295 N.C. App.—No. 4 Pages 589-705

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 7, 2025

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

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COURT OF APPEALS

CASES REPORTED

FILED 17 SEPTEMBER 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Contested case—certificate of need application—approval without public hearing—no per se substantial prejudice—waiver of statutory right inapplicable—In a contested case regarding two university healthcare systems' competing applications to the Department of Health and Human Services (DHHS) for a certificate of need to develop 68 acute care beds, where the losing applicant (petitioner) challenged DHHS's decision to approve the competitor's application without conducting a public hearing as required under N.C.G.S. § 131E-185(a1)(2), the Office of Administrative Hearings (OAH) correctly held that DHHS failed to use proper procedure by disregarding the public hearing requirement, even despite DHHS's concerns relating to the COVID-19 pandemic at the time. Nevertheless, OAH's final decision was vacated on appeal because, contrary to OAH's holding, the failure to conduct a public hearing did not automatically result in per se substantial prejudice to petitioner in its contested case. Additionally, because the public hearing requirement was a statutory right that existed for the public's benefit, principles of waiver and estoppel did not preclude petitioner from challenging DHHS's departure from the requirement. The matter was remanded for further proceedings to determine if petitioner was indeed substantially prejudiced. **Duke Univ. Health Sys., Inc. v. N.C. Dep't of Health & Hum. Servs., 589.**

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Neglect—failure to make reasonable progress—competency of evidence—hearsay exception—In a proceeding that resulted in the termination of respondent-mother's parental rights to her child on the statutory grounds of neglect and failure to make reasonable progress in correcting the conditions that led to the child's removal, the district court did not err in relying on testimony from a social worker about her personal memories of respondent-mother's sworn testimony at a prior hearing—evidence that respondent-mother conceded was a statement by a party and thus admissible under a hearsay exception. Moreover, respondent-mother's argument about the weight that the testimony should be afforded was misplaced as such considerations are reserved solely for the district court. **In re B.A.J., 593.**

Neglect—failure to make reasonable progress—judicial notice—testimony from prior hearings—In a proceeding that resulted in the termination of respondent-mother's parental rights to her son on the statutory grounds of neglect and failure to make reasonable progress in correcting the conditions that led to the child's removal, the district court did not err in taking judicial notice of findings of fact made in prior orders—even though those findings were based on a lower evidentiary standard—where the court also considered evidence at the termination hearing, including testimony from the social worker assigned to the case, the guardian ad litem's report, and twenty exhibits related to respondent-mother's progress on her case plan. **In re B.A.J., 593.**

Neglect—failure to make reasonable progress—prior invocations of Fifth Amendment rights—adverse inferences—In a proceeding that resulted in the termination of respondent-mother's parental rights to her child on the statutory ground of neglect and that she had failed to make reasonable progress in correcting the conditions that led to the child's removal, the district court was permitted to draw an adverse inference from respondent-mother's invocations at prior hearings of her Fifth Amendment right not to answer questions about torture and abuse inflicted on the child's older sibling. Further, a review of the unchallenged findings of fact revealed that respondent-mother's refusal to answer those questions was not the sole basis for the termination of her parental rights. **In re B.A.J., 593.**

Neglect—sufficiency of findings—likelihood of future neglect—In a proceeding that resulted in the termination of respondent-mother's parental rights to her child, the district court's conclusion of law that the statutory ground of neglect existed—based on a likelihood of future neglect by respondent-mother if the child was returned to her care—was supported by the court's findings of fact that respondent-

mother failed to: (1) complete all components of her case plan; (2) acknowledge or accept responsibility for the reasons the child was removed from her home (including previous neglect of the child, abuse and neglect inflicted on the child's older siblings, torture inflicted on one of the older siblings, and respondent-mother's ongoing involvement with the child's father despite multiple domestic violence incidents); and (3) understand the role she played in the child's previous neglect. **In re B.A.J., 593.**

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Revised net metering rates—sufficiency of evidence and findings—approval not arbitrary and capricious or erroneous—The decision of the Utilities Commission approving revised net energy metering (NEM) rates was not arbitrary and capricious or based on an error requiring reversal where the Commission's findings were supported by competent, material, and substantial evidence—collected during the Commission's de facto investigation (as required by statute) of the costs and benefits of customer-sited generation—and where those findings, in turn, supported its conclusions of law that a sufficient investigation was performed and that the rates proposed by the electric public utility companies met the statutory requirement of being nondiscriminatory and in furtherance of ensuring that NEM customers pay their full fixed cost of service. **State ex rel. Utils. Comm'n v. Env't Working Grp., 650.**

Revised net metering rates—tariff designs—elimination of flat-rate class of customers—obligation to ensure payment of full fixed cost of service—The Utilities Commission did not violate the requirement in N.C.G.S. § 62-126.4 that it must "establish net metering rates under all tariff designs" when it approved revised net energy metering (NEM) rates that, by requiring all customers to participate in a "time-of-use" (TOU) rate schedule, eliminated a previously-existing class of "flat-rate" NEM customers (who had paid the same rate of electricity purchased at any time of day, in contrast to the variable TOU rates). According to the clear and unambiguous language of the statute, the Commission was required to establish "non-discriminatory" NEM rates to ensure that every customer pay its full fixed cost of service under any of the offered tariff designs—not to set rates for all previously offered tariff designs—and, here, the Commission fulfilled its obligations pursuant to this provision. **State ex rel. Utils. Comm'n v. Env't Working Grp., 650.**

VENUE

Petition for termination of sex offender registration—out-of-state conviction—registrant no longer residing in-state—The trial court erred by dismissing a petition for termination of sex offender registration based on improper venue where petitioner, who registered as a sex offender in Mecklenburg County based on his out-of-state reportable conviction because that is where he resided when he moved to North Carolina, properly filed his termination petition in Mecklenburg County even though he no longer lives in North Carolina. Although the controlling statute, N.C.G.S. § 14-208.12A, does not address where a termination petition should be filed for former North Carolina residents with out-of-state reportable convictions who no longer reside in-state, the appellate court interpreted the statute in the context of the rest of Article 27A in Chapter 14 of the General Statutes to require a person seeking removal from the registry to file in the county in which they previously maintained registration. Here, Mecklenburg County was the correct venue and the superior court in that county had jurisdiction to hear the petition. **In re Goldberg, 613.**

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.

DUKE UNIVERSITY HEALTH SYSTEM, INC., PETITIONER
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTHCARE PLANNING AND 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. COA23-1070

Filed 17 September 2024

Hospitals and Other Medical Facilities—contested case—certificate of need application—approval without public hearing—no per se substantial prejudice—waiver of statutory right inapplicable

In a contested case regarding two university healthcare systems' competing applications to the Department of Health and Human Services (DHHS) for a certificate of need to develop 68 acute care beds, where the losing applicant (petitioner) challenged DHHS's decision to approve the competitor's application without conducting a public hearing as required under N.C.G.S. § 131E-185(a1)(2), the Office of Administrative Hearings (OAH) correctly held that DHHS failed to use proper procedure by disregarding the public hearing requirement, even despite DHHS's concerns relating to the COVID-19 pandemic at the time. Nevertheless, OAH's final decision was vacated on appeal because, contrary to OAH's holding, the failure to conduct a public hearing did not automatically result in per se substantial prejudice to petitioner in its contested case. Additionally, because the public hearing requirement was a statutory right that existed for the public's benefit, principles of waiver and estoppel did not preclude petitioner from challenging DHHS's departure from the requirement. The matter was remanded for further proceedings to determine if petitioner was indeed substantially prejudiced.

Appeal by Petitioner from final decision entered on 21 July 2023 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 14 August 2024.

Baker, Donelson, Bearman, Caldwell & Berkowitz, a Professional Corporation, by Iain M. Stauffer and William F. Maddrey, for petitioner-appellee.

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

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, Noah H. Huffstetler, III, Candace S. Friel, and Nathaniel J. Pencook, for respondents-intervenors-appellants.

MURPHY, Judge.

The failure of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section ("the Agency") to conduct a public hearing pursuant to N.C.G.S. § 131E-185(a1)(2) does not automatically constitute substantial prejudice to a petitioner in a contested case before the Office of Administrative Hearings. Here, where the Office of Administrative Hearings reasoned in its final decision that the Agency's failure to conduct a public hearing constituted *per se* substantial prejudice to the petitioner before it, we must vacate that final decision.

BACKGROUND

Respondents University of North Carolina Hospitals at Chapel Hill, University of North Carolina Health Care System (collectively "UNC"), and the Agency appeal from a final decision of the Office of Administrative Hearings filed 21 July 2023. The decision pertained to a contested case between Petitioner Duke University Health System, Inc., and UNC to obtain a certificate of need to develop 68 acute care beds in the Durham/Caswell County service area pursuant to the 2022 State Medical Facilities Plan. The final decision, in relevant part, granted summary judgment in favor of Duke and vacated the underlying decision of the Agency conditionally approving UNC's certificate of need application, reasoning that (1) the Agency erred in failing to conduct a public hearing in accordance with N.C.G.S. § 131E-185(a1)(2),[1] notwithstanding any ongoing concerns relating to the COVID-19 pandemic at the time; and (2) the omission of a public hearing caused *per se* substantial prejudice to Duke within the meaning of N.C.G.S. § 150B-23(a).

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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 [provided in N.C.G.S. § 131E-185(a1)(1)], the [Agency] 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[.00]) or more[.]" N.C.G.S. § 131E-185(a1)(2) (2023). There is no dispute in this case that the proposed project met the $5,000,000.00 threshold at which N.C.G.S. § 131E-185(a1)(2) requires a public hearing.

ANALYSIS

N.C.G.S. § 150B-23(a) provides, in relevant part, that "[a] contested case shall be commenced . . . by filing a petition with the Office of Administrative Hearings and[] . . . shall be conducted by that Office." N.C.G.S. § 150B-23(a) (2023).

> A petition shall . . . state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency did any of the following:
>
> (1) Exceeded its authority or jurisdiction.
>
> (2) Acted erroneously.
>
> (3) Failed to use proper procedure.
>
> (4) Acted arbitrarily or capriciously.
>
> (5) Failed to act as required by law or rule.

Id. When reviewing alleged legal errors by the Office of Administrative Hearings on appeal, we employ de novo review. N.C.G.S. § 150B-51(b)-(c) (2023).

Here, where Duke argued before the Office of Administrative Hearings that the Agency failed to use proper procedure, it was also required to show that the Agency "deprived [it] of property, [] ordered [it] to pay a fine or civil penalty, or [] otherwise substantially prejudiced [its] rights" to establish to the Office of Administrative Hearings that reversible error occurred before the Agency. N.C.G.S. § 150B-23(a)(3) (2023). For the reasons discussed in two of our recent opinions, *Fletcher Hosp. Inc. v. N.C. Dep't of Health & Hum. Servs.*, *Div. of Health Serv. Regul.*, *Health Care Plan. & Certificate of Need Section*, 902 S.E.2d 1 (N.C. Ct. App. 2024) and *Henderson Cnty. Hosp. Corp. v. N.C. Dep't of Health & Hum. Servs.*, No. COA23-1037 (N.C. Ct. App. Aug. 6, 2024), although the Office of Administrative Hearings correctly held that the Agency failed to use proper procedure in omitting a public hearing despite any pandemic-related concerns, such an omission does not constitute substantial prejudice *per se* under N.C.G.S. § 150B-23(a).

Respondents also argue that waiver and estoppel prevented Duke from arguing before the ALJ that the Agency's failure to hold a hearing was improper, as Duke had itself utilized Agency proceedings without public hearings during the pandemic. However, our jurisdiction has long held that statutory rights in place for the benefit of the public—as opposed to for the personal benefit of the party—cannot be waived.

See, *e.g.*, *Sisk v. Perkins*, 264 N.C. 43, 46 (1965) ("Statutory provisions enacted for the benefit of a party litigant, as distinguished from those for the protection of the public, may be waived, expressly or by implication."); *Calaway v. Harris*, 229 N.C. 117, 119 (1948) ("Statutory provisions enacted for the benefit of a party litigant, as distinguished from those for the protection of the public, may be waived, expressly or by implication."); *Holloman v. Holloman*, 127 N.C. 15, 16 (1900) ("[T]he [c]ourts cannot dispense with the requirement to file the affidavit. That requirement is for the good of the public at large, and not for the convenience or benefit of the parties to the action."). Jurists and academics alike have critiqued agency proceedings on the basis that they suffer from problems of democratic legitimacy, and the public hearing requirement of N.C.G.S. § 131E-185(a1)(2) exists, at least in significant part, to legitimize aspects of the agency review process that might otherwise be democratically suspect. *Cf. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1929 n.13 (2020) (Thomas, J., concurring) ("[T]he notice and comment process at least attempts to provide a 'surrogate political process' that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process."). Public hearings under N.C.G.S. § 131E-185(a1)(2) are not, therefore, private benefits to their participants, but critical aspects of the agency review process that exist for public and systemic benefits.[2] Waiver therefore does not apply—and, for equivalent reasons, estoppel does not, either.

We therefore vacate the final decision and remand for further proceedings. *Fletcher*, 902 S.E.2d at 7. Our holding does not preclude a subsequent ruling that Duke was substantially prejudiced in the event more specific findings supporting such a ruling are found to exist on remand. *Id.* ("AdventHealth satisfied its burden of proof in showing Agency error, but it failed to forecast particularized evidence of substantial prejudice. Yet, our determination in this case should not be misconstrued. AdventHealth may ultimately satisfy its burden; it may not. The ALJ ruled on two specific issues that have been raised and briefed in this appeal: failure to conduct a public hearing under § 131E-185(a1)(2) and reversible error *per se*. We have resolved those specific issues. While this Court may address summary judgment on alternative grounds de novo, we deem this case an appropriate circumstance to remand for further proceedings not inconsistent with this opinion.").

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2. Indeed, one can imagine that the beneficial or detrimental effect of a public hearing for any particular party would be circumstantial rather than categorical.

CONCLUSION

Failure to conduct a public hearing as required by N.C.G.S. § 131E-185(a1)(2), despite constituting improper procedure for purposes of N.C.G.S. § 150B-23(a)(3), does not automatically result in substantial prejudice to a petitioner before the Office of Administrative Hearings. We therefore vacate the final decision in this case and remand for further proceedings.

VACATED AND REMANDED.

Judges COLLINS and FLOOD concur.

IN THE MATTER OF B.A.J.

No. COA24-254

Filed 17 September 2024

1. Termination of Parental Rights—neglect—failure to make reasonable progress—judicial notice—testimony from prior hearings

In a proceeding that resulted in the termination of respondent-mother's parental rights to her son on the statutory grounds of neglect and failure to make reasonable progress in correcting the conditions that led to the child's removal, the district court did not err in taking judicial notice of findings of fact made in prior orders—even though those findings were based on a lower evidentiary standard—where the court also considered evidence at the termination hearing, including testimony from the social worker assigned to the case, the guardian ad litem's report, and twenty exhibits related to respondent-mother's progress on her case plan.

2. Termination of Parental Rights—neglect—failure to make reasonable progress—competency of evidence—hearsay exception

In a proceeding that resulted in the termination of respondent-mother's parental rights to her child on the statutory grounds of neglect and failure to make reasonable progress in correcting the conditions that led to the child's removal, the district court did not err in relying on testimony from a social worker about her personal memories of respondent-mother's sworn testimony at a prior hearing—evidence that respondent-mother conceded was a statement by a party and thus admissible under a hearsay exception.

Moreover, respondent-mother's argument about the weight that the testimony should be afforded was misplaced as such considerations are reserved solely for the district court.

3. Termination of Parental Rights—neglect—failure to make reasonable progress—prior invocations of Fifth Amendment rights—adverse inferences

In a proceeding that resulted in the termination of respondent-mother's parental rights to her child on the statutory ground of neglect and that she had failed to make reasonable progress in correcting the conditions that led to the child's removal, the district court was permitted to draw an adverse inference from respondent-mother's invocations at prior hearings of her Fifth Amendment right not to answer questions about torture and abuse inflicted on the child's older sibling. Further, a review of the unchallenged findings of fact revealed that respondent-mother's refusal to answer those questions was not the sole basis for the termination of her parental rights.

4. Termination of Parental Rights—neglect—sufficiency of findings—likelihood of future neglect

In a proceeding that resulted in the termination of respondent-mother's parental rights to her child, the district court's conclusion of law that the statutory ground of neglect existed—based on a likelihood of future neglect by respondent-mother if the child was returned to her care—was supported by the court's findings of fact that respondent-mother failed to: (1) complete all components of her case plan; (2) acknowledge or accept responsibility for the reasons the child was removed from her home (including previous neglect of the child, abuse and neglect inflicted on the child's older siblings, torture inflicted on one of the older siblings, and respondent-mother's ongoing involvement with the child's father despite multiple domestic violence incidents); and (3) understand the role she played in the child's previous neglect.

5. Termination of Parental Rights—best interests of the child—statutory factors—relative placements ruled out—no abuse of discretion

In the disposition portion of a proceeding that resulted in the termination of respondent-parents' parental rights to their son on the statutory ground of neglect, the district court did not abuse its discretion in determining that termination was in the child's best interest where the court's findings on each of the factors listed in N.C.G.S. § 7B-1110(a) were supported by competent evidence.

Specifically, although a social worker testified that a bond existed between respondent-mother and the child but did not include any detail about the nature of that bond—for example, whether it was strong or nurturing—the court appropriately rejected potential placements for the child with paternal relatives after determining that those placements had previously been ruled out and should not be reconsidered and that testimony of those relatives at the termination hearing was not credible.

Appeal by respondent-mother and respondent-father from order entered 26 October 2023 by Judge Faith A. Fickling-Alvarez in Mecklenburg County District Court. Heard in the Court of Appeals 28 August 2024.

Mecklenburg County Attorney's Office, by Senior Associate Attorney Kristina A. Graham, for Petitioner-Appellee Mecklenburg County Department of Social Services.

Administrative Office of the Courts, by Brittany T. McKinney, for Guardian ad Litem.

Emily Sutton Dezio for Respondent-Appellant Mother.

Peter Wood for Respondent-Appellant Father.

COLLINS, Judge.

Mother and Father appeal the termination of their parental rights to their child, Billy.[1] Mother argues that some of the adjudicatory findings of fact were unsupported by evidence, the court's remaining findings were insufficient to support the court's conclusions that grounds existed to terminate her parental rights, and the court abused its discretion when it determined that termination of her parental rights was in Billy's best interest. Father argues only that the trial court abused its discretion when it determined that termination of his parental rights was in Billy's best interest. For the reasons below, we affirm.

I. Background

Mother and Father are the biological parents of Billy. Billy was born in 2021 and has two older sisters, Stephanie and Sarah, who

1. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

are Mother's biological daughters but who have different biological fathers than Billy.[2] The three children came into Mecklenburg County Department of Social Services ("DSS") custody on 16 September 2021 when DSS received a report alleging physical abuse of Sarah. The report alleged that Mother and Father hit Sarah with belts, cords, and shoes; "tie[d] up [Sarah's] hands and feet with sheets and t-shirts and . . . and h[u]ng her from a door"; taped her mouth shut; yelled at her; and made her do squats and push-ups; and that Mother told Stephanie and Sarah not to tell anyone about these things. The Charlotte-Mecklenburg Police Department ("CMPD") executed a search warrant on the house and located items that corroborated the report. Additionally, CMPD found a pit bull locked in a cupboard under the kitchen sink without access to food or water, a broken bed frame in the children's bedroom with dried and fresh feces smeared on the bed frame, and a smashed tv on top of the broken bed frame in the children's room. Sarah was taken to the emergency room, where doctors found she had "multiple injuries in various stages of healing" and these injuries were "non-accidental." Mother admitted to causing Sarah's injuries with a belt; she was arrested and charged with Felony Child Abuse.

DSS filed a petition on 20 September 2021 alleging that Sarah was abused and neglected and that Stephanie and Billy were neglected, and DSS took non-secure custody of the children. The initial adjudication and disposition hearings took place in February and March 2022, and the trial court adjudicated Billy a neglected juvenile. At disposition, the trial court did not order reunification efforts with the parents because it found that Mother and Father "committed or encouraged the commission of . . . chronic physical or emotional abuse of [Sarah] and torture of [Sarah]" and that Billy was "present in the home and observed to some degree the torture and physical abuse imposed upon [Sarah] by [parents]." The trial court adopted a primary plan of adoption for Billy with a secondary plan of guardianship but permitted the possibility of supervised visitation between the parents and Billy for two hours twice per week.

The trial court held a permanency planning hearing over 22 April 2022, 28 September 2022, and 6 October 2022. The trial court found that the parents were not making adequate progress under the plan and that they were not "actively participating in or cooperating with the plan, [DSS], and GAL." The trial court found that

2. Stephanie and Sarah are not subjects of this appeal.

> Mother and Father [] are acting in a manner inconsistent with the health and safety of the juveniles. . . .
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> . . . .
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> Both Mother and Father [] refused to answer questions during this proceeding in reliance on the 5th amendment privilege. These questions were related to the acts of torture and physical abuse that they imposed on [Sarah], and the injurious consequences of neglect that they imposed on [Stephanie] and [Billy]. Pursuant to case law, the [c]ourt draws an adverse inference against Mother and Father [], but the [c]ourt does not solely use these adverse inferences to support the continued cessation of reasonable efforts, but in conjunction with all the other findings the [c]ourt has made in this order.
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> If Mother and Father [] cannot admit and/or recognize the abuse and neglect they imposed on the juveniles, they are not able to demonstrate to the Court that they understand the impact on the juveniles and they are not able to demonstrate they have rehabilitated themselves and the circumstances that caused the abuse and neglect.
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> Mother and Father [] have had another child and they are residing together. Both of them have expressed an intent to reunify with all the children as one family unit. This intent demonstrates that Mother is not considering the best interest of the juveniles [Stephanie] and [Sarah], as she intends them to reunify with her significant other who this [c]ourt has found committed acts of physical and emotional abuse upon them, including torture upon [Sarah].

The trial court then found that DSS "appropriately ruled out" Father's mother as a possible relative placement based on concerns that she "would fail to protect the juveniles and/or would fail to follow court orders" as she had "previously allowed unauthorized contact between [Billy] and Mother and Father" against the trial court's order. Father then identified his brother as a potential relative placement for Billy and the trial court ordered DSS to assess Father's brother for possible placement.

The trial court held another permanency planning hearing on 30 August 2023 and 7 September 2023, and it again found that the parents were not making adequate progress and that the issues that brought Billy into custody had not been resolved. The trial court found

that Mother had attended classes and mental health treatment, but she was "involved in another domestic violence incident with [Father] and has continued to engage with him thereafter." During the domestic violence incident, Father struck Mother in the face, grabbed her neck and squeezed, and hit her on the side of her head with a gun. Later that same night, Mother's home was "shot into at least eight times." The trial court found that Mother was "unsure whether she will, or even wants to" file for a domestic violence protective order ("DVPO") against Father and that Father has been calling Mother from the jail and "[Mother] has accepted and engaged in these phone calls with [Father]." Additionally, the court found that Mother testified that she had been "fully honest" with her therapist but still would not discuss in therapy the "heinous, cruel, and inappropriate actions of abuse and torture" that resulted in Billy entering DSS custody. The trial court again found that Father's mother was appropriately ruled out by DSS as a possible relative placement for Billy, and it found that Father's brother had three drug-related felony charges and that DSS ruled him out as a possible relative placement.

On 11 January 2023, DSS filed a motion to terminate the parents' parental rights on the grounds of neglect, willful failure to make reasonable progress in correcting the conditions which led to removal of the juvenile, and willful failure to pay a reasonable portion of the cost of care of the juvenile. The termination of parental rights hearing ("TPR hearing") took place on 20 and 26 September 2023. DSS did not proceed on the willful failure to pay a reasonable portion of the cost of care ground. During the hearing, the trial court took judicial notice of the underlying orders without objection from any party, received live testimony from a social worker employed with DSS, and admitted twenty exhibits into evidence. Mother did not testify or call any witnesses, and she offered exhibits that were not properly admitted as conceded by her attorney during the hearing. Father did not testify but called his mother and brother as witnesses.

After considering all the evidence, the trial court terminated the parents' parental rights to Billy on the grounds of neglect and willful failure to make reasonable progress in correcting the conditions that led to Billy's removal. The trial court proceeded to the dispositional phase and concluded that it was in Billy's best interest for the parents' rights to be terminated.

II. Discussion

Mother argues that some of the adjudicatory findings of fact were unsupported by evidence, the court's remaining findings were insufficient to support the court's conclusions that grounds existed to terminate her

parental rights, and the court abused its discretion when it determined that termination of her parental rights was in Billy's best interest. Father argues only that the trial court abused its discretion when it determined that termination of his parental rights was in Billy's best interest.

A. Standard of Review

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796-97 (2020) (citation omitted). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019) (citing N.C. Gen. Stat. § 7B-1109(f)). We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent[,] and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citations omitted). Unchallenged findings of fact are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citation omitted).

If the trial court concludes that there are grounds to terminate parental rights, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citations omitted). We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence. *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (citations omitted). Unchallenged dispositional findings are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019) (citation omitted). A trial court's best interests determination "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6, 832 S.E.2d at 700 (citation omitted).

B. Mother's Appeal

1. Judicial Notice of Prior Orders

[1] Mother first argues that adjudicatory findings 11, 15, 16, and 18 are unsupported by the evidence because the trial court "impermissibly relied on its prior findings in the dispositional and permanency planning hearings" that were "found under a lower standard of proof than the

clear, cogent, and convincing evidence standard" of those findings made at the TPR hearing. Mother claims that the trial court "simply adopted the findings" and "that there was not sufficient evidence to support these findings[.]"

"A trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence." *In re T.N.H.*, 372 N.C. at 410, 831 S.E.2d at 60 (citation omitted). "[T]he trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *Id.*

Here, in addition to the trial court taking judicial notice of prior orders, the social worker assigned to the case testified at the TPR hearing regarding Mother's past and present lack of progress on her case plan and the progression of the case since Billy entered into DSS custody and through the TPR hearing. The trial court also admitted into evidence without objection the GAL report and twenty exhibits that were relevant to Billy's entrance into DSS custody and the progression of the case through the TPR hearing. Additionally, adjudicatory findings of fact 21, 23, and 24 all pertain to Mother's circumstances at the time of the TPR hearing. The challenged findings of fact are based, at least in part, on live testimony and other exhibit evidence provided at the TPR hearing, and the challenged findings are thus "sufficient to demonstrate that the trial court made an independent determination regarding the evidence presented." *Id.* at 410, 831 S.E.2d at 61. We conclude that Mother's argument is without merit.

2. Competency of the Evidence

[2] Mother next argues that portions of adjudicatory findings 20, 23, and 24 pertaining to Mother's honesty in therapy are not supported because "the trial court relied on incompetent evidence in [its] findings regarding whether or not [Mother] was honest with her therapist." Mother argues that the social worker's testimony, based upon the social worker's recollection of Mother's testimony from a prior permanency planning hearing in August 2023 ("the August 2023 hearing"), is incompetent evidence because "[t]he social worker is merely reciting a recollection of [Mother's] testimony from a prior hearing."

Mother cites to *Hensey v. Hennessy*, 201 N.C. App. 56, 685 S.E.2d 541 (2009), for the proposition that, because a trial court "does not have the

authority to issue an order based solely upon the court's own personal memory of another entirely separate proceeding," the social worker here was not permitted to testify as to her recollection of Mother's testimony at a prior hearing. Mother's reliance is misplaced.

In *Hensey*, the trial court issued an order after it did not hear "any evidence" at a civil hearing and instead based its order upon the trial court's personal memory of a prior criminal proceeding. *Id.* at 67-68, 685 S.E.2d at 549. Our Court examined the appellate record and concluded that the

> plaintiff presented absolutely *no* evidence before the trial court. The most troubling aspect of this case is that the transcript of the hearing reveals that the trial judge granted the order without hearing any evidence because he "heard it on the criminal end." In other words, because he was the judge presiding over the criminal case in which charges stemming from this incident were brought against defendant, the trial judge concluded that he need not hear any evidence regarding this civil matter.
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> . . . .
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> Although we appreciate the trial court's concern for judicial economy, a judge's own personal memory is not evidence. The trial court does not have authority to issue an order based solely upon the court's own personal memory of another entirely separate proceeding, and it should be obvious that the evidence which must be taken orally in open court must be taken *in the case which is at bar*, not in a separate case which was tried before the same judge.

Id. (quotation marks and citations omitted).

Here, the social worker testified about her personal recollections of Mother's statements at the August 2023 hearing; this was not an instance where the trial court "issued an order based upon the court's own personal memory." *Id.* at 67, 201 N.C. App. at 549. The social worker testified that she was present in court at the August 2023 hearing and heard Mother's testimony during that hearing. She then testified without objection as to her personal memories of Mother's testimony about her engagement in therapy. *Hensey* is thus inapplicable here.

Additionally, Mother concedes that her testimony at the August 2023 hearing is "a statement by a party and would pass the hearsay exception and be admissible as evidence." Mother argues, however, that "the social

worker's recollection or prior testimony should not be afforded sufficient weight to terminate [Mother's] parental rights." Mother's testimony at the August 2023 hearing is admissible and we cannot re-examine the weight the trial court afforded to the social worker's testimony. *See In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) (explaining that the trial court is "uniquely situated" to "assess[] the demeanor and credibility of witnesses" and, as such, "appellate courts may not reweigh the underlying evidence presented at trial"); *see also In re J.I.G.*, 380 N.C. 747, 754, 869 S.E.2d 710, 715 (2022) (refusing to review the trial court's assignment of weight and credibility to testimony, stating that the determination "resides solely in the purview of the trial court").

When the social worker was questioned about Mother's engagement in therapy, the social worker testified:

> Q: [Mother] has participated in mental health services and is in individual therapy; is that correct?
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> [Social Worker]: Yes.
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> Q: And at the [hearing] which happened on August 30, 2023, Mother did testify that she felt she has been fully honest with her therapist as to why the children are in [DSS] custody, correct?
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> [Social Worker]: Yes.
>
> Q: But then, further within that same hearing, Mother further testified that she did not admit to her therapist committing physical abuse against [Sarah], correct?
>
> [Social Worker]: Yes.
>
> Q: To your knowledge, has Mother discussed with her therapist anything surrounding physical abuse, emotional abuse, torture, or inappropriate physical discipline of her children?
>
> [Social Worker]: No, she has not.
>
> Q: At that August 30, 2023, hearing, [Mother] also testified that she did discuss the domestic violence incident from July 5th with her therapist, correct?
>
> [Social Worker]: Yes.
>
> Q: But then she further testified at that same hearing that [Mother] does not discuss [Father] . . . with her therapist, correct?

> [Social Worker]: Yes.
>
> Q: So you would agree that [Mother] is not being fully honest and transparent with her therapist about the facts and circumstances of why her children are in [DSS] custody, correct?
>
> [Social Worker]: Yes.

This testimony is clear, cogent, and convincing evidence that Mother was not honest with her therapist. The social worker further testified that Mother "being forthcoming with her therapist in regard to her behavior and what led to her children entering [DSS] custody" would demonstrate to DSS Mother's acceptance of responsibility, which further supports that Mother was not honest or transparent with her therapist. The challenged portions of adjudicatory findings 20, 23, and 24 pertaining to Mother's honesty in therapy are supported by clear, cogent, and convincing evidence.

3. Refusal to Testify – Fifth Amendment

[3] Mother argues that her "refusal to testify cannot be the sole basis to terminate her parental rights" and cites to adjudicatory findings 15, 16, 18, 23, and 24 as support that the trial court's basis to terminate her parental rights was made "upon her refusal to testify."[3] Upon our review of the challenged findings, we note that they reference Mother's invocations of the Fifth Amendment at prior hearings, specifically relating to questions about "the acts of torture and physical abuse that the parents imposed on [Billy's] next oldest sibling . . . ." In *In re K.W.*, this Court explained that a parent may not invoke their Fifth Amendment right not to answer questions and then use that right as both a shield and sword in a civil proceeding:

> [S]ince [m]other invoked her 5th Amendment right not to answer questions . . . , the trial court could infer that her answers would have been damaging to her claims . . . . Although mother had a right to assert her constitutional right not to answer, this proceeding is a civil case and she is not entitled to use the privilege against self-incrimination as both a "shield and a sword."

282 N.C. App. 283, 288, 871 S.E.2d 146, 151 (2022) (citation omitted). The trial court was permitted to draw an adverse inference against Mother

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3. We note that adjudicatory finding 23 does not mention Mother's choice to invoke her Fifth Amendment right.

for invoking the Fifth Amendment and the unchallenged findings of fact indicate that the trial court did not terminate Mother's parental rights solely because of her refusal to answer questions at prior hearings.

4. Grounds to Terminate Mother's Rights

[4] Mother argues that the trial court committed reversible error by concluding that she (1) neglected Billy, specifically arguing that there is a lack of evidence to support that there was a probability of repetition of neglect; and (2) willfully left Billy in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions which led to Billy's removal.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), the trial court may terminate a parent's parental rights upon finding that "[t]he parent has . . . neglected the juvenile[,]" as defined in N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1) (2023). In relevant part, a neglected juvenile is defined as one whose parent "[d]oes not provide proper care, supervision, or discipline" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. §§ 7B-101(15)(a), (15)(e) (2023).

Such "neglect must exist at the time of the termination hearing." *In re B.S.O.*, 234 N.C. App. 706, 714, 760 S.E.2d 59, 65 (2014) (quotation marks, brackets, and citation omitted). "[I]f the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re V.S.*, 380 N.C. 819, 822, 869 S.E.2d 698, 701 (2022) (quotation marks and citation omitted). This Court has expressly stated that "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re C.M.P.*, 254 N.C. App. 647, 655, 803 S.E.2d 853, 859 (2017) (citation omitted). Additionally, a parent's failure to "demonstrate that sustained behavioral change of the type necessary to ensure the [minor child's] safety and welfare" can support a conclusion that there is a likelihood of repetition of neglect. *See In re R.L.R.*, 381 N.C. 863, 875, 874 S.E.2d 579, 590 (2022).

Here, it is undisputed that Billy was previously adjudicated neglected. As to the likelihood of future neglect, the trial court made numerous supported findings of fact that Mother could continue to neglect Billy if he was returned to her care, including:

> 15. . . . .
>
> > b.(i)(3) If the respondent parents could not admit and/or recognize the abuse and neglect they imposed on

> [Billy] and his older siblings, they were not able to demonstrate to the [c]ourt that they understood the impact they have had on the juveniles and they were not able to demonstrate they have rehabilitated themselves and the circumstances that caused the abuse and neglect.
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> b.(i)(4) The respondent parents had another child named [Penny] and they are residing together. Both of them have expressed an intent to reunify with all the children as one family unit. This intent demonstrates that Mother was not considering the best interest of all of the children, as she intended them to reunify with her significant other who this [c]ourt had found committed acts of physical and emotional abuse upon them, including torture upon [Sarah].
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> . . . .

16. [M]other participated in DV services, mental health treatment and parenting. However,

> . . . .
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> b. Additionally, Mother failed to be transparent with her therapist and had not discussed with her therapist about the actions of abuse, torture, improper supervision and improper discipline that the respondent parents committed against [Billy] and his siblings, despite Mother indicating at the [permanency planning hearing] that she has been completely honest with her therapist.

. . . .

18. At [the second permanency planning hearing], the [c]ourt ruled:

> . . . .
>
> b. That . . . the respondent parents were not . . . actively participating or cooperating with the plan, [DSS] and GAL. They . . . were both acting in a manner inconsistent with the health and safety of the juvenile.

. . . .

20. As of the completion of this TPR hearing, Mother has demonstrated that she had employment and housing. She

had engaged in mental health services, parenting classes, and DV services, but she failed to provide documentation/evidence that she has accepted the role she played in [Sarah's] abuse or the neglect she imposed on [Stephanie and Billy]. She failed to demonstrate to the [c]ourt that she understands the impact on [Billy] and failed to demonstrate that she has been able to rehabilitate herself from the circumstances that caused the neglect against [Billy]. Mother has not been forthcoming with her therapist. She also continues to engage with, and not protect herself from, Father [] despite a recent severe incident of domestic violence he perpetrated against her at her residence.

. . . .

23. The respondent parents have been separated from [Billy] for approximately two years—a long period of time. As noted above, [Billy] was adjudicated neglected on February 2, 2022. The neglect that led to the removal and adjudication created a substantial risk of harm to [Billy]. There is a likelihood of repetition of neglect in that there exists a substantial risk of harm to [Billy] if he were returned home, as demonstrated by the respondent parents' collective failure to accept responsibility for the conditions that led to the removal and adjudication which makes it impossible for this [c]ourt to know whether the respondent parents know their behavior was wrong and/or that they know (or have learned) how to change said behavior. Respondent parents' behavior was so egregious and severe that [Billy's] safety in their care cannot be ensured. [Billy] is currently 2 years old, is not potty trained, and likely to engage in bed wetting for a significant period of time which could result in the same heinous, cruel, and tortuous disciplinary measures taken by the respondent parents against [Sarah] for bed wetting. Additional factors the [c]ourt considered as it relates to willfulness and the creation of a substantial risk of harm for [Billy] are mother's voluntary decision not to be honest with her therapist about what led [Billy] to be taken into [DSS] custody, mother's voluntary decision to continue contact with father after a recent severe domestic violence incident, and her failure to file for a DVPO after said incident all of which demonstrated a likelihood of mother not protecting [Billy] as she had not protected herself. . . .

> 24. [Mother] could have been, but made a voluntary decision to not be[,] honest and forthcoming with her therapist. . . . [S]he made a voluntary choice to continue contact with father by accepting his phone calls while he was in jail following the recent DV incident and not seek a DVPO after said incident despite having the ability to file a DVPO against him and serve him in jail. . . .

These supported findings of fact show that Mother failed to complete all of the components of her case plan, failed to acknowledge or accept responsibility for the reasons that Billy came into DSS custody, and failed to understand the role she played in Billy's neglect. These findings support the trial court's conclusion that there was a likelihood of future neglect by Mother. *See R.L.R.*, 381 N.C. at 875, 874 S.E.2d at 589 (determining that parents are "required to demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors"); *see also In re M.S.E.*, 378 N.C. 40, 58-59, 859 S.E.2d 196, 210-11 (2021) (upholding ground of neglect in part based on the parent's inadequate engagement in remedial services and inability to understand the needs of their children).

Because the trial court's findings support its conclusions of law that there was a previous adjudication of neglect and a likelihood of future neglect if Billy was returned to Mother's care, the trial court did not err in determining that grounds existed to terminate Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1). *See In re V.S.*, 380 N.C. at 822, 869 S.E.2d at 701.

"In termination of parental rights proceedings, the trial court's finding of any one of the enumerated grounds [in N.C. Gen. Stat. § 7B-1111(a)] is sufficient to support a termination." *In re N.T.U.*, 234 N.C. App. 722, 733, 760 S.E.2d 49, 57 (2014) (quotation marks, ellipsis, and citation omitted). Accordingly, we need not address the other ground for termination found by the trial court.

5. Best Interest Determination

[5] Mother lastly argues that the trial court abused its discretion by terminating her parental rights because it was not in Billy's best interest to do so.

After an adjudication that one or more grounds exist to terminate parental rights under N.C. Gen. Stat. § 7B-1111, the trial court "proceeds to the dispositional stage." *In re A.U.D.*, 373 N.C. at 6, 832 S.E.2d at 700. The court shall determine whether it is in the juvenile's best interest to terminate parental rights by considering the following criteria:

1. The age of the juvenile.

2. The likelihood of adoption of the juvenile.

3. Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

4. The bond between the juvenile and the parent.

5. The quality of the relationship between the juvenile and the proposed adoptive parent.

6. Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2023). The trial court must make written findings of the factors it considers to be relevant. *In re Z.A.M.*, 374 N.C. at 99, 839 S.E.2d at 799.

Here, the trial court made the following dispositional findings of fact:

1. The Adjudicatory Findings of Fact are incorporated herein by reference as if fully set forth.

2. [DSS] proffered live testimony from [the social worker]. The GAL proffered live testimony . . . and GAL Exhibit 1. GAL Exhibit 1 was the GAL's Termination of Parental Rights Report which was admitted into evidence without objection.

3. The permanent plan in [Billy's] best interest is adoption. The parents having their parental rights is a barrier to adoption.

4. [Billy] recently turned 2 years old. He has been in [DSS] custody since he was approximately one month old so he has been in custody almost his entire life.

5. Terminating the respondent parents' parental rights will aid in the accomplishment of the permanent plan of adoption. Neither the family nor any other prospective adoptive home can adopt the juvenile unless the respondent parents consent to an adoption or their parental rights are terminated. The respondent parents have insufficient progress on addressing the removal conditions. Given that lack of progress, significant barriers to reunification remain. Therefore, the best option available for [Billy] is for him to be adopted which requires that the parental rights of the respondent parents be terminated.

6. The Court has evidence that a bond exists between [Billy] and the respondent parents. However, the Court has no evidence of the type of bond that exist[s]. Specifically, whether it is strong or nurturing bond; or whether [Billy] even recognizes Mother and Father [] to be his parents. Additionally, Father [] has missed all his visits with [Billy] beginning July 6, 2023 through the date of the TPR hearing due to his incarceration for committing domestic violence against Mother.

7. It is not in [Billy's] best interest to keep him in [DSS] custody indefinitely for the respondent parents to have more time to show progress, to admit and/or recognize the neglect they imposed, to demonstrate to the Court that they understand the impact on [Billy], to demonstrate they have rehabilitated themselves and the circumstances that caused the neglect against [Billy], and/or to find an alternative placement for possible guardianship which is not the primary permanency plan.

8. It is in his best interest for [Billy] to obtain a safe, stable, and permanent home.

9. [Billy] has lived with his current foster family since January 12, 2022 so for approximately one year and nine months of his 2-year-old life. [Billy] has a strong, loving bond with his foster parents, as well as the biological children of the foster parents. [Billy] calls foster parents "mommy" and "daddy[,]" and he refers to the foster parents' biological children as "sister" and "brother." The quality of the relationship and care provided by the foster parents is excellent, as they ensure that all of [Billy's] physical, mental, emotional, and developmental needs are met. The foster parents provide positive and nurturing care to [Billy]. [Billy] is happy, nurtured[,] and loved by the foster parents.

10. The foster parents have expressed a desire to adopt [Billy] and have remained committed throughout the case to adopting [Billy] if he became legally cleared to do so.

11. The likelihood of [Billy] being adopted is very high.

12. Terminating the respondent parents' parental rights is in the juvenile's best interest.

Mother argues that dispositional finding 6 is not supported by the evidence because the trial court finds "no evidence of the type of bond existed between Billy and [Mother] despite the social worker testifying that a bond existed." The record evidence supports dispositional finding 6, as testimonial evidence shows that *a* bond existed between Billy and Mother, but there is no evidence of the *type* of bond that existed, such as a strong or nurturing bond. The GAL report entered into evidence and the social worker's testimony merely show that Mother had "appropriate and positive interactions with [Billy] during supervised visits[,]" but they are otherwise completely silent as to the type and extent of the bond between Mother and Billy. There is additionally no evidence that Billy recognized Mother to be his parent. Finding 6 is thus supported by competent evidence.

Mother argues that dispositional finding 7 is not supported by the evidence because "Father . . . provided approved by Gaston County DSS placements of close family relatives," our General Statutes prefer relative placements over non-family members, and Father's mother and brother "were inappropriately excluded."

We first note that the trial court's unchallenged adjudicatory finding 22, incorporated by reference into its dispositional findings, supports dispositional finding 7. The trial court found:

> 22. As of the completion of this TPR hearing . . . [DSS] had already appropriately ruled out [Father's] proposed family members. Furthermore, this [c]ourt did not hear any evidence at this hearing that warranted reconsideration of [Father's] proposed family members. [Father's mother's] testimony confirmed that she allowed unauthorized contact between the parents and [Billy] against the [c]ourt's order. Additionally, [father's brother's] testimony at this hearing is not credible in that it is inconsistent with the [DSS social worker's] credible testimony during this hearing and with the [c]ourt's [prior] order.

Mother did not challenge adjudicatory finding 22, and it is thus binding on appeal. *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 65 (citations omitted). This finding demonstrates that the trial court considered the testimony from Father's mother and Father's brother offered during the TPR hearing and weighed the credibility of their testimony before deciding that it would not reconsider Father's mother or brother as possible relative placements. The dispositional finding 7 is supported by the competent evidence.

Moreover, our Supreme Court has consistently held that a trial court is not required to consider potential relative placements during the dispositional phase of a TPR proceeding. *See In re H.R.S.*, 380 N.C. 728, 736, 869 S.E.2d 655, 660 (2022) (explaining that the trial court is required to consider relative placements in the "initial abuse, neglect, and dependency stage of a juvenile proceeding" and "the trial court is not expressly directed to consider the availability of a relative placement" during the dispositional phase); *see also In re S.D.C.*, 373 N.C. 285, 289, 837 S.E.2d 854, 857 (2020).

The trial court properly considered all the relevant factors of N.C. Gen. Stat. § 7B-1110, and it was within the discretion of the trial court to decide how each factor should be weighed. *In re I.N.C.*, 374 N.C. 542, 550, 843 S.E.2d 214, 220 (2020). This Court may not "substitute our preferred weighing of the relevant statutory criteria for that of the trial court[.]" *Id.* at 550-51, 843 S.E.2d at 220. The trial court's conclusion that termination of Mother's parental rights was in Billy's best interest "was not manifestly unsupported by reason." *In re Z.L.W.*, 372 N.C. at 438, 831 S.E.2d at 66.

C. Father's Appeal

Father's sole issue on appeal is that the trial court abused its discretion by terminating his parental rights without first making adequate findings of fact about two relatives offered as relative placements for Billy.

Father does not challenge any of the adjudicatory findings of fact and challenges only the portion of dispositional finding 7 pertaining to alternative placement for possible guardianship for Billy. The dispositional finding 7 states:

> 7. It is not in [Billy's] best interest to keep him in [DSS] custody indefinitely for the respondent parents to have more time to show progress, to admit and/or recognize the neglect they imposed, to demonstrate to the [c]ourt that understand the impact on [Billy], to demonstrate they have rehabilitated themselves and the circumstances that caused the neglect against [Billy], and/or to find an alternative placement for possible guardianship which is not the primary permanency plan.

We first note that the trial court's unchallenged adjudicatory finding 22, incorporated into its dispositional findings, supports dispositional finding 7. The trial court found:

> 22. As of the completion of this TPR hearing . . . [DSS] had already appropriately ruled out [Father's] proposed family members. Furthermore, this [c]ourt did not hear any evidence at this hearing that warranted reconsideration of [Father's] proposed family members. [Father's mother's] testimony confirmed that she allowed unauthorized contact between the parents and [Billy] against the [c]ourt's order. Additionally, [father's brother's] testimony at this hearing is not credible in that it is inconsistent with the [DSS social worker's] credible testimony during this hearing and with the [c]ourt's [prior] order.

Father did not challenge adjudicatory finding 22, and it is thus binding on appeal. *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 65 (citations omitted). This finding demonstrates that the trial court considered the testimony from Father's mother and Father's brother offered during the TPR hearing and weighed the credibility of their testimony before deciding that it would not reconsider Father's mother or brother as possible relative placements. The dispositional finding 7 is supported by the evidence.

Moreover, our Supreme Court has consistently held that a trial court is not required to consider potential relative placements during the dispositional phase of a TPR proceeding. *See In re H.R.S.*, 380 N.C. at 736, 869 S.E.2d at 660 (explaining that the trial court is required to consider relative placements in the "initial abuse, neglect, and dependency stage of a juvenile proceeding" and "the trial court is not expressly directed to consider the availability of a relative placement" during the dispositional phase); *see also In re S.D.C.*, 373 N.C. at 289, 837 S.E.2d at 857.

The trial court properly considered all the relevant factors of N.C. Gen. Stat. § 7B-1110, and it was entirely within the discretion of the trial court to decide how each factor should be weighed. *In re I.N.C.*, 374 N.C. at 550, 843 S.E.2d at 220. This Court may not "substitute our preferred weighing of the relevant statutory criteria for that of the trial court[.]" *Id.* at 550-51, 843 S.E.2d at 220. The trial court's determination that termination of Father's parental rights was in Billy's best interest "was not manifestly unsupported by reason." *In re Z.L.W.*, 372 N.C. at 438, 831 S.E.2d at 66.

III. Conclusion

The trial court's adjudicatory findings of fact are supported by clear, cogent, and convincing evidence, which in turn support the trial court's conclusion of law that Billy was a neglected juvenile. The trial court did not abuse its discretion in concluding that

termination of Mother and Father's parental rights was in Billy's best interest. Accordingly, we affirm the trial court's order terminating Mother and Father's parental rights.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

IN THE MATTER OF DAVID ROBERT GOLDBERG

No. COA23-1015

Filed 17 September 2024

Venue—petition for termination of sex offender registration—out-of-state conviction—registrant no longer residing in-state

The trial court erred by dismissing a petition for termination of sex offender registration based on improper venue where petitioner, who registered as a sex offender in Mecklenburg County based on his out-of-state reportable conviction because that is where he resided when he moved to North Carolina, properly filed his termination petition in Mecklenburg County even though he no longer lives in North Carolina. Although the controlling statute, N.C.G.S. § 14-208.12A, does not address where a termination petition should be filed for former North Carolina residents with out-of-state reportable convictions who no longer reside in-state, the appellate court interpreted the statute in the context of the rest of Article 27A in Chapter 14 of the General Statutes to require a person seeking removal from the registry to file in the county in which they previously maintained registration. Here, Mecklenburg County was the correct venue and the superior court in that county had jurisdiction to hear the petition.

Appeal by Petitioner from Order entered 6 July 2023 by Judge Michael A. Stone in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 May 2024.

Paul M. Dubbeling for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

HAMPSON, Judge.

Factual and Procedural Background

David Robert Goldberg (Petitioner) appeals from an Order dismissing his Petition for Termination of Sex Offender Registration based on improper venue pursuant to N.C. Gen. Stat. § 14-208.12A (2023). The Record before us tends to reflect the following:

In 2003, Petitioner was convicted of Possession of Child Pornography in the United States District Court for the District of South Carolina. Upon his conviction, Petitioner registered as a sex offender in South Carolina.

In 2005, Petitioner moved to Mecklenburg County and, as required by law, registered as a sex offender with the Sheriff of Mecklenburg County. He later moved to Florida. In November 2022, he successfully petitioned for removal from the South Carolina sex offender registry.

On 23 June 2022, Petitioner filed a Petition for Termination of Sex Offender Registration in Mecklenburg County, where he last resided in North Carolina. At the hearing, the State argued that the trial court did not have jurisdiction under N.C. Gen. Stat. § 14-208.12A to hear the Petition. The State posited there was no jurisdiction because Section 14-208.12A requires a petitioner convicted of an out-of-state or federal offense to file the petition "in the district where the person resides" and Petitioner resided in Florida, not in Mecklenburg County.

Petitioner argued that dismissal was improper because the provisions of Section 14-208.12A directing where petitions should be filed establish venue rather than determining jurisdiction. Petitioner further argued venue was proper in Mecklenburg County under the general venue provisions of N.C. Gen. Stat. § 1-82. Petitioner also contended if there was no venue or jurisdiction in Mecklenburg County where he was registered—and, thus, nowhere in North Carolina—this raised constitutional issues under the Privileges and Immunities Clause and Equal Protection Clause of the United States Constitution.

The trial court interpreted the statute as establishing venue but ruled that Mecklenburg County was an improper venue and dismissed the Petition. On 6 July 2023, the trial court entered its written Order dismissing the Petition. On 26 July 2023, Petitioner timely filed written notice of appeal.

Issue

The dispositive issue is whether N.C. Gen. Stat. § 14-208.12A allows persons whose underlying conviction occurred outside of North Carolina and who no longer reside in the state to petition for removal from the North Carolina Sex Offender Registry in the district where they previously resided and registered as a sex offender in North Carolina.

Analysis

The North Carolina Sex Offender and Public Protection Registration Program is governed by Part 2 of Article 27A in Chapter 14 of the North Carolina General Statutes. By its terms it requires:

> (a) A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. If the person moves to North Carolina from outside this State, the person shall register within three business days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first. If the person is a current resident of North Carolina, the person shall register:
>
> (1) Within three business days of release from a penal institution or arrival in a county to live outside a penal institution; or
>
> (2) Immediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.
>
> Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A.

N.C. Gen. Stat. § 14-208.7.

Under N.C. Gen. Stat. § 14-208.12A, persons required to register as a sex offender may, ten years after their initial registration, petition in Superior Court to terminate their registration requirements. The statute directs where this petition should be filed:

> If the reportable conviction is for an offense that occurred in North Carolina, the petition shall be filed in the district where the person was convicted of the offense.

> If the reportable conviction is for an offense that occurred in another state, the petition shall be filed in the district where the person resides. . . . Regardless of where the offense occurred, if the defendant was convicted of a reportable offense in any federal court, the conviction will be treated as an out-of-state offense for the purposes of this section.

N.C. Gen. Stat. § 14-208.12A(a). The statute thus expressly assigns the proper district for filing a petition for (1) those with in-state convictions (the district of conviction) and (2) those with out-of-state convictions who reside in North Carolina (their district of residence).

As an initial matter, in this case, the State contends the trial court properly dismissed the Petition. However, the State posits the trial court should have grounded its decision in a lack of jurisdiction rather than venue. The State rests its argument on our decision in *In re Dunn*, 225 N.C. App. 43, 738 S.E.2d 198 (2013).

In that case, the petitioner appealed the trial court's denial of his petition to terminate his sex offender registration. 225 N.C. App. 43, 44, 738 S.E.2d 198, 198 (2013). The petitioner's registration requirement stemmed from a North Carolina offense. *Id.* Accordingly, Section 14-208.12A(a) required that he file his petition in the district where he was convicted of the offense. The petitioner was convicted of the underlying sex offense in Montgomery County but filed his petition in Cumberland County. *Id.* We declined to reach the merits of the petitioner's argument, instead holding that under Section 14-208.12A the trial court did not have jurisdiction to hear the petition because it had not been filed in the county in which the petitioner had been convicted. *Id.* at 45, 738 S.E.2d at 199. Accordingly, we dismissed the appeal and vacated the trial court's order as null and void for lack of jurisdiction. *Id.*

The State contends that *Dunn*, because it describes Section 14-208.12A(a) as jurisdictional in nature, requires we hold the trial court in this case likewise did not have jurisdiction to hear Petitioner's Petition. *Dunn* is, however, inapposite. *Dunn* does not address registrants with out-of-state convictions and, unlike in this case, addresses a petition filed in the incorrect forum when the correct forum was expressly provided by the statute.

Petitioner's conviction, unlike that in *Dunn*, occurred outside of North Carolina. The statute mandates that his petition be filed "in the district where [he] resides." N.C. Gen. Stat. § 14-208.12A(a). The State encourages us to read this provision narrowly, such that it only

establishes jurisdiction in a district so long as the person remains a physical resident of that district. Unlike in *Dunn*, where the statute mandated the petition be filed in Montgomery County but it was mistakenly filed in Cumberland, the State argues that filing the Petition in Mecklenburg was improper because there is *no* district in which it can be properly filed. This reading would leave any registrant with an out-of-state conviction who moves to another state unable to petition for removal from the registry after the ten-year period.

The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment. *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005). In determining this intent, we look first to the plain language of the statute, then to the legislative history, the spirit of the act, and what the act seeks to accomplish. *State v. Langley*, 371 N.C. 389, 395, 817 S.E.2d 191, 196 (2018). If a literal interpretation of a word or phrase's plain meaning would lead to "absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277.

The better reading of this statute is to interpret it as a whole with the rest of Article 27A, which establishes the North Carolina Sex Offender Registry and sets registration requirements. "Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 66, 241 S.E.2d 324, 328 (1978). Any North Carolina resident with a reportable conviction is required to register with the Sheriff "of the county where the person resides." N.C. Gen. Stat. § 14-208.7. When a person required to maintain registration moves to a new county, they are required to report to both the Sheriff of the current county of residence and also the Sheriff of the new county of residence. *See* N.C. Gen. Stat. § 14-208.9(a). The Sheriff then reports the change of address or county to the North Carolina Department of Public Safety who, in turn, informs the new Sheriff of the change of address. *Id*. In that case, logically, a person with a reportable out-of-state conviction would appropriately file a petition for removal from the registry under section 14-208.12 in the judicial district containing the new county of residence.

Likewise, if the person intends to move out of state, the person is required to notify the Sheriff of the county of current residence. *See* N.C. Gen. Stat. § 14-208.9(b) (2023). The Sheriff notifies the Department of Public Safety, who notifies the appropriate state official in the new state of residence. *See* N.C. Gen. Stat. § 14-208.9(b)(2) (2023). However, there

does not appear to be any mechanism—other than that provided by Section 14-208.12—for removal from the North Carolina Sex Offender Registry for former North Carolina residents with out-of-state reportable convictions who relocate out of the state.

Simply stated, any person who takes residency in North Carolina with a reportable conviction is required to maintain registration with the Sheriff "in the county where the person resides." N.C. Gen. Stat. § 14-208.7(a). In turn, Section 14-208.12a requires a person seeking removal from the registry to file in one of two venues: if the person has a reportable North Carolina conviction, that person must file in the judicial district where the conviction occurred. *See Dunn*, 225 N.C. App. At 45, 738 S.E.2d at 199. If the person has a reportable out-of-state or federal conviction, that person must file in the judicial district in which they reside and thus were required to register in North Carolina. N.C. Gen. Stat. § 14-208.12A(a).

Here, to comply with the statutory North Carolina Sex Offender Registry reporting requirements, Petitioner was required to maintain registration in Mecklenburg County—where he resided in North Carolina. There is no indication on this Record that Petitioner relocated his residence elsewhere in North Carolina or became a resident of any other North Carolina county such that he was required to register in a different North Carolina county. As such, for purposes of the North Carolina Sex Offender Registry, Petitioner's residency in North Carolina remains in Mecklenburg County.

Thus, Petitioner—with an out-of-state reportable conviction[1]—filed the Petition in Mecklenburg County Superior Court: the district of his residence in North Carolina and the county in which he was registered with the Sheriff consistent with N.C. Gen. Stat. §§ 14-208.7 and 14-208.12A. Therefore, venue was proper in that judicial district and the Mecklenburg County Superior Court had jurisdiction to hear the Petition.[2] Consequently, the trial court erred in dismissing the Petition for improper venue.[3]

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1. For persons with a North Carolina reportable conviction, presumably venue and jurisdiction will always lie in the judicial district where the conviction occurred irrespective of residency. *Dunn*, 225 N.C. App. at 45, 738 S.E.2d at 199; N.C. Gen. Stat. § 14-208.12A(a).

2. Based on our resolution of this matter on statutory grounds we need not address the constitutional implications of Petitioner's argument.

3. We also do not address the State's alternative argument that the petition should have been dismissed based on Petitioner's failure to include with his petition an affidavit

Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's Order dismissing the Petition and remand this matter to the trial court for further proceedings on the Petition. We express no opinion on the merits of the Petition.

REVERSED AND REMANDED.

Judges WOOD and STADING concur.

IN THE MATTER OF K.B.C., A.G.S.C., J.N.C.

No. COA24-296

Filed 17 September 2024

1. Appeal and Error—appellate jurisdiction—notice of appeal—timeliness—tolling of filing period—nonjurisdictional defects

The Court of Appeals had jurisdiction to review a father's appeal from an order terminating his parental rights in his children, where a fourteen-day delay in serving the order on the father tolled the 30-day period for filing notice of appeal (in accordance with Civil Procedure Rule 58), and where the father timely filed his notice within 30 days after the order was served. Although the father's notice of appeal had incorrectly designated the Supreme Court as the appellate court to which he was appealing and failed to cite the correct statute providing for his right to appeal, these defects were nonjurisdictional.

2. Appeal and Error—preservation of issues—admission of evidence—termination of parental rights proceeding—invited error—failure to object

In an appeal from an order terminating a father's parental rights in his three children, the father could not challenge the court's admission of evidence at the termination hearing showing that the children's guardian ad litem (GAL) had obtained a signed statement

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verifying that he has provided notice of the petition to the sheriff of the county where he was originally convicted, as required by N.C. Gen. Stat. § 14-208.12A(a). This issue was not raised before the trial court and thus has not been preserved for our review. N.C. R. App. P. 10.

from him—without his attorney present—indicating that he would not oppose the entry of an order allowing his children to be adopted by their foster family. Firstly, any error in admitting the evidence was invited error, since it was the father's counsel who called the GAL to testify and elicited the testimony regarding the signed statement. Secondly, the father never objected to the GAL's testimony or to the admission of the signed statement during the hearing, and therefore he failed to preserve for appellate review his arguments challenging the evidence.

3. Termination of Parental Rights—grounds for termination—dependency—parent's incarceration—one of multiple factors

The trial court did not err in terminating a father's parental rights in his three children on the ground of dependency (N.C.G.S. § 7B-1111(a)(6)), where the court found that the father had been imprisoned for various crimes and would remain in custody for nine years. Although a parent's incarceration cannot serve as the sole basis for a dependency adjudication, the court here considered multiple factors beyond the fact of the father's incarceration, including the substantial length of his sentence, its impact on the children and their relationship with their father, the importance of the children's physical and emotional well-being, and the lack of appropriate alternative placements for the children.

Appeal by Respondent-Father from Orders entered 15 December 2023 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 27 August 2024.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for Respondent-Appellant Father.

Sherryl West for Petitioner-Appellee Wilkes County Department of Social Services.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP., by Samuel J. Ervin, IV, for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Father appeals from Orders terminating his parental rights in Karen, Amy, and Julie.[1] The Record before us tends to reflect the following:

On 6 December 2020, Wilkes County Department of Social Services (DSS) received a report that Amy and Karen, who were two-and-a-half and one-and-a-half years old respectively, were wandering alone in the parking lot of a motel while Mother[2] was sleeping in a motel room. Following substantiation of this allegation, both Mother and Respondent-Father entered into a safety plan with DSS. Pursuant to this safety plan, Respondent-Father was required to supervise the children's interactions with Mother at all times.

On 9 March 2021, Debbie Barker (SW Barker), the DSS social worker assigned to the family, was unable to locate them at their last known address. SW Barker then went to Respondent-Father's place of employment, a sawmill, and found Amy and Karen walking around the parking lot alone in only diapers and t-shirts. Mother was asleep in the family van. Respondent-Father was not present at the scene, in violation of the safety plan. Following this incident, Amy and Karen were placed with a temporary safety placement Respondent-Father had suggested. On 19 March 2021, Respondent-Father signed a case management plan in which he agreed to participate in random drug screenings, locate appropriate housing, and make weekly contact with the social worker.

On 29 April 2021, Respondent-Father was arrested for receiving stolen goods and was incarcerated in the Wilkes County Jail. While Respondent-Father was incarcerated, the minor children's temporary safety placement informed DSS they were no longer willing to care for the minor children. Respondent-Father provided SW Barker with his aunt and uncle as a temporary safety placement, and the children were subsequently placed with them.

On or about 4 July 2021, Respondent-Father was arrested for possession of methamphetamine, felony larceny, breaking and entering, larceny of a firearm, and failure to pay child support. Respondent-Father was sentenced to a term of incarceration, and his projected release

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1. Pseudonyms stipulated to by the parties pursuant to Rule 42(b) of the North Carolina Rules of Appellate Procedure.

2. Mother is not a party to this appeal.

date at the time of the termination hearing was 13 May 2032. On 8 July 2021, the children's placement informed DSS that they could not be a long-term placement for the minor children, but they would continue to care for them until DSS could find another placement. On 13 July 2021, DSS filed petitions alleging Karen and Amy were neglected juveniles.

On 15 August 2021, Mother gave birth to Julie several weeks prematurely. Julie weighed just over three pounds and tested positive for amphetamines, methamphetamine, and marijuana. On 16 August 2021, Mother left the hospital against medical advice and had no contact with DSS. On 23 August 2021, DSS filed a petition alleging Julie was a neglected and dependent juvenile and took her into nonsecure custody.

On 18 August 2021, SW Barker visited Respondent-Father at the Wilkes County Jail to inform him of Julie's birth and request that he provide another temporary safety placement for the minor children. Respondent-Father named one of his older daughters, as well as a friend and his wife, as potential placements. DSS could not approve Respondent-Father's daughter as a placement. Respondent-Father did not have a phone number for his friend, but he believed the friend and his wife lived somewhere on Highway 115 near a Dollar General. SW Barker was unable to locate them in a phone book or online. She also went out to the area described by Respondent-Father but was unable to locate them.

On 30 June 2022, all three minor children were adjudicated neglected, placed in DSS custody, and entered foster care. On 16 March 2023, DSS filed petitions to terminate both parents' parental rights in all three minor children. These Petitions came on for hearing on 17 November 2023. During these proceedings, Respondent-Father's counsel called David Borrows, the Guardian ad litem (GAL), to testify. Counsel for Respondent-Father elicited testimony that on 7 October 2022, GAL had visited Respondent-Father in prison "to find out what his intentions were and whether or not, if in the event TPR was ordered, whether he would intent [sic] to fight that." Counsel asked GAL: "And did [Respondent-Father] sign relinquishment papers at that point?" GAL responded: "I don't think it was a relinquishment paper at all. It was just a statement saying that he had no intention to fight the order [terminating his parental rights], if he were ordered by the court." GAL further testified he had written the statement Respondent-Father signed and he subsequently submitted it to the trial court. The statement read:

> I, [Respondent-Father] am the father of [Julie, Karen and Amy].

> I understand that my children are currently in foster care and are being well cared for. I believe it is in my childrens' [sic] best interest for them to remain in their present situation.
>
> I am informed by the Guardian ad Litem that the present care-givers wish to adopt my children. I state that I have no intention to oppose a court order to this effect.

GAL did not contact Respondent-Father's attorney, and his attorney was not present during this conversation with GAL. Counsel for GAL asked the trial court to admit the signed statement. No party objected to admission of the statement, and the trial court admitted it as evidence.

On 15 December 2023, the trial court entered Orders terminating both parents' parental rights in Karen, Amy, and Julie. In its Orders, the trial court concluded grounds existed to terminate Respondent-Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) and (9). The Orders were served 29 December 2023. Respondent-Father timely filed Notice of Appeal on 16 January 2024. On 9 May 2024, Respondent-Father filed a Petition for Writ of Certiorari to address certain defects in his Notice of Appeal.

Appellate Jurisdiction

[1] The trial court filed its Orders terminating Respondent-Father's parental rights on 15 December 2023; however, the Orders were not served until 29 December 2023. Our Rules of Appellate Procedure provide that in appeals filed under N.C. Gen. Stat. § 7B-1001, notice of appeal is governed by Section 7B-1001(b) and (c). N.C. R. App. P. 3.1(b) (2023). Section 7B-1001(b), in turn, states notice of appeal "shall be given in writing by a proper party as defined in G.S. 7B-1002 and shall be made within 30 days after entry *and service of the order* in accordance with G.S. 1A-1, Rule 58." N.C. Gen. Stat. § 7B-1001(b) (2023) (emphasis added).

Here, the Orders were not served until 29 December 2023. Under Rule 58 of our Rules of Civil Procedure, when a party fails to serve a copy of the judgment upon the other parties within three days after the judgment is entered, "[a]ll time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement[.]" N.C. Gen. Stat. § 1A-1, Rule 58 (2023). Thus, because the Orders were not served on Respondent-Father for fourteen days after their filing, the thirty-day window for Respondent-Father to file notice of appeal was tolled until the Orders were served. Therefore, Respondent-Father

had thirty days from service of the Orders on 29 December 2023 to file notice of appeal. He did so on 16 January 2024, well within that thirty-day window. Accordingly, Notice of Appeal was timely filed.

Additionally, although Respondent-Father's Notice of Appeal contained two defects, these defects are non-jurisdictional, and we conclude his Notice of Appeal was sufficient. First, Respondent-Father incorrectly designated his appeal to the North Carolina Supreme Court rather than the Court of Appeals. However, this Court has previously held "a defendant's failure to designate this Court in a notice of appeal does not warrant dismissal of the appeal where this Court is the only court possessing jurisdiction to hear the matter and the [opposing party] has not suggested that it was misled by the defendant's flawed notice of appeal." *State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624 (2014) (citing *State v. Ragland*, 226 N.C. App. 547, 552-53, 739 S.E.2d 616, 620 (2013)). *See also Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (notice of appeal was sufficient to confer jurisdiction where "[d]efendants could fairly infer Plaintiff's intent to appeal to this Court, as this Court is the only court with jurisdiction over Plaintiff's appeal.").

Second, Respondent-Father's Notice of Appeal failed to include the correct statute providing for his right to appeal. As above, this Court has previously heard appeals despite a party's failure to include the correct statute in its notice of appeal. *E.g.*, *Maldjian v. Bloomquist*, 245 N.C. App. 222, 225, 782 S.E.2d 80, 83 (2016) (noting defendants' failure to include a statutory citation in their notice of appeal, but determining "[n]onetheless, we review defendants' appeal . . ."). Thus, neither defect in Respondent-Father's Notice of Appeal is jurisdictional. Therefore, this Court has jurisdiction to hear his appeal.[3]

Issues

The issues on appeal are whether the trial court erred by: (I) admitting the signed statement procured by GAL; and (II) concluding grounds existed to terminate Respondent-Father's parental rights.

Analysis

I. Admission of Signed Statement

[2] Respondent-Father contends the trial court admitted and considered as evidence GAL's "makeshift surrender" and, in doing so, denied

3. Consequently, because we have appellate jurisdiction, we dismiss Respondent-Father's Petition for Writ of Certiorari.

Respondent-Father his right to counsel and right to fundamentally fair procedures. More specifically, Respondent-Father argues his interaction with GAL in which he signed the surrender violated his right to counsel, which is "an extension of a father's right to fundamental[ly] fair procedures" because GAL "encouraged [Respondent-Father] to surrender his parental rights" in the absence of counsel.

As an initial matter, DSS and GAL correctly note the trial court would not have heard the contested evidence had Respondent-Father not called GAL to testify and elicited the testimony about which Respondent-Father now complains. It is well-established under our caselaw that a party is not entitled to seek relief on appeal from a trial court action the party invited. *See, e.g.*, *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) ("Ordinarily one who causes . . . the court to commit error is not in a position to repudiate his action or assign it as ground for a new trial."); *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced."). *See also* N.C. Gen. Stat. § 15A-1443(c) (2023) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.").

Here, counsel for Respondent-Father called GAL to testify and affirmatively elicited testimony tending to show Respondent-Father signed a statement that he would not oppose the entry of an order allowing the children to be adopted by their current foster family. Counsel for Respondent-Father specifically asked GAL:

> [Counsel]: And then you did go see [Respondent-Father] while he was in Roanoke, right?
>
> [GAL]: I did.
>
> [Counsel]: And what was the nature of that visit?
>
> [GAL]: I wanted to find out what his intentions were and whether or not, if in the event if TPR was ordered, whether he would intent [sic] to fight that.
>
> [Counsel]: And did he sign relinquishment papers at that point?
>
> [GAL]: I don't think it was a relinquishment paper at all. It was just a statement saying that he had no intention to fight the order, if he were ordered by the court.
>
> . . . .

> [Counsel]: Were you trying to act in the best interest of the minor children?
>
> [GAL]: Absolutely.

Thus, even if the trial court's admission and consideration of GAL's testimony was error, such error was invited by Respondent-Father and, consequently, he is not entitled to relief on appeal.

Even setting aside any invited error, Respondent-Father failed to preserve his right to challenge the admission and consideration of GAL's evidence on review. Our Rules of Appellate Procedure provide:

> 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2023).

The transcript of the proceeding reflects no such objection, motion, or request by Respondent-Father as to either the GAL's testimony or the admission of Respondent-Father's signed statement into evidence. Thus, this issue was not preserved for appellate review. In his briefing to this Court, Respondent-Father makes no argument to the contrary. Therefore, this issue is not preserved for appellate review.

II. Termination of Parental Rights

[3] Respondent-Father contends the trial court erred in terminating his parental rights in the minor children because it impermissibly based its determination grounds existed to terminate his parental rights solely on his incarceration. We disagree.

"A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists." *In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). "The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law." *Id.* Unchallenged findings of fact are binding on review.

Koufman v. Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted).

"If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child." *In re C.C.*, *J.C.*, 173 N.C. App. 375, 380-81, 618 S.E.2d 813, 817 (2005) (citation omitted). "The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights." *Id.* at 380-81, 618 S.E.2d at 817. "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (citation and quotation marks omitted).

Here, the trial court concluded Respondent-Father's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), which provides a court may terminate a party's parental rights upon a finding

> [t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6) (2023). Under N.C. Gen. Stat. § 7B-101, a "dependent juvenile" is one "in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2023). "Thus, the trial court's findings regarding this ground 'must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.' " *In re L.R.S.*, 237 N.C. App. 16, 19, 764 S.E.2d 908, 910 (2014) (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)).

In support of this Conclusion, the trial court made specific Findings that are unchallenged on appeal, including the following:

> 25. On April 29, 2021, the Respondent Father was arrested for receiving stolen goods. The social worker is unaware of the length of this incarceration.
>
> . . . .
>
> 27. On or about July 4, 2021, the Respondent Father was arrested for larceny of a firearm, drug related charges, as well as other matters. He has not been out of custody since that day.
>
> . . . .
>
> 29. On or about July 8, 2021, [Paternal Aunt] contacted [DSS] and informed that she and her husband could not be long term placement for [Karen] and [Amy] and asked [DSS] to find a good home for the children.
>
> . . . .
>
> 34. In addition, Social Worker Barker spoke to the Respondent Father at the jail to ascertain any other possible placements for all three of his daughters. He named his older daughter, . . . who could not be approved by [DSS]. He also named Tom and Lisa Parsons. The Respondent Father had been incarcerated with Mr. Parsons. He did not have a phone number for the Parsons', but thought that they lived somewhere on Highway 115 near a Dollar General. The social worker searched the phone book and on line [sic] in an attempt to locate the Parsons'. She also went out to the area of the Dollar General to try to locate them with no luck. The Respondent Mother could not be located to ask for potential temporary placements.
>
> . . . .
>
> 55. Although the Respondent Father did provide two temporary safety placements for [Karen] and [Amy], neither were willing to care for [Karen] and [Amy] long term. Social Worker Debbie Barker investigated two additional possible placements recommended by the Respondent Father. His older daughter . . . could not be approved by [DSS]. He also named Tom and Lisa Parsons. Social Worker Barker could not locate them. Therefore, he

> lacked an appropriate alternative child care arrangement as to [Karen].
>
> . . . .
>
> 59. The Respondent Father was sentenced as a habitual felon and is scheduled to be released from incarceration on May 13, 2032.
>
> 60. The Respondent Father is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of N.C.G.S. 7B-101, and there is a reasonable probability that the incapability will continue for the foreseeable future.
>
> . . . .
>
> 63. Incarceration alone is neither a sword or a shield in a termination of parental rights decision. Though it is clear to the Court that the Respondent Father loves the minor child, there is a reasonable probability that the Respondent Father's incapability will continue for the foreseeable future. For the next nine years, he will not be able to provide and care for the minor child or have a personal relationship with her. These things are integral to the happiness, well-being and safety of the minor child, and the Respondent Father will not be in a position to provide these for the minor child.

The trial court made identical Findings in its Orders regarding Amy and Julie. Further, Kirsten Shepherd (SW Shepherd), a social worker for DSS, testified about Respondent-Father's capacity to care for the children while incarcerated:

> [Counsel for DSS]: [Respondent-Father] was doing what he could while incarcerated in jail or prison?
>
> [SW Shepard]: Right.
>
> [Counsel for DSS]: But, obviously, he could not establish housing for the children?
>
> [SW Shepard]: Correct.
>
> [Counsel for DSS]: He wasn't able to visit the children in person–
>
> [SW Shepard]: Correct.

> [Counsel for DSS]: –because of his circumstances? Obviously he couldn't be employed or supervise children while in jail or prison?
>
> [SW Shepard]: Correct.

Respondent-Father contends the trial court erred in concluding this ground for termination existed because its "entire basis for the dependency termination ground was [Respondent-Father]'s incarceration." This Court has consistently affirmed that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (quoting *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (2003)). However, as the above demonstrates, the trial court considered, beyond the fact of Respondent-Father's incarceration, the substantial length of Respondent-Father's sentence, its effect upon the minor children, the minor children's physical and emotional well-being, and Respondent-Father's lack of appropriate alternative placements for the children. The trial court expressly noted that because of his incarceration, "[f]or the next nine years, [Respondent-Father] will not be able to provide and care for the minor child[ren] or have a personal relationship with [them]. These things are integral to the happiness, well-being and safety of the minor child[ren][.]" Consideration of a parent's incarceration in this way is consistent with our precedent.

Our Supreme Court in *In re A.L.S.* considered an appeal by a respondent-parent whose parental rights had been terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). 375 N.C. 708, 851 S.E.2d 22 (2020). There, the respondent-parent was incarcerated during the proceedings and appeal, and she faced twenty-two to forty-two additional months of imprisonment. *Id.* at 714, 851 S.E.2d at 27. The Court explained "[t]he fact that respondent-mother faces an *extended period of incarceration* regardless of the exact date upon which she is scheduled to be released provides ample support for the trial court's determination that she was incapable of providing for the proper care and supervision of the children and that there was a reasonable probability that her incapability would continue for the foreseeable future." *Id.* (citations omitted) (emphasis added). Likewise, this Court has also found extended periods of incarceration can render a parent incapable of providing sufficient care and supervision of a minor child. *See, e.g.*, *In re L.R.S.*, 237 N.C. App. at 21, 764 S.E.2d at 911; *In re N.T.U.*, 234 N.C. App. 722, 735, 760 S.E.2d 49, 58 (2014).

Additionally, the Record establishes Respondent-Father was unable to provide an appropriate alternative childcare arrangement for the

minor children. The minor children, upon Respondent-Father's recommendation, had on two separate occasions been placed with caretakers; however, neither placement was willing to provide long-term care for the children. Most recently, Respondent-Father proposed his adult daughter, as well as a friend of his. As the trial court noted in its Findings, DSS was unable to approve Respondent-Father's daughter as a placement and DSS was unable to locate Respondent-Father's friend. Thus, the Record supports the trial court's Finding that Respondent-Father lacked an appropriate alternative childcare arrangement, and that Respondent-Father is unable to provide proper care and supervision for the minor children. Therefore, the trial court did not err in concluding Respondent-Father's parental rights were subject to termination based on dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).[4] Further, Respondent-Father makes no arguments as to disposition. Consequently, the trial court did not err in concluding it was in the best interests of the children to terminate Respondent-Father's parental rights and entering its Orders terminating Respondent-Father's parental rights.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Orders terminating Respondent-Father's parental rights in Karen, Amy, and Julie.

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

4. Because we conclude this ground has ample support in the trial court's Findings, we need not address Respondent-Father's arguments as to the remaining termination ground found by the trial court under N.C. Gen. Stat. § 7B-1111(a)(9). *See In re P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d at 246 ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds." (citation and quotation marks omitted)).

CORNELIUS ANTONIO KINLAW, PLAINTIFF/PETITIONER
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, DEFENDANT/RESPONDENT

No. COA23-1101

Filed 17 September 2024

1. Administrative Law—health care personnel registry—alleged neglect or abuse—procedural due process—appeal barred by statute of limitations

In a contested case arising from the listing of petitioner—a health care worker—on the North Carolina Health Care Personnel Registry for charges of patient abuse and neglect (as required by N.C.G.S. § 131E-256(a)), the superior court did not violate petitioner's procedural due process rights in dismissing his appeal for lack of subject jurisdiction because, although petitioner had a liberty interest with which the State had interfered (being accused of wrongful actions that would likely hinder his future employment in the health care industry), the statute of limitations pertinent to his appeal (as found in N.C.G.S. § 150B-23(f)) was thirty days following the date on which the agency placed notice of its decision in the mail to petitioner, irrespective of when the notice was received.

2. Administrative Law—health care personnel registry—statute of limitations—incorrect appeal deadline in agency notice—equitable estoppel inapplicable

In a contested case arising from the listing of petitioner—a health care worker—on the North Carolina Health Care Personnel Registry for charges of patient abuse and neglect (as required by N.C.G.S. § 131E-256(a)), the Court of Appeals rejected petitioner's alternative argument that respondent agency should be estopped from relying on the thirty-day statute of limitations for appeal from placement on the registry on the ground that the agency gave petitioner an incorrect deadline for filing such an appeal; subject matter jurisdiction rests upon the law alone, rendering the doctrine of equitable estoppel irrelevant in this circumstance.

3. Administrative Law—health care personnel registry—erroneous statement by agency employee—tolling of statute of limitations not required

In a contested case arising from the listing of petitioner—a health care worker—on the North Carolina Health Care Personnel

Registry for charges of patient abuse and neglect (as required by N.C.G.S. § 131E-256(a)), the superior court did not err in declining to toll the statute of limitations applicable to petitioner's appeal due to an erroneous statement made by an agency employee to petitioner regarding the appeal because that situation did not rise to the level of an exceptional circumstance that would justify such relief.

Appeal by petitioner from order entered 19 September 2023 by Judge Joseph N. Crosswhite in Cabarrus County Superior Court. Heard in the Court of Appeals 14 August 2024.

Duke University School of Law, by Charles R. Holton and Jesse H. McCoy, II, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Farrah R. Raja, for respondent-appellee.

FLOOD, Judge.

Cornelius Antonio Kinlaw ("Petitioner") appeals from an order denying his request for judicial review for lack of subject matter jurisdiction. Petitioner first argues the trial court's conclusion that, pursuant to N.C. Gen. Stat. § 131E-256, it lacked subject-matter jurisdiction over Petitioner's appeal, was erroneous and in violation of Petitioner's procedural due process rights under the North Carolina Constitution and the United States Constitution. Petitioner further contends, in the alternative, the North Carolina Department of Health and Human Services ("DHHS") should be estopped from relying on the thirty-day statute of limitations to dismiss Petitioner's claim for lack of subject matter jurisdiction, or the statute of limitations should have been tolled. After careful review, we conclude: Petitioner had adequate notice, and his due process rights were not violated; Petitioner failed to comply with the required statutory provisions, which failed to confer subject matter jurisdiction on the trial court; and this case does not rise to the circumstances for which a statute of limitations may be tolled.

I. Factual and Procedural Background

Petitioner was working as a member of the health care field at the Atrium Health Behavioral Health clinic in Charlotte, North Carolina, when DHHS began investigating allegations against Petitioner of patient abuse and neglect when Petitioner "aggressively handled the [patient] and pushed the [patient] to the floor[.]" DHHS mailed a notice letter to

Petitioner via certified mail on 4 October 2022, which contained notice of the investigation, and stated that Petitioner's name was being placed on the North Carolina Health Care Personnel Registry for charges of patient abuse and neglect. The letter also contained further instructions on Petitioner's right to appeal.

On 6 October 2022, Petitioner received a notification from the United States Postal Service informing him that he was to receive a letter from DHHS that day, but Petitioner stated the letter did not arrive. Two days later, on 8 October 2022, Petitioner went to the post office to inquire about the letter and was informed that the letter was still in transit. On 10 October 2022, after another two days of not receiving the letter, Petitioner returned to the post office, where he was again told the letter was in transit. On that same day, Petitioner spoke with Paula Evans, DHHS's investigator for Petitioner's case, and Ms. Evans instructed him to wait for the letter. Ms. Evans further informed Petitioner that once Petitioner received the letter, he would have thirty days to appeal.

Over a week later, on 19 October 2022, Petitioner still had not received the letter and requested Ms. Evans to email him the letter. Ms. Evans emailed the letter to Petitioner the following day.

Once Petitioner received the letter, the instructions to appeal informed him to call the Office of Administrative Hearings ("OAH") for more information and provided him the number to do so. Petitioner called OAH eight times between 25 October and 28 October 2022 before receiving the necessary information to appeal to the OAH. On 6 November 2022, Petitioner emailed his appeal to the OAH as directed, and it was filed on 7 November 2022.

Upon appeal to the OAH, on 22 March 2023, Administrative Law Judge Selina Malherbe dismissed Petitioner's appeal for lack of subject matter jurisdiction. In doing so, Judge Malherbe found that Petitioner had failed to timely file his appeal, reasoning that, per N.C. Gen. Stat. § 131E-256, an appellant must file his appeal within thirty days following the mailing of DHHS's written notice; Petitioner filed his on 7 November 2022, more than thirty days following DHHS's 4 October 2022 mailing of the letter. Petitioner appealed to the trial court on 13 April 2023, and was again dismissed for lack of subject matter jurisdiction. Petitioner timely appealed to this Court on 26 September 2023.

II. Jurisdiction

This Court has jurisdiction to review Petitioner's appeal as an appeal from the final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, Petitioner argues (A) the trial court's conclusion that, pursuant to N.C. Gen. Stat. § 131E-256, it lacked subject matter jurisdiction over Petitioner's appeal, was erroneous, and in violation of Petitioner's procedural due process rights under the North Carolina Constitution and the United States Constitution. Petitioner also contends that, in the alternative, either (B) DHHS should be estopped from relying on the thirty-day statute of limitations to dismiss Petitioner's claim for lack of subject matter jurisdiction, or (C) the statute of limitations should have been tolled. We address each argument, in turn.

A. Procedural Due Process

[1] This Court reviews de novo an agency's final decision for issues of contested constitutional violations. N.C. Gen. Stat. §§ 150B-51(b)(1)–(4), (c) (2023). Under a de novo review, "the reviewing court considers the matter anew and freely substitutes its own judgment for the agency's." *Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 69, 692 S.E.2d 96, 102 (2010) (citation and internal quotation marks omitted) (cleaned up).

Pursuant to the United States Constitution, "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const., amend. XIV, § 1. The North Carolina Constitution similarly provides that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Our Supreme Court has held that "[t]he term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *Rhyne v. K–Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (citation and internal quotation marks omitted).

"The Due Process Clause provides two types of protection—substantive and procedural due process." *State v. Williams*, 235 N.C. App. 201, 205, 761 S.E.2d 662, 665 (2014) (citation omitted). "Procedural due process restricts governmental actions and decisions which 'deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.' " *Peace v. Emp. Sec. Comm'n of N.C.*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18, 31 (1976)). "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Id.* at 322, 507 S.E.2d at 278 (citation omitted).

To examine a procedural due process claim, this Court must first "determine whether there exists a liberty or property interest which has been interfered with by the State[,]. . .[and] second, we must determine whether the procedures attendant upon that deprivation were constitutionally sufficient." *Delhaize Am., Inc. v. Lay*, 222 N.C. App. 336, 343, 731 S.E.2d 486, 491 (2012) (citation and internal quotation marks omitted).

1. Liberty Interest

First, Petitioner contends he has a liberty interest with which the State has interfered. We agree.

"One of the liberty interests encompassed in the Due Process Clause of the Fourteenth Amendment is the right 'to engage in any of the common occupations of life[.]' " *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923)). Our North Carolina Supreme Court has previously held that "[t]he right of a citizen to live and work where he will is offended when a state agency unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities." *Id.* at 724, 260 S.E.2d at 617. Thus, "where a state agency publicly and falsely accuses a discharged employee of dishonesty, immorality, or job[-]related misconduct, considerations of due process demand that the employee be afforded a hearing in order to have an opportunity to refute the accusation and remove the stigma upon his reputation." *Id.* at 724, 260 S.E.2d at 617 (citations omitted).

Under N.C. Gen. Stat. § 131E-256, DHHS maintains a registry of all health care personnel who DHHS has found to have, *inter alia*, committed abuse or neglect within a health care facility. *See* N.C. Gen. Stat. § 131E-256(a) (2023). A member of the health care personnel who wishes to contest such findings before being placed on the registry must file a petition "within [thirty] days of the mailing of the written notice of [DHHS]'s intent to place its findings about the person in the [registry]." N.C. Gen. Stat. § 131E-256(d) (2023).

In *Presnell*, the plaintiff was dismissed from her job as the manager of an elementary school cafeteria after being accused of bringing liquor into work. 298 N.C. at 717–18, 260 S.E.2d at 613. The plaintiff sued for defamation and wrongful discharge. *Id.* at 718, 260 S.E.2d at 613. The trial court dismissed the plaintiff's defamation claim, finding the claim failed to state a claim for defamation, but the Court of Appeals reversed, holding a claim for defamation had been sufficiently made. *Id.* at 718–19, 260 S.E.2d at 613. This matter eventually came before our Supreme Court, whereupon the Court concluded that "[b]y alleging acts of defamation

concurrent with and related to the termination of her employment, [the] plaintiff's complaint does no more than state a claim of right to an [o]pportunity to be heard in a meaningful time, place, and manner[,]" thus, invoking a due process claim. *Id.* at 724, 260 S.E.2d at 617. The Supreme Court proceeded to analyze the procedural due process claim and held that the plaintiff had a "colorable claim" of a constitutionally protected liberty interest. *Id.* at 724, 260 S.E.2d at 617. The Supreme Court reasoned that because the plaintiff's dismissal from her job was based on "alleged unsupported charges," this "might wrongfully injure her future placement possibilities" if left unrefuted. *Id.* at 724, 260 S.E.2d at 617. The Court concluded the plaintiff's due process rights would be satisfied "by providing [the] plaintiff an opportunity to clear her name in a hearing of record [e]ither before her discharge [o]r within a reasonable time thereafter." *Id.* at 724, 260 S.E.2d at 617.

Here, like in *Presnell*, Petitioner has been accused of wrongful actions that will likely hinder his future employment in the health care industry, since the registry is available for all health care facilities to review. *See* N.C. Gen. Stat. § 131E-256(d2) (2023) ("Before hiring health care personnel into a health care facility or service, every employer at a health care facility shall access the Health Care Personnel Registry and shall note each incident of access in the appropriate business files."). Thus, Petitioner has a liberty interest at stake that, if left unrefuted, "might wrongfully injure [Petitioner's] future placement possibilities." *See Presnell*, 298 N.C. at 724, 260 S.E.2d at 617.

Because Petitioner has a liberty interest that has been interfered with, we now assess whether DHHS's procedures for appealing placement on the registry were constitutionally sufficient. *See Delhaize Am.*, 222 N.C. App. at 343, 731 S.E.2d at 491.

2. Procedures

Second, Petitioner contends that the trial court's enforcement of the thirty-day statute of limitations against his appeal was in violation of his procedural due process rights. We disagree.

Our courts have long held that the North Carolina Constitution's Due Process Clause "has the same meaning as due process of law under the Federal Constitution." *State v. Garrett*, 280 N.C. App. 220, 235, 867 S.E.2d 216, 226 (2021). Procedural due process "requires that an individual receive adequate notice and a meaningful opportunity to be heard before he is deprived of life, liberty, or property." *Herron v. N.C. Bd. of Exam'rs for Eng'rs & Surveyors*, 248 N.C. App. 158, 166, 790 S.E.2d 321, 327 (2016) (citation and internal quotation marks omitted).

Due process does not require "actual notice before the government may" impose on one's liberty interest, but "[r]ather, due process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *St. Regis of Onslow Cnty. v. Johnson*, 191 N.C. App. 516, 519–20, 663 S.E.2d 908, 911 (2008) (citation and internal quotation marks omitted). Deprivation of a protected interest must be "implemented in a fair manner." *Garrett*, 280 N.C. App. at 236, 867 S.E.2d at 226. "Whether a party has adequate notice is a question of law." *Trivette v. Trivette*, 162 N.C. App. 55, 58, 590 S.E.2d 298, 302 (2004) (citation omitted).

When filing an action against being placed on the registry, a member of the health care profession must file a petition "within [thirty] days of the mailing of the written notice of the Department's intent to place its findings about the person in the [registry]." N.C. Gen. Stat. § 131E-256(d). Because N.C. Gen. Stat. § 131E-256(d) does not explicitly state when notice commences, we look to the general statute of N.C. Gen. Stat. § 150B-23(f) regarding administrative cases, which provides,

> [t]he *time limitation* [for filing a petition for a contested case hearing in the OAH], whether established by another statute, federal statute, or federal regulation, or this section, *commences when notice is given* of the agency decision to all persons aggrieved that are known to the agency by personal delivery, electronic delivery, or *by the placing of the notice in an official depository of the United States Postal Service* wrapped in a wrapper addressed to the person at the latest address given by the person to the agency.

N.C. Gen. Stat. § 150B-23(f) (2023) (emphasis added).

This Court has held that, under this statute, "a petitioner is *deemed* to have notice of a final agency decision as soon as the agency places the decision in the mail, even if it takes several days for the petitioner to receive it." *Krishnan v. N.C. Dep't of Health & Hum. Servs.*, 274 N.C. App. 170, 173, 851 S.E.2d 431, 433 (2020) (citing N.C. Gen. Stat. § 150B-23(f)). Thus, here, Petitioner was deemed by law to have had notice from the date the notice was mailed on 4 October 2024. *See Krishnan*, 274 N.C. App. at 173, 851 S.E.2d at 433; *see also* N.C. Gen. Stat. § 150B-23(f). Further, this Court has never held, upon our review of N.C. Gen. Stat. § 131E-256(d), that thirty days was an inadequate amount of time to appeal, and we decline to do so now.

"The power of the Legislature of each state to enact statutes of limitation and rules of prescription is well recognized and unquestioned." *Sayer v. Henderson*, 225 N.C. 642, 643, 35 S.E.2d 875, 876 (1945). North Carolina courts have "traditionally acknowledged the rule of statutory construction that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must adhere to its plain and definite meaning." *Gummels v. N.C. Dep't of Hum. Res.*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990) (citation omitted). "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *U.S. v. Locke*, 471 U.S. 84, 101, 105 S. Ct. 1785, 1796, 85 L. Ed. 2d 64 (1985).

Petitioner cites *Flippin v. Jarrell* in support of his argument that a thirty-day limit is constitutionally inadequate as applied to himself. 301 N.C. 108, 270 S.E.2d 482 (1980). In *Flippin*, the plaintiff brought suit after a recently enacted statute shortened the statute of limitations for bringing medical malpractice claims, leaving the plaintiff with a thirty-nine-day grace period to bring suit, as opposed to the previously longer period the plaintiff had to bring such a claim. *Id.* at 114, 270 S.E.2d at 486–87. This matter eventually came before our Supreme Court, whereupon they held that a grace period of thirty-nine days was "constitutionally insufficient and unreasonable" as applied to the plaintiff. *Id.* at 115, 270 S.E.2d at 487.

Petitioner's reliance on *Flippin*, however, is misplaced. In *Flippin*, the plaintiff's time limitation was shortened by a newly enacted statute, and our Supreme Court considered on appeal whether the plaintiff had an adequate grace period to file her appeal. *Id.* at 115, 270 S.E.2d at 487. Here, on appeal, there is no issue regarding the shortening of an appellate statute of limitations, nor regarding a grace period for Petitioner to file appeal. As such, our Supreme Court's holding in *Flippin* is immaterial to the instant case.

Petitioner's current argument fails because, regardless of when he eventually received actual notice, he was deemed by law to have received notice on 4 October 2022. *See Krishnan*, 274 N.C. App. at 173, 851 S.E.2d at 433. We decline to hold that thirty days is an inadequate amount of time for notice as provided by the General Assembly, and accordingly conclude Petitioner's due process rights were not violated. *See Sayer*, 225 N.C. at 643, 35 S.E.2d at 876.

B. Subject Matter Jurisdiction and Estoppel

[2] Petitioner argues, in the alternative, DHHS should be estopped from relying on the thirty-day statute of limitations to dismiss for lack of subject matter jurisdiction because DHHS erroneously informed Petitioner of an incorrect filing deadline. We disagree.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *Hillard v. Hillard*, 223 N.C. App. 20, 22, 733 S.E.2d 176, 179 (2012) (citation and internal quotation marks omitted).

This Court has held that "because the right to appeal to an administrative agency is granted by statute, compliance with statutory provisions is necessary to sustain the appeal." *Gummels v. N.C. Dep't of Hum. Res.*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990).

As stated above, when a member of the health care profession wishes to appeal his or her placement on the health care violations' registry by DHHS, the member must file a petition "within 30 days of the mailing of the written notice of the Department's intent to place its findings about the person in the [registry]." N.C. Gen. Stat. § 131E-256(d). If the appeal is not filed within the statutorily set thirty days, the right to appeal is lost. *See Gummels*, 98 N.C. App. at 677, 392 S.E.2d at 114.

Our courts have held that "[s]ubject-matter jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *Burgess v. Smith*, 260 N.C. App. 504, 509, 818 S.E.2d 164, 168 (2018) (citation and internal quotation marks omitted) (cleaned up). "[T]he doctrine[] of equitable estoppel . . . [is] irrelevant to issues of subject-matter jurisdiction[.]" *Id.* at 512, 818 S.E.2d at 169.

It is undisputed that Petitioner filed his appeal after thirty days. Petitioner was deemed by law to have notice on 4 October 2022 and should have filed within thirty days as required by N.C. Gen. Stat. § 131E-256(d). Petitioner's argument that DHHS should be equitably estopped is irrelevant as to whether subject matter jurisdiction was conferred on the trial court. *See Burgess*, 260 N.C. App. at 512, 818 S.E.2d at 169. As such, because Petitioner failed to comply with the statutory provisions, the trial court correctly found that it lacked subject matter jurisdiction. *See Gummels*, 98 N.C. App. at 677, 392 S.E.2d at 114.

C. Subject Matter Jurisdiction and Tolling

[3] Finally, Petitioner contends that the statute of limitations should have been tolled because Petitioner relied on an erroneous statement of the law by Ms. Evans. We disagree.

"The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court." *Dorsey v. Univ. of N.C. at Wilmington*, 122 N.C. App. 58, 62–63, 468 S.E.2d 557, 560 (1996) (citation omitted). N.C. Gen. Stat. § 150B-51(b) sets forth this standard of review, and states that:

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

N.C. Gen. Stat. § 150B-51(b) (2023). "An appellate court's standard of review of an agency's final decision . . . has been, and remains, whole record on the findings of fact and *de novo* on the conclusions of law." *Fonvielle v. N.C. Coastal Res. Comm'n*, 288 N.C. App. 284, 287, 887 S.E.2d 93, 96 (2023) (citation omitted). "Where there is no dispute over the relevant facts, a lower court's interpretation of a statute of limitations is a conclusion of law that is reviewed *de novo* on appeal." *Goetz v. N.C. Dep't of Health & Hum. Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010) (citation omitted).

"Statutes of limitations . . . are subject to equitable tolling . . . when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *CTS Corp. v. Waldburger*, 573 U.S. 1, 9, 134 S. Ct. 2175, 2183, 189 L. Ed. 2d 62 (2014) (citation omitted) (cleaned up).

In support of his argument, Petitioner cites *House of Raeford Farms, Inc. v. State ex rel. Env't Mgmt. Comm'n*, where our Supreme Court

held that a statute of limitations should have been tolled where the trial court erroneously asserted subject matter jurisdiction over an administrative agency's decision before the appealing filing deadline passed, and the petitioners failed to comply with the statutory appealing provisions based on the trial court's assertion. 338 N.C. 262, 267, 449 S.E.2d 453, 457 (1994). The Court determined that the statute of limitations should be tolled where a petitioner relies on a trial court's assertion of having subject matter jurisdiction and, because of that assertation, fails "to comply with the statutory time requirements for seeking administrative review[.]" *Id.* at 267, 449 S.E.2d at 457.

The circumstances of the present case do not rise to the exceptional circumstances under *House of Raeford Farms*. Unlike the petitioners in *House of Raeford Farms*, Petitioner in this case did not rely on a trial court's assertion of subject matter jurisdiction, which caused him to fail to comply with the statutory provisions to appeal. *See id.* at 267, 449 S.E.2d at 457. Instead, Petitioner simply failed to comply with the thirty-day deadline of which he was deemed by law to have notice of. *See Krishnan*, 274 N.C. App. at 173, 851 S.E.2d at 433.

Because Petitioner's untimely filing was not shown to be caused by an "extraordinary circumstance," we hold that the trial court correctly declined to toll the statute of limitations. *See CTS Corp.*, 573 U.S. at 9, 134 S. Ct. at 2183, 189 L. Ed. 2d at 62.

IV. Conclusion

We conclude Petitioner's due process rights were not violated, as Petitioner was deemed by law to have notice for thirty days, and we decline to hold that thirty days is an inadequate amount of time for notice. Petitioner's equitable estoppel argument has no bearing on the issue of subject matter jurisdiction. Petitioner failed to comply with the statutory provisions to appeal and, thus, the trial court lacked subject matter jurisdiction. Further, this case does not rise to the circumstances for which a statute of limitations may be tolled. Accordingly, we affirm the lower court's decision to dismiss Petitioner's request for lack of subject matter jurisdiction.

AFFIRMED.

Judges MURPHY and COLLINS concur.

MILLSAPS v. HAGER

[295 N.C. App. 643 (2024)]

MARY K. MILLSAPS, DARRELL T. MILLSAPS, AND H&M ENTERPRISES & LOGISTICS OF STATESVILLE, INC., PLAINTIFFS
v.
DAVID B. HAGER, GAIL P. HAGER, AND HAGER TRUCKING CO., INC., DEFENDANTS

No. COA23-1028

Filed 17 September 2024

1. Appeal and Error—preservation of issues—contract dispute —lack of mutual assent—raised for first time on appeal

In a dispute between corporations regarding alleged misappropriation of revenue in which the trial court granted plaintiffs' motion to enforce a settlement agreement, defendants' argument that the agreement could not be enforced due to a lack of mutual assent regarding a material term of the agreement—regarding whether defendants would be jointly and severally liable to plaintiffs for a total sum of $385,000—was not preserved for appellate review because they did not raise the issue before the trial court; therefore, this issue was dismissed.

2. Contracts—intra-corporate dispute—settlement agreement —joint and several liability—notice of claim

In a dispute between corporations regarding alleged misappropriation of revenue, the trial court's order granting plaintiffs' motion to enforce a settlement agreement was affirmed where there was no merit to assertions by defendants (a husband and wife and their company) that plaintiffs failed to properly plead a claim for joint and several liability—which is not required under Civil Procedure Rule 8—or to give adequate notice to defendant wife of her potential joint and several liability. Based on the litigation materials, including the receiver's affidavit regarding sums owed by both the husband and the wife to the other corporation and the wife's affidavit disputing the facts and allegations against her, the wife was clearly put on notice of a potential claim for joint and several liability.

Appeal by Defendants from order entered 6 July 2023 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 28 May 2024.

Jones, Childers, Donaldson & Webb, PLLC, by Kevin C. Donaldson, for defendants-appellants.

Pope McMillan, P.A., by Clark D. Tew and Christian Kiechel, for plaintiffs-appellees.

STADING, Judge.

This appeal arises from an intra-corporate dispute and presents a single issue: whether the trial court erred in concluding that liability was joint and several as to all defendants in its order enforcing a settlement agreement between the parties. We dismiss in part and affirm in part the trial court's order for the reasons explained below.

I. Factual Background and Procedural History

The underlying action in this case was initiated on 30 July 2020 when plaintiffs Mary K. Millsaps and Darrell T. Millsaps filed a verified complaint against defendant David B. Hager and then-defendant H&M Enterprises & Logistics of Statesville, Inc. The complaint alleged that H&M was formed by David Hager and Darrell Millsaps in March 2009, with David Hager owning a fifty-one percent interest in the company and Darrell Millsaps owning the remaining forty-nine percent interest. Plaintiffs further alleged that David Hager exercised his control and management over H&M to abscond with and redirect corporate revenues—that rightfully belonged to the Millsaps—to himself, his immediate family members and for the benefit of Hager Trucking. Specifically, plaintiffs alleged that David Hager had directed corporate payments of $800 per week to his wife, Gail Hager, "for no valuable service provided to H&M" or the shareholders. Based on those allegations, the Millsaps advanced four primary claims for relief: (1) a derivative action seeking recovery of the misappropriated corporate funds; (2) production of corporate records and an accounting; (3) dissolution and appointment of a receiver; and (4) breach of fiduciary duty. The Millsaps also sought punitive damages and to pierce the corporate veil.

After defendants filed an answer and counterclaims on 4 March 2019, the parties consented to the appointment of a receiver. During the ensuing course of litigation, at the request of the receiver, H&M shifted from a defendant to a plaintiff in this suit. Additionally, plaintiffs filed an amended complaint in October 2020, adding Gail Hager as a defendant and asserting a claim for fraudulent transfer.

On 28 May 2021, plaintiffs moved for summary judgment. The trial court heard the motion on 2 December 2021, and on 20 December 2021 entered an order granting relief on plaintiffs' first, fourth, and fifth claims but denying summary judgment as to damages. Thereafter, the matter

was set for trial on 6 June 2022, but after a jury was empaneled and some testimony was presented, a mistrial was declared when the Millsaps fell ill with COVID-19. The trial was then set for the 3 October 2022 term of superior court but was automatically stayed once the Hagers filed for bankruptcy protection on 28 September 2022.

The matter was next set for trial in January 2023, but when the case was called for trial, the parties informed the trial court of the settlement agreement at issue here. Specifically, defendants' counsel informed the trial court that his clients had agreed to "enter into a consent judgment for the total sum of $385,000" with allocation among the three defendants to be resolved by counsel for defendants and counsel for plaintiffs. Counsel for plaintiffs agreed.

The next filing in the record of this matter came on 16 June 2023 in the form of plaintiffs' "Motion to Enforce Settlement Agreement." Therein plaintiffs asserted that "[d]espite agreeing to the material terms of the settlement in court, [d]fendants ha[d] refused to sign the consent judgment. . . . [because defendants alleged, they] had not agreed whether [the settlement] amount was to be assessed jointly and severally or against only one individual or another." Plaintiffs emphasized that defendants had represented to the trial court "that the dispute had been settled, announced the amount of the settlement, and announced that there was no need for trial." Plaintiffs then suggested that "[i]f [d]efendants disagree as to what the contribution towards such award should be by and between them, . . . they are entitled to seek contribution from each other" or bring an action against their shared counsel if they believed he acted outside his authority—although plaintiffs noted that the latter option would be unlikely to succeed given that the individual defendants had been present in court when the agreement was announced. Finally, they asked the trial court to enter judgment in the amount of $385,000 "against [d]efendents, jointly and severally."

At the hearing on plaintiffs' motion to enforce, the parties argued the question of joint and several liability particularly as to Gail Hager. Near the end of the hearing, defendants' counsel emphasized that "*this is the only issue*. I'm asking the [c]ourt to issue *a ruling that there is no joint and several liability* as it relates to David and Gail [Hager] based on the pleadings and based on the transcript and parties['] agreements." (Emphasis added). Defendants never suggested, much less argued, that the settlement agreement did not constitute a binding contract.

In its resulting order entered on 6 July 2023, the trial court first determined "that an issue exists in the settlement agreement, which was

reached on January 24, 2023, as to whether liability should be joint and several. However, both parties agree that the issue of joint and several liability is a matter of law that should be determined by [the trial c]ourt." The trial court then concluded that defendants' liability was joint and several and that plaintiffs "Motion to Enforce the Settlement Agreement" should be granted. Defendant timely appealed from that order.

II. Jurisdiction

This appeal lies of right under N.C. Gen. Stat. § 7A-27(b)(1) (2023) ("[A]ny final judgment of a superior court. . . .").

III. Analysis

Defendants argue that the trial court erred in finding liability to be joint and several as to defendants. Specifically, defendants contend: (1) there was no meeting of the minds between the parties as to joint and several liability—a material term—such that the settlement agreement was not a valid contract; and (2) even if a contract had been entered, "plaintiffs never made any claim for, nor sought, joint and several liability of the [current] defendants in any of their pleadings." Defendants' first position is not properly before this Court, and we are unpersuaded by their remaining contention.

A. Preservation of Defendants' First Issue on Appeal

[1] Defendants' first argument on appeal is that there was no "meeting of the minds" between the parties regarding a material term of the settlement agreement. Specifically, they maintain that, as of the June 2023 motion hearing, "[t]he allocation of the amount of the consent judgment as to each defendant was a material term that the parties still needed to agree upon." In other words, defendants assert that the settlement agreement was not a contract and thus was not enforceable at all.

In response, plaintiffs contend that the question of whether the settlement agreement constituted a contract is not properly before the Court on appeal because

> [d]efendants did not once raise this issue before the trial court. Instead, [d]efendants only asked the trial court to enter a proposed consent judgment, executing the settlement agreement they now seek to disengage themselves from, that created buckets of liability with certain damages joint and several between Gail Hager and Hager Trucking and certain damages joint and several between David Hager and Hager Trucking, but with no damages

> joint and several between Gail Hager and David Hager. . . . Furthermore, nowhere in [d]efendant[s'] brief do they contest the finding by the [trial c]ourt that "both parties agree that the issue of joint and several liability is a matter of law that should be determined by this [c]ourt as part of this hearing; and neither party objects to this [c]ourt deciding the issue as part of this hearing."

As plaintiffs then correctly note, "[t]he issue of lack of mutual assent in a contract is not reviewable when raised before an appellate court for the first time." *See Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, 222 N.C. App. 83, 88, 731 S.E.2d 837, 841 (2012) ("Because the arguments as to mutual assent . . . were not properly raised at the time of the motion [in the trial court], we will not consider them for the first time on appeal."). *See also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (noting that "the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]").

Our review of the transcript from the hearing on the motion to enforce confirms that while zealously arguing the issue of joint and several liability, defendants' counsel represented to the trial court that "[w]e agreed on a settlement which makes it a consent judgment." Defendants' counsel never argued or asked the trial court to rule that there was not a valid contract. Instead, he maintained that joint and several liability remained an issue that defendants asked the trial court to resolve. Accordingly, we hold that defendants' contention that the settlement agreement was not, in fact, a contract—raised the first time in this appeal—was not preserved for our consideration. That issue is, therefore, dismissed.

B. Standard of Review

Although the parties here disagree about the nature of the order from which this appeal was taken, they agree a *de novo* review is appropriate. Defendants assert that the appeal arises from an order "regarding a motion to enforce a settlement agreement" and thus urge that the summary judgment standard—*de novo* review—is appropriate. *See Hardin v. KCS Int'l Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009).

Plaintiffs emphasize that, at the hearing on their motion to enforce, the parties "asked the [trial c]ourt to make a determination on liability based upon the pleadings and prior orders in the case and determining whether [d]efendants Gail Hager and David Hager were potentially subject to any form of joint and several liability." Plaintiffs contend that this "action by the parties converted the hearing to one of a [bench]

trial on stipulated facts," the appellate standard of review for which is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, *cert. and disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). "We review conclusions of law from a bench trial de novo." *S. Seeding Serv. v. W.C. English*, 224 N.C. App. 90, 97, 735 S.E.2d 829, 834 (2012) (citation omitted).

C. Joint and Several Liability of Defendants

[2] We next address defendants' argument that the trial court erred "in finding liability to be joint and several as to all defendants" because "plaintiffs never made any claim for, nor sought joint and several liability of the defendants in any of their pleadings." Accordingly, defendants assert that plaintiffs failed to sufficiently plead or put Gail Hager on notice for a claim of joint and several liability. We disagree.

As to the first portion of defendants' position, North Carolina's Civil Procedure Rule 8 "requires only that a pleading contain 'a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief.' " *Feltman v. City of Wilson*, 238 N.C. App. 246, 251-52, 767 S.E.2d 615, 620 (2014) (quoting N.C. R. Civ. P. 8(a)(1) (brackets omitted)). In enacting Rule 8 "our General Assembly adopted the concept of notice pleading" and "[u]nder notice pleading, 'a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought.' " *Id.* (quoting *Wake Cty. v. Hotels.com, L.P.*, 235 N.C. App. 633, 646, 762 S.E.2d 477, 486 (2014)). No requirement to state a claim for joint and several liability in the complaint appears in that rule.

Moreover, as to notice, we agree with plaintiffs that defendants have been fully aware of the liability Gail Hager faces under the order appealed from. For example, the affidavit of the receiver dated 28 May 2021 noted, among other things, the following: "David & *Gail Hager* had an amount due to H&M Enterprises and Logistics of Statesville, Inc. in the amount of $356,873.74"; a "verbal agreement" between plaintiffs and *the Hagers* existed in which H&M would pay down a loan held in the name of *the Hagers personally*; that $16,226.83 of H&M funds had been used to pay utility bills for "the primary residence and rental properties of David & *Gail Hager*"; and "David & *Gail Hager* took salaries

in a disproportionate ratio compared to their respective ownerships in the company." (Emphasis added). Gail Hager then executed an affidavit on 20 July 2021 disputing the facts and allegations against her relating to the transfer of inventory, the payment of personal bills, and her personal work.

Accordingly, we agree with plaintiffs' assertion that as of the receiver's affidavit and Gail Hager's affidavit in the summer of 2021—some two years before the June 2023 filing of plaintiffs' motion to enforce the settlement agreement and the hearing on that motion later in the same month—the litigation materials in this case, including "the factual pleadings and other part[s] of the [amended] complaint, clearly put Gale Hager on notice of a potential claim for joint and several liability, [such that] it was her duty to, through discovery, motions for summary judgment, or otherwise, dispose of that possibility if she believed it to be in error."

IV. Conclusion

Defendants' argument challenging the existence of the settlement agreement on contractual grounds is dismissed. The trial court's order on plaintiffs' motion to enforce the settlement agreement is affirmed.

DISMISSED IN PART; AFFIRMED IN PART.

Judges ZACHARY and COLLINS concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF - NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR; DUKE ENERGY PROGRESS, LLC, PETITIONER; DUKE ENERGY CAROLINAS, LLC, PETITIONER

v.

ENVIRONMENTAL WORKING GROUP, INTERVENOR; 350 TRIANGLE, INTERVENOR; 350 CHARLOTTE, INTERVENOR; THE NORTH CAROLINA ALLIANCE TO PROTECT OUR PEOPLE AND THE PLACES WE LIVE, INTERVENOR; NC WARN, INTERVENOR; NORTH CAROLINA CLIMATE SOLUTIONS COALITION, INTERVENOR; SUNRISE MOVEMENT DURHAM HUB, INTERVENOR; DONALD E. OULMAN, INTERVENOR

No. COA23-760

Filed 17 September 2024

1. Utilities—revised net metering rates—investigation of costs and benefits of customer-sited generation—Commission's obligation—de facto investigation

Prior to approving proposed revised net energy metering (NEM) tariffs, the Utilities Commission is required, pursuant to the clear and unambiguous language of N.C.G.S. § 62-126.4, to conduct an investigation of the costs and benefits of customer-sited energy generation, an interpretation of the statute that is also consistent with other provisions of the Public Utilities Act. Here, although the Commission erroneously determined that it did not, itself, have to conduct such an investigation—only that an investigation must be held prior to its approval of revised rates—the record revealed that the Commission effectively conducted the required investigation by: opening a docket; soliciting comments from all interested parties; and compiling, reviewing, and weighing the evidence collected before making its decision. Therefore, the Commission's de facto investigation fulfilled its statutory obligation, and its order approving revised NEM rates was modified and affirmed.

2. Utilities—revised net metering rates—tariff designs—elimination of flat-rate class of customers—obligation to ensure payment of full fixed cost of service

The Utilities Commission did not violate the requirement in N.C.G.S. § 62-126.4 that it must "establish net metering rates under all tariff designs" when it approved revised net energy metering (NEM) rates that, by requiring all customers to participate in a "time-of-use" (TOU) rate schedule, eliminated a previously-existing class of "flat-rate" NEM customers (who had paid the same rate of electricity purchased at any time of day, in contrast to the variable TOU rates). According to the clear and unambiguous language of the

statute, the Commission was required to establish "nondiscriminatory" NEM rates to ensure that every customer pay its full fixed cost of service under any of the offered tariff designs—not to set rates for all previously offered tariff designs—and, here, the Commission fulfilled its obligations pursuant to this provision.

3. Utilities—revised net metering rates—sufficiency of evidence and findings—approval not arbitrary and capricious or erroneous

The decision of the Utilities Commission approving revised net energy metering (NEM) rates was not arbitrary and capricious or based on an error requiring reversal where the Commission's findings were supported by competent, material, and substantial evidence—collected during the Commission's de facto investigation (as required by statute) of the costs and benefits of customer-sited generation—and where those findings, in turn, supported its conclusions of law that a sufficient investigation was performed and that the rates proposed by the electric public utility companies met the statutory requirement of being nondiscriminatory and in furtherance of ensuring that NEM customers pay their full fixed cost of service.

Appeal by Intervenors-appellants from order entered 23 March 2023 by the North Carolina Utilities Commission. Heard in the Court of Appeals 7 February 2024.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Jack E. Jirak, Marion "Will" Middleton, III, Catherine Wrenn, and J. Ashley Cooper, pro hac vice, for petitioners-appellees Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC.

Chief Counsel Lucy E. Edmondson and Anne M. Keyworth, Staff Attorney, for intervenor-appellee Public Staff – North Carolina Utilities Commission.

Lewis & Roberts, PLLC, by Matthew D. Quinn, for intervenors-appellants NC WARN, North Carolina Climate Solutions Coalition, and Sunrise Movement Durham Hub.

Catherine Cralle Jones and Caroline Leary, pro hac vice, for intervenor-appellant Environmental Working Group.

Andrea C. Bonvecchio for intervenors-appellants 350 Triangle, 350 Charlotte, and the North Carolina Alliance to Protect Our People and the Places We Live.

Donald E. Oulman, pro se, as intervenor-appellant.

MURPHY, Judge.

N.C.G.S. § 62-126.4 requires the electric public utility Companies to file proposed revised NEM tariffs for the Utilities Commission's approval. The plain language of the statute provides that, before the Commission may establish net metering rates, it must conduct an investigation of the costs and benefits of customer-sited generation. The plain statutory language further directs that—only after the Commission has fulfilled this statutory duty—the Commission shall establish nondiscriminatory net metering rates that ensure the NEM customer pays its full fixed cost of service under all offered NEM tariff designs. The Commission erred in concluding that it was not required to perform an investigation of the costs and benefits of customer-sited generation; however, the record reveals that the Commission de facto performed such an investigation when it opened an investigation docket in response to the Companies' proposed revised NEM rates; permitted all interested parties to intervene; and accepted, compiled, and reviewed over 1,000 pages of evidence.

The Commission is delegated exclusive authority to establish NEM rates, and we do not disturb an order by the Commission approving NEM rates unless we determine it to be unconstitutional, in excess of the Commission's statutory authority or jurisdiction, procedurally unlawful, legally erroneous, unsupported by the evidence, or arbitrary or capricious and prejudicial to an appellant's substantial rights. The Commission made findings of fact as to the costs and benefits of customer-sited generation supported by competent, material, and substantial evidence; reached conclusions of law supported by these findings of fact; and acted pursuant to its explicit statutory authority under N.C.G.S. § 62-126.4. We uphold the Commission's order establishing the Companies' revised NEM rates as modified by this opinion to reflect that N.C.G.S. § 62-126.4 requires the Commission to perform an investigation of the costs and benefits of customer-sited generation before it may establish NEM rates.

BACKGROUND

Environmental Working Group, 350 Triangle, 350 Charlotte, the North Carolina Alliance to Protect Our People and the Places We Live, NC

WARN, North Carolina Climate Solutions Coalition, Sunrise Movement Durham Hub, and Donald E. Oulman (collectively, "Appellants") appeal from the *Order Approving Revised Net Metering Tariffs* entered by the North Carolina Utilities Commission ("Commission") on 23 March 2023, which established new rates for net energy metering ("NEM") customers served by Appellees Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC (collectively, "the Companies").

A. History of NEM

The Commission first approved NEM rates for pilot photovoltaic ("PV") rate riders in 2000. These pilot riders allowed customers with small-scale PV generating facilities "to operate their facilities in parallel with the utility, to use the generation from the PV facility to offset some or all of the electricity that would otherwise be supplied to them by the utility, and to receive a credit for any excess generation provided to the utility."

In October 2005, the Commission established an initial framework for NEM in North Carolina, defined "as a billing arrangement whereby the customer-generator is billed according to the difference over a billing period between the amount of energy consumed by the customer at its premises and the amount of energy generated by the renewable energy facility." This framework included a mandatory "time-of-use" ("TOU") rate schedule, with compensation rates for excess customer generation to be "commensurate with the TOU period" during which excess energy was generated, and eliminated all types of stand-by charges for participating customers.

In July 2006, the Commission ordered "utilities to amend their NEM tariffs and riders to allow for any residual excess on-peak energy not consumed by the participating customer during on-peak periods to be applied against any remaining off-peak consumption during a monthly billing period[]" and "maintained its position[s] that the TOU-demand rate schedule requirement for NEM was not too complicated" and "that renewable energy certificates ([']RECs[']) associated with excess energy would be transferred to the utility to help offset the costs otherwise borne by the utility and ratepayers in general that were incurred to accommodate NEM."

In August 2007, our General Assembly enacted the Clean Energy and Energy Efficiency Portfolio Standard ("CEPS"). *See* N.C.G.S. § 62-133.8 (2023). In response, the Commission amended NEM policy to require

> utilities to offer customer-generators the option of NEM under any rate schedule available to customers in the same rate class but allow[] customers on the TOU-demand

> tariff to retain all the RECs associated with the customer's generation while allowing the utility to obtain the RECs from NEM customers on all other retail rate schedules at no cost as part of the NEM arrangement. The Commission further determined that NEM customers on any TOU rate schedule must have on-peak generation first applied to offset on-peak consumption and excess off-peak generation first applied to offset off-peak consumption.

The Commission acknowledged potential concerns of cross-subsidization under this framework "but decided that such potential was outweighed by the potential for non-quantified benefits and the clearly enunciated State policy favoring development of additional renewable generation."

In 2017, the General Assembly enacted the Distributed Resources Access Act, N.C.G.S. §§ 62-126.1 through 62-126.10, which declared

> as a matter of public policy it is in the interest of the State to encourage the leasing of solar energy facilities for retail customers and subscription to shared community solar energy facilities. The General Assembly further finds and declares that in encouraging the leasing of and subscription to solar energy facilities pursuant to this act, cross-subsidization should be avoided by holding harmless electric public utilities' customers that do not participate in such arrangements.

N.C.G.S. § 62-126.2 (2023). The Act also required the Commission to establish NEM rates according to the following procedure:

> (a) Each electric public utility shall file for Commission approval revised net metering rates for electric customers that (i) own a renewable energy facility for that person's own primary use or (ii) are customer generator lessees.
>
> (b) The rates shall be nondiscriminatory and established only after an investigation of the costs and benefits of customer-sited generation. The Commission shall establish net metering rates under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service. Such rates may include fixed monthly energy and demand charges.
>
> (c) Until the rates have been approved by the Commission as required by this section, the rate shall be the applicable net metering rate in place at the time the facility

> interconnects. Retail customers that own and install an on-site renewable energy facility and interconnect to the grid prior to the date the Commission approves new metering rates may elect to continue net metering under the net metering rate in effect at the time of interconnection until [1 January] 2027.

N.C.G.S. § 62-126.4 (2023).

In 2021, the General Assembly enacted House Bill 951, which created specific goals for reduced carbon emissions from electric generating facilities, instructed the Commission to create a "Carbon Plan" to achieve these goals, and directed the Commission to

> (i) evaluate and modify as necessary existing standby service charges, (ii) revise net metering rates, (iii) establish an on-utility-bill repayment program related to energy efficiency investments, and (iv) establish a rider for a voluntary program that will allow industrial, commercial, and residential customers who elect to purchase from the electric public utility renewable energy or renewable energy credits, including in any program in which the identified resources are owned by the utility in accordance with sub-subdivision b. of subdivision (2) of Section 1 of this act, to offset their energy consumption, which shall ensure that customers who voluntarily elect to purchase renewable energy or renewable energy credits through such programs bear the full direct and indirect cost of those purchases, and that customers that do not participate in such arrangements are held harmless, and neither advantaged nor disadvantaged, from the impacts of the renewable energy procured on behalf of the program customer, and no cross-subsidization occurs.

2021 North Carolina Laws S.L. 2021-165 § 5 (H.B. 951).

B. Procedural History

On 29 November 2021, the Companies filed a joint petition for approval of revised NEM rates with the Commission pursuant to N.C.G.S. § 62-126.4. In their petition, the Companies stated that the proposed revised rates were chosen based on their own recently-conducted "Comprehensive Rate Design Study," which the Companies alleged fulfilled the statutory requirement that revised "rates shall be . . . established only after an investigation of the costs and benefits of customer-sited

generation." N.C.G.S. § 62-126.4 (2023). Specifically, the Companies claimed that

> the results of the Rate Design Study provide a current and detailed look at the costs and benefits of serving NEM customers under Existing NEM Programs. The Companies utilitized these results to create rate structures that accurately capture the current costs to serve these customers and ensure NEM customers pay their "full fixed cost of service" in accordance with [N.C.G.S. § 62-126.4].

Based on the Comprehensive Rate Design Study, the Companies' proposed rates would (1) establish a monthly minimum bill amount to ensure that energy distribution costs are properly recovered from the customers who created those costs; (2) create a grid access fee for customers with large solar facilities, as those customers "represent the greatest potential for under-recovery of fixed costs"; (3) create non-bypassable charges to recover costs not currently included in the Companies' energy rates to ensure that solar program expenses and non-energy linked costs are not inappropriately collected from non-solar customers, but from NEM customers; (4) credit customers "for any net monthly exports to the utility grid" at the same rates that the Companies pay to utility-scale qualifying facilities to "accurately capture the benefits provided to the total utility system by the customer-sited generation and [to] align the costs of serving these customers with the benefits [the Companies] receive[]" from these customers; and (5) utilize the Companies' established TOU rate schedule to "produce rates that are more reflective of the costs and help reduce cost shifts by incentivizing load to be shifted to low-cost times and ensuring cost recovery for higher cost peak periods[,]" "with any net excess energy exported to the grid from a customer-sited facility credited to the customer each month at avoided cost rates."

The Companies also presented the Commission with a Memorandum of Understanding ("MOU") amongst themselves and four solar energy interest groups, indicating the interest groups' support of the Companies' proposed NEM tariffs and of a resolution proposed in a separate docket to create incentives for residential customer-generators who took service under the new NEM rates. The MOU further "set[] out a non-binding understanding that [the Companies] would explore a solar program tailored to low-income customers as a potential future [energy efficiency] or demand response program[]" and "work collaboratively with stakeholders to develop a policy proposal for the next generation of nonresidential NEM."

On 10 January 2022, the Commission docketed the Companies' petition *In the Matter of Investigation of Proposed Net Metering Policy Changes* and directed all interested parties to file comments or petitions to intervene on or before 15 March 2022. The Commission recognized Appellees North Carolina Utilities Commission – Public Staff and the North Carolina Attorney General's Office as intervenors pursuant to N.C.G.S. §§ 62-15(d) and 62-20. The Commission also granted the petitions of Appellants to intervene in the docket. The Commission accepted comments, reply comments, and further responsive comments into the docket. The Commission established the final deadline for further responsive comments on 27 May 2022.

On 16 June 2022, several of the Appellants filed a joint motion for an evidentiary hearing. The Commission accepted parties' responses to the motion filed on or before 24 June 2022 and, on 8 November 2022, denied the motion. The Commission further ordered that the parties file proposed orders and briefs. On 23 March 2023, the Commission entered an *Order Approving Revised Net Metering Tariffs*, which included slight alterations to the Companies' proposed tariffs. On 3 April 2023, the Companies filed the new NEM tariffs, to become effective on 1 July 2023. Appellants appealed.

ANALYSIS

Appellants contend that the Commission established the Companies' proposed NEM rates in violation of N.C.G.S. § 62-126.4 by (A)(1) failing to conduct an independent "investigation" of the costs and benefits of customer-sited generation and (A)(2) eliminating an existing class of flat-rate NEM customers. Alternatively, Appellants argue that the Commission's order is arbitrary or capricious or unsupported by competent evidence because the Commission (B)(1) failed to consider multiple benefits of customer-sited generation and (B)(2) relied on the MOU, a non-unanimous "settlement agreement."

We review a decision by the Utilities Commission pursuant to N.C.G.S. § 62-94:

> [We] may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or

> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (2023). "Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable." N.C.G.S. § 62-94(e) (2023). We may reverse the Commission's decision only upon "strict application of the six criteria enumerated in N.C.G.S. § 62-94(b)":

> Read contextually, therefore, the requirements that "substantial rights have been prejudiced," that error must be prejudicial and that actions of the Commission are presumed just clearly indicate that judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria which circumscribe judicial review.

State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 20 (1981). The appellant bears the burden to demonstrate that the Commission erred as a matter of law and that this error was prejudicial. *See id.* at 25.

We review the Commission's findings of fact to determine whether they are supported by "competent, material, and substantial evidence[.]" *State ex rel. Utils. Comm'n v. Cooper*, 368 N.C. 216, 223 (2015). Unchallenged findings of fact are deemed supported by such evidence and are consequently binding on appeal. *Id.* We review the Commission's conclusions of law to determine if they are supported by its findings of fact. *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352 (1987); *see also Coble v. Coble*, 300 N.C. 708, 714 (1980) ("Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken . . . in logical sequence . . . .").

A. Commission's Statutory Duties

Appellants argue that the Commission failed to fulfill its statutory duties under N.C.G.S. § 62-126.4 and, therefore, erred in establishing

the Companies' proposed NEM rates. N.C.G.S. § 62-126.4, entitled "Commission to establish net metering rates," mandates the following:

> (a) Each electric public utility shall file for Commission approval revised net metering rates for electric customers that (i) own a renewable energy facility for that person's own primary use or (ii) are customer generator lessees.
>
> (b) The rates shall be nondiscriminatory and established only after an investigation of the costs and benefits of customer-sited generation. The Commission shall establish net metering rates under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service. Such rates may include fixed monthly energy and demand charges.
>
> (c) Until the rates have been approved by the Commission as required by this section, the rate shall be the applicable net metering rate in place at the time the facility interconnects. Retail customers that own and install an on-site renewable energy facility and interconnect to the grid prior to the date the Commission approves new metering rates may elect to continue net metering under the net metering rate in effect at the time of interconnection until January 1, 2027.

N.C.G.S. § 62-126.4 (2023).

Appellants' argument that the Commission erred in applying N.C.G.S. § 62-126.4 to the instant case is two-fold. First, Appellants argue that the Commission itself was required to—and did not—perform "an investigation of the costs and benefits of cutomer-sited generation[]" before approving the Companies' proposed rates; that is, no party other than the Commission may perform an investigation of the costs and benefits of customer-sited generation within the meaning of N.C.G.S. § 62-126.4, and the Commission performed no such investigation before it established the Companies' revised NEM rates. Second, Appellants argue that the Commission failed to "establish net metering rates under all tariff designs" by effectively "eliminat[ing] the class of 'flat-rate' NEM customers who paid the same rate for electricity purchased at any time of day" and "requiring all residential NEM customers to participate in [a] TOU [rate] with [Critical Peak Pricing ('CPP')][.]"

1. Investigation

[1] In its order, the Commission concluded that the plain and unambiguous language of N.C.G.S. § 62-126.4(b) does *not* require the statutorily-prescribed investigation to be Commission-led:

> The Commission also disagrees with the argument that [N.C.G.S. § 62-126.4] requires the Commission to conduct its own investigation of the costs and benefits of customer-sited generation. The statute states that "rates shall be . . . established only after an investigation of the costs and benefits of customer-sited generation." N.C.G.S. § 62-126.4(b). The statute then requires the Commission to establish the rates. *Id.* Nothing in the plain language of the statute mandates that the investigation must be conducted by the Commission, only that an investigation take place prior to rates being established. While the statute provides the Commission with the ability to direct an investigation, nothing in the plain language of the statute requires the Commission, itself, to conduct the investigation. The Commission concludes that the statute only mandates that an investigation be conducted prior to the establishment of rates, which has occurred.

The Companies argue that this conclusion was proper, as N.C.G.S. § 62-126.4 "expressly states when and if it tasks a particular party with performing an activity. For example, it identifies utilities as the parties to 'file for Commission approval' of revised net metering rates, and it identifies the Commission as the party who will 'establish' the revised net metering rates." By contrast, the Companies contend, the statute clearly and unambiguously requires only that "an investigation of the costs and benefits of customer-sited generation[,]" *id.*, be performed "but [] does not task any specific party—much less the Commission—with leading that investigation."

Appellants challenge this conclusion, contending that both the statutory language and "[t]he legislative intent behind [N.C.G.S. §] 62-126.4 make[] clear that *the Commission* must lead an independent cost-benefit analysis into customer-sited generation."

We agree with Appellants that the plain language of N.C.G.S. § 62-126.4 clearly and unambiguously requires that it is the *Commission* who must conduct an investigation of the costs and benefits of customer-sited generation before it may establish net metering rates.

Therefore, we need not look further than the plain language of the statute to ascertain its meaning:

> "In resolving issues of statutory construction, we look first to the language of the statute itself." *Walker v. Bd. of Trs. of the N.C. Local Gov'tal Emps. Ret. Sys.*, 348 N.C. 63, 65 (1998) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409 (1996)).
>
> > When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990). However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.").
>
> *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006). Thus, the initial issue that must be addressed in construing the relevant statutory language requires a determination of whether the language in question is ambiguous or unambiguous.

Fidelity Bank v. N.C. Dep't of Revenue, 370 N.C. 10, 18-19 (2017) (parallel citations omitted).

As Appellants aptly note, "[n]early every aspect of [N.C.G.S. § 62-126.4] requires that the Commission, not the [electric public utility], take lead on the establishment of new NEM tariffs. For instance, the title of the statute is, 'Commission to establish net metering rates.' " N.C.G.S. § 62-126.4(a) dictates that "[e]ach electric public utility shall file for Commission approval revised net metering rates[.]" N.C.G.S. § 62-126.4(a) (2023). Subsection (a) clearly and unambiguously provides that, after an electric public utility has fulfilled its statutory duty of filing revised net metering rates, those rates are subject to the Commission's approval. *Id.* Subsection (b) then dictates that the Commission shall establish "nondiscriminatory" net metering rates "under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service[,]" but "*only* after an investigation of the costs and benefits

of customer-sited generation." N.C.G.S. § 62-126.4(b) (2023) (emphasis added). Furthermore, subsection (c) provides that the utility's proposed revised rates are without effect unless and until the Commission has approved them. N.C.G.S. § 62-126.4(c) (2023).

N.C.G.S. § 62-126.4 both empowers and requires the Commission—and only the Commission—to establish net metering rates. Furthermore, it requires that the Commission may *only* do so after an investigation of the costs and benefits of customer-sited generation. It is clear from the plain language of the statute that the investigation of the costs and benefits of customer-sited generation contemplated in subsection (b) is to be performed in connection with, and as a prerequisite to, the Commission establishing net metering rates. Notably, the statute makes no reference to the public utility outside of its duty under subsection (a). The statute does not mandate that an investigation of the costs and benefits of customer-sited generation be performed in connection with the utility's filing of revised NEM rates. Despite the contentions of the Companies and the Public Staff, this reading does not require us "to insert language into or read limitations or requirements into [the] statute[]."

The Public Staff contends that, under our holding in *AH N.C. Owner LLC v. N.C. Dept. of Health and Human Services*, 240 N.C. App. 92 (2015), even if we determine that the plain language of the statute does not align with the Commission's interpretation, we must "defer" to the Commission's interpretation that *any* party may perform an investigation of the costs and benefits of customer-sited generation before the Commission establishes net metering rates. *See id.* at 102 ("It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute as long as the agency's interpretation is reasonable and based on a permissible construction of the statute.") (cleaned up). As the Public Staff notes, however, such deference is appropriate only when we have determined that the statutory language is ambiguous. *Id.* As determined above, the language at issue here is not. Furthermore, such deference, even when appropriate, does not contravene our de novo standard of review for issues of law; "[s]o far as necessary to the decision and where presented," it is the court who "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C.G.S. § 62-94(b) (2023). We emphasized the same in *AH N.C. Owner*, where the controlling statute required this Court to "conduct its review of the final decision using the de novo standard of review." *AH N.C. Owner*, 240 N.C. App. at 102.

Even assuming, *arguendo*, that the statute is ambiguous as to the meaning of "investigation," N.C.G.S. § 62-126.4 "must be construed consistently with other provisions of the" Public Utilities Act. *See Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 358 (2014) ("Further, [N.C.G.S.] § 132-1.3 must be construed consistently with other provisions of the Public Records Act.").

N.C.G.S. § 62-37, entitled "Investigations," empowers the Commission to, "on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or of any particular public utility . . . either with or without a hearing as it may deem best[.]" N.C.G.S. § 62-37 (2023). "If[,] after such an investigation, . . . the Commission, in its discretion, is of the opinion that the public interest shall be served" by a further investigation, audit, or appraisal, it shall "report its findings and recommendation to the Governor and Council of State" and seek authorization "to order any such appraisal, investigations, or audit to be undertaken by a competent, qualified, and independent firm" of its choosing.

Furthermore, N.C.G.S. § 62-126, entitled, in pertinent part, "Investigation of existing rates[,]" provides that,

> [w]henever the Commission, after a hearing had after reasonable notice upon its own motion or upon complaint of anyone directly interested, finds that the existing rates in effect and collected by any public utility are unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law, the Commission shall determine the just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force, and shall fix the same by order.

N.C.G.S. § 62-136(a) (2023). This statute not only contemplates another type of "investigation" that the Commission may perform; it also employs phrasing similar to that of N.C.G.S. § 62-126.4. The Public Utilities Act directs the Commission to "make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction." N.C.G.S. § 62-130 (2023). Furthermore, "[t]he Commission shall from time to time as often as circumstances may require, change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility." N.C.G.S. § 62-136(d) (2023). As part of this duty, the Commission may investigate existing rates to ensure they are not "unjust, unreasonable, insufficient or discriminatory, or in

violation of any provision of law[.]" N.C.G.S. § 62-136(a) (2023). N.C.G.S. § 62-136 provides that, "[w]henever the Commission, *after a hearing had* . . . finds that the existing rates" of a public utility "are unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law, the Commission shall determine . . . and shall fix . . . just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force[.]" N.C.G.S. § 62-136(a) (2023) (emphasis added).

Here, the Commission concluded that "nothing in the plain language of [N.C.G.S. § 62-126.4] requires the Commission, itself, to conduct" an investigation of the costs and benefits of customer-sited generation because "the statute only mandates that an investigation *be conducted* prior to the [Commission's] establishment of rates[.]" By the Commission's same reasoning, nothing in the plain language of N.C.G.S. § 62-136 would require the Commission, itself, to have a hearing because the statute only mandates that a hearing *be had* prior to the Commission's finding, determination, and order. Such a result, where the Public Utilities Act grants the Commission exclusive authority to set rates for public utilities and empowers the Commission to conduct hearings to this end, is both plainly absurd and in direct conflict with the General Assembly's directives throughout the chapter. *See State v. Beck*, 359 N.C. 611, 614 (2005) ("[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded."). Here, too, where the Public Utilities Act grants the Commission exclusive authority to set rates for public utilities and empowers the Commission to conduct investigations to this end, the Commission's interpretation would lead to absurd and contradictory results.

We hold that N.C.G.S. § 62-126.4 clearly and unambiguously requires the Commission to first investigate the costs and benefits of customer-sited generation and to then establish net metering rates. Therefore, we must determine whether, under these facts, the Commission did perform such an investigation. Although the Commission did not purport to have done so, the record demonstrates that the Commission de facto performed an investigation of the costs and benefits of customer-sited generation before it established the Companies' proposed revised rates.

As the Commission notes, the statute does not "require that the 'investigation' be in any particular format or using any particular procedure." On 10 January 2022, the Commission entered an *Order Requesting Comments* in this matter, designated as *In the Matter of Investigation of Proposed Net Metering Policy Changes*. As noted by

the Public Staff, the Commission established this docket "specifically to evaluate [the Companies'] filings and investigate the cost[s] and benefits of customer-sited generation as presented in the docket with the goal of establishing NEM rates[,]" and the Commission allowed "all interested parties to file comments and reply comments on [the Companies'] proposed revised NEM rates." The Commission then "[found] and conclude[d], based on all the foregoing materials of record, that the requirements established in [2017 North Carolina Laws S.L. 2017-192 (HB 589)] and N.C.G.S. § 62-126.4 have been satisfied in a manner sufficient to enable the Commission to establish new NEM tariffs as mandated by those enactments."

We hold that the Commission conducted an investigation of the costs and benefits of customer-sited generation by opening a docket, requesting comments from all interested parties, compiling and reviewing more than 1,000 pages of evidence, and weighing the merits of this evidence to assist in making its final determination.

2. Tariff Designs

[2] Appellants further argue that the Commission violated its statutory mandate to "establish net metering rates *under all tariff designs*," N.C.G.S. § 62-126.4(b) (2023) (emphasis added), "[b]y requiring all residential NEM customers to participate in TOU with CPP," thereby "eliminat[ing] the [existing] class of 'flat-rate' NEM customers who paid the same rate for electricity purchased at any time of day." According to Appellants, the Commission was required to—and did not—establish rates that continued to "provide an NEM option for those customers with the flat-rate tariff."

N.C.G.S. § 62-126.4(b) reads, in pertinent part: "[t]he Commission shall establish net metering rates under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of service." *Id.* The Commission determined that "[t]he most natural reading of the language of subsection 126.4(b) is that the Commission is to ensure that under whatever tariff designs net metering *is being offered* the rates set must be sufficient to recover all fixed costs of service[,]" *not* to ensure that rates be set under *all previously offered* tariff designs. The Commission further determined that "the fundamental operative requirement expressly advanced" by the language of N.C.G.S. § 62-126.4 "is to ensure that NEM customers pay their 'full fixed cost of service.' "

We agree with the Commission that N.C.G.S. § 62-126.4 plainly directs the Commission, after its investigation, to establish NEM rates that are "nondiscriminatory[]" and that, "under all tariff designs[,] . . .

ensure that the net metering retail customer pays its full fixed cost of service." N.C.G.S. § 62-126.4(b) (2023). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614. As the Commission noted, Appellants' proposed reading of the language "is forced and effectively rewrites the sentence . . . as a conjunctive[.]" N.C.G.S. § 62-126.4 does not direct the Commission to establish NEM rates under all tariff designs *and* ensure the NEM customer pays its full fixed cost of service; rather, the statute requires the Commission to establish NEM rates under all tariff designs *that* ensure the NEM customer pays its full fixed cost of service.

To be sure, we note that—even if the statutory language were ambiguous—the General Assembly has declared its purpose in enacting the Distributed Resources Access Act, including N.C.G.S. § 62-126.4:

> The General Assembly of North Carolina finds that as a matter of public policy it is in the interest of the State to encourage the leasing of solar energy facilities for retail customers and subscription to shared community solar energy facilities. The General Assembly further finds and declares that in encouraging the leasing of and subscription to solar energy facilities pursuant to this act, cross-subsidization should be avoided by holding harmless electric public utilities' customers that do not participate in such arrangements.

N.C.G.S. § 62-126.2 (2023). "The primary endeavor of courts in construing a statute is to give effect to legislative intent." *Beck*, 359 N.C. at 614. By both its plain language and stated legislative intent, N.C.G.S. § 62-126.4 requires the Commission to establish nondiscriminatory rates that ensure that, under any of the offered tariff designs, the NEM customer will pay its full fixed cost of service.

B. Order Establishing NEM Rates

[3] As we have determined that the Commission fulfilled its statutory duties, we proceed to determine whether the Commission's *Order Approving Revised Net Metering Tariffs* is proper. The Public Utilities Act empowers the Commission to, *inter alia*, "provide just and reasonable rates and charges for public utility services without unjust discrimination[] [or] undue preferences or advantages . . . and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy[.]" N.C.G.S. § 62-2(a)(4) (2023). "The General Assembly has delegated to

the Commission, and not to the courts, the duty and power to establish rates for public utilities." *State ex rel. Utils. Comm'n v. Westco Tel. Co.*, 266 N.C. 450, 457 (1966). Therefore, we review the Commission's order only to determine whether the Commission's findings therein are supported by competent, material, and substantial evidence and whether these findings support its conclusions of law.

1. Costs and Benefits of Customer-Sited Generation

First, Appellants contend that the Commission's order approving revised net metering tariffs is "arbitrary and capricious" and subject to reversal under N.C.G.S. § 62-94(b)(6) because it "failed to consider multiple material benefits of NEM solar." *See* N.C.G.S. § 62-94(b) (2023) ("[The Court] may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are . . . arbitrary or capricious."). Appellants argue that

> [t]he Commission was presented with substantial evidence about which costs and benefits, under the applicable standard of care, must be considered in any cost-benefit analysis of NEM solar. Instead of grappling with this issue and identifying which costs and benefits should be factored into the cost-benefit analysis, the Commission blindly accepted, without analysis, that the costs and benefits analyzed in the Companies' internal Embedded and Marginal Cost Study were sufficient. The Commission's failure to analyze and make conclusions about this crucial issue—i.e., about exactly which costs and which benefits are relevant—renders the Commission's decision, in violation of [N.C.G.S.] § 62-94(b)(6), arbitrary and capricious.

We begin by emphasizing, as the Commission correctly noted, that "[t]he statute requires an investigation of the costs and benefits of *customer-sited generation*[,]" not "a value of solar study." Appellants contend that the Commission failed to make a "reasoned determination of *which* costs and benefits should be considered," such that its cost-benefit analysis is "by its very nature . . . arbitrary and capricious." While Appellants correctly note that the Commission found that "[t]he analyses in the embedded and marginal cost studies that Duke conducted . . . capture[d] the *majority, if not all*, of the known and verifiable benefits of solar generation[,]" the Commission further specified *which* costs and benefits it deemed appropriate for its consideration. First, the Commission found that

> [t]he record . . . relative to including the benefits of avoided [transmission and distribution ("T&D")] costs in the [Net Excess Energy Credit ("NEEC")[1]] is inconclusive and the Commission will not require that such benefits be added to the NEEC calculations at this time, but rather will revisit the matter in future avoided cost proceedings.

The Commission then "reiterate[d] its position that only *known and measurable benefits and costs* should be included in the determination of the NEEC." The Commission reasoned that it "cannot speculate on future deferrals of T&D costs" and "is also not persuaded that NEM will always provide a grid deferral benefit[]" and found that this uncertainty "alone justifies the exclusion of avoided T&D benefits from the NEEC."

Furthermore, the Commission found that the cost-of-service studies performed at the Commission's request in the Companies' 2019 general rate cases were appropriate for its consideration of "the need for the proposed NEM tariffs" in the present docket, as "the cost-of-service studies used for this investigation were the last ones conducted[,] and no costs have been added to base rates since that time[.]" The Commission also took notice of the "discussion and commentary" in 2022 Carbon Plan proceedings, wherein the Companies "considered, evaluated, and discussed the use of behind-the-meter generation to achieve the goals of [2021 North Carolina Laws S.L. 2021-165 (HB 951)] and the general system benefits of doing so." The Commission found the information presented during these proceedings to be appropriate for its consideration "in the present docket[,]" as "both HB 589 and HB 951 address review and revision of the present NEM programs[.]"

This Court is without power to require the Commission to adopt the "National Standard Practice Manual for Benefit-Cost Analysis of Distributed Energy Resources" advanced by Appellants in its investigation of the costs and benefits of customer-sited generation. While "an order which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal[,]" the Commission's order synthesizing the parties'

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1. The Net Excess Energy Credit, or NEEC, refers to the rate at which the Companies' NEM customer receives credit for the net excess energy generated by that customer and exported to the grid. "The initial NEEC proposed in each new NEM tariff is based upon avoided cost rates approved in" a separate docket. "Duke indicated it will update the NEEC upon the approval of new avoided costs . . . in general rate case proceedings" or "biennial avoided cost proceedings."

arguments and materials, declining to adopt the standards proposed by Appellants, and explaining which costs and benefits it found to be appropriate for its consideration, "is sufficient to show that the Commission gave more than minimal consideration to" Appellants' proposed guidelines. *State ex rel. Utils Comm'n v. Thornburg*, 314 N.C. 509, 511, 515 (1985).

The Commission found that the Companies' "proposal provides an adequate mechanism to reduce the cross-subsidy of fixed cost recovery by incorporating a number of rate design elements[,] . . . including the requirement that NEM customers take service under a time-of-use rate schedule to enable intra-period netting." The Commission then concluded that the Companies' "proposed residential NEM tariffs have met the statutory requirement to develop NEM rates that address [an] NEM customer's full fixed cost of service."

Ultimately, the Commission found and concluded, "based on all the foregoing materials of record, that the requirements established in HB 589 and N.C.G.S. § 62-126.4 have been satisfied in a manner sufficient to enable the Commission to establish new NEM tariffs as mandated by those enactments." We hold that the record contains competent, material, and substantial evidence to support the Commission's findings as to the costs and benefits of customer-sited generation, and these findings support its conclusion that a sufficient investigation was performed such that it may establish the Companies' proposed NEM rates.

2. Settlement Agreement

Finally, Appellants contend that the non-unanimous MOU and the non-binding stipulation agreement presented by the Companies "should be given little or no weight." Our Supreme Court has held

> that a stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under chapter 62 should be accorded full consideration and weighed by the Commission with all other evidence presented by any of the parties in the proceeding. The Commission must consider the nonunanimous stipulation along with all the evidence presented and any other facts the Commission finds relevant to the fair and just determination of the proceeding. The Commission may even adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes "its own independent conclusion" supported by substantial evidence on the record that the

> proposal is just and reasonable to all parties in light of all the evidence presented.

State ex rel. Utils. Comm'n v. Carolina Util. Customers, Ass'n, 348 N.C. 452, 466 (1998). As determined above, the Commission independently analyzed all materials in the record; made findings of fact supported by competent, material, and substantial evidence; and reached conclusions of law supported by its findings of fact. Therefore, the Commission's consideration of the MOU was appropriate.

CONCLUSION

The Commission acted pursuant to its statutory authority in establishing the Companies' revised NEM rates. The record indicates that the Commission de facto fulfilled its statutory duty to investigate the costs and benefits of customer-sited generation before establishing the Companies' NEM rates. Furthermore, the Commission properly considered the evidence before it and made appropriate findings of fact and conclusions of law. Appellants have failed to demonstrate that their substantial rights were prejudiced by the Commission's order due to any error justifying reversal under N.C.G.S. § 62-94(b), and we modify and affirm the Commission's order establishing the Companies' proposed NEM rates.

MODIFIED AND AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

STATE v. EVANS

[295 N.C. App. 671 (2024)]

STATE OF NORTH CAROLINA
v.
LORI ANN EVANS

No. COA23-1160

Filed 17 September 2024

1. Larceny—by an employee—intent to permanently deprive—sufficiency of evidence

In a prosecution for three counts of larceny by an employee, where defendant—a manager at a discount store—was responsible for depositing $11,000.83 in cash into the bank on the store's behalf but failed to do so, the trial court properly denied defendant's motion to dismiss the charges for insufficient evidence that defendant intended to permanently deprive the store of its money, where the State presented substantial evidence that: defendant took the cash, falsely logged the cash deposits into the store's deposit log, and then quit her job the next day; went missing for three months, evading both her employer's and law enforcement's efforts to contact her, as well as evading arrest; and did not reimburse the stolen funds until over six months after her arrest and over 10 months after she originally took the money.

2. Sentencing—prior record level—calculation—classification of prior misdemeanor conviction—prior plea agreement not breached

After defendant was found guilty on three counts of larceny by an employee, the trial court correctly applied N.C.G.S. § 15A-1340.14(c) in classifying defendant's prior misdemeanor conviction as a felony for the purpose of calculating her prior record level at sentencing. Even though the prior conviction resulted from a plea agreement wherein defendant pled guilty to misdemeanor possession of methamphetamine after originally being charged with felony possession, the court's choice to classify the conviction as a felony did not breach defendant's plea agreement. Under the statute's plain language, defendant's prior conviction had to be classified as it would have been classified at the time that she committed the larceny offenses she was now being sentenced for; here, the felony classification was proper, since the legislature had amended the General Statutes by striking the offense of misdemeanor possession of methamphetamine and classifying any amount of methamphetamine possession as a felony.

Appeal by Defendant from judgment entered 25 May 2023 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 14 August 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip K. Woods, for the State-Appellee.

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

COLLINS, Judge.

Defendant Lori Ann Evans appeals from judgment entered upon a jury's guilty verdict of three counts of larceny by an employee. Defendant argues that the trial court erred by denying her motion to dismiss for insufficient evidence and erred in calculating her prior record level. Because the State presented sufficient evidence that Defendant acted with the requisite intent, the trial court did not err by denying Defendant's motion to dismiss. Because the trial court properly applied the relevant sentencing statute, the trial court did not err in calculating Defendant's prior record level. We find no error.

I. Background

Defendant was indicted on 4 April 2022 for three counts of larceny by an employee. When the case came on for trial, the State's evidence tended to show the following:

Defendant was the manager of a Dollar General store in Benson off N.C. Highway 50. On 13, 14, and 15 May 2021, Defendant was to deliver cash deposits to First Citizens Bank on behalf of Dollar General. On each of these days, Defendant indicated in the store deposit log that she was taking a bag of cash to deposit, and Dollar General's security footage captured Defendant leaving the store with a deposit bag. In total, Defendant took $11,000.83 from the store. On 16 May, Defendant made an entry into the store deposit log indicating that she had made the three deposits. The next day, Defendant quit her job. A cash audit later revealed that these deposits had not been made.

After being notified that the bank had never received the deposits, a loss prevention officer for Dollar General attempted to contact Defendant several times but was unsuccessful. The officer asked another store manager—who knew Defendant well—to contact Defendant; however, that store manager was also unsuccessful in doing so. The

missing cash was then reported to the Johnston County Sheriff's Office. A Sheriff's deputy attempted to reach Defendant on several occasions but was unsuccessful.

Warrants were issued for Defendant's arrest on 28 May 2021. Sheriff's deputies attempted to serve Defendant at her last known home address in Benson, North Carolina; the home, however, was vacant when they arrived. Defendant was finally located in Chadbourn, North Carolina, on 5 September 2021 and served with arrest warrants.

More than six months later, on 29 March and 28 April 2022, Defendant made three deposits totaling $11,000.83 into Dollar General's bank account, using the same cash bags that she had used to remove money from the store in May 2021. The three cash bags contained twenty-six, thirty, and forty-four $100 bills, respectively. According to Dollar General's loss prevention officer, it was highly unusual for a deposit bag to contain more than twenty $100 bills.

At trial, Defendant admitted to leaving the store with the deposit bags and making an entry into the store deposit log indicating that she had made the three deposits. She testified, however, that she left the bags in her car for her daughter to deposit and assumed her daughter had made the deposits. When asked why she had not answered the calls from Dollar General's loss prevention officer and managers, Defendant testified that she did not answer because, at that time, she did not know any money was missing. Defendant further testified that once apprehended for the missing cash, she "scrape[d] and scrounge[d]" $11,000.83 by working and borrowing from family members and deposited this money into Dollar General's bank account.

Defendant's motions to dismiss the charges were denied. The jury convicted Defendant of all three counts of larceny by an employee.

At sentencing, the trial court classified Defendant as a prior record level two and sentenced her to a term of five-to-fifteen months' imprisonment, suspended, and twenty-four months of supervised probation. Defendant gave an oral notice of appeal in open court.

II. Discussion

A. Motion to Dismiss

[1] Defendant first contends that the trial court erred by denying her motion to dismiss because the evidence presented was insufficient to support a conclusion that Defendant intended to permanently deprive Dollar General of its money.

This Court reviews the trial court's denial of a motion to dismiss de novo. *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013). In doing so, the reviewing court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "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." *Id.* at 379, 526 S.E.2d at 455. Once the court determines that a reasonable inference may be drawn, it is then for the jury to decide whether the facts satisfy the defendant's guilt beyond a reasonable doubt. *Id.* "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Id.* (quotation marks and citation omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted). When considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, "giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192–93, 451 S.E.2d 211, 223 (1994) (citation omitted).

To survive a motion to dismiss a charge of larceny by an employee, the State must present sufficient evidence of the following elements:

> (1) the defendant was an employee of the owner of the stolen goods; (2) the goods were entrusted to the defendant for the use of the employer; (3) the goods were taken without the permission of the employer; and (4) the defendant had the intent to steal the goods or to defraud his employer.

State v. Frazier, 142 N.C. App. 207, 209, 541 S.E.2d 800, 801 (2001) (citations omitted); *see also* N.C. Gen. Stat. § 14-74 (2023). The intent required by the fourth element includes "both the intent to wrongfully take *and* the intent to permanently deprive the owner of possession." *State v. Spera*, 290 N.C. App. 207, 216, 891 S.E.2d 637, 644 (2023).

Direct evidence of a defendant's intent to permanently deprive the owner of possession is not required; the requisite intent is often inferred from circumstantial evidence. *Id.* at 215, 891 S.E.2d at 644. For example, this intent can "be deemed proved if it appears [the defendant] kept the goods as his own [un]til his apprehension, or that he gave them away, or

sold or exchanged or destroyed them . . . ." *State v. Smith*, 268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966) (quotation marks and citation omitted); *see, e.g.*, *State v. Osborne*, 149 N.C. App. 235, 243, 562 S.E.2d 528, 534 (2002) (defendant's keeping the stolen goods among his own possessions until apprehension was sufficient evidence of the requisite intent); *State v. Allen*, 193 N.C. App. 375, 381, 667 S.E.2d 295, 299 (2008) (defendant's abandonment of the stolen item, demonstrating an indifference to whether the stolen item would ever be recovered by the victim, was sufficient evidence of the requisite intent).

Here, Defendant was entrusted with three bags of Dollar General's money totaling $11,000.83 between 13 and 15 May 2021. She made an entry into Dollar General's deposit log on 16 May 2021 indicating that she had deposited that money into the bank. In reality, she had not made those deposits and had no first-hand knowledge of anyone else making those deposits. The next day, Defendant quit her job.

Dollar General's loss prevention officer, a Dollar General store manager, and law enforcement officers attempted to contact Defendant on numerous occasions. All of those attempts failed. When law enforcement officers attempted to serve Defendant with her arrest warrants at her home, her home appeared vacant. Ultimately, it took law enforcement over three months to locate Defendant, who was found in Chadbourn.

On 29 March and 28 April 2022, more than ten months after taking the cash out of the Dollar General store and indicating to Dollar General that the cash had been deposited in the bank, and more than six months after being arrested, Defendant deposited $11,000.83 into Dollar General's bank account. The denominations of the bills deposited were different from the denominations of bills typically deposited by Dollar General. Defendant admitted at trial that the cash she deposited in March and April 2022 was not the cash she took from the store in May 2021; the cash she had been entrusted to by the store was gone.

Defendant quit her job the day after she falsely indicated that she had deposited Dollar General's money into its bank account and left town. Considered in the light most favorable to the State, the evidence was sufficient to support a conclusion that Defendant intended to wrongfully take and permanently deprive Dollar General of the money she was entrusted with. *See Rose*, 339 N.C. at 192, 451 S.E.2d at 223.

Citing *Spera*, Defendant contends that her reimbursement of the stolen funds shows that she never intended to permanently deprive Dollar General of the money. Unlike in *Spera*, however, Defendant did not deposit any money into Dollar General's bank account until after she

was arrested for three counts of larceny by an employee, more than ten months after she had failed to deposit the money. *See, e.g.*, *Spera*, 290 N.C. App. at 219–20, 891 S.E.2d at 646–47 (holding that there was insufficient evidence of a permanent deprivation, as the evidence tended to show that the defendant merely took the stolen car for a "joy ride" and returned the keys to the victim roughly thirty minutes after the taking). Defendant's contentions do not warrant dismissal for insufficient evidence. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

Because the State presented sufficient evidence of each element of the offense of larceny by an employee, the trial court did not err by denying Defendant's motions to dismiss.

B. Defendant's Prior Record Level

[2] Defendant next contends that the trial court erred in calculating her prior record level for sentencing. Specifically, Defendant argues that by treating her 1999 misdemeanor conviction as a felony, the trial court breached her 1999 plea agreement, wherein she pled guilty to misdemeanor possession of methamphetamine after being charged with felony possession of methamphetamine.

A trial court's determination of a defendant's prior record level is a conclusion of law reviewed de novo review on appeal. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). Likewise, this Court reviews de novo whether the State breached a plea agreement and whether the trial court entered a judgment inconsistent with the terms of a plea agreement. *State v. Knight*, 276 N.C. App. 386, 390, 857 S.E.2d 728, 732 (2021).

"The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions . . . ." N.C. Gen. Stat. § 15A-1340.14(a) (2023). One point is assigned for misdemeanor convictions. *Id.* § 15A-1340.14(b) (2023). Felony convictions are assigned more points, depending upon the class of felony, with two points assigned to each prior felony Class H or I conviction. *Id.* For purposes of determining a defendant's prior record level, "the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." *Id.* § 15A-1340.14(c) (2023).

The State presented to the trial court a computerized criminal history printout indicating that Defendant was charged in 1999 with felony possession of methamphetamine and misdemeanor possession of drug paraphernalia; pled "guilty to a lesser degree" to misdemeanor possession of methamphetamine; and was sentenced to forty-five days of

confinement, suspended for one year of unsupervised probation, and ordered to pay a $100 fine and court costs. That same year, however, the North Carolina General Assembly amended our general statutes by striking the offense of misdemeanor possession of methamphetamine and classifying the possession of any amount of methamphetamine as a felony. *See* 1999 N.C. Sess. Laws 370. By the plain language of N.C. Gen. Stat. § 15A-1340.14(c), because possession of methamphetamine was classified as a Class I felony on the date Defendant committed larceny by an employee in the present case, the trial court did not err by assigning her 1999 conviction two points for the purpose of determining her prior record level. *See* N.C. Gen. Stat. § 15A-1340.14(c); *see also State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.") (citation omitted).

Defendant argues that by classifying her prior conviction as a felony, the trial court breached her 1999 plea agreement. In essence, Defendant argues that she did not get the benefit of her earlier bargain. We disagree.

"A plea agreement is treated as contractual in nature, and the parties are bound by its terms." *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) (citation omitted). Plea agreements differ from ordinary contracts, however, because a defendant waives various constitutional rights by pleading guilty to a crime. *Knight*, 276 N.C. App. at 390, 857 S.E.2d at 732. Therefore, the plea bargain process "must be attended by safeguards to [e]nsure the defendant receives what is reasonably due in the circumstances." *Id.* (quotation marks and citation omitted).

On this record, Defendant was charged with felony possession of methamphetamine and misdemeanor possession of drug paraphernalia. She "bargained" for a conviction to a lesser degree of possession of methamphetamine, dismissal of the possession of drug paraphernalia charge, and a sentence in accordance with that agreement. Defendant thus received "what [was] reasonably due in the circumstances." *Id.*

N.C. Gen. Stat. § 15A-1340.14(c) was enacted in 1993, six years before Defendant pled guilty to possession of methamphetamine. *See* 1993 N.C. Sess. Laws 538. With the passage of 1999 N.C. Sess. Laws 370, Defendant was on notice that, should she be convicted of an offense in the future, her conviction for possession of methamphetamine would be assigned two points for the purpose of determining her prior record level. The language of N.C. Gen. Stat. § 15A-1340.14(c) is clear and unambiguous: Defendant's prior offense must be classified as it would be classified at

the time she committed the offense for which she is currently being sentenced. Additionally, as the trial court noted below, Defendant is not now a convicted felon. "But for purposes of calculating her prior record level, she is a prior record level two because two points would be assigned to that offense. Since [possession of methamphetamine] is now a felony."

Accordingly, because the trial court properly applied N.C. Gen. Stat. § 15A-1340.14(c) and did not otherwise breach Defendant's 1999 plea agreement, the trial court did not err in calculating Defendant's prior record level.

III. Conclusion

Because the State presented substantial evidence of each element of the charge of larceny by an employee, the trial court did not err by denying Defendant's motion to dismiss. Because the trial court did not breach Defendant's prior plea agreement, the trial court did not err in calculating Defendant's prior record level.

NO ERROR.

Judges MURPHY and FLOOD concur.

STATE OF NORTH CAROLINA
v.
TRAVIS K. McCORD, AKA SHAWN LATTIMORE, DEFENDANT

No. COA23-915

Filed 17 September 2024

1. Constitutional Law—mandatory life without parole—Miller statute resentencing—credibility findings by resentencing judge permitted

In a resentencing proceeding conducted pursuant to N.C.G.S. § 15A-1340.19B(a)(2) (part of the statutory scheme (the *Miller* statute) enacted in response to the holding in *Miller v. Alabama*, 567 U.S. 460 (2012), which barred mandatory life without parole sentences for defendants who were under age 18 at the time of their crimes), the imposition of a sentence of life without parole for defendant—who was 16 years old at the time of the crime for which he was convicted of first-degree murder—was affirmed where the resentencing judge made findings in support of his sentencing

decision regarding the credibility of evidence offered at defendant's trial, as explicitly permitted by the *Miller* statute and the United States Supreme Court decision in *Miller*.

2. Constitutional Law—mandatory life without parole—Miller statute resentencing—consideration of mitigating factors

In a resentencing proceeding conducted pursuant to N.C.G.S. § 15A-1340.19B(a)(2) (part of the statutory scheme (the *Miller* statute) enacted in response to the holding in *Miller v. Alabama*, 567 U.S. 460 (2012), which barred mandatory life without parole sentences for defendants who were under age 18 at the time of their crimes), the resentencing court did not abuse its discretion in imposing a sentence of life without parole for defendant, who was 16 years old at the time of the crime for which he was convicted of first-degree murder, after considering and weighing the evidence—including defendant's involvement in the execution of the initial robbery plan, his leadership when the incident turned into a murder, his efforts thereafter to minimize his risk of being held responsible, his multiple disciplinary infractions over two decades of imprisonment, and his high rank in a gang—that was relevant to the contested mitigating factors of defendant's age, immaturity, reduced ability to appreciate risks and consequences, subjection to family and peer pressure, and likelihood to benefit from rehabilitation.

3. Constitutional Law—Miller statute—facial constitutionality—Eighth Amendment

The Court of Appeals overruled defendant's arguments that (1) the *Miller* statute (N.C.G.S. § 15A-1340.19A et seq.) is facially unconstitutional—because it contains a presumption in favor of life without parole and does not provide adequate guidance for sentencing courts—and (2) a sentence of life without parole for a juvenile offender remains unconstitutional under both the United States and North Carolina Constitutions; the North Carolina Supreme Court had previously considered and rejected each contention.

Appeal by defendant from orders and judgments entered 3 March 2023 by Judge W. Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 13 August 2024.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

DILLON, Chief Judge.

In 1999, Defendant Travis K. McCord was sentenced to life without parole ("LWOP") for first-degree murder. As Defendant was only 16 years old at the time of the murder, Defendant was entitled to a resentencing hearing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). After the resentencing hearing, the court again sentenced Defendant to LWOP. We affirm.

I. Background

Defendant previously appealed his conviction in the early 2000s.[1]

Under the law applicable at the time of Defendant's trial, it was mandatory for the trial judge to sentence a defendant convicted of first-degree murder who was 16 years of age at the time of the murder to LWOP. *See* N.C.G.S. § 14-17 (1997).

In 2012, the United States Supreme Court's decision in *Miller v. Alabama* held that *mandatory* LWOP sentences for defendants who were under 18 years of age at the time of the crime violate the United States Constitution's Eighth Amendment prohibition on cruel and unusual punishments. 567 U.S. at 465. Four years later, in 2016, in the case of *Montgomery v. Louisiana*, the United States Supreme Court determined that *Miller* applies retroactively. 577 U.S. at 208–09.

In response to *Miller*, our General Assembly enacted N.C.G.S. § 15A-1340.19A, *et seq*. (2023) (the "*Miller* statute"). The *Miller* statute requires that the sentencing court conduct a hearing for every defendant convicted of first-degree murder[2] who was under 18 years old at the time of the offense to determine whether LWOP or a lesser sentence is appropriate. N.C.G.S. § 15A-1340.19B(a)(2).

Defendant was granted a *Miller* resentencing hearing, which occurred in January 2020.

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1. Defendant appealed his conviction in *State v. McCord*, 140 N.C. App. 634 (2000). Our Court remanded the case for a *Batson* hearing but otherwise held no error. *See id*. On remand, the trial court found no *Batson* violation, and our Court affirmed. *See State v. McCord*, 158 N.C. App. 693 (2003).

2. Under the *Miller* statute, a first-degree murder conviction *based on the felony murder rule* carries a sentence of life imprisonment *with* parole rather than an LWOP sentence. *See* N.C.G.S. § 15A-1340.19B(1).

Defendant also filed motions challenging the constitutionality of his sentence and the constitutionality of North Carolina's statutory scheme, the *Miller* statute.

In March 2023, the superior court convened a hearing and entered orders resentencing Defendant to LWOP and denying his constitutional challenges. Defendant appeals.

II. Argument

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

A. Credibility Determination

[1] Defendant first argues that the resentencing judge, in making his sentencing determination, impermissibly assessed the credibility of witnesses who testified during the 1999 trial, where he was not the presiding judge at that trial. For instance, in his order, the resentencing judge made findings regarding Defendant's propensity to criminal behavior and the lead role Defendant played in the murder, based largely on the 1999 trial testimony of two of the three accomplices who had participated with Defendant in the killing:

> The testimony of Katina Lankford (hereinafter Lankford) and Amy Sigmon (hereinafter Sigmon) as set forth in the trial transcript was credible and generally consistent with the testimony of other witnesses in the trial as well as being consistent with physical evidence presented and analyzed for purposes of the trial. Based on consistency of the testimony with other evidence presented at the trial, the Court finds that their version of the events is factually true.

Indeed, the testimonies from the accomplices tended to show, not only that Defendant participated in the murder, but that he was the leader of the group. However, while it is clear the jury believed the evidence that Defendant participated in the murder (based on their guilty verdict), it is unknowable whether the jury believed that Defendant was the leader. But in determining an LWOP sentence to be appropriate, the resentencing judge found the testimony of two accomplices and other evidence—tending to show that Defendant was the leader and likely to reoffend—to be credible.

We conclude that the judge in a *Miller* resentencing hearing, rather than a jury, may make credibility findings regarding the evidence offered

at the trial to support his sentencing decision. In so holding, we are persuaded by the following: The United States Supreme Court's holding in *Miller* states that "*a judge* or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible punishment for juveniles." 567 U.S. at 489 (emphasis added). *See also Raines v. State*, 845 S.E.2d 613 (Ga. 2020) (jury not required to make findings in *Miller* resentencing hearing); *State v. Keefe*, 478 P.3d 830 (Mont. 2021) (same); *People v. Skinner*, 917 N.W.2d 292 (Mich. 2018) (same).

Also, our *Miller* statute provides that "[t]he order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and *such other findings as the court deems appropriate to include in the order*." N.C.G.S. § 15A-1340.19C(a) (2023) (emphasis added). Further, the *Miller* statute provides the matter may be heard by a judge other than the judge who presided at trial. *See* N.C.G.S. § 15A-1340.19C(b) (2023).

Our General Assembly has provided that in *any* criminal jury trial, the presiding judge may be substituted with a new judge during the course of the trial prior to sentencing in certain circumstances. *See* N.C.G.S. § 15A-1224 (2023). After this substitution, the new judge may be required, and is allowed, to make credibility findings about witnesses who testified even prior to the substitution in considering the appropriate sentence within the presumptive range.

Similarly in federal court, the Federal Rules of Criminal Procedure allow for the substitution of a new judge during the sentencing phase in certain circumstances. *See* Fed. R. Crim. P. 25(b)(1). The sentencing judge is allowed to make credibility findings about witnesses who testified in front of the other judge during the guilt determination phase of the trial in order to appropriately sentence the defendant. For example, in *United States v. Bourgeois*, 950 F.2d 980 (5th Cir. 1992), the trial judge became disabled after the trial, so the case was transferred to another judge for sentencing. *Id.* at 987. The defendant requested that the substituting judge recuse himself or grant the defendant a new trial because the substituting judge would not be able to assess the credibility of the witnesses who testified at trial in front of the preceding judge. *Id.* The Fifth Circuit rejected the defendant's argument, concluding that the substituting judge "was capable of assessing the credibility of the witnesses and the evidence at trial by a thorough review of the record." *Id. See also United States v. Casas*, 425 F.3d 23, 56 (1st Cir. 2005); *United States v. McGuinness*, 769 F.2d 695, 696 (11th Cir. 1985) (stating "[a] sentencing judge enjoys broad discretion to determine whether he can perform sentencing duties in a case he did not try.").

Here, the judge who presided over Defendant's *Miller* resentencing stated that he "considered everything presented to it" in determining Defendant's sentence, which includes evidence such as the 1999 trial transcript and Defendant's 1997 confession following his arrest for the murder. We are satisfied that the judge thoroughly reviewed the record and could appropriately assess the credibility of the two co-defendants who testified against Defendant at the 1999 trial.

B. Mitigating Factors

[2] Defendant argues that the trial court ignored mitigating evidence and misapplied some of *Miller*'s mitigating factors. We review orders weighing the *Miller* factors only for abuse of discretion. *State v. Golphin*, 292 N.C. App. 316, 322 (2024). "Abuse of discretion results where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Pursuant to the *Miller* statute, the defendant may submit mitigating circumstances for the court to consider in determining whether to impose an LWOP sentence. N.C.G.S. § 15A-1340.19B(c)(1)–(9).

1. Contested Mitigating Factors

Defendant specifically contests the court's weighing of the following factors: (1) age, (2) immaturity, (3) reduced ability to appreciate risks and consequences, (4) family and peer pressure exerted upon the defendant, and (5) the defendant's likelihood to benefit from rehabilitation.

a. Defendant's age

Defendant was 16 years, 7 months, and 15 days old at the time of the murder. The resentencing court found that "Defendant [was] substantially closer to the age of a criminal adult." Nonetheless, the court noted that "[t]he chronological age and the youth of the Defendant is a mitigating factor to which the court gave substantial weight." We conclude the court did not abuse its discretion in its consideration of this mitigating factor.

b. Immaturity

The resentencing court did not give significant weight to the factor of immaturity. The court found that, being less than 18 years old, Defendant lacked "some degree of maturity" but there was "no evidence of any specific immaturity that mitigates Defendant's conduct in this case." For example, the forensic psychiatry expert testified that immaturity can manifest itself in impetuous and impulsive acts, and the court noted that Defendant did not "act impetuously or impulsively[,]" as the

plans for committing the robbery (which escalated into murder) were modified multiple times and Defendant was involved in at least two of those plan modifications. Accordingly, we conclude the court did not abuse its discretion in its consideration of this mitigating factor.

c. Ability to appreciate risks and consequences

The court found that Defendant's ability to appreciate risks and consequences as a mitigating factor was "not existent and does not apply." Specifically, the court noted that a person of Defendant's age with no intellectual or mental health disabilities would know the consequences of armed robbery, rape, kidnapping, and murder. The court further noted: Defendant deliberately minimized the chance of being held responsible for the murder by moving the victim from the motel (a public place) to a remote place; Defendant killed the victim to eliminate her as a potential witness; Defendant forced his co-defendants to participate in the execution-style murder so they would be less likely to testify against him; and Defendant had condoms (and let a co-defendant borrow a condom to rape the victim), but he chose not to use a condom while he raped the victim because he planned to kill her and knew pregnancy would not be an issue. We conclude the court did not abuse its discretion in its consideration of this mitigating factor.

d. Familial or peer pressure

The court found that familial or peer pressure was not a mitigating factor in this case. For example, the court noted that

> [a]lthough Defendant was brought into the crime by the other participants, once the plan to rob the victim was initiated, the Defendant became a leader in its execution. At the time of the murder, it was the Defendant who not only pressured the others to participate in the murder but he actually forced the other participants to shoot the victim to kill he[r] under the duress of being told if they did not shoot the victim, he would kill them.

And though the court did not assign mitigating value to Defendant's dysfunctional childhood here, the court explicitly found his dysfunctional childhood to be a mitigating factor later in its Order under the category of "any other mitigating factor or circumstance." We conclude the court did not abuse its discretion in its consideration of this mitigating factor.

e. Likelihood to benefit from rehabilitation in confinement

The resentencing court found the likelihood that Defendant would benefit from rehabilitation in confinement was not a mitigating factor.

The court noted that it had the benefit of evaluating Defendant's behavior while serving his sentence over the last two decades. Specifically, Defendant has had multiple disciplinary infractions, he was convicted of simple assault in 2003 and assault of a government official in 2013, and he is a high-ranking member of the Blood Nation gang. We conclude the court did not abuse its discretion in its consideration of this mitigating factor.

C. Constitutional Arguments

[3] Defendant argues that North Carolina's *Miller* statute is unconstitutional on its face because it contains a presumption in favor of LWOP and its framework does not provide adequate guidance for sentencing courts.[3] Our Supreme Court, however, has sustained the constitutionality of our State's *Miller* statute. *See State v. James*, 371 N.C. 77, 99 (2018). We conclude the statute is not unconstitutional on its face.

Defendant also argues that an LWOP sentence for juvenile offenders is unconstitutional under both the Eighth Amendment of the United States Constitution and Article 1, Section 27 of the North Carolina Constitution. He specifically argues an LWOP sentence should never be imposed because it is impossible to determine how a human being may change in the future (*i.e.*, impossible to determine if a human being is irreparably corrupt). Defendant's argument is without merit, as our Supreme Court has recognized that LWOP sentences are constitutional (under both the federal and state constitutions) for a juvenile deemed to be irreparably corrupt. *See State v. Conner*, 381 N.C. 643, 659–69 (2022); *State v. Kelliher*, 381 N.C. 558, 560 (2022).

AFFIRMED.

Judges WOOD and THOMPSON concur.

3. Defendant asserts this argument to preserve it for reconsideration by our Supreme Court and for possible future federal review.

STATE v. NOVA

[295 N.C. App. 686 (2024)]

STATE OF NORTH CAROLINA
v.
VICTOR MANUEL MEDINA NOVA, DEFENDANT

No. COA23-883

Filed 17 September 2024

Evidence—other crimes, wrongs, or acts—similarity and temporal proximity—not unduly prejudicial—indecent liberties with a child

In a prosecution for taking indecent liberties with a child, the trial court did not err in admitting evidence of defendant's sexual conduct with another minor, pursuant to Evidence Rule 404(b), where the evidence was: (1) uncontestedly admitted for a proper purpose; (2) sufficiently similar—each incident involving defendant fondling the genitals of boys (ages 10 and 13 years) with whom he had developed a relationship at the same church; and (3) sufficiently close in time—the incidents having occurred only two years apart. Moreover, the probative value of evidence of the other incident—in showing a common plan by defendant—was not substantially outweighed by the danger of unfair prejudice, particularly where the trial court gave the jury an appropriate limiting instruction.

Appeal by Defendant from judgment entered 12 January 2023 by Judge David A. Phillips in Gaston County Superior Court. Heard in the Court of Appeals 14 August 2024.

Stephen G. Driggers, for defendant-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Chris D. Agosto Carreiro, for the State.

STADING, Judge.

Defendant Victor Manuel Medina Nova appeals from judgment entered after a jury found him guilty of taking indecent liberties with a child. After careful review, we discern no error.

I. Background

When he was around eight years old, N.R.[1] and his family began

1. A pseudonym is used to protect the victim's identity.

attending Casa de Dios Puerta al Cielo ("the church"). By the time he was twelve years old, N.R. became involved in the church by participating in the worship team as the drummer, operating the audio system during services, and attending youth group. Through his involvement at the church, N.R. had the occasion to meet Defendant.

Defendant is a former adult member of the church who worked with the youth group and the worship team. N.R. began assisting Defendant with the music during church services when he was thirteen years old. At the time, N.R. viewed Defendant as a "mentor" because "he was . . . the only person that was consistent and . . . there for [him]." N.R. discussed many things with Defendant, including his parents and school. Over time, Defendant increasingly engaged in inappropriate behaviors with N.R. including grabbing N.R.'s bottom and touching him when nobody was watching or around.

During a worship practice in the summer of 2014, when N.R. was thirteen years old, he told Defendant of his plans to try out for the school soccer team. Defendant told N.R. that in doing so, N.R. would have to undergo a physical examination and be "check[ed]." Defendant then asked N.R. if he could "check" him and "motioned" for N.R. to "stand beside" a large printer in the room. Defendant then put his hands inside of N.R.'s underwear and nodded his head up and down while fondling N.R.'s genitalia. As N.R. was leaving, Defendant told him not to tell anybody what had happened.

N.R. first reported Defendant's abuse in 2017 to a youth leader at the church. At this time, N.R. learned that he was not the only youth member to have been abused by Defendant. Upon hearing that Defendant also abused B.T.,[2] another minor, N.R. came forward and reported Defendant's actions to law enforcement.

On 19 February 2018, Defendant was indicted and charged with one count of taking indecent liberties with a child. Before trial, the State moved to introduce B.T.'s testimony under Rule of Evidence 404(b). N.C. Gen. Stat. § 8C-1, R. 404(b) (2023). The trial court granted the State's motion, concluding that "the facts surrounding the [D]efendant's previous child sex offense [were] sufficiently similar to the case before the [c]ourt," and that B.T.'s testimony was relevant to show "motive, intent, modus operandi, preparation, knowledge, identity of the perpetrator, lack of accident and common scheme or plan." The trial court also concluded "that the temporal proximity between the two offenses [was] not

2. A pseudonym is used to protect the victim's identity.

so remote that it would render the evidence inadmissible in the present case," and that "the probative value of the 404(b) evidence outweigh[ed] the potential for unfair prejudice. . . ."

Defendant's trial began on 9 January 2023. During the trial, the State presented testimony from B.T., testimony from B.T.'s mother, and played a recording of B.T.'s interview with a children's advocacy center. Before the introduction of this evidence, the trial court instructed:

> Members of the jury, evidence will be presented tending to show that the defendant touched [B.T.'s] genitals. This evidence is received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed. That the defendant had the intent, which is a necessary element of the crime charged in this case. That there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it is received. You may not consider it for any other purpose.

Thereafter, B.T. testified that he and his parents knew Defendant through the church. B.T. recounted that he and his siblings had stayed with Defendant for several weeks while their parents traveled to Central America. At some point during this stay with Defendant, B.T. was watching TV on the couch alone and Defendant "climbed over [him] . . . started rubbing [his] shoulder . . . and . . . laid down there with [him]." B.T. said that after heading to bed, Defendant entered his bedroom, "got underneath the covers" with him, and started touching him "in his private area and bottom." Defendant then attempted "to make [B.T.] touch his private area. . . . moved [B.T.] onto [his] stomach, and . . . rubb[ed] his private area against [B.T.'s] bottom." B.T.'s mother testified that he was ten years old when this incident occurred.

Defendant moved to dismiss the charge at the close of the State's evidence, arguing that the State failed to put on evidence that Defendant acted "for the purpose of sexual arousal" when he had touched N.R. The State argued that Defendant's intent could be inferred from the character evidence presented by B.T. and Defendant's nodding while touching N.R. The trial court denied Defendant's motion to dismiss. During the presentation of Defendant's evidence, he elected to take the stand and denied having touched N.R. inappropriately. Defendant subsequently admitted to watching B.T. while his parents were out of town, and he denied ever touching B.T. inappropriately. Defendant again moved for

dismissal of the charge at the close of all evidence, which was also denied. After deliberating, the jury delivered a guilty verdict. The trial court sentenced Defendant to sixteen to twenty-nine months in prison and ordered him to register as a sex offender for a period of thirty years. Defendant gave notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction to consider Defendant's appeal under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Analysis

Defendant submits one issue for our consideration: whether the trial court erred in admitting testimony under Rule 404(b) that was dissimilar to the crime charged and unfairly prejudicial. After careful review, we hold that the trial court did not err by admitting B.T.'s testimony under Rule 404(b). We also hold that the trial court did not abuse its discretion when conducting a Rule 403 balancing test. N.C. Gen. Stat. § 8C-1, R. 403 (2023).

A. Standard of Review

This Court reviews the admission of Rule 404(b) evidence by engaging in a two-step analysis: (1) whether the evidence is admissible under Rule 404(b), and (2) whether the trial court abused its discretion in applying a Rule 403 balancing test. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012) (citation omitted). "When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions." *Id.* at 130, 726 S.E.2d at 159. "We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *Id.*

"Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted). And "[u]nder the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, but instead to decide whether the trial court's ruling was so arbitrary it could not have been the result of a reasoned decision." *State v. Turner*, 273 N.C. App. 701, 708, 849 S.E.2d 327, 332 (2020) (citation omitted).

B. Rule 404(b) Evidence

Defendant contends that the trial court erred by concluding that B.T.'s testimony was admissible under Rule 404(b) because it was not sufficiently similar or temporally proximate. We disagree. Since Defendant does not contest whether B.T.'s testimony was admitted for a proper purpose, our review is limited to the similarity and temporal proximity requirements of Rule 404(b). *State v. Godfrey*, 263 N.C. App. 264, 270, 822 S.E.2d 894, 899 (2018) (citation and internal brackets omitted) ("when prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403.").

Rule 404(b) of the North Carolina Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, R. 404(b). Rule 404(b) is "a rule of inclusion, and evidence of prior bad acts is admissible unless the only reason that the evidence is introduced is to show the defendant's propensity for committing a crime like the act charged." *State v. Pickens*, 385 N.C. 351, 356, 893 S.E.2d 194, 198 (2023) (citation omitted). If a party offers evidence under Rule 404(b), it "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence." *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citation omitted). That said, 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) (citation omitted). "This is particularly true where the fact sought to be proved is the defendant's intent to commit a similar sexual offense for which the defendant has been charged." *State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561-62 (1992) (citation omitted).

The admission of evidence under Rule 404(b) is "constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citation omitted). "Prior acts are sufficiently similar 'if there are some unusual facts present in both crimes' that would indicate that the same person committed them." *Id.* at 131, 726 S.E.2d at 159 (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d

876, 890-91 (1991)). But "[w]e do not require that the similarities 'rise to the level of the unique and bizarre.' " *Id.* (quoting *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988)). "Our case law is clear that near identical circumstances are not required . . . ; rather, the incidents need only share some unusual facts that go to a purpose other than propensity for the evidence to be admissible." *Id.* at 132, 726 S.E.2d at 160 (internal quotation marks and citations omitted).

Defendant acknowledges that Rule 404(b) is a rule of inclusion but argues the similarity and temporal requirements of *Beckelheimer* are not met here. *Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159. In *Beckelheimer*, the defendant was charged with three counts of indecent liberties with a child and one count of first-degree sexual offense after he "placed his hands in the victim's pants, then unzipped the victim's pants and performed oral sex on him while holding him down." *Id.* at 128, 726 S.E.2d at 157. At trial, the State offered prior acts evidence from the victim's half-brother pursuant to Rule 404(b). *Id.* The half-brother testified that when he was about thirteen years old, "defendant . . . touched [his] genital area outside of his clothes while pretending to be asleep, . . . reach[ed] inside his pants to touch his genitals, [and] . . . performed oral sex on him." *Id.* at 129, 726 S.E.2d at 158. The trial court concluded that the prior act contained sufficient similarities with respect to the victim's age, the location of the abuse, and "how the occurrences were brought about." *Id.* at 131, 726 S.E.2d at 159. Although the half-brother's assault took place "ten to [twelve] years ago," the trial court "concluded that given the similarities, particularly the location of the occurrence, how the occurrences were brought about, and the age range of each of the alleged victims at the time of the acts which occurred in the bedroom, that temporal proximity is reasonable." *Id.* at 129, 726 S.E.2d at 158.

Thereafter, the *Beckelheimer* defendant appealed the introduction of the half-brother's testimony on the grounds of similarity and temporal proximity. *Id.* at 129-30, 726 S.E.2d at 158. Our Supreme Court held that there was sufficient similarity and temporal proximity "to support the State's theory of modus operandi in th[e] case." *Id.* In reaching this decision, the court noted that Rule 404(b) does not "require circumstances to be all but identical for evidence to be admissible. . . ." *Id.* at 132, 726 S.E.2d at 160 (citation omitted). Rather, "the incidents need only share some unusual facts that go to a purpose other than propensity." *Id.* (internal quotation marks and citations omitted). As to the issue of temporal proximity, the court noted that "[r]emoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as

to permit a reasonable inference that the same person committed both crimes." *Id.* at 132-33, 726 S.E.2d at 160 (citation omitted). In these types of cases, "remoteness in time goes to the weight of the evidence rather than its admissibility." *Id.* at 133, 726 S.E.2d at 160 (citations omitted).

Here, the trial court's findings support its conclusion that B.T.'s testimony satisfied the admissibility requirements of Rule 404(b) because there are sufficient similarities between the two alleged incidents. Contrary to Defendant's urging, B.T. and N.R. were sufficiently close in age at the time of the alleged acts. Both victims were young boys—B.T. was ten years old, and N.R. was thirteen.[3] Defendant also seeks to differentiate between the setting as one alleged incident occurred in a back room of the church and the other occurred in a bedroom. This distinction of exact setting is one of lesser significance than the trial court's finding Defendant's behavior taking place when both boys were isolated away from adults. Defendant then attempts to juxtapose the trial court's findings regarding acts of abuse because Defendant not only touched B.T.'s "genital area"—as he did with N.R.—but he also "pressed his genitals into [B.T.'s] buttocks region." Evidence of Defendant's additional acts committed against B.T. does not negate the similarity of the initial act committed against both boys. Furthermore, the trial court found, and evidence shows, a key similarity in that Defendant met and developed relationships with both boys through the church. Thus, there are "some unusual facts present in both crimes that would indicate that the same person," Defendant, "committed them." *Id.* at 131, 726 S.E.2d at 159 (citations and internal quotation marks omitted).

Although there is no brightline rule addressing how much time is too remote to show temporal proximity, the incident with N.R. occurred only two years before the incident with B.T. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160 (a ten-to-twelve-year separation between two instances is reasonable if the "*modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried."); *see also State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 825 (1988) (a seven-year gap between prior acts and the charged acts rendered 404(b) evidence inadmissible since "its probative impact . . . [amounted to] little more than character evidence illustrating the predisposition of the accused.").

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3. Citing page fourteen of the record, Defendant's brief asserts that "the incident with N.R. occurred in 2014, when N.R. was 14 years old." However, pages three and twelve of the record show that N.R. was still thirteen on the day of the incident. Furthermore, the trial court's order states on the same page cited by Defendant that "[t]he victim . . . was 13 years of age. . . ."

Here, the modus operandi of the crime being tried is not only strikingly similar to B.T.'s testimony, but also occurred only two years earlier. Accordingly, the temporal proximity requirement of Rule 404(b) has been sufficiently satisfied.

We hold that the trial court did not err by concluding that B.T.'s testimony was admissible because the prior act was sufficiently similar and temporally proximate to the incident involving N.R. *Id.* at 132, 726 S.E.2d at 159 (citation omitted).

C. Rule 403 Balancing Test

Defendant next contends that the trial court abused its discretion by admitting B.T.'s testimony because its probative value was outweighed by unfair prejudice pursuant to Rule 403. Defendant argues that "the jury could not properly evaluate N.R.'s credibility, given the over-persuasive impact of B.T.'s 404(b) evidence." We disagree.

"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, R. 403. "Unfair prejudice, as used in Rule 403, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Wilson*, 345 N.C. 119, 127, 478 S.E.2d 507, 513 (1996) (citations and internal quotation marks omitted). "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). "In general, the exclusion of [404(b)] evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion." *Wilson*, 345 N.C. at 127, 478 S.E.2d at 513 (citation omitted). "In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citations and internal quotation marks omitted).

Here, the trial court concluded that "the probative value of the 404(b) evidence outweigh[ed] the potential for unfair prejudice in that the evidence is relevant to show motive, intent, modus operandi, preparation, knowledge, identity of the perpetrator, lack of accident, and common scheme or plan." The trial court's conclusion is supported by reason because both instances involved "young [h]ispanic males. . . . both knew [ ] [D]efendant through the church. Both allegations involved [ ] [D]efendant fondling each young man's [genitals]. . . . [and] in each

case, [ ] [D]efendant isolated the victim away from other adults." These similarities also are fairly supported by the record because "the trial court conduct[ed] voir dire on the evidence, ma[de] extensive findings, [and] concluded the evidence [was] relevant for a purpose such as showing common plan. . . ."

The trial court also properly curtailed the risk of unfair prejudice by issuing a limiting jury instruction as follows: "[i]f you believe this evidence, you may consider it but only for the limited purpose for which it is received. You may not consider it for any other purpose." *See State v. Barnett*, 223 N.C. App. 450, 456, 734 S.E.2d 130, 135 (2012) ("Limiting instructions mitigate the danger of unfair prejudice to the defendant"). By limiting the scope in which the jury could view B.T.'s testimony, the judge mitigated the risk of the evidence having an "undue tendency to suggest decision on an improper basis." *Wilson*, 345 N.C. at 127, 478 S.E.2d at 513 (citations and internal quotation marks omitted). For these reasons, we conclude that the trial court's ruling was not "arbitrary," but was "the result of a reasoned decision." *Turner*, 273 N.C. App. at 708, 849 S.E.2d at 332 (citation omitted).

The trial court's conclusion following a Rule 403 balancing test was well-reasoned and rests within its sound discretion. Any risk of unfair prejudice was adequately tempered by the trial court's limiting instruction.

IV. Conclusion

We hold that the trial court did not err by admitting B.T.'s testimony because it satisfies the similarity and temporal proximity requirements of Rule 404(b). We also hold that the trial court did not abuse its discretion in determining that B.T.'s testimony was more probative than prejudicial after conducting a Rule 403 balancing test. There was thus no error at trial, and we affirm the judgment.

NO ERROR.

Judges TYSON and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
BRINDELL WILKINS, DEFENDANT

No. COA23-839

Filed 17 September 2024

1. False Pretense—obtaining something of value—renewal of law enforcement certification—falsification of records—no causal connection

The trial court erred by denying defendant's motion to dismiss charges of obtaining property by false pretenses arising from defendant—who was then the elected sheriff of his county—having falsified training attendance records in order to continue his law enforcement certification. The State's evidence was insufficient to prove the essential element of "obtaining" something of value because renewal of a license or certification does not constitute obtaining property within the meaning of N.C.G.S. § 14-100 and, here, defendant only sought to retain the certification previously issued to him. Therefore, there was no causal connection between defendant's misrepresentation and obtaining the initial certification.

2. Indictment and Information—obstruction of justice—falsified training records—no allegation of act to subvert legal proceeding—fatally defective

Where indictments charging defendant with common law obstruction of justice were fatally defective, the trial court lacked subject matter jurisdiction to enter judgment on those charges and therefore erred by denying defendant's motion to dismiss. Although the indictments alleged that defendant—then the elected sheriff of his county—falsified training attendance records in order to continue his law enforcement certification, they did not allege facts to support the essential element that the wrongful acts were done to subvert a potential investigation or legal proceeding.

Appeal by Defendant from Judgments entered 8 December 2022 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 12 June 2024.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele Goldman, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Brindell Wilkins (Defendant) appeals from Judgments entered pursuant to jury verdicts finding him guilty of six counts of Obtaining Property by False Pretenses and six counts of felony Obstruction of Justice. The Record before us tends to reflect the following:

In 2009 Defendant was appointed Sheriff of Granville County, and in 2010 he was elected to that office. Prior to this appointment, Defendant served in Granville County as a deputy sheriff from 1989 through 1996, as an auxiliary officer from 1996 through 2001, and as chief deputy sheriff from 2001 until his appointment as Sheriff.

During his time as a deputy, Defendant received the certification required to hold that position. The North Carolina Sheriffs' Education and Training Standards Commission (the Commission) sets requirements for deputy sheriffs to become certified justice officers, while the North Carolina Sheriffs' Education and Training Standards Division (Division) operates as staff for the Commission, overseeing training and certification for justice officers. Requirements for deputy sheriffs include an initial 600-to-700-hour Basic Law Enforcement Training course.

After obtaining certification, justice officers must complete annual in-service training, which includes firearm requirements for officers authorized to carry firearms. Sheriffs' offices are required to submit a yearly report to the Division setting forth which of its justice officers completed annual training and, if applicable, whether they qualified to carry a firearm for that year. The Division then reviews the reports and audits the records for compliance with the Commission's standards.

As Sheriff, Defendant was not required to maintain certification or complete in-service training requirements. N.C. Gen. Stat. § 17E-11. However, he was still able to voluntarily complete training to maintain his certification if he so chose.

Between the years of 2013 and 2019, Defendant reported to the Division that he had satisfactorily completed voluntary in-service training and firearm qualification classes. However, a 2019 investigation of the Granville County Sheriff's Office revealed that Defendant's signatures on training class rosters appeared to be falsified. His firearms

requalification scores were not posted with those of the deputy sheriffs, and deputy sheriffs later testified at trial that Defendant had not participated in in-service training or firearms training and requalification with them. Defendant was charged with six counts each of Obtaining Property by False Pretenses and Obstruction of Justice.

At trial, Defendant admitted that he had not completed in-service training or firearms training and requalification since becoming Sheriff. He testified he submitted the false records for "a personal reason" and that he "wanted to get credit for it."

Defendant moved to dismiss all charges and the trial court denied his Motion. The jury found Defendant guilty on all twelve counts. The trial court sentenced Defendant to six to seventeen months' imprisonment, with an additional suspended sentence of the same length. Defendant gave oral Notice of Appeal.

Issue

The issues on appeal are whether the trial court (I) erred in denying Defendant's Motion to Dismiss the charges of Obtaining Property by False Pretenses; and (II) erred in denying Defendant's Motion to Dismiss the charges of Obstruction of Justice.

Analysis

We review the trial court's denial of a motion to dismiss *de novo*, substituting our judgment freely for that of the trial court. *State v. Walker*, 286 N.C. App. 438, 441, 880 S.E.2d 731, 735 (2022). "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). If so, the motion is properly denied. *Id.* at 66, 296 N.C. at 651-52.

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). "Only defendant's evidence which does not contradict and is not inconsistent with the state's evidence may be considered favorable to defendant if it explains or clarifies the state's evidence or rebuts inferences favorable to the state." *State v. Sumpter*, 318 N.C. 102, 107-08, 347 S.E.2d 396, 399 (1986).

I. Obtaining Property by False Pretenses

[1] To convict Defendant of Obtaining Property by False Pretenses (OPFP), the State must provide evidence of "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); N.C. Gen. Stat. § 14-100 (2023). Defendant argues that the State has failed to prove the final element because the certification was already in his possession when he filed the false reports and renewing a certification does not constitute "obtaining" it as required by the statute. We agree.

To convict for OPFP, "[t]here must be a causal relationship between the representation alleged to have been made and the *obtaining* of the money or property." *State v. Davis*, 48 N.C. App. 526, 531, 269 S.E.2d 291, 294-95 (1980) (emphasis added). Thus, Defendant's argument—that he did not obtain anything because of his misrepresentation but only maintained possession of a certification obtained prior—depends on whether renewal of a license or certification constitutes obtaining property within the meaning of the statute.

We addressed a similar question in *State v. Mathis*, 261 N.C. App. 263, 819 S.E.2d 627 (2018). There, the defendant was a bail bondsman charged with OPFP for renewing his bondsman's license after submitting reports that misrepresented the bonds he had issued. *Id.* at 267, 819 S.E.2d at 631. Renewal allowed him to keep the license for another year. *Id.* As in this case, the defendant argued that he had not obtained anything of value because he already had a license prior to the misrepresentation. *Id.* at 281, 819 S.E.2d at 639-40. We agreed and rejected the State's argument that retaining the bondsman's license fell within the definition of "obtaining" as used in the OPFP statute, holding that "retain is not within the definition of obtain" and that a renewal could not constitute obtaining for the purposes of the statute. *Id.* We noted that the Department of Insurance had different processes and requirements for obtaining a bondsman's license and renewing or retaining one. *Id.* We also noted that the rule of lenity, which requires us to strictly construe criminal statutes and resolve ambiguities in favor of defendants, supported our holding. *Id.*; *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007).

Defendant argues that, similarly to *Mathis*, his false pretense led only to retaining the certification he first obtained while working as a deputy and there is therefore no causal connection between his

misrepresentation and *obtaining* the certification. We agree. Here, the indictment alleged Defendant obtained "continued law enforcement certification." Applying *Mathis*, we conclude that renewing a previously acquired law enforcement certification does not constitute obtaining property. As with the bondsman's license at issue in that case, the process for obtaining and renewing law enforcement certification differs considerably, with initial obtainment requiring completion of the Basic Law Enforcement Training course. The evidence showed Defendant did not obtain a new certification but retained a previously issued one, and to "retain is not within the definition of obtain." *Id.* at 282, 819 S.E.2d at 640. Because Defendant must have obtained property to be charged with OPFP, we conclude the trial court erred in denying his motion to dismiss.

The State attempts to distinguish *Mathis*, arguing that our decision in that case rested on an error in the indictment. The indictment in *Mathis* alleged the defendant "obtain[ed] . . . a Professional Bail Bondsman's License" that the parties agreed had, in fact, been in his possession prior to his alleged acts. *Id.* at 282, 819 S.E.2d at 640. It was only on appeal at oral argument that the State introduced the argument that "retaining wrongfully is obtaining" and that "obtaining a renewal" may constitute "obtaining." *Id.* at 282, 819 S.E.2d at 640. We declined to engage with this argument because it was inconsistent with the indictment, which did not allege the defendant had "obtained a renewal." *Id.* ("Additionally, the State's assertion at oral argument—Defendant obtained a renewal—is not what the State alleged in the indictment.").

In this case, the indictment alleges that Defendant obtained "continued law enforcement certification." While this phrasing is slightly different from the indictment in *Mathis*, it does not change the facts of this case: that Defendant obtained his certification prior to making any misrepresentation, and his false pretenses led only to a retention of certification. Under *Mathis*, this is not obtaining property within the meaning of the statute and Defendant could not be convicted of OPFP. *Id.* at 283, 819 S.E.2d at 640 ("The State also contended obtaining a renewal may be obtaining. We disagree."). The trial court erred by denying his Motion to Dismiss the charges of Obtaining Property by False Pretenses.

II. Obstruction of Justice

[2] To prove the offense of common law obstruction of justice, the State must show Defendant: "(1) unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud." *State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342-43 (2014). "[A]ny action intentionally undertaken by the defendant for the purpose of obstructing,

impeding, or hindering the plaintiff's ability to seek and obtain a legal remedy will suffice to support a claim for common law obstruction of justice." *Blackburn v. Carbone*, 208 N.C. App. 519, 703 S.E.2d 788 (2010). An obstructive act is "one that is done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation, which might lead to a judicial or official proceeding." *State v. Coffey*, 292 N.C. App. 463, 471, 898 S.E.2d 359, 364, *disc. review denied*, 386 N.C. 341, 901 S.E.2d 796 (2024).

We do not reach Defendant's arguments as to the sufficiency of evidence supporting his conviction for obstruction of justice because the indictments are facially invalid as to this charge. Because a facially invalid indictment fails to confer subject matter jurisdiction on the trial court, its validity may be challenged at any time and a conviction based on an invalid indictment must be vacated. *State v. Perkins*, 286 N.C. App. 495, 502, 881 S.E.2d 842, 849 (2022). "It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008).[1]

An indictment must include "[a] plain and concise factual statement in each count, which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2023). Defendant argues the State failed to allege obstruction because the indictment asserts no facts showing Defendant's actions were done to subvert a potential investigation or legal proceeding. The indictment alleged Defendant:

> unlawfully, willfully and feloniously with deceit and intent to defraud, did commit the infamous offense of obstruction of justice by knowingly providing false and misleading information in training records indicating he had completed mandatory in-service training and annual firearm qualification where he had not completed it, and knowing that these records and/or the information contained in these records would be and were submitted to the North Carolina Sheriffs' Education and Training

1. Defendant has filed with this Court a Motion for Appropriate Relief requesting that we address the error in the indictment in light of *Coffey*. Because errors in the indictment are jurisdictional in nature and may be raised at any time, including *sua sponte*, we elect to address this issue in this opinion and dismiss Defendant's Motion as moot.

> Standards Division thereby allowing defendant to maintain his law enforcement certification when he had failed to meet the mandated requirements.

This indictment is materially identical to that at issue in the related case of *State v. Coffey*, 292 N.C. App. 463, 898 S.E.2d 359, 364, *disc. review denied*, 386 N.C. 341, 901 S.E.2d 796 (2024). There, the defendant certified our present Defendant's falsified attendance and firearms records. *Id.* at 360-61. The indictment alleged he acted "for the purpose of allowing Sheriff Wilkins and Chief Deputy Boyd to maintain their law enforcement certification when he had failed to meet the mandated requirements." *Id.* at 365. However, it did not allege that he acted with intent to obstruct an investigation or judicial proceeding. This raised the question of what constitutes an "act which prevents, obstructs, impedes or hinders public or legal justice." *Id.* at 363; *In re Kivett*, 309 N.C. 635, 670, 309 S.E. 2d 442, 462 (1983) (defining common law obstruction of justice).

We observed that, under our precedent, an act that obstructs justice must be one that is "done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation, which might lead to a judicial or official proceeding." *Id.* at 364. When the indictment fails to allege that the acts were intended to interfere with an investigation or proceeding, it fails to allege facts supporting an element of the offense. *Id.* at 365. The indictments in *Coffey*, as in this case, alleged the defendant "willfully and knowingly provided false and misleading information in training records knowing those records would be submitted to [the Division.]" *Id.* However, there was no indication in the indictment that the defendant had acted to hinder any investigation by the Division or to impair their ability to seek relief against the involved parties: "While these alleged actions are wrongful, there are no facts asserted in the indictment to support the assertion Defendant's actions were done to subvert a potential subsequent investigation or legal proceeding." *Id.* Instead, the indictments alleged his actions were "done for the sole purpose of allowing his supervisors to maintain their certifications." *Id.*

Defendant's nearly identical indictment likewise asserts only that his submission of falsified records was done for the purpose of maintaining his certification despite failing to meet the requirements. It does not allege that his wrongful acts were done to subvert a potential investigation or legal proceeding, and therefore fails to allege he performed an act which "prevents, obstructs, impedes or hinders public or legal justice." *Kivett*, 309 N.C. at 670, 309 S.E.2d at 463; N.C. Gen. Stat.

§ 15A-924(a)(5) (2023). The indictment therefore fails entirely to charge Defendant with a criminal offense.[2]

Thus, here, the indictments were insufficient by failing to allege the crime of common law obstruction of justice. Therefore, the indictments were fatally defective. Consequently, the trial court erred in denying Defendant's Motion to Dismiss because the indictments as to Obstruction of Justice were defective and the trial court lacked subject matter jurisdiction to enter judgment thereon.[3]

Conclusion

Accordingly, for the foregoing reasons, we reverse the ruling of the trial court as to Defendant's Motion to Dismiss the charges of Obtaining Property by False Pretenses and vacate the trial court's Judgments as to Defendant's convictions of common law Obstruction of Justice.

REVERSED IN PART; VACATED IN PART.

Judges MURPHY and WOOD concur.

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2. We note that our Supreme Court has recently held that "an indictment raises jurisdictional concerns only when it wholly fails to charge a crime against the laws or people of this State." *State v. Singleton*, 386 N.C. 183, 184-85, 900 S.E.2d 802, 805 (2024). A "mere pleading deficiency" does not deprive our courts of jurisdiction. *Id.* at 215, 900 S.E.2d at 824. The indictment in this case does not allege conduct that could be understood to constitute common law obstruction of justice and therefore fails entirely to allege a criminal act, creating a jurisdictional defect. We additionally observe that the Supreme Court denied discretionary review in *Coffey* subsequent to its opinion in *Singleton*. 901 S.E.2d 796. *Coffey* remains binding precedent upon this Court.

3. It must be noted that the trial court did not have the benefit of our decision in *Coffey*.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 SEPTEMBER 2024)

BIGGS v. ERIE INS. EXCH. No. 23-1167	Durham (23CVS1463)	Dismissed
CAMPBELL v. WARREN No. 23-1011	Burke (13CVD552) (15CVD988)	Reversed and Remanded
HANDS v. HANDS No. 24-19	Mecklenburg (20CVD15708)	Affirmed
IN RE B.-L.K. No. 24-188	Moore (22JT65)	Affirmed
IN RE P.Z.R. No. 24-402	New Hanover (21JT41) (21JT42)	Affirmed
IN RE R.A.S. No. 24-150	Johnston (19JT234-500) (19JT235-500) (19JT236-500)	Affirmed
KOTSIAS v. FLA. HEALTH CARE PROPS. No. 23-1029	N.C. Industrial Commission (X59853)	AFFIRMED IN PART, REMANDED IN PART, ALL COSTS TAXED TO APPELLANT
SMITH v. SMITH No. 24-245	Forsyth (22CVS5302)	Dismissed
STATE v. ABERNETHY No. 24-232	Catawba (22CRS609)	No Error
STATE v. BAILEY No. 24-485	Moore (23CRS203372) (23CRS215138)	No Error
STATE v. BRADSHAW No. 23-797	Guilford (18CRS85724)	Dismissed
STATE v. DAVIS No. 23-1088	Brunswick (23CRS366)	Affirmed
STATE v. DUMAS No. 24-76	Montgomery (23CRS1012)	No Error

STATE v. ELLISON No. 24-53	Buncombe (20CRS91286) (20CRS92077) (21CRS472)	Vacated and Remanded
STATE v. HENDERSON No. 23-553	Buncombe (20CRS89242-43)	No Plain Error
STATE v. JONES No. 24-49	Buncombe (02CRS50329) (02CRS50399-400)	Affirmed
STATE v. JONES No. 23-991	Nash (21CRS53377) (21CRS53378)	No Error
STATE v. MOODY No. 24-61	Mecklenburg (20CRS16583)	AFFIRMED In Part, and DISMISSED In Part
STATE v. PARKER No. 24-432	Forsyth (22CRS353186) (22CRS357432)	No Error
STATE v. PATTERSON No. 23-730	Forsyth (19CRS55162) (22CRS1020)	No Error
STATE v. PENA No. 23-537	Mecklenburg (12CRS223248-51)	No Error
STATE v. RAWSON No. 23-610	Buncombe (22CRS1610)	No Error
STATE v. ROLLINSON No. 23-992	New Hanover (20CRS51101-02)	No Error
STATE v. SLADE No. 23-1157	Guilford (15CRS93186-88) (19CRS25103-07)	Affirmed in Part, Vacated in Part, Remanded for Resentencing
STATE v. SUGGS No. 23-4	Mecklenburg (19CRS27393) (19CRS28377)	No Error
STATE v. TAFT No. 24-430	Pitt (21CRS53490) (21CRS53773)	Affirmed in Part, Vacated in Part, and Remanded

STATE v. WARREN No. 24-164	Beaufort (22CRS279630) (22CRS687)	No Error
STEPHENS v. LUNNERMON No. 24-243	Cumberland (22CVD6293)	Affirmed
TADLOCK v. MORETZ No. 23-561	Catawba (19CVD1047)	Affirmed
TEASLEY v. HARRIS TEETER, LLC No. 24-537	Durham (23CVS004839)	Dismissed
WELLS FARGO BANK, N.A. v. GEORGE No. 23-1002	New Hanover (23CVD2728)	Affirmed

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