge, which excluded the infliction of physical injury element. The trial court denied the request. On 7 June 2023, the jury found Defendant guilty of assault on an employee of a state detention facility inflicting physical injury. Defendant ultimately pleaded guilty to attaining habitual felon status. The trial court sentenced Defendant to an active term of 42 to 63

months of imprisonment. The following day, Defendant gave oral notice of appeal in open court.

II. Discussion

A. Appellate Jurisdiction

[1] Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, a party seeking to appeal a superior court or district court judgment or order in a criminal action is required to either (1) provide oral notice of appeal at trial, or (2) file a written notice of appeal within fourteen days following the entry of judgment. N.C. R. App. P. 4(a). "The Rule permits oral notice of appeal, but *only if given at the time of trial*." *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) (citation omitted) (emphasis added).

Concurrent with his appeal, Defendant has filed a petition for writ of *certiorari* seeking to preserve his appeal should this Court hold Defendant has lost his right to appeal due to a "failure to take timely action" if the Court finds notice of appeal was not given *at trial*. N.C. R. App. P. 21(a)(1). Defendant's trial concluded on 7 June 2023, and he gave oral notice of appeal, through counsel, on the morning of 8 June 2023 during the same session of court and before the same judge who entered the judgments. Neither Defendant nor his counsel filed a written notice of appeal.

The relevancy and unsettledness as to what constitutes "*at the time of trial*," is clearly demonstrated by the numerous petitions for writ of *certiorari* filed in this Court "out of an abundance of caution" in case this Court deems an appeal untimely for "failure to take timely action" by not giving oral notice of appeal "at trial" in the minutes following sentencing. N.C. R. App. P. 21(a)(1). For example, in *Holanek*, this Court granted certiorari when oral notice of appeal was given six days after the conclusion of trial, in open court, and before the same judge that presided over the trial. *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231-32 (2015). In *Smith*, this Court granted certiorari where the trial concluded at 12:30 p.m. and oral notice of appeal was given at 3:25 p.m. that same day. *State v. Smith*, 267 N.C. App. 364, 366-67, 832 S.E.2d 921, 924-25 (2019). These few cases, of the many before this Court, illustrate this Court's rationale for granting certiorari, despite an "untimely" notice, was because "petitioners demonstrated good faith efforts in making a timely appeal and because the appeal had merit." *State v. Myrick*, 277 N.C. App. 112, 114, 857 S.E.2d 545, 547 (2021) (cleaned up). Accordingly, we are compelled to interpret what is considered a notice of appeal *at trial*.

To analyze this question, it is necessary to expound the parameters between "the span of a trial" and "a session of the court." In *Sammartino*, this Court analyzed an argument set forth by the defendants, that the trial court was without the authority to modify the judgments two days after a sentencing hearing. *State v. Sammartino*, 120 N.C. App. 597, 599, 463 S.E.2d 307, 309 (1995). In that case, the defendants conceded the trial court could modify the judgments *during the same session of court* but argued that the session ended "with the completion of the cases on the docket" on the day of the sentencing hearing. *Id.* There, this Court explained, "[D]uring a session of the court a judgment is *in fieri* and the court has authority in its sound discretion, prior to expiration of the session, to modify, amend or set aside the judgment." *Id.* (citations omitted). *In fieri* denotes a legal proceeding that "is pending or in the course of being completed." *In fieri*, Black's Law Dictionary (11th ed. 2019). Further, the term "session" denotes "the time during which a court sits for business and refers to a typical one-week assignment of court." *Sammartino*, 120 N.C. App. at 599, 463 S.E.2d at 309 (citation omitted). The Court in *Sammartino* held that because the judgments were entered during the week of court assigned to the judge, the trial court properly modified its prior judgments entered earlier that week. *Id.* at 600, 463 S.E.2d at 309.

Similarly, in *Edmonds*, the trial court entered a judgment against the defendant imposing a suspended prison sentence; however, two days later, it modified the judgment to include an active term instead. *State v. Edmonds*, 19 N.C. App. 105, 107, 198 S.E.2d 27 (1973). In that case, this Court held that the trial court acted within its discretion when it modified the first judgment and explained that the modification was proper because it was "during the same session." *Id.* at 107, 198 S.E.2d at 27-28. This Court, too, found no error in a trial court's ruling when it resentenced the defendant the day after his initial sentencing, thereby modifying the first judgment. *State v. Quick*, 106 N.C. App. 548, 561, 418 S.E.2d 291, 299 (1992). In *Quick*, this Court reasoned, "[u]ntil the expiration of the term, the orders and judgment of a court are *in fieri*, and the judge has the discretion to make modifications in them as he may deem to be appropriate for the administration of justice." *Id.* (citation omitted); *see also State v. Dorton*, 182 N.C. App. 34, 42, 641 S.E.2d 357, 362 (2007) ("It is uncontested . . . that both [of] defendant's . . . resentencing hearings occurred during the same term of criminal court. The trial court did not, therefore, err by modifying its resentencing judgment during that session."). In *In re Tuttle*, this Court held the trial court did not err when it made an additional, material finding following the entry of a judgment and the defendant's notice of appeal, holding, "[t]he term of

court had not expired, the judgment remained *in fieri* despite the notice of appeal." *In re Tuttle*, 36 N.C. App. 222, 225, 243 S.E.2d 434, 436 (1978).

To the contrary, "[a] trial court loses jurisdiction to modify or amend a judgment after the adjournment of the trial session." *State v. Jones*, 27 N.C. App. 636, 638, 219 S.E.2d 793, 795 (1975) (citations omitted). "[A] trial session shall terminate or adjourn upon the announcement in open court that the court is adjourned *sine die*" meaning, "without assigning a day for a further meeting or hearing." *Id.* at 639, 219 S.E.2d at 795 (citation omitted). Accordingly, since a trial court has the authority to modify, amend, or set aside a judgment during a *session* of court, when a judgment is *in fieri*, the *time of trial* should also logically extend to the end of the respective session, or when court adjourns *sine die*.

We hold Defendant entered a timely oral notice of appeal because Defendant, through counsel, provided notice of appeal in open court while the judgment was *in fieri* and the trial court possessed the authority to modify, amend, or set aside judgments entered during that session. Defendant gave notice of appeal the following morning, before the same judge, and during the same *session* of court, prior to the trial court adjourning *sine die*. Thus, the period of time for Defendant to provide timely notice of appeal *at trial* commenced following sentencing and ended when the court session adjourned *sine die*. *Sammartino*, 120 N.C. App. at 599-600, 463 S.E.2d at 309. Therefore, we conclude Defendant's oral notice of appeal was timely, not defective, and we have jurisdiction to hear the merits of his appeal. As a result, Defendant's petition for writ of *certiorari* is unnecessary and dismissed as moot.

B. Jury Instruction

[2] On appeal, Defendant argues the trial court erred in failing to give his requested jury instruction on the lesser included offense of assault on an officer or employee of the State. We disagree.

"Whether evidence is sufficient to warrant an instruction is a question of law." *State v. Palmer*, 273 N.C. App. 169, 171, 847 S.E.2d 449, 451 (2020) (citation omitted). "[W]here the request for a specific instruction raises a question of law, the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (cleaned up). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *State v. Guerrero*, 279 N.C. App. 236, 241, 864 S.E.2d 793, 798 (2021) (citation omitted). During the charge conference, Defendant requested the instruction be given, and thus, properly preserved the issue for review on appeal. N.C. R. App. P. 10(a)(2).

To determine whether an instruction on a lesser included offense is appropriate, "[t]he test is whether there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (cleaned up). "Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *Id.* (cleaned up). Our Supreme Court has cautioned trial courts from "indiscriminately or automatically instructing on lesser included offenses." *State v. Taylor*, 362 N.C. 514, 530, 669 S.E.2d 239, 256 (2008) (cleaned up). "Such restraint ensures that the jury's discretion is channeled so that it may convict a defendant of only those crimes fairly supported by the evidence." *Id.* (cleaned up).

Here, Defendant was found guilty of assault inflicting physical injury on an employee of a state detention facility pursuant to N.C. Gen. Stat. § 14-34.7. Under this offense, the elements are: (1) an assault; (2) on a person who is employed at a detention facility operated under the jurisdiction of the State or a local government; (3) while the employee is in the performance of the employee's duties; (4) inflicts physical injury on the employee. N.C. Gen. Stat. § 14-34.7(c)(2). "For purposes of this subsection, 'physical injury' includes cuts, scrapes, bruises, or other physical injury which does not constitute serious injury." N.C. Gen. Stat. § 14-34.7(c). Whereas, under the requested instruction on the lesser included offense of assault on an officer or employee of the State, the elements are: (1) an assault; (2) on an officer or employee of the State; (3) when the officer or employee is discharging or attempting to discharge his official duties. N.C. Gen. Stat. § 14-33(c)(4).

When distinguishing between these offenses, Defendant argues an instruction on the lesser included offense would have been appropriate because the "physical injury" element was disputed and should have been decided by the jury. In support, Defendant offers the testimony of Officer Logan and Officer Lynch, attesting that they saw Defendant hit Sergeant Lackey only once. Further, Defendant contends the video of the incident confirms their testimony. He concedes that a hit to the face *can* cause physical injury; however, Defendant urges this Court to conclude that the question of whether Sergeant Lackey had been *actually* physically injured by Defendant should have been left to the jury.

At trial, it was established unequivocally that Defendant struck Sergeant Lackey in the face at least once. Sergeant Lackey further testified that he had bruising and swelling on his face and scrapes and bruises on his arm following his altercation with Defendant. Officer

Lynch testified to seeing a knot on his forehead the next day. Further, the State introduced three exhibits of photographs depicting Sergeant Lackey's injuries.

On appeal, Defendant does not dispute this evidence. Instead, Defendant disputes the number of times Sergeant Lackey was hit and whether the evidence supported the severity of the injury. Given that "physical injury" includes "cuts, scrapes, bruises, or other physical injury which does not constitute serious injury," we are unpersuaded by Defendant's argument. N.C. Gen. Stat. § 14-34.7(c). The "physical injury" element was sufficiently satisfied when Defendant struck Sergeant Lackey in the face, despite the number of times or the severity of the injuries sustained. Moreover, Defendant presented no conflicting evidence with respect to this evidence. Therefore, we hold that the State presented sufficient evidence of every element of the offense of assault inflicting physical injury on an employee of a state detention facility, and that the trial court did not err in omitting the lesser included offense in the jury instructions.

III. Conclusion

The evidence presented at trial was sufficient as to each element of the crime charged, assault inflicting physical injury on an employee of a state detention facility, and there was no conflicting evidence as to any of the elements. Thus, the trial court did not err by omitting the lesser included offense in the jury instructions. We hold Defendant received a fair trial free from error.

NO ERROR.

Judges STROUD and COLLINS concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
DOUGLAS CLEMON SILER, DEFENDANT

No. COA23-474

Filed 6 August 2024

1. Search and Seizure—unlabeled pill bottle—probable cause—officer's observations and prior knowledge

In a drug prosecution, the trial court properly denied defendant's motion to suppress opioids found in an unlabeled orange pill bottle in defendant's car despite improperly basing its decision on a reasonable suspicion standard because the officer who encountered defendant at a gas station had probable cause to believe that the bottle containing white pills (which defendant hid from view inside his car upon seeing the officer) contained illegal drugs, justifying a search of defendant's vehicle. Although the officer did not know that defendant was then on supervised probation (and subject to searches based on a lower standard—reasonable suspicion), the officer recognized defendant from previous encounters, knew that defendant had been involved with illegal drugs in the past, and remembered defendant trying to hide drugs from an officer who served him with an indictment on a prior occasion. Further, when the officer asked defendant about the unlabeled orange pill bottle, defendant repeatedly lied about its existence.

2. Probation and Parole—probation revocation—after end of probationary period—lack of finding of "good cause"—remand required

Where the trial court revoked defendant's probation after the term of his probation expired without finding that "good cause" existed to do so, but where sufficient evidence existed from which the trial court could have made such a finding, the judgment revoking probation was vacated and the matter was remanded to the trial court for re-consideration.

Appeal by defendant from two judgments entered 4 August 2022 by Judge R. Allen Baddour, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 2 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert T. Broughton, for the State.

Office of the Appellate Defender, *Glenn Gerding*, *by Assistant Appellate Defender Michele Goldman for defendant-appellant.*

DILLON, Chief Judge.

Douglas Clemon Siler, Defendant, was charged with five drug offenses arising from an encounter with a law enforcement officer on 23 July 2021. On the day of the encounter, Defendant was on supervised probation, though that fact was unknown to the arresting officer. During the encounter, the officer discovered Defendant to be in the possession of illegal drugs on his person and in his car. Prior to trial, Defendant filed a motion to suppress "all evidence obtained by the State pursuant to the invalid and illegal search, seizure and arrest" of Defendant, as well as the fruits of any "illegal and invalid search and arrest." Thereafter, Defendant pleaded guilty to one count of trafficking in opium or heroin by possession, which officers found in his car during the encounter. He entered this plea, pursuant to a plea agreement, which included dismissal of the four other charges and preservation of the right to appeal the denial of the motion to suppress.

The trial court entered a judgment sentencing Defendant to a term of imprisonment based on the plea agreement. The trial court entered a second judgment revoking Defendant's probation. Defendant appeals both judgments.

I. Analysis

Defendant makes arguments concerning the validity of the officer's search and concerning the revocation of his probation. We consider each in turn.

A. Validity of the Search

[1] Defendant argues that the trial court erred in denying his motion to suppress the drugs found by the officer during the 23 July 2021 encounter. We review a trial court's ruling on a motion to suppress to determine whether competent evidence supports any challenged finding of fact and whether the valid findings support the trial court's conclusions of law, which are reviewed *de novo*. *See State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994).

Defendant specifically contends that the trial court erred by using a "reasonable suspicion" standard, as opposed to a "probable cause" standard in evaluating the officer's search.

Generally, the Fourth Amendment and the North Carolina Constitution permit searches if the officer has probable cause to believe that the search will reveal evidence of a crime. *See, e.g.*, *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302–03 (2016).

However, our Supreme Court has held that the government may constitutionally impose *as a condition of probation* that the probationer be subject to searches on a lesser standard than probable cause. *See United States v. Knights*, 534 U.S. 112 (2001). And our General Statutes allow a trial court to impose as a condition of probation that the probationer allow searches based on reasonable suspicion, rather than probable cause, specifically that the probationer:

> [s]ubmit to warrantless searches by a law enforcement officer of the probationer's person and of the probationer's vehicle, upon a reasonable suspicion that the probationer is engaged in criminal activity . . . .

N.C. Gen. Stat. § 15A-1343(b)(14) (2024). In the present case, on the day of his encounter with the officer, Defendant was on probation and subject to this condition.

Defendant raises an issue of first impression for a North Carolina appellate court: Is a search based on a standard less than probable cause (as authorized by the terms and conditions of probation) valid, where the officer performing the search is *not aware* that the target of his search is on probation?

On this issue, we note that the Supreme Court of the United States has instructed "it is imperative" for a judge evaluating the reasonableness of an officer's actions under the Fourth Amendment to judge the facts under "an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). *See also Scott v. United States*, 436 U.S. 128, 137 (1978); *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Likewise, our Supreme Court has instructed the determination of Fourth Amendment reasonableness is based on facts *known to the officer* at the time of the challenged search or seizure. *See State v. Nicholson*, 371 N.C. 284, 293, 813 S.E.2d 840, 845–46 (2018); *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641–42 (1982).

The Supreme Court of the United States also sustained a California law allowing a suspicionless search of a parolee, in part, because the officer conducting the search had knowledge the target of the search was a

parolee. *See Samson v. California*, 547 U.S. 843 (2006). Specifically, in response to the dissent's concern the holding would grant law enforcement untethered discretion, Justice Thomas, writing for the majority, responded that "[u]nder California precedent, we note, an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee." *Id.* at 856, n.5.

Other federal courts have held that an officer must know about the target's probationary status in order for that status to serve as the *constitutional* justification for a warrantless search. *See, e.g., United States v. Job*, 871 F.3d 852, 859 (9th Cir. 2017); *Muse v. Harper*, 2017 U.S. Dist. LEXIS 135107, *11–13 (M.D. Tenn.); *United States v. Taylor*, 2021 U.S. Dist. LEXIS 258200, 2021 WL 8875706, *31–32 (Tenn. E.D. 2021). Other states have held a warrantless search, based on less than probable cause, cannot be retroactively rendered reasonable by search conditions discovered later. The actions are only reasonable if the officer knows of the search conditions *at the time* the search or seizure occurs. *See, e.g.*, *State v. Maxim*, 454 P.3d 543, 550 (Idaho 2019); *State v. Hamm*, 589 S.W.3d 765, 779 (Tenn. 2019); *Cantrell v. State*, 673 S.E.2d 32, 35–36 (Ga. App. 2009); *State v. Donaldson*, 108 A.3d 500, 506 (Md. App. 2015); *People v. Sanders*, 73 P.3d 496, 507–08 (Cal. 2003).

Some federal courts have inferred it may be a violation of the rights of one subject to an outstanding arrest warrant, if he is arrested by an officer, who is not aware of the warrant, and who has no other justification to make the arrest. *See, e.g.*, *Fulson v. Columbus*, 801 F. Supp. 1, 7 (S.D. Ohio 1992); *Bruce v. Perkins*, 701 F. Supp. 163, 164–65 (N.D. Ill. 1988); *Torres v. Ball*, 2021 U.S. Dist. LEXIS 47280, 2021 WL 965314 (W.D.N.C. 2021); *Burtch v. Dodson*, 2019 U.S. Dist. LEXIS 236275 *10 (M.D. Ga. 2019).

The State argues the search was consensual when he agreed to the condition of probation. Defendant, however, responds that he withdrew any such consent during the encounter, which he is allowed to do. *See, e.g.*, *State v. Stone*, 362 N.C. 50, 59, 653 S.E.2d 414, 420 (2007) (noting that a search subject "had opportunities to limit or withdraw his consent," but failed to do so); *State v. Medina*, 205 N.C. App. 683, 688, 697 S.E.2d 401, 405 (2010) (noting that a search subject is "free to withdraw his consent at any[]time").

We do not resolve this question. We conclude the uncontradicted evidence at the suppression hearing shows the officer had probable cause to search Defendant's vehicle, where he discovered the opioids, for which Defendant was convicted.

At the suppression hearing, the arresting officer testified about his encounter with Defendant on 23 July 2021. Defendant did not testify.

The trial court did not make any written findings in its order denying Defendant's suppression motion. The better practice would have been for the trial court to have made written and more detailed findings. However, where no "material conflict" in the evidence exists, a defendant is not prejudiced if the trial court fails to make written findings. *See*, *e.g.*, *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980).

The uncontradicted evidence regarding the encounter at the gas station offered by the State tended to show: An officer pulled up to a gas pump opposite a car in which Defendant occupied the passenger seat. He was in uniform, driving a marked law enforcement vehicle. While the officer stood at the rear quarter of his patrol car pumping gas, he looked through the driver's side window of the car, in which Defendant was seated. He observed Defendant move an unlabeled *orange* pill bottle, containing white pills, from the center console area to under his seat out of view.

The officer recognized Defendant from previous encounters. He knew Defendant had been involved in illicit drug activities in the past. He remembered one occasion in the recent past Defendant had tried to hide illicit drugs he was carrying when the officer was serving an indictment on Defendant for another drug charge.

In any event, after placing the orange pill bottle under his seat, Defendant exited the car and started pumping gas. Having suspicion about the unlabeled orange pill bottle, the officer approached Defendant, though he did not know that Defendant was on probation. He asked Defendant about the location of the pills in the orange bottle. Defendant lied, denying he possessed any pills. After the officer persisted in his questioning, Defendant produced a *white* pill bottle from his pocket that he claimed contained his own medicine. The officer recognized that bottle as one commonly sold over the counter, which contained "possibly Ibuprofen or something along those lines."

As Defendant started to put the white pill bottle back into his pocket, the officer demanded to see it. He took it from Defendant's possession and placed it on the trunk of one of the vehicles. At this time, Defendant again lied about an orange pill bottle inside the car. Defendant did, however, admit that the white pill bottle contained Vicodin, a scheduled narcotic, which he said he got from a friend.

It is illegal in North Carolina for a prescription to be dispensed or distributed without a label. N.C. Gen. Stat. § 90-106(f) (2024). The white

pill bottle the officer observed did not have a label indicating a prescription for Vicodin. The orange pill bottle containing white pills the officer had observed did not contain any label.

The officer opened the white pill bottle; believed the pills therein to be Vicodin, a scheduled narcotic to which the Defendant admitted; and he confirmed they were not in an original prescription container. Defendant claimed he had gotten the pills "from a friend," but denied having other pills in his vehicle.

The officer subsequently searched the vehicle. During the search, the officer found the unlabeled orange pill bottle he had seen Defendant possessing earlier. Defendant admitted the orange pill bottle and the 73 pills inside were his. He was arrested. Lab testing confirmed the pills inside the unlabeled orange pill bottle were opioids.

Defendant was convicted only for a crime associated with the opioids found inside the unlabeled orange pill bottle recovered from inside the vehicle. He was not convicted of any crime associated with the Vicodin found on his person inside the white pill bottle.

We conclude that the evidence of the encounter up to just prior to the search of the vehicle was sufficient to give the officer probable cause to search the vehicle. In so holding, we note that probable cause does not require certainty, as explained by our Supreme Court:

> Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required.
>
> * * *
>
> Thus, while a reviewing court must, of necessity view the action of the law enforcement officer in retrospect, our role is not to import to the officer what our judgment, as legal technicians, might have been a prudent course of action; but rather our role is to determine whether the officer has acted as a man of reasonable caution who, in good faith and based upon practical consideration of everyday life, believed the suspect committed the crime for which he was later charged.

State v. Zuniga, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984) (citing *Texas v. Brown*, 460 U.S. 730 (1983) and *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

We conclude that the information known to the officer created a practical probability that there was an orange pill bottle containing illicit drugs inside Defendant's vehicle. For instance, the officer had knowledge of Defendant being involved with illicit drugs based on past encounters. He observed Defendant hiding an unlabeled, orange pill bottle containing white pills only after the officer came into Defendant's view. Defendant repeatedly lied to the officer about the existence of the orange pill bottle.

We did not include in our analysis of determining whether probable cause existed the evidence that, prior to searching the vehicle, the officer found Vicodin after opening the white pill without Defendant's consent. Even without that discovery, the officer had probable cause to search the vehicle. And, again, Defendant was not convicted of any crime associated with the Vicodin found in the white pill bottle.

B. Probation Revocation

[2] Defendant challenges the trial court's judgment revoking his probation *after* Defendant's probationary period had expired, contending that the trial court failed to find that "good cause" justified revoking probation. The State concedes this error.

We agree with the State that there was sufficient evidence before the trial court from which that court *could* make the required finding. Accordingly, we vacate that judgment and remand for the trial court to re-consider the matter.

II. Conclusion

Even if the trial court erred by basing its order on Defendant's suppression motion on a reasonable suspicion standard, we conclude the error was harmless. The uncontradicted evidence introduced at the hearing shows the officer had probable cause to search Defendant's vehicle. We affirm the judgment entered upon Defendant's plea of guilty to trafficking in opioids.

We vacate the judgment revoking Defendant's probation. The trial court failed to make the "good cause" findings required to revoke probation after the probationary period has expired. We remand to the trial court to reconsider the matter. The trial court may, in its discretion, consider new evidence on remand.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges TYSON and GRIFFIN concur.

STATE v. THOMAS

[295 N.C. App. 269 (2024)]

STATE OF NORTH CAROLINA
v.
QUANTEZ LASHAY THOMAS

No. COA23-774

Filed 6 August 2024

1. Burglary and Unlawful Breaking or Entering—breaking or entering a motor vehicle—larceny—lack of consent—evidence sufficient

In a prosecution on charges including breaking and entering a motor vehicle and larceny arising from the theft of items from a van, the trial court did not err in denying defendant's motion to dismiss for insufficient evidence that defendant acted without the consent of the victim—an essential element of both offenses—where, despite the absence of testimony from the victim or evidence of forced entry, circumstantial evidence in the form of video surveillance footage showing defendant's demeanor (including turning off his headlights when parking near the van; constantly looking around as he checked the van's door, rifled through its contents, and placed items in his pockets and car; and keeping his headlights off as he drove away from the van), taken in the light most favorable to the State, was sufficient to permit a reasonable inference by the jurors that defendant both entered the van and took the items without the victim's consent.

2. Evidence—lay opinion testimony—identification of defendant in videos and photographs—plain error—prejudice not shown

In a prosecution on charges arising from the theft of a purse containing a credit card from a car and the use of the card at a Walmart, the trial court did not commit plain error in allowing lay opinion testimony from a law enforcement officer who identified defendant as the person depicted in surveillance video footage from the store and in photographs derived from the footage. Even assuming, without deciding, that admission of the testimony was error—in that it was not "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony or the determination of a fact in issue" (Evidence Rule 701)—defendant failed to demonstrate that the testimony had a probable impact on the jury's verdicts given the overwhelming evidence, both direct and circumstantial, of his guilt.

3. Sentencing—new trial following appellate review—more severe sentence imposed—no lesser sentence statutorily authorized

The statutory prohibition in N.C.G.S. § 15A-1335 on imposing a sentence, following appellate review, "for the same offense . . . which is more severe than the prior sentence" was not implicated where, in defendant's new trial, the trial court added an additional prior record level point pursuant to N.C.G.S. § 15A-1340.14(b)(6) (one point assigned "[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted"), with the result that defendant's prior record level was raised from III to IV. The trial court sentenced defendant at the bottom of the presumptive range applicable to a prior record level IV offender with habitual felon status in the absence of any mitigating factors for the convictions consolidated in the judgment and was not statutorily authorized to impose any lesser sentence—the sole exception to the provisions of N.C.G.S. § 15A-1335.

Appeal by defendant from judgments entered 19 August 2022 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 15 May 2024.

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

Gilda C. Rodriguez for defendant-appellant.

ZACHARY, Judge.

Defendant Quantez Lashay Thomas appeals from judgments entered upon a jury's verdicts finding him guilty of possession of a stolen motor vehicle, misdemeanor operation of a motor vehicle to elude arrest, two counts of breaking or entering a motor vehicle, two counts of misdemeanor larceny, two counts of financial transaction card theft, and attaining the status of a habitual felon. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

I. Background

This case returns to this Court after Defendant received a new trial upon his first appeal. *See State v. Thomas* (*Thomas I*), 281 N.C. App. 722, 868 S.E.2d 176, 2022 WL 453450 (unpublished). The full procedural history of Defendant's first trial can be found in this Court's prior opinion in

this matter. *See id.* at *1–*3. We recite here only those background and procedural facts relevant to the issues presented in this appeal.

The charges for which Defendant was tried arose from a series of vehicle-related crimes in and around High Point. On 17 January 2019, Kari Rhodes noticed that her Nissan Altima was missing from the parking lot of her apartment complex. On 21 January 2019, Angela Marion was leaving a gym with her husband when she noticed that the window on the passenger's side of their car had been broken, and her purse had been taken from the vehicle. Ms. Marion kept two credit cards in her wallet within her purse. When she called to cancel those credit cards, she learned that they had already been used, with hundreds of dollars of purchases having been charged to each card.

Officer Kaylyn Stewart[1] of the High Point Police Department ("HPPD") investigated the use of Ms. Marion's credit cards at several businesses. Among them was a Walmart on South Main Street in High Point. A Walmart loss-prevention associate retrieved surveillance video footage from the evening of 21 January 2019—when Ms. Marion's card was used—and captured some still photographs from the footage. Officer Stewart later testified about the appearance of the suspect in the surveillance video footage, including, among other details, that the suspect was wearing a camouflage jacket.

On 25 January 2019, Alondra McGill was cleaning an office with her aunt, Teresa Perez. In her van, Ms. Perez had a pair of Nike sneakers that had been delivered to her home for Ms. McGill. After the women finished cleaning, they went to Ms. Perez's van and noticed several items missing, including the Nike sneakers, Ms. Perez's purse, and some cleaning supplies. Ms. McGill would later testify that she never saw the Nike sneakers, that she never gave anyone else permission to take the shoes, and that Ms. Perez had never given anyone permission to enter her van.

HPPD officers investigating the breaking or entering and larceny from Ms. Perez's van obtained surveillance video footage showing Ms. Perez's van in the adjacent parking lot. After reviewing the footage, which showed a man entering Ms. Perez's van and removing items from it, the officers identified Defendant as a suspect.

On 6 February 2019, an HPPD officer recognized Defendant driving a Nissan Altima. The officer initiated a traffic stop by activating the

1. By the time Officer Stewart testified at the trial from which appeal is taken, she had been promoted to the rank of Detective. For ease of reading and consistent with her rank at all times relevant to this appeal, we refer to her as "Officer Stewart" in this opinion.

lights and siren, but Defendant sped away in excess of the speed limit, and the officer did not pursue him. The officer found the Altima later that night, apparently abandoned. Upon further investigation, he confirmed by the VIN number that the Altima had been reported stolen by Ms. Rhodes's husband. Officer Stewart responded to the scene of the abandoned Altima and discovered, *inter alia*, a pair of Nike shoes and a camouflage jacket inside the car. Once her car was recovered, Ms. Rhodes did not recall if anything was missing from it, but she noticed several items inside that had not previously been present in the car, including the coat and the shoes.

On 22 July 2019, a Guilford County grand jury returned true bills of indictment, charging Defendant with the following offenses: three counts of obtaining property by false pretenses; three counts of financial transaction card theft; two counts of breaking or entering a motor vehicle; felony larceny; possession of a stolen motor vehicle; felonious fleeing to elude arrest with a motor vehicle; three counts of misdemeanor larceny; and attaining the status of habitual felon. On 11 February 2020, the matter came on for trial. *Id.* at *3. The jury found Defendant guilty of 13 of the charged offenses, and the trial court consolidated the convictions into two judgments.

In the first judgment, the trial court consolidated the felony larceny with convictions for breaking or entering a motor vehicle, possession of a stolen motor vehicle, and two counts of obtaining property by false pretenses; in this judgment, the trial court sentenced Defendant as a prior record level III offender with habitual felon status to a term of 67 to 93 months' imprisonment in the custody of the North Carolina Division of Adult Correction. In the second judgment, the court consolidated the second breaking or entering a motor vehicle conviction with the third conviction of breaking or entering a motor vehicle, three counts of financial transaction card theft, two counts of misdemeanor larceny, and misdemeanor fleeing to elude arrest with a motor vehicle; in this judgment, the trial court sentenced Defendant as a prior record level III offender with habitual felon status to a consecutive term of 26 to 44 months.[2] Defendant appealed, and on 15 February 2022 this Court filed its opinion in *Thomas I*, in which we ordered a new trial. *Id.* at *5.

On remand, the matter came on for a new trial on 15 August 2022. The State's evidence included, *inter alia*, surveillance video footage of

2. The trial court made a clerical error in its judgments after the first trial, but in light of our disposition, we did not reach that issue in *Thomas I*. *Id.* at *3 n.1.

Ms. Perez's van during the incident in question and testimony by Officer Stewart, in which she identified Defendant as the individual in that footage. At the close of the State's evidence, the State took a voluntary dismissal of one count of misdemeanor larceny and two counts of obtaining property by false pretenses. The trial court then granted Defendant's motion to dismiss in part, as to one count of financial transaction card theft, and further ruled that the State could not proceed with the felony larceny charge but could prosecute the offense as an additional count of misdemeanor larceny.

The jury generally found Defendant guilty as charged, except for finding him guilty of misdemeanor rather than felony operation of a motor vehicle to elude arrest and finding him not guilty of the count of misdemeanor larceny that had been initially charged as a felony. The jury also found that Defendant had attained the status of a habitual felon.

On 19 August 2022, the trial court again consolidated the various convictions into two judgments. In the first judgment, the trial court consolidated the possession of a stolen motor vehicle conviction with one conviction for breaking or entering a motor vehicle, and attaining habitual felon status, and sentenced Defendant as a prior record level III offender to a term of 67 to 93 months' imprisonment. In the second judgment, which included the other conviction for breaking or entering a motor vehicle among the remaining convictions, the trial court accepted the State's argument that all of the elements of the breaking or entering conviction were included in one of Defendant's prior offenses and added an additional point to Defendant's prior record level, raising him to a prior record level IV offender. Accordingly, the trial court sentenced Defendant as a prior record level IV offender with habitual felon status to a term of 30 to 48 months' imprisonment.

Defendant gave notice of appeal in open court.

II. Discussion

Defendant contends that the trial court: (1) "erred when it denied [Defendant's] motion to dismiss the breaking [or] entering a motor vehicle and misdemeanor larceny charges" relating to Ms. Perez "because the State presented insufficient evidence of lack of consent"; (2) "committed plain error . . . when it allowed the lay witness opinions of Officer Stewart as to what and whom surveillance videos and photographs depicted"; and (3) "erred when it sentenced [Defendant] to a sentence more severe than the prior vacated sentence in violation of N.C. Gen. Stat. § 15A-1335."

A. Motion to Dismiss

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charges in 19 CRS 67750: one count each of breaking or entering a motor vehicle and misdemeanor larceny, both relating to Ms. Perez's vehicle. Defendant alleges that the State "failed to present sufficient evidence of an essential element of the charges"—namely, "lack of consent"—because Ms. Perez did not testify at trial. We disagree.

1. Standard of Review

"We review de novo a trial court's denial of a motion to dismiss a criminal charge for insufficient evidence." *State v. Gibson*, 277 N.C. App. 623, 624, 859 S.E.2d 253, 254 (2021). When conducting de novo review, this Court "consider[s] the matter anew and freely substitut[es] our own judgment for that of the trial court." *State v. Edgerton*, 266 N.C. App. 521, 532, 832 S.E.2d 249, 257 (2019), *disc. review denied*, 375 N.C. 496, 847 S.E.2d 886 (2020).

"In reviewing a motion to dismiss based on insufficiency of the evidence, our inquiry is whether there is substantial evidence (1) of each essential element of the offense charged, and (2) of defendant's being the perpetrator of such offense." *Id.* at 532, 832 S.E.2d at 257–58 (cleaned up). "On review of the denial of a motion to dismiss, this Court is concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Baskin*, 190 N.C. App. 102, 108, 660 S.E.2d 566, 571 (cleaned up), *disc. review denied*, 362 N.C. 475 (2008).

The trial court reviews a defendant's motion to dismiss "to determine whether there is substantial evidence of each element of the charged offense. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Gibson*, 277 N.C. App. at 624, 859 S.E.2d at 254 (cleaned up). "The evidence must be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* at 624, 859 S.E.2d at 255 (cleaned up). Additionally, "where there is substantial evidence of each element of the offense charged, the fact that there is only a modicum of physical evidence, or inconsistencies in the evidence, is for the jury's consideration." *State v. Jackson*, 162 N.C. App. 695, 697, 592 S.E.2d 575, 577 (2004).

"The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence 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 (cleaned up), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

> If the evidence presented is circumstantial, the court must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Id. (emphasis omitted) (cleaned up).

2. Analysis

Regarding the denial his motion to dismiss the charges of breaking or entering a motor vehicle and larceny, Defendant's sole argument of error by the trial court is that the State failed to present any evidence regarding the lack of Ms. Perez's consent.

The lack of consent of the owner is an essential element of both offenses. The elements of the offense of breaking or entering a motor vehicle are: "(1) . . . a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein." *Jackson*, 162 N.C. App. at 698, 592 S.E.2d at 577 (emphasis omitted); *see also* N.C. Gen. Stat. § 14-56 (2023). "The essential elements of larceny are that the defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019) (cleaned up).

The crux of Defendant's argument is that "there was no testimony from the alleged owner of the vehicle regarding lack of consent." As to the breaking or entering charge, Defendant further asserts that "there was no evidence of locked doors, broken windows, or any physical evidence of a forced entry that indicated a lack of consent to entry into the van." As to the larceny charge, Defendant contends that "the State failed to present sufficient evidence that the cleaning products were taken without the owner's consent." Rather, Defendant alleges that the testimony of Ms. McGill was "insufficient to establish the lack of consent element required for the larceny charge" because she "was not the owner of the cleaning products and she was not in possession of the cleaning products when they were alleged to have been taken."

The State responds that there was sufficient circumstantial evidence from which the jury could infer that Defendant lacked Ms. Perez's consent to break or enter into her car or to take her property. As stated above, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted). Indeed, this Court has previously recognized that in some cases, the "very nature" of the circumstances "gives rise to an inference that the owner of the vehicle did not consent to [the] defendant's conduct" in breaking or entering it. *State v. Jacobs*, 202 N.C. App. 350, 352, 688 S.E.2d 112, 113–14, *disc. review denied*, 364 N.C. 328, 701 S.E.2d 243 (2010).

The State suggests that "Defendant's knowledge that he lack[ed] consent to enter [Ms. Perez's] vehicle can be inferred by his demeanor[,]" as exhibited in the parking lot surveillance video footage of the incident. In the recording, Defendant drives up to Ms. Perez's van and turns off his headlights before he parks his vehicle next to hers. Defendant exits his vehicle and walks in front of Ms. Perez's van, looking into the nearby storefront, then casually walks back to the van. With his back to the storefront, obscuring the view of his hand, Defendant surreptitiously tries to open the van's side door. Upon discovering that the van is unlocked, he takes another glance toward the storefront as he opens the van door and leans inside the van. Defendant quickly removes a box with the Nike logo from the van, again looking toward the storefront and around the parking lot as he closes the van door and puts the Nike box in the back seat of his own car. Defendant then returns to the van and, while continually checking the storefront, opens the front passenger door, gets in the seat, and closes the door. As Defendant rifles through the contents of the van, occasionally putting things in his pockets, he rarely goes more than a second without looking up at the storefront or around the parking lot. He exits the van, keeping his eyes on the storefront as he checks that the passenger door is closed by pressing on it with his hip. He then walks around to the trunk, which he opens, and makes several trips removing items—including cleaning supplies—from the trunk and putting them into the back seat of his vehicle. Finally, Defendant reenters his vehicle, backs out of the parking spot, and only turns on his car's headlights as he drives away.

Even though the State did not present direct evidence of lack of consent in the form of testimony by Ms. Perez, this video, which was published to the jury several times, constituted sufficient circumstantial evidence to survive Defendant's motion to dismiss. Specifically, when viewed in the light most favorable to the State, the surveillance footage would permit "a reasonable inference of [D]efendant's guilt [to] be

drawn from the circumstances, [and] it [was thus] for the jury to decide whether the facts, taken singly or in combination, satisf[ied] it beyond a reasonable doubt that . . . [D]efendant is actually guilty." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (cleaned up). Accordingly, Defendant's argument is overruled.

B. Lay Opinion Testimony

[2] Defendant next argues that the trial court committed plain error by "allow[ing] the lay witness opinions of Officer Stewart as to what and whom surveillance videos and photographs depicted." Again, we disagree.

1. Standard of Review

Defendant acknowledges that he did not object at trial to the admission of the testimony that he now challenges on appeal, and so he specifically and distinctly contends that the admission of this testimony amounted to plain error. *See* N.C. R. App. P. 10(a)(4). To show 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings . . . ." *Id.* (cleaned up).

2. Analysis

Defendant asserts that the admission of testimony by Officer Stewart, identifying Defendant as the individual in the Walmart surveillance video footage and in still photographs derived from the footage, amounts to plain error. Under Rule 701 of the North Carolina Rules of Evidence, a non-expert witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701.

This Court has recognized that lay opinion testimony identifying a criminal defendant in a photograph or videotape may be admissible "where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony." *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (citation omitted), *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135

(2009). Defendant cites *Buie* and *State v. Belk* as examples of a trial court admitting testimony that oversteps this guidance. *See id.* at 732, 671 S.E.2d at 355 (the trial court abused its discretion in admitting testimony by a law enforcement officer who "offered his opinion, at length, about the events depicted in . . . surveillance tapes, concluding that the video corroborated the [witness]'s testimony."); *see also State v. Belk*, 201 N.C. App. 412, 418, 689 S.E.2d 439, 443 (2009) ("[T]here was no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify [the d]efendant as the individual in the surveillance footage."), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010).

However, Defendant's reliance upon *Buie* and *Belk* is misplaced, as neither case involved plain-error review. Indeed, the *Buie* Court even concluded that the error was harmless because there was "sufficient evidence to support the jury's decision, independent from the testimony" of the law enforcement officer. 194 N.C. App. at 734, 671 S.E.2d at 357. So too, here.

Even assuming, *arguendo*, that the trial court erred, "after examination of the entire record," Defendant has not shown that "the error had a probable impact on the jury's finding that . . . [D]efendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (cleaned up). In light of the "overwhelming" evidence—direct and circumstantial—in this case, "[D]efendant cannot show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Moreover, Defendant has not shown that this is "the exceptional case" in which the alleged error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334 (cleaned up). Therefore, Defendant's argument is overruled.

C. Sentencing

[3] Lastly, Defendant argues that the trial court erred by sentencing him in violation of N.C. Gen. Stat. § 15A-1335 to a sentence more severe than the prior vacated sentence. We disagree.

1. Standard of Review

This Court reviews de novo alleged statutory errors regarding sentencing issues, as such errors "are questions of law[.]" *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (citation omitted).

2. Analysis

In its second consolidated judgment, the trial court sentenced Defendant—a prior record level IV offender with habitual felon status

—to a term of 30 to 48 months' imprisonment. Because this sentence is more severe than the sentence in the second consolidated judgment from *Thomas I*, Defendant alleges that the trial court violated N.C. Gen. Stat. § 15A-1335. Defendant thus requests that this Court vacate the second consolidated judgment and remand for resentencing.

Section 15A-1335 provides, in pertinent part:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335.

Defendant contends that "[t]he sole exception to N.C. Gen. Stat. § 15A-1335, and the only circumstance in which a higher sentence will be allowed on resentencing, is when a statutorily mandated sentence is required by the General Assembly." *State v. Cook*, 225 N.C. App. 745, 747, 738 S.E.2d 773, 775 (citation omitted), *disc. review denied*, 367 N.C. 212, 747 S.E.2d 249 (2013). In support of this proposition, Defendant emphasizes that this Court has stated that "[a] trial court *may* add one point if all the elements of the present offense are included in any prior offense." *State v. Posner*, 277 N.C. App. 117, 122, 857 S.E.2d 870, 874 (2021) (emphasis added) (cleaned up); *accord* N.C. Gen. Stat. § 15A-1340.14(b)(6). Defendant argues that the additional point, which raised his prior record level to IV, was not "statutorily mandated" and therefore his sentence does not fall within the "sole exception" to § 15A-1335. *Cook*, 225 N.C. App. at 747, 738 S.E.2d at 775 (citation omitted).

First, Defendant bases his argument solely on the proposition that the trial court's decision to add a point under § 15A-1340.14(b)(6) is discretionary. In his reply brief, Defendant asserts that the State has failed to cite "a statute or case that states the additional point is mandatory when applicable. In fact, the language of N.C. Gen. Stat. § 15A-1340.14(b)(6), does not include 'shall' or 'must.' " True though that assertion may be, the statute likewise does not include any discretionary terms, such as "may." Rather, § 15A-1340.14(b)(6) merely states: "Points are assigned as follows: . . . . If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point." N.C. Gen. Stat. § 15A-1340.14(b)(6).

Contrary to Defendant's assertion, a close reading of *Posner* reveals that this Court used the word "may" in a discussion of whether the trial court erred when it used the same felony prior record level worksheet to determine the defendant's prior record level for five separate judgments, when only two of the judgments involved offenses that shared elements with his prior offenses. *Posner*, 277 N.C. App. at 122, 857 S.E.2d at 874. In light of the plain language of the statute that provides a straightforward directive regarding the addition of the "extra" point in question, the passing use of the term "may" in *Posner* cannot reasonably read as Defendant suggests. Indeed, nothing in the plain text of § 15A-1340.14(b)(6) suggests that the assignment of an additional point is not mandatory if the trial court determines that its conditions are satisfied. It would strain credulity to suggest that any of the other subsections of § 15A-1340.14(b) providing for the assignment of points would be discretionary, and Defendant cites no authority to suggest why subsection (6) would be an exception.

Here, the trial court assessed an additional point to Defendant's prior record level, which raised his prior record level from III to IV. Notably, Defendant does not challenge the merits of the addition of this point on appeal; he merely challenges whether the point was "statutorily required" as part of his challenge to his sentence under § 15A-1335. Yet, "where the trial court is required by statute to impose a particular sentence . . . § 15A-1335 does not apply to prevent the imposition of a more severe sentence." *State v. Powell*, 231 N.C. App. 129, 133, 750 S.E.2d 899, 902 (2013) (citation omitted).

The trial court sentenced Defendant to a term of 30 to 48 months' incarceration, at the bottom of the presumptive range under our sentencing guidelines. *See* N.C. Gen. Stat. § 15A-1340.17(c)(4). In the absence of any mitigating factors, the trial court was not statutorily authorized to impose any lesser sentence than the sentence entered. Accordingly, N.C. Gen. Stat. § 15A-1335 "does not apply to prevent the imposition of a more severe sentence." *Powell*, 231 N.C. App. at 133, 750 S.E.2d at 902 (citation omitted). Defendant's argument is overruled.

III. Conclusion

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

NO ERROR.

Chief Judge DILLON and Judge ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 AUGUST 2024)

ADVENTURE TRAIL OF CHEROKEE, INC. v. OWENS No. 23-1043	Jackson (18CVS775)	Affirmed
BILBRO v. ECU HEALTH No. 23-1172	Pitt (23CVS1789)	Affirmed
CITY OF ASHEVILLE v. MR ENT., LLC No. 23-1110	Buncombe (18CVS3771)	Vacated and Remanded
IN RE K.C. No. 23-1136	New Hanover (20JT240)	Affirmed
J.Z. v. CCR MOORESVILLE WELLNESS, LLC No. 23-789	Iredell (21CVS2216)	Affirmed
McDOUGALD v. WHITE OAK PLANTATION HOMEOWNERS ASS'N, INC. No. 23-756	Buncombe (20CVS4519)	Affirmed
PUB. SERV. CO. OF N.C., INC. v. SEN-ASHEVILLE I, LLC No. 23-1116	Henderson (20CVS1721)	Dismissed
STATE v. FOGELMAN No. 23-1124	Duplin (18CRS50060-61)	Dismissed
STATE v. GATLING No. 23-746	Hertford (20CRS275-278)	No error and remanded in part
STATE v. LEMLEY No. 23-1135	Wake (20CRS216031-910)	New Trial
STATE v. PRICE No. 23-361	Johnston (16CRS2558) (16CRS56417) (18CRS577)	No Error
STATE v. RAPE No. 23-1023	Union (21CRS53085)	No Error
STATE v. REY No. 23-847	Lee (20CRS51340)	Affirmed

STATE v. SACKMAN No. 23-872	Macon (22CRS294917)	Dismissed
STATE v. ST. ONGE No. 23-1047	Mecklenburg (20CRS215389-90)	No Error
STATE v. STIDHAM No. 23-823	Cleveland (21CRS54361)	Dismissed and no plain error

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