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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DEBRA CULLEN, PLAINTIFF
v.
LOGAN DEVELOPERS, INC., DEFENDANT

No. COA22-223

Filed 16 May 2023

1. Negligence—contributory negligence—unsafe condition—newly constructed home—summary judgment

In an action arising from plaintiff's fall through the attic floor of her newly constructed home, the trial court erred by granting summary judgment in favor of defendant general contractor on plaintiff's negligence claim where the forecast of evidence showed a genuine issue of material fact as to whether plaintiff was contributorily negligent by failing to look out for her safety—whether she knew or should have known that the scuttle hole that defendant had constructed and then subsequently concealed with drywall presented an unsafe condition. According to plaintiff's forecasted evidence, she had walked through the area before defendant created the scuttle hole, and it had been covered by plywood flooring; later, after she expressed her dislike of the scuttle hole, defendant assured her that the scuttle hole would be fixed prior to closing.

2. Negligence—gross negligence—unsafe condition—newly constructed home—summary judgment

In an action arising from plaintiff's fall through the attic floor of her newly constructed home, the trial court erred by granting summary judgment in favor of defendant general contractor on plaintiff's gross negligence claim where defendant had constructed a scuttle hole in the ceiling of the master bathroom to comply with the

local building code and then subsequently concealed the hole with drywall after plaintiff expressed her displeasure over the appearance of the hole. According to the forecasted evidence, defendant knew that concealing the hole violated applicable building code and posed a hazard, but he did it anyway, which a jury could find amounted to wanton conduct done with conscious or reckless disregard for the safety of others.

Appeal by Plaintiff from judgment entered 14 October 2021 by Judge Henry L. Stevens in Brunswick County Superior Court. Heard in the Court of Appeals 20 September 2022.

Ricci Law Firm, P.A., by Meredith S. Hinton and William J. Patterson, for plaintiff-appellant.

McAngus Goudelock & Courie PLLC, by Jeffery I. Stoddard, for defendant-appellee.

MURPHY, Judge.

The trial court improperly granted Defendant's motion for summary judgment and dismissed Plaintiff's negligence claim where the forecast of evidence showed a genuine issue of material fact as to whether Plaintiff knew or should have known that the scuttle hole Defendant constructed in her attic walk space had not been closed but was concealed with drywall and thus presented an unsafe condition. As the forecast of evidence must be viewed in the light most favorable to Plaintiff, the trial court erred in concluding Plaintiff was contributorily negligent as a matter of law. The forecast of evidence likewise showed a genuine issue as to whether Defendant's conduct in visually concealing the scuttle hole with drywall amounted to gross negligence. We vacate the trial court's order.

BACKGROUND

Defendant general contractor Logan Developers, Inc. contracted to build a new home for Plaintiff Debra Cullen and her husband in Southport. The home was a model home that Defendant designed. During a final walkthrough of the home nearing the end of construction, Plaintiff and her husband noticed that Defendant had cut a new scuttle hole to access the attic through the area of the existing attic walk space and the master bathroom ceiling. Plaintiff and her husband complained to Defendant that the scuttle hole was an eyesore and they wanted it

gone. Defendant's agent told Plaintiff the local building code required the scuttle hole be there; however, "[t]o meet the Cullens halfway," according to Defendant, it agreed to cover the scuttle hole with drywall and concealed its appearance from the master bathroom ceiling.

During their first week in the home, on 1 May 2019, Plaintiff walked into the attic and began taking pictures of areas where she wanted to add plywood flooring to the existing walk space but where there was only insulation. Plaintiff stepped onto the area of the walk space that Defendant cut for the scuttle hole and fell through the ceiling of the master bathroom. Plaintiff suffered serious injuries, including a broken ankle and thumb.

Plaintiff acknowledged at deposition that, if she had looked down at the scuttle hole, she likely "would have seen insulation and [she] would not have stepped in it." However, according to Plaintiff, Defendant never spoke with her about what covering the scuttle hole would entail or "the details of what work they were going to do[.]" Instead, Plaintiff stated that Defendant's agent's "exact words were 'by closing, you'll never know [the scuttle hole] was there.' " Plaintiff testified that, in light of Defendant's statements, she did not think to look down at the area because she "thought that [w]hole thing was plywood like it was in the beginning . . . ."[1]

On 15 October 2020, Plaintiff filed suit in Brunswick County, asserting one count each of negligence and gross negligence. Plaintiff alleged Defendant was negligent and grossly negligent in, *inter alia*, (1) failing to comply with applicable building codes, (2) failing to construct the home in a fit and habitable condition and failing to properly inspect and repair the scuttle hole, and (3) failing to adequately warn Plaintiff of the unsafe condition. Plaintiff sought recovery for her injuries, including medical expenses and lost income and Social Security benefits, as well as punitive damages for Defendant's gross negligence.

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1. Defendant answered the following to an interrogatory regarding its placement of the scuttle hole:

> On [28 December] 2018, the rough-in inspection noted that the distance from the attic entry to the mechanical air handler unit was greater than 20 feet. According to the [building] code, if the air handler is more than 20 feet from the access point, the entire walk path to the unit must have six feet of head clearance. Some of the framing in the Cullen's house lowered the head clearance below six feet. This required a scuttle hole or another access to the mechanic air handler unit. . . . The only location that would allow for access within 20 feet along with the clearance requirement was the master bathroom [area of the attic].

Defendant answered, alleging Plaintiff was aware of the scuttle hole and that "the framed opening from the attic side was left open, not concealed in any way, and clearly visible to someone in the attic." Defendant asserted affirmative defenses, including contributory negligence, assumption of risk, and completion and acceptance.[2]

On or about 1 July 2021,[3] Defendant filed a motion for summary judgment seeking Plaintiff's claims be dismissed and judgment be entered in its favor on all counts. By order entered 14 October 2021, the trial court concluded the forecasted evidence, even in the light most favorable to her, showed Plaintiff was contributorily negligent as a matter of law, thus barring her negligence claim, and that Plaintiff had alleged "insufficient facts . . . to support a conclusion of gross negligence on behalf of Defendant." The trial court granted Defendant's motion for summary judgment and dismissed Plaintiff's claims. Plaintiff timely appealed.

ANALYSIS

We review a trial court's order granting summary judgment *de novo*. *Proffitt v. Gosnell*, 257 N.C. App. 148, 151 (2017). "Under a *de novo* review, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower court." *Id.* (marks omitted).

Summary judgment is appropriate under Rule 56 of the North Carolina Rules of Civil Procedure where

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment bears the burden of showing that no triable issue of fact exists, and may satisfy its burden by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that an affirmative defense would bar the non-moving party's claim.

Id. at 151 (marks omitted); N.C.G.S. § 1A-1, Rule 56(c) (2021).

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2. Defendant also alleged affirmative defenses of failure to mitigate and lack of proximate cause.

3. Defendant's motion for summary judgment is not file stamped, but there was no dispute regarding the filing of the motion at the hearing.

"[S]ummary judgment is proper in a negligence case where the forecast of evidence fails to show negligence on [the] defendant's part, or establishes [the] plaintiff's contributory negligence as a matter of law." *Stansfield v. Mahowsky*, 46 N.C. App. 829, 830, *disc. review denied*, 301 N.C. 96 (1980); *see also McCauley v. Thomas*, 242 N.C. App. 82, 90 (2015) ("The issue of gross negligence should be submitted to the jury if there is substantial evidence of the defendant's wanton and/or [willful] conduct."). Summary adjudication of such claims, however, "is normally inappropriate due to the fact that the test of the reasonably prudent person is one which the jury must apply in deciding the questions at issue." *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 88 (2001). Moreover, the issue of whether a plaintiff was contributorily negligent "is ordinarily a question for the jury; such an issue is rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff's negligence so clearly that no other reasonable conclusion may be reached." *Proffitt*, 257 N.C. App. at 152.

A. Contributory Negligence

[1] For the purposes of this appeal, Defendant concedes that its actions may have been negligent, but maintains that, "[r]egardless of whether it was negligent to place the scuttle hole, cover the scuttle hole with drywall, fail to cover the attic side of the scuttle hole with plywood, or whether any of these actions were a code violation, the evidence is unequivocal that [Plaintiff] was negligent in stepping backwards in an attic while unreasonably choosing to not watch where she was stepping." The trial court, in its order, concluded that Plaintiff's "own negligence clearly contributed to her" injuries in that the forecasted evidence "affirmatively show[ed]" she failed "to keep a proper lookout for her own safety while stepping backwards and off the plywood walking path in the attic and into an area that she knew was unsafe."

We disagree and conclude the forecast of evidence shows a genuine issue of fact exists as to whether Plaintiff knew or should have known there was an unsafe condition in the area where she was walking in the attic. The trial court therefore erred in concluding Plaintiff was contributorily negligent as a matter of law for failing to look down and behind her before she stepped in that area.

The doctrine of contributory negligence provides that "a plaintiff cannot recover for injuries resulting from a defendant's negligence if the plaintiff's own negligence contributed to [her] injury." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 483 (2020). Contributory negligence is "conduct which fails to conform to an objective standard of behavior—the care an ordinarily prudent person would

exercise under the same or similar circumstances to avoid injury." *Proffitt*, 257 N.C. App. at 152 (emphasis omitted).

A successful defense requires "a want of due care on the part of the plaintiff[.]" *Id.* (marks omitted). Oftentimes, "[t]he basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, [the] plaintiff failed to keep a proper lookout for her own safety. The question is . . . whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor." *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468 (1981), *overruled on other grounds*, *Nelson v. Freeland*, 349 N.C. 615 (1998); *see also Proffitt*, 257 N.C. App. at 164 ("[I]t is well settled that a person is contributorily negligent if he or she knows of a dangerous condition and voluntarily goes into a place of danger."). Our Supreme Court has further explained that "one is not required to anticipate the negligence of others; in the absence of anything which gives or should give notice to the contrary, one is entitled to assume and to act on the assumption that others will exercise ordinary care for their own or others' safety." *Norwood*, 303 N.C. at 469. Plaintiff's behavior must be "compared to that of a reasonable person under similar circumstances." *Draughon*, 374 N.C. at 484.

In this case, Defendant affirmed its agent

> told [Plaintiff and her husband] that wherever there was subflooring in the attic they could place storage bins but that they were prohibited by code from adding any additional subflooring to the attic. *[Plaintiff and her husband] knew from these conversations they could not step off the subflooring in the attic.* . . . [Defendant told Plaintiff the scuttle hole] was required by code so [Defendant] could not cover it with plywood. To meet [Plaintiff and her husband] halfway, [Defendant's agent] told them he could put drywall over the scuttle hole.

(Emphasis added). But Plaintiff's forecasted evidence, if believed, shows the only time Plaintiff walked in the attic prior to the accident was before Defendant installed the scuttle hole, and the area where Defendant cut the scuttle hole was within the area of what was once a walk space when Plaintiff was previously in the attic. *See Norwood*, 303 N.C. at 469 (emphasis added) ("Applying this principle to the facts of the case *sub judice*, [the] plaintiff was contributorily negligent only if in the exercise of ordinary care she should have seen *and appreciated the danger of* the protruding platform."). Plaintiff explained in her answers to interrogatories that her husband had previously

> walked in and saw the hole in the [master bathroom] ceiling. He asked [Defendant] what it was. [Defendant] told him not to worry, that they would fix the hole as soon as the inspection was completed. It was our understanding that this was fixed prior to us closing on the house.

Plaintiff stated she believed this meant Defendant would "replace[] the plywood that [Defendant] had . . . removed to" cut the scuttle hole. Plaintiff further averred that "[t]he *hole* was something that [Defendant] told us would be fixed prior to us closing on the house." (Emphasis added).

We must view the evidence in the light most favorable to Plaintiff, and these statements create a genuine issue of material fact as to whether Plaintiff knew the area remained unsafe such that she was negligent in failing to look out for her safety while walking. *See Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citations omitted) ("The movant's papers are carefully scrutinized; those of the adverse party are indulgently regarded. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party."); *Maness v. Fowler-Jones Constr. Co.*, 10 N.C. App. 592, 598 ("While . . . there may have been other, safer procedures which [the] plaintiff could have followed . . . , this would not as a matter of law require a holding that [she] was negligent in doing what [she] did."), *cert. denied*, 278 N.C. 522 (1971). The merits of Defendant's affirmative defense and any evidence that Plaintiff knew the danger existed present a question of fact for the jury to decide. *See*, *e.g.*, *id.*; *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 395 (2007) (marks omitted) ("[S]ummary judgment is rarely appropriate in cases of negligence or contributory negligence."); *see also Proffitt*, 257 N.C. App. at 152 ("Contradictions or discrepancies in the evidence even when arising from the plaintiff's evidence must be resolved by the jury rather than the trial judge.").

We note further the cases Defendant cites in support of its argument pertaining to Plaintiff's knowledge in this case all involve plaintiffs employed and working in a specialized or dangerous line of work, or involve falls in public areas where the plaintiff had no reasonable expectation the area would be free of dangers. *See Swinson v. Lejeune Motor Co.*, 147 N.C. App. 610, 618-19 (2001) (McCullough, J., dissenting) (affirming finding of contributory negligence where the plaintiff fell in a car dealership parking lot), *reversed for reasoning stated in dissenting opinion*, 356 N.C. 286 (2002); *Holland v. Malpass*, 266 N.C. 750, 752 (1966) ("The plaintiff's evidence . . . shows that the plaintiff, an experienced garage worker, failed to look before he stepped where he should have anticipated some obstruction was likely."); *Lee v. Carolina*

Upholstery Co., 227 N.C. 88, 89 (1946) ("[The P]laintiff was an experienced truckman and was doing the work in his own way."); *Dunnevant v. Southern Ry. Co.*, 167 N.C. 232, 233 (1914) (sustaining motion to nonsuit where the plaintiff fell at a train station late at night after walking off into the dark without his lantern).

Our Supreme Court held in *Holland* that "[w]hat constitutes reasonable care depends upon the nature of the business and the normal use in such business establishments of like areas." *Holland*, 266 N.C. at 752. Plaintiff's state of mind is relevant in determining whether she conducted herself in a reasonably prudent manner; in this case, Plaintiff's state of mind was that of someone walking into her brand-new home she contracted with Defendant to build, subject to the safety standards set forth in the applicable building codes, as well as any contractual assurances and warranties. She was also aware of the area of attic previously covered by plywood flooring, prior to the creation of the scuttle hole, and aware of Defendant's assurance the scuttle hole had been fixed prior to closing on the home. *See Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 377 (marks omitted) ("The standard is always the rule of the prudent man or the care which a prudent man ought to use under like circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions."), *aff'd*, 307 N.C. 267 (1982); *see also Crescent Univ. City Venture, LLC v. Trussway Mfg., Inc.*, 376 N.C. 54, 61-62 (2020) (noting that, even in cases involving only economic loss by "subsequent home purchaser[s]," the plaintiff may "recover against the builder of a home in negligence" on grounds of public policy specific to "the plight of residential homebuyers[,]" specifically that "[t]he ordinary purchaser of a home is not qualified to determine when or where a defect exists"). Plaintiff's forecast of evidence, taken as true, prevented a conclusion by the trial court that Plaintiff was contributorily negligent as a matter of law by failing to look out for her safety. The trial court therefore erred in concluding Plaintiff was contributorily negligent and dismissing Count I of Plaintiff's complaint.

B. Plaintiff's Claim of Gross Negligence

[2] Plaintiff next challenges the trial court's conclusion that Plaintiff alleged insufficient facts to support a finding of gross negligence.

Gross negligence "consists of wanton conduct done with conscious or reckless disregard for the rights and safety of others. An act is wanton when it is . . . done needlessly, manifesting a reckless indifference to the rights of others." *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 490 (citations and marks omitted), *disc. review denied*, 766 S.E.2d 646 (2014).

Our Supreme Court

> has described the difference between ordinary and gross negligence as follows:
>
> [T]he difference between the two is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, i.e., a conscious disregard of the safety of others.

Ray v. N.C. Dep't of Transp., 366 N.C. 1, 13 (2012) (quoting *Yancey v. Lea*, 354 N.C. 48, 53 (2001)).

> In determining or defining gross negligence, this Court has often used the terms willful and wanton conduct and gross negligence interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct. We have defined gross negligence as wanton conduct done with conscious or reckless disregard for the rights and safety of others. An act is wanton when it is done of wicked purpose, *or when done needlessly*, manifesting a reckless indifference to the rights of others. Our Court has defined willful negligence in the following language:
>
> An act is done wilfully when it is done *purposely and deliberately in violation of law* or when it is done knowingly and of set purpose, *or when the mere will has free play, without yielding to reason*. The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.

Green v. Kearney, 217 N.C. App. 65, 70 (2011) (emphases added) (quoting *Yancey*, 354 N.C. at 52-53). "Wanton and willful negligence rests on the assumption that [the defendant] knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results." *Wagoner v. R.R.*, 238 N.C. 162, 168 (1953).

Plaintiff alleged the following "intentional wrongdoing or deliberate misconduct[,]" *Green*, 217 N.C. App. at 75, in support of her claim of gross negligence:

4. Prior to Plaintiff taking possession of the Premises, Defendant left a hole in the ceiling of the master bathroom in order for it to be inspected.

5. Defendant assured Plaintiff that the hole would be fixed after the inspection and before her taking possession of the Premises.

6. On or about [25 April 2019], Plaintiff began occupying the Premises.

7. The hole in the ceiling of the master bathroom appeared to have been properly repaired and was no longer visible to Plaintiff.

. . . .

10. Plaintiff had no knowledge or notice of any unresolved dangerous condition of the attic floor/master bathroom ceiling that would cause it to collapse.

. . . .

25. The conduct of Defendant constituted gross negligence and/or willful and wanton disregard for the rights and safety of Plaintiff.

26. By reason of the conduct of Defendant, Plaintiff is entitled to punitive damages.

Defendant's operations director stated the following at Defendant's Rule 30 deposition:

Q. Do you think [covering the scuttle hole with drywall] was a right decision for [Defendant] to make?

A. No. Absolutely not. I told [our employee working on the site]—I said, that—whether we think it's necessary or not it is—was required by code. It was installed and inspected and it should have stayed.

Q. And so doing away with that would make the house not up to code?

A. Correct. If an inspector re-inspected that he would have—he would have found that in violation.

Q. Would that be a problem for [Defendant]?

A. Yes.

Q. Did [Defendant's employee] ever ask if he could do that?

A. He did not.

The forecasted evidence in this case thus contains allegations and averments which, if taken as true, show Defendant knew concealing the appearance of the scuttle hole from the side of the master bathroom ceiling violated applicable building code, and otherwise knew concealing the hole posed a hazard, but did it anyway. *See Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 403 (2001) ("Conduct is wanton when it is carried out with a . . . reckless indifference."). While we acknowledge gross negligence "is a high threshold for liability," *Green*, 217 N.C. App. at 74 (marks omitted), viewing the materials in the light most favorable to Plaintiff, as we must, we hold the trial court erred in concluding Defendant was not grossly negligent as a matter of law. The forecasted evidence states a claim for gross negligence and raises a genuine issue of material fact whether Defendant's conduct surrounding the scuttle hole amounted to "wanton conduct done with conscious or reckless disregard for the . . . safety of others" such that it cannot be said Defendant was not grossly negligent as a matter of law.[4] *See Bullins v. Schmidt*, 322 N.C. 580, 583 (1988); *Beck*, 57 N.C. App. at 385 ("Plaintiff's evidence which tended to show numerous violations of the National Electrical Safety Code and of defendant's own standards was sufficient to merit the submission of the issue of punitive damages to the jury."); *cf. Bashford v. N.C. Licensing Bd. for General Contractors*, 107 N.C. App. 462, 466 (1992) (noting more than a violation of the building code is needed to establish gross negligence under both N.C.G.S. § 87-11(a) and the common law). Accordingly, the trial court erred in dismissing Count II of Plaintiff's complaint.

Lastly, Defendant's argument that Plaintiff has abandoned the available remedy of punitive damages by failing to discuss them in her Appellant Brief is misplaced. The trial court dismissed Plaintiff's complaint, determining she was not entitled to relief as a matter of law. The issue of to what relief she would be entitled is thus not before us. Plaintiff specifically alleged willful and wanton conduct in Count II of her complaint for gross negligence in support of punitive damages. If,

4. Since the forecasted evidence does not establish Plaintiff was contributorily negligent as a matter of law, Defendant's argument concerning Plaintiff's gross-contributory negligence likewise fails. *See McCauley*, 242 N.C. App. at 89 (citation omitted) ("[A] plaintiff's contributory negligence does not bar recovery from a defendant who is grossly negligent. Only gross contributory negligence by a plaintiff precludes recovery by the plaintiff from a defendant who was grossly negligent.").

from the evidence, the jury determines there was willful and wanton conduct on the part of Defendant amounting to gross negligence and Plaintiff was not contributorily negligent, Plaintiff may pursue punitive damages. *See Beck*, 57 N.C. App. at 383 (marks omitted) ("Our Court has stated that under the common law of this State punitive damages may be awarded when the wrong is done willfully . . . or in a manner which evinces a reckless and wanton disregard of [the] plaintiff's rights.").

CONCLUSION

For the foregoing reasons, we vacate the trial court's order granting Defendant's motion for summary judgment and remand for further proceedings.

VACATED AND REMANDED.

Chief Judge STROUD and Judge ZACHARY concur.

MAURICE DEVALLE, PETITIONER
v.
NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT

No. COA22-256

Filed 16 May 2023

1. Administrative Law—petition for judicial review—denial of justice officer certification—sufficiency of exceptions to final agency decision

In a contested case in which a school resource officer sought judicial review of the final agency decision of the N.C. Sheriffs' Education and Training Standards Commission (Commission) denying his application for justice officer certification—a certification previously granted to petitioner when he was an officer with the state highway patrol but which the Commission had revoked for lack of good moral character—the petition for judicial review was not subject to dismissal for lack of notice where it contained, as required by N.C.G.S. § 150B-46, sufficient exceptions to the final agency decision and a request for relief (in this case, reversal of the decision and reinstatement of the justice officer certification).

2. Public Officers and Employees—denial of justice officer certification—arbitrary and capricious—unsupported by substantial evidence

In a contested case in which a school resource officer applied for reinstatement of justice officer certification—which had previously been granted to him when he was an officer with the state highway patrol but which was revoked for lack of good moral character—the decision of the N.C. Sheriffs' Education and Training Standards Commission (Commission) to disregard the administrative law judge's recommendation for reinstatement and instead deny indefinitely petitioner's request for certification was arbitrary and capricious and not supported by substantial evidence. The Commission did not abide by its own standard in determining whether petitioner had good moral character at the time of the contested case hearing—relying instead on the incident several years prior that led to petitioner's termination from the highway patrol, which did not amount to severe misconduct—and failed to take into account evidence that petitioner's character had been rehabilitated. Therefore, the trial court did not err by reversing the Commission's decision and directing the Commission to reinstate petitioner's certification retroactively.

Appeal by Respondent from order entered 22 November 2021 by Judge James Gregory Bell in Columbus County Superior Court. Heard in the Court of Appeals 2 November 2022.

The McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellee.

North Carolina Fraternal Order of Police, Amicus Curiae Brief, by Norris A. Adams, II, for petitioner-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ameshia Cooper Chester, for respondent-appellant.

MURPHY, Judge.

Where the North Carolina Sheriffs' Education and Training Standards Commission revoked Petitioner's justice officer certification for lack of good moral character based on his conduct in 2016, the Commission could not deny Petitioner's certification indefinitely where the only recent evidence to support the denial was his demeanor on

cross examination during the contested-case hearing and Petitioner presented sufficient evidence that he rehabilitated his character. We affirm the trial court's order on judicial review reversing the Commission's final agency decision and ordering that it issue Petitioner his justice officer certification retroactive to the date of application.

BACKGROUND

Petitioner Maurice Devalle served with the North Carolina State Highway Patrol for nineteen years. Respondent North Carolina Sheriffs' Education and Training Standards Commission ("the Commission") had certified Mr. Devalle as a justice officer during that time, since November 1998. Prior to April 2017, Mr. Devalle received only one disciplinary action by the Highway Patrol in the form of a written warning.

The Highway Patrol received a tip in November 2016 that Mr. Devalle was at his residence in Wake County while he was supposed to be on duty in Wayne County. The Highway Patrol conducted an internal investigation following the tip. The Highway Patrol learned Mr. Devalle had falsely reported he resided within the mandated-20-mile radius of his duty station in Wayne County, when he in fact lived 44 miles away, in Wake County. On 11 November 2016, Highway Patrol personnel traveled to Mr. Devalle's Wake County home while he was scheduled to be on duty and found him there dressed in plain clothing. Mr. Devalle admitted that, on occasion, he would drive home for lunch and then stay home "for extended periods of time while he was on-duty . . . ." Mr. Devalle acknowledged he knew this conduct violated Highway Patrol Policy.

On 24 April 2017, the Highway Patrol terminated Mr. Devalle's employment and, four days later, notified the Commission of Mr. Devalle's termination and the above conduct. The Commission revoked Mr. Devalle's justice officer certification as a result of the report effective 24 April 2017.[1]

In August 2017, Mr. Devalle began working as a school resource officer for East Columbus County High School and applied that same month once again for justice officer certification with the Commission through the Columbus County Sheriffs' Office. On 29 January 2019,[2] the Commission notified Mr. Devalle that it had reviewed his application for certification and denied his certification indefinitely. The notification

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1. Mr. Devalle's termination from the Highway Patrol and initial loss of certification in April 2017 are not at issue in this appeal.

2. Mr. Devalle remained employed at East Columbus County High during this period.

indicated to Mr. Devalle his denial was due to him "[n]o longer possessing the good moral character required of all justice officers."[3]

On 20 March 2019, Mr. Devalle filed a request for a contested case hearing in the Office of Administrative Hearings. On 3 December 2019, Mr. Devalle's case came on for hearing before administrative law judge Melissa Owens Lassiter. The Commission only presented evidence of the 2016 conduct that led to Mr. Devalle's termination. Mr. Devalle presented two witnesses at the hearing, the Sheriff of Columbus County and school principal of East Columbus County High School, his superiors, where Mr. Devalle was employed as a school resource officer. Both individuals testified in depth to the effect that Mr. Devalle currently had good moral character. The administrative law judge found:

> 68. . . . . [The Commission] failed to present any evidence concerning any activities involving [Mr. Devalle] that took place more recently than 2016. While four witnesses from the [Highway] Patrol testified regarding [Mr. Devalle's] dismissal from the Patrol, none of those witnesses possessed any first-hand knowledge of how [Mr. Devalle] has conducted himself in terms of truthfulness or conformance with policies while [presently] employed as a deputy sheriff in Columbus County. None of those witnesses opined that [Mr. Devalle] lacked good moral character, either generally, or to serve as a deputy sheriff in this State.

(Transcript citations omitted). By proposal for decision filed 3 June 2020, the administrative law judge recommended a conclusion that the evidence at the hearing "rebutted the finding by [the Commission] that Petitioner lacks the good moral character required of a justice officer." The administrative law judge recommended this was a result of the testimony by Mr. Devalle's superiors establishing that Mr. Devalle "has rehabilitated his character since 2017."

By final agency decision signed 6 October 2020,[4] the Commission rejected the administrative law judge's proposal and concluded instead that the evidence before the administrative law judge showed Mr. Devalle "currently does not possess the good moral character required

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3. The Commission also denied Mr. Devalle's certification for the Class B misdemeanor of "Willfully Failing to Discharge Duties," but suspended the denial. This ground is not at issue on appeal.

4. Alan Cloninger, Chairman, North Carolina Sheriffs' Education and Training Standards Commission.

to continue certification as a deputy sheriff." The Commission accepted and found the testimony of Mr. Devalle's present character to be credible and believable. The Commission found, however, that Mr. Devalle lacked candor and truthfulness while testifying on cross examination at the contested case hearing, and therefore concluded he lacked the good moral character required for justice officer certification. The Commission denied Mr. Devalle's certification indefinitely as a result.[5]

On 3 December 2020, Mr. Devalle filed a petition for judicial review of the Commission's final agency decision in Columbus County Superior Court. The Commission filed a motion to dismiss and brief in opposition.

On 22 November 2021, the trial court concluded the record established that Mr. Devalle "*presently* has good moral character to serve as a Deputy Sheriff," and reversed the Commission's final agency decision. The trial court ordered the Commission to grant Mr. Devalle's application for certification effective and retroactive to August 2017. The Commission appeals.

ANALYSIS

The Commission advances several arguments on appeal challenging the trial court's reversal of its final agency decision. The Commission first argues the trial court erroneously concluded Mr. Devalle's petition for judicial review provided sufficient notice to the Commission of Mr. Devalle's exceptions to its final agency decision. The Commission also argues no grounds support the trial court's reversal of its final agency decision under the provisions of N.C.G.S. § 150B-51(b). We disagree, and affirm the trial court's order.

"Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies . . . , is entitled to judicial review of the decision . . . ." N.C.G.S. § 150B-43 (2021). On petition for judicial review from a final administrative agency decision, the trial court sits as an appellate court reviewing the administrative agency. *See Rector v. N.C. Sheriff's Educ. & Training Standards Com.*, 103 N.C. App. 527, 532 (1991) (citing *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410 (1977)).

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5. The Commission denied the certification indefinitely based upon Mr. Devalle's "lack of good moral character." The Commission denied Mr. Devalle's certification for a suspended sanction of five years for the commission of the Class B offense of willful failure to discharge duties.

The North Carolina Administrative Procedure Act defines the scope of a Superior Court's review over a final agency decision. *See* N.C.G.S. § 150B-51 (2021). Subsection (b) provides:

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

N.C.G.S. § 150B-51(b) (2021).

Errors asserted under subdivisions (1) through (4) of subsection (b) are reviewed *de novo*. N.C.G.S. § 150B-51(c) (2021). "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *N.C. Dep't of Env't and Nat. Res. v. Carroll*, 358 N.C. 649, 660 (2004) (quotation marks omitted). In contrast, errors asserted under subdivisions (5) and (6) are reviewed "using the whole record standard of review." N.C.G.S. § 150B-51(c) (2021).

Under the whole record standard of review, the trial court reviews the whole record to ensure "the administrative agency's decision is supported by substantial evidence." *Rector*, 103 N.C. App. at 532. The question before the trial court was whether there was "substantial evidence to support a finding" essential to the agency's determination. *In re Rogers*, 297 N.C. 48, 65-66 (1979). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and 'is more than a scintilla or a permissible inference.' " *Rector*, 103 N.C. App. at 532 (marks omitted).

"When this Court reviews an appeal from the [S]uperior [C]ourt reversing the decision of an administrative agency, our standard of review is twofold and is limited to determining: (1) whether the [S]uperior

[C]ourt applied the appropriate standard of review and, if so, (2) whether the [S]uperior [C]ourt properly applied this standard." *McCrann v. N.C. HHS*, 209 N.C. App. 241, 246, *disc. review denied*, 365 N.C. 198 (2011); *see also Powell v. N.C. Crim. Justice Educ. Training Stds. Comm'n.*, 165 N.C. App. 848, 851 (2004) (citation and marks omitted) ("The appellate court examines the trial court's order regarding an agency decision for error of law.").

A. Adequacy of Petition for Judicial Review

[1] We first address the Commission's argument that Mr. Devalle's petition for judicial review lacked sufficient notice to the Commission of the specific exceptions Mr. Devalle took to its final agency decision. We conclude the trial court properly denied the Commission's motion to dismiss Mr. Devalle's petition for judicial review on this ground.

Section 150B-46 of the North Carolina Administrative Procedure Act governs the contents of a petition for judicial review over an administrative agency's final decision. N.C.G.S. § 150B-46 (2021). It requires only that "[t]he petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks." N.C.G.S. § 150B-46 (2021). " 'Explicit' is defined in this context as 'characterized by full clear expression: being without vagueness or ambiguity: leaving nothing implied.' " *Gray v. Orange County Health Dept.*, 119 N.C. App. 62, 70 (quoting *Vann v. N.C. State Bar*, 79 N.C. App. 173, 173-74 (1986)), *disc. review denied*, 341 N.C. 649 (1995).

Mr. Devalle's petition for judicial review in this case took exception to the Commission's finding "that [Mr. Devalle] lacked the good moral character required of every justice officer under 12 NCAC 10B .0303(a)(8)." Mr. Devalle complained that the Commission found the only evidence regarding Mr. Devalle's current moral character to be "credible, honest, and believable," but that the Commission nonetheless concluded Mr. Devalle lacked the requisite moral character. Moreover, Mr. Devalle cited our Supreme Court's decision in *In re Dillingham*, 188 N.C. 162 (1924), and asserted that the sanction of revocation for an indefinite period may continue only "so long as the stated deficiency exists." Mr. Devalle thus excepted "to particular findings of fact, conclusions of law, or procedures." *Kingsgrab v. State Bd. of Barber Examiners*, 236 N.C. App. 564, 570 (2014), *disc. review denied*, 368 N.C. 244 (2015). He then prayed that the trial court "[r]everse the portion of the Final Agency Decision that determined that he continues to lack good moral character," and that the court "[r]einstate [his] justice officer certification[.]" We conclude this filing adequately stated the exceptions Mr. Devalle took to the Commission's final agency decision—i.e., an erroneous

finding of Mr. Devalle's present lack of good moral character—and that Mr. Devalle was seeking a reversal thereof. *See James v. Wayne County Board of Education*, 15 N.C. App. 531, 533 (1972) (citing *In re Appeal of Harris*, 273 N.C. 20 (1968) ("Our Supreme Court has held that the primary purpose of the statute is to confer the right of review and that the statute should be liberally construed to preserve and effectuate that right."). Moreover, although the Commission was not required to file a response to the petition for judicial review, *see* N.C.G.S. § 150B-46 (emphasis added) ("Other parties to the proceeding *may* file a response to the petition within 30 days of service."), the Commission did file a brief in opposition, which was extensive and which addressed the various exceptions raised in Mr. Devalle's petition for review and argued their inadequacy. We agree with the trial court that the Commission was "in no way blindsided by a lack of notice or detail," and conclude Mr. Devalle's petition for review was "sufficiently explicit to have allowed effective judicial review." *Gray*, 119 N.C. App. at 71 (brackets omitted).

B. N.C.G.S. § 150B-51

[2] We next address the Commission's argument the trial court erred in reversing its final agency decision pursuant to N.C.G.S. § 150B-51(b) on the grounds it was unsupported by substantial evidence in view of the entire record and that the Commission erred as a matter of law. The trial court held that, "[u]nder a correct interpretation of the good moral character rule, [Mr. Devalle] presently has good moral character sufficient for certification as a Deputy Sheriff." The trial court rendered additional findings of fact to the effect that "[t]he credible and persuasive testimonies by Sheriff Greene and Principal Johnson demonstrated that [Mr. Devalle] has restored his character so that he now possesses the good moral character required to continue to be certified as a deputy sheriff."

The Commission addresses each of subdivisions N.C.G.S. § 150B-51(b)(3)-(6) and argues that, because the administrative law judge had found Mr. Devalle lacked "candor and sincerity" on cross examination during the contested case hearing, the trial court erred in reversing its final agency decision in that it was not entered upon unlawful procedure (N.C.G.S. § 150B-51(b)(3)) or based upon an error of law (N.C.G.S. § 150B-51(b)(4)), and that it was otherwise supported by substantial evidence (N.C.G.S. § 150B-51(b)(5)) and not arbitrary, capricious, or an abuse of discretion (N.C.G.S. § 150B-51(b)(6)). Mr. Devalle maintains the trial court's order should be affirmed because the Commission failed to present sufficient evidence that his 2016 conduct amounted to "a severe case" of bad moral character warranting indefinite denial, "particularly in light of the evidence of rehabilitation, and that his *present* character is good."

Mr. Devalle maintains the Commission erroneously distorted the administrative law judge's "credibility determinations and [failed] to give deference to her role as the fact-finder and [that] this conduct amounts to arbitrary and capricious decision making on the part of" the Commission.

We agree with the trial court and conclude the Commission did not abide by its own good moral character standard when it denied Mr. Devalle's justice officer certification indefinitely. The Commission's decision was arbitrary and capricious, and its denial was unsupported by substantial evidence. We affirm the trial court's order reversing the Commission's final agency decision.

Chapter 17E of the North Carolina General Statutes, as well as our Administrative Code, grant the Commission the authority to certify, revoke, suspend, or deny justice officer certifications in North Carolina based on certain qualifications, which the Commission is permitted to establish. *See* N.C.G.S. §§ 17E-1, -4 (2021); *see also* Strong's North Carolina Index 4th § 30 (2021) (citing N.C.G.S. §§ 17E-1, -4 (2021) ("The commission was created to deal with the training and educational needs of sheriffs and deputy sheriffs and has the power, among other things, to establish minimum educational and training standards and to certify persons who have met those standards."). Article 12, Chapter 10B of our Administrative Code provides, in relevant part:

> (b) The [Sheriffs' Education and Training Standards] Commission shall revoke, deny, or suspend the certification of a justice officer when the commission finds that the applicant for certification or the certified officer:
>
> . . . .
>
> (2) fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300[.]

12 NCAC 10B .0204(b)(2) (2021).

Subdivision .0301 provides that "[e]very Justice Officer employed or certified in North Carolina shall":

> be of good moral character as defined in: In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940); In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State

> v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); and later court decisions that cite these cases as authority[.]

12 NCAC 10B .0301(a)(9) (2021). Accordingly, our State's caselaw defines the concept of good moral character. *See* 12 NCAC 10B .0301(a)(9).

The requirement that an applicant maintain good moral character means

> something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong.

In re Rogers, 297 N.C. at 58 (quoting *In re Applicants for License*,191 N.C. 235 (1926)). "Character thus encompasses both a person's past behavior and the opinion of members of his community arising from it." *Id*. Further, "whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." *Id*. "[W]hen one seeks to establish restoration of a character which has been deservedly forfeited, the question becomes essentially one 'of time and growth.' " *In re Willis*, 288 N.C. 1, 13, *appeal dismissed*, 423 U.S. 976 (1975) (quoting *In re Dillingham*, 188 N.C. 162 (1924)).

While vague, the "good moral character" standard is not "an unconstitutional standard." *Id*. at 11. "The right to establish such qualifications rests in the police power—a power by virtue of which a State is authorized to enact laws to preserve the public safety, maintain the public peace and order, and preserve and promote the public health and public morals." *In re Applicants for License*, 143 N.C. 1, 5 (1906). Nonetheless, "[s]uch a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial . . . ." *Konigsberg v. State*, 353 U.S. 252, 263 (1957).

In 2011, the Commission, in a different case, issued a final agency decision in which it summarized its operating framework for determinations of lack of good moral character and the appropriate corresponding sanctions. *See Royall v. N.C. Sheriffs' Educ. And Training Standards Comm'n*, Final Agency Decision, 09 DOJ 5859 (5 January 2011). The conduct at issue in *Royall* involved the petitioner releasing to the public

sensitive information he obtained about ongoing investigations through his service with the Yadkin County Sheriffs' Office on certain social media websites. The administrative law judge who heard the evidence in the contested case hearing recommended a finding of a lack of good moral character by the petitioner and, as a result, recommended his certification be revoked for four months.

Despite the administrative law judge's recommendations, the Commission concluded there was no factual or legal basis to support a finding the petitioner presently lacked the requisite good moral character to warrant his revocation. The Commission explained:

> 6. While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the [Commission's] rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult.
>
> 7. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character *should be reserved for clear and severe cases of misconduct*.
>
> 8. Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. . . . . The incident alleged in this case is insufficient to rise to the required level of proof to establish that Petitioner Royall lacks good moral character. Under *In Re Rogers*, a single instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the high level required to reflect a lack of good moral character.
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> . . . .
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> 11. The totality of the facts and circumstances surrounding Petitioner Royall's conduct, in light of his exemplary history of good moral character and professionalism in law enforcement, does not warrant any finding that Petitioner Royall lacks good moral character. The substantial evidence of Petitioner's good moral character is clear and compelling. Sheriff Jack Henderson's description of Petitioner Royall is very telling: "He's the kind of guy, if

> he's cutting a watermelon, he'll give you the best piece." Therefore, the evidence demonstrates that there is no proper basis for revocation or suspension of Petitioner's law enforcement certification.
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> . . . .
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> 13. The totality of the facts and circumstances surrounding Petitioner Royall's conduct, in light of his otherwise exemplary history of good moral character and professionalism in law enforcement, do not warrant or justify revoking or suspending Petitioner's law enforcement certification. There has been no violation of [the Commission's] good moral character rule.

Royall v. N.C. Sheriffs' Educ. And Training Standards Comm'n, Final Agency Decision, 09 DOJ 5859 (5 January 2011) (emphasis supplied) (citations omitted). It appears the Commission viewed the petitioner's social media activity and postings in *Royall* to constitute "a single instance of conduct."

Here, as the trial court noted, instead of investigating Mr. Devalle's current moral character, the Commission relied solely on Mr. Devalle's conduct in 2016 which led to his termination of employment from the Highway Patrol.

The Commission characterized the testimony concerning Mr. Devalle's present moral character as follows:

> 21. Despite knowing that [Mr. Devalle] had been working as a deputy sheriff for two and a half years, [the Commission's Probable Cause Committee] did not interview the Columbus County Sheriff or the school principal for whom [Mr. Devalle] served as a school resource officer since August 2017. [The Commission's Probable Cause Committee] had no knowledge of what Mr. Devalle did while working as a school resource officer or how he discharged his duties as a school resource officer.
>
> . . . .
>
> 54. At hearing, [Mr. Devalle] attempted to justify his working from home while on duty by stating that a "very, very small percentage' " of his job duties involved being on patrol. However, [Mr. Devalle] completed weekly reports of daily activity claiming approximately 40% of his time was spent on patrol in Wayne County.

55. The transcripts of [Mr. Devalle's] statements to the Patrol's Internal Affairs on [15 November] 2016, [18 November] 2016, and [27 March] 2017 corroborate [Mr. Devalle's] above cited admissions. They also provide substantial statements of [Mr. Devalle] made closer in time to the events in question, shedding light on facts that [Mr. Devalle] allegedly no longer recalls.

. . . .

69. Steadman Jody Greene is the Sheriff of Columbus County, Whiteville, North Carolina. [Mr. Devalle] works for Sheriff Greene as a deputy in the capacity of the school resource officer. ln this capacity, [Mr. Devalle] is armed with both lethal and non-lethal weapons. [Mr. Devalle] serves at the pleasure of the Sheriff. At the time of hearing, Sheriff Greene had just been released from the hospital and voluntarily came to testify that [Mr. Devalle] does a fine job for him and how important [Mr. Devalle] is to his agency.

70. When Sheriff Greene hired [Mr. Devalle], he was aware that [Mr. Devalle] had been dismissed from the [Highway] Patrol. [Mr. Devalle] had told him. Sheriff Greene is satisfied that [Mr. Devalle] has good moral character. Given the importance of the school resource officer, Greene must place someone in that position upon which he has a special trust and confidence. Sheriff Green has that special trust and confidence in [Mr. Devalle]. He hired [Mr. Devalle] based upon the principal, school board members, parents and students all recommending him and not based upon the past. Sheriff Greene is satisfied that [Mr. Devalle] had performed his duties "above and beyond." If [Mr. Devalle] was unable to serve as a deputy, it would negatively impact Greene's force.

71. Based on [Mr. Devalle's] service as a deputy sheriff, Sheriff Greene has no hesitation as to [his] truthfulness or ability to tell the truth.

72. Jeremiah Johnson is the principal at East Columbus High School in Lake Waccamaw, North Carolina. Johnson knows [Mr. Devalle] in two capacities: as the school resource officer at East Columbus High School and as an assistant football coach and track coach at that school.

[Mr. Devalle] has served, and continues to serve, in those capacities since 2017. Johnson has had the opportunity to watch [Mr. Devalle] perform those duties "every day" that school is in session. Johnson described [Mr. Devalle], in performing his duties as a school resource officer, as "dedicated to the school, dedicated to the students, dedicated to the staff. He comes to school - comes to work every day, is there to serve and protect. He's part of my administrative team. He's almost my right-hand man."

73. When asked whether he had had an opportunity to form an opinion as to [Mr. Devalle's] character, Johnson said, "He is an awesome person. He is an awesome man. And I'm not just saying that for me, I'm saying that for my kids at my school." When asked whether [Mr. Devalle] had ever committed any act that would cause Johnson to doubt [his] capacity to be truthful, Johnson answered, "No."

74. Mr. Johnson has no doubt, based on what he's observed from [Mr. Devalle], that [Mr. Devalle] does not lack the character necessary to serve as a school resource officer at Johnson's high school. Johnson would not have permitted [Mr. Devalle] to serve as an assistant football coach and track coach, in addition to serving as a school resource officer, if he had any doubts about [Mr. Devalle's] character.

75. Mr. Johnson opined that if [Mr. Devalle] was no longer able to serve East Columbus as a school resource officer, the lack of [Mr. Devalle's] presence would make the school less safe.

76. Johnson also spoke of the strong professional bond that exists between himself as principal and [Mr. Devalle] as the school resource officer. Johnson thinks that [Mr. Devalle] is the best school resource officer he has ever worked with and as a school administrator, Johnson has trained many SROs. He opined that interaction with the students would suffer tremendously if [Mr. Devalle] was not at East Columbus High. "These kids, they look up to him." Johnson explained how [Mr. Devalle] has helped other students such as buying shoes for kids, bought lunch for kids, and given them food. . . .

. . . .

> 79. Neither [the Commission's Probable Cause Committee] nor [the Commission] presented any evidence at hearing regarding [Mr. Devalle's] performance of his duties as a Columbus County deputy sheriff. [The Commission] failed to present any evidence concerning any activities involving [Mr. Devalle] that took place more recently than 2016. While four witnesses from the Patrol testified regarding [Mr. Devalle's] dismissal from the Patrol, none of those witnesses possessed any first-hand knowledge of how [Mr. Devalle] has conducted himself in terms of truthfulness or conformance with policies while employed as a deputy sheriff in Columbus County. None of those witnesses opined that [Mr. Devalle] lacked good moral character, either generally, or to serve as a deputy sheriff in this State.
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> . . . .
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> 81. During his case in chief, [Mr. Devalle] presented significant evidence demonstrating that [Mr. Devalle] has rehabilitated and rebuilt his career since 2016 and 2017 while working as a school resource officer at East Columbus High School. Such evidence showed that [Mr. Devalle] has exhibited highly favorable traits, including but not limited to helping, teaching, and serving as positive role models for students at East Columbus High School not only as a school resource officer, but as a coach in two sports. Sheriff Greene and Principal Johnson opined that [Mr. Devalle's] absence from their respective entities would have a negative impact on their workplaces. The scope and magnitude of [Mr. Devalle's] character traits, as witnessed by Sheriff Greene and Principal Johnson, qualify as extenuating circumstances which the [Commission] should consider in determining whether [Mr. Devalle] possesses the good moral character required of a justice officer.

The Commission further concluded:

> 24. Sheriff Greene and Principal Johnson testified that [Mr. Devalle] has rehabilitated and rebuilt his character, since being fired by the [Highway] Patrol, and as a deputy sheriff, and as school resource officer and coach at East Columbus High School. Greene and Johnson testified that for two and a half years, [Mr. Devalle's] service as a deputy sheriff has been nothing but exemplary both of

> that service and of [Mr. Devalle's] character while engaging in that service. Such testimony was credible, honest, and believable.

Despite the above credible evidence of Mr. Devalle's present moral character, the Commission found that, while testifying on cross examination before the administrative law judge, Mr. Devalle

> exhibited a lack of candor and sincerity during cross-examination by [the Commission's] counsel. During [the Commission's] questions, [Mr. Devalle] was evasive and feigned a lack of memory or confusion in response to [the Commission's] questions about [Mr. Devalle's] conduct with the [Highway] Patrol in 2016. [Mr. Devalle] remained evasive and elusive even after having his recollection refreshed with his prior statements. In contrast, [Mr. Devalle] readily recollected circumstances from this period, when questioned by his own counsel, without having to review any materials.

The Commission therefore concluded that "the most recent demonstration of [Mr. Devalle's] character was the hearing itself[,]" and denied Mr. Devalle's certification for a lack of moral character.

We agree with the trial court these findings and conclusions do not conform with the standard the agency applied in *Royall*. By failing to apply the same standard to similarly situated individuals, the record in this case is one "which indicates arbitrary, discriminatory or capricious application of the good moral character standard" by the Commission. *In re Willis*, 288 N.C. at 19.

The administrative law judge who heard the evidence in this case found and concluded the following regarding Mr. Devalle's conduct at the contested case hearing:

> 69. At hearing, [Mr. Devalle's] testimony exhibited a lack of candor and sincerity during cross-examination by [the Commission's] counsel. During [the Commission's] questions, [Mr. Devalle] was evasive and feigned a lack of memory or confusion in response to [the Commission's] questions about [Mr. Devalle's] conduct with the [Highway] Patrol in 2016. [Mr. Devalle] remained evasive and elusive even after having his recollection refreshed with his prior statements. In contrast, [Mr. Devalle] readily recollected circumstances from this period, when questioned by his own counsel, without having to review any materials.

> 70. During his case in chief, [Mr. Devalle] presented significant evidence demonstrating that [he] has rehabilitated and rebuilt his career since 2016 and 2017 while working as a school resource officer at East Columbus High School. Such evidence showed that [Mr. Devalle] has exhibited highly favorable traits, including but not limited to helping, teaching, and serving as positive role models for students at East Columbus High School not only as a school resource officer, but as a coach in two sports. Sheriff Greene and Principal Johnson opined that [Mr. Devalle's] absence from their respective entities would have a negative impact on their workplaces. The scope and magnitude of [Mr. Devalle's] character traits, as witnessed by Sheriff Greene and Principal Johnson, qualify as extenuating circumstances which the [Commission] should consider in determining whether [Mr. Devalle] possesses the good moral character required of a justice officer.

The administrative law judge concluded that "*[e]ven given [Mr. Devalle's] cross-examination testimony at hearing*, the totality of the evidence rebutted the finding by the Probable Cause Committee that [Mr. Devalle] lacks the good moral character required of a justice officer and showed that [Mr. Devalle] has rehabilitated his character since 2017[,]" and that the "credible and persuasive testimonies by Sheriff Greene and Principal Johnson demonstrated that [he] has restored his character so that he now possesses the good moral character required to continue certification as a deputy sheriff." (Emphasis added).

As the Commission made clear in its statement of the applicable law in *Royall*, it would only be cases of severe conduct that may serve as the basis for a finding of lack of good moral character and, where evidence of rehabilitation is presented, the question becomes one of time and growth. Neither the Commission nor the administrative law judge made a finding in this case that Mr. Devalle's conduct with the Highway Patrol in 2016 was severe, and the Commission made a finding concerning rehabilitation. The Commission found Sheriff Greene and Principal Johnson's testimony was "credible, honest, and believable" and that Mr. Devalle had "rehabilitated and rebuilt his character."

In view of the Commission's findings that Mr. Devalle has rehabilitated his moral character since the 2016 conduct and the lack of a finding or substantial evidence that Mr. Devalle's conduct on cross examination was severe, pursuant to the Commission's own standard expounded upon in *Royall*, we agree with the trial court the Commission erred and

applied an arbitrary and capricious decision to Mr. Devalle. The evidence and findings fail to show severe misconduct amounting to a lack of good moral character as a matter of law. *See In re Rogers*, 297 N.C. at 58 ("Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents."); *Rector*, 103 N.C. App. at 532 (quotation marks omitted) ("Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or 'whimsical' in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment.").[6] We agree there is a lack of substantial record evidence to support the Commission's conclusion Mr. Devalle presently lacks the good moral character required of justice officers in North Carolina warranting indefinite denial of his certification, *see Rector*, 103 N.C. App. at 532 (quotation marks omitted) ("[T]he whole record rule requires the court, in determining the substantiality of evidence supporting the Board's decisions, to take into account whatever in the record fairly detracts from the weight of the Board's evidence."), and affirm the trial court's order reversing the Commission's decision and ordering it issue Mr. Devalle his justice officer certification retroactive to August 2017.

CONCLUSION

Mr. Devalle's petition for judicial review provided adequate notice to the Commission, and the Commission applied a heightened good moral character standard to Mr. Devalle than that which it has previously enumerated when it denied his justice officer certification indefinitely such that its decision was arbitrary and capricious. The Commission's denial was further unsupported by substantial evidence. We affirm the trial court's order reversing the Commission's final agency decision. The Commission's imposition of the sanction of a five-year denial and suspension thereof for five years for willfully failing to discharge duties was not appealed and is thus binding on the Commission.

AFFIRMED.

Judges TYSON and WOOD concur.

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6. In *Royall*, the Commission held "[t]he substantial evidence of [the petitioner's] good moral character [was] clear and compelling" in light of Sheriff Jack Henderson's "very telling" description of the petitioner that "He's the kind of guy, if he's cutting a watermelon, he'll give you the best piece." *Jeffrey Gray Royall v. N.C. Sheriffs' Educ. and Training Standards Comm'n*, Final Agency Decision, 09 DOJ 5859 (2011).

IN RE D.C.

[289 N.C. App. 30 (2023)]

IN THE MATTER OF D.C. AND J.C.

No. COA22-751

Filed 16 May 2023

1. Termination of Parental Rights—termination order—reversed and remanded—compliance with appellate court's mandate

After the Supreme Court reversed and remanded a termination of parental rights (TPR) order because the trial court had made its findings of fact under the wrong evidentiary standard, the trial court's subsequent TPR order (entered on remand) was affirmed where it sufficiently complied with the Supreme Court's mandate to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact." Given the mandate's plain language—along with the Court's comment that remanding the case would not necessarily be "futile," as the record was not necessarily "insufficient" to support findings that would establish any of the statutory TPR grounds—the trial court was not required on remand to conduct a new dispositional hearing or to receive additional evidence before making new findings. Further, the trial court's assertion at the remand hearing—that its prior use of the incorrect evidentiary standard was only a "clerical error"—was irrelevant where the trial court otherwise complied with the Court's mandate.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of evidence—nexus between case plan components and conditions that led to child's removal

The trial court properly terminated a mother's parental rights in her son for failure to make reasonable progress in correcting the conditions that led to his removal from the home (N.C.G.S. § 7B-1111(a)(2)) where the court's findings of fact were supported by clear, cogent, and convincing evidence, and where there was a sufficient nexus between the case plan components that the mother failed to comply with and the conditions resulting in the child's removal. Specifically, the evidence showed that the mother willfully failed to participate in parenting classes and individual counseling sessions that her case plan required her to complete, and the main purpose of those two case plan components was to help the mother acknowledge why her son was removed from the home.

3. Termination of Parental Rights—best interests of the child—dispositional factors—likelihood of adoption—not dispositive

The trial court did not abuse its discretion in concluding that termination of a mother's parental rights in her minor son was in the child's best interests, where clear, cogent, and convincing evidence supported the court's factual findings regarding two statutory dispositional factors: whether termination would aid in accomplishing the child's permanent plan of adoption, and the bond between the mother and her child. A likelihood of adoption (also one of the statutory factors) is not dispositive as to a best interest determination, and therefore—even if the record lacked current, relevant evidence indicating a likelihood of the child's adoption—the court's decision was not manifestly unsupported by reason.

Appeal by respondent-father and respondent-mother from an order entered 22 June 2022 by Judge Kristina Earwood in Swain County District Court. Heard in the Court of Appeals 26 April 2023.

Edward Eldred for respondent-appellant father.

J. Lee Gilliam Assistant Parent Defender, and Wendy C. Sotolongo, Parent Defender, for respondent-appellant mother.

Justin B. Greene for petitioner-appellee Swain County Department of Social Services.

Womble Bond Dickinson LLP, by Theresa M. Sprain, for appellee guardian ad litem.

FLOOD, Judge.

Respondent-Mother and Respondent-Father (collectively, "Respondent-Appellants") appeal from an order terminating their parental rights of their two minor children. We conclude the trial court obeyed the mandate of our Supreme Court on remand and affirm the trial court's order terminating parental rights.

I. Facts and Procedural Background

In early 2016, Respondent-Appellants were caring for their three biological children, Diana, Julia, and Dylan, and three unrelated children,

Ryan, Charlotte, and Ava.[1] *In re D.C.*, 262 N.C. App. 372, 2018 WL 5796710, at *1 (N.C. App. and Nov. 6, 2018). On 4 April 2016, Ryan was admitted to the emergency room with "life-threatening, non-accidental injuries." *Id.* The attending doctor noted Ryan to be "dirty, covered with scabs and bruises, and severely malnourished[,]" and concluded that Ryan was "minutes to an hour away from death at the time he arrived[.]" *Id.* On 5 April 2016, the Swain County Department of Social Services ("DSS") filed petitions alleging Ryan was abused, and the five other children were neglected by Respondent-Appellants. All six children were taken into custody by DSS that same month. *Id.* at *3. Respondent-Appellants were subsequently indicted for, *inter alia*, felony child abuse against Ryan, and they were both arrested in June 2016. Respondent-Appellants were released on bond soon after.

On 20 July 2017, the trial court entered an order adjudicating Respondent-Appellants' biological children (the "children") neglected. Six months later, in January 2018, the trial court entered a disposition order that eliminated reunification with Respondent-Appellants as part of the children's permanent plans. Respondent-Appellants appealed both the adjudication and disposition orders. *Id.* at *3.

On 6 November 2018, this Court entered an opinion where we: (1) affirmed the adjudication order; (2) vacated the disposition order because the trial court erred by not making the "necessary *specific* finding . . . that a court of competent jurisdiction has determined that aggravating circumstances exist based on the enumerated list to cease reunification efforts"; and (3) remanded for further proceedings. *Id.* at *8–9. On 16 July 2019, the trial court entered a disposition order pursuant to this Court's remand, and again ordered elimination of reunification efforts from the children's permanent plan. On 18 July 2019, the trial court entered a permanency planning order, and in January 2020, the trial court entered a permanency planning review order whereby the children's permanent plan was set to adoption.

On 10 June 2020, DSS filed a petition to terminate Respondent-Appellants' parental rights in Dylan and Julia,[2] and the trial court heard the petition on 7 December 2020 and 2 February 2021. On 29 March 2021, the trial court entered a termination of parental rights order, with its findings of fact made by a preponderance of the evidence. Respondent-Appellants appealed the trial court's order to our Supreme

1. Pseudonyms have been used to protect the identities of the minor children.

2. Pre-hearing, DSS dismissed the petition as to Diana because she "was expected to reach the age of majority prior to the final resolution of this matter."

Court, arguing the trial court used the wrong standard of proof. *In re J.C.*, 380 N.C. 738, 2022-NCSC-37, ¶ 1.

On 28 September 2021, DSS filed a motion to remand to the trial court for a "correction" of the court's statement regarding the standard of proof used to make its findings of fact, and our Supreme Court denied the motion. *Id.* ¶ 5 n. 6. On 18 March 2022, our Supreme Court reversed and remanded the trial court's order "for its consideration of the record before it in order to determine whether DSS demonstrated by clear, cogent, and convincing evidence that one or more statutory grounds exist to permit termination of parental rights." *Id.* ¶ 16. Our Supreme Court also provided:

> Without commenting on the amount, strength, or persuasiveness of the evidence contained in the record, we merely conclude that we cannot say that remand of this case for the trial court's consideration of the evidence in the record utilizing the proper "clear, cogent, convincing" standard of proof would be "futile," so as to compel us to conclude that the record of this case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination.

Id. ¶ 16 (emphasis in original) (internal citation omitted).

The hearing on remand was held on 20 April 2022. Following statements by counsel, the trial court provided:

> It was fully the [c]ourt's intention to find by clear, cogent and [convincing evidence] standard. And I'm going to do that. I have reviewed the file. I have reviewed the evidence. I've also reviewed the Supreme Court's judgment and opinion.
>
> And so that was the [c]ourt's intent. It was a clerical error, so if you will correct that and submit the appropriate order.

On 22 June 2022, the trial court again entered a written order terminating Respondent-Appellants' parental rights and concluded there were two sufficient grounds for termination:

> [(1)] that [Respondent-Appellants] have willfully and not due solely to poverty, left the juvenile(s) in a placement[] outside of the home for a period of greater than twelve months, and [(2)] that [Respondent-Appellants] have neglected the minor child(ren) within the meaning of N.C. [Gen. Stat. §] 7B-101 and N.C. [Gen. Stat. §] 7B-1111,

> and said neglect has continued through the date of the filing of the petition(s) for termination of parental rights and that there is a likelihood of continuing neglect of the minor child(ren).

The trial court also noted in its order that it made its findings of fact—which were largely the same as those in the 29 March order—"using the clear, cogent and convincing evidence standard, following the remand of this matter from the Honorable Supreme Court of North Carolina." The trial court's adjudicatory findings of fact include, *inter alia*:

> 21. That [Respondent-Appellants'] case plan(s) include the following provisions, to wit:
>
> i) Complete a mental health and substance abuse assessment and follow the recommendations of the assessment
>
> ii) Complete parenting classes
>
> iii) Obtain stable housing and employment
>
> iv) Address the juveniles' educational needs
>
> v) Participate in random drug screens
>
> vi) Participate in individual counseling
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> 22. That [Respondent-Appellants] completed mental health and substance abuse assessments in April of 2016. There were no recommendations associated with the assessments at that time.
>
> 23. That [DSS] requested that [Respondent-Appellants] complete an in-person parenting class of at least [twelve] hours. [Respondent-Appellants] together completed an online parenting class totaling four hours, which [DSS] (and the [c]ourt) have found to be unsatisfactory. [Respondent-Appellants] have never enrolled in or completed an in-person parenting class.
>
> 24. That [Respondent-Appellants] were notified on numerous occasions that their completion of an online parenting class was not satisfactory toward the completion of their case plan and the [c]ourt's Order on Disposition (Finding #44) reflects that the parents had prior notice of this as early in this case as November of 2017.
>
> 25. That [DSS] felt that the parenting classes would be necessary in this case based upon the history of abuse and

neglect that occurred in [Respondent-Appellants'] home and as set forth in the [c]ourt's Order of Adjudication.

26. That [Respondent-Appellants] were enrolled in individual counseling in April of 2016 through November of 2016. [DSS] received an update in November 2016 that stated that [Respondent-Appellants] were engaging and participating in individual therapy.

27. That [DSS] received no further updates regarding [Respondent-Father's] engagement with therapy past November of 2016.

28. That [Respondent-Appellants] completed a child and family evaluation in April of 2016. The recommendations of that evaluation were that [Respondent-Appellants] should complete parenting classes, engage in individual therapy, and complete a capacity to parent evaluation. One of the stated goals of [Respondent-Appellants'] engagement in therapy was to complete individual therapy to acknowledge why the juveniles[] came into custody of [DSS].

. . . .

33. That neither of [Respondent-Appellants] have had any visitation with the juveniles since June of 2016. Visitation occurred for approximately two months at the initial stages of this case. [Respondent-Appellants] were thereafter arrested for felony and misdemeanor child abuse, and [Respondent-Appellants'] bond restrictions prevented them from having any contact with the juveniles. The juvenile court subsequently ordered that [Respondent-Appellants] should have no contact with the juveniles unless recommended by the juveniles' counselor.

. . . .

36. That [the foster care social worker] has had numerous meetings and conversations with [Respondent-Appellants] and has encouraged them to complete their case plans and to re-enroll in therapy.

37. That [Respondent-Mother] has told the social worker that she does not trust or need counseling and has chosen not to participate [in] counseling. [Respondent-Appellants] have never signed any sort of release to allow [DSS] access to their counseling records, and [Respondent-Appellants']

counselor(s) never provided any specific details about [Respondent-Appellants'] counseling sessions to [DSS].

. . . .

48. That [Dylan] and [Julia] have more needs (physical, mental and psychological) than other children of their age. The history of this case indicates that [Respondent-Appellants] lack the skills necessary to address the juveniles['] particular needs and further that [Respondent-Appellants] have not availed themselves of services such as parenting classes or therapy which would better equip them to address the juveniles' needs.

. . . .

69. That [Dylan] does not often speak about [Respondent-Appellants] in counseling. On the occasions when he has brought them up, he has stated that he does not feel safe with them, and they did not keep him safe.

. . . .

71. That [Dylan] continues to be afraid of his parents and has expressed those feelings to his counselor.

72. That [Dylan] will often try to change subjects or avoid the topic of [Respondent-Appellants].

73. That Ms. Farr[, Dylan's counselor,] has discussed future contact and visitation with [Dylan]. [Dylan] has repeatedly stated that he does not want to have contact with his parents. . . .

74. That [Dylan's counselor] believes that [Dylan] having contact with [Respondent-Appellants] would lead [Dylan] to being hospitalized again. She expressed concern that seeing [Respondent-Appellants] would lead to an increase in his fear and anxiety that could lead to a psychiatric break.

75. That [Dylan's counselor's] professional opinion is . . . that contact with [Respondent-Appellants] would cause significant harm to [Dylan]. [Dylan's counselor's] opinion is based on her past observations and therapy of [Dylan] and his past responses.

Additionally, the 22 June order's dispositional findings section provides, in relevant part:

> 9. That [Dylan] does not have a bond with [Respondent-Appellants], however he does have some positive memories of [Respondent-Father].
>
> . . . .
>
> 11. That [Dylan's counselor has opined] . . . that having the parental rights of [Dylan's] parents terminated would bring [Dylan] a sense of relief. He has said in the past that he was afraid that his biological parents would take him away from [his foster family].
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> . . . .
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> 15. That [Dylan's counselor] opined . . . that it would not be appropriate or in the best interests of [Dylan] to have ongoing contact with his parents.
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> . . . .
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> 41. That the continued parental rights of [Respondent-Appellants] are a barrier to the adoption(s) of the juveniles and a barrier to the accomplishment of the permanent plan for the juvenile(s).
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> . . . .
>
> 52. That the [c]ourt makes the above findings following a review of the [R]ecord, the evidence presented and the argument(s) of counsel. The court would find that following an application of the clear, cogent, and convincing evidence standard, the evidence could show that it is in the best interest[s] of the juveniles, [Dylan] and [Julia,] . . . that the parental rights of [Respondent-Appellants] be terminated.
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> . . . .
>
> 101. That [Respondent-Appellants] have willfully, and not due solely to poverty, left the minor children in placement outside off the home for more than twelve (12) months.

Respondent-Father and Respondent-Mother each timely filed notice of appeal.

II. Jurisdiction

Respondent-Appellants' appeals are properly before this court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2), 7B-1001(a)(7), and 7B-1002(4). *See* N.C. Gen. Stat. §§ 7A-27(b)(2), 7B-1001(a)(7), 7B-1002(4) (2021).

III. Analysis

Respondent-Appellants each argue the trial court did not obey the Supreme Court's Mandate. Respondent-Mother further argues the trial court's findings and conclusions regarding grounds for terminating her parental rights in Dylan do not meet a clear, cogent, and convincing standard, and the trial court abused its discretion when it made findings contrary to the evidence and relied on those findings in making its decision.

A. Supreme Court's Mandate

[1] Respondent-Father and Respondent-Mother each argue the trial court did not strictly follow the Supreme Court's Mandate by failing to reconsider whether DSS met its evidentiary burden under the clear, cogent, and convincing standard. Respondent-Father specifically contends the trial court disobeyed the Supreme Court's Mandate by failing to "reconsider" the evidence, and by failing to make a new best interests determination. Respondent-Mother specifically contends the Supreme Court's Mandate required the trial court to do more than correct a clerical error in its 29 March order, and the trial court's attempt to correct a clerical error was insufficient to comply with the Mandate. We address both Respondent-Father's and Respondent-Mother's contentions.

This Court's interpretation of an appellate court's mandate on remand to the trial court is an issue of law reviewable *de novo*. *See State v. Hardy*, 250 N.C. App. 225, 232, 792 S.E.2d 564, 568 (2016); *see also State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 282 (2016). An appellate court's mandate "is binding upon the trial court and must be strictly followed without variation or departure." *McKinney v. McKinney*, 228 N.C. App. 300, 302, 745 S.E.2d 356, 358 (2013). "[I]t is well-established that in discerning a mandate's intent, the plain language of the mandate controls." *In re Parkdale Mills*, 240 N.C. App. 130, 135, 770 S.E.2d 152, 156 (2015). Trial court judgments that are "inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court . . . [are] unauthorized and void." *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989).

In *Parkdale*, this Court heard an appeal from a lower tribunal's decision on remand, where we had instructed the lower tribunal "to conduct further hearings *as necessary*." *Parkdale*, 240 N.C. App. at 135, 770 S.E.2d at 156 (emphasis in original). We held, "[w]here a directive of this Court instructs a lower tribunal that the lower tribunal shall conduct hearings *as necessary*, the plain language of such a directive indicates

that the lower tribunal may, but is not required to, conduct additional hearings." *Id.* at 131, 770 S.E.2d at 154 (emphasis in original) (internal quotation marks omitted).

Here, our Supreme Court's Mandate provided that the trial court was to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact[,]" and that "remand of this case to the trial court for such an exercise is appropriate, unless the record of this case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination." *In re J.C.*, ¶ 15 (emphasis in original) (internal quotation marks omitted). Upon remand, the trial court provided in its written order that it made its findings of fact "[f]ollowing a review of the record, the evidence presented and the argument(s) of counsel[,]" and "using the clear, cogent and convincing evidence standard, following the remand of this matter from the Honorable Supreme Court of North Carolina."

Respondent-Father contends that "[b]y instructing the trial court to make a *new adjudicatory ruling*, the Supreme Court necessarily instructed the trial court to conduct a new disposition hearing." As set forth in *Parkdale*, however, the mandate of an appellate court is to be interpreted by its plain language, and even where the mandate requires a trial court to "conduct further hearings *as necessary*," the trial court "may, but is not required to, conduct additional hearings." *Parkdale*, 240 N.C. App. at 131, 770 S.E.2d at 154 (emphasis in original). The plain language of our Supreme Court's Mandate, here, contains no such stipulation as to the trial court conducting a further disposition hearing. Rather, the Mandate directed the trial court to "review and reconsider the *record before it* by applying the clear, cogent, and convincing standard to make findings of fact." *In re J.C.*, ¶ 15 (emphasis added). Further, our Supreme Court concluded that it "cannot say that remand of this case for the trial court's consideration of the evidence in the record utilizing the proper 'clear, cogent, convincing' standard of proof would be 'futile,' " and that the record is not necessarily "insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination." *Id.* ¶ 16 (emphasis in original). Accordingly, it was not incumbent upon the trial court to hear additional evidence or conduct further hearings, and the court properly reviewed and reconsidered "the record before it." *See id.* ¶ 15; *see Parkdale*, 340 N.C. App. at 131, 770 S.E.2d at 154.

We note that the trial court stated during the 20 April hearing that "[i]t was fully the [c]ourt's intention to find [facts] by [the] clear, cogent and [convincing evidence] standard[,]" and its use of the incorrect standard "was a clerical error." Respondent-Mother contends "[t]his was not

consistent with the Supreme Court's [M]andate, which called for the trial court to 'reconsider' the evidence." The Record demonstrates, however, that the court obeyed the plain language of the Supreme Court's Mandate by reviewing and reconsidering the record before it under the clear, cogent, and convincing evidence standard. *See In re J.C.*, ¶ 15. Whether the court's use of the incorrect standard in the 29 March order was a "clerical error" has no bearing on our analysis, and the trial court did not err.

B. Clear, Cogent, and Convincing Evidence

[2] Respondent-Mother argues in her brief that neither ground found by the trial court for parental rights termination in Dylan met the "clear and convincing"[3] evidence threshold. Specifically, Respondent-Mother contends she made reasonable progress under the circumstances to correct the conditions that led to the removal of Dylan, and there was no clear, cogent, and convincing evidence that supported the trial court's finding of continuing neglect. We disagree.

"The issue of whether a trial court's adjudicatory findings of fact support its conclusions of law that grounds existed to terminate parental rights pursuant to N.C. [Gen. Stat.] § 7B-1111(a) is reviewed de novo by the appellate court." *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 7 (internal quotation marks omitted) (cleaned up). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re A.L.*, 378 N.C. 396, 2021-NCSC-92, ¶ 16. "[A]n adjudication of any single ground for terminating a parent's rights under N.C. [Gen. Stat.] § 7B-1111(a) will suffice to support a termination order." *In re M.S.*, 378 N.C. 30, 2021-NCSC-75, ¶ 21 (citation and internal quotation marks omitted).

Under statute, a court may terminate parental rights upon a finding that:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than [twelve] months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to

3. Although Mother argues the trial court did not meet the "clear and convincing" standard of evidence, the Supreme Court's Mandate set forth that the trial court's findings must meet the "clear, cogent, and convincing" standard, and our analysis therefore turns on the latter. *See In re J.C.*, ¶ 15.

> the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2) (2021); *see In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001); *see also In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71 ("A respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress sufficient to warrant the termination of parental rights under [N.C. Gen. Stat. §] 7B-1111(a)(2).") (internal quotation marks omitted) (cleaned up). For a respondent-parent's noncompliance with her case plan to support the termination of her parental rights, however, "there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home." *In re J.S.*, 374 N.C. at 816, 845 S.E.2d at 71 (quoting *In re B.O.A.*, 372 N.C. 372, 384, 831 S.E.2d 305, 314 (2019)); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131, 695 S.E.2d 517, 524 ("[T]he case plan is not just a check list. The parents must demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors.").

Here, the children came into the custody of DSS in April 2016, and Respondent-Appellants were arrested in June 2016. Respondent-Appellants have been out on bond since that time, and their bond prohibited them from having contact with their children. Dylan, therefore, has been placed outside the home for more than twelve months pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2021).

Respondent-Appellants' case plan set forth requirements that they participate in parenting classes totaling twelve hours, and in individual counseling sessions. DSS presented evidence that Respondent-Appellants willfully failed to fulfill either of these two requirements, despite many opportunities to do so. Respondent-Appellants elected to participate in an online parenting class totaling four hours, and were repeatedly instructed by DSS that this was insufficient to fulfill the parenting class requirement of the case plan. After November 2016, DSS received no further update regarding Respondent-Appellants attending individual counseling or therapy, despite DSS's continued encouragement of Respondent-Appellants to do so. Further, Respondent-Mother communicated to the social worker that she does not trust or need counseling

and has chosen not to participate in counseling. The completion of both individual counseling and parenting classes was important under the circumstances, as one of the stated goals for Respondent-Appellants in completing these two, specific, case plan requirements was to "acknowledge why the juveniles[] came into custody of [DSS]." *See In re J.S.*, 374 N.C. at 816, 845 S.E.2d at 71; *see also In re Y.Y.E.T.*, 205 N.C. App. at 131, 695 S.E.2d at 524.

The foregoing evidence demonstrates an ability on the part of Respondent-Mother to show reasonable progress in her case plan and, not on account of poverty, an unwillingness to make the effort. *See McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175. As the aim of these two case plan requirements was to "acknowledge why the juveniles[] came into custody of [DSS][,]" there is a nexus between these components of the case plan and the conditions leading to Dylan's removal from Respondent-Appellants' home. *See In re J.S.*, 374 N.C. at 816, 845 S.E.2d at 71; *see also In re Y.Y.E.T.*, 205 N.C. App. at 131, 695 S.E.2d at 524. Accordingly, the trial court's adjudicatory finding that Respondent-Mother willfully left the juvenile in foster care or placement outside the home for more than twelve months was supported by clear, cogent, and convincing evidence, and the trial court had sufficient grounds to terminate Respondent-Mother's parental rights in Dylan. *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2021). The trial court's adjudicatory finding pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) is, on its own, sufficient to support termination of Respondent-Mother's parental rights, and we need not assess Respondent-Mother's neglect argument. *See In re M.S.*, ¶ 21.

C. Best Interests of the Child

[3] Respondent-Mother argues the trial court abused its discretion when it made erroneous findings concerning Dylan's likelihood of adoption, which "possibly influence[d] the court's ultimate best interests determination."

"With regard to the trial court's assessment of a juvenile's best interests at the dispositional stage, . . . we review that decision solely for abuse of discretion." *In re R.D.*, 376 N.C. 244, 248, 852 S.E.2d 117, 122 (2020) (citation and internal quotation marks omitted). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a seasoned decision." *Id.* at 248, 852 S.E.2d at 122.

In making a determination on the best interests of a juvenile:

> After an adjudication that one or more grounds for terminating a parent's rights exist, the [trial] court shall determine

> whether terminating the parent's rights is in the juvenile's best interest. The court may consider any evidence, including hearsay evidence as defined in [N.C. Gen. Stat. §] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (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, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2021). Our Supreme Court has provided the likelihood of adoption criterion is not dispositive as to a best interests determination, and "the trial court need not find a likelihood of adoption in order to terminate parental rights." *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 28 (internal quotation marks omitted); *see also In re A.R.A.*, 373 N.C. 190, 200, 835 S.E.2d 417, 424 (2019) ("[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights.") (alteration in original) (citation omitted).

As explained above, the Supreme Court's Mandate did not require the trial court to conduct additional hearings or receive new evidence on remand. *See In re J.C.*, ¶ 15. Accordingly, it was proper for the court to consider the evidence "in the record before it" to make a best interests determination under N.C. Gen. Stat. § 7B-1110(a). *Id.* ¶ 15.

The trial court, in its written order, made relevant findings based on clear, cogent, and convincing evidence concerning Dylan and regarding subsections (3) and (4) of N.C. Gen. Stat. § 7B-1110(a). The current permanent plan for Dylan is "adoption with a concurrent plan of guardianship." The trial court made adjudicatory findings of fact 69, 71, 72, 73, 74, and 75, and dispositional findings of fact 9, 11, 15, and 41, all of

which were based on the evidence of Dylan's counseling sessions and are relevant to either the accomplishment of Dylan's permanent plan or the bond between Dylan and Respondent-Appellants. *See* N.C. Gen. Stat. § 7B-1110(a)(3)–(4) (2021).

Even if there is a lack of current, relevant evidence supporting a likelihood of Dylan's adoption, the trial court's conclusion that it would be in Dylan's best interests to terminate Respondent-Appellants' parental rights was supported by findings made by clear, cogent, and convincing evidence. It cannot be said that the trial court's decision was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a seasoned decision." *In re R.D.*, 376 N.C. at 248, 852 S.E.2d at 122. We hold the trial court did not abuse its discretion in concluding the termination of Respondent-Mother's parental rights was in Dylan's best interests.

IV. Conclusion

After careful review, we conclude the trial court: obeyed the Supreme Court's mandate to review and reconsider the record before it under the clear, cogent, and convincing standard; found sufficient grounds to terminate Respondent-Appellants' parental rights in Dylan; and did not abuse its discretion in making its best interests determination. For the foregoing reasons, we affirm the trial court's order terminating the parental rights of Respondent-Appellants.

AFFIRMED.

Judges DILLON and WOOD concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY DAVID GUNTER

No. COA22-669

Filed 16 May 2023

1. Appeal and Error—preservation of issues—fatal defect in indictment—general motion to dismiss

In defendant's appeal from his conviction for aiding and abetting possession of a firearm by a felon, the appellate court presumed, without deciding, that defendant's general motion to dismiss for insufficiency of the evidence at trial preserved for appellate review his argument that the indictment was fatally defective.

2. Indictment and Information—aiding and abetting possession of a firearm by a felon—elements—no fatal defect

An indictment charging defendant with aiding and abetting the possession of a firearm by a felon included all the necessary elements of the crime and, therefore, was not fatally defective. Specifically, the indictment asserted that defendant "unlawfully, willfully, and feloniously" aided and abetted another man by concealing two handguns for him prior to a traffic stop, all while knowing that the other man was a convicted felon.

3. Aiding and Abetting—possession of a firearm by a felon—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss—for insufficiency of the evidence—a charge of aiding and abetting possession of a firearm by a felon, where the State presented substantial evidence showing that defendant provided two handguns to another man and then helped him by concealing the guns prior to a traffic stop, all while knowing that the other man was a convicted felon. Notably, the officers who conducted the stop testified that, when arresting defendant, defendant told them that he had only hidden the guns because he knew the other man was a convicted felon.

Appeal by defendant from judgment entered 14 October 2021 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellant Defender Amanda S. Zimmer, for the defendant-appellant.

Paul F. Herzog, for the defendant-appellant.

TYSON, Judge.

Timothy David Gunter ("Defendant") appeals from judgment entered on a jury's verdict for aiding and abetting possession of a firearm by a felon. Our review reveals no error.

I. Background

Cleveland County Sheriff's Detectives Aaron Shumate and Timothy Sims were driving in an unmarked vehicle. Detective Shumate observed a black Chevrolet pickup truck three or four car lengths ahead swerve left of the center line several times while travelling on County Line Road. The Detectives observed two occupants seated inside the pickup truck and observed the passenger reaching all around the vehicle. Detective Shumate initiated a traffic stop.

The truck pulled into a convenience store's parking lot at the intersection of Goforth Road and County Line Road. Detective Shumate approached the passenger side of the truck, while Detective Sims approached the driver's side. Detective Shumate recognized Defendant, seated in the passenger seat of the truck, based upon prior encounters with him.

Detective Shumate asked Defendant to step out of the truck, and Defendant complied with the request. Defendant placed his hands on the side of the truck, and Detective Shumate conducted a *Terry* frisk, but did not find any contraband. Defendant denied Detective Shumate's request to search the truck. Simultaneously, Detective Sims asked the driver, Conner Bryce Wellmon ("Wellmon"), to exit the vehicle. Detective Sims conducted a *Terry* frisk of Wellmon and discovered .32 caliber ammunition located inside his pocket. Detective Sims knew Wellmon was a convicted felon. Backup officers had arrived and stood with Defendant and Wellmon, while Detectives Sims and Shumate searched the truck.

Detectives opened the glove box and found a Glock handgun behind the dash of the truck. A thirty-three round 9mm magazine was found on the floorboard behind the driver's seat and a fifteen round 9mm Glock magazine was found under the passenger's seat. Loose ammunition was found scattered throughout the truck's interior cabin.

Detective Sims located a nickel-plated .32 caliber revolver under the center seat. Detective Shumate found a clear plastic baggie, on the

rear floor between the driver's and passenger's seats, which he believed contained methamphetamine. Defendant was arrested and transported to the county detention center. While being processed, Defendant told Detective Shumate he was surprised the detectives had found methamphetamine inside the truck because he had eaten it. While Detective Shumate was reading Defendant the warrant for carrying a concealed handgun, Defendant stated he had concealed the guns only because he knew Wellmon was a convicted felon.

Defendant was indicted for aiding and abetting possession of a firearm by a felon, possession of methamphetamine, and for carrying a concealed weapon. Defendant moved to dismiss for sufficiency of the evidence at the close of the State's evidence and again at the close of all evidence. The trial court denied both motions. A jury convicted Defendant of all three charges on 14 October 2021.

Defendant was sentenced as a prior record level II offender to an active term of 13 to 25 months, suspended for 24 months of supervised probation. As a condition of supervised probation, Defendant was ordered to serve 30 days in the Cleveland County Jail. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2021).

III. Issues

Defendant challenges his conviction for aiding and abetting possession of a firearm by a felon. Defendant first argues the indictment was fatally defective. He also asserts the trial court erred by denying Defendant's motion to dismiss for insufficiency of the evidence.

IV. Fatal Defect

A. Standard of Review

[1] North Carolina Rules of Appellate Procedure 10(a)(1) delineates the procedures for preserving errors on appeal:

> 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). Rule 10(a)(1) requires a defendant to "preserve the right to appeal a fatal variance." *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012) (citations omitted).

Our Supreme Court held in *State v. Golder* that a defendant's blanket motion to dismiss at the close of the state's evidence and renewed again at the close of all the evidence "preserves all issues related to sufficiency of the State's evidence" arguments for appellate review. *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) ("Because our case law places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged, . . . under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review.").

This Court explained the ambiguity about whether a defendant's general and generic motion to dismiss for insufficiency of the evidence properly preserves a defendant's fatal defect argument on appeal in *State v. Mackey*:

> Post-*Golder*, our Supreme Court has not affirmatively held whether a general motion to dismiss preserves a defendant's fatal variance objection for appeal as a "sufficiency of the State's evidence" objection under *Golder*. *Id.*; *State v. Smith*, 375 N.C. 224, 228, 846 S.E.2d 492, 494 (2020) (explaining this Court in *State v. Smith*, 258 N.C. App. 698, 812 S.E.2d 205 (2018), "concluded [ ] defendant's *fatal variance argument was not preserved* because it was not expressly presented to the trial court[,]" while also acknowledging this Court had reached its decision before our Supreme Court issued *Golder*) (emphasis supplied) (citation omitted). The Supreme Court in *Smith*, "assum[ed] without deciding that defendant's fatal variance argument was preserved[.]" *Id.* at 231, 846 S.E.2d at 496.
>
> Since *Smith* and *Golder*, criminal defendants before this Court assert "the Supreme Court in *Golder* [had] 'assumed without deciding' that 'issues concerning fatal variance are preserved by a general motion to dismiss.' " *See State v. Brantley-Phillips*, 278 N.C. App. 279, 286, 2021-NCCOA-307, ¶ 21, 862 S.E.2d 416, 422 (2021).

State v. Mackey, 287 N.C. App. 1, 6, 2022-NCCOA-715, ¶24-25, 882 S.E.2d 405, 409 (2022).

Here, like in *Mackey*, this Court again presumes, "without deciding", Defendant's general and generic motion to dismiss for sufficiency of the evidence preserved his fatal variance objections. *Id.*

B. Analysis

[2] An indictment "is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (citation and quotation marks omitted).

A defendant is guilty of aiding and abetting another person in committing a crime if: "(i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citation omitted).

N.C. Gen. Stat. § 14–415.1(a) provides: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm [.]" N.C. Gen. Stat. § 14–415.1(a) (2021) "Thus, the State need only prove two elements [beyond a reasonable doubt] to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (2007).

The indictment charging Defendant with aiding and abetting the possession of a firearm by a felon asserted Defendant did "unlawfully, willfully, and feloniously":

> Aid and abet, Conner Bryce Wellmon, by concealing two handguns for Conner Bryce Wellmon prior to a traffic stop knowing that Mr. Wellmon was convicted of obtaining property by false pretense, a class H felony with a maximum sentence of 39 months in prison. The felony was committed on 11/26/2014 and Mr. Wellmon was convicted of that felony on 08/05/2015 and he received a 6-17 month active sentence that was suspended for 30 months of supervised probation in Cleveland County file number 14 CRS 55542.

(all caps in original).

The indictments included the necessary elements for the crime of aiding and abetting the possession of a firearm by a felon. N.C. Gen. Stat.

§ 14–415.1(a); *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686. Defendant's argument is without merit and overruled.

V. Sufficiency of the Evidence

[3] Defendant argues the State was required to produce evidence of Defendant's intent, despite the absence of an intent requirement in N.C. Gen. Stat. § 14–415.1(a), because the indictment referenced Defendant's knowledge of Wellmon's prior felony conviction. Defendant cites cases wherein North Carolina's appellate courts have held insufficient evidence of intent existed to support a conviction for crimes with an specific intent element, such as burglary and breaking and entering.

A. Standard of Review

"[T]he denial of a motion to dismiss for insufficiency of the evidence is a question of law reviewed de novo (sic) by the appellate court." *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). "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) (citation and quotation marks omitted).

This Court reviews whether sufficient evidence existed to support a criminal conviction by considering the evidence "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Golder*, 374 N.C. at 250, 839 S.E.2d at 790 (citation and internal quotation marks omitted).

B. Analysis

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and internal quotation marks omitted).

Possession of a firearm by a felon only requires the State to prove two elements: "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686.

> Possession of a firearm may be actual or constructive. Actual possession requires that the defendant have physical or personal custody of the firearm. In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has both the

> power and intent to control its disposition or use. When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession. Constructive possession depends on the totality of the circumstances in each case.

State v. Taylor, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (internal citations omitted).

Here, the State presented evidence which tended to show Defendant had provided the .32 caliber revolver to Wellmon. The State also presented evidence which tended to show Defendant knew of Wellmon's prior felony conviction. Detective Shumate testified that, when he arrested Defendant for concealing a handgun, Defendant "uttered that he [had] only concealed the guns because he knew Conner Wellmon was a convicted felon." Detective Sims corroborated this information, testifying Defendant stated "the only reason that [he] even hid the gun or threw the guns and concealed them was because [he] thought Mr. Wellmon was a felon and [he] didn't want him to get in trouble."

The State's evidence sufficiently supports Defendant's conviction for aiding and abetting the possession of a firearm by a felon. *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826; *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686; *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764. Defendant's argument is without merit.

VI. Conclusion

The indictment charging Defendant with aiding and abetting the possession of a firearm by a felon included the necessary elements outlined in N.C. Gen. Stat. § 14–415.1(a). *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686. Defendant's argument asserting his indictment was fatally defective is overruled.

The State presented sufficient evidence for the trial court to overrule Defendant's motion to dismiss and submit the charge to the jury. *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826; *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686; *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764.

Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges COLLINS and RIGGS concur.

STATE OF NORTH CAROLINA
v.
KEITH D. MAHATHA, DEFENDANT

No. COA20-656

Filed 16 May 2023

1. Evidence—disclosure of evidence by State—untimely disclosure—sanctions—exculpatory value of evidence

In defendant's trial for charges arising from allegations that he assaulted his girlfriend, the trial court did not abuse its discretion by denying defendant's motion for a mistrial premised on the State's late disclosure of discoverable material under N.C.G.S. § 15A-910 where defendant failed to identify any exculpatory value in the recorded jail phone calls. In addition, pursuant to the statute, even when a disclosure violation occurs, sanctions are not mandatory. The appellate court did not consider defendant's arguments regarding evidence that was admitted without objection.

2. Constitutional Law—effective assistance of counsel—implied concession of guilt—less serious offense—no error

In defendant's trial for charges arising from allegations that he assaulted his girlfriend with a firearm, where defense counsel neither expressed nor implied that defendant must be guilty of one of the less serious charged crimes, assault on a female, and where defense counsel did not completely omit any of the charged crimes from his request that the jury find defendant not guilty during his closing argument, defense counsel did not concede defendant's guilt and therefore did not render ineffective assistance of counsel.

Appeal by Defendant from judgments entered 13 February 2020 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 26 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah N. Tackett, for the State.

Richard J. Costanza for defendant-appellee.

MURPHY, Judge.

Under N.C.G.S. § 15A-910, a criminal defendant may move for sanctions, including a mistrial, where the State fails to abide by its obligation

to timely disclose exculpatory evidence. However, sanctions under N.C.G.S. § 15A-910 are not mandatory, even where a disclosure violation occurs. Here, where the only files reviewable on appeal and not timely disclosed by the State were recorded calls from a jail with no exculpatory value, the trial court did not abuse its discretion in denying Defendant's motion for a mistrial on the basis that the State violated its duty to disclose.

Additionally, where a defendant claims on appeal that he received ineffective assistance of counsel due to his counsel conceding his guilt without his consent, a new trial is warranted only where counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense. Here, the Record reveals that defense counsel neither expressed nor implied that there was no other conclusion than Defendant's guilt of one of the charged crimes, nor did counsel completely omit any of the crimes of which he asked the jury to find Defendant not guilty during his closing argument. We therefore conclude that defense counsel did not concede Defendant's guilt and that, consequently, Defendant did not receive ineffective assistance of counsel.

BACKGROUND

This case arises out of Defendant Keith D. Mahatha's convictions for communicating threats, possession of a firearm by a felon, assault on a female, and assault with a deadly weapon inflicting serious injury ("AWDWISI") on 13 February 2020. Defendant is alleged to have assaulted his then-girlfriend because she would not show him her phone.

Around 12:30 a.m. on 14 October 2018, Defendant and the victim arrived home to the victim's second-floor apartment in Greensboro where they had resided together since June 2018. Defendant had been upset with her earlier that day because he wanted to access her personal cell phone, and a heated argument ensued once the two were at home and Defendant continued to demand access. Tired and wanting to go to bed, the victim got into bed to go to sleep for the night. Defendant then allegedly grabbed his gun, pointed it at the victim's head, and stated, "[b]itch, you're going to unlock this phone, or I'm going to kill you," before hitting her forehead with the butt of his gun—a gun the victim testified that Defendant carried "on him just about at all times." The victim then screamed and attempted to get away from Defendant by hiding in her bathroom, but Defendant grabbed her and dragged her into the living room where he again demanded she unlock her phone. She refused to unlock the phone, and Defendant responded by punching her in the face four or five times, blackening her eye.

Fearing Defendant would kill her, the victim slid her phone underneath a couch and ran outside the apartment, injuring her ankle jumping down the last few stairs after she believed she heard him open the door and come after her. The victim, wearing only the undergarments she had worn to bed, fearfully hobbled on one foot into the parking lot and hid underneath a car. She was found by neighbors who lived in her apartment complex and who eventually called 911. Although police did not find Defendant that evening, arrest warrants for Defendant were issued for communicating threats, assault by pointing a gun, AWDWISI, assault on a female, possession of firearm by a felon, and attempted breaking or entering. On 7 January 2019, a Guilford County Grand Jury returned true bills of indictment charging Defendant with these offenses.

Almost a week before trial, the State provided defense counsel with 16 officer bodycam footage videos, a police report, and handwritten notes from an interview with the victim. The State asked counsel if he needed more time to prepare, but defense counsel "reluctantly indicated" that the time remaining under the then-current schedule was sufficient. When the State indicated its intent to play portions of the bodycam footage for the jury, defense counsel stated that he had no "discovery-related objections to anything." Defense counsel also did not object to the admission of the footage when later offered into evidence, and the evidence was admitted.

On the first morning of trial, the State provided an additional 63 photographs of the crime scene and the victim's injuries, as well as a lab report from an analyst with the Greensboro Police Department, all of which were sent to the State only after the State became aware that morning that the pictures had been inadvertently mislabeled under a different case number. Defense counsel again stated that he had no "discovery-related objections to anything" on the first day of trial and did not object to the admission of this further evidence when introduced by the State at trial. The evidence was admitted.

On the second day of trial, the State indicated that it had come into possession of 29 recordings of phone calls Defendant made to the victim while he was in jail and provided the calls to defense counsel. The prosecutor did not acquire the recordings until the second day of the trial because he did not realize that the calls occurred while Defendant was in custody and were therefore likely recorded.[1] The State expressed its intention to play only one recording that had been previously referred to

1. The prosecutor had instead believed the calls occurred in the three-day window between the alleged incident and Defendant's arrest.

during the victim's testimony. After listening to the recording during the lunch break, defense counsel raised a discovery-related objection and requested the trial court exclude the call as the sanction for the State's allegedly untimely disclosure. Nonetheless, the trial court allowed the State to play the recording for the jury.

Defendant moved for a mistrial at the close of the State's evidence, alleging violations of due process rights to meaningful cross-examination and a fair trial due to the alleged discovery violations. The trial court denied Defendant's mistrial motion. Defense counsel then indicated to the court that Defendant did not wish to testify in his own defense and did not intend to present any evidence. The trial proceeded to closing arguments, where defense counsel made several statements—reproduced *infra*—that Defendant argues implicitly conceded his guilt of assault on a female.

On 13 February 2020, Defendant was found guilty of communicating threats, AWDWISI, assault on a female, and possession of a firearm by a felon.[2] Defendant timely appeals.

ANALYSIS

Defendant presents two main arguments on appeal: first, that the trial court abused its discretion by denying his motion for a mistrial; and, second, that he received ineffective assistance of counsel when his trial counsel implicitly conceded he was guilty of assault on a female.

A. Motion for Mistrial

[1] Defendant argues the trial court abused its discretion by denying his motion for a mistrial, which was premised upon the State's late disclosure of discoverable material under N.C.G.S. § 15A-910. The material at issue included "(1) 16 body-worn camera videos on 5 February 2020, the Thursday preceding the start of the Defendant's trial; (2) 63 crime scene photographs and a lab report on 11 February 2020, the first day of trial; and (3) 29 recorded jail phone calls between [] Defendant and [the victim] on 12 February 2020, the second day of trial."

Under N.C.G.S. § 15A-1061, a trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.G.G.S. § 15A-1061 (2021). "We review a trial court's denial

2. Defendant, however, was acquitted of attempted breaking or entering and assault by pointing a gun.

of a defendant's motion for mistrial for abuse of discretion." *State v. Crump*, 273 N.C. App. 336, 339 (2020) (citing *State v. Hester*, 216 N.C. App. 286, 290 (2011)), *disc. rev. denied*, 377 N.C. 567 (2021); *see also State v. King*, 343 N.C. 29, 44 (1996) ("It is well settled that a motion for a mistrial and the determination of whether [the] defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion."). " 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hauser*, 271 N.C. App. 496, 498 (2020) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

Defendant argues that, because the State violated its statutory duty of disclosure and gave Defendant's counsel insufficient time to prepare his defense, the trial court abused its discretion by denying Defendant's motion for a mistrial. According to Defendant, in determining whether he was prejudiced, the court "did not consider the cumulative effect o[f] the late production of discovery on the eve of and during trial—material that would require hours of review by defense counsel." Defendant contends prejudice should be presumed from the late production because there was no likelihood his counsel could have provided effective assistance given the large amount of evidence and the insufficient opportunity for counsel to assess the material's evidentiary value, conduct any necessary further investigation, and adjust counsel's existing trial strategy.

In response to Defendant's argument, the State contends the trial court did not abuse its discretion in denying the motion for mistrial because the State did not violate its duty to disclose; and, consequently, the trial court properly allowed the admission of the body camera video, crime scene photos, lab report, and phone recordings. The State also contends that, even if the call was erroneously admitted, Defendant was not prejudiced and the error was harmless beyond a reasonable doubt.

The State's statutory duty to disclose is detailed in N.C.G.S. § 15A-903, which provides the following in pertinent part:

> (a) Upon motion of the defendant, the court must order:
>
> (1) The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant.

> a. The term "file" includes the defendant's statements, the codefendant's statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

N.C.G.S. § 15A-903(a)(1)(a.) (2022). Moreover, under N.C.G.S. § 15A-903(b), if "the State voluntarily provides disclosure . . . , the disclosure shall be to the same extent as required by [N.C.G.S. § 15A-903(a)]." N.C.G.S. § 15A-903(b) (2022). "If at any time during the course of the proceedings the court determines that a party has failed to comply[,]" the court "may (1) [o]rder the party to permit the discovery or inspection, [] (2) [g]rant a continuance or recess, [] (3) [p]rohibit the party from introducing evidence not disclosed, [] (3a) [d]eclare a mistrial, [] (3b) [d]ismiss the charge, with or without prejudice, or (4) [e]nter other appropriate orders." N.C.G.S. § 15A-910(a) (2021). "Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply . . . ." N.C.G.S. § 15A-910(b) (2021).

We must therefore determine whether the State failed to comply with its statutory duty to disclose discoverable material and, if so, whether the trial court abused its discretion by not granting Defendant's motion for a mistrial as an appropriate sanction pursuant to N.C.G.S. § 15A-910(a)(3a). As an initial matter, however, we first address which of the alleged discovery violations we may review on appeal, as the State argues appellate review of Defendant's arguments concerning the bodycam footage, crime scene photographs, and lab report is improper given Defendant's failure to object to their admission at trial.

1. Reviewability

As stated earlier, the disclosed material at issue falls into three categories: body camera videos, which were disclosed shortly before the start of the trial; photographs and a lab report, which were disclosed on the first day of trial; and Defendant's recorded jail phone calls, which were disclosed on the second day of trial. However, our review is limited only to the material to which Defendant raised an objection during trial. *See, e.g.*, *State v. Grooms*, 353 N.C. 50, 76 (2000); *State v. Hartley*, 212 N.C. App. 1, 5-6, *disc. rev. denied*, 365 N.C. 339 (2011).

"When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion." *State*

v. Taylor, 332 N.C. 372, 384 (1992). Here, Defendant did not object during trial to the admission of the bodycam footage, photographs, or lab report, nor did he raise any concerns about untimely disclosure of this evidence prior to the start of trial. When it provided defense counsel the bodycam footage, the prosecution asked if the defense needed more time to prepare, but counsel denied needing a continuance to prepare for trial. On the morning of trial, when the State indicated its intent to play portions of the footage for the jury and introduce several of the photographs into evidence, defense counsel stated that he had "no discovery-related objections to anything." When the videos and pictures were later offered into evidence, defense counsel stated again that he had no objection, and the evidence was admitted.[3] " 'Having failed to draw the trial court's attention to the alleged discovery violation, [Defendant] denied the court an opportunity to consider the matter and take appropriate steps.' " *State v. Early*, 194 N.C. App. 594, 605 (2009) (quoting *State v. Herring*, 322 N.C. 733, 748 (1988)). " 'As such, [D]efendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion.' " *Id.* (quoting *Taylor*, 332 N.C. at 384). We therefore cannot consider discovery violations concerning the bodycam footage, crime scene photographs, and lab report.

However, as the State concedes on appeal, Defendant did raise an objection to the admission of his recorded jail calls. Accordingly, we review Defendant's arguments related to the calls, which requires us to determine whether the State violated its duty to disclose and, if so, whether the trial court abused its discretion in rejecting the requested sanction of a mistrial. *See supra*.

2. Alleged Discovery Violation

With respect to the duty to disclose under N.C.G.S. § 15A-903, "Defendant's rights to discovery are statutory. Constitutional rights are not implicated in determining whether the State complied with these

3. In response to the State's contention that he failed to raise an objection concerning the bodycam footage, photographs, and lab report, Defendant argues that his trial counsel's decision to not pursue sanctions for the alleged late disclosure of this material was "consistent with Rule 12 of the North Carolina General Rules of Practice, which requires lawyers to treat opposing counsel with 'candor and fairness.' " According to Defendant, his trial counsel "could have sought the full gamut of remedies set out in [N.C.G.S.] § 15A-910" but instead "overlooked the State's late disclosures and did not seek the imposition of sanctions." Defendant claims his trial counsel's "professionalism should not shield the State from scrutiny over their late disclosures and its impact on the ability to effectively represent [] Defendant." However, well-established law demands defense counsel raise an objection to bring the discovery issue to the trial court's attention and, thus, to allow us to review the denial of Defendant's motion for an abuse of discretion. *See State v. Herring*, 322 N.C. 733, 748 (1988); *Taylor*, 332 N.C. at 384.

discovery statutes."[4] *State v. Ellis*, 205 N.C. App. 650, 655 (2010). " 'There is no general constitutional or common law right to discovery in criminal cases.' " *Id.* (quoting *State v. Haselden*, 357 N.C. 1, 12, *cert. denied*, 540 U.S. 988 (2003)). " 'The purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.' " *Id.* (quoting *State v. Payne*, 327 N.C. 194, 202 (1990), *cert. denied*, 498 U.S. 1092 (1991)). "[O]nce . . . the State has provided discovery there is a continuing duty to provide discovery and disclosure." *Id.*

Defendant contends that his counsel was not, as required by N.C.G.S. § 15A-903(a)(1), provided with the recorded jail phone calls that were "in the possession of the various law investigative agencies having custody of the Defendant or those charged with investigating the offenses for which he stood trial." According to Defendant, during trial, both the prosecutor and defense counsel noted a voluntary discovery request was made on Defendant's behalf in April 2019, and the State's continuing discovery obligation was deemed to have been made under an order of the trial court once the prosecution turned over some evidence in response to the request. Defendant argues that he "was entitled to this material in a timely manner" because exculpatory evidence must be provided in such a manner that defense counsel has sufficient time to "effectively use it." (Emphasis omitted.)

We do not accept one of the critical premises underlying this argument; namely, that the calls were exculpatory. Defendant claims the "exculpatory value" of the calls—which were Defendant's own conversations—"would have been a factor in the decision to offer defense evidence; specifically, defense counsel and [] Defendant could have decided [] Defendant would testify, after which defense counsel could seek the admission of the statements made by [] Defendant during the calls which could corroborate his trial testimony." But Defendant's appellate counsel, after having months between his appointment and the date on which he filed Defendant's brief, does not identify any single specific statement that would have corroborated Defendant's testimony as to any contested issue at trial. Defendant offers nothing more than speculation to support his claim that he may have chosen to testify if his counsel was given more time to listen to the calls, and Defendant has not identified any particular testimony he could have provided that would have been exculpatory when paired with the content of any of the calls. Moreover, although Defendant identifies the potential role

4. Defendant has not raised any constitutional arguments concerning the State's duty to disclose.

of the calls in impeaching the alleged victim's testimony at trial as a separate basis for their exculpatory value, Defendant has not pointed to any statement made by the victim within the recordings that contradicted her testimony or otherwise had impeachment value.

Defendant's inability to identify the evidence's exculpatory value demonstrates that the trial court did not abuse its discretion; despite the volume of material, an inability to access a series of non-exculpatory phone calls would not have "result[ed] in substantial and irreparable prejudice to [] [D]efendant's case." N.C.G.S. § 15A-1061 (2021); *cf. State v. Canady*, 355 N.C. 242, 252-53 (2002) (holding exculpatory evidence was improperly withheld where there was a "reasonable probability that if [the] defendant had access to informants who had names of others involved in the [crime at issue], such information could have swayed the jury to reach a different outcome").

Nor does the statutory scheme governing the State's duty to disclose provide any further basis to find the trial court abused its discretion. As stated earlier, when the State fails to timely comply with its duty of disclosure, the trial court "*may* (1) [o]rder the party to permit the discovery or inspection, [] (2) [g]rant a continuance or recess, [] (3) [p]rohibit the party from introducing evidence not disclosed, [] (3a) [d]eclare a mistrial, [] (3b) [d]ismiss the charge, with or without prejudice, or (4) [e]nter other appropriate orders." N.C.G.S. § 15A-910(a) (2021) (emphasis added). The plain language of the statute makes clear that the trial court also has the discretion not to enter *any* sanctions. *See* N.C.G.S. § 15A-910(d) (2021) (emphasis added) ("*If the court imposes any sanction*, it must make specific findings justifying the imposed sanction."). Accordingly, despite the State's untimely disclosure, the trial court ruled well within the options provided to it under N.C.G.S. § 15A-910 not to declare a mistrial.

B. Effective Assistance of Counsel

[2] Defendant next argues he received ineffective assistance of counsel due to his trial counsel's alleged implicit concession that he was guilty of assault on a female. Defendant relies on *State v. Harbison*, 315 N.C. 175 (1985), and *State v. McAllister*, 375 N.C. 455 (2020), to contend he received *per se* ineffective assistance of counsel. At oral argument, Defendant's appellate counsel confirmed that this ineffective assistance argument is limited to alleging *Harbison* error.

1. Standard of Review

"We review *per se* ineffective assistance of counsel claims *de novo*." *State v. Moore*, 286 N.C. App. 341, 345 (2022) (citing *State v. Harbison*,

315 N.C. 175 (1985)); *see also State v. Wilson*, 236 N.C. App. 472, 475-78 (2014) (applying the *de novo* standard to the defendant's claim that his trial counsel's statements amounted to *Harbison* error).

2. *Harbison* Error

We recently provided a concise description of the applicable law for cases where the defendant has alleged ineffective assistance of counsel based on a *Harbison* error:

> A defendant claiming ineffective assistance of counsel must ordinarily show both that counsel's performance was deficient, and that counsel's deficient performance prejudiced the defense. [*Strickland v. Washington*, 466 U.S. 668, 687 (1984)]. However, "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180[] . . . . Statements by defense counsel "must be viewed in context to determine whether the statement was, in fact, a concession of defendant's guilt of a crime[.]" *State v. Mills*, 205 N.C. App. 577, 587[] . . . (2010) (citation omitted). Where "defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy." [*McAllister*, 375 N.C. at 475]. "[T]he trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *State v. Foreman*, 270 N.C. App. 784, 790[] . . . (2020) (citation omitted).

Moore, 286 N.C. App. at 345. Our Supreme Court has "emphasize[d] that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence." *McAllister*, 375 N.C. at 476.

In *McAllister*, our Supreme Court "extended *Harbison* to instances where defense counsel does not expressly request that the jury convict the defendant of a charge, but impliedly concedes the defendant's guilt to a charged offense." *State v. Guin*, 282 N.C. App. 160, 169 (2022). In that case, the defendant was tried for assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape.

See McAllister, 375 N.C. at 458-59. In its case-in-chief, the State played for the jury a videotaped police interview with the defendant in which the defendant admitted that he and the victim got into a rough "tussle," but he denied sexually assaulting her. *Id.* at 458. The defendant also stated in the interview, "[I]f I smacked [her] ass up, then I smacked [her]; I can take the rap for that." *Id.* During his closing argument, the defendant's counsel referenced the defendant's statements from the interview. Defense counsel stated to the jury, "[T]hings got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives." *Id.* at 460. Defense counsel told the jury that the defendant "was being honest" during the interview. *Id.* Throughout his closing argument, "counsel never expressly mentioned [or asked the jury to find the defendant not guilty of] the charge of assault on a female but repeatedly addressed the other three charges against [the] defendant." *Id.* at 473.

In reviewing the remarks, our Supreme Court held that *Harbison* error occurs not only where there is an express concession of guilt, but also where counsel's statements "cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense":

> [A] *Harbison* violation . . . encompass[es] situations in which defense counsel impliedly concedes his client's guilt without prior authorization.
>
> . . .
>
> Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur. In cases where—as here—defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy. In such cases, the defendant is prejudiced in the same manner and to the same degree as if the admission of guilt had been overtly made. Thus, our decision in this case is faithful to the rationale underling *Harbison*.
>
> . . .
>
> [U]nder *Harbison* and its progeny[,] defense counsel was required to obtain the informed consent of [the]

> defendant before embarking on such a strategy that implicitly acknowledged to the jury his guilt of a separately charged offense.

Id. at 473-75. Our Supreme Court concluded that the defense counsel's statements constituted error under *Harbison* as "an implied concession of guilt." *Id.* at 476.

In concluding that the defense counsel's statements constituted *Harbison* error, our Supreme Court considered the defense counsel's statements to implicitly admit the defendant's guilt for three core reasons. "First, defense counsel attested to the accuracy of the admissions made by [the] defendant in his videotaped statement by informing the jurors that [the] defendant was 'being honest.' " *Id.* at 474. "Second, [the] defendant's attorney not only reminded the jury that [the] defendant had admitted he 'did wrong' during the altercation in which [the victim] got 'hurt,' but defense counsel then proceeded to also state his own personal opinion that 'God knows he did [wrong]'—thereby implying that there was no justification for [the] defendant's use of force against [the victim]." *Id.* Third, "at the very end of his closing argument, defense counsel asked the jury to find [the] defendant not guilty of every offense for which he had been charged except for the assault on a female offense." *Id.*

Here, Defendant argues that statements made by his defense counsel "track[] very closely" with those made by the defense counsel in *McAllister*. Defendant cites two statements from his counsel's closing argument. First, immediately after beginning the closing with "[l]adies and gentlemen, [Defendant] is not guilty of assault with a deadly weapon inflicting serious injury, he's not guilty of possession of a firearm by a felon, he's not guilty of assault by pointing a gun, because [Defendant] did not have a firearm[,]" Defendant's counsel made the following argument:

> Now, I -- I somewhat envy you because of the important role that you're about to serve, but I also empathize with how difficult what you're about to do is. Because I told you in the beginning that this was a case about nuance. Not everything is this sexy black-and-white scenario of good versus evil. This is a case where you may find that [Defendant] did something, did something terrible, did something to someone who maybe didn't deserve it. No one does. No one deserves to have what may or may not have happened to Ms. Golden. Nobody. And no one is going to stand up here and tell you that it's okay or that any of that behavior, if true, is okay. It's not.

Second, later in his closing argument, Defendant's counsel stated,

> You know what? You can believe that he committed an assault. I'm not asking you to find him guilty of assault on a female, but you can believe that he committed a non-gun-related assault. And everything the State said still makes sense. Honestly, it makes better sense. It explains why he didn't try to get the hell out of Dodge immediately and toss a gun. If you believe that [Defendant] went too far, committed an assault, and then tried to go find her, whether it was to continue the argument or not, you could believe that if the man's on probation and the police roll up, he's going to get in trouble for that. So yes, of course, he would leave. It doesn't -- it doesn't mean he's leaving just because there's a gun.

These are the only statements on which Defendant relies to argue his counsel implicitly conceded he was guilty of assault on a female.

Defendant asserts several reasons for why these statements parallel those in *McAllister*. First, Defendant claims counsel told the jury they could find the Defendant did something terrible, which was a "not-so-subtle reference to the Defendant assaulting [the victim]." Defendant contends that counsel provided his personal opinion about Defendant's actions by telling the jury that no one deserved what happened to the victim and that "no one is going to stand up here and tell you that it's okay or that any kind of that behavior, if true, is okay. It's not." According to Defendant, in *McAllister*, the Court was troubled by defense counsel's similar offering of his personal opinion about his client's culpability for assault. Second, Defendant claims "[a]nother commonality is that defense counsel in both cases urged the respective juries to find their clients not guilty of the more serious offenses." Defendant argues that his counsel "only made a cursory argument about the [assault on a female] count, saying that while he was not telling the jury to convict his client for that offense (and attempted breaking or entering and communicating threats), they should '[d]o what you believe the law requires you to do.' " We are not persuaded by either reason.

First, Defendant is incorrect that his counsel referenced Defendant as assaulting the victim and that his counsel gave his personal opinion implying there was no conclusion other than Defendant's guilt, as in *McAllister*. A core element of our Supreme Court's reasoning in *McAllister* was that the defense counsel "not only reminded the jury that [the] defendant had admitted he 'did wrong' during the altercation in which [the victim] got 'hurt,' but defense counsel then proceeded to

also state his own personal opinion that 'God knows he did [wrong]'—thereby implying that there was no justification for [the] defendant's use of force against [the victim]." *McAllister*, 375 N.C. at 474; *see also Guin*, 2022-NCCOA-133, at ¶ 37 (referring to this reason as one of "three core reasons" the Court found the statements problematic). Here, the two excerpts from closing arguments cited by Defendant neither express nor imply that there was no other outcome other than that Defendant was guilty of assault on a female. Instead, Defendant's counsel expressly stated, "I'm not asking you to find him guilty of assault on a female." Counsel made this clear after he stated that "you can believe that he committed a non-gun-related assault[,] . . . [a]nd everything the State said still makes sense." Nor does the other excerpt cited by Defendant concede Defendant's guilt, explicitly or implicitly; rather, at worst, it expresses that the jury "may or may not" find Defendant guilty of an offense.[5] As such, the statements do not rise to the level of those in *McAllister*.

Second, while Defendant's counsel urged the jury to find Defendant not guilty of the more serious offenses, Defendant himself makes clear that counsel did not completely omit the assault on a female count from the counts on which he asked the jury to find Defendant not guilty. In contrast, as our Supreme Court expressly stated in *McAllister*, defense counsel "overtly s[ought] a not guilty verdict as to the three more serious charges" but "omitt[ed] mention of the assault on a female charge" by "not expressly mentioning that charge *at all during the entire closing argument* . . . ." *McAllister*, 375 N.C. at 474 (emphasis added). The Court thus concluded that "the only logical inference in the eyes of the jury would have been that defense counsel was implicitly conceding defendant's guilt as to that charge." *Id.* Here, however, we cannot say that the only logical inference to be drawn from defense counsel's argument was a concession of Defendant's guilt as to the assault on a female

5. We are cognizant that some of defense counsel's remarks may have implicitly acknowledged the *likelihood* that the jury would believe the State as to some charges and not others. For example, before clarifying that he was "not asking [the jury] to find [Defendant] guilty of assault on a female[,]" defense counsel remarked that the jury "can believe that [Defendant] committed a non-gun-related assault[,] . . . [a]nd everything the State said still makes sense." However, we emphasize that the distinction between differentiating charges by evidentiary support, as defense counsel did in this case, and an *actual* concession, express or implied, is more than a formality or commitment to literalism. Just as critical to the effective performance of counsel as the commitment not to concede on a client's behalf is the ability to argue nuance to a jury that may otherwise—as defense counsel suggested—be tempted to think in "black-and-white" terms. Without the ability to argue, in the hypothetical, that a jury could find a client guilty of one charge and not another, a criminal defense attorney's work would be reduced to a parody of itself, hamstringing the credibility of its own arguments.

charge because counsel did not completely omit mention of this charge; indeed, he asked the jury to "return a verdict of not guilty" shortly after discussing this charge in the closing argument. We therefore conclude that Defendant's reliance on *McAllister* is unconvincing, and we do not believe Defendant has demonstrated *Harbison* error.

CONCLUSION

For the foregoing reasons, Defendant has not shown that the trial court abused its discretion by denying his motion for a mistrial, nor has he demonstrated that his trial counsel implicitly conceded his guilt of assault on a female.

NO ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JOSHUA DAVID REBER

No. COA22-130

Filed 16 May 2023

1. Evidence—prior bad acts—child rape trial—text messages with girlfriend—highly prejudicial—new trial granted

Where the trial court committed plain error in a trial for multiple counts each of rape of a child and sexual offense with a child (based on acts alleged to have occurred when the victim was between eight and eleven years old) by allowing the State to introduce text message exchanges between defendant and a former girlfriend as Rule 404(b) evidence, defendant was entitled to a new trial. Neither exchange—one of which was in regard to a sexual encounter that occurred when defendant's girlfriend was intoxicated and which she could not later remember, and the other of which was in regard to a plan to meet at a motel and to have defendant's daughter keep the meeting a secret from defendant's family—was sufficiently similar to the events giving rise to the criminal charges at issue. Therefore, their introduction was highly prejudicial and likely impacted the jury verdict, particularly in a case where, since there was no physical evidence of the crimes or eyewitnesses, the outcome of the case was dependent upon the jury's perception of the credibility of each witness.

2. Criminal Law—prosecutor's closing argument—child rape trial—nature of defendant's time with the victim

The trial court was not required to intervene ex mero motu during the prosecutor's closing argument in defendant's trial for multiple counts each of rape of a child and sexual offense with a child regarding several comments by the prosecutor: (1) describing the video game that defendant and the victim played together as having a mature rating and that being "full of gore, smoking, profanity, and sex scenes," which were legitimate inferences from the evidence; (2) referencing the victim's cross-examination by defendant's attorney, which did not denigrate the defense attorney and was not grossly improper; and (3) remarking on the short amount of time defendant had spent in jail due to being released soon after his arrest when defendant's grandmother provided bond money, which was not grossly improper and was part of the evidence since defendant had testified that he had been out of jail on bond since his arrest.

3. Criminal Law—prosecutor's closing argument—child rape trial—remarks on sexual history—unsupported and inflammatory

The trial court erred in defendant's trial for multiple counts each of rape of a child and sexual offense with a child by failing to intervene ex mero motu during the prosecutor's closing argument when the prosecutor remarked on defendant's use or lack of use of condoms during sexual intercourse and when he discussed defendant's sexual history with his girlfriend, both of which were grossly improper and inflammatory. The prosecutor's inferences that defendant was spreading sexually transmitted diseases was not supported by the evidence and served only to inflame the passions or prejudice of the jury, and the inference that defendant manipulated his girlfriend was an impermissible character attack based on improperly admitted evidence (the introduction of which constituted plain error entitling defendant to a new trial).

Judge DILLON dissenting.

Appeal by Defendant from judgments entered 9 August 2021 by Judge Forrest D. Bridges in Ashe County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Margaret A. Force, for the State.

Daniel M. Blau, for the Defendant.

WOOD, Judge.

Joshua Reber ("Defendant") appeals from judgments finding him guilty of several counts of rape of a child and sex offense with a child. For the reasons stated herein, we reverse the trial court's judgment and remand for a new trial.

I. Factual and Procedural Background

In 2009, Defendant and his daughter, Beth,[1] moved to North Carolina to live with his grandparents in Ashe County so Defendant's grandparents could help with childcare while Defendant worked. That same year, when Defendant was twenty years old, he became friends with Sherry and Troy, a married couple he knew because they worked together at a group home for individuals with mental disabilities. Defendant became close to the couple and their five children, and he was treated like a member of their family. Because of his close relationship with the family, Defendant and his daughter spent a significant amount of time at Troy and Sherry's home and often spent the night at their home. During their friendship, he and his daughter lived with the family for approximately a month. Troy and Defendant would hunt together, and Troy would bring along his daughter, Khloe, after she turned four years old. Khloe and her sister visited Defendant's grandparents' home a few times to play with Beth, and, on one occasion, the two sisters stayed the night in Beth's room. Khloe also liked to play a video game called Call of Duty with Defendant when she came to Defendant's grandparents' home.

In late September or early October 2015, when Khloe was eleven years old, she told a boyfriend that Defendant had engaged in sexual activities with her and was encouraged by him to report these events to her mother. Khloe then told her mother, Sherry, that Defendant had been "messing with her." In response to Khloe's allegations, Sherry contacted the Ashe County Sheriff Department and filed a report with Captain Carolyn Gentry ("Captain Gentry"). Captain Gentry arranged for Khloe to be interviewed and to have a medical exam.

On 15 October 2015, Detective Graybeal of the Wilkes County Sheriff's Department, a forensic interviewer at the Safe Spot Child Advocacy Center, interviewed Khloe. During the interview, Khloe stated that the abuse first occurred when she was eight years old while she was alone with Defendant in a deer blind. She reported that one night, after using a spotlight to hunt, Defendant started massaging her, penetrated

1. Pseudonyms are used here to protect the identity of juveniles.

her vagina with his finger, and later rubbed her chest under her shirt. Khloe also described additional sexual acts that she claimed took place over the next three years, including multiple incidents of vaginal sex, digital penetration, and oral sex with such acts occurring in the deer blind, on her family's couch, in her bedroom, and in the bathroom at her home. Khloe also stated that sexual acts occurred at Defendant's home to include his bedroom, a smoking spot outside, and the woods. Khloe reported to Detective Graybeal that she and Defendant sent nude photos to each other on Snapchat and chatted over Facebook messenger. According to Khloe, the sexual abuse stopped before her eleventh birthday in April 2015. At the child advocacy center, Dr. Suttle conducted a medical exam of Khloe. The medical exam consisted of a head-to-toe assessment and included a genital exam and an anal exam.

On 4 November 2015, Defendant was arrested for several counts of sexual offense with a child and rape of a child. On 19 November 2015, Captain Gentry obtained a search warrant for Defendant's phone. Defendant was indicted on 25 April 2016 on four counts of Rape of a Child in 15 CRS 50792-93 and six counts of Sex Offense with a Child in 15 CRS 50794-96. Defendant was tried before a jury during the 2 August 2021 criminal session of Ashe County Superior Court with Superior Court Judge Forrest D. Bridges presiding.

During trial, several witnesses testified. Khloe, seventeen years old at the time of trial, testified that she first met Defendant when she was four or five years old and viewed him as a brother with whom she wrestled, hunted, and played videogames. However, Khloe testified that when she reached puberty at age eight, Defendant began to engage in sexual activities with her. She reported that the first incident occurred one evening when she, Defendant, and her father were watching television together in the living room at 3 a.m. Khloe testified that after her father went to bed, Defendant suggested that they move outside to hunt for coyotes, and they entered the deer blind. In the deer blind, Defendant proceeded to massage her chest and buttocks and penetrated her vagina with his finger. Khloe described that she "didn't know how to feel honestly" as she was "scared, nervous, but I had a crush on him before it and, you know, I looked at it like, well, maybe he likes me too, and it's kind of exciting."

According to Khloe, their relationship changed, and she began to view Defendant as a boyfriend, to the point where she did not have "any boyfriends at school." Khloe further testified that when she was between the ages of eight and eleven, the sexual touching occurred at least weekly and took place in the deer blind, the woods located behind

her parents' home, her parents' living room, the bathroom, her bedroom, Defendant's bedroom, and outside of his grandparents' home. Khloe recounted that when she slept over at Defendant's grandparents' home, she would sneak into Defendant's bedroom located on the main level of the home, where they engaged in sexual acts. Khloe testified that she and Defendant played videogames in his bedroom at his grandparents' home, and would wait until everyone left the home, so that "whenever they left, that's when things escalated."

Khloe recounted that on a particular occasion, Defendant's grandmother took Khloe's sister and Beth to church, while Khloe stayed behind with Defendant, so that they "had a little time to [them]selves," which allowed Defendant to "be a little more further with it." Khloe stated that Defendant came over to her parents' home three or four times a week, and at least once a week, they would engage in sexual intercourse in the deer blind. Khloe also alleged that she and Defendant engaged in sexual acts in her family's bathroom, the only bathroom in the home, during the night. She testified Defendant never used a condom during these sexual activities and there were times when Defendant ejaculated into her mouth, into the toilet, or into leftover bottles. Defendant told Khloe not to tell her father about their sexual activities "because he didn't want their relationship to be ruined between them" and not tell anyone else, lest "he would go to prison."

During cross-examination, Khloe testified that, within the two weeks before trial, she watched the interview conducted on 15 October 2015 and explained, "The only reason why I watched the videos is because I didn't remember nothing for six years. So I had to just really remember everything . . . . because this happened so many times, like the littlest details I probably had done forgot about." When asked about her truthfulness, Khloe stated that she did not need to make up any lies to get attention from her parents.

Khloe's mother, Sherry, also testified that she viewed Defendant as one of her own kids and treated him as part of her family. She stated that all of her children viewed Defendant as a big brother. Sherry testified that she thought Defendant and Khloe had "a brother-sister relationship" before Khloe disclosed the abuse to her. Sherry testified that after Khloe told her about these alleged events, she observed a change in her daughter. Khloe was bullied, depressed, and suicidal and started cutting herself, but Sherry testified that she did not notice any of these behaviors prior to Khloe telling her what had occurred. Sherry also described Khloe as a "normal 8- to 11-year-old" child during the period of these alleged acts. Sherry testified that, in 2010, she quit working and stayed at home "all of the time" to care for the children.

Defendant's grandmother, Mrs. Swann, testified that when Defendant and his daughter moved in with her and her husband, she stopped working to stay home and take care of Beth. Mrs. Swann stated that during the times Khloe came over to her home, her sister was always with her, and Mrs. Swann was home during those visits. During the single time that Khloe and her sister slept over, the three girls slept in Beth's room located in the basement. Mrs. Swann's bedroom was also located in the basement and next to Beth's room. Mrs. Swann testified that, during the relevant period, their dachshunds, which were normally kept in the basement, barked "if anybody moved down there." Mrs. Swann stated that Khloe was never left home alone with Defendant while the rest of the family went to church, and, in fact, both she and her sister had attended church with Mrs. Swann on the one occasion they slept over. When Khloe and Defendant played video games in his bedroom, Mrs. Swann testified that the door was always open and, from a vantage point in the kitchen, she could clearly see into it. According to Mrs. Swann, she and her husband required doors to be kept open when other children were in their home.

Neither Khloe's mother nor Defendant's grandmother testified to ever having seen any questionable behavior from Defendant or any inappropriate interaction between Defendant and Khloe.

At trial, the State called an expert witness, Ms. Browning of the Safe Spot Child Advocacy Center, to discuss the results of Khloe's 22 October 2015 medical exam, though Ms. Browning was not the medical provider who examined Khloe on 22 October 2015 and had not met her. According to Dr. Suttle's medical report, she did not observe anything specific during the physical exam, which, according to Ms. Brown, would include instances of torn hymenal tissue, evidence of an STD, or pregnancy.

However, Ms. Browning testified that the lack of significant findings during the genital exam does not rule out the possibility of sexual abuse because "it's very few children who have experienced sexual abuse that have any kind of injuries" since injuries can heal very quickly or there was never an injury there in the first place. Nevertheless, Dr. Suttle's report listed "no physical evidence of sex[ual] abuse found." On cross-examination, Ms. Browning conceded, "In other words, it was an unremarkable or normal exam for a child [Khloe's] age when it was done on October 22, 2015."

Agent Anderson of the SBI testified that he conducted a forensic examination of Defendant's cell phone on 15 March 2016. After reviewing the data extraction, Agent Anderson testified that he did not find

evidence of nude photographs having been exchanged between Khloe and Defendant. He also discovered that the phone did not appear to have been activated until May 2015, one month after the alleged abuse had stopped. Agent Anderson found thousands of text messages between Defendant and his girlfriend at that time, Danielle, but no communications between Defendant and Khloe. Agent Anderson testified that he attempted to do a data extraction from Khloe's tablet but was unsuccessful due to technical issues.

The Defense called as a witness Sgt. Lewis, a retired sergeant from the Ashe County Sheriff's Office who assisted Captain Gentry on this case. Sgt. Lewis was assigned to take photographs of Defendant's genital area in order to verify Khloe's claims regarding the location of alleged moles on Defendant's body. Sgt. Lewis testified that he did not observe any evidence of a mole in Defendant's pubic line or on his penis.

At trial, Defendant testified on his own behalf. Defendant testified about his and his daughter's close relationship with Sherry and Troy and their children, and that he spent quite a bit of time over at their home. He explained that Troy and Sherry's home only had one bathroom. He further testified he was Facebook friends with all of Troy's family who had Facebook accounts, including Khloe and he was first introduced to Call of Duty, a video game, by Troy's sons. Defendant recounted that Troy and Sherry had marital discord, and, consequently, Troy would leave their home for a couple of weeks at a time. During those times, Defendant would visit him at his father's home. Defendant testified he never spent the night at their home during the periods of time Troy was not living there. If Defendant slept over, he would sleep on the couch located in the living room, while Beth slept in the room shared by Khloe and her sisters.

Defendant testified that at the request of her parents, he had taken Khloe hunting in the family's backyard, around 2:00 or 3:00 p.m., but would return from hunting by nightfall. Defendant testified that he and Khloe did not hunt deer in the evening because it was illegal to hunt deer after dark. Defendant testified he was never alone with Khloe in Troy's deer blind at night, but that there were times when they would go out together to the picnic table and spotlight for coyotes. Defendant denied ever engaging in any sexual activities with Khloe.

Defendant also recounted that Khloe had visited his grandparents' home with her sister two or three times but had never come alone. Defendant testified that he and Khloe had played video games in a bedroom but that the bedroom door was open and that Khloe never came into his room at any other time. Defendant further reported that Khloe

would never have stayed home from church when she spent the night because his "grandparents don't allow that." Defendant testified that his grandmother stayed at home most of the time in order to watch Beth and other children who visited and that she had a habit of "peeking in and checking in," as well as walking past doors and looking in when visitors came to her home.

Defendant testified that, since moving to North Carolina, he had girlfriends with whom he had sexual relationships and that none of these sexual interactions occurred at his grandparents' home. Defendant also reported that he engaged in contraceptive practices including using a condom, and, when a condom was not available, Defendant utilized the pull-out method.

When asked about his cellphone, Defendant testified that it could have been in May 2015 that he bought the phone upon which the search warrant was executed, but he did not buy it in order to hide any previous contact with Khloe. Defendant testified he never used Snapchat during the period between 2012 and 2015. While Defendant might have downloaded the application to chat with Danielle on one occasion in 2015, Defendant stated he did not communicate with Khloe over Snapchat. Defendant and Khloe did exchange messages over Facebook messenger, but Defendant explained that the messages were not sexual in nature. Defendant denied exchanging nude photos with Khloe over any method of communication.

On cross-examination, Defendant was asked by the State prosecutor about his relationship with Danielle, at which point Defendant testified that they had slept together once before entering into a relationship. The prosecutor questioned Defendant about several text message exchanges with Danielle. In an exchange on 5 July 2015, during a discussion about the size of Danielle's breasts, Defendant mentioned that he had seen her breasts once before they began dating. The texts that were read aloud during the trial stated that Danielle did not "remember taking [her] shirt off," at which Defendant replied, "You didn't, but we were messing around on the couch, and you let me pull them out at the top of the top." Danielle responded that she did not remember the incident, and Defendant texted, "You did get drunk pretty fast." The prosecutor then asked:

> Q: She was so drunk, she couldn't remember taking her shirt off, and you had sex with her?
>
> A: No, I mean, we were drinking with her and her cousin.

> Q: She was so drunk, she couldn't remember taking her shirt off?

Defense counsel objected to the prosecutor's last question, and the court sustained the objection. The prosecutor also questioned Defendant about another text message exchange in which he and Danielle discussed trying to find a place to engage in sexual activity because Defendant's grandparents prohibited Defendant's girlfriends from staying at their home. In the exchange, Defendant proposed: "We could go get another motel [room] but I hope [Beth] doesn't say anything to my grandparents." Danielle asked Defendant if he could "ask her not to say anything?"; Defendant responded, "Yeah, but she has a big mouth[,] but I can try."

On 9 August 2021, the jury found Defendant guilty of four counts of rape of a child and six counts of sex offense with a child. The trial court consolidated the charges in 15 CRS 50792-93, sentencing Defendant to an active term of 300-420 months, and then consolidated the charges in 15 CRS 50794-96, sentencing Defendant to a consecutive active term of 300-420 months. Defendant gave oral notice of appeal in open court and filed a written notice of appeal on 13 August 2021.

II. Analysis

A. Introduction of Defendant's Text Messages into Evidence.

[1] On appeal, Defendant argues that the trial court committed plain error by allowing the State to introduce into evidence two text message exchanges between Defendant and Danielle. Defendant contends that the first text message conversation, which discussed Defendant's prior sexual encounter with Danielle when she was intoxicated, was not relevant "to show that he had any plan or intent to sexually assault [Khloe]." Additionally, Defendant argues that the text conversation in which he and Danielle discussed a plan to meet at a motel and in which he considered asking his daughter not to report this plan to her great-grandparents does not indicate that he "had a plan or intent to abuse [Khloe]." According to Defendant, such evidence showcasing his prior sexual relationship was inadmissible for any valid Rule 404(b) purpose; thus, this improper character evidence was prejudicial. We agree.

"[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Where an objection about the admissibility of evidence is not preserved at trial, the issue may be raised on appeal based on

"plain error" if the defendant shows that the admission was a fundamental error with a "probable impact on the jury's finding that the defendant was guilty" and "absent the error the jury probably would have reached a different verdict." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "The plain error rule applies only in truly exceptional cases." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

Under Rule 404(b), evidence tending to show a defendant committed other wrongs, crimes, or acts, and his propensity to commit such acts, is admissible, provided it is relevant for some purpose other than to show the propensity or disposition of a defendant "to commit an offense of the nature of the crime charged." *State v. Al-Bayyinah*, 356 N.C. 150, 153-54, 567 S.E.2d 120, 122 (2002) (citing *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). "[T]he admissibility of evidence of a prior crime must be closely scrutinized since this type of evidence may put before the jury crimes or bad acts allegedly committed by the defendant for which he has neither been indicted nor convicted." *State v. Jones*, 322 N.C. 585, 588, 369 S.E.2d 822, 824 (1988).

Examples of purposes for which evidence of other crimes, wrongs, or acts is admissible include: "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident," but the enumerated list of permissible purposes in the rule is not exclusive. *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987); N.C. Gen. Stat. § 8C-1, R. 404(b) (2022). Accordingly, evidence of " 'other crimes, wrongs, or acts' . . . need only be 'relevant to any fact or issue other than the character of the accused' to be admissible." *State v. Gordon*, 228 N.C. App. 335, 338, 745 S.E.2d 361, 364 (2013) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)).

Even if relevant, 404(b) evidence is also "constrained by the requirements of similarity and temporal proximity." *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123, *appeal after new trial*, 359 N.C. 741, 616 S.E.2d 500 (2005). "Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act.' " *Id.* at 155, 567 S.E.2d at 123 (citing *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991)).

Under Rule 404(b) a prior act or crime is sufficiently similar to warrant admissibility if there are "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both." *Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91 (citations omitted). The similarities are not required to "rise to the level of the

unique and bizarre." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988).

In *State v. Dunston*, appealing his convictions of first-degree sex offense with a child and taking indecent liberties with a child, the defendant argued that the trial court erred in admitting his wife's testimony that she and defendant engaged in anal sex. 161 N.C. App. 468, 469, 588 S.E.2d 540, 542 (2003). This Court determined that a defendant who "engaged in and liked consensual anal sex with an adult, whom he married, [was] not by itself sufficiently similar to engaging in anal sex with an underage victim beyond the characteristics inherent to both, i.e., they both involve anal sex, to be admissible under Rule 404(b)." *Id.* at 473, 588 S.E.2d at 544-45. Finding the evidence "was not relevant for any purpose other than to prove defendant's propensity to engage in anal sex," this Court held the trial court erred in admitting this testimony. *Id.*

Additionally, in *State v. Davis*, this Court held that a defendant who previously "wrote about having non-consensual anal intercourse with an adult woman whom he knew" did not constitute a prior action that was substantially similar to his present charges involving "anal penetration of defendant's six-year-old son" as the only overlapping fact between the two actions was anal intercourse. *State v. Davis*, 222 N.C. App. 562, 567, 731 S.E.2d 236, 240 (2012). We further stated:

> While 'the Court has been markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b), . . . [n]evertheless, the Court has insisted the prior offenses be similar and not too remote in time.' *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419-20 (1986). Here, apart from the fact that anal intercourse was involved, the acts bore no resemblance to each other, involving different genders, radically different ages, different relationships between the parties, and different types of force.

Id. at 568, 731 S.E2d at 241.

Here, the charged crimes involve a girl between the ages of eight and eleven years old when the alleged sexual abuse occurred. In contrast, the 404(b) evidence involved a text message conversation between Defendant and a former girlfriend discussing an isolated, consensual sexual encounter they shared before formally dating. Further, there is no similarity in how the charged crimes and these 404(b) offenses came to occur other than the allegation that both involved sexual intercourse.

While the text message conversation mentioned that Danielle had been drinking during the time of their sexual encounter, there is no record evidence that Defendant provided Khloe with alcohol or that she was impaired during the alleged sexual offenses. Likewise, the locations of the alleged offenses and the 404(b) offense are dissimilar: there is no evidence that Defendant and Khloe participated in drinking and afterwards, engaged in sexual activities while others were present. In contrast, Defendant, Danielle, and her cousin drank together culminating with Defendant and Danielle "messing around on the couch." The evidence, presented through a text message conversation, that Defendant previously engaged in consensual sexual intercourse with an adult woman who had been drinking is not sufficiently similar to show that Defendant possessed any plan or intent to engage in sexual acts with Khloe.

Additionally, Defendant and Danielle's text exchanges regarding a plan to meet at a motel and his possibly asking his daughter not to report this plan to his grandparents is not sufficiently similar to the charged offenses. The text message exchange, which was admitted into evidence, involved Defendant considering whether to ask that his daughter not tell his religious grandparents that he was having consensual sexual intercourse with an adult woman with whom he was in a relationship. However, there is no evidence that Defendant actually had this discussion with his daughter. Even though Defendant's daughter is similar in age to Khloe, contemplating asking his child to withhold highly personal information from relatives is not sufficiently similar where Defendant is alleged to have asked Khloe not to disclose her own sexual abuse. We hold that Defendant's text message exchanges with Danielle do not give rise to any inference that Defendant "would be desirous of or obtain sexual gratification" from sexual intercourse with an eight-to- eleven-year-old girl. *Davis*, 222 N.C. App. at 570, 731 S.E.2d at 241-42.

We further agree that "Rule 404(b) evidence carries an inherent risk of prejudice; by its very nature, it informs the jury about the defendant's prior bad acts and impugns his character." As this Court has previously recognized, the improper admission of a prior sexual deviance by a defendant

> tends to bolster an alleged victim's testimony that an assault occurred *and* that the defendant was the perpetrator, since such evidence informs the jury that the defendant has committed sexual assault in the past. This evidence further tends to diminish the defendant's credibility, and creates the possibility that the jury will convict

> the defendant based upon the prior bad act instead of solely on properly admitted evidence.

State v. Gray, 210 N.C. App. 493, 521, 709 S.E.2d 477, 496 (2011). Here, the evidence portraying Defendant as manipulative by (1) engaging in sexual intercourse with a woman who had been drinking alcohol, and (2) for contemplating asking his daughter to not share his plans to meet a girlfriend at a motel so they could engage in sexual intercourse is highly prejudicial and impermissibly attacked Defendant's character.

Given the sensitive and potentially inflammatory nature of the Rule 404(b) evidence, "it is highly probable this testimony was prejudicial to defendant, especially in light of the inconsistent and unclear nature of the remaining evidence in this case." *Dunston*, 161 N.C. App. at 473-74, 588 S.E.2d at 545. Here, Khloe testified she had sexual intercourse with Defendant between the ages of eight to eleven, but the State's witness, Ms. Browning, testified that Khloe's 2015 medical exam found no physical evidence of sexual abuse, sexually transmitted diseases, or pregnancy, and the physical exam was characterized as "an unremarkable or normal exam for a child [of Khloe's] age when it was done."

Further, there were no eyewitnesses to the several years of alleged abuse, despite both Khloe's mother and Defendant's grandmother continuously being present at their respective homes to watch the children in their care. Neither Khloe's mother nor Defendant's grandmother testified that they had ever seen any questionable behavior or inappropriate interactions between Defendant and Khloe. Additionally, Agent Anderson testified that after conducting a data extraction on Defendant's cell phone, he was unable to find any evidence of nude photograph exchanges or locate any history of communications between Defendant and Khloe. Sgt. Lewis also provided testimony that he did not personally observe a mole in Defendant's pubic line or on his penis, in contradiction to Khloe's description of Defendant's body.

Finally, Defendant denied the allegations against him and testified to events which rebutted Khloe's testimony. Thus, the outcome of the case "depended upon the jury's perception of the truthfulness of each witness." *State v. Maxwell*, 96 N.C. App. 19, 25, 384 S.E.2d 553, 557 (1989). The improperly admitted evidence bolstered Khloe's testimony, diminished Defendant's credibility, and made it more likely that the jury would convict Defendant based on his character, rather than the facts presented. *Gray*, 210 N.C. App. at 521, 709 S.E.2d at 496.

The trial court therefore erred, under the facts and circumstances of the instant case, in admitting evidence of Defendant's text message

exchanges with a previous girlfriend under Rule 404(b) of the North Carolina Rules of Evidence. Because this error tended to be highly prejudicial to Defendant, such that it had a probable impact on the jury's finding that he was guilty, Defendant is entitled to a new trial. *Dunston*, 161 N.C. App. at 474, 588 S.E.2d at 545.

B. State Prosecutor's Closing Argument.

[2] Next, Defendant argues that the trial court erred by failing to intervene *ex mero motu* in response to several statements made by the State prosecutor during his closing argument. While we disagree with a portion of Defendant's argument, part of his argument has merit.

During closing arguments, a lawyer is "to provide the jury with a summation of the evidence, which in turn serves to sharpen and clarify the issues for resolution by the trier of fact and should be limited to relevant legal issues." *State v. Jones*, 355 N.C. 117, 127, 558 S.E.2d 97, 103 (2002) (cleaned up). In a criminal jury trial, our General Assembly has enacted specific guidelines for closing arguments:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230 (2022). "[A]rgument of counsel must be left largely to the control and discretion of the presiding judge and . . . counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). Nonetheless, this wide latitude is limited: a closing argument must: "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108.

Because Defendant's attorney did not object to the State's closing argument, "defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. 'To establish such an abuse, defendant must show

that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.' " *State v. Tart*, 372 N.C. 73, 80-81, 824 S.E.2d 837, 842 (2019) (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998)). "Even when a reviewing court determines that a trial court erred in failing to intervene *ex mero motu*, a new trial will be granted only if 'the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.' " *Id.* at 82, 824 S.E.2d at 842 (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106). In order to assess whether this level of prejudice against Defendant has been shown, the challenged statements are considered "in context and in light of the overall factual circumstances to which they refer." *Id.* at 82, 824 S.E.2d at 843 (citation omitted).

Defendant identifies several portions in the State's closing argument which he asserts is grossly improper. First, in recounting Defendant's relationship with Khloe and the time they spent together, the State Prosecutor stated:

> [T]he evidence is uncontradicted from his own house, he played Call of Duty with her, video games. Call of Duty, a video game with a mature rating, a war game where you use a control to shoot and kill people. It's full of gore, smoking, profanity, sex scenes. And he is doing this with a girl who has not even reached the fifth grade yet.

Defendant argues that there was no evidence introduced at trial that "the game had a mature rating, or that it involved shooting other people, or that it contained gore, smoking, profanity, or sex scenes." We disagree. In the above cited instance, the State prosecutor's statement represented legitimate inferences from the evidence that was presented by the testimonies of Defendant, Khloe, and the SBI Agent in describing the video game. Call of Duty is a well-known video game. To the extent that the State described details about the game that go beyond common knowledge, the remarks were not grossly improper or so extreme and of such a magnitude that their inclusion in the State's argument prejudiced Defendant by rendering the proceedings fundamentally unfair.

Next, Defendant contests the State prosecutor's statement regarding Khloe's decision to testify against Defendant and referred to Defendant's trial attorney:

> [Khloe] got up on that stand knowing that [Defendant's attorney] has her recorded interview from that October of 2015 date and that she's going to try to cast her in the

> worst light she can, and that she's going to try to trip her up . . . [Khloe] got on that stand knowing what she was facing[.]

Defendant argues that these remarks were improper and denigrated the trial attorney's role as defense counsel. We disagree. The prosecutor's remarks did not denigrate Defendant's attorney or her duty to confront witnesses, as it described the process of cross-examination and thus, was not grossly improper.

Next, Defendant objects to the prosecutor's remarks concerning Defendant's grandmother providing the bond money for Defendant to be released from jail shortly after his arrest: "[H]e only spent a few days in jail before she posted his bond and he got out. He got out shortly after that nontestimonial identification order. Free as a bird." Defendant argues that this comment "had no connection to the evidence in the case," and encouraged the jury to convict him "because he had suffered no consequences to that point." Again, we disagree as the remark about Defendant's limited time in jail was connected to the evidence where Defendant testified that he had been out of jail on bond since his arrest, and, thus, this statement cannot be classified as an extreme or grossly improper comment.

[3] Next, Defendant argues that the prosecutor made two grossly improper remarks during closing argument which warranted intervention *ex mero motu* by the trial court. During closing, the State prosecutor discussed Defendant's use of birth control during sexual intercourse and remarked:

> An eight- to eleven- year-old child having sex with a man 16 years her senior who by his own testimony is sleeping with other women in this community with no protection. You think about that. You think about an eight- or nine-year old walking around pregnant. You think about an eight- or nine-year-old poking around with herpes or gonorrhea or syphilis or Aids [sic].

The State prosecutor also addressed Defendant's sexual history with Danielle, and their text message exchange discussing their first sexual engagement:

> Who is [Defendant]? . . . Danielle, a woman who when he was developing a friendship, his first sexual encounter with her involved taking her boobs out of her shirt and having intercourse with her and you've seen the text

> messages to show that she was too drunk to even remember it[,] to even remember taking her shirt off.

We agree that the prosecutor's comments concerning Defendant's condom usage and sexually transmitted diseases were unsupported and inflammatory, as it appealed "to passions or prejudice." *Tart*, 372 N.C. at 80, 824 S.E.2d at 842 (quoting *Jones*, 355 N.C. at 135, 558 S.E.2d at 108). While Defendant testified that he usually wore condoms with his adult sexual partners, there was no evidence that he or any of his sexual partners had herpes, gonorrhea, syphilis, or AIDS. The prosecutor's statements that Defendant was sleeping around with women in the community with no protection and possibly spreading sexually transmitted diseases was unsupported and inflammatory. Additionally, the record evidence does not show that Khloe became pregnant or contracted any type of sexually transmitted disease from Defendant. In fact, based on Dr. Suttle's medical examination there were no significant findings of lesions, tears, venereal disease, or pregnancy present in Khloe's medical exam.

This remark "cannot be construed as anything but a thinly veiled attempt to appeal to the jury's emotions" by inferring that Defendant had impregnated Khloe and given sexually transmitted diseases to her as a result of unprotected sexual intercourse. The prosecutor's argument was improper as "it referred to events and circumstances outside the record" and "attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice." *Jones*, 355 N.C. at 132, 558 S.E.2d at 107. Additionally, the State's remarks about Defendant's sexual history with Danielle were impermissible character attacks based on improperly admitted evidence. Such comments are so highly prejudicial and tend to infect the trial with such unfairness, that the trial court erred by failing to intervene *ex mero motu* or otherwise instruct the jury to disregard them.

The impact of the prosecutor's statements in question, which conjure up inaccurate images of Defendant as sexually manipulative, promiscuous, and a carrier of sexually transmitted diseases, is too contaminating to be easily removed from the jury's consciousness, thus infecting the entire trial. Consequently, we hold the disparaging remarks made by the State prosecutor were grossly improper and prejudicial, and the trial court erred by failing to intervene *ex mero motu* in response to the grossly improper and prejudicial statements made by the State prosecutor during his closing argument. As we have already held Defendant is entitled to a new trial, it is unnecessary to address Defendant's remaining arguments. *State v. Dunston*, 161 N.C. App. 468, 474, 588 S.E.2d 540, 545 (2003).

III. Conclusion

For the reasons stated above, we conclude that, due to the plain errors made by the trial court, Defendant is entitled to a new trial. Therefore, we reverse and remand for a new trial. It is ordered.

REVERSED AND REMANDED.

Judge COLLINS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

Because I believe that Defendant has failed to show reversible error, I respectfully dissent.

The majority takes issue with the prosecution's cross examination of Defendant concerning his sexual encounters with an adult woman friend which included an encounter when the woman was drunk. However, Defendant's counsel did not object to the questioning. Arguably, the questioning was not error, as the defense opened the door to the questioning by asking Defendant on direct about his relationship with this adult woman. Even if the questioning about Defendant's inappropriate behavior with the adult woman was inadmissible under our Rules of Evidence, I do not believe the trial court committed error by failing to intervene.

The majority also takes issue with the prosecutor's statements during closing regarding Defendant's sexual relationship with the adult woman that was outside any evidence presented, notably that Defendant could have transmitted an STD or impregnated the pre-teen victim. Perhaps these statements were inappropriate. However, Defendant's counsel did not object or ask for any instruction concerning these statements. And, assuming these statements were inappropriate, I do not believe the trial court erred by failing to intervene when the prosecutor made these statements during closing.

Even assuming the above-described testimony and prosecutor statements constituted error, I do not believe the error constituted plain error. It is certainly *possible* a juror may have some reasonable doubt that the abuse occurred *until* hearing the inappropriate testimony regarding Defendant's encounter with his adult friend and the

inappropriate statements during prosecutor's closing. Indeed, the State's case relied primarily on the victim's credibility, as there was no physical or third-party eyewitness evidence of the abuse. But I do not believe Defendant has met his burden to show that the jury's verdict *probably* would have been different had the jury not heard this testimony or statements.[1]

I have reviewed the other arguments raised by Defendant and conclude that none of them warrant a new trial. Accordingly, my vote is "no error."

STATE OF NORTH CAROLINA
v.
TYQUEAN QUA'SHED SHARPE, DEFENDANT

No. COA22-491

Filed 16 May 2023

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

In a prosecution for possession of a firearm by a felon arising from a traffic stop, during which police found a rifle inside the rear passenger compartment of a vehicle while defendant sat in the front passenger seat as one of four passengers, the trial court improperly denied defendant's motion to dismiss where there was insufficient evidence that defendant constructively possessed the rifle. The State's evidence failed to show that defendant—who neither owned the vehicle nor was driving it at the time—was in exclusive possession of the vehicle when police found the rifle, and therefore the State was not entitled to an inference of constructive possession sufficient to submit the case to the jury. Further, although the State presented evidence of additional incriminating circumstances, any link between defendant and the rifle created by these circumstances was speculative at best.

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1. See my dissent in *State v. Watkins*, 277 N.C. App. 386, 857 S.E.2d 36 (2021), discussing how the burden to show plain error, as established by our Supreme Court, is higher than the burden set by the United States Supreme Court to show ineffective assistance of counsel: Plain error requires a showing that a different result *probably* would have occurred, whereas an IAC error merely requires a showing a *reasonable probability* that the result would have been different.

Appeal by Defendant from Judgments entered 14 July 2021 by Judge Thomas D. Haigwood in Nash County Superior Court. Heard in the Court of Appeals 22 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kellie E. Army, for the State.

Shawn R. Evans for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Tyquean Qua'shed Sharpe (Defendant) appeals from Judgments entered 14 July 2021 upon jury verdicts finding him guilty of Possession of a Firearm by a Felon and Misdemeanor Resisting a Public Officer. On appeal to this Court, Defendant only challenges his conviction for Possession of a Firearm by a Felon. As such, we conclude there was no error in Defendant's Misdemeanor Resisting a Public Officer conviction and limit our analysis to the sole argument raised by Defendant. The Record before us tends to reflect the following:

On 14 September 2020, Defendant was indicted for Possession of a Firearm by a Felon and Misdemeanor Resisting a Public Officer. The matter came on for trial on 13 July 2021. The State's evidence presented at trial tends to reflect the following:

On 11 May 2020, the Problem Oriented Response Team (PORT) of the Rocky Mount Police Department, whose purpose is to focus on high crime areas, was monitoring social media. PORT was aware of several shootings in the area and was attempting to prevent retaliatory shooting by locating individuals that may have been involved in the incidents. PORT identified Defendant as one of those possible individuals. Officers with PORT observed Defendant—via social media—"looking at weapons, firearms, ammunition, things of that nature" at a local retail store. Shortly thereafter, the Officers with PORT located Defendant and initiated a traffic stop; Corporal Chad Creech (Corporal Creech) and Officer Cameron McFadden (Officer McFadden) both testified the stop was conducted to prevent the occurrence of "retaliation shootings." The vehicle stopped at a gas station. Defendant was one of four occupants inside the vehicle, sitting in the front passenger seat. Once the vehicle was stopped, Defendant exited the vehicle and went inside the gas station. Officer McFadden attempted to conduct a frisk of Defendant, but Defendant refused to cooperate; did not comply with the officer's

commands; and began resisting. Eventually, Officer McFadden resorted to tasing Defendant in order "to get him to comply." Defendant was then handcuffed and detained in a patrol vehicle.

After Defendant was detained, Corporal Creech conducted a search of the vehicle and discovered "a box of bullets in the middle of the floorboard, in between the front – front driver and front passenger, in the middle; a bottle of Hennessy in the front seat; and there was a rifle in the back seat." Further, Corporal Creech testified, the rifle "was at an angle, not longways, but like facing the driver and the passenger, like in between the driver and the passenger, facing up towards the back passenger, not laying flat on the seat." No DNA evidence or fingerprints were recovered from the firearm or introduced into evidence.

At the close of the State's evidence, Defendant moved to dismiss the charge of Possession of a Firearm by a Felon for insufficient evidence. The trial court denied the Motion. Defendant presented evidence, including the driver of the vehicle testifying the rifle found in the backseat belonged to Qadarius Grimes (Grimes), one of the other occupants of the vehicle. Grimes testified that the rifle found in the vehicle belonged to Grimes, and further, he stated he told the officers at the time of the traffic stop the rifle belonged to him. Defendant testified the vehicle belonged to his mother. Defendant testified he did not have a license and his mother only permitted use of the vehicle if someone else was driving. Defendant testified his mother had required him to bring the vehicle home after she saw Defendant driving the vehicle earlier that day via livestream on social media. At the close of all the evidence, Defendant renewed his Motion to Dismiss. The trial court again denied the Motion. On 14 July 2021, the jury returned a verdict finding Defendant guilty of Possession of a Firearm by a Felon and Misdemeanor Resisting a Public Officer. That same day, the trial court entered two Judgments against Defendant. The first Judgment sentenced Defendant to a 17 to 30 month active sentence for the Possession of a Firearm by a Felon conviction. The second Judgment, for the Misdemeanor Resisting a Public Officer conviction, sentenced Defendant to a consecutive 60-day sentence to be suspended for 18 months of supervised probation upon release from his active sentence. Defendant provided Notice of Appeal in open court.

Issue

The dispositive issue on appeal is whether the trial court erred in denying Defendant's Motion to Dismiss the charge of Possession of a Firearm by a Felon.

Analysis

Defendant contends the trial court erred in denying his Motion to Dismiss the charge of Possession of a Firearm by a Felon due to insufficiency of the evidence. Specifically, Defendant contends the State failed to establish his constructive possession of the firearm located in the backseat of the vehicle. We agree.

We review a trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). However, "[u]pon defendant's motion for dismissal, the question for the Court is 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. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). "Evidence is not substantial if it arouses only a suspicion about the facts to be proved, even if the suspicion is strong." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (citing *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983)).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720. "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." *Sumpter*, 318 N.C. at 107-08, 347 S.E.2d at 399 (citations omitted).

N.C. Gen. Stat. § 14-415.1(a) provides: "[i]t shall be unlawful for any person who has been convicted of a felony to . . . possess, or have in his custody, care, or control any firearm . . . ." N.C. Gen. Stat. § 14-415.1(a) (2021). "In order to obtain a conviction for possession of a firearm by a felon, the State must establish that (1) the defendant has been convicted of or has pled guilty to a felony and (2) the defendant, subsequent to the conviction or guilty [plea], possessed a firearm." *State v. Taylor*, 203

N.C. App. 448, 458-59, 691 S.E.2d 755, 764 (2010) (citations omitted). Here, Defendant does not contest his status as a felon.

Thus, the only question is whether there is evidence Defendant possessed the firearm in question on the date of his arrest.

> Possession of a firearm may be actual or constructive. Actual possession requires that the defendant have physical or personal custody of the firearm. In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has both the power and intent to control its disposition or use. When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession. Constructive possession depends on the totality of the circumstances in each case.

Id. at 459, 691 S.E.2d at 764 (citations omitted).

In this case, in the absence of any evidence Defendant had physical or personal custody of the firearm, the State proceeded on a theory of constructive possession. Therefore, the State was required to prove Defendant had the "power and intent to control" the disposition or use of the firearm. *Id.* On appeal, the State first contends the evidence supported a finding Defendant had exclusive possession of the vehicle because he was "custodian" of the vehicle. As such, the State contends it is entitled to an inference of constructive possession of the firearm sufficient to submit the charge to the jury.

In particular, the State primarily relies on *State v. Mitchell* for the proposition:

> "[A]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [contraband] was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where [contraband] was found *is sufficient, in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury."

224 N.C. App. 171, 177, 735 S.E.2d 438, 443 (2012) (quoting *State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011)). Here, the State presented no evidence Defendant owned the vehicle.[1] Moreover, the evidence shows Defendant was not the driver of the vehicle. Nevertheless, the State contends Defendant was the "custodian" of the vehicle—notwithstanding the fact he was not driving the vehicle—and had exclusive possession of the vehicle because "Defendant's mother was the owner of the car and allowed him to use it if he had a driver." The State offers no support for this assertion.

However, in *State v. Mitchell*, the defendant was the driver of a borrowed car. *Id.* Likewise, in *Best*, cited by *Mitchell*, "the revolver was found in a van driven by Defendant[.]" *Best*, 214 N.C. App. at 47, 713 S.E.2d at 562. In fact, tracing back the quote relied on by the State from *Mitchell* reveals that in each case "custodian of the vehicle" referred directly to the *driver* of a borrowed vehicle. *See State v. Hudson*, 206 N.C. App. 482, 490, 696 S.E.2d 577, 583 (2010); *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984). Indeed, none of these cases provide any definition or authority for what "custodian of the vehicle" means or from where the phrase is derived. Ultimately, we trace the roots of the *Mitchell* Court's quote to *State v. Glaze*, which makes no mention of "custodian of the vehicle" and stands for the proposition:

> The driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Thus, where contraband material is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury.

24 N.C. App. 60, 64, 210 S.E.2d 124, 127 (1974). *Glaze* and its progeny may be read together to establish the driver of a borrowed vehicle is a custodian of the vehicle and has the same power to control the contents of the vehicle as the owner. In fact, on the other hand, this Court has at least suggested that where a defendant is only a passenger, "despite having legal ownership of the vehicle, defendant exercised no control over the car at the time the rifle was found." *State v. Bailey*, 233 N.C. App. 688, 693, 757 S.E.2d 491, 494 (2014).

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1. In fact, the only evidence related to ownership was in Defendant's evidence the vehicle belonged to his mother.

Nevertheless, we presume, without deciding, the State's position is correct: that a passenger in a vehicle may also constitute a custodian of the vehicle when the passenger was the permitted user of the vehicle by the owner. Here, the evidence—drawing inferences favorable to the State from Defendant's evidence—tends to show Defendant was permitted to use the vehicle by his mother. As such, the evidence could support an inference Defendant was a custodian of the vehicle. However, under our existing case law, the driver was *also* a custodian of the vehicle. As such, the evidence fails to show Defendant was in *exclusive* possession of the vehicle at the time the rifle was found. Moreover, then, the State is not entitled to any presumption of "knowledge and possession" of the firearm sufficient to submit the case to the jury.

While the evidence reflects Defendant was not in exclusive possession of the vehicle, the State may still establish constructive possession through evidence of "other incriminating circumstances." *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764. Indeed, this case is analogous to *State v. Alston*, 131 N.C. App. 514, 508 S.E.2d 315 (1998). There, the defendant was the front seat passenger in a vehicle driven by the defendant's wife. *Id.* at 515, 508 S.E.2d at 316. The vehicle was owned by the defendant's brother. *Id.* at 516, 508 S.E.2d at 317. The firearm used to support the charge of possession of a firearm by a felon was found in the center console of the vehicle. *Id.* at 515, 508 S.E.2d at 316-17. With respect to constructive possession of the firearm, this Court observed: "Possession of an item may be either sole or joint; however, joint or shared possession exists only upon a showing of some independent and incriminating circumstance, beyond mere association or presence, linking the person(s) to the item[.]" *Id.* at 519, 508 S.E.2d at 318. This Court explained: "Both [d]efendant and his wife had equal access to the handgun, but there is no evidence otherwise linking the handgun to [d]efendant." *Id.* at 519, 508 S.E.2d 319. Our Court concluded: "Accordingly, there is not substantial evidence in this record that Defendant had the possession, control, or custody of the handgun." *Id.* Consequently, we held the trial court should have dismissed the charge of possession of a firearm by a felon. *Id.*

Likewise, in *Bailey*, this Court held a charge of possession of a firearm by a felon should have been dismissed for insufficient evidence. *Bailey*, 233 N.C. App. at 693, 757 S.E.2d at 494. There, the defendant, the owner of the vehicle, was in the front passenger seat. *Id.* The rifle at issue was in the rear passenger area of the vehicle. *Id.* This Court concluded "the only evidence linking defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat." *Id.*

Similarly, in the case *sub judice*, the evidence shows Defendant was not the driver of the vehicle, but sitting in the front passenger seat

and the firearm was located in the rear passenger compartment. Unlike *Alston* and *Bailey*, here, there were four adults in the vehicle—with two in the rear seat, including a passenger in the seat behind Defendant where the rifle was found. Also, unlike *Alston* and *Bailey*—where there was evidence the defendants' wife and girlfriend, respectively, were the registered owners of the firearms—here, from the State's perspective, there was no evidence of ownership of the rifle.[2] In this case, then, as in *Alston* and *Bailey*, the evidence, taken in the light most favorable to the State, shows the only evidence linking Defendant to the rifle was his presence and awareness of the firearm in the car. This evidence is insufficient to show Defendant was in constructive possession of the rifle.[3]

The State, however, contends there is evidence of additional incriminating circumstances: "Defendant was driving the car sometime earlier in the day, was observed examining weapons, and was among the individuals identified by PORT as a retaliatory shooting concern."[4] The State contends these circumstances are sufficient to support a finding of constructive possession of the firearm. We disagree.

Any linkage between Defendant and the rifle created by these circumstances is, at best, speculative and conjectural. *See State v. Angram*, 270 N.C. App. 82, 87, 839 S.E.2d 865, 868 (2020) ("Although circumstantial evidence may be sufficient to prove a crime, pure speculation is not, and the State's argument is based upon speculation." (citation omitted)). There was no evidence Defendant was in possession—actual or constructive—of the rifle while he was driving the vehicle earlier in the day. It is highly speculative to assume the fact Defendant was observed examining or looking at firearms in a store means he later possessed the rifle. There was no evidence of any firearm purchase or that Defendant

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2. The only evidence of ownership was in Defendant's evidence through the testimony of Grimes that the rifle belonged to him. However, this evidence is not considered in our review of the Motion to Dismiss.

3. The State cites to *State v. Wirt*, 263 N.C. App. 370, 822 S.E.2d 668 (2018), to contend Defendant's proximity to the firearm may constitute sufficient evidence of constructive possession. However, in that case, the defendant was the driver of a pickup truck, which would create the inference of knowledge and possession. *Id.* at 374, 822 S.E.2d at 671. Further, the firearm was found under the front passenger seat and the defendant had been observed earlier riding in the front passenger seat. *Id.* at 376, 822 S.E.2d at 672. The Court also found incriminating circumstances from the evidence the defendant and his passenger had been involved in drug dealing using the truck. *Id.*

4. The State does not contend the bullets found in the center console constituted an additional incriminating circumstance linking Defendant to the rifle. Indeed, it appears from the evidence the bullets were for a totally different firearm belonging to the driver of the vehicle.

took any firearm from the store. There was no evidence the rifle was purchased at the store. The State also did not present evidence of DNA or fingerprints linking Defendant to the firearm. Finally, the fact Defendant was identified as a "retaliatory shooting concern" may well arouse suspicion Defendant was in possession of a firearm, but mere suspicion does not constitute sufficient evidence to survive a motion to dismiss. *See Malloy*, 309 N.C. 179, 305 S.E.2d 720 (If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.").

In this case, the evidence, without more, is not sufficient to support a finding Defendant, while seated in the front passenger seat and one of four occupants, was in constructive possession of a firearm found in the rear passenger compartment of a vehicle not owned or operated by Defendant. Thus, the State failed to present sufficient evidence to establish Defendant's constructive possession of the firearm. Therefore, the trial court erred in denying Defendant's Motion to Dismiss for insufficient evidence. Consequently, we reverse the trial court's Judgment for the conviction of Possession of a Firearm by a Felon.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in the 14 July 2021 Judgment for the conviction of Misdemeanor Resisting a Public Officer (20 CRS 51426); however, we reverse the 14 July 2021 Judgment for the conviction of Possession of a Firearm by a Felon (20 CRS 51425) and remand this matter for resentencing for Misdemeanor Resisting a Public Officer.

NO ERROR IN PART; REVERSED IN PART. REMANDED FOR RESENTENCING.

Judges COLLINS and WOOD concur.

STATE v. WHITE

[289 N.C. App. 93 (2023)]

STATE OF NORTH CAROLINA
v.
ORIENTIA JAMES WHITE

No. COA22-369

Filed 16 May 2023

Larceny—sufficiency of evidence—false pretenses—single taking—electronics in infant car seat box

There was sufficient evidence to convict defendant of both felony larceny and obtaining property by false pretenses where the State's evidence showed that defendant entered a Walmart with co-conspirators, took an $89 infant car seat out of its box, placed nearly $10,000 of electronic merchandise inside the car seat box, and paid for the car seat box at the self-checkout kiosk, knowing that the box actually contained the electronic merchandise. The single-taking rule was not violated because felony larceny and obtaining property by false pretenses are separate and distinguishable offenses. In addition, the trial court did not violate N.C.G.S. § 14-100(a) by submitting felony larceny and obtaining property by false pretenses to the jury as separate counts to be considered independently because the two offenses are not mutually exclusive.

Appeal by defendant from judgments entered 26 August 2021 by Judge Jonathan Wade Perry in Union County Superior Court. Heard in the Court of Appeals 21 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Wendy J. Lindberg, for the State.

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

ZACHARY, Judge.

Defendant Orentia[1] James White appeals from judgments entered upon a jury's verdicts finding him guilty of felony larceny; conspiracy to commit felony larceny; and obtaining property by false pretenses; and upon his guilty plea to having attained habitual felon status. After careful review, we conclude that Defendant received a fair trial, free from error.

1. The judgments appealed from spell Defendant's name as "Orientia" but the record reflects that Defendant's name is spelled "Orentia."

I. Background

On 17 December 2018, when they arrived for work at approximately 7:00 a.m., employees of the Walmart in Monroe discovered that a locked display case in the electronics department had been opened and nearly emptied. The display case, which was usually filled to its capacity with Beats and Apple merchandise, was later determined to be missing 70 items worth a total of $9,898.80.

Walmart management contacted the Monroe Police Department and instructed the store's asset protection department "to conduct video surveillance to find out what happened[.]" Meanwhile, an employee found a Beats speaker on the floor in the crafts department, the section of the store adjacent to the electronics department. There, the employee also discovered a car seat out of its box, which "was unusual because [Walmart] cannot sell car seats out of the box."

Surveillance footage captured between 1:03 and 1:48 a.m. showed the actions of three suspects: two men—one of whom would later be identified as Defendant—and a woman.[2] The three individuals entered the store and the two men headed to the electronics department. The unidentified female suspect approached the two male suspects pushing a shopping cart that contained a plastic storage bin and a child's car seat box. The two unidentified suspects pushed the shopping cart past the Beats display case and turned into the adjacent aisle, where they removed the car seat box from the shopping cart and placed it out of the camera's view. Defendant followed behind them, stopping at the display case. As Defendant perused the display case, the two unidentified suspects pushed the shopping cart—now containing only the plastic storage bin without the car seat box—and walked away. About a minute later, the unidentified male suspect joined Defendant at the display case; Defendant had his back to the camera, obscuring his actions at the display case. The two men then moved away from the display case, and Defendant walked alone up the aisle where the car seat box had been placed. Over the next few minutes, the suspects appeared to browse as lone shoppers, periodically disappearing from the surveillance footage and reappearing soon thereafter.

The unidentified female suspect reappeared with the shopping cart containing the plastic storage bin, and pushed it up to the display case. She placed the plastic bin on the ground in front of the display case and emptied its merchandise into the plastic bin while Defendant browsed in

2. The two other suspects appear not to have subsequently been identified or charged.

the adjacent aisle. She then pushed the plastic bin up the adjacent aisle, where she met Defendant, who crouched down next to her. The female suspect then returned to the now-empty shopping cart and pushed it out of the camera's view while Defendant remained crouching near the plastic bin in the adjacent aisle. After a few minutes, the female suspect reappeared, pushing the empty shopping cart up to Defendant, who placed the car seat box in the shopping cart before the female suspect pushed the cart away. Defendant walked up the other end of the aisle and followed after her on his own.

A few minutes later, another surveillance camera captured the female suspect approaching an exit door, pushing the shopping cart containing the car seat box. However, due to the early morning hour, the door did not open, so she pushed the cart away from the door. A few minutes later, another surveillance camera recorded the three suspects apparently purchasing the car seat at a self-checkout kiosk. Cameras in the parking lot captured the three suspects exiting the store, loading the car seat box into a vehicle in the parking lot, and driving off together.

On 8 April 2019, a Union County grand jury returned true bills of indictment charging Defendant with one count each of felony larceny, conspiracy to commit felony larceny, obtaining property by false pretenses, and having attained habitual felon status. The grand jury returned superseding indictments on the same charges on 4 November 2019.

On 23 August 2021, the matter came on for trial in Union County Superior Court. At the close of the State's evidence, Defendant moved to dismiss the charges against him, which the trial court denied. Defendant did not present any evidence, and he renewed his motion to dismiss at the close of all evidence. The trial court again denied Defendant's motion to dismiss.

The trial court instructed the jury on the offenses of felony larceny, conspiracy to commit felony larceny, and obtaining property by false pretenses. The jury returned guilty verdicts for all three offenses. Thereafter, Defendant pleaded guilty to attaining the status of habitual felon.

The trial court entered two judgments, sentencing Defendant as a habitual felon in the mitigated range to two consecutive terms of 75 to 102 months in the custody of the North Carolina Division of Adult Correction, and ordering that court costs and restitution of $9,898.80 to Walmart be entered as a civil judgment. Defendant gave oral notice of appeal.

II. Discussion

Defendant argues that the trial court erred by denying his motion to dismiss because there was insufficient evidence to support the charges of both felony larceny and obtaining property by false pretenses. Alternatively, in the event that this Court finds that his motion to dismiss argument was not preserved for appellate review, Defendant argues that the trial court erred by instructing the jury on both the charge of felony larceny and the charge of obtaining property by false pretenses.

A. Preservation

"Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure provides that, in a criminal case, to preserve an issue concerning the sufficiency of the State's evidence, the defendant must make a motion to dismiss the action at trial." *State v. Golder*, 374 N.C. 238, 245, 839 S.E.2d 782, 787 (2020) (citation and internal quotation marks omitted); N.C. R. App. P. 10(a)(3). Our Supreme Court recently held that "Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence." *Golder*, 374 N.C. at 245–46, 839 S.E.2d at 788. Accordingly, "a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *Id.* at 246, 839 S.E.2d at 788.

In the case at bar, Defendant moved to dismiss all charges at the close of the State's evidence, and he renewed his motion to dismiss at the close of all evidence. Accordingly, Defendant properly preserved this issue, and we need not address his alternative argument. *See id.*

B. Standard of Review

Our standard of review of a trial court's denial of a motion to dismiss is well established:

> In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a

> finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo.

State v. Blagg, 377 N.C. 482, 487–88, 858 S.E.2d 268, 273 (2021) (citation omitted).

C. Analysis

Defendant argues that the trial court should have dismissed either the charge of felony larceny or the charge of obtaining property by false pretenses under the "single taking rule." "The 'single taking rule' prevents a defendant from being charged or convicted multiple times for a single continuous act or transaction." *State v. Buchanan*, 262 N.C. App. 303, 306, 821 S.E.2d 890, 892 (2018). "[A] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) (citation omitted). The "single taking rule" also applies to indictments charging the offense of obtaining property by false pretenses. *Buchanan*, 262 N.C. App. at 306, 821 S.E.2d at 892.

In *Adams*, for example, the defendant was charged with both felonious larceny of a firearm and felonious larceny of property stolen pursuant to a breaking or entering. 331 N.C. at 332, 416 S.E.2d at 388. The evidence at trial tended to show that the firearm that was the subject of the first larceny charge was among the property that was the subject of the second larceny charge. *Id.* Our Supreme Court concluded that the "defendant was improperly convicted and sentenced for both larceny of a firearm and felonious larceny of that same firearm pursuant to a breaking or entering." *Id.* at 333, 416 S.E.2d at 389.

However, in each of the cases upon which Defendant relies, including *Adams*, the defendant was charged with *either* larceny offenses *or* obtaining property by false pretenses, but not both. *See id.*; *see also State v. Posner*, 277 N.C. App. 117, 120, 857 S.E.2d 870, 873 (2021) (one count of felony larceny of property pursuant to a breaking or entering and one count of felony larceny of a firearm); *Buchanan*, 262 N.C. App. at 308, 821 S.E.2d at 893 (two counts of obtaining property by false pretenses); *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 682 (1985) (three counts of larceny of firearms and one count of felony larceny). Unlike

those cases, in the case before us Defendant was charged with both larceny *and* obtaining property by false pretenses.

This Court has recognized that "the crimes of larceny and obtaining property by false pretenses . . . are separate and distinguishable offenses." *State v. Kelly*, 75 N.C. App. 461, 463, 331 S.E.2d 227, 229 (1985). "The essential elements of larceny are that the defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019) (citation and internal quotation marks omitted). By contrast, obtaining property by false pretenses comprises the following elements: "(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. Pierce*, 279 N.C. App. 494, 499, 865 S.E.2d 335, 339 (2021) (citation omitted). "A key element of obtaining property by false pretenses is that an intentionally false and deceptive representation of a fact or event has been made." *Kelly*, 75 N.C. App. at 464, 331 S.E.2d at 230. This reveals a significant distinction between the two offenses: "A false and deceptive representation is not an element of larceny." *Id.*

Here, Defendant made such a "false and deceptive representation of a fact": he represented to Walmart[3] that he was purchasing a car seat for $89.00, rather than $9,898.80 worth of misappropriated merchandise secreted inside the car seat's box. As the State persuasively argues in its appellate brief, had Defendant and his co-conspirators attempted to take the merchandise and carried it out of the store without involving the car seat box, under the "single taking" rule "the proper charges would have been one count of felony larceny and one count of conspiracy to commit felony larceny, not 70[.]"

However, as the State correctly observes, Defendant and his co-conspirators committed the separate and distinguishable offense of obtaining property by false pretenses "by removing an infant car seat from its box, loading that box with the stolen [merchandise], and taking that box to the checkout counter, where they paid the value for an infant car seat knowing that it was not the value of the items inside the box." By selecting a large box and removing its original contents, Defendant and his co-conspirators were able to represent to Walmart that they were purchasing an item worth less than one percent of the actual value of

3. For the purposes of N.C. Gen. Stat. § 14-100, the term "person" includes a "corporation." N.C. Gen. Stat. § 14-100(c) (2021).

the merchandise it contained. As the State notes: "Defendant's actions by paying the value for a box that represented an $89.00 item knowing there were multiple, more valuable items inside the box at the time was conduct sufficient to support a false representation being made." We agree with the State's contention that it "provided substantial evidence of every element of *both* crimes" of felony larceny and obtaining property by false pretenses.

Defendant further argues that N.C. Gen. Stat. § 14-100 prohibited the trial court "from submitting felony larceny and obtaining property by false pretenses as two separate counts for the jury to consider independently and return two separate verdicts on." For support, Defendant points to the portion of § 14-100(a) that provides:

> [I]f, on the trial of anyone indicted for [obtaining property by false pretenses], it shall be proved that he obtained the property in such manner as to amount to larceny or embezzlement, the jury shall have submitted to them such other felony proved; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

N.C. Gen. Stat. § 14-100(a) (2021).

Our Supreme Court has interpreted this provision with respect to embezzlement, holding:

> Where . . . there is substantial evidence tending to support both embezzlement and false pretenses arising from the same transaction, the State is not required to elect between the offenses. Indeed, if the evidence at trial conflicts, and some of it tends to show false pretenses but other evidence tends to show that the same transaction amounted to embezzlement, the trial court should submit both charges for the jury's consideration. In doing so, however, the trial court must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both. If, on the other hand, the evidence at trial tends only to show embezzlement or tends only to show false pretenses, the trial court must submit only the charge supported by evidence for the jury's consideration.

State v. Speckman, 326 N.C. 576, 579, 391 S.E.2d 165, 167 (1990).

Defendant posits that because N.C. Gen. Stat. § 14-100(a) "applies equally to 'larceny or embezzlement,' the *Speckman* discussion is

equally relevant in the larceny context." Accordingly, Defendant contends that, "[a]t most, the trial court in this case was authorized under *Speckman* to submit felony larceny and obtaining property by false pretenses as mutually exclusive options for the jury to return a verdict on." We disagree.

Defendant overlooks a critical principle underlying the *Speckman* Court's reasoning: the crimes of embezzlement and obtaining property by false pretenses are mutually exclusive. As the *Speckman* Court explained, in order "to constitute embezzlement, the property in question initially *must be acquired lawfully*, pursuant to a trust relationship, and then wrongfully converted"; in order to constitute false pretenses, however, "the property *must be acquired unlawfully* at the outset, pursuant to a false representation." *Id.* at 578, 391 S.E.2d at 166–67 (emphases added). Because "property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other." *Id.* at 578, 391 S.E.2d at 167. This mutual exclusivity was the basis for the *Speckman* Court's holding that "a defendant may not be convicted of both embezzlement and false pretenses arising from the same act or transaction[.]" *Id.*

By contrast, the crimes of larceny and obtaining property by false pretenses are not mutually exclusive. As previously discussed, "the crimes of larceny and obtaining property by false pretenses . . . are separate and distinguishable offenses." *Kelly*, 75 N.C. App. at 463, 331 S.E.2d at 229. Accordingly, Defendant is incorrect to assert that *Speckman* "is equally relevant in the larceny context." As we previously explained: "A false and deceptive representation is not an element of larceny." *Kelly*, 75 N.C. App. at 464, 331 S.E.2d at 230.

In the larceny indictment, the State alleged that Defendant did "steal, take and carry away a quantity of headphones and an I-Pod, without the consent of the possessor and knowing that he was not entitled to it, with the intent to deprive the possessor of its use permanently[.]" And in the indictment for obtaining property by false pretenses, the State alleged that Defendant obtained "a quantity of headphones and an I-Pod" by the following false and intentionally deceptive scheme:

> [D]efendant took a car seat out of [its] box while in Wal-Mart. . . . [D]efendant placed a quantity of headphones and an I-Pod in the empty car seat box. . . . [D]efendant then rang up and paid for the car seat box knowing a car seat was not in the box and he never paid for the quantity of headphones and I-Pod that were actually in the box.

This was a false representation of a material fact which was intended to deceive, and which did in fact deceive.

(Emphasis added).

The offenses of larceny and obtaining property by false pretenses are not mutually exclusive, neither in their elements, as explained above, nor as alleged in the instant indictments. Furthermore, as previously discussed, viewed in the light most favorable to the State, we conclude that the State presented "substantial evidence of each essential element of [each] crime and that [D]efendant is the perpetrator." *Blagg*, 377 N.C. at 487, 858 S.E.2d at 273 (citation omitted). Accordingly, the trial court did not err in denying Defendant's motion to dismiss, or in submitting both offenses to the jury "to consider independently and return two separate verdicts on."

III. Conclusion

For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges FLOOD and RIGGS concur.

STATE OF NORTH CAROLINA
v.
CODY BLAKE WILKIE, DEFENDANT

No. COA22-94

Filed 16 May 2023

Homicide—second-degree murder—sufficiency of evidence—circumstantial

In defendant's trial resulting in his conviction for second-degree murder, the trial court did not err in denying defendant's motion to dismiss where there was substantial evidence that defendant was the perpetrator of the offense. The State presented evidence that witnesses found defendant standing with a pistol next to a dump truck and that defendant told the witnesses that the dead victim was inside the truck; furthermore, the victim had a fatal gunshot wound to the head, defendant knew and worked with the victim,

and defendant was seen with the victim shortly before the victim's death. Defendant failed to cite any case supporting his contention that the circumstantial evidence against him was insufficient.

Appeal by defendant from judgment entered 22 January 2021 by Judge V. Bradford Long in Superior Court, Randolph County. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State.

Anne Bleyman for defendant-appellant.

STROUD, Chief Judge.

Defendant appeals the judgment convicting him of second-degree murder. Because there was substantial evidence Defendant was the perpetrator of the offense, we conclude there was no error.

I. Background

The State's evidence tended to show that in June of 2018, Mr. Andy Moody and Defendant were driving two separate trucks at a dump site. Mr. Randall Long, who owns a trucking company, noticed Defendant was not driving the dump truck well: "I mean he was -- it was like -- I know when you get in somebody's truck for the first time, it takes -- you know, you got to learn that truck. But it was some clanging, and I mean it was pretty bad. It wasn't normal." After other issues with Defendant's difficulties driving the dump truck, Mr. Long told Mr. Moody, "you need to do something or that truck ain't going to make it all day." Defendant then "had to ride with" Mr. Moody the rest of the day. Eventually, Mr. Moody and Defendant left the dump site together.

In the middle of the night of June 5, Mr. Wayne Munsell was driving when he saw Defendant, an acquaintance, at an intersection standing next to a dump truck. Mr. Munsell stopped, and Defendant told Mr. Munsell he thought his truck was out of gas. Mr. Munsell agreed to give Defendant a ride to get gas when Mr. Michael Everwine approached in his vehicle. Mr. Munsell noticed Defendant had a pistol.

Defendant and Mr. Munsell left the dump truck and Mr. Everwine to get gas, and Defendant stated that if Mr. Everwine looked in the dump truck, "it's on him because there's a dead guy in there." Defendant then told Mr. Munsell the "dead guy" was Mr. Moody and referred to Mr.

Moody as "the anti-Christ." Mr. Munsell dropped Defendant off and went back to the dump truck where he found a man with a gunshot wound. 911 was called and the man was airlifted out. The man was identified as Mr. Moody, who died from "a gunshot wound of the head."

Defendant was indicted for first-degree murder, found guilty by a jury of second-degree murder, and sentenced by the trial court. Defendant appeals. During the pendency of this appeal, Defendant also filed a letter with this Court alleging ineffective assistance of appellate counsel.

II. First-Degree Murder

At the close of the State's evidence at trial, Defendant made a motion to dismiss which the trial court denied. Defendant's only argument on appeal is that the State failed to present sufficient evidence to prove Defendant shot Mr. Moody, and therefore the trial court erred in denying his motion to dismiss.

> The standard of review on a motion to dismiss is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.
>
> > Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom.

State v. Angram, 270 N.C. App. 82, 83, 839 S.E.2d 865, 866 (2020) (citation omitted).

While often motions to dismiss require consideration of the elements of the crime, here Defendant only contests that he was "the perpetrator of the offense." *Id.* Defendant essentially contends that because there is no direct evidence he shot Mr. Moody, the circumstantial evidence is not enough to survive his motion to dismiss. But it is well established that we review the sufficiency of circumstantial evidence in the same manner as direct evidence:

> Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. A court's review of the sufficiency of the evidence is identical whether the evidence is circumstantial or direct. It is for the jury to weigh the evidence.

State v. Lee, 213 N.C. App. 392, 396, 713 S.E.2d 174, 177 (2011) (citations, quotation marks, and brackets omitted).

Defendant's argument regarding the evidence is subdivided into six sections: an introduction, the standard of review, an analysis, an argument for why the issue is preserved, an argument for the alleged error being prejudicial, and a conclusion. Thus, the substantive argument portion of Defendant's argument is the "Analysis[,]" and in these seven pages he does not cite a single case supporting his contention that the circumstantial evidence against him would not be sufficient to submit to the jury for consideration. Further, Defendant's only cited law beyond defining murder and the jury's duty, is regarding how his "extrajudicial confession" alone is not enough to constitute sufficient evidence. But Defendant ignores the evidence beyond his statements to Mr. Munsell. The remaining evidence shows that Defendant knew and worked with Mr. Moody; he was seen with Mr. Moody shortly before his death; he was discharged from a job by Mr. Moody on 5 June 2018, the very day of the murder; Defendant was found by the dump truck containing Mr. Moody's body; and Defendant possessed a gun immediately after leaving the dump truck.

The State was not required to produce an eyewitness to the shooting or physical evidence linking Defendant to the gun as Defendant implies, considering the other substantial evidence. Viewing the evidence in the light most favorable to the State, as we must, *Angram*, 270 N.C. App. at 83, 839 S.E.2d at 866, the circumstantial evidence in this case served as "proof of a chain of facts and circumstances indicating the guilt[,]" *Lee*, 213 N.C. App. at 396, 713 S.E.2d at 177, of Defendant as "the perpetrator of the offense." *Angram*, 270 N.C. App. at 83, 839 S.E.2d at 866. This argument is overruled.

Finally, we also note that during the pendency of Defendant's appeal, in December 2022, Defendant wrote a letter to this Court requesting "a new appeal and new appeal lawyer." Defendant was apparently under the erroneous impression that his appeal had already concluded and his conviction had been upheld. Generously construing Defendant's letter, he appears to allege his appellate counsel was biased against him due to a letter he wrote to her. But Defendant was mistaken as to the status of his appeal at the time of his letter, as he claims that "[i]n September [he] was notified that appeal lawyer had filed a brief on his behalf *and that the Court of Appeals had affirmed his conviction*[.]" (Emphasis added.) Further, many of Defendant's arguments seem to stem from issues with his trial counsel rather than his appellate counsel. Although Defendant's letter was indexed as a motion for appropriate relief with this Court,

the substance of the letter did not raise any cognizable claim this Court would have jurisdiction to address when it was filed. Therefore, this opinion does not address the contentions of Defendant's letter and does not prevent Defendant from filing any motions as he may deem fit, including a motion for appropriate relief before the trial court.

III. Conclusion

Because there was substantial evidence Defendant murdered Mr. Moody, the trial court properly denied his motion to dismiss.

NO ERROR.

Judges ZACHARY and MURPHY concur.

VETRIVEL THIAGARAJAN, PLAINTIFF
v.
SARALA JAGANATHAN, DEFENDANT

No. COA22-745

Filed 16 May 2023

Appeal and Error—notice of appeal—timeliness—applicable deadline under Rule 3(c)

An appeal from an equitable distribution order was dismissed as untimely where defendant did not—as required under Appellate Rule 3(c)(1)—file her notice of appeal within thirty days after the trial court entered the order. Although defendant did file her notice of appeal exactly thirty days after plaintiff served her a copy of the order, which would have made defendant's notice timely under Appellate Rule 3(c)(2), plaintiff served the copy of the order within the three-day window prescribed by Civil Procedure Rule 58 (the calculation of which included only business days, pursuant to Appellate Rule 6(a)), and therefore Appellate Rule 3(c)(1) governed the timeliness of defendant's notice of appeal.

Appeal by defendant from order entered 4 February 2022 by Judge Rashad Hauter in Wake County District Court. Heard in the Court of Appeals 7 February 2023.

Julyan Law Firm, PLLC, by McKenzie M. L. Canty, for plaintiff-appellee.

John M. Kirby for defendant-appellant.

ZACHARY, Judge.

Defendant Sarala Jaganathan appeals from the trial court's equitable distribution order ("the Order") providing for an unequal distribution of the parties' marital assets. After careful review, we conclude that Defendant did not timely notice her appeal of the Order, leaving this Court without jurisdiction to review this matter. Therefore, we dismiss Defendant's appeal.

I. Background

This matter arises out of an equitable distribution proceeding, which culminated in the Order entered by the trial court on 4 February 2022. On 9 February 2022, Plaintiff's counsel filed a certificate of service, stating that counsel served a copy of the Order upon Defendant by first-class mail on that day. Defendant filed her notice of appeal on 11 March 2022.

II. Discussion

Appellate Rule 3(c) provides the deadlines for filing notice of appeal in civil cases. N.C. R. App. P. 3(c). Compliance with Appellate Rule 3(c) is no mere technicality; it is jurisdictional and, therefore, critical. *See Magazian v. Creagh*, 234 N.C. App. 511, 513, 759 S.E.2d 130, 131 (2014) ("Failure to file a timely notice of appeal is a jurisdictional flaw which requires dismissal."). In civil actions, the notice of appeal must be filed "within thirty days *after entry of judgment* if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure." N.C. R. App. P. 3(c)(1) (emphasis added). However, if the appealing party has not been served with a copy of the judgment within Rule 58's three-day window, then the party must file and serve notice of appeal "within thirty days *after service upon the party* of a copy of the judgment[.]" N.C. R. App. P. 3(c)(2) (emphasis added).

Here, the trial court entered its Order on 4 February 2022. Plaintiff served Defendant with a copy of the Order by first-class mail on 9 February. Defendant then filed notice of appeal on 11 March 2022, more than 30 days after the 4 February entry of the Order, but exactly 30 days after Plaintiff served her by first-class mail on 9 February. Thus, the question presented is whether the computation of the timeliness of Defendant's notice of appeal is governed by Appellate Rule 3(c)(1) or 3(c)(2), with the answer depending upon whether Defendant was served with a copy of the Order within the three-day period prescribed

by Rule 58 of the Rules of Civil Procedure. *See* N.C. R. App. P. 3(c)(1)–(2). If Appellate Rule 3(c)(1) applies, Defendant's notice of appeal was untimely, and her appeal must be dismissed; under Appellate Rule 3(c)(2), however, Defendant's notice of appeal would be timely, and properly before us.

We first address the date of entry of the trial court's Order. Rule 58 of the Rules of Civil Procedure states that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5." N.C. Gen. Stat. § 1A-1, Rule 58 (2021). "The purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered." *Manone v. Coffee*, 217 N.C. App. 619, 621, 720 S.E.2d 781, 783 (2011) (citation omitted). In the present case, the date of entry is easily identifiable: the trial court reduced the Order to writing, signed it, and filed it on 4 February 2022. We thus base our analysis of the timeliness of Defendant's notice of appeal upon this date of entry.

Next, we determine the date on which Plaintiff served a copy of the Order upon Defendant. Rule 58 provides, in pertinent part:

> The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. *Service and proof of service shall be in accordance with Rule 5* [of the Rules of Civil Procedure].

N.C. Gen. Stat. § 1A-1, Rule 58 (emphasis added).

Rule 5, in turn, permits service by first-class mail upon a party, which was the method utilized by Plaintiff's counsel in this case. *See id.* § 1A-1, Rule 5(b)(2)(b). Service by mail is "complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service." *Id.* § 1A-1, Rule 5(b). Thus, under Rule 5(b)(2)(b), Defendant was served by mail upon Plaintiff's deposit of the copy of the Order in the United States Mail on 9 February 2022. *See id.*

The next critical factor is whether the 9 February service date fell "within the three-day period prescribed by Rule 58[.]" N.C. R. App. P. 3(c)(1). Importantly, this calculation includes only *business* days: "In computing any period of time prescribed or allowed by" the Rules of Civil Procedure, such as the three-day period prescribed by Rule 58, "[w]hen the period of time prescribed or allowed is less than seven days,

intermediate Saturdays, Sundays, and holidays shall be excluded in the computation" of days. N.C. Gen. Stat. § 1A-1, Rule 6(a).

Appellate Rule 3(c)(1) applies where a copy of the judgment is served "within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure[,]" N.C. R. App. P. 3(c)(1); hence, the time computation under Appellate Rule 3(c) is governed by Rule 6(a) of the Rules of Civil Procedure. Accordingly, our computation of this three-day period excludes weekends and court holidays. *See Magazian*, 234 N.C. App. at 513, 759 S.E.2d at 131 ("The three[-]day period [within which to serve a copy of a judgment] excludes weekends and court holidays.").

In *Magazian*, the appellant appealed from an order entered on a Friday, but acknowledged that he received actual notice of the order on the following Wednesday. *Id.* This Court deemed the service to have occurred on the date when he received that actual notice, and concluded that he "received actual notice within three days of entry of the order, excluding the intervening Saturday and Sunday. Therefore, to be timely, the Rules of Appellate Procedure required [the appellant] to file his notice of appeal within 30 days of entry of the order." *Id.* Because the appellant did not do so, this Court concluded that "the appeal [wa]s not timely" and dismissed for lack of jurisdiction. *Id.*

The timeline of the instant case mirrors that in *Magazian*. Here, the trial court entered the Order on Friday, 4 February 2022. The following Wednesday, 9 February 2022, Plaintiff served Defendant with a copy of the Order by first-class mail. Excluding the intermediate Saturday and Sunday from our calculation of the timeline, as we must, *id.*, Plaintiff served Defendant by mail on the third business day following the trial court's entry of the Order.

Because Defendant was "served with a copy of the [Order] within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure[,]" Appellate Rule 3(c)(1) governs the timeliness of Defendant's notice of appeal, rather than Appellate Rule 3(c)(2). N.C. R. App. P. 3(c)(1). As such, Defendant was required to file her notice of appeal within 30 days after entry of the Order, rather than 30 days after Plaintiff's service by mail. *See id.*

Defendant filed her notice of appeal on 11 March, more than 30 days after the 4 February entry of the Order, and therefore, her notice of appeal was untimely. Consequently, we must dismiss this appeal. *See Magazian*, 234 N.C. App. at 513, 759 S.E.2d at 131.

III. Conclusion

For the foregoing reasons, Defendant failed to properly invoke the jurisdiction of this Court. We dismiss Defendant's appeal.

DISMISSED.

Judges TYSON and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 MAY 2023)

ANDERSON v. N.C. 4504 GRAHAM NEWTON RD. TR. No. 22-61	Wake (21CVS2310)	Dismissed
IN RE A.M.B. No. 22-505	Johnston (19JT299)	Affirmed
IN RE A.N.T. No. 22-752	New Hanover (20JT188) (20JT189)	Affirmed
IN RE C.P. No. 22-760	Alleghany (20JT3)	Affirmed
IN RE D.M.C. No. 22-593	Beaufort (20JT120)	Affirmed
IN RE H.M. No. 22-552	Union (19JT176)	Affirmed
IN RE J.A.M. No. 22-687	Guilford (18JT94) (18JT95) (18JT96)	Affirmed
IN RE J.E.H. No. 22-590	Stanly (20JT27) (20JT28)	Affirmed
IN RE J.R. No. 22-404	Wake (20JT20-22)	Affirmed
IN RE R.D.R. No. 22-777	Forsyth (21JT58) (21JT59) (21JT60)	Reversed
IN RE S.H. No. 22-698	Robeson (19JT400) (20JT17)	Affirmed.
IN RE S.Y. No. 22-653	Iredell (18JT256) (18JT257) (18JT258)	Affirmed
MOONEY v. FASTENAL CO. No. 22-940	Buncombe (22CVS549)	Dismissed

STATE v. BROWN No. 22-850	Cleveland (21CRS51432) (21CRS51433) (21CRS51436) (21CRS51437)	No Error
STATE v. BRYANT No. 22-820	Alamance (20CRS53307)	Remanded For Correction Of Clerical Error.
STATE v. CANOY No. 22-1038	Carteret (21CRS52881-82)	Dismissed
STATE v. CEPHUS No. 22-886	Dare (21CRS50700) (22CRS25)	No Error in part, Dismissed in part
STATE v. CREECH No. 22-679	Brunswick (19CRS53929)	No Prejudicial Error
STATE v. HARRIS No. 22-728	Wake (19CRS220756)	No Error
STATE v. HUMPHREY No. 22-558	Onslow (20CRS54637-38)	NO PLAIN ERROR; INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DISMISSED WITHOUT PREJUDICE
STATE v. LUCAS No. 22-612	Nash (20CRS52740) (21CRS656)	Vacated and Remanded
STATE v. PARKER No. 22-574	Mecklenburg (20CRS15960)	No Prejudicial Error
STATE v. RIVERA No. 22-720	Catawba (16CRS3923) (16CRS3924) (17CRS100) (18CRS4225) (18CRS4226)	NO PREJUDICIAL ERROR
STATE v. TURNER No. 22-887	Pender (21CRS50192)	Dismissed
STEPHENS-BEY v. DUKE UNIV. MED. CTR. No. 22-1017	Durham (22CVS2875)	Dismissed.

CROWELL v. CROWELL

[289 N.C. App. 112 (2023)]

ANDREA CROWELL, PLAINTIFF
v.
WILLIAM CROWELL, DEFENDANT

No. COA22-111

Filed 6 June 2023

1. Divorce—equitable distribution—distributive award—prior order vacated—law of the case—new award permissible

In an equitable distribution case in which the trial court's prior order was vacated because the court erroneously required plaintiff to liquidate specified items of separate property to satisfy a distributive award, the trial court did not violate the law of the case or exceed the scope of the appellate court's holding when it entered a new order on remand with a distributive award that only incidentally or indirectly affected plaintiff's separate property. Despite plaintiff's argument that the practical effect of the new order would be to require plaintiff to liquidate separate property because she had no other means to pay the distributive award, the trial court's conclusion in its new order that plaintiff had the ability to pay the award left plaintiff the choice of whether or not to use her separate property to pay the distributive award.

2. Divorce—equitable distribution—distributive award—impermissibly reduced to money judgment

In an equitable distribution case in which the trial court's prior order was vacated because the court erroneously required plaintiff to liquidate specified items of separate property to satisfy a distributive award, although the trial court did not err on remand by entering a new order also requiring plaintiff to pay a distributive award (this time without specifying how she should satisfy the award), the court nevertheless erred by reducing the distributive award to a money judgment, where it had no grounds to do so under N.C.G.S. § 50-20 since the new order constituted an initial award and the amount was not yet past due.

Appeal by Plaintiff from order entered 16 July 2021 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 4 October 2022.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, and Plumides, Romano & Johnson, PC, by Richard B. Johnson, for plaintiff-appellant.

No brief filed for defendant-appellee.

MURPHY, Judge.

In *Crowell v. Crowell*, 372 N.C. 362, 368 (2019), a previous appeal in this case, our Supreme Court held that the trial court may not specifically order Plaintiff to liquidate items of separate property to satisfy a distributive award. However, the previous holding did not prohibit the trial court from entering a distributive award that incidentally or indirectly affects Plaintiff's separate property. Where the trial court entered a new order that did not directly affect Plaintiff's separate property rights, that order did not violate the law of this case.

However, a trial court may not reduce a distributive award to a money judgment in an initial order. Here, where the end result of the previous appeal was a total vacation of the appealed order, the trial court was not permitted to initially reduce the distributive award in the new order to a money judgment on remand as no proper grounds existed to do so. Accordingly, we partially vacate the new order and remand for the entry of a proper distributive award.

BACKGROUND

Plaintiff and Defendant were married on 11 July 1998, separated on 3 September 2013, and divorced in April 2015. As of the date of separation, Plaintiff and Defendant had incurred a significant amount of marital debt. On 17 February 2014, Plaintiff filed a complaint against Defendant for equitable distribution, alimony, and postseparation support. Defendant filed an answer to the complaint and included a counterclaim for equitable distribution.

From 6 July 2016 to 8 July 2016, the issues of equitable distribution and alimony were tried in Mecklenburg County District Court. The parties had stipulated in the final pretrial order that 14212 Stewarts Bend Lane, 14228 Stewarts Bend Lane, and 14512 Myers Mill Lane were all Plaintiff's separate property, and the trial court distributed the properties, along with their underlying debts, to Plaintiff. The trial court also found the following:

> As a result of this equitable distribution Defendant[] will have more debt than property and Plaintiff[] will have to liquidate her property to pay the distributive award. . . . Neither party has any liquid marital property left. . . . There was no choice but to distribute all the debts to

> Defendant[] in his case which results in a heavy burden he may never be able to pay before his death and a distributive award owed by Plaintiff[] that she may never be able to pay before her death.

On 15 August 2016, the trial court entered its equitable distribution judgment and alimony order, denying alimony and specifically ordering Plaintiff to liquidate 14212 Stewarts Bend Lane and 14228 Stewarts Bend Lane to satisfy the distributive award to Defendant. On 14 September 2016, Plaintiff appealed from the equitable distribution judgment and alimony order; and, on 2 January 2018, this Court issued a divided opinion. *See Crowell v. Crowell*, 257 N.C. App. 264, 285 (2018). The Majority opinion held, in relevant part, that the trial court did not err by "considering" Plaintiff's separate property and ordering her to liquidate it to satisfy a distributive award to Defendant. *Id.* However, on 16 August 2019, our Supreme Court issued a unanimous opinion reversing this Court's affirmation of the equitable distribution judgment and order and remanding with further orders to remand to the trial court. *Crowell v. Crowell*, 372 N.C. 362, 368 (2019). The Court concluded that "the trial court distributed separate property . . . when it ordered Plaintiff to liquidate her separate property to pay a distributive award" and that "there is no distinction to be made between 'considering' and 'distributing' a party's separate property in making a distribution of marital property or debt where the effect of the resulting order is to divest a party of property rights she acquired before marriage." *Id.* Our Supreme Court ultimately held the trial court could not order Plaintiff to liquidate her separate property to satisfy the distributive award because "trial courts are not permitted to disturb rights in separate property in making equitable distribution award orders." *Id.* at 370.

Pursuant to our Supreme Court's holding, the trial court held a hearing on 10 February 2021; and, on 16 July 2021, the trial court issued an *Amended Equitable Distribution Judgment and Alimony Order*. The trial court concluded "Plaintiff[] has the ability to pay the distributive award as outlined herein[,]" incorporated the bulk of the 2016 order by reference, and entered the following distribution order:

> 1. Paragraph 6 (a) – (d) of the Decretal Section of the Original Order is hereby amended as follows:
>
> In order to accomplish the equitable distribution, Plaintiff[] is required to pay a distributive award of Eight Hundred Sixteen Thousand Seven Hundred Ninety-Four Dollars and no/100 ($816,794[.00]) to be paid as follows:

> a. A lump [sum] payment of Ninety Thousand Dollars and no/100 ($90,000[.00]) within sixty (60) days from [10 February 2021].
>
> b. A second lump [sum] payment of One Hundred Thousand Dollars and no/100 ($100,000[.00]) within ninety (90) days of [20 February 2021].
>
> c. A third lump [sum] payment of Two Hundred Ten Thousand Dollars and no/100 ($210,000[.00]) on or before [10 February 2022].
>
> d. The balance of Four Hundred Twenty-Four Thousand Two Hundred Ninety-Four Dollars and no/100 ([$424,294.00]) owed is reduced to judgment and shall be taxed with post judgment interest and collected in accordance with North Carolina law.
>
> 2. Except as specifically modified herein, the parties' separate property, marital property, and divisible property shall remain as it was previously classified, valued, and distributed in the [15 August 2016 order].
>
> 3. Except as specifically modified herein, the [15 August 2016 order] shall remain in full force and effect.

(Marks omitted.) Plaintiff timely appealed.

ANALYSIS

In substance, Plaintiff makes two arguments on appeal: (A) that the trial court's 16 July 2021 order was erroneous because, in effect, the order required Plaintiff to liquidate the same properties at issue in the first appeal and (B) the trial court was not authorized under the Equitable Distribution Act to reduce the distributive award in the 16 July 2021 order to a money judgment.[1] For the reasons stated below, the current order does not violate the law of this case; however, as the trial court was not authorized to reduce the distributive award in

1. Plaintiff also argues the trial court was without jurisdiction to enter injunctive relief while the matter was on appeal. However, while the Record contains Defendant's motion for injunctive relief and Plaintiff's response to that motion, nowhere does it appear that the trial court actually ruled on the motion. It was Plaintiff's duty and opportunity to supply an adequate record on appeal, and we decline to opine on an order not presented to us. *See* N.C. R. App. P. 9(a)(1)(h) (2023) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal. . . . The printed record in civil actions . . . shall contain[] . . . a copy of the judgment, order, or other determination from which appeal is taken[.]").

the 2021 order to a money judgment, we vacate and remand in part for the entry of a distributive award consistent with this opinion.

A. 2021 Order

[1] Plaintiff first argues the trial court erred in entering the 16 July 2021 order because the practical effect of the order was to require Plaintiff to liquidate the same properties our Supreme Court held the trial court could not order her to liquidate during the previous appeal, thus violating the law of this case. *See Spoor v. Barth*, 257 N.C. App. 721, 728 (2018) (citing *Hayes v. City of Wilmington*, 243 N.C. 525, 536 (1956)) ("Under the law-of-the-case doctrine, when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal."). Plaintiff breaks this argument into three distinct sub-arguments: first, because the trial court's finding that the only way Plaintiff could satisfy a distributive award was to liquidate separate property was undisturbed in the previous appeal, the effect of the distributive award in the 2021 order remains violative of our Supreme Court's previous holding; second, the 2021 order attempts to change the finding of fact that Plaintiff was unable to satisfy the distributive award without liquidating the properties; and, third, the trial court exceeded the scope of the previous holding by including, without taking new evidence, that "Plaintiff[] has the ability to pay the distributive award as outlined herein."

Each of these arguments is predicated on a misreading of our Supreme Court's holding. The original order was not overturned on the basis that it had some propensity to affect Plaintiff's separate property; rather, it was overturned because "the trial court ordered [P]laintiff to *use* specific items of separate property to satisfy marital debt, *immediately* affecting her rights in that property." *Crowell*, 372 N.C. at 369 (second emphasis added). Indeed, the Court's opinion explicitly recognized that a distributive award with a collateral effect on separate property is not only permissible, but to be expected:

> [W]here a marriage is in debt, it is difficult to envision a scenario in which the making of a distributive award will not affect a party's separate property in some manner. Nevertheless, within the confines of N.C.G.S. § 50-20, the trial court in this case was only permitted to use that debt in calculating the amount of the distributive award, not to dictate how the debt was to be paid.

Id. at 371; *see also id.* at 369 n.4 (recognizing "a trial judge's undoubted authority to consider the amount of separate property held by each party in determining the amount of marital property and debt that should be distributed to each party at the conclusion of the equitable distribution process").

In light of a proper reading of the final holding in the previous appeal, each of Plaintiff's arguments fail. The trial court's 2021 order does not require Plaintiff to liquidate separate property, nor would she be required to do so if she were to obtain the funds necessary to pay the distributive award from a different source. Even if we were to take as fixed the trial court's finding that Plaintiff will only have the means to pay the current distributive award by liquidating the properties at issue in the first appeal,[2] such a finding does not itself transform the ensuing order into a command "to *use* specific items of separate property to satisfy marital debt[.]" *Id.* at 369. And the trial court's new conclusion of law that "Plaintiff[] has the ability to pay the distributive award as outlined herein" is entirely consistent with this distinction in light of Plaintiff's *ability* to liquidate the property if that is how she chooses to satisfy the distributive award. Thus, the trial court's 2021 order in no way violates the law of this case.

B. Distributive Award as a Money Judgment

[2] Plaintiff next argues the trial court erred by reducing the distributive award to a money judgment. Although much of this argument is derivative of her position that the 2021 order violates the law of the case, the bulk of it concerns the trial court's authority to reduce the distributive award to the *form* of a judgment. According to Plaintiff, the trial court was not permitted to reduce the award to judgment. We agree.

Under N.C.G.S. § 50-20, a distributive award is "payable either in a lump sum or over a period of time in fixed amounts"; no specific statutory provision authorizes payment in the form of a money judgment. N.C.G.S. § 50-20(b)(3) (2021). While we have previously suggested in dicta that, despite the lack of express statutory authorization, *past-due* equitable distribution payments may be reduced to a money judgment,

2. This proposition, we note, is based on an incorrect reading of the case's procedural history. The North Carolina Supreme Court's holding was not limited to a narrow correction of the original distribution order; rather, it reversed our partial affirmance of the trial court's order, and the other part of that mandate was to vacate. *See Crowell*, 257 N.C. App. at 285 (2018), *rev'd*, 372 N.C. at 371. In other words, the end result of the previous appeal was to fully vacate the equitable distribution order; the original findings of fact were not, as Plaintiff contends, "undisturbed on appeal."

see Romulus v. Romulus, 216 N.C. App. 28, 36-37 (2011), we only did so to an extent commensurate with the analogous statutory provisions for past-due child support and alimony payments. *See* N.C.G.S. § 50-13.4(f)(8) (2021) ("[P]ast due periodic [child support] payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments and may include provisions for periodic payments."); N.C.G.S. § 50-16.7(i) (2021) ("[P]ast-due periodic [alimony] payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments."). However, our observation in *Romulus* specifically concerned an action to enforce past-due payments and has never been extended to initial distributive awards.

Here, the distributive award at issue was not past due. The 2021 order, despite being informed by the same valuations used to create the order at issue in the first appeal and nominally having been "amended," was actually an entirely new order.[3] And, while there is precedent for the ability for an award to be past-due on remand where an award is partially, rather than fully, vacated, an appellate court must clarify such a limitation on its holding in order for that rule to apply. *See Quick v. Quick*, 305 N.C. 446, 462 (1982) ("We have vacated only that portion of the trial court order dealing with the *amount* of alimony. The parties' stipulation that plaintiff is *entitled* to alimony is in no way disturbed and remains in full force and effect for the hearing on remand."), *superseded in part by statute*, N.C.G.S. § 50-13.4(f)(9) (1983).

Without any limitation on the previous order of our Supreme Court, the award contained in the current order could not have been past due, and even the reasoning in dicta in *Romulus* would not authorize its reduction to a money judgment. We vacate the portion of the trial court's 2021 order concerning the form and amount of the distributive award—specifically, item (1) of the decretal section of the *Amended Equitable Distribution Judgment and Alimony Order*—and remand for the entry of a form of distributive award authorized by N.C.G.S. § 50-20.

CONCLUSION

As our Supreme Court's opinion in the previous appeal did not prohibit the entry of distributive awards with incidental effects on Plaintiff's separate property, the trial court's *Amended Equitable Distribution Judgment and Alimony Order* did not violate the law of this case.

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3. For the reasons stated previously, the effect of the Supreme Court's opinion in the previous appeal was to fully vacate the original order and the distribution award it authorized. *See supra* fn. 2.

However, the trial court was not authorized to reduce the distributive award in the 2021 order to a money judgment, and we vacate and remand in part for the entry of a distributive award consistent with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Chief Judge STROUD and Judge GORE concur.

IN THE MATTER OF A.R.B.

No. COA22-694

Filed 6 June 2023

Termination of Parental Rights—standard of proof—Rule 60(a) motion—substantive modification to original order

The trial court abused its discretion by granting petitioner-mother's Rule 60(a) motion to amend the court's original order, which terminated respondent-father's parental rights in his child, to add the correct standard of proof to the order. The addition of the standard of proof amounted to a substantive modification altering the effect of the original order, thus exceeding the scope of the Rule 60 authority to correct clerical mistakes. Where there was no transcript from the trial proceedings from which the appellate court could determine whether the trial court announced the correct standard of proof in open court, the amended order was vacated and the matter was remanded for application of the proper standard of proof.

Appeal by Respondent-Father from Order filed 6 June 2022 by Judge Emily Cowan in Henderson County District Court. Heard in the Court of Appeals 26 April 2023.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for Respondent-Appellant Father.

Emily Sutton Dezio, for Petitioner-Appellee Mother.

STADING, Judge.

Respondent-Father ("Father") appeals from the trial court's Amended Order terminating his parental rights to his child based on willful abandonment and neglect. Father argues (1) that the trial court abused its discretion in granting a Rule 60(a) motion to amend the Original Order terminating his parental rights and (2) in the alternative, that there is no clear, cogent, and convincing evidence to support the trial court's findings that Father willfully abandoned his child. For the reasons set forth below, we vacate and remand the Order of the trial court with instructions consistent with this Opinion.

I. Background

"Adam,"[1] born 23 April 2018, is the child of Petitioner-Mother, Miranda Burlseon ("Mother"), and Father, Brandon Ezequiel Johnson. At the time of Adam's birth, Mother was seventeen years old, and Father was nineteen years old. The parties were never married. Since his birth, Adam resided exclusively with Mother.

On 26 June 2018, Father initiated a custody action in Henderson County, requesting custody of Adam and child support. Mother counterclaimed for the same. In April 2019, the court awarded joint legal custody of Adam to both parties, with Adam living primarily with Mother, and Father receiving supervised visitation that would eventually progress to unsupervised visits. The court determined Father "had issues with [m]arijuana use" and ordered him to complete "a 12-panel hair follicle drug test by May 13, 2019 and to present the results of said test to [Mother]'s attorney of record."

In August 2018, when Adam was four months old, Mother began a relationship with Kemper Henderson. Throughout Adam's early years, Henderson was very involved in Adam's daily care. Mother and Henderson married on 10 October 2020 and moved to South Carolina with Adam.

In May 2019, Father attended three, two-hour-long, supervised visits with Adam at Mother's home. According to Mother, Father, and Henderson, the visits went well, and all parties were cordial and friendly with one another. On May 17, 2019, Father delivered a box of diapers and wipes to Mother and visited with Adam. After this visit, Father ceased communication with Mother and failed to attend other scheduled visitations. On 3 June 2019, Mother filed a "Motion to Show Cause and a Motion to Modify Custody based upon [Father]'s failure to contact

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

the minor child, nor to produce the court-ordered drug test results." The matter was noticed for hearing but was never heard and removed from the district court's calendar on 14 May 2020.

On 21 June 2019, Father contacted Mother, stating he completed his follicle drug test. Mother questioned his lack of contact and failure to attend visits. Father stated Mother's attorney contacted him and told him that he could not visit Adam until he completed his drug test. Mother claims her attorney did not contact Father. Father admits this was the last time he attempted to contact Mother and that he has not seen Adam since May 2019.

On 7 December 2020, Mother petitioned for termination of Father's parental rights. After he was served, Father filed a pro-se answer on 5 February 2021 and an additional answer through appointed counsel on 24 March 2021. The district court appointed a Guardian ad Litem ("GAL"), but the court dismissed the first GAL for failure to complete services, thereby delaying the hearing. The court appointed Christopher Reed to be Adam's GAL. On 16 February 2022, with both parties present, the district court held a hearing on the petition.[2]

The court heard testimony from Father and Mother, as well as Andrea Straton, Adam's maternal grandmother, and Cindy Frickel, Father's family friend. The court also considered the GAL report, filed on 16 February 2022. The report detailed the GAL's interactions with Mother, Father, and Adam, noting that while Father loves Adam, Father "admits and recognizes that since he has not seen [Adam] since May 2019, he currently had no bond with his son, and his son would not recognize him as his father." The GAL's report concluded that it was in Adam's best interest that Father's parental rights be terminated to allow for Adam's adoption by Henderson. Ultimately, the court found that Father had abandoned and neglected Adam, and it was in Adam's best interest that Father's parental rights be terminated. The court entered the order terminating Father's rights on 25 February 2022 and Father entered a notice of appeal on 28 February 2022.

On 27 May 2022, Mother filed a Rule 60(a) motion, requesting "the court to amend the February 25, 2022 Order terminating the parental rights to clearly state the standard of review for which she made her findings of fact relating to the grounds to terminate." On 9 June 2022, the

2. A record of this proceeding, and another held on 9 June 2022, was made with an electronic recording device that subsequently malfunctioned. The assigned transcriptionist was unable to prepare a verbatim transcript, so the parties stipulated to the inclusion of summaries of the proceedings in narrative form. *See* N.C. R. App. P. 9(c)(1).

court held a hearing and determined that the language of the Order could be "made clearer to ensure that the standard of review used by the court applies not only to the best interests but also that there were grounds to terminate [Father]'s parental rights." Father's counsel objected to the change, but ultimately, the court entered an Amended Order terminating Father's parental rights. Father timely filed a notice of appeal from the Amended Order and Order granting the Rule 60(a) motion.

II. Jurisdiction

This Court has jurisdiction over Father's appeal from the Amended Order terminating his parental rights pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 7B-1001(a)(7) (2023).

III. Analysis

Father presents two issues on appeal: (1) whether the trial court abused its discretion in granting the Rule 60(a) motion to make a substantive, rather than clerical, change to the Termination of Parent Rights ("TPR") Order; and (2) if this Court finds the trial court did not abuse its discretion, whether there is clear, cogent, and convincing evidence to support the trial court's determination that grounds existed to terminate Father's parental rights. We first examine whether the court properly granted the Rule 60(a) motion.

A. Comparison of the Orders

We pay due deference to the principle that parents have fundamental, substantive rights under the United States Constitution that are embodied in North Carolina General Statutes and reinforced by precedential case law. In *Santosky v. Kramer*, the United States Supreme Court held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." 455 U.S. 745, 747–48, 102 S. Ct. 1388, 1391–92 (1982). The Juvenile Code in North Carolina "provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage." *In re K.N.*, 373 N.C. 274, 277-78, 837 S.E.2d 861, 864-865 (2020) (citing N.C. Gen. Stat. §§ 7B-1109, -1110 (2017)). During the first or adjudicatory stage, the petitioner bears the burden of proving by "*clear, cogent, and convincing evidence*" the existence of one or more grounds for termination pursuant to subsection 7B-1111(a) of the General Statutes of North Carolina. N.C. Gen. Stat. § 7B-1109(e), (f) (emphasis added). Next, if a trial court finds that a ground for termination exists, it proceeds to the second or dispositional stage, at which it must "determine

whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a).

In the trial court's Original Order, the only recitation of a standard of proof was found in paragraph 26, in reference to the dispositional stage, which read: "[t]hat there is clear and convincing evidence that it is in the best interests of the minor child that the Father's parental rights be terminated." In considering Mother's 60(a) motion, the trial court recognized the deficiency in granting the Order and ultimately determined "it is best practice to grant this Motion and be clear upon the standard used at the hearing to terminate Respondent's parental rights." The amended portion reads as follows:

> THAT FURTHER, that Petitioner[-Mother] has produced the following clear, convincing and cogent evidence to support termination of the parental rights and that it is in the child's best interest to do so;
>
> . . . .
>
> 24. Based on the foregoing, the Petitioner[-Mother] has established grounds for termination of the parental rights of the Respondent[-Father] by clear, cogent, and convincing evidence. That Respondent[-Father], as a natural parent of the juvenile, has willfully abandoned the juvenile for at least six (6) consecutive months immediately preceding the filing of this Petition for Termination of Parental Rights, pursuant to the provisions of N.C. Gen. Stat. § 7B-1111(a)(7).
>
> 25. Based upon the foregoing, the Petitioner[-Mother] has established grounds for termination of the parental rights of the Respondent[-Father] by clear, cogent, and convincing evidence. That Respondent[-Father], as a natural parent of the juvenile, has neglected, pursuant to the provisions of N.C. Gen. Stat. § 7B-1111(a)(1) by:
>
> a. Abandoning the juvenile,
>
> b. Failing to provide the proper care, supervision or discipline for the juvenile, and
>
> c. Showing a lack of parental concern for the juvenile.
>
> 26. Based upon the totality of the evidence and by the clear, cogent and convincing standard of law, termination

> of the Respondent[-Father]'s parental rights is in the best interest and welfare of the juvenile.

A comparison of the two Orders reveals, inter alia, that the modifications were an intentional addition to include the constitutionally permissible standard of proof.

B. Substantive Versus Clerical Changes

This Court reviews a trial court's decision to amend an order after a Rule 60(a) motion for abuse of discretion. *In re Estate of Meetze*, 272 N.C. App. 475, 479, 847 S.E.2d 220, 224 (2020). Rule 60(a) of North Carolina's Rules of Civil Procedure states:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge order. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C.G.S. § 1A-1, Rule 60(a) (2022). "Clerical mistakes" are those that do not alter the court's reasoning or determination in ruling on an order. *In re J.K.P.*, 238 N.C. App. 334, 343, 767 S.E.2d 119, 124 (2014). "While Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." *In re C.N.C.B.*, 197 N.C. App. 553, 556, 678 S.E.2d 240, 242 (2009) (citations omitted). Thus, a trial court abuses its discretion if the correction "alters the effect of the original order." *In re Meetze*, 272 N.C. App. at 479, 847 S.E.2d at 224. We are now tasked with determining whether the trial court's initial omission and subsequent addition of the correct standard was a clerical mistake or a substantive modification constituting an abuse of discretion.

The existing body of case law contemplating whether a trial court is divested of jurisdiction pursuant to Rule 60(a) does not speak directly to the primary issue in this case. Available precedent considering whether a trial court exceeded the bounds of a clerical mistake and trod onto the territory of a substantive modification has considered alterations in findings of fact that change the result of an order. *See, e.g.*, *In re B.B.*, 381 N.C. 343, 873 S.E.2d 589 (2022). Father cites several cases in support of his argument in which granting a Rule 60(a) motion to amend

an order was found to be a substantive alteration. *In re B.L.H.*, 376 N.C. 118, 852 S.E.2d 91 (2020); *In re M.R.F.*, 378 N.C. 638, 862 S.E.2d 758 (2021); *Hinson v. Hinson*, 78 N.C. App. 613, 337 S.E.2d 663 (1985); *In re C.N.C.B.*, 197 N.C. App. 553, 678 S.E.2d 240 (2009); *In re J.C.*, 380 N.C. 738, 869 S.E.2d 682 (2022). However, in these cases, our State Supreme Court addressed whether excluding the standard of proof from the written order is *reversible error*—distinguished from our present case which considers whether the addition of the standard of proof is a *substantive modification* under a Rule 60(a) amendment.

In one such case, the Court held that "a trial court does not reversibly err by failing to explicitly state the statutorily-mandated standard of proof in the written termination order if . . . the trial court explicitly states the proper standard of proof in open court at the termination hearing." *In re B.L.H.*, 376 N.C. at 120–21, 852 S.E.2d at 95 (2020). In another matter, the Court considered a scenario in which the trial court did not make an announcement either in its written order or in open court about the standard of proof that it applied to make findings of fact. *In re M.R.F.*, 378 N.C. at 643, 862 S.E.2d at 762 (2021). The Court held "[i]n light of not only the failure of the trial court to announce the standard of proof which it was applying to its findings of fact but also due to petitioner's failure to present sufficient evidence to support any of the alleged grounds for the termination of the parental rights of respondent-father, we are compelled to simply, *without remand*, reverse the trial court's order." *Id.* at 642–643, 862 S.E.2d 758, 762–763 (emphasis original). More recently, the Court determined that employing the wrong standard of proof requires a reviewing court to set aside a termination of parental rights order. *In re J.C.*, 380 N.C. at 744, 689 S.E.2d at 687 (2022). Though these cases address the insufficiency of orders and are not a factual analysis of a modification under Rule 60(a), they speak directly to the importance of the trial court memorializing its employment of the correct standard of proof during the proceedings in this context.

While case law highlights the significance of substantiating the use of the correct standard of proof, well-founded principles of statutory construction provide additional guidance. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (internal citation omitted). "It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *In re Estate of Lunsford*, 359 N.C. 382, 391–92, 610 S.E.2d 366, 372 (2005) (internal citation omitted). "If the statutory language is clear and unambiguous, the

court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted). *Black's Law Dictionary* defines a "clerical error" as "an error resulting from a minor mistake or inadvertence. . . ." *Clerical error*, *Black's Law Dictionary* (7th ed. 2002). Such an error as the omission of the proper standard of proof can hardly fall within the realm of a clerical error or mistake.

In the matter presently before our Court, due to a malfunction of the electronic recording device, we are without an original transcript from the proceedings and left only with a "narrative of the proceedings," the Original Order, and the Amended Order. Thus, it is impossible for this Court to determine whether the trial court announced the correct standard of proof in open court. The timeline and sequence of events in this matter is also noteworthy. The adjudicatory hearing on termination was held on 16 February 2022 and the Order of Termination was entered on 25 February 2022. On 28 February 2022, Father filed his notice of appeal. It was not until 27 May 2022 that Mother filed a Rule 60(a) motion that highlighted the deficiencies in the Original Order. Then, on 9 June 2022, the trial court granted Mother's motion pursuant to Rule 60(a) and entered the Amended Order.

In the Original Order, a single reference of an imprecise, albeit acceptable articulation of the standard of proof is present in the findings of fact, which states there is "clear and convincing evidence that it is in the best interests of the minor child that the Father's parental rights be terminated." *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) ("It is well established that 'clear and convincing' and 'clear, cogent, and convincing' describe the same evidentiary standard"). Still, a comparison of the Original and Amended Orders shows that the Original Order is deficient in that "[t]he burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on *clear, cogent, and convincing* evidence." N.C. Gen. Stat. § 7B-1109 (emphasis added). Here, in contrast to the Amended Order, the Original Order fails to assert the proper standard of proof for any findings beyond the "best interests of the minor child." Moreover, an application of available Rule 60(a) case law invites us to determine whether the additional language "alters the effect of the original order." *Buncombe Cnty. ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993). The Original Order has no legal effect, while the Amended Order is legally sufficient to terminate parental rights. Absent proper employment of the appropriate standard of proof by the trial court in either the written Order or the record of the proceedings, any subsequent addition including this standard of proof was substantive and an abuse of discretion.

In addition to challenging the propriety of the Rule 60(a) motion, Father challenges the trial court's factual findings, as well as its conclusion that his abandonment of Adam was willful. We do not reach the merits of these particular arguments because we conclude the trial court's Order is invalid.

IV. Conclusion

It is not lost on this Court that the differences between the two Orders are technical. Nonetheless, considering timeless legal principles and the fundamental rights at stake, we find the modifications were substantive rather than clerical in nature and divested the trial court of jurisdiction to make such changes pursuant to Rule 60(a). Accordingly, it was an abuse of discretion to grant Mother's Rule 60(a) motion to amend the Original Order terminating Father's rights. Therefore, we vacate the trial court's Amended Order terminating Father's parental rights and remand to apply the proper standard of proof. On remand, the trial court may consider additional evidence or hear further arguments if necessary.

VACATED AND REMANDED.

Judges HAMPSON and CARPENTER concur.

IN THE MATTER OF M.S., L.S., A.S., Minor Children

No. COA22-615

Filed 6 June 2023

1. Child Abuse, Dependency, and Neglect—neglect—findings of fact—clear, cogent, and convincing evidence—domestic violence incident

An order adjudicating three children as neglected was affirmed where clear, cogent, and convincing evidence supported the trial court's findings of fact, which included findings describing an incident of domestic violence inflicted upon the children's mother by their father. The trial court's failure to indicate the exact date that the incident occurred did not affect the underlying validity of the findings and did not constitute prejudicial error. Further, where the court found that the mother denied the incident of domestic violence to a social worker but that the social worker noticed a bruise

on the mother's arm, that finding was not based on improper hearsay evidence but on the social worker's in-court testimony regarding her observations of the bruise.

2. Child Abuse, Dependency, and Neglect—neglect—ceasing reunification efforts—factors—required findings—no prejudicial error

After adjudicating three children as neglected, the trial court did not abuse its discretion by ceasing reunification efforts with the children's parents where, although the trial court made inadequate findings about the aggravating circumstances listed in N.C.G.S. § 7B-901(c) to justify its disposition, the record contained ample evidence that reunification efforts would be inappropriate, and thus the court's error did not amount to prejudicial error.

3. Child Visitation—child neglect case—disposition—no visitation—insufficient findings

After a trial court adjudicated three children as neglected, the portion of its dispositional order directing that the children's parents have no visitation was vacated and remanded where, in its findings of fact, the court failed to address whether the parents had utilized any prior visitation periods. On remand, the court needed to make written findings regarding the parents' prior visitation with the children, and the court could deny visitation only upon finding that the parents had forfeited their visitation rights and that denying visitation would be in the children's best interests.

Appeal by respondents from judgment entered 28 April 2022 by Judge Corey J. MacKinnon in Rutherford County District Court. Heard in the Court of Appeals 9 May 2023.

Hanna Frost Honeycutt, for the petitioner-appellee.

Attorney for GAL, Matthew D. Wunsche, for the other-appellee.

Gillette Law Firm PLLC, by Jeffrey William Gillette, for the respondent-appellant.

Emily Sutton Dezio, PA, by Emily S. Dezio, for the respondent-appellant.

TYSON, Judge.

Respondent-Mother ("Mother") and Respondent-Father ("Father") appeal from a disposition and adjudication order entered on 28 April 2022, which ceased DSS's reunification efforts and all visitation of Mother and Father with their three children. We affirm in part, vacate in part, and remand.

I. Background

Rutherford County Department of Social Services ("DSS") obtained custody of Mother's and Father's three children, six-year-old Micky, five-year-old Lucy, and three-year-old Annette, on 7 February 2021. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors).

DSS received a report on 8 January 2021 alleging Mother and Father suffered from substance abuse issues, engaged in a history of domestic violence, and their home lacked electricity. DSS received another report three days later alleging improper supervision of the children, alcohol abuse by Father, and asserting Mother was often covered in bruises. A third report was received in early February and alleged Father had assaulted one of the minor children while visiting Father's family in Michigan and an "amber alert" was subsequently issued.

DSS investigations revealed a history of domestic violence between Mother and Father. The youngest child, Annette, who was one year old at the time, tested positive for methamphetamines two days after being removed from Mother's and Father's home. DSS also discovered Mother's and Father's parental rights had been terminated in Michigan for five other minor children: two children were Father's biological children, two children were Mother's biological children, and one was the biological child of both Mother and Father.

Shortly after DSS began investigating, Mother agreed to reside in the local PATH shelter to protect herself and the juveniles from Father, given the recent assault charges and amber alert accusations in Michigan. Mother left the PATH shelter after only a few days. DSS filed juvenile petitions for neglect, took custody of the children, and asserted:

> The Department received reports regarding this family on January 10, 11, and February 4, 2021. These reports included concerns of domestic violence, improper discipline, improper care, and substance use. The allegations were denied by the family. Throughout the assessment it was found that the family has significant history in Michigan. The parents were TPR'd [sic] on in Michigan

> due to sexual abuse. Throughout the assessment the professional collaterals had serious concerns for the children, due to being around [Father]. The family fled Michigan when they found out they were pregnant with [Micky], for fear that Michigan DSS would take this child. Due to severe concerns of domestic violence and sexual abuse and the children not being verbal, Social Worker [sic] scheduled a medical exam for the children. Before this exam took place, the family fled to Michigan. The report received on February 4, 2021, had serious concerns of substance use and domestic violence. Social Worker [sic] has not been able to reach or locate the family since the last week of January 2021. There are serious concerns regarding the risk of harm to these children based on the history of the parent's behavior with no evidence of treatment or behavior[al] change.

An order for nonsecure custody was entered because Mother and Father had "created conditions likely to cause injury or abuse or has failed to provide or is unable to provide, adequate supervision or protection." The juveniles were adjudicated as neglected for living in an environment injurious to their welfare pursuant to N.C. Gen. Stat. § 7B-101(15)(e) (2021).

The 9 February 2021 order on need for continued nonsecure custody provided Mother and Father should receive one hour of supervised visitation each week.

Father's case plan provided he:

> a) Agrees to complete a domestic violence batterer's assessment and take classes if recommended by the provider.
>
> b) Agrees to abide by the no-contact order in place between him and the children's mother, [ ].
>
> c) Agrees to complete a Comprehensive Clinical Assessment (CCA) and follow all recommendations.
>
> d) Agrees to complete a Sex Offender Evaluation.
>
> e) Agrees to submit random drug screens within 24 hours of the request.
>
> f) Agrees to maintain appropriate housing.
>
> g) Agrees to actively seek employment and notify the Social Worker of submitted job applications and interviews.

Mother's case plan on 17 February 2021 provided she:

> a) Agrees to complete a domestic violence victim's assessment and take classes if recommended by the provider.
>
> b) Agrees to abide by the no-contact order in place between her and the children's father, [ ].
>
> c) Agrees to participate in and graduate from parenting classes.
>
> d) Agrees to complete a Comprehensive Clinical Assessment (CCA) and follow all recommendations.
>
> e) Agrees to engage in therapy.

Mother attended one hour of supervised visitation. Nothing was noted in the record of any issues arising during that visit. A DSS witness testified shortly after that visit, Annette and Lucy began experiencing asserted "sexualized behaviors." Visitation was ceased after a pre-adjudication hearing held on 16 March 2021. The pre-adjudication order found:

> 4. That the minor child and siblings have been exhibiting sexualized behaviors that are not appropriate for their ages.
>
> 5. That the Department has obtained TPR orders from the State of Michigan regarding other minor children where the respondent parents had their rights terminated due to sexual abuse of those children and allowing the sexual abuse to occur.
>
> 6. That the potential harm to the minor child is greater than the benefit of visitation occurring at this time.

A hearing was held on 22 March 2022. DSS called several witnesses, including social workers, a foster care worker, foster care parents for the children, and the officer who had dealt with several domestic violence calls at Mother's and Father's home. Certified copies of the petitions and orders terminating Mother's and Father's parental rights to other children in Michigan were entered. Evidence at trial indicated Mother failed to acknowledge Father's domestic violence:

> [DSS ATTORNEY]: And did you ask the Respondent Mother about the domestic violence?
>
> [SOCIAL WORKER]: I did.
>
> [DSS ATTORNEY]: Okay. What was her answer?

> [SOCIAL WORKER]: She denied it. I'd spoke to her multiple times just offering my help if she needed it and she continuously denied it. I believe she actually told me there was some domestic violence in the past but that he was better now.

The trial court made identical findings for all three children and found:

> 8. That the Department received a report on the 8th of January, 2021 alleging substance abuse in the home and a lack of power at the residence.
>
> 9. That the social worker went to the home and found the home to be without running water. That the home did have power.
>
> 10. That all three children and the respondent parents were at the home.
>
> 11. That another report was received on the 11th of January, 2021 alleging improper supervision and alcohol abuse.
>
> 12. That the social worker went to the residence and noticed the respondent mother to be visibly upset and that she acts differently when the respondent father is present for the conversation.
>
> 13. That there is a history of 911 calls out to the house regarding domestic violence.
>
> 14. That the respondent father was charged with disorderly conduct and assault on a female after an incident in December of 2020.
>
> 15. That during that incident Officer James Greene found the respondent father in the middle of the road yelling obscenities towards another gentleman. He stopped to talk to the respondent father and the respondent father told him that the officer should go and check on his wife.
>
> 16. Officer Greene suspected that he was under the influence based on his behaviors.
>
> 17. Office[r] Greene arrived at the home where the respondent mother and three minor children were present. He observed the respondent mother to be beaten up with a blood[y] lip and bleeding from the side of her eye. The

respondent mother stated the respondent father assaulted her. She was offered but refused medical care.

18. The assault on a female was ultimately dismissed due to the respondent mother's failure to cooperate with the prosecution.

19. That part of his bond release conditions was to not have any contact with the respondent mother. He violated this condition on multiple occasions.

20. That when questioned by the social worker about the domestic violence, the respondent acknowledged a prior history of domestic violence but denied any current issues.

21. That the Department received another report alleging the respondent father assaulting one of the minor children and the respondent mother while they were in Michigan at the paternal grandmother's house. That an amber alert was issued on the 4th of February, 2021.

22. That the family returned to North Carolina and the social worker went to the home on the 6th of February, 2021.

23. That during this home visit the respondent mother stated that " [Father] is not well right now," referring to the respondent father. She stated that he is a "whole other person" and "needs help."

24. She denied the incident of domestic violence[,] but the social worker noticed a bruise on the respondent mother's arm.

25. The respondent mother did not allow a photograph to be taken of the bruise.

26. That the respondent father was in jail on this date, but bonded out on the 7th of February, 2021. That the social worker talked to the respondent father[,] and he acknowledged a history of domestic violence but stated it was in the past.

27. That the respondent mother agreed to go to the PATH Shelter with the minor children.

28. That she ultimately did not stay at the PATH Shelter and the Department took custody of the minor children.

29. That the social worker obtained DSS records from the State of Michigan. The respondent parents had their parental rights involuntarily terminated for multiple minor children due to the respondent father sexually abusing a minor child and physically abusing another minor child. The respondent mother allowed the abuse.

30. The records also indicate a history of domestic violence between the respondent parents while residing in Michigan.

31. That there are no records to indicate the respondent father received any type of sex offender treatment to address the concerns from the prior case.

32. The respondent parents moved to North Carolina shortly after their rights were terminated in Michigan.

33. That on the 9th of February, 2021, the minor child [Annette] was drug screened and her hair was positive for methamphetamines.

34. That after the minor children were placed in the custody of the Department[,] they were placed in foster home.

35. That the minor children had significant delays and were assessed to need speech and occupation therapy. None of the minor children were able to communicate verbally.

. . . .

37. The minor child, [Lucy], was placed by herself in a foster home. The foster mother observed her to have nightmares and to be scared of the bathroom.

38. She also observed [Lucy] to push toys against her private area and that she would grind her private area on the side of the bathtub.

39. She was also observed to keep her legs tightly crossed and could be heard say "no no" at night.

40. On one occasion she was given lotion after a bath[,] and she immediately went to rub the lotion on her private area.

41. On another occasion, she was handed a phone and immediately pointed the camera at her private area.

42. That [Lucy] demonstrated sexualized behaviors that are not age appropriate.

43. That initially, [Annette] and [Micky] were placed together in a foster home.

44. The foster parents observed [Micky] to have severe physical tantrums and to be non-verbal. That he would have nightmares where he would start screaming. That he was 4 at the time.

45. That [Micky] would have food aggression.

46. That he avoided bath time and had to be carried in the bathroom to be cleaned.

47. That [Annette] was observed to have fear of everyone, especially males. That she would scream and cry a lot.

48. That she, like her siblings, did not want to take a bath. The placement had to use baby wipes to clean her for the first few weeks while in their care.

49. She also demonstrated sexualized behaviors of rubbing her private area against her car seat, high chair, and in the bathtub.

50. She had nightmares every night and would wake up drenched in sweat. She could be heard saying "no."

51. That the foster parents observed [Micky] and [Annette] not to have a sibling bond.

52. That all of the minor children have significant delays.

53. That there is a long-standing history of domestic violence between the respondent parents and these children have been exposed to the domestic violence. There was at least one incident of significant domestic violence in front of the minor children in North Carolina.

54. All three children exhibit overly sexualized behaviors for their age.

55. The Court took Judicial Notice of 20 CR 53048.

56. That the minor child named above is a neglected juvenile as defined by N.C. G[en.] S[tat.] § 7B-101(15).

During the dispositional hearing held on the same day, a foster care worker testified regarding Mother's and Father's compliance with their case plans. The possibility of other family members obtaining custody of Micky, Annette, and Lucy was also discussed.

At the disposition hearing, the trial court found these additional facts:

> 7. That as of March 22, 2022, the respondent mother has not completed any of the [case plan] items. She has not engaged in domestic violence classes even though DSS has provided her with the contact information for the program.
>
> 8. That the no contact order was dismissed and the respondent mother is now living with the respondent father again. They are both homeless or living in different motels when they have the money. They can be found walking on the trail or sitting at Wal-Mart holding signs asking for money.
>
> 9. That DSS made a referral for the respondent mother to complete her Comprehensive Clinical Assessment[,] but she never followed through with this.
>
> 10. That DSS made another referral[,] and the respondent mother completed the assessment on October 8, 2021 but did not return for services until the dates listed below: February 14, 2022 (Outpatient therapy), February 21, 2022 (outpatient therapy), March 11, 2022 (medication management) NO SHOW, March 25, 2022 (Outpatient therapy).
>
> 11. That the respondent mother has refused drug screens on two separate occasions.
>
> 12. That the respondent mother has not made any progress on her case plan. She does sometimes attend court in this matter.
>
> . . .
>
> 14. That as of March 22, 2022, the respondent father has submitted one drug screen at the beginning of the case. He completed a domestic violence batterer's assessment and was recommended to participate in batterer's classes. The respondent father has not followed through with his classes or completed any of the other items listed above.

15. That the respondent father completed an assessment for the Batterer's Intervention Program in April 2021 but did not return to begin classes. He has since been discharged.

16. That he did not obtain a sex offender evaluation.

17. That the no contact order was dismissed[,] and the respondent mother is now living with the respondent father again. They are both homeless or living in different motels when they have the money. They can be found walking on the trail or sitting at Wal-Mart holding signs asking for money.

18. That the respondent father has a criminal court date of April 11, 2022 to address the current pending charges. If convicted[,] his probation will be revoked[,] and he will be looking to serve jail time. The respondent father also has a felony charge that will be addressed after the April 11, 2022 court date.

1[9]. That the respondent father reports he is engaged in TASC services[,] but he has not signed a release for DSS to receive this information. That the respondent father's probation officer reports he is not passing drug screens.

[20]. That the respondent father has not made any progress on his case plan.

[21]. That a Court Report for the Dispositional Hearing was received into evidence and reviewed by the Court, and the facts contained in said summary are incorporated herein as further findings of fact. The Court Report, marked as Exhibit "A", is attached hereto and incorporated herein by reference.

2[2]. That the Department has made reasonable efforts towards the permanent plan of reunification in this matter.

2[3]. That reasonable efforts for reunification have been made by the agency to include: development of the Out of Home Service Agreement for the respondent mother; Child and Family Team Meetings, home visits, and other services as described in the attached court report.

2[4]. That the conditions which led to the placement of the Child in DSS custody still exist and the return of the

> Child to the home of the respondent parents would be contrary to the welfare of the Child at this time. That the respondent father is appropriate for a trial home placement.
>
> 2[5]. That it is in the best interest of the Child to remain in the custody of Rutherford County Department of Social Services.
>
> 2[6]. That the recommendation for th[ese] [juveniles] is a plan of non-reunification and to come back within 30 days to set a permanent plan for the minor child[ren].
>
> 2[7]. That both respondent parents have had their parental rights involuntarily terminated in Michigan. That neither testified in this matter.

The trial court adjudicated all minor children as neglected under N.C. Gen. Stat. § 7B-101(15) (2021). The trial court concluded DSS reunification efforts with Mother and Father was not required pursuant to N.C. Gen. Stat. § 7B-901(c) (2021), and a permanency planning hearing was scheduled within thirty days instead of the typical ninety days window. N.C. Gen. Stat. § 7B- 901(d). Mother and Father timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

Father argues several findings of fact are not supported by competent evidence. He also argues the evidence, taken as a whole, fails to support an adjudication of neglect.

Father and Mother both argue the trial court erred by ceasing reunification efforts in the initial dispositional orders. They argue the trial court improperly based its decision on the involuntary termination of Mother's and Father's parental rights for the five other children in Michigan.

Father and Mother both assert the district court abused its discretion by ordering no visitation between the parents and their children.

IV. Neglect Adjudication

[1] Father challenges several findings of fact, including findings of fact 12, 14-17 and 24. He argues those findings of fact are not supported by competent evidence. Without those facts, Father argues the findings of

fact only demonstrate a "raw suspicion" of domestic violence, and no evidence exists to demonstrate direct violence.

A. Standard of Review

In reviewing an adjudication order, this Court must determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations and internal quotation marks omitted). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

Unchallenged findings of fact are presumed to be supported by sufficient evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

B. Analysis

"The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2021).

1. Finding of Fact 12

Finding of fact 12 provides: "the social worker went to the residence and noticed the respondent mother to be visibly upset and that she acts differently when the respondent father is present for the conversation."

The DSS attorney asked the social worker about Mother's demeanor during direct examination. The social worker answered: "Most of the time when I went to the home [Mother] was upset and crying, just tearful most of the time." On redirect, the DSS attorney had the following exchange with the social worker:

> [DSS ATTORNEY]: All right. And on your first, I'm looking at your dictation again, and on your first trip out there [Father] was there when you first arrived but he had to leave for a little bit and you described that when he left . . . Respondent Mother, began to cry?
>
> [SOCIAL WORKER]: Yes.
>
> [DSS ATTORNEY]: She was upset. Do you remember that?
>
> [SOCIAL WORKER]: I do.

> [DSS ATTORNEY]: And did she state why she was upset?
>
> [SOCIAL WORKER]: She never really would. I remember specifically multiple home visits, me going and her crying for no alleged, I mean she never really gave me a reason as to why she was so upset.

The social worker testimony revealed her multiple personal observations and rationally-based perception regarding Mother's behavior. Finding of Fact 12 was based on clear, cogent, and convincing evidence. Father's argument is without merit.

2. Findings of Fact 14-17

Father also argues findings of fact 14-17 are not supported by clear, cogent, and convincing evidence. Those findings of fact collectively describe Officer Greene's encounter with Father in late 2020 and his follow-up encounter with Mother. Father asserts Officer Greene's testimony omits the date the domestic violence incident occurred, and the trial court's finding was not based on clear, cogent, and convincing evidence. Officer Greene testified to the following at trial:

> [DSS ATTORNEY]: Officer Greene, I'm going to show you a shuck, criminal file. Is this the one where you took out the charge?
>
> [OFFICER GREENE]: Yes, sir.
>
> [DSS ATTORNEY]: Okay. And can you just tell me the events of how that charge came about that day?
>
> [OFFICER GREENE]: That day we dealt with [Father]. He was in front of Tri-City Motel on the East, at the intersection of East Main Street and Ledbetter Road in our city limits of Spindale. We got a call about a subject being disruptive in the middle of the roadway. Myself and my partner, Officer Edwards, got there. [Father] was in the middle of the roadway shouting obscenities towards Tri-City Motel. We asked [Father] on several occasions to step out of the roadway. He didn't listen. We then placed him under arrest for [being] disruptive and shouting obscenities towards the hotel. And at the time during his arrest he made the comment to me that I need to go check on his wife at the residence and that's where the charge came from when I went to check on his wife at the residence after we had arrested him for the other charge.

> [DSS ATTORNEY]: Did you go, did you go check on his wife?
>
> [OFFICER GREENE]: I did, at 175 Illinois Street.
>
> [DSS ATTORNEY]: So what was the scene when you arrived?
>
> [OFFICER GREENE]: When I got there it was dark inside the residence, knocked on the door. [Mother] came to the door and let us in. Well, actually she didn't let us in. She knocked on the door and we walked [sic], was checking on her to make sure she was okay. Opened the door, seen her sitting on the couch. It was dark in there. She had her three children in there with her and she was beat up in her face, eye swelled up, bleeding from her lip, from the side of her eye. I asked her then did she need medical treatment. She didn't want medical treatment. She didn't want us to be there. I asked her what had happened and she stated that her and her husband, [Father], had got into an argument and he had assaulted her but she didn't want to press charges against him.
>
> [DSS ATTORNEY]: Did [Father], so was he being carried to the jail?
>
> [OFFICER GREENE]: Yes, he was already in custody at the county jail at the time, yes.
>
> [DSS ATTORNEY]: So when he told you to go check on his wife, I mean that's kind of an abnormal thing to say –
>
> [OFFICER GREENE]: It was.
>
> [DSS ATTORNEY]: – after being arrested. Did he offer any explanation?
>
> [OFFICER GREENE]: He didn't. He just stated a couple of times you may want to go check on my wife.

Officer Greene's testimony was based on personal observations and provided clear, competent and convincing evidence to support the trial court's findings of fact. Officer Greene was presented with the criminal file of the charges he initiated at trial and testified about what he had remembered from the encounter. Later, during the testimony of the social worker, the court acknowledged the incident had actually occurred in November 2020:

> THE COURT: Any other follow-ups? You said that it was January. Are we talking about January of '21?
>
> THE WITNESS: Yes.
>
> THE COURT: So after the criminal charge which was looks like November of –
>
> THE WITNESS: Yeah.

Whether the trial court's findings indicate the exact date the incident occurred does not affect the underlying validity of the findings. A minor error about the exact date upon which a domestic violence incident occurred is not prejudicial. *In re Clark*, 72 N.C. App. 118, 126, 323 S.E.2d 754, 759 (1984) (explaining any "ambiguity" in the evidence or findings of fact regarding the exact date of an assault are "minor" and "non-prejudicial"). Additionally, the children's court reports provide the exact day Father was arrested on 19 November 2020. Father's argument is without merit.

3. Finding of Fact 24

Father lastly asserts finding of fact 24, which provided Mother "denied the incident of domestic violence[,] but the social worker noticed a bruise on the respondent mother's arm," was based on improper hearsay evidence. Father's argument refers to the following exchange:

> [DSS ATTORNEY]: When you went to see the Respondent Mother when they got back from Michigan, did you observe any marks or bruises on her?
>
> [SOCIAL WORKER]: In reading the dictation on-call did. She observed a bruise on her arm.
>
> [DSS ATTORNEY]: Did anyone ask the Respondent Mother about the bruise?
>
> [SOCIAL WORKER]: They did. They asked what happened and –
>
> [FATHER'S ATTORNEY]: Objection. This is hearsay.
>
> THE COURT: Who – are you testifying about the conversation you had with her or –
>
> [SOCIAL WORKER]: No, just what was in dictation from the on-call social worker.
>
> [FATHER'S ATTORNEY]: I'd ask to *voir dire* (inaudible).

> THE COURT: I'm going to actually sustain the objection but, sure.

The record indicates Father objected to any testimony regarding what the social worker had *asked* Mother about the bruise, which the Court sustained as hearsay. Finding of fact 24 is instead based upon the statement elicited *prior* to the hearsay objection, which asserted the social worker had observed a bruise on Mother's arm. Father failed to object to this portion of the testimony at trial. His argument is overruled.

V. Ceasing Reunification Efforts

[2] Father and Mother each argue the trial court erred by ceasing reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c).

A. Standard of Review

If the trial court follows the factors in the statute and enters supported findings of fact, a trial court's permanency planning decision to cease reunification efforts pursuant N.C. Gen. Stat. § 7B- 901(c) is reviewed for an abuse of discretion. *In re B.R.W.*, 278 N.C. App. 382, 409, 863 S.E.2d 202, 221 (2021) (explaining "as long as the trial court considers the factors as required by N.C. Gen. Stat. § 7B-901(c) and makes the appropriate findings, we can find no abuse of discretion by the trial court's decision"), *aff'd*, 381 N.C. 61, 871 S.E.2d 764 (2022).

B. Analysis

Our General Assembly amended the statute governing dispositional hearings in 2015. The current version of the statute provides:

> (c) If the disposition order places a juvenile in the custody of a county department of social services, the court *shall direct* that *reasonable efforts for reunification* as defined in G.S. 7B-101 *shall not be required* if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling evidence warranting continued reunification efforts:
>
> . . .
>
> (2) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent.

N.C. Gen. Stat. § 7B-901(c)(2) (2021) (emphasis supplied).

Here, the trial court concluded: "a ground exists under N.C.G.S. 7B-901(c) and therefore a reunification plan is not appropriate in this

matter. That no compelling interest exists to order a plan of reunification." The court made no findings on reasons, culpability, or temporal proximity of that ground to conclude "no compelling interest exists to order . . . reunification," where the constitutional safeguards and the statute mandates "the court *shall direct* that *reasonable efforts for reunification*" be made. *Id.* (emphasis supplied).

Mother argues she was not bound by her case plan because she never signed it. The record on appeal does not contain any case plan which bears the Mother's signature. Father's attorney cross-examined the foster care worker on this issue. The social worker testified each time she contacted Mother and Father she would "go over their case plans and discuss[:] are you guys working on this, what can I help you with, do I need to call and make appointments, those types of things, so they were aware of what was on their case plans."

The social worker testified Father and Mother had failed to comply with the vast majority of their case plans, and neither parent had fully completed a single item therein. The trial court found Mother had initialed many of the aspects of her purported plan, but she had failed to follow up on or complete the requirements. The trial court also found the conditions which led to the children's placement in DSS custody still existed, and Mother and Father had failed to address the issues which led to the children's removal. DSS entered into evidence certified copies of the petitions and orders from Michigan terminating Mother's and Father's parental rights to other children.

Respondents have failed to show the trial court prejudicially erred by not ordering DSS's reunification efforts be continued under N.C. Gen. Stat. § 7B-901(c)(2). *In re B.R.W.*, 278 N.C. App. at 409, 863 S.E.2d at 221.

VI. Visitation

[3] Father and Mother both assert the district court abused its discretion by ordering no visitation with their children.

A. Standard of Review

If the trial court follows the factors and mandates in the statute and case law and enters supported findings of fact, "appellate courts review the trial court's dispositional orders of visitation for an abuse of discretion, with an abuse of discretion having occurred only upon a showing that the trial court's actions are manifestly unsupported by reason." *In re L.E.W.*, 375 N.C. 124, 134, 846 S.E.2d 460, 468 (2020) (citations, internal quotation marks, and alterations omitted); *accord In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015) ("We review a trial court's

determination as to the best interest of the child for an abuse of discretion.") (citation and quotation marks omitted).

"Abuse of discretion exists when the challenged actions are manifestly unsupported by reason." *In re S.R.*, 207 N.C. App. 102, 110, 698 S.E.2d 535, 541 (2010) (citation and internal quotation marks omitted); *see also In re A.J.L.H.*, 384 N.C. 45, 57, 884 S.E.2d 687, 695-96 (2023).

B. Analysis

N.C. Gen. Stat. § 7B-905.1 addresses visitation between a parent and their children who are removed from their home and taken from their custody:

> An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the *juvenile's placement outside the home shall provide for visitation* that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.

N.C. Gen. Stat. § 7B-905.1(a) (2021) (emphasis supplied).

An order that revokes custody or continues the placement of a juvenile outside the home must establish a visitation plan for parents unless the trial court finds "that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation." *In re T.H.*, 232 N.C. App. 16, 34, 753 S.E.2d 207, 219 (2014) (citation and internal quotation marks omitted); *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (explaining a trial court may only "prohibit visitation or contact by a parent . . . consistent with the juvenile's health and safety").

> [I]n the absence of findings that the parent has forfeited his or her right to visitation or that it is in the child's best interest to deny visitation, the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place, and conditions under which such visitation rights may be exercised. As a result, even if the trial court determines that visitation would be inappropriate in a particular case or that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.

In re K.C., 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009) (citation, internal quotation marks, and alterations omitted).

When wholly denying visitation between a parent and their child, this Court has previously considered factors such as: (1) whether the parent denied visitation has a "long history with CPS"; (2) whether the issues which led to the removal of the current child are related to previous issues which led to the removal of another child; (3) whether a parent minimally participated, or failed to participate, in their case plan; (4) whether the parent failed to consistently utilize current visitation; and, (5) whether the parent relinquished their parental rights. *See In re J.L.*, 264 N.C. App. at 422, 826 S.E.2d at 268 (analyzing a trial court's compliance with N.C. Gen. Stat. § 7B-905.1 regarding the visitation provisions awarded in a permanency planning order).

In addition to the parental protections contained in the statutes, the Supreme Court of the United States has repeatedly confirmed there is a fundamental and constitutional right of parents to the "care, custody and control" of their children. *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000) (citations omitted). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158,166, 88 L. Ed. 645, 652 (1944).

> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *See, e.g.*, *Stanley v. Illinois*, 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence

> historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.")[.]

Troxel, 530 U.S. at 66, 147 L. Ed. 2d at 57.

DSS must overcome the constitutional and "the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69, 147 L. Ed. 2d at 59 (citing *Parham*, 442 U.S. at 602, 61 L. Ed. 2d at 121). Mere disagreement with or failing to follow a DSS recommendation does not render a parent unfit, nor is necessarily conduct inconsistent with the rights of a parent. *Id.* Those decisions rest with the parent.

There is often "testimony in the record below that could have supported different factual findings and possibly, even [ ] different conclusion[s,] [b]ut an important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence." *In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019). While the trial court is "uniquely situated to make [a] credibility determination," and "appellate courts may not reweigh the underlying evidence presented at trial," the constitutional and "the traditional presumption that a fit parent will act in the best interest of his or her child" must be overcome by the State proving unfitness or conduct inconsistent with parental rights by the prescribed burden of proof. *Id.*; *Troxel*, 530 U.S. at 69, 147 L. Ed. 2d at 59 (citing *Parham*, 442 U.S. at 602, 61 L. Ed. 2d at 121).

Findings describing a parent's failure to engage with a case plan or services, even if previously agreed to, does not compel, but *may* support a finding that visitation is inconsistent with a child's health and safety and may indicate probability of future neglect without a change in the parent's circumstances, status, or conditions. *In re C.M.*, 273 N.C. App. 427, 432, 848 S.E.2d 749, 753 (2020).

Depending on proper prior notice to the parents, the adjudication, initial dispositional hearing, and permanency planning hearing can be held on the same day. *In re C.P.*, 258 N.C. App. 241, 244, 812 S.E.2d 188, 191 (2018). In *In re E.A.C.*, this Court stated: "Although the Juvenile Code has established a sequential hearing process, courts may combine and conduct the adjudicatory, dispositional, and permanency planning hearings on the same day." 278 N.C. App. 608, 614-15, 863 S.E.2d 433, 438 (2021) (citing *In re C.P.*, 258 N.C. App. at 244, 812 S.E.2d at 191).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and the North Carolina Constitution protects

"a natural parent's paramount constitutional right to custody and control of his or her children" and ensures that "the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citations omitted).

Here, the trial court failed to address whether Mother and Father utilized any prior visitation periods. *See In re J.L.*, 264 N.C. App. at 422, 826 S.E.2d at 268. The trial court had initially ordered visitation of the children with Mother and Father. Only Mother visited her children, while under DSS supervision. The record does not reflect any issues that arose *during* the visitation.

This matter is remanded to the trial court for further consideration. The trial court is instructed to make written and supported findings of fact regarding Mother's and Father's prior utilization of visitation. *Id.* The trial court may deny visitation *only* upon a finding that Mother or Father "has forfeited their right to visitation [and] it is in the child's best interest to deny visitation." *In re T.H.*, 232 N.C. App. 16, 34, 753 S.E.2d 207, 219 (2014) (quotation marks and citation omitted).

VII. Conclusion

The trial court's findings of fact related to the adjudication and disposition of the placement of the children outside the home are supported by clear, cogent, and convincing evidence. *In re Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365; *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676; *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. That portion of the order is affirmed.

The trial court's decision to cease DSS' statutorily required reunification efforts of the children with Father and Mother is not shown to be an abuse of discretion. *In re B.R.W.*, 278 N.C. App. at 409, 863 S.E.2d at 221. The record shows no efforts by Father to relieve the conditions which led to the children's removal from the home. That portion of the order is affirmed.

The disposition order concerning visitation is vacated and remanded to the trial court for further consideration of whether Mother and Father utilized the visitation previously awarded to them and for a determination of visitation. N.C. Gen. Stat. § 7B-905.1. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges ARROWOOD and RIGGS concur.

IN RE N.T.

[289 N.C. App. 149 (2023)]

IN THE MATTER OF N.T., K.M., A.C.

No. COA22-582

Filed 6 June 2023

1. Child Abuse, Dependency, and Neglect—permanency planning—ceasing reunification efforts—sufficiency of evidence

In a neglect matter, in which three minor children were removed from their parents' home after the youngest suffered from an unexplained, non-accidental skull fracture at one month old, the trial court did not err by entering a permanency planning review order allowing the department of social services (DSS) to cease reunification efforts with the parents where the court's factual findings—regarding the parents' lack of progress on their case plans and continued inability to explain the cause of the skull injury—were based on sufficient competent evidence, including testimony, reports, and letters from DSS, the children's guardian ad litem, the parents' therapists, and family members.

2. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to nonparent—constitutionally protected parental status

In a neglect matter, in which three minor children were removed from their parents' home after the youngest child suffered from an unexplained, non-accidental skull fracture at one month old, the trial court did not err by entering a permanency planning review order awarding guardianship of the children to their paternal grandparents. The court's determination that the parents had acted inconsistently with their constitutionally protected parental rights and were not fit and proper persons to have custody of the children was supported by findings that the parents still had not provided an explanation for how the youngest child got injured and had not fully complied with all aspects of their respective case plans. Those findings, in turn, were supported by competent evidence including testimony, reports, and letters from the department of social services, the children's guardian ad litem, the parents' therapists, and family members.

3. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to nonparent—best interests of the child

In a neglect matter, in which three minor children were removed from their parents' home after the youngest child suffered from an

unexplained, non-accidental skull fracture at one month old, the trial court did not abuse its discretion by determining that guardianship with family members would be in the children's best interests. The court's factual findings regarding bests interests were supported by the same competent evidence that supported the court's decision to end reunification efforts, including testimony, reports, and letters from the department of social services, the children's guardian ad litem, the parents' therapists, and family members.

Appeal by Respondent-Mother and Respondent-Father from order entered 28 March 2022 by Judge David E. Sipprell in Forsyth County District Court. Heard in the Court of Appeals 10 May 2023.

Melissa Starr Livesay, Assistant County Attorney, for Petitioner-Appellee Forsyth County Department of Social Services.

Ellis & Winters LLP, by James M. Weiss, for Appellee-Guardian ad Litem.

Anné C. Wright for Respondent-Appellant Mother.

Kimberly Connor Benton for Respondent-Appellant Father.

COLLINS, Judge.

Respondent-Mother and Respondent-Father appeal from the trial court's order ceasing reunification efforts with their minor children Nate, Kat, and Amy[1] and awarding guardianship of the children to Nate's paternal grandparents. We affirm.

I. Factual and Procedural Background

Mother is the biological mother of Nate, Kat, and Amy. Father is the biological father of Nate and the caretaker of Kat and Amy.[2]

Forsyth County Department of Social Services ("DSS") received a report on 6 June 2018 that one-month old Nate had been admitted to Brenner's Children's Hospital with an unexplained skull fracture. Although Mother and Father told DSS that they were the sole caretakers for Nate, neither parent could provide an explanation for Nate's injuries.

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1. We use pseudonyms to protect the identities of the minor children. *See* N.C. R. App. P. 42.

2. Kat and Amy's putative father is not a party to this appeal.

Nate was diagnosed with bilateral skull fractures, bilateral scalp hematomas, and a small extra-axial hemorrhage along the right cerebral portion of his brain. Dr. Stacy Thomas with Brenner's Children's Hospital opined that Nate's injuries were the result of non-accidental trauma.

DSS filed petitions on 11 June 2018 alleging that Nate was abused and neglected, and that Kat and Amy were neglected. DSS obtained non-secure custody of all three children and placed them with Nate's paternal grandparents. After a hearing on 17 October 2018, the trial court entered an order on 24 January 2019 adjudicating all three children neglected and ordering that custody remain with DSS.

Throughout the life of the case, Mother maintained that Nate's injuries were caused by birth trauma. Furthermore, at a permanency planning meeting on 4 April 2019, Father presented new information to DSS and the Guardian ad Litem ("GAL") regarding the possible cause of Nate's injuries:

> The Father placed [Nate's] car seat on the ground. [Amy] and [Kat] were in the back seat of the car arguing and the Father attempted to stop the girls from arguing when his foot hit [Nate's] car se[a]t and [Nate] slipped out of the car seat onto the ground. The Mother was in the passenger seat but did not witness the accident. The Mother asked what happened after hearing [Nate] cry, the Father stated nothing.

The trial court entered a permanency planning order on 15 May 2019, setting a primary plan of guardianship and a secondary plan of reunification. Following a hearing on 1 July 2020, the trial court entered an order on 31 August 2020 ceasing reunification efforts with Mother and Father, eliminating reunification as a secondary plan, and awarding guardianship of all three children to Nate's paternal grandparents. Both Mother and Father appealed, and this Court vacated the permanency planning order and remanded to the trial court to "determine whether Nate is an Indian Child for purposes of ICWA and to ensure compliance with ICWA's notice requirements." *In re N.T.*, 278 N.C. App. 811, 860 S.E.2d 343 (2021) (unpublished).

On remand, the trial court held an additional hearing on 21 February 2022 before entering an order on 28 March 2022 finding that ICWA did not apply, ceasing reunification efforts, eliminating reunification as a secondary plan, and awarding guardianship of all three children to Nate's paternal grandparents.

Mother and Father timely appealed.

II. Discussion

A. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re M.T.*, 285 N.C. App. 305, 322, 877 S.E.2d 732, 746 (2022) (quotation marks and citations omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.M.*, 276 N.C. App. 291, 299, 856 S.E.2d 904, 910 (2021) (quotation marks and citation omitted). "At the disposition stage, the trial court solely considers the best interests of the child. . . ." *In re J.H.*, 373 N.C. 264, 268, 837 S.E.2d 847, 850 (2020) (quotation marks and citation omitted).

The trial court's findings of fact are conclusive on appeal if supported by any competent evidence, notwithstanding contrary evidence in the record. *In re C.M.*, 273 N.C. App. 427, 430, 848 S.E.2d 749, 751-52 (2020). The trial court's conclusions of law are reviewed de novo. *In re K.L.*, 254 N.C. App. 269, 272-73, 802 S.E.2d 588, 591 (2017).

B. Reunification

[1] Mother and Father both contend that the trial court erred by ceasing reunification efforts and eliminating reunification as a permanent plan because the findings of fact made pursuant to N.C. Gen. Stat. § 7B-906.2 are not supported by competent evidence.

At a permanency planning hearing, reunification shall be a primary or secondary plan unless, inter alia, the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. N.C. Gen. Stat. § 7B-906.2(b) (2022). The trial court must also make written findings of fact concerning:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2022).

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

> 39. The [c]ourt ordered the Respondent Mother . . . to comply with all of the following in order to correct the circumstances which caused the children's removal from her care and custody and adjudication if she wished to be reunified with the children:
>
> a. **Notify FCDSS of any changes in address, telephone number, income, employment, or household composition within 24 hours:**
>
> [Mother] has reported that none of this information has changed with the exception of her having a baby in January 2022. Since this case has been pending and [Nate], [Kat], and [Amy] have been removed, [Mother] has had three children.
>
> b. **Comply with any recommendations made as a result of the parenting capacity assessment completed and provide any and all documentation regarding how [Nate] received his injuries other than birth trauma:**
>
> [Mother] reports that she continues to attend individual counseling with Ms. Anne Doherty monthly. However, when asked if therapy was helpful or beneficial, [Mother] responded that it was not beneficial or helpful, but stated she "will keep trying it." Previously, [Mother] signed a limited release which only allowed her attorney to obtain her records. Therefore, FCDSS has never received any mental health records to be able to verify that [Mother] is attending therapy or the nature of objective of the therapy attended.
>
> On February 8, 2022, FCDSS Social Work Supervisor Burleson received release of information forms from Attorney Mortis for [Mother's] mental health records. Supervisor Burleson then requested records from Ms. Doherty. To date, FCDSS has not received any records.
>
> As of January 2022, [Mother] has not provided any additional information or documentation to FCDSS regarding how [Nate] received his injuries, other than birth trauma and the incident with the car seat that was provided to the [c]ourt at the April 12, 2019 Permanency Planning Hearing.

On February 4, 2020, FCDSS received documentation from Stokes County DSS, the county in which [Mother] and [Father] have resided since after the children's removal. The documentation shows that [Mother] told a CPS worker on September 12, 2020, "I don't know how he got the injury. I guess I should have just told them my other kid did it or something. I can't lie." More recently, on June 2, 2020, [Mother] reported that she believes that [Nate] has a medical disorder that would account for his injuries. She reported that she continues to believe that birth trauma could be a cause of his injuries.

As of January 2022, [Mother] continues to report to FCDSS that birth trauma is the cause of [Nate's] injuries.

c. **Maintain a safe and stable living environment:**

FCDSS went out to the home of [Father] and [Mother] on November 24, 2021 and observed the parents in the home with two toddlers. The home was sufficiently baby-proofed, however there were stacks of items throughout the home that were out of reach of the children at that time, however, could pose an issue as the children grow and become more mobile. The family is making plans to repurpose their garage into a room for the older girls to share, there is a bedroom for the three children who remain in [Father] and [Mother's] custody, and a bedroom for [Nate].

In her testimony, Supervisor Burleson acknowledged that she observed no safety concern in [Mother and Father's] home. However, Supervisor Burleson was not at the home to assess the safety and welfare of the three children who reside with [Mother] and [Father]. Supervisor Burleson's observation was that the home was a physically safe location for the children and there were no apparent issues with the two children who were present in the home at the time of her visit.

d. **Demonstrate the ability to meet the basic needs of [Amy], [Kat], and [Nate]:**

[Nate's paternal grandparents] report that the parents have provided items for the children, such as clothing, snacks, and toiletries and financial support.

e. **Demonstrate skills learned in parenting classes during visitation with [Amy], [Kat], and [Nate]:**

Per reports of the children, caregivers and parents, the visits have been going well and earlier in COVID it was harder to have visits in person. The family reports that they have 8 hours of visitation per week, however, when looking at the closing court order from July 2020, the parents were to get a minimum of 4 hours per week.

[Nate's paternal grandparents] have expressed that the 8 hours per week poses a hardship at times as they want to follow the [c]ourt's order, however with the parents' work schedules, 8 hours per week presents a challenge. FCDSS would be recommending no more than 4 hours per week.

[Mother] and [Father] try to make valuable use of the time to engage the older girls in activities and crafts. [Father], due to his work schedule at nights, calls the children in the morning before going to school and speaks with them.

. . . .

41. Around June 2, 2020, [Mother] reported that she was going monthly for counseling, but she stopped for two months. At that time in regards to her sessions, [Mother] reported that "They're going," "I talk to her," and "We're working on stuff." [Mother] would not provide more information to FCDSS about what she is learning in sessions or her therapeutic goals.

. . . .

44. The Respondent Father . . . was ordered to comply with all of the following in order to correct the circumstances which caused his child's removal from his care and custody and adjudication if he wished to be reunified:

a. **Notify FCDSS of any changes in address, telephone number, income, employment, or household composition within 24 hours:**

[Father] reports the only change for him is his employment. He is now employed . . . driving a forklift and currently works 2nd shift as of September 2021.

b. **Comply with any recommendations made as a result of the parenting capacity assessment completed and provide any and all documentation regarding how [Nate] received his injuries other than birth trauma:**

[Father] reports that he continues to be engaged with Mr. George Hage with Counseling and Spirituality and going monthly. FCDSS has inquired about the releases for Mr. Hage and [Father] reported FCDSS would have to get those from his attorney.

As of February 18, 2022, FCDSS had not received any releases for [Father], therefore has no records for verification that he is attending therapy or the nature or goals of any therapy attended.

[Father] has not provided any additional information or documentation to FCDSS regarding how [Nate] received his injuries, other than birth trauma and the incident with the car seat that was provided to the [c]ourt at the April 12, 2019 Permanency Planning Hearing. [Father] concurs with [Mother] that [Nate] may have a medical condition or that the injuries in question were caused by birth trauma.

c. **Maintain a safe and stable living environment:**

FCDSS went out to the home of [Father] and [Mother] on November 24, 2021 and observed the parents in the home with 2 toddlers. The home was sufficiently baby-proofed, however there were stacks of items throughout the home that were out of reach of the children at that time, however, could pose an issue as the children grow and become more mobile. The family is making plans to repurpose their garage into a room for the older girls to share, there is a bedroom for the 2 toddler and now new infant to share and then a bedroom for [Nate]. The home is in good condition and was appropriate.

d. **Demonstrate the ability to meet the basic needs of [Amy], [Kat], and [Nate]:**

[Nate's paternal grandparents] report that the parents have provided items for the children, such as clothing, snacks, and toiletries and financial support.

e. **Demonstrate skills learned in parenting classes during visitation with [Amy], [Kat], and [Nate]:**

Per reports of the children, caregivers and parents, the visits have been going well and earlier in COVID it was harder to have visits in person. The family reports that they have 8 hours of visitation per week, however, when looking at the closing court order from July 2020, the parents were to get a minimum of 4 hours per week. The relatives have expressed that the 8 hours per week poses a hardship at times as they want to follow the courts order, however if the parents' work schedules, 8 hours per week presents a challenge. FCDSS would be recommending no more than 4 hours per week. [Father] and [Mother] try to make valuable use of the time to engage the older girls in activities and crafts. [Father], due to his work schedule at nights, calls the children in the morning before going to school and after school and speaks with them.

. . . .

46. [Father] reported to FCDSS that he continues to be engaged in counseling with Mr. George Hage and he attends monthly. [Father] would not provide more information about what he is learning in sessions and or the nature or goals of his therapy. In November 2021, [Father] reported to FCDSS Social Work Supervisor Dana Burleson that he doesn't feel therapy is beneficial, stating "It provides a little bit of help towards other topics but not towards this situation." FCDSS has not received releases by [Father] to request records from Mr. Hage. FCDSS has also reached out to his attorney for assistance in obtaining signed releases. As of February 18, 2022, FCDSS has not received signed releases or records from Mr. Hage. During the hearing on February 21, 2022, [Father] provided documentation to FCDSS regarding his work with Mr. Hage.

. . . .

58. FCDSS has had difficulty throughout the life of this case in communicating with the parents. The parents have not willingly provided information when requested by FCDSS. Despite this difficulty, FCDSS has received information that the parents complied with classes and assessments.

. . . .

105. The minor children cannot return to the home or care of a parent immediately, within the next six months, or within any reasonable period of time.

106. The immediate return of the minor children to the home of a parent would be contrary to their health, safety, and welfare.

107. Further reunification efforts would be clearly unsuccessful and inconsistent with the minor children's health and safety. The children have been outside of the parents' home and care for approximately 1,350 days. The cause of [Nate's] injuries remains unknown. The causal or contributing factors leading up to and surrounding [Nate's] injuries remain unknown. It is unlikely more information will be gained by the passage of more time, and further delay to the children's permanence is not in their best interests.

. . . .

114. Pursuant to NCGS §7B-906.2, the permanent plan of reunification would not be successful because:

a. The parents have not made adequate progress within a reasonable period of time towards the objective of reunification. While the parents have attended services, the intended purpose and benefit of the services has not been achieved; IE: The parents have attended therapy sessions. However, the therapy sessions have not examined the causes or circumstances surrounding [Nate's] injuries while in the parents' care.

b. The parents have not been cooperative or forthcoming with FCDSS or the GAL program. FCDSS has been unable to effectively communicate and gain necessary information from the parents.

c. The parents are present and available to the [c]ourt today. The parents have not been regularly available to FCDSS and the GAL outside of court.

d. The parents have acted in a manner that is inconsistent with the health or safety of the minor children. After more than 1,300 [days] outside the home and care of the Respondent Parents, there is no information about the cause of [Nate's] injuries or the

> circumstances which led to those injuries while in the care of [Mother] and [Father].

In making these findings, the trial court considered testimony from DSS Social Work Supervisor Dana Burleson, GAL District Administrator Melissa Bell, Nate's paternal grandfather, Mother, and Father. The trial court also considered reports from DSS, the GAL, and Mother. Finally, the trial court considered letters from Ann Doherty, Mother's therapist, and George Hage, Father's therapist. This competent evidence supports the trial court's findings of fact, even if there exists contradictory evidence in the record. *In re C.M.*, 273 N.C. App. at 430, 848 S.E.2d at 751-52; *see also In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) ("[A]n important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial.").

Accordingly, the trial court did not err by ceasing reunification efforts because its findings of fact under N.C. Gen. Stat. § 7B-906.2 are supported by competent evidence.

C. Guardianship

1. Unfitness/Acting Inconsistently with Constitutionally Protected Status

[2] Mother contends that "[t]he trial court should not have applied a best interest standard as in doing it failed to protect [Mother's] constitutional rights as a parent." Similarly, Father contends that the trial court erred by applying "the best interest of the child standard in awarding guardianship of Nate to the paternal grandparents as there was insufficient evidence his father was unfit or had acted inconsistently with his constitutionally protected rights as a parent."

"A parent has an interest in the companionship, custody, care, and control of his or her children that is protected by the United States Constitution." *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010) (quotation marks, brackets, and citations omitted). "So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by the application of the 'best interest of the child' standard." *Id.*, 704 S.E.2d at 503 (citation omitted). "However, a parent can forfeit their right to custody of their child by unfitness or acting inconsistently with their constitutionally protected status." *In re J.M.*, 276 N.C. App. at 307, 856 S.E.2d at 915 (citation omitted). "Findings in

support of the conclusion that a parent acted inconsistently with the parent's constitutionally protected status are required to be supported by clear and convincing evidence." *In re K.L.*, 254 N.C. App. at 283, 802 S.E.2d at 597 (citation omitted).

Here, the trial court made the following relevant findings:

> 116. The Respondent [Mother] is not a fit and proper person to have the care, custody, and control of the minor children concerned. [Nate], [Kat], and [Amy] were adjudicated neglected individuals after [Nate] sustained non-accidental injuries in the care of [Mother] and [Father]. The cause of and circumstances surrounding those injuries remain unknown and unaddressed.
>
> 117. The Respondent [Mother] has acted in a manner that is inconsistent with her constitutionally protected status as a parent. While [Mother] has occasionally provided financial support and necessary items for the care of these three minor children, [Nate's paternal grandparents] have assumed the primary responsibility for financially supporting and meeting the children's needs since June 11, 2018.
>
> 118. The Respondent Father . . . is not a fit and proper person to have the care, custody, and control of the minor child [Nate]. [Nate] and his siblings [Kat] and [Amy] were adjudicated neglected juveniles after [Nate] sustained non-accidental injuries in the care of [Mother] and [Father]. The cause of and circumstances surrounding those injuries remain unknown and unaddressed.
>
> 119. The Respondent [Father] has acted in a manner that is inconsistent with his constitutionally protected status as a parent. While [Father] has occasionally provided financial support and necessary items for the care of [Nate], [Nate's paternal grandparents] have assumed the primary responsibility for financially supporting and meeting the child's daily needs since June 11, 2018.

Although labeled as findings of fact, the trial court's determinations that Mother and Father were unfit and acting inconsistently with their constitutionally protected status are conclusions of law that we review de novo. *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) ("If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*." (citation omitted)).

To support these conclusions, the trial court made the following relevant findings of fact:

> 46. [Father] reported to FCDSS that he continues to be engaged in counseling with Mr. George Hage and he attends monthly. [Father] would not provide more information about what he is learning in sessions and or the nature or goals of his therapy. In November 2021, [Father] reported to FCDSS Social Work Supervisor Dana Burleson that he doesn't feel therapy is beneficial, stating "It provides a little bit of help towards other topics but not towards this situation." FCDSS has not received releases by [Father] to request records from Mr. Hage. FCDSS has also reached out to his attorney for assistance in obtaining signed releases. As of February 18, 2022, FCDSS has not received signed releases or records from Mr. Hage. During the hearing on February 21, 2022, [Father] provided documentation to FCDSS regarding his work with Mr. Hage.
>
> . . . .
>
> 59. FCDSS continues to have the same primary concern that inadequate information has been provided as to how [Nate] was injured. Without this information, FCDSS cannot adequately assess how to correct safety concerns in the parents' care or confirm that the children would now be safe if returned to the home and care of [Mother] and [Father].
>
> . . . .
>
> 92. The therapy letter provided by [Mother] reflects that her goals in therapy were "the importance of her professional communication even in a situation where she reported feeling lack of control as well as confusion and helplessness." [Mother] acknowledged the purpose of that goal was for her to be able to communicate with the Social Workers about the case without becoming angry. The second therapy goal was "adjustment to the loss of her children." [Mother] acknowledged the purpose of that goal was for her to be able to manage her feelings regarding the placement of her children in DSS custody.
>
> 93. Nothing in the letter from clinician Ann Doherty reflects that [Mother] was working on therapy goals related to exploring the effects of stress around the time

of [Nate's] injuries in 2018 or exploring the circumstances surrounding [Nate's] injuries.

94. The letter provided by [Father] reflects that his goals in therapy related to "developing a sense of peace and acceptance of the separation of his three children from him," and managing symptoms of anxiety and "occurrences of depression."

95. It appears that [Father] did speak with his therapist during two sessions on February 22, 2020 and January 15, 2022 about [Nate's] injuries. However, it appears the information shared was limited to the theory of the fall from the car seat, as presented in 2019. Counselor Hage wrote: "[W]e have also dealt with concerns and stressors related to his son's fall. [Father] reports no major incident or disorder with [Nate] from his birth up until the incident. He certainly regrets the accident happening with the child due to not buckling him with the seat belt into his car seat . . . I see the accident as something that happened in the split seconds of sudden distraction of two children fighting in the car, thereby, putting the parents in an insupportable position."

96. Nothing indicates that new information has been gained about the circumstances surrounding [Nate's] injuries or that the circumstances surrounding [Nate's] injuries were ever addressed through the Respondent Father's participation in therapy.

97. From 2019 to the present, neither [Mother] nor [Father] have provided a sufficient explanation about how [Nate] was injured while in their care, accepted responsibility for the injuries, or provided insight into the circumstances surrounding [Nate's] injuries.

98. In the absence of information about how [Nate] sustained the injuries in question and with no information about the causal and contributing factors surrounding those injuries, the [c]ourt is unable to find that the circumstances which led to the removal of [Nate], [Kat], and [Amy] from the home and care of [Mother] and [Father] and the children's subsequent adjudication have been adequately corrected such that the children can safely reunify with the parents.

The trial court made these findings after considering testimony from DSS Social Work Supervisor Dana Burleson, GAL District Administrator Melissa Bell, Nate's paternal grandfather, Mother, and Father; reports from DSS, the GAL, and Mother; and letters from Ann Doherty, Mother's therapist, and George Hage, Father's therapist. Accordingly, clear and convincing evidence supports the trial court's findings of fact.

These findings of fact, in turn, support the trial court's conclusions of law that Mother "is not a fit and proper person to have the care, custody, and control of the minor children" and that Mother "acted in a manner that is inconsistent with her constitutionally protected status as a parent." Furthermore, these findings of fact support the trial court's conclusions of law that Father "is not a fit and proper person to have the care, custody, and control of the minor child" and that Father "acted in a manner that is inconsistent with his constitutionally protected status as a parent."

2. Best Interests Determination

[3] Mother contends that "[t]he trial court's decision regarding the children's best interest is not supported by reason and is an abuse of the trial court's discretionary latitude at disposition." Furthermore, Father contends that the trial court's "determination of Nate's best interest is not supported by reason and is an abuse of the court's discretion at disposition."

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

> 85. [Nate] entered FCDSS custody in June 2018 after sustaining serious, life threatening injuries due to non-accidental means. The cause of the injuries, as identified by Dr. Thomas, was blunt force trauma. [Nate's] siblings [Kat] and [Amy] were present in the same home and in the care of the same adults as [Nate] when he was injured.
>
> . . . .
>
> 87. Since the children entered FCDSS custody, [Mother] and [Father] have given two explanations for how [Nate's] injuries occurred: birth trauma and a fall from a car seat.
>
> 88. Based upon the record, the theory of birth trauma was previously presented. The [c]ourt did not accept that theory, as it directed the parents to present any explanations they could offer besides birth trauma.

89. In 2019, [Father] identified a fall from a car seat onto the ground as the cause of the injuries [Nate] sustained. In 2019, FCDSS and the GAL followed up on this reported cause with Dr. Thomas, who advised the injuries were highly unlikely to have been caused by such a fall and identified blunt force trauma as the cause of the injuries.

90. At the hearing today, February 21, 2022, when asked how [Nate] sustained the injuries in question, [Mother] did not provide any new or additional information. [Mother] again referenced birth trauma. [Mother] did not elaborate as to why she believed [Nate's] injuries resulted from birth trauma, nor did she present any new evidence to support the birth trauma theory. [Mother] stated she was unwilling to exclude birth trauma as a cause of these injur[i]es until such time as she personally spoke to a doctor about her beliefs.

91. At the hearing today, February 21, 2022, when asked how [Nate] sustained the injuries in question, [Father] denied the injuries were the result of non-accidental trauma. He identified an accidental explanation, the fall from the car seat as presented in 2019. [Father] did not present any new or additional evidence or information to support his theory that car seat incident caused the injuries.

. . . .

96. Nothing indicates that new information has been gained about the circumstances surrounding [Nate's] injuries or that the circumstances surrounding [Nate's] injuries were ever addressed through the Respondent Father's participation in therapy.

97. From 2019 to the present, neither [Mother] nor [Father] have provided a sufficient explanation about how [Nate] was injured while in their care, accepted responsibility for the injuries, or provided insight into the circumstances surrounding [Nate's] injuries.

98. In the absence of information about how [Nate] sustained the injuries in question and with no information about the causal and contributing factors surrounding those injuries, the [c]ourt is unable to find that the circumstances which led to the removal of [Nate], [Kat], and

> [Amy] from the home and care of [Mother] and [Father] and the children's subsequent adjudication have been adequately corrected such that the children can safely reunify with the parents.
>
> . . . .
>
> 123. It is in the best interests of the minor children and will promote the children's health, safety, and welfare to be placed into the Guardianship of [Nate's paternal grandparents].
>
> . . . .
>
> 128. The plan of care which is in the best interests of [Nate], [Kat], and [Amy] is for [Nate's paternal grandparents] to be appointed as their Guardians, and as Guardians for [Nate's paternal grandparents] to have the physical and legal custody of the children, with visitation . . . .

These findings are supported by the same competent evidence that supported the trial court's findings regarding reunification efforts. Accordingly, the trial court did not abuse its discretion by awarding guardianship to Nate's paternal grandparents.

III. Conclusion

The trial court did not err by ceasing reunification efforts, eliminating reunification as a permanent plan, and granting guardianship of Nate, Kat, and Amy to Nate's paternal grandparents. Accordingly, we affirm.

AFFIRMED.

Judges DILLON and STADING concur.

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

No. COA22-882

Filed 6 June 2023

1. Appeal and Error—interlocutory order—partial dismissal—substantial right—possibility of inconsistent verdicts

In an action arising from a contractual dispute in which a sports marketing company (plaintiff) sued an intercollegiate sports association (defendant) to recover money owed under their contract and alleged in its complaint claims for breach of contract, unfair and deceptive trade practices, violation of the Wage and Hour Act, and unjust enrichment, where the trial court granted defendant's motion to dismiss the latter two claims but allowed plaintiff's other two claims to proceed, the court's interlocutory order was immediately appealable as affecting a substantial right because it created the risk of inconsistent verdicts from two possible trials that would involve the same factual issues.

2. Employer and Employee—contractual dispute—Wage and Hour Act claim—definition of "employee"—not inclusive of corporations

In an action arising from a contractual dispute in which a sports marketing company (plaintiff) sued an intercollegiate sports association (defendant) to recover money owed under their contract, the trial court properly dismissed plaintiff's claim under the Wage and Hour Act because plaintiff, as a corporate entity, was not an individual and therefore was not defendant's "employee" as defined by the Act.

3. Unjust Enrichment—essential elements—sufficiency of allegations—alternative to breach of contract

In an action arising from a contractual dispute in which a sports marketing company (plaintiff) sued an intercollegiate sports association (defendant) to recover money owed under their contract, the trial court erred by denying plaintiff's claim for unjust enrichment, where plaintiff sufficiently alleged each element of the claim in its complaint, including that plaintiff conferred a measurable benefit on defendant by soliciting potential sponsors and procuring sponsorship agreements, that defendant was aware of and consciously accepted the benefits provided by plaintiff, and that plaintiff did not

provide the benefits officiously or gratuitously. Despite defendant's argument, the fact that plaintiff asserted its claim for unjust enrichment as an alternative to its breach of contract claim was not an appropriate basis for dismissal.

Appeal by Plaintiff from an order entered 27 May 2022 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 April 2023.

Devore, Acton & Stafford, P.A., by Joseph R. Pellington, Corey V. Parton, and Walton H. Walker, for Plaintiff.

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

WOOD, Judge.

We are asked to review an interlocutory order granting a dismissal, pursuant to Rule 12(b)(6), of claims alleging unjust enrichment and violations of the Wage and Hour Act. For the reasons outlined below, we affirm the dismissal of the Wage and Hour Act claim and reverse the dismissal of the unjust enrichment claim.

I. Background

The Intercollegiate Men's Lacrosse Coaches Association ("IMLCA") entered a contract with Jessey Sports, LLC in 2020. The Contract provided that Jessey Sports would obtain sponsorships, grants, and other sources of revenue for the IMLCA for a term of five years; however, either party could terminate the contract upon ninety days' notice. The IMLCA agreed to pay Jessey Sports $3,000 per month and thirty percent of net revenue received from sponsorships and grants obtained by Jessey Sports.

In August 2021, the IMLCA notified Jessey Sports of its intent to terminate their contract. On 28 October 2021, Jessey Sports filed an action to recover money allegedly owed for the months of July through November under allegations of breach of contract, unfair and deceptive trade practices, violation of the Wage and Hour Act, and unjust enrichment. The IMLCA moved to dismiss these four claims under Rule 12(b)(6) for failure to state claims upon which relief could be granted. On 27 May 2022, the trial court denied the motion to dismiss the breach of contract and unfair and deceptive trade practices claims but granted the motion to dismiss the Wage and Hour Act and unjust enrichment

claims. Jessey Sports appeals from the order granting the IMLCA's motion to dismiss these latter two claims.

II. Jurisdiction

[1] Though the trial court dismissed the Wage and Hour Act and unjust enrichment claims, it did not dismiss the remaining two claims. The trial court's dismissal order, therefore, is not a final judgment upon which appeal as of right may ordinarily be taken. N.C. Gen. Stat. § 7A-27(b)(1) (2022). "A judgment is final which decides the case upon its merits, without any reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court." *Sanders v. May*, 173 N.C. 47, 49, 91 S.E. 526, 527 (1917) (citation omitted). Instead, the order is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

There are two circumstances under which an interlocutory order may be appealed.

> First, the trial court may certify [pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)] that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.

Davis v. Davis, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (internal citations and quotation marks omitted).

The trial court here did not certify the order for immediate appeal; we therefore look to see if the dismissal order "affects some substantial right." *Id.* Jessey Sports asserts that the order affects a substantial right in that it presents the risk of inconsistent verdicts stemming from two separate trials upon the same facts and issues. We agree.

"[T]he right to avoid the possibility of two trials on the same issues is a substantial right that may support immediate appeal." *Alexander Hamilton Life Ins. Co. of Am. v. J&H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 701, 543 S.E.2d 898, 900 (2001) (citing *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)). However, this rule is abrogated when "there are no factual issues common to the claim determined and the claims remaining." *Id.*

We agree with Plaintiff that the Wage and Hour Act claim involves the same underlying facts as the breach of contract claim. These common facts include the parties' contractual relationship with each other and the same alleged misconduct.

As in *Panos v. Timco Engine Center, Inc.*, "[i]f we dismiss Plaintiff's appeal with respect to the N.C. Wage and Hour Act claim and a later appeal is successful, Plaintiff will be required to present the same evidence of Defendant's breach of the employment agreement that he will present on his remaining breach of contract claim." 197 N.C. App. 510, 515, 677 S.E.2d 868, 873 (2009). This Court reviewed that interlocutory order due to the risk that "the same evidence [might] be presented to different juries on the same factual issue, which could result in inconsistent verdicts." *Id.* We likewise hold that an appeal of the trial court's dismissal order here affects a substantial right due to the risk of inconsistent verdicts from two different trials on the same factual issues and therefore review the merits of Plaintiff's appeal pursuant to N.C. Gen. Stat. § 7(b)(3)(a). In our discretion, we also address the merits of the unjust enrichment claim "[i]n the interests of judicial economy." *Id.*

III. Standard of Review

We review *de novo* orders granting motions to dismiss under Rule 12(b)(6). *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009). When reviewing an order granting a motion to dismiss under Rule 12(b)(6), we must determine whether "the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Block v. Cnty. of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E2d 838, 840 (1987)). Dismissal is proper "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

IV. Discussion

Jessey Sports argues that it was an "employee" of the ICMLA such that the trial court erred in dismissing Jessey Sports' claim under the Wage and Hour Act. Jessey Sports further argues that the trial court

erred in dismissing its claim for unjust enrichment despite the presence of an express agreement between the parties. We review each of these arguments in turn.

A. Wage and Hour Act

[2] The Wage and Hour Act applies to employer-employee relationships. N.C. Gen. Stat. § 95-25.1(b) (2022). Under this act, "employer" is defined broadly as "any person acting directly or indirectly in the interest of an employer in relation to an employee." § 95-25.2(5). A "person," as used here, can include "an individual, partnership, association, corporation," and other entities. § 95-25.2(11). An "employee," by contrast, is defined more narrowly as "any *individual* employed by an employer." § 95-25.2(4) (emphasis added). Jessey Sports argues that, though it is a limited liability corporation, it is considered an "individual" and thus an "employee" under the Wage and Hour Act so as to be afforded the same benefits. Put another way, Jessey Sports claims to have been an employee of the ICMLA. We disagree.

This Court and our Supreme Court have never held that a corporate entity is considered an "individual" under the Wage and Hour Act, and we refuse to do so now. Indeed, to do so would subvert the plain language of the statute. Though the Wage and Hour Act includes entities such as corporations in its definition of "employer," entities are notably absent from the definition of "employee." This interpretation is consistent with this Court's holding that "a corporation is not an individual under North Carolina law." *HSBC Bank USA v. PRMC, Inc.*, 249 N.C. App. 255, 259, 790 S.E.2d 583, 586 (2016).

Jessey Sports attempts to support its position by citing to certain federal caselaw that hold a corporation could be considered an employee under the similar Fair Labor Standards Act. However, we find this reasoning unpersuasive. Jessey Sports lacked standing to bring this claim, and the trial court properly dismissed it.

B. Unjust Enrichment

[3] Jessey Sports next argues that the trial court improperly dismissed its claim for unjust enrichment. Generally, "where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation." *Krawiec v. Manly*, 370 N.C. 602, 615, 811 S.E.2d 542, 551 (2018) (quoting *Atl. Coast Line R.R. Co. v. State Highway Comm'n*, 268 N.C. 92, 95-96, 150 S.E.2d 70, 73 (1966)). Our Supreme Court in *Booe v. Shadrick* summarized the law supporting a claim for unjust enrichment as follows:

> A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law. A quasi contract or a contract implied in law is not a contract. The claim is not based on a promise but is imposed by law to prevent an unjust enrichment. If there is a contract between the parties the contract governs the claim and the law will not imply a contract.

322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). "Under a claim for unjust enrichment, a plaintiff must establish certain essential elements: (1) a measurable benefit was conferred on the defendant, (2) the defendant consciously accepted that benefit, and (3) the benefit was not conferred officiously or gratuitously." *Lake Toxaway Cmty. Ass'n v. RYF Enters., LLC*, 226 N.C. App. 483, 490, 742 S.E.2d 555, 561 (2013) (quoting *Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co.*, 211 N.C. App. 252, 259-60, 712 S.E.2d 670, 677 (2011)).

Here, Jessey Sports included in its complaint allegations that it

> conferred upon [the IMLCA] a measurable benefit by providing services including, but not limited to, identifying and soliciting potential sponsors, negotiating and procuring sponsorship agreements, maintaining and enhancing relationships with current sponsors, and other performed work and conferred benefits as stated herein.
>
> [The IMLCA] was aware that [Jessey Sports] was furnishing it valuable services and consciously accepted, and continues to accept, the benefits of Plaintiff's work and performance.
>
> [Jessey Sports] did not provide its services to [the IMLCA] officiously or gratuitously.

From these, and other allegations, Jessey Sports asked that the trial court "[f]ind that [the IMLCA] committed breach of contract against [Jessey Sports] or, alternatively, that [the IMLCA] was unjustly enriched to [Jessey Sports's] detriment."

Taken as true, these allegations support the necessary elements for a claim of unjust enrichment and would allow the claim to survive a motion to dismiss under Rule 12(b)(6).

The IMLCA argues that the trial court properly dismissed the unjust enrichment claim because Jessey Sports also pleaded claims, such as the breach of contract claim, that alleged an express contract. Thus, the IMLCA argues that Jessey Sports cannot plead both unjust enrichment and

breach of contract where one theory requires an implied contract and the other requires an express contract. We disagree. In actions alleging breach of contract, plaintiffs may also plead unjust enrichment "in the alternative." *James River Equip., Inc. v. Mecklenburg Utils., Inc.*, 179 N.C. App. 414, 419, 634 S.E.2d 557, 560 (2006). This is consistent with our "[l]iberal pleading rules [which] permit pleading in the alternative." *Catoe v. Helms Constr. & Concrete Co.*, 91 N.C. App. 492, 498, 372 S.E.2d 331, 335 (1988).

Jessey Sports pleaded unjust enrichment "alternatively" to its breach of contract claim and alleged facts sufficient to support an unjust enrichment claim. We therefore hold that the trial court improperly dismissed Jessey Sports's claim for unjust enrichment.

V. Conclusion

The trial court properly dismissed Jessey Sports's Wage and Hour Act claim. However, it erred in dismissing the unjust enrichment claim for failure to state a claim upon which relief could be granted where the claim was made in the alternative to a breach of contract claim and otherwise alleged facts sufficient to support the claim. Consequently, we affirm the dismissal of the Wage and Hour Act claim, reverse the dismissal of the unjust enrichment claim, and remand to the trial court for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges GRIFFIN and GORE concur.

KASSEL v. RIENTH

[289 N.C. App. 173 (2023)]

RICHARD KASSEL, AND WIFE, SUSAN KASSEL, PLAINTIFFS
v.
KENNETH RIENTH, AND WIFE, CATHERINE RIENTH, DEFENDANTS

No. COA22-825

Filed 6 June 2023

1. Real Property—real estate purchase contract—consent order—no judicial determination of parties' rights

The trial court did not err by interpreting a consent order as a court-approved standard real estate purchase contract subject to the rules of contract interpretation (rather than a court order enforceable only through contempt powers) where the plain language of the consent order and the facts of the case showed that the judge who signed the order merely approved the parties' agreement and set it out in a judgment, without making a judicial determination of the parties' respective rights. The judge's use of terminology like "upon greater weight of the evidence" and "concludes as a matter of law" did not outweigh the overwhelming evidence that the judge merely approved the agreement of the parties.

2. Real Property—real estate purchase contract—consent order—reasonable time to perform

Having properly interpreted a consent order as a court-approved standard real estate purchase contract subject to the rules of contract interpretation, the trial court did not err by interpreting the consent order—which contained a provision that closing would take place sixty days after the filing of the consent order—as allowing a reasonable time to perform where it did not contain a "time is of the essence" clause.

3. Real Property—real estate purchase contract—consent order—specific performance—findings of fact

In a real estate dispute involving a consent order that the trial court properly interpreted as a court-approved standard real estate purchase contract subject to the rules of contract interpretation, the trial court did not abuse its discretion in granting plaintiffs' motion for specific performance where the court made adequate findings of fact showing that plaintiffs were ready, willing, and able to perform according to the consent order. The numerous findings of fact challenged by defendants were supported by competent evidence.

4. Real Property—real estate purchase contract—consent order —Rule 11 motion for sanctions

In a real estate dispute involving a consent order that the trial court properly interpreted as a court-approved standard real estate purchase contract subject to the rules of contract interpretation, the trial court did not err by denying defendants' Rule 11 motion for sanctions, which defendants filed in response to plaintiffs' Rule 60 motion, where the plaintiffs undertook a reasonable inquiry and believed their position was well grounded, plaintiffs reasonably believed a mutual mistake existed between the parties, and there was no evidence that plaintiffs filed the motion for improper purposes.

Appeal by defendants-appellants from order entered 14 March 2022 by Judge J. Stanley Carmical in Brunswick County Superior Court. Heard in the Court of Appeals 26 April 2023.

Law Offices of G. Grady Richardson, Jr., P.C., by Susan Groves Renton and G. Grady Richardson, Jr., for defendants-appellants.

The Del Re Law Firm, by Benedict J. Del Re, Jr., for plaintiffs-appellees.

FLOOD, Judge.

Kenneth and Catherine Rienth ("Defendants") appeal from the 14 March 2022 Order for Specific Performance (the "March Order"). On appeal, Defendants argue the trial court erred by: (1) interpreting the consent order as a standard real estate purchase contract and not an order of the court; (2) inserting words into the unambiguous consent order; (3) making findings of fact that are unsupported by the evidence; and (4) denying their motion for sanctions. After careful review, we find no error.

I. Factual and Procedural Background

On 13 February 2020, Richard and Susan Kassel ("Plaintiffs") entered into a Lease Agreement and Option to Purchase (the "Lease Agreement") Defendants' home (the "Home") located at 3227 St. Andrews Circle SE, Southport, North Carolina. Per the Lease Agreement, Plaintiffs would lease the Home for a term of one year, beginning on 15 February 2020, with the right to purchase the Home at any time prior to the expiration of the Lease Agreement.

On 3 August 2020, a hurricane substantially damaged the Home, resulting in the need to replace the roof. Defendants did not name Plaintiffs as an additional insured party on the Home and had difficulty obtaining insurance proceeds on repairs made by Plaintiffs. Plaintiffs alleged Defendants refused to pay those funds in an attempt to profit from the storm repairs.

On 22 January 2021, Plaintiffs sent Defendants written notice of their intent to close with a cash sale on the Home. Plaintiffs hired Sandra Darby ("Ms. Darby") as their closing attorney, and Defendants hired Zach Clouser ("Mr. Clouser") as their closing attorney. The closing date was scheduled for 14 February 2021, but the parties were unable to close on the sale.

On 16 February 2021, after it became clear to Plaintiffs that Defendants were not going to close on the Home, Plaintiffs filed a Claim of Lien with the Brunswick County Clerk of Court for $13,512.87. This "mechanic's lien" was filed against the Home to secure the costs they expended to repair the roof damaged by the hurricane. Subsequently, Excel Roofing filed their own mechanic's lien for the roofing work they completed on the Home.

On 8 April 2021, Plaintiffs filed a Complaint in Brunswick County Superior Court for breach of the Lease Agreement, breach of offer to purchase, specific performance, breach of duty of good faith, and damages. In their Complaint, Plaintiffs alleged Clay Collier ("Mr. Collier") contacted Ms. Darby and represented himself as the attorney for Defendants. Plaintiffs alleged the sale of the Home did not take place because Defendants did not procure and provide the documents necessary to close on the Home and continued to demand more money related to the costs of repairing the roof.

In June 2021, after ongoing negotiations, Plaintiffs' current counsel, Benedict Del Re ("Mr. Del Re") drafted a consent order (the "Consent Order") memorializing Plaintiffs' and Defendants' resolution of issues and agreement to close. After drafting the Consent Order, Mr. Del Re sent the Consent Order to Defendants for their approval and signature. Defendants signed the Consent Order on 21 June 2021 and sent it to Plaintiffs for their signature. The Consent Order, which was "the result of arm's length negotiation" between parties, was intended to resolve all claims between the parties and grant Plaintiffs' claim for specific performance. Per the Consent Order, Defendants were responsible for satisfying Excel Roofing's mechanic's lien, and Plaintiffs were responsible for "satisfy[ing] the [mechanic's] lien for $13,512.87." Defendants

were also responsible for providing proper execution and delivery of all documents necessary to complete the closing transaction. The parties further agreed rent would be abated from the time the Consent Order was filed until the closing was complete.

On 22 June 2021, Mr. Del Re emailed then-attorney for Defendants, Mr. Collier, summarizing what Defendants needed to complete in order to close. It is unclear from the Record whether Mr. Collier responded to this email, but Mr. Del Re sent a follow up email on 24 June 2021, stating:

> This is just not working. The mortgage company is going to back out of the financing which will cause further delay . . . . I have no order, nor lien cancellation, no response on [Plaintiffs'] lien payment.

On 28 June 2021, Mr. Clouser sent the seller documents and the receipt for Excel Roofing's mechanic's lien payoff to Mack Hewett ("Mr. Hewett"), who took over closing responsibilities from Ms. Darby on behalf of Plaintiffs. Later that afternoon, the lender emailed Mr. Clouser requesting a list of items the lender needed "ASAP" to secure financing. Mr. Clouser responded that he was not doing the closing, and that last he heard, Mr. Hewett was responsible for the closing.

On 7 July 2021, Judge Disbrow signed the Consent Order, and it was filed with the clerk the same day. The Consent Order did not specify the date for closing, but it stipulated closing was to occur sixty days after the Consent Order was filed, which would have been 7 September 2021.[1] Defendants sent a request for a closing date but were told Plaintiffs were waiting on lender confirmation. Plaintiffs did not communicate a closing date to Defendants, but Plaintiffs worked with the lender through the month of August to complete the transaction. On 9 August 2021, Plaintiffs emailed Mr. Hewett that they had "scheduled a closing for [12 August 2021,]" but due to final documents being "held-up," closing on this date would not be feasible. It is unclear from the Record who was responsible for holding up these documents.

On 8 September 2021, Mr. Del Re emailed Mr. Collier to schedule the closing date for 10 September 2021. Mr. Collier responded, "I am not acting as [sellers'] attorney for the closing; that is [Mr.] Clouser who, according to [Defendants] has tried to contact [Mr. Hewett] and got no response. The deadline for closing was yesterday."

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1. Sixty days after 7 July 2021 would have been 5 September 2021 but this day was a Sunday and the following day was Labor Day.

On 9 September 2021, Mr. Clouser emailed Mr. Del Re and Mr. Hewett the following: "As of last evening I was told not to release the seller documents because the deadline expired as far as the closing date. I just got off the phone with [Mr. Hewett] and let him know, since I received an additional email today that stated the same." On 10 September 2021, Mr. Clouser sent another email that stated: "[Plaintiffs] told me to not release documents or order an updated payoff statement. They said the date that closing was required expired." The parties attempted to resolve issues related to the closing but were unable to reach a resolution.

On 1 November 2021, Plaintiffs filed a Motion for Clarification and a Motion for Relief from Final Entry of Judgment/Order under Rule 60 of the North Carolina Rules of Civil Procedure (the "Rule 60 Motion"), requesting the trial court extend the closing date. In their Motion, Plaintiffs alleged the delay in closing was due to Defendants' delay in "consenting to inspections and providing verification of rents paid by Plaintiffs, delays in loan commitment due to title issues surrounding the cancellation of a mechanic's lien in the Clerk's office (official record), unexpected delays, and other delays not the fault of the Plaintiffs[.]"

On 20 December 2021, Defendants filed a Motion to Enforce the Consent Order, which included a motion to eject Plaintiffs from the Home and restore possession to Defendants. Defendants further requested an award of Rule 11 sanctions (the "Rule 11 Motion") against Plaintiffs and Mr. Del Re for the Rule 60 Motion. In response, Plaintiffs filed an Objection to Defendants' Motion and a Countermotion for Specific Performance.

On 14 March 2022, Judge Carmical entered the March Order granting Plaintiffs' Motion for Specific Performance and denying Defendants' Rule 11 Motion. The March Order concluded as a matter of law that the Consent Order "was intended to be a recital of the parties' agreement . . . [and] should be considered a court-approved contract and be subject to the normal rules of contract interpretation." The trial court further concluded:

> Where a contract for the sale of real property does not include an explicit provision that time is of the essence for execution of the contract terms, the 'the dates stated in an offer to purchase and contract agreement serve on as guidelines, and such dates are not binding on the parties.'

The trial court did not rule on the Rule 60 Motion filed by Plaintiffs.

On 12 April 2022, Defendants filed timely notice of appeal.

II. Jurisdiction

This Court has jurisdiction to hear this appeal as a final order from a superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

A. Consent Order

[1] Defendants' first two issues on appeal are whether the trial court erred in (1) interpreting the Consent Order as a standard real estate contract and not a court order and (2) rewriting the Consent Order's explicit deadline for Plaintiffs to close on the purchase of the Home by allowing Plaintiffs "a reasonable time to perform." To address these issues, we are required to determine whether the Consent Order is a court-approved contract subject to regular principles of contract interpretation, or an order of the court enforceable only through contempt powers. Traditionally, consent orders have been considered "merely a recital of the parties' agreement and not an adjudication of rights. This type of judgment does not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties." *Rockingham Cnty. DSS ex rel. Walker v. Tate*, 202 N.C. App. 747, 750, 689 S.E.2d 913, 915 (2010). The question before us, therefore, is whether the inclusion of findings of fact and conclusions of law in the Consent Order transformed it from a court-approved recitation of the parties' agreement into a binding order of the court subject to enforcement only through contempt powers. In answering this question, we first examine diverging views of this State's jurisprudence regarding consent orders.

North Carolina's jurisprudence regarding consent orders has long agreed "the general rule is that a consent judgment is the contract of the parties entered upon the record with the sanction of the court." *Handy Sanitary Dist. v. Badin Shores Resort Owners Ass'n, Inc.*, 225 N.C. App. 296, 298, 737 S.E.2d 795, 798 (2013); *see also In re Smith's Will*, 249 N.C. 563, 568–69, 107 S.E.2d 89, 93–94 (1959) (consent judgment was nothing more than a contract not punishable by contempt); *Yount v. Lowe*, 288 N.C. 90, 96, 215 S.E.2d 563, 567 (1975) ("The decisions of this State have gone very far in approval of the principle that a judgment by consent is but a contract between the parties . . . ."); *Crane v. Greene*, 114 N.C. App. 105, 441 S.E.2d 144 (1994); *Potter v. Hileman Lab'y, Inc.*, 150 N.C. App. 326, 564 S.E.2d 259 (2002); *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 630 S.E.2d 693 (2006).

There appears, however, to be a split in our jurisprudence in how a court determines the proper remedy for a breach or violation of a consent order. One line of cases has concluded that, when a consent order

contains findings of fact and conclusions of law, it is an order of the court only actionable through contempt powers. In *Potter*, we reasoned:

> A consent judgment is the contract of the parties entered upon the record with the sanction of the court. Thus, it is both an order of the court and a contract between the parties. If a consent judgment is merely a recital of the parties' agreement and not an adjudication of rights, it is not enforceable through the contempt powers of the court, but only through a breach of contract action.

150 N.C. App. at 334, 564 S.E.2d at 265 (citations omitted). In *Potter*, we determined the consent order was not a "mere recital of the parties' " agreement—and was an order of the court—because the consent order contained findings of fact and an order based on those findings. *Id.* at 334, 564 S.E.2d at 265. In the opposite vein, in *Ibele v. Tate*, we found a consent order was *not* an order of the court because it did not contain findings of fact or conclusions of law but was merely a recitation of the parties' settlement agreement. 163 N.C. App. 779, 781, 594 S.E.2d 793, 795 (2004).

In another line of cases, our jurisprudence has definitively held consent orders are court-approved contracts subject to principles of contract interpretation, not contempt powers, without indicating whether the consent order contained findings of fact. *Cf. Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 65, 630 S.E.2d 693, 695 (2006) ("Consent judgments delineating easement rights are foremost contracts."); *see also Reaves v. Hayes*, 174 N.C. App. 341, 343–44, 620 S.E.2d 726, 728–29 (2005) ("A consent judgment is a contract between the parties entered upon the records of the court with the approval and sanction of a court of competent jurisdiction. It is construed as any other contract. . . . Thus, a consent judgment '*must* be enforced according to contract principles.' ") (emphasis added); *Hemric v. Gore*, 154 N.C. App. 393, 397, 572 S.E.2d 245, 257 (2002); ("A consent judgment is a contract between the parties entered upon the record with the sanction of the trial court and is enforceable by means of an action for breach of contract and not contempt."); *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("A consent judgment is a court-approved contract subject to the rules of contract interpretation.").

In a third line of cases, this Court reviewed the four-corners of the consent judgment at issue to determine whether it was more appropriately considered a court-approved contract or an order of the court. In *Crane*, this Court considered whether the trial court merely approved the agreement of the parties or went beyond the original agreement and

made a judicial determination of the parties' respective rights. 114 N.C. App. at 106, 441 S.E.2d at 144–45 ("In the ordinary case, when a court merely approves the agreement of the parties and sets it out in the judgment, a judicial determination is obviated, and the judgment is nothing more than a contract which is enforceable only by means of an action for breach of contract."). Even though the consent order at issue did not contain findings of fact or conclusions of law, the Court did not conclude this was dispositive of the consent order being a court-approved contract. *Id.* at 107, 441 S.E.2d at 145. Instead, the *Crane* Court reasoned the introduction to the consent order "*clearly*" stated its purpose:

> THIS MATTER coming on before the undersigned Superior Court Judge at the October 8, 1990 Civil Session of the Avery County Superior Court, and it appearing to the Court *that the parties, acting through their attorneys and pro se respectively, have agreed to resolve all matters* pertaining to the above-captioned action as set forth below.
>
> THEREFORE, IT IS HEREBY, ORDERED, ADJUDGED AND DECREED.

Id. at 106–107, 441 S.E.2d 145 (second emphasis added). We found the consent judgment was a court-approved contract because the judgment, "[o]n its face," did not reflect a determination by the trial court of either issues of fact or conclusions of law, but merely recited the parties' agreement. *Id.* at 106–107, 441 S.E.2d at 145 ("Viewed from its four corners, it is clear that the order . . . is merely a recital of the parties' agreement and not an adjudication of rights.").

In *Nohejl v. First Homes of Craven County Inc.*, this Court held, based on "*the facts of [the] case*," the trial court had the power to enforce a consent order through contempt. 120 N.C. App. 188, 189, 461 S.E.2d 10, 11 (1995) (emphasis added). The consent order provided it could be enforced "by specific performance, contempt, or any method that may be available." *Id.* at 189, 461 S.E.2d at 11.[2] Distinguishing from the consent order at issue in *Crane*, the *Nohejl* Court concluded the consent order *was* an order of the court because it was entered by

2. It is worth noting, the plaintiffs in *Nohejl* filed a motion to hold the defendant in contempt based on the consent order. It seems, based on the wording of the consent order at issue, the Court would have also affirmed an order for specific performance had the plaintiffs requested and been granted specific performance by the trial court. This Court determined the appropriate remedy based on the plain-language of the Consent Order, which lends further support to our conclusion that findings of fact alone are not dispositive.

the trial court and contained written findings of fact and an order based on those findings. *Id.* at 190–91, 461 S.E.2d at 12.

In *PCI Energy Services, Inc. v. Wachs Technology Services, Inc.*, this Court once again considered whether a consent judgment that contained findings of fact and conclusions of law was a court-approved contract or an order of the court. 122 N.C. App. 436, 439, 470 S.E.2d 565, 566 (1996). We found the procedural history of the case to be significant, specifically noting the same trial judge who entered the consent order had previously entered a preliminary injunction in the case. *Id.* at 439, 470 S.E.2d at 567. We also found the language of the consent order to be significant. *Id.* at 439, 470 S.E.2d at 567. Similar to *Crane*, the consent order at issue in *PCI Energy* stated, "*the parties have entered into a Settlement Agreement* which can be made the subject of this Consent Agreement." *Id.* at 439, 470 S.E.2d at 567 (emphasis added). The trial court, however, went a step further than that in *Crane* and "explicitly 'approve[d,] . . . adopt[ed,] . . . incorporat[ed] and . . . made an enforceable judgment of the Court,' the terms of the settlement agreement." *Id.* at 439, 470 S.E.2d at 567 (alterations in original). We ultimately held, "[b]y 'adopting' and 'incorporating' the settlement agreement, the [trial] court transformed the parties' agreement into the [trial] court's own determination of the parties' respective rights and obligations[,]" and "did not merely 'rubber stamp' the parties' private agreement[.]" *Id.* at 439–40, 470 S.E.2d at 567.

Nohejl, *Crane*, and *PCI Energy* lend support to our conclusion that findings of fact and conclusions of law are not dispositive of whether a consent order is a court-approved contract enforceable through a breach of contract action, or an order of the court enforceable through contempt powers. Instead, a court must consider whether, on its face, the order goes beyond a "mere[] recital" of the parties' agreement, *see Crane*, 114 N.C. App. at 107, 441 S.E.2d at 145, the facts of each individual case, *see Nohejl*, 120 N.C. App. at 189, 461 S.E.2d at 11, and the procedural history surrounding the litigation. *See PCI Energy*, 122 N.C. App. at 439, 470 S.E.2d at 567.

Turning to the case *sub judice*, we conclude the above-referenced considerations weigh in favor of the Consent Order being a court-approved contract subject to standard rules of contract interpretation. First, the plain language of the Consent Order shows the court "merely approve[d] the agreement of the parties and set[] it out in the judgment." *See Crane*, 114 N.C. App. at 106, 441 S.E.2d at 145. Similar to the consent order at issue in *Crane*, the Consent Order in this case states, "*the parties have reached an agreement* regarding resolution of

the issues plead in the Complaint and Counterclaim . . . ." (emphasis added). The plain language of the Consent Order affirms that it is the result of a mutual agreement reached by the parties. The Consent Order was not an adjudication of parties' respective rights, but rather was the result of an "arm's length negotiation" between parties.

Second, based on the facts of this case, it appears that Judge Disbrow approved the agreement reached by the parties, and did not make a judicial determination of the parties' respective rights. *See Crane*, 114 N.C. App. at 106, 441 S.E.2d at 145. Judge Disbrow signed the Consent Order after it had been drafted and signed by the parties and notarized. Judge Disbrow did not "adopt" or "incorporate" the terms of the settlement agreement into the Consent Order; he signed the Consent Order exactly as it was presented to him by the parties. *See PCI Energy*, at 439, 470 S.E.2d at 567. Notably, Defendants had already signed and notarized the Consent Order on 21 June 2021 before it was presented to Judge Disbrow. Judge Disbrow could not have "transformed the parties' agreement" into his "own determination of the parties' respective rights and obligations" without sending it back to Defendants for approval and signature. *See id.* at 439, 470 S.E.2d at 567.

Third, from our review of the language of the Consent Order, it appears that Judge Disbrow essentially "rubber stamped" the agreement reached by the parties. *See PCI Energy*, 122 N.C. App. at 439, 470 S.E.2d at 566. The first six findings of fact identify the parties, summarize the Complaint, and summarize the option to purchase. Finding of Fact 7 explains the "terms of the agreement" reached by the parties, including the sixty days to close provision. The remaining findings of fact are standard contract provisions including: a merger clause, representations of warranties, effect of the agreement on successors and assigns, modifications, and choice of law. The Consent Order lacks any evidence that Judge Disbrow "transformed" it by "incorporating," or "adopting" provisions of the parties' agreement into his own determination of their respective rights. *See PCI Energy*, 122 N.C. App. at 439–40, 470 S.E.2d at 567. The Consent Order *was* the parties' agreement in its entirety.

Although the Consent Order uses language that could imply the trial court's independent insertion of findings of fact or conclusions of law—e.g., "upon greater weight of the evidence and the Record," "entry of judgment," "concludes as a matter of law," "it is ordered, adjudged and decreed," and "hereby made an Order of the Court"—such terminology does not outweigh the overwhelming evidence that the trial court merely approved the agreement of the parties and did not make a judicial determination of their respective rights. *See Crane*, 114 N.C. App. at 107, 441

S.E.2d at 145. The language from the Consent Order is not unlike that seen in *Crane*, where this Court used the terms "ordered, adjudged and decreed" and concluded the consent order was not an adjudication of the parties' rights. *See Crane*, 114 N.C. App. at 107, 441 S.E.2d at 145.

Not only does our jurisprudence indicate that the Consent Order here is a court-approved contract, but likewise, Defendants' filing also indicates they viewed it similarly. Defendants filed a Motion to Enforce the Court Order, not a motion to hold Plaintiffs in contempt for failing to comply with the Consent Order. Thus, Defendants themselves likely viewed the Consent Order as a real estate contract between the parties, not a court order enforceable through contempt powers. At trial, Defendants *acknowledged* that they could have filed a motion for contempt, and that they ultimately decided not to because it would not have afforded them any relief.

Therefore, we find the Consent Order was a court-approved contract subject to the usual principles of contract interpretation. *See Reaves*, 174 N.C. App. at 343, 620 S.E.2d at 728.

B. Modification of the Consent Order

[2] Defendants next argue the trial court erred by inserting Plaintiffs' requested language of "reasonable time to perform" into the unambiguous Consent Order. The trial court, however, did not "insert" language into the Consent Order as Defendants contend. The trial court *interpreted* the Consent Order as allowing a "reasonable time to perform" because the Consent Order did not have a "time is of the essence" clause. Having determined the Consent Order was a court-approved contract subject to principles of contract interpretation, we hold the trial court's interpretation was correct.

"The trial court's determination of whether the language in a consent judgment is ambiguous . . . is a question of law and therefore our review of that determination is *de novo*." *Hemric v. Groce*, 169 N.C. App. 69, 75, 609 S.E.2d 276, 282 (2005). " '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. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

> As a general rule, the language of a contract should be interpreted as written; however, there is a well-settled exception, the "reasonable time to perform rule," that applies to contracts for the sale of real property. With respect to these realty sales contracts, it has long been held that in the absence of a "time is of the essence" provision, time is

> not of the essence, the dates stated in an offer to purchase and contract agreement serve only as guidelines, and such dates are not binding on the parties.

Harris v. Steward, 193 N.C. App. 142, 146, 666 S.E.2d 804, 807 (2008) (citations omitted).

Here, the Consent Order, which pertains to the sale of real property, includes a provision that closing would take place sixty days after the filing of the Consent Order. No provision for, or indication that "time is of the essence" was included in the Consent Order.

Thus, the trial court did not err by interpreting the Consent Order, absent a "time is of the essence clause," as allowing closing "within a reasonable time." *See Harris*, 193 N.C. App. at 146, 666 S.E.2d at 807.

C. Competent Evidence to Support Specific Performance

[3] Defendants also argue the trial court lacked competent evidence to support its March Order. We disagree.

> The sole function of the equitable remedy of specific performance is to compel a party to do that which in good conscience he ought to do without court compulsion. The remedy rests in the sound discretion of the trial court and is conclusive on appeal absent a showing of a palpable abuse of discretion.

Munchak Corp. v. Caldwell, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980) (citations omitted). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, 245 N.C. App. 25, 31, 781 S.E.2d 840, 844 (2016) (citation omitted).

"In reviewing a trial [court]'s findings of fact, we are strictly limited to determining whether the [court's] underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *Reeder v. Carter*, 226 N.C. App. 270, 274, 740 S.E.2d 913, 917 (2013) (citation and internal quotation marks omitted). "Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary." *Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (citation omitted). The trial court does not need to find that *all* the facts support a specific conclusion of law; rather it must find facts necessary to establish the cause of action, that may lead to the cause

of action failing, or necessary to establish a defendant's affirmative defense. *Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC*, 378 N.C. 100, 105, 851 S.E.2d 496, 500 (2021).

"The party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform." *Ball v. Maynard*, 184 N.C. App. 99, 107, 645 S.E.2d 890, 896 (2007) (citation omitted).

1. Finding of Fact 1

First, Defendants argue Finding of Fact 1 incorrectly refers to only two of the six causes of action set forth in Plaintiffs' Complaint, which prevents a correct interpretation of the Consent Order and an understanding of what it was intended to resolve.

Finding of Fact 1 provides:

> 1. Plaintiffs filed an action for Breach of Contract and Specific Performance to enforce an offer to Purchase Contract for real estate owned by Defendants dated February 14, 2020 located at 3227 St. Andrew's Circle in Southport, N.C. 28462.

Plaintiffs' Complaint asserted six causes of action including: breach of the Lease Agreement, breach of offer to purchase and contract, specific performance, reasonable attorney's fees pursuant to N.C. Gen. Stat. § 46A-3, punitive damages pursuant to N.C. Gen. Stat. § 1D-1, and breach of duty to act in good faith. The Consent Order itself described only an action for "Breach of Contract, Specific Performance, and *other claims, equitable remedies and monetary damages* . . . ." (emphasis added). The claims relevant to interpreting the Consent Order and what it was intended to resolve are breach of contract and specific performance.

Thus, there was no error in omitting the remaining four claims, and if there was error, it was harmless because the March Order adequately establishes the relevant causes of action. *See Carolina Mulching Co.*, 378 N.C. at 106, 851 S.E.2d at 500.

2. Findings of Fact 4 and 5

Second, Defendants argue Findings of Fact 4 and 5 incorrectly interpret the Consent Order, state facts that are not grounded in law, and do not address the proper legal standard to be applied in this case. Defendants specifically argue Finding of Fact 4 misleadingly omits that the findings of fact in the Consent Order were made "upon greater weight of the evidence."

Findings of Fact 4 and 5 provide:

> 4. The [Consent] Order at issue in this case was prefaced with "[t]he Court finds that the parties have reached an agreement regarding the resolution of the issues plead in the Complaint and Counterclaim …" and made its findings of conclusions based "upon the stipulations of counsel and consent of the parties." The [Consent] Order does not include a provision that it is enforceable through the contempt powers of the court.
>
> 5. There is no indication that there was a hearing where evidence was taken, or that independent findings or conclusions of law were made by the Judge. Defendants state in their [brief] that "Plaintiffs and Defendants reached an agreement settling all matters, claim, disputes and actions in the Lawsuit by mutual agreement and entry into the Consent Order." In addition, the Defendants state that Plaintiffs' attorney drafted all of the provisions of the [Consent] Order and that Defendants did not change any of those terms.

Finding of Fact 4 quotes language directly from the Consent Order. The omission that the findings were made "upon the greater weight of the evidence" does not render the finding unsupported by competent evidence. The trial court heard sufficient evidence showing no hearing was held on the Consent Order, Judge Disbrow signed the Consent Order after it had been drafted and signed by the parties, Defendants' brief states the parties reached an agreement settling all matters, and Mr. Del Re drafted the terms of the Consent Order. Based on this overwhelming evidence, we hold the parties intended the Consent Order to be a contract. The trial court gave more weight to "upon the stipulations of counsel and consent of the parties" than it did "upon greater weight of the evidence," which is not an error. *See Burrell*, 185 N.C. App. at 697, 649 S.E.2d at 442.

Findings of Fact 4 and 5, therefore, are supported by the language of the Consent Order. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

3. Finding of Fact 6

Third, Defendants argues the trial court erred in Finding of Fact 6 because Defendants did not make any statements agreeing that the Consent Order was meant to be a court-approved contract.

Finding of Fact 6 provides:

> 6. The July 7, 2021 [Consent] Order on its face, along with the statements of both parties, demonstrate that the [Consent] Order was intended to be a recital of the parties' agreement, with no adjudication on the part of the Court. Therefore, the [Consent] Order should be considered a court-approved contract and be subject to the normal rules of contract interpretation.

While Defendants' counsel may have stated "it's not a contract. It's an order[,]" Finding of Fact 6 states that the "statements of both parties, *demonstrate* that the [Consent] Order was intended to be a recital of the parties' agreement, with no adjudication on the part of the Court." (emphasis added). In Defendants' motion to enforce the Consent Order they stated: "Plaintiff[s] and Defendants reached an agreement," the Consent Order was drafted with "all terms and provisions," and the Consent Order was signed by Defendants prior to receiving Judge Disbrow's signature. Taken together, these representations by Defendants show both parties intended the Consent Order to be a court-approved contract.

Accordingly, Finding of Fact 6 is supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

4. Findings of Fact 9 and 15

Fourth, Defendants argue Finding of Fact 9 "erroneously describes the email sent by [Mr. Del Re] on 8 September 2021 . . . as 'confirming' the closing date." Defendants further argue Findings of Fact 9 and 15 are not supported by competent evidence because Defendants did not refuse to tender a deed at closing.

Findings of Fact 9 and 15 provide:

> 9. The [Consent] Order was entered on July 7, 2021, meaning the 60-day deadline expired on September 7, 2021. On September 8, 2021, Plaintiffs sent an email to Defendants confirming a closing date of September 10, 2021. Defendants responded that the deadline for closing was the day before. The sellers never tendered the deed. Plaintiffs allege, and Defendants have not disputed, that the mortgage company was ready to fund the loan.
>
> . . . .

> 15. The [Consent] Order did not provide "time was not [sic] of the essence" and Plaintiffs were ready to tender the balance of the purchase price and close within a reasonable period of time. Defendants then refused to tender the deed at settlement, in breach of the [Consent] Order.

The email sent on 8 September 2021 was sent with the intent of confirming the closing date. Plaintiffs may have been incorrect about the date of the closing, but that does not change the intent behind the 8 September 2021 email, which was to confirm a closing date of 10 September 2021.

As for Defendants refusing to tender the deed, this is also supported by the evidence. The portion of Finding of Fact 9 that states, "Defendants never tendered the deed[,]" is supported by email evidence that Defendants did not tender the deed. Plaintiffs were prepared to go forward with the closing, albeit late, but Defendants, either directly or through counsel, refused to tender the deed.

Thus, Findings of Fact 9 and 15 are supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

5. Finding of Fact 10

Fifth, Defendants argue the trial court erred in Finding of Fact 10 because it incorrectly states a conclusion of law as fact. Specifically, Defendants argue that the finding "[Plaintiffs] are entitled to specific performance" is a conclusion of law, not a finding of fact. Further, Defendants argue the finding incorrectly states delays were the fault of Defendants. Finding of Fact 10 states:

> 10. Plaintiffs allege in their filings that the closing date was set by the Lenders and Plaintiffs' closing attorney and that they were ready to tender the balance of the purchase price and receive the deed to the property. There is no indication, and it is not alleged by Defendants, that Plaintiffs are not "ready, willing, and able to perform." Plaintiffs have demonstrated that they are entitled to specific performance and that the sale of the property should be completed as intended by the [Consent] Order. 10. [sic] Plaintiffs allege that "due to delays in [D]efendants consenting to inspections and providing verification of rents paid by the Plaintiffs, delays in loan commitment due to title issues surrounding the cancellation of the mechanic's lien in the clerk's office, unexpected

> delays and other delays not the fault of [P]laintiffs[,]" they were not ready for closing until September 10, 2021.

"If a finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable [*de novo*] on appeal." *See Burrell*, 185 N.C. App. at 697, 649 S.E.2d at 442.

At trial, Plaintiffs were able to show the existence of a valid contract and its terms, and that they were ready, willing, and able to perform. As we previously concluded, absent a "time is of the essence" clause, Plaintiffs had a "reasonable time to perform," and their two-day delay in closing does not render them any less willing and able to perform. *See Ball*, 184 N.C. App. at 107, 645 S.E.2d at 896. The conclusion of law that Plaintiffs were entitled to specific performance, therefore, was not an error. *See Burrell*, 185 N.C. App. at 697, 649 S.E.2d at 442.

Moreover, the remaining portions of Finding of Fact 10 are not independent findings made by the trial court but are merely a summary of the arguments made by Plaintiffs in their motion, and the finding is supported by Plaintiffs' motion.

Accordingly, Finding of Fact 10 is supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

6. Findings of Fact 11, 12, 13, and 14

Sixth, Defendants argue competent evidence refutes Findings of Fact 11, 12, 13, and 14 because Defendants did not make "time is of the essence" arguments, the delays in closing were Plaintiffs' fault, and the focus on "reasonable" or "of the essence" was reached under a misapprehension of the law. Defendants further argue Findings of Fact 11, 12, and 13 are not supported by the evidence because there were no "required prerequisites," and any delays were Plaintiffs' fault. We disagree.

The challenged Findings of Fact state:

> 11. Defendants allege that the time was "of the essence" in the contract and that because the Plaintiffs did not close on or before September 7, 2021, they were not in compliance with the terms of the [C]onsent [O]rder. Defendants do not contend that the delay was the fault of the Plaintiffs, Defendants contend there was a delay in closing and because the mandatory closing deadline was missed, Defendants are entitled to refuse to close on the contract.
>
> 12. The [Consent] Order does not contain an explicit "time is of the essence provision[.]" The provision at issue in

> the parties' dispute is accompanied by a list of required prerequisites to complete the contract that depend on the actions of third parties, such as the Lender. Because there is no "time is of the essence provision" the "reasonable time to perform rule" applies to the requirements of the [Consent] Order. Plaintiffs have alleged several reasons outside of their control as to why their ability to close was delayed, and Defendant[s] had not contested those reasons. Some of the reasons alleged by Plaintiffs are due to Defendants [sic] own failure to act as needed to effectuate the intent of the [Consent] Order.
>
> 13. The delay in closing was three (3) days past the 60-day deadline period, not a significant amount of time. Plaintiffs have adequately demonstrated that they did not "delay or tarry" in complying with the contract and that they complied within a reasonable period of time.

The Consent Order provided:

> 7. That the parties have reached a settlement of the dispute in this matter with the substantive terms of the agreement as follows:
>
> a. Defendants, by and through Counsel will, within Five (5) days of the entry of this Order, satisfy the lien at the Office of the Clerk of Court filed by Excel Roofing, secure a notarized Affidavit from the lien claimant that the lien has been satisfied by an authorized agent of Excel Roofing to be filed with the Clerk of Court in the Lien Docket, and secure a further Subcontractor's notarized lien waiver of all liens to be provided to the mortgage lender of the Plaintiff[s]. . . from the lien holder.
>
> b. That the Plaintiffs will, within Five (5) days of the entry of this Order, satisfy the lien for $13,512.87 filed February 16, 2021 in 21 M 59 at the Office of the Clerk of Court and provide a notarized Affidavit from the Plaintiff (or entity) that the lien has been satisfied by an authorized agent of Plaintiff to be filed with the Clerk of Court in the Lien Docket, and secure a further affidavit and General Lien Waiver of all liens to be provided to the mortgage lender of the Plaintiff . . . to the Defendants [sic].
>
> c. That on a date to be set by the Plaintiff's Lender in conjunction with the Plaintiff's Attorney, not to exceed 60 days

> from the entry of the Order, Plaintiff[s] will tender the balance of the $337,500 purchase price being $312,500.00 with $25,000 having been credit [sic] to buyers as a deposit having been received, with adjustments for insurance (Flood, Hazard, Wind and Hail), County and City taxes and property owners due, other prorations and any other regular and customary expense adjustments, and any additional costs and expenses for document preparation, title insurance, revenue stamps any other regular and customary expenses paid by the buyer and seller for closing of real property in Brunswick County, State of North Carolina. That Defendants, on said date, will provide the proper execution and delivery to the closing attorney of all documents *necessary to complete the transaction contemplated by this Contract, including the deed, settlement statement, deed of trust and other loan or conveyance documents and waivers. That all parties will cooperate in the requests of the Lender for documents, assignments of insurance, etc. and any other forms necessary to close the loan and facilitate the closing to include the permission for any necessary inspections for the loan and the property closing.* That the transfer of the property will be free of all liens and encumbrances by a general Warranty Deed, allowing Plaintiff's [sic] lender a First secured position in the property. That further rent is abated.

(emphasis added).

Defendants may not have raised "time is of the essence" arguments in their motions or at the hearing, but in the Record, there are two emails Defendants sent Plaintiffs where Defendants stated, "time was of the essence." First, in an email sent from Defendants' counsel to Mr. Del Re on 27 October 2021, Defendants' counsel stated: "If you have any serious and meaningful offer on behalf of the [Plaintiffs] to resolve this matter, let me know. Time is of the essence." (emphasis in original). In this context, we read "time is of the essence" to refer to Mr. Del Re's response to the email rather than the performance of the contract being "of the essence." The second communication, however, does support the trial court's findings that Defendants alleged time was of the essence to fulfill the Consent Order. In the second correspondence, a settlement communication sent from Defendants' counsel to Mr. Del Re on 29 October 2021, Defendants' counsel stated, "[t]he [Plaintiffs] pay the lump sum of [redacted] time being of the essence . . . ." (emphasis in

original). This communication lends support to the trial court's finding that Defendants did in fact allege "time was of the essence[.]" To be clear, the Consent Order did not contain a "time is of the essence" clause and Finding of Fact 11 does not contradict this. Finding of Fact 11 only states Defendants argued "time was of the essence," which we conclude was supported by competent evidence for the reasons explained. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

As for the "prerequisites," it is clear from the plain language of the Consent Order that both parties were required to fulfill certain obligations prior to closing. Defendants were required to satisfy the mechanic's lien filed by Excel Roofing, Plaintiffs were responsible for satisfying the mechanic's lien they had filed on the Home, and both parties were responsible for procuring various documents and cooperating with the lender. This challenged portion of the Finding of Fact 12, therefore, is supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

Additional evidence indicates both parties were responsible for the delay. The Record shows the lender requested a thirty-day extension on the purchase contract. Plaintiffs emailed Mr. Hewett on 9 August 2021 advising him that Plaintiffs had scheduled a closing for 12 August 2021, but this would not be able to occur as the lender could not finalize the loan documents due to a delay in the Property Owners Association providing a statement of dues paid on the Home. On 11 August 2021, Plaintiffs stated in an email to their counsel, "[n]ot to my surprise—title issues are holding us up." Moreover, on 4 October 2021, Mr. Del Re sent Defendants' counsel an email, which stated:

> Let me know you received the documents showing that the loan was approved and ready to close in September. Those emails also reflect that the settlement lawyer is the one who picked the date of closing pursuant to the [C]onsent [O]rder.

While the email referencing the lender-set closing date was omitted from the Record, Defendants' counsel's response is further evidence such an email existed. In response to the aforementioned email sent on 4 October 2021, Defendants' counsel represented:

> Confirming that I did receive your fax and reported to [Defendants] via email that it appeared the delay this time was not caused by you[] or [Plaintiffs] and that it appears [Plaintiffs] had funding to close.

The portions of Findings of Fact 11, 12, and 13 that state delays were not the fault of Plaintiffs, therefore, are supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

Finally, Defendants argue the trial court erred in Findings of Fact 11, 12, and 13 because the focus on the timing being "reasonable" or "of the essence" was reached as a misapprehension of law by treating the Consent Order as a real estate contract. Having affirmed the trial court's conclusion that absent a "time is of the essence" clause, Plaintiffs were entitled to a reasonable amount of time to perform, we conclude these findings are supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

Accordingly, we hold the trial court did not abuse its discretion in granting Plaintiffs' Motion for Specific Performance because the trial court made adequate findings of fact showing Plaintiffs were ready, willing, and able to perform according to the Consent Order. *See Greenshields*, 245 N.C. App. at 31, 781 S.E.2d at 844; *Ball*, 184 N.C. App. at 107, 645 S.E.2d at 896.

D. Motion for Sanctions

[4] Lastly, Defendants argue the trial court erred by denying their Rule 11 Motion.[3] Defendants filed the Rule 11 Motion alleging Plaintiffs' Rule 60 Motion was "not well-grounded in fact, not warranted by existing law, and/or was interposed for the improper purposes of annoying Defendants and their counsel, causing unnecessary delay . . . and needlessly increasing the Defendants' cost of litigation." We disagree.

"This Court exercises a de novo review of the question of whether to impose Rule 11 sanctions." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (1994). A Rule 11 analysis includes three parts: whether the document is (1) factually sufficient; (2) legally sufficient; and (3) filed for an improper purpose. *Id.* at 635, 442 S.E.2d at 365. "A violation of any one of these requirements mandates the imposition of sanctions under Rule 11." *Id.* at 635, 442 S.E.2d at 365. "The totality of the circumstances determine[s] whether Rule 11 sanctions are merited." *Williams v. Hinton*, 127 N.C. App. 421, 423, 490 S.E.2d 239, 241 (1997).

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3. Plaintiffs seemingly withdrew their Rule 60 Motion during the hearing and requested the trial court, instead, grant an order of specific performance. The trial court did not rule on the Rule 60 Motion but granted the request for specific performance and denied Defendants' Rule 11 Motion. Finding no case law indicating a withdrawn motion renders a motion for sanctions moot, we review the merits of Defendants' argument.

"In determining factual sufficiency, we must decide '(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.' " *In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (2014) (citation omitted). As for legal sufficiency, this Court is required to first "look at 'the facial plausibility of the [motion] and *only then*, if the [motion] is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the [motion] was warranted by existing law.' " *Id.* at 230, 754 S.E.2d at 173 (emphasis added) (citation omitted). "An objective standard is used to determine whether a [motion] has been interposed for an improper purpose, with the burden on the movant to prove such improper purposes." *Id.* at 230, 754 S.E.2d at 173 (citation and internal quotation marks omitted).

First, Defendants argue Plaintiffs' Rule 60 Motion is not factually sufficient because there was no "mutual mistake" in the Consent Order, the parties agreed on how to interpret the Consent Order and the closing mechanics, there was no newly discovered evidence presented by Plaintiffs, and no extraordinary circumstances were alleged. After a thorough review of the Rule 60 Motion, the Record, and the hearing transcripts, we conclude Plaintiffs undertook a reasonable inquiry of the facts and believed their position was well grounded in those facts. Further, the contents of the Rule 60 Motion are supported by the Record. *See In re Thompson*, 232 N.C. App. at 230, 754 S.E.2d at 173.

Second, Defendants argue Plaintiffs' Rule 60 Motion is not legally sufficient because Plaintiffs could not have reasonably believed a "mutual mistake" existed between the parties. Evidence in the Record, however, supports Plaintiffs' belief that both parties were mistaken about the closing date. First, there is evidence Plaintiffs were diligently working through the month of August. Plaintiffs corresponded with the lender regarding outstanding documents, Plaintiffs had scheduled a closing for 12 August 2021, and based on the email evidence in the Record, Plaintiffs' communications did not evince a concern that closing on 10 September 2021 would be an issue. While Plaintiffs could have been more prompt by not waiting until 8 September 2021 to communicate that closing would not occur until 10 September 2021, it is not apparent that they knew of Defendants' intention to firmly interpret the closing date. Further, because we affirmed the trial court's March Order interpreting the Consent Order as a court-approved real estate contract, which would provide a reasonable time for closing the property purchase, we also hold the Rule 60 Motion was legally sufficient. *See In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173.

Third, Defendants argue the Rule 60 Motion was interposed for improper purposes of harassing Defendants and needlessly costing them attorneys' fees. We see no evidence of this in the Record nor have Defendants adequately shown improper purposes. *See In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (the burden is on the moving party to show a Rule 60 motion was filed for improper purposes).

Having found Plaintiffs' Rule 60 Motion was factually sufficient, legally sufficient, and not filed for improper purposes, we therefore conclude the trial court did not err in denying Defendants' Rule 11 Motion. *See Dodd*, 114 N.C. App. at 635, 442 S.E.2d at 365.

IV. Conclusion

The trial court did not err in interpreting the Consent Order as a court-approved contract, interpreting the Consent Order as allowing for performance in a reasonable amount of time, granting specific performance in favor of Plaintiffs, or denying Defendants' Rule 11 Motion. For the foregoing reasons, we hold the trial court did not err in granting Plaintiffs' Countermotion for Specific Performance.

AFFIRMED.

Judges DILLON and WOOD concur.

VINCENT K. PAYIN, PLAINTIFF
v.
JEFFREY PIERCE FOY, DEFENDANT

No. COA22-735

Filed 6 June 2023

Civil Procedure—summons—timeliness—motion to dismiss

Where plaintiff filed his complaint "for restorative justice" and failed to cause a summons to be issued within five days pursuant to Civil Procedure Rule 4(a), the action abated. Because defendant thereafter filed a motion to dismiss before plaintiff caused a summons to be issued, the action was not revived and the trial court did not err by granting defendant's motion to dismiss.

Appeal by Plaintiff from order entered 3 February 2022 by Judge Ned W. Mangum in Wake County District Court. Heard in the Court of Appeals 11 April 2023.

Vincent K. Payin, pro se, Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

COLLINS, Judge.

Plaintiff Vincent K. Payin appeals from a 3 February 2022 order dismissing his "Complaint For[] [R]estorative Justice" against Defendant Jeffrey Pierce Foy for Plaintiff's failure to properly effectuate service of the summons and complaint upon Defendant and because the complaint was time barred by the applicable statute of limitations. For the reasons stated herein, we affirm.

I. Background

This appeal arises from Plaintiff's attempt to collect a debt allegedly owed to him by Decedent David Foy's Estate, which was being administered by Defendant, Decedent's son.

According to Plaintiff, he was hired to provide homecare services to Decedent in 2011. When Decedent's health insurance expired in February 2016, Plaintiff and Decedent entered into a verbal agreement whereby Decedent would pay Plaintiff out-of-pocket for continued homecare services.

Decedent died intestate on 24 May 2017. A notice to creditors of Decedent's Estate was published in accordance with law, providing that all claims against the Estate must be submitted to Defendant by 10 March 2018 (the "creditor deadline"). Plaintiff submitted a claim against the Estate for $22,866.45 on 28 March 2018, eighteen days past the creditor deadline. On 10 April 2018, Plaintiff received a letter from Defendant informing him that his claim against Decedent's Estate had been rejected. Plaintiff filed a Rule 60(b)(1) & (6) Motion to Reopen Decedent's Estate.[1] The motion was denied on 17 June 2019 for Defendant's failure to timely submit the claim and for his failure to timely commence an action to recover on the claim after receiving written notice of the claim's rejection.

On 25 October 2021, Plaintiff filed his complaint for restorative justice in Wake County District Court. A summons was not issued on that date or within five days. Plaintiff sent a copy of the complaint to Defendant's former attorney, Terrell Thomas. However, Thomas was not representing Defendant in this matter and had not agreed to accept service on Defendant's behalf. On or around 24 November 2021, Defendant filed a

1. This motion is not in the record but is referenced in the order denying the motion.

Rule 12 Motion to Dismiss for, among other things, Plaintiff's failure to cause a summons to be issued. On 2 December 2021, thirty-five days after the complaint had been filed, Plaintiff caused a summons to be issued in the name of Defendant. Plaintiff attempted to effectuate service of the summons and the complaint upon Defendant, but this attempt failed as he sent the documents to Defendant's former address where Defendant no longer resided.

After a hearing on 3 February 2022 on Defendant's motion to dismiss, Plaintiff's complaint was dismissed by order entered that day. Plaintiff timely appealed to this Court.

II. Discussion

Plaintiff first argues that the trial court erred by dismissing his complaint because the issuance and service of process was proper.

"A civil action is commenced by filing a complaint with the court." N.C. Gen. Stat. § 1A-1, Rule 3 (2021). "Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." *Id.* § 1A-1, Rule 4(a) (2021). When a summons is not issued within five days, the action abates and is deemed never to have commenced. *Roshelli v. Sperry*, 57 N.C. App. 305, 308, 291 S.E.2d 355, 357 (1982). However, a properly issued and served summons can revive and commence a new action on the date of its issuance, unless defendant moves to dismiss the action prior to issuance and service of the summons. *Stokes v. Wilson & Redding Law Firm*, 72 N.C. App. 107, 111, 323 S.E.2d 470, 474 (1984); *Roshelli*, 57 N.C. App. at 308, 291 S.E.2d at 357.

Here, Plaintiff filed his complaint on 25 October 2021. A summons was not issued within five days and the action abated. Defendant filed his motion to dismiss the action on 29 November 2021, several days before Plaintiff caused a summons to be issued on 2 December 2021. Accordingly, the action was not revived upon the issuance of the summons and the trial court did not err by granting Defendant's motion to dismiss. *See Stokes*, 72 N.C. App. at 111, 323 S.E.2d at 474. In light of this conclusion, we need not reach Plaintiff's remaining arguments.

III. Conclusion

Because Plaintiff failed to cause a summons to be timely issued in the name of Defendant, the trial court did not err by dismissing Plaintiff's complaint. The trial court's order is affirmed.

AFFIRMED.

Chief Judge STROUD and Judge FLOOD concur.

SEMELKA v. UNIV. OF N. CAROLINA

[289 N.C. App. 198 (2023)]

RICHARD C. SEMELKA, M.D., PLAINTIFF
v.
THE UNIVERSITY OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE INSTITUTION OF THE STATE OF NORTH CAROLINA; THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, A CONSTITUENT INSTITUTION OF THE UNIVERSITY OF NORTH CAROLINA; CAROL L. FOLT, SUED IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; JAMES WARREN DEAN, JR., SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; WILLIAM L. ROPER, SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; ARVIL WESLEY BURKS, JR., SUED IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; AND MATTHEW A. MAURO, SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA22-831

Filed 6 June 2023

1. Appeal and Error—interlocutory order—substantial right—applicability of collateral estoppel—colorable claim

In plaintiff's action under the Whistleblower Act, in which he alleged that he was terminated from employment at a university in retaliation for having reported health and safety concerns about his department, the trial court's interlocutory order denying defendants' motion to dismiss was immediately appealable as affecting a substantial right where defendants asserted a colorable claim that collateral estoppel principles might bar plaintiff's claim because identical issues were actually litigated in a prior administrative proceeding (and upheld on judicial review).

2. Employer and Employee—whistleblower claim—unlawful termination—causal connection—retaliatory motive

Plaintiff's claim pursuant to the Whistleblower Act that he was terminated from employment in retaliation for having reported health and safety concerns about his department should have been dismissed where he failed to establish a prima facie case. In particular, plaintiff could not satisfy the third element of a whistleblower claim—that there existed a causal connection between his report to university administration and his subsequent termination—given facts that his termination for misconduct was based on misrepresentations he made when seeking reimbursement for $30,000 in personal legal fees.

3. Appeal and Error—mootness—cross-appeal—plaintiff's claim collaterally estopped

In a whistleblower action, where plaintiff's claim that he was unlawfully terminated from his employment at a university—in retaliation for having reported health and safety concerns—was barred by collateral estoppel principles, requiring dismissal of the claim, defendants' cross-appeal was dismissed as moot.

Appeal by defendants and cross-appeal by plaintiff from order entered 24 March 2022 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 12 April 2023.

Law Office of Mark L. Hayes, by Mark L. Hayes; and Bailey & Dixon, LLP, by J. Heydt Philbeck, for plaintiff.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for defendants.

Office of University Counsel, by Marla S. Bowman, for defendant-the University of North Carolina at Chapel Hill.

ARROWOOD, Judge.

The University of North Carolina ("UNC"), the University of North Carolina at Chapel Hill ("UNC-CH"), Carol L. Folt ("Chancellor Folt"), James Warren Dean, Jr. ("Provost Dean"), William L. Roper ("Dr. Roper"), Arvil Wesley Burks, Jr. ("Dr. Burks"), and Matthew A. Mauro ("Dr. Mauro") (collectively, "defendants") appeal from the trial court's order denying their motion to dismiss.[1] Richard C. Semelka, M.D. ("plaintiff"), cross-appeals. After careful review, we reverse the trial court's order denying defendants' motion to dismiss and dismiss plaintiff's cross-appeal.

I. Background

Litigation arising from plaintiff's termination of employment from UNC-CH is before this Court for the third time on appeal. Plaintiff exhausted the administrative remedies available under the Administrative Procedures Act, N.C. Gen. Stat. § 150B-1 *et seq.*, by petitioning for judicial review of the final termination decision made by UNC-CH's Board of Governors ("BOG"). This Court upheld the trial court's order affirming plaintiff's discharge in *Semelka v. Univ. of N. Carolina*, 275 N.C. App. 662, 854 S.E.2d 34 (2020) ("*Semelka I*"), *disc. review denied*, 380 N.C. 289, 867 S.E.2d 678 (mem.), *and disc. review dismissed*, 867 S.E.2d 684 (mem.) (2022). The facts underlying plaintiff's

1. Chancellor Folt, Provost Dean, Dr. Roper, Dr. Mauro, and Dr. Burks (collectively, "the individual defendants") were sued in both their official and individual capacities. Chancellor Folt, Provost Dean, and Dr. Roper are no longer employed at UNC-CH. Presently, Dr. Burks serves as Dean of the School of Medicine, Vice Chancellor for Medical Affairs, and CEO of the UNC Health Care System; Dr. Mauro serves as the James H. Scatliff Distinguished Professor of Radiology and President of UNC Faculty Physicians.

termination, including facts discovered in the administrative action, tend to establish the following.[2]

Plaintiff was formerly employed as a tenured professor within the Department of Radiology at UNC-CH's School of Medicine. On 8 January 2016, plaintiff sent a letter to Chancellor Folt expressing various health and safety concerns within the Department of Radiology and, as Chair of the Radiology Department, Dr. Mauro's "repeated failure to properly address[,]" "or otherwise protect patients and staff[,]" from the harmful conditions created by certain colleagues within the School of Medicine. Plaintiff's letter, which was incorporated into his complaint, also alleged Dr. Mauro "[r]etaliat[ed] against [him] . . . by not appointing [him] as the [D]ivision [C]hief of Abdominal Imaging, but rather select[ing] the only outside candidate that applied."

On 21 January 2016, on behalf of Chancellor Folt, Provost Dean responded to plaintiff's letter. Provost Dean informed plaintiff that his previously communicated concerns were " 'thorough[ly] investigat[ed][,]' " but since they pertained to former colleagues, further disciplinary action was unwarranted. With respect to plaintiff's concerns involving a current faculty member, Provost Dean stated that the matter was also investigated, but found to be without merit. Regarding plaintiff's appointment as Division Chief, Provost Dean stated, " 'any personnel decision is open to a number of interpretations' " and " 'based on a number of factors[,]' " but should plaintiff wish to pursue further action, he may contact the University Faculty Grievance Committee for assistance. Provost Dean also offered to meet with plaintiff " 'to further discuss his concerns.' "

Plaintiff "opted not to file a grievance or contact the Ombuds Office[,]" but instead obtained legal counsel for the purported purpose "of assisting him in presenting his health, safety, and work environment concerns directly to UNC-CH's Board of Trustees[.]" In February 2016, plaintiff retained the legal services of Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C. ("Mintz Levin").

On 13 July 2016, plaintiff submitted an expense reimbursement request to Bob Collichio ("Mr. Collichio"), the Department of Radiology's Associate Chair for Administration, seeking reimbursement for

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2. Plaintiff challenges the use of outside materials as we are reviewing a motion to dismiss, however, "[t]his Court has long recognized that a court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration." *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981) (citations omitted). Plaintiff also referred to the administrative action in his complaint.

approximately $30,000 in legal fees from the Radiology Department's Operating Fund.[3] In a series of follow-up emails, plaintiff explained his stated reasons for requesting the reimbursement were due to legal consultations he sought in reference to his professional work and were related to his university duties. Plaintiff acknowledged that some prior consultations may have appeared personal in nature, but he contended no more than one and a half hours were expended on personal matters.

Mr. Collichio requested assistance from UNC-CH's Office of University Counsel ("OUC") due to the "unusual" nature of plaintiff's request. On 25 July 2016, Mr. Collichio requested additional documentation and more detailed information relating to plaintiff's relationship with Mintz Levin to determine which legal expenses were "strictly business-related" and potentially reimbursable. Plaintiff provided Mr. Collichio with partially redacted invoices and a copy of the Mintz Levin engagement letter dated 5 February 2016. On 5 August 2016, plaintiff informed Mr. Collichio of his intention to terminate Mintz Levin and "expressed frustration that his reimbursement request had still not been approved[.]" Plaintiff learned on 23 August 2016 that he would not be reimbursed.

Also in August 2016, at the request of OUC, UNC-CH's Chief Audit Officer and Director of the Internal Audit Department, Phyllis Petree ("Ms. Petree") initiated an investigation into plaintiff's reimbursement request to determine whether plaintiff's stated reasons for retaining Mintz Levin were truly for university-related purposes. In addition to investigating plaintiff's relationship with Mintz Levin, Ms. Petree conducted an audit into previous travel and business expenses paid to plaintiff between July 2010 and September 2016. The audit revealed that on multiple occasions dating from 2010, plaintiff received reimbursements for nine trips which were " 'primarily personal in nature and were not reimbursable as business travel.' " It appeared that plaintiff had developed a pattern of planning personal vacations, and shortly before the trip was scheduled to begin, plaintiff would attempt to schedule work meetings with colleagues abroad to justify multiple days of travel

3. The Radiology Department Operating Fund operates in accordance with the UNC School of Medicine Faculty Affairs Code ("Faculty Affairs Code") and the Policy on Clinical Department Faculty Providing Expert Legal Services and Testimony ("Expert Legal Services Policy"). Under these policies, clinical departments within the School of Medicine have an established Departmental Operating Fund to hold income generated by faculty members for outside professional services. The Faculty Affairs Code expressly provides that such funds belong to the Radiology Department and are designed to be "used for professional purposes[.]" However, the Faculty Hearings Committee noted a "lack of clarity . . . on how such funds can and should be used."

reimbursement requests. Furthermore, the investigation into plaintiff's relationship with Mintz Levin ultimately revealed that plaintiff misrepresented the nature of his reimbursement request in an improper attempt to have the university pay for personal legal expenses. As a result of her findings, Ms. Petree concluded, " 'the primary purpose of the law firm engagement giving rise to the legal fees in question was for personal matters, though [plaintiff] initially represented that the fees were for consultation related to cybersecurity and to his University duties.' "

Ms. Petree's final audit report was issued to Chancellor Folt on 5 January 2017. In a letter dated 11 January 2017, relying on the findings provided by Ms. Petree, Provost Dean informed plaintiff of UNC-CH's intent to discharge him due to misconduct pursuant to Section 3 of the *Trustee Policies and Regulations Governing Academic Tenure in the University of North Carolina at Chapel Hill* (the "Tenure Policy"). The letter stated that plaintiff submitted a reimbursement request for approximately $30,000 in legal fees, "knowingly misrepresenting that these expenses were incurred for legal advice regarding" his professional work, "when, instead, these legal services were obtained for primarily personal reasons, including pursuing possible legal action against the University." The letter further stated plaintiff had established a "pattern of dishonesty and false representations" due to his history of "seeking full reimbursement from the University" for primarily personal trips and "other costs that cannot be validated due to inadequate documentation[,]" or were not applicable for reimbursement under "state and University policy." Provost Dean estimated that the total amount of "impermissible reimbursements" were "in excess of $27,000." Plaintiff's behavior was described as "unethical conduct" "sufficiently serious as to adversely reflect on [his] honesty, trustworthiness and fitness to be a faculty member." Plaintiff responded on 17 January 2017, and informed Provost Dean of his intent to appeal the discharge decision to the Faculty Hearings Committee (or "the Committee") pursuant to the Tenure Policy.

A hearing regarding plaintiff's appeal was conducted over the course of three days beginning on 23 March 2017 and concluding on 12 April 2017. The stated issues before the Committee included determining whether UNC-CH could prove by the "clear and convincing standard" "whether permissible grounds for [plaintiff]'s discharge exist[ed] under the Tenure Policy and whether those grounds were, in fact, the basis of the University's decision to discharge." Pursuant to Section 3(a)(1) of the Tenure Policy, misconduct justifying discharge may "be either (i) sufficiently related to a faculty member's academic responsibilities as to disqualify the individual from effective performance of university duties,

or (ii) sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member[.]"

The Faculty Hearings Committee heard testimony from thirteen witnesses, including plaintiff, and examined other documentary evidence relating to plaintiff's termination. Plaintiff's "central defense . . . was that UNC-CH was retaliating against him for raising prior safety concerns within the Department [of Radiology]." Findings and recommendations of the Committee were issued to Chancellor Folt on 23 May 2017. The Faculty Hearings Committee ultimately rejected plaintiff's retaliation claim finding "no evidence" of retaliation. In pertinent part, the Committee discovered: "[d]espite [plaintiff]'s broad statements in his communication with Mr. Collichio, the specificity of his emails to Mintz Levin . . . make clear that [plaintiff] originally consulted outside counsel because he was considering legal action against the University."

Moreover, the Committee stated:

> We searched and asked specific questions looking for behavior that would indicate some sort of retaliation against [plaintiff] for bringing his safety concerns to the attention of those in the School of Medicine and University administration. We could find no evidence to indicate the University took employment action against [plaintiff] because of his complaints. We could find no evidence that Provost Dean relied on anything other than the grounds found in the Tenure Policy as the basis for his discharge of [plaintiff].

Accordingly, the Committee concluded:

> [Plaintiff]'s choice to seek reimbursement for $30,000 worth of legal fees and his description of the need for this outside legal consultation as being related to various activities such as writing books or considering new safety procedures was disingenuous and dishonest. Indeed, he eventually admitted to Ms. Petree that a significant portion (40%) of his conversations with Mintz Levin were related to taking legal action against the University . . . . Such conduct constitutes misconduct of such a nature as to adversely reflect on [plaintiff]'s honesty, trustworthiness and fitness to be a faculty member. Therefore, we find [plaintiff]'s conduct was of such a nature as to indicate that he is unfit to continue as a member of the faculty. We were not convinced that the travel improprieties noted

> by Ms. Petree by themselves rose to the level requiring discharge since those requests were clear, did reference at least some University-related meetings, and went through multiple levels of review before being granted.

On 9 June 2017, Chancellor Folt notified plaintiff of her decision to accept the findings and recommendations of the Faculty Hearings Committee. Chancellor Folt agreed that plaintiff engaged in misconduct "sufficiently serious" "to render [him] unfit to serve as a member of the faculty" and further concurred with the Committee's absence of findings evidencing retaliation. Pursuant to Section 8 of the Tenure Policy, plaintiff appealed Chancellor Folt's discharge decision to the Board of Trustees ("BOT") on 19 June 2017.

In its decision rendered 1 August 2017, the BOT affirmed Chancellor Folt's decision. Plaintiff appealed the BOT's decision to the BOG on 10 August 2017. The BOG affirmed the dismissal decision on 12 September 2018, concluding "there [wa]s sufficient evidence in the record to determine that [plaintiff] knowingly misrepresented that multiple reimbursement requests for legal and travel expenses were for university purposes when, in fact, substantial portions of the expenses were for personal purposes, constituting misconduct under Section 603(1) of *The Code* [*of the Board of Governors of The University of North Carolina*]."[4] Similarly, the BOG found no "evidence to support [plaintiff]'s claim that UNC-CH selected another candidate for the Division Chief position or chose to discharge [plaintiff]" in an act of retaliation "against him for reporting safety concerns about colleagues to UNC-CH administrators."

Pursuant to N.C. Gen. Stat. § 150B-43, plaintiff petitioned for judicial review of the BOG's final decision to Orange County Superior Court. The trial court conducted a *de novo* review of the legal issues and a whole record review of the factual evidence to determine whether plaintiff's dismissal was supported by substantial evidence in the record. The proposed issues before the trial court included:

> 1. Whether the evidence was sufficient to support [plaintiff]'s dismissal from UNC-CH's School of Medicine based on misconduct.
>
> 2. Whether the decision was properly made and consistent with the requirements of Section 603 of [*The Code*] where [plaintiff] claimed that UNC-CH administrators

4. *The Code of the Board of Governors of The University of North Carolina* ("The Code") is incorporated into the Tenure Policy.

> engaged in unethical and illegal conduct related to [plaintiff]'s discharge from employment, including retaliating against him for his reports of safety concerns related to colleagues; and
>
> 3. Whether UNC-CH administrators erred by halting [plaintiff]'s pay after the campus-based review process ended with the decision of the [BOT] to uphold [plaintiff]'s dismissal from employment from UNC-CH.

Per order entered 25 April 2019, the trial court affirmed plaintiff's termination but found UNC-CH wrongfully discontinued his salary in August 2017, stating "[plaintiff] should have been paid through the September 12, 2018 decision of the BOG." With respect to plaintiff's termination, the trial court concluded:

> [T]he decision to discharge [plaintiff] based on misconduct is supported by substantial evidence in the record and is not arbitrary, capricious, or an abuse of discretion. Specifically, substantial evidence in the record supports the conclusion that [plaintiff] submitted to UNC-CH for reimbursement legal fees of approximately $30,000, knowingly, misrepresenting that such expenses were for University business when in fact these legal services were obtained for primarily personal reasons. Substantial evidence in the record further supports that such conduct, as detailed above, constitutes misconduct warranting dismissal, as set forth in Section 603 of *The Code* and in Section 3 of UNC-CH's Tenure Policy.

Plaintiff appealed the trial court's order and UNC cross-appealed the trial court's conclusion of law relating to the discontinuation of plaintiff's salary. *Semelka I*, 275 N.C. App. at 670, 854 S.E.2d at 40. This Court affirmed the trial court's order and held that substantial evidence supported the conclusion that plaintiff engaged in misconduct justifying discharge, discharge was not an excessive discipline in violation of *The Code*, and the BOG's decision to terminate was not an " 'unjust and arbitrary application of disciplinary penalties[.]' " *Id.* at 676-79, 854 S.E.2d at 43-45. We also affirmed the trial court's conclusion that "UNC violated its own policies when it ceased [plaintiff]'s pay at the date of the BOT decision before the BOG issued its ultimate decision." *Id.* at 682, 854 S.E.2d at 47.

Plaintiff commenced the instant action on 11 January 2018 by filing a complaint in Orange County Superior Court (the "Orange County

complaint") alleging defendants' initiation of dismissal proceedings against him were retaliatory in violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq*. (the "Whistleblower Act"). On 10 August 2018, plaintiff voluntarily dismissed the Orange County complaint pursuant to N.C. R. Civ. P. 41(a)(1) and filed a fundamentally similar complaint in Wake County Superior Court (the "Wake County complaint") on 24 August 2018.

Defendants filed a motion to dismiss the Wake County complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6) on 28 September 2018, asserting, among other things, Wake County was an improper venue. Ruling solely on the issue of venue, the trial court denied defendants' motion in an order entered 19 June 2019. In an opinion filed 31 December 2020, we vacated and remanded the trial court's order with instructions to transfer the action to Orange County Superior Court. *Semelka v. Univ. of N. Carolina*, 275 N.C. App. 683, 689, 854 S.E.2d 47, 51 (2020) ("*Semelka II*"). Per order entered 18 August 2021, the case was transferred to Orange County.

Proceedings in the instant case resumed upon plaintiff's scheduling of defendants' original motion to dismiss the Wake County complaint for a hearing on 14 February 2022. Due to uncertainty regarding whether the Wake County motion to dismiss was properly before the trial court, defendants filed an amended motion to dismiss on 9 February 2022.

The day of the scheduled hearing, defendants filed a second amended motion to dismiss in order to incorporate new legal arguments based on our Supreme Court's order denying plaintiff's request for discretionary review rendered 9 February 2022. Plaintiff challenged the validity of the second amended motion to dismiss arguing defendants are prohibited from amending their motion. The trial court, considering the denial of discretionary review a "significant development[,]" accepted defendants' second amended motion to dismiss finding one month an adequate amount of time for plaintiff to brief and oppose a new argument. Accordingly, the trial court acknowledged defendants' original motion and amended motion to dismiss as withdrawn and scheduled a hearing on the second amended motion to dismiss for the following month.

Defendants' second amended motion to dismiss was heard at the 14 March 2022 session of Orange County Superior Court, Judge Baddour presiding. Defendants argued that the trial court lacked jurisdiction to hear plaintiff's whistleblower complaint as the question of plaintiff's discharge being the result of unlawful retaliation was addressed throughout the administrative process. Defendants attached multiple exhibits

to their motion, including: the BOG's decision affirming plaintiff's discharge, plaintiff's petition for judicial review, the trial court's order affirming the BOG's decision to discharge, selected documents from the administrative appeal, and *Semelka I*.

Plaintiff's counsel countered defendants' arguments substantively, but procedurally argued defendants' second amended motion to dismiss ought to be treated as invalid as the Rules of Civil Procedure do not provide an avenue for parties to amend their motions prior to filing an answer. Plaintiff also attached various documents in opposition to defendants' second amended motion to dismiss, including: UNC's notice of intent to discharge dated 11 January 2017, plaintiff's request for a hearing before the Faculty Hearings Committee, the Tenure Policy, and the complete transcript from the Committee hearing.

The trial court entered an order on 24 March 2022 denying defendants' motion in part but granting dismissal of all claims against the individual defendants in their individual capacities. Defendants filed a notice of appeal on 20 April 2022 and plaintiff cross-appealed on 22 April 2022.

II. Discussion

At the outset, we must address the interlocutory nature of defendants' appeal.

A. Interlocutory Order

[1] An order denying a motion to dismiss is interlocutory because it leaves the matter for further action by the trial court. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citation omitted) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "an interlocutory order may be appealed immediately . . . if (i) the trial court certifies the case for immediate appeal pursuant to N.C. [Gen. Stat.] § 1A-1, Rule 54(b), or (ii) the order 'affects a substantial right of the appellant that would be lost without immediate review.' " *McIntyre v. McIntyre*, 175 N.C. App. 558, 562, 623 S.E.2d 828, 831 (2006) (citation omitted).

Defendants concede this appeal as interlocutory, but contend a substantial right is affected as they "ma[k]e a colorable assertion of

collateral estoppel" and "are facing a second trial on issues already resolved in [*Semelka I*][.]" Our case law establishes that a trial court's order rejecting the affirmative defense of collateral estoppel can affect a substantial right, however, "incantation of the [doctrine of collateral estoppel] does not . . . automatically entitle a party to an interlocutory appeal[.]" *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 533-34 (citation omitted), *writ of supersedeas and disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (mem.) (2007). Thus, we must preliminarily determine whether defendants have made a colorable argument that the doctrine applies in this context in order to allow us to exercise jurisdiction over this appeal.

Although *Semelka I* consists of an administrative action, "it is axiomatic that no one ought to be twice vexed for the same cause[,]" and "[t]his fundamental principle of law applies to administrative decisions." *In re Mitchell*, 88 N.C. App. 602, 604, 364 S.E.2d 177, 179 (1988) (citations omitted). Determining whether an administrative decision enjoys the protections of "*res judicata* depends upon its nature; decisions that are 'judicial' or 'quasi-judicial' can have that effect, decisions that are simply 'administrative' or 'legislative' do not." *Id.* at 605, 364 S.E.2d at 179 (citation omitted). The distinction between a quasi-judicial determination and an administrative one "is not precisely defined," but "courts have consistently found decisions to be quasi-judicial when the administrative body adequately notifies and hears before sanctioning, and when it adequately provides under legislative authority for the proceeding's finality and review." *Id.* (citations omitted).

Here, as illustrated by the facts set forth above, plaintiff appealed Provost Dean's discharge decision pursuant to "Section 3(b)(4) of the Tenure Policy." The appeal was held in accordance with the Tenure Policy, heard before a neutral panel of five faculty members, and plaintiff was represented by counsel. *The Code*, as incorporated into the Tenure Policy, allowed plaintiff to appeal the termination decision to the BOG and N.C. Gen. Stat. § 150B-43 provided plaintiff the right to petition for judicial review. Accordingly, collateral estoppel may apply in the present case as the facts of *Semelka I* were established in a quasi-judicial forum as provided under legislative authority.

"The companion doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) have been developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citation omitted).

> Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. The doctrine is designed to prevent repetitious lawsuits, and parties have a *substantial right* to avoid litigating issues that have already been determined by final judgment.

Turner v. Hammocks Beach Corp., 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (emphasis added) (alteration, citation, and internal quotation marks omitted). "An issue is actually litigated, for purposes of collateral estoppel . . . if it is properly raised in the pleadings or otherwise submitted for determination and is in fact determined." *Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011) (citation, brackets, and internal quotation marks omitted). "A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical[;] [i]f they are not identical, then the doctrine of collateral estoppel does not apply." *Id.* (citation and internal quotation marks omitted).

On the other hand, "the rules for determining whether the parties in question are or were in privity with parties in the prior action are not as well defined." *State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000). Our case law describes "privity" as " somewhat elusive" because "no definition of the word . . . can be applied in all cases." *Id.* (citation and internal quotation marks omitted) (quoting *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 577 (1962)). When considering whether privity exists, we must "look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest." *Williams*, 217 N.C. App. at 8, 719 S.E.2d at 94 (citation and internal quotation marks omitted). " 'In general, 'privity involves a person so identified in interest with another that he represents the same legal right' previously represented at trial.' " *Summers*, 351 N.C. at 623, 528 S.E.2d at 20 (citations omitted).

To determine whether collateral estoppel applies in the present case we must first determine whether the individual defendants stand in privity with the respondents of *Semelka I*, UNC and UNC-CH. Plaintiff argues the individual defendants do not share privity as they "had no ability to direct the course of the litigation" and cannot be bound by a judgment to which they were not named parties. This application of privity is incorrect.

Plaintiff's recitation of privity derives from case law established prior to our Supreme Court's elimination of the mutuality requirement

of collateral estoppel in *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986). Contrary to plaintiff's contention, "[w]here a litigant seeks to assert collateral estoppel defensively," mutuality of estoppel is not required. *Johnson v. Smith*, 97 N.C. App. 450, 453, 388 S.E.2d 582, 584 (citation omitted), *disc. review denied*, 326 N.C. 596, 393 S.E.2d 878 (mem.) (1990). Thus, "the litigant invoking collateral estoppel need not have been a party to or in privity with a party to the first lawsuit 'as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the earlier action.' " *Id.* (citation omitted). Here, it is apparent that plaintiff received a full and fair opportunity to challenge his discharge as a three-day hearing was held before the Faculty Hearings Committee.

Likewise, plaintiff's complaint in the instant case, along with a review of the circumstances underlying plaintiff's termination, lead us to conclude that *Semelka I* involved identical issues previously litigated, actually determined, and necessary to the overall disposition regarding plaintiff's discharge. As indicated above, the issues presented to the Faculty Hearings Committee included determining "whether permissible grounds for [plaintiff]'s discharge existe[d] under the Tenure Policy and whether those grounds were, in fact, the basis of the University's decision to discharge." The Committee's findings illustrate that a critical component of their overall decision regarding plaintiff's termination included examining potential retaliation on behalf of the individual defendants due to plaintiff bringing his "long-standing concerns about safety" in the Radiology Department to the attention of university administration, a central feature of plaintiff's complaint in the instant case. In fact, the Committee noted that they were "struck by the seriousness" of plaintiff's allegations yet found "sufficient evidence . . . that the University ha[d] met its burden in acknowledging and investigating [plaintiff]'s concerns."

In sum, *Semelka I* upheld plaintiff's termination, was a final judgment on the merits, and facts relating to plaintiff's termination being the result of retaliation were actually litigated and necessary to the judgment. *See City of Asheville v. State*, 192 N.C. App. 1, 14, 665 S.E.2d 103, 115 (2008) (citation omitted) (" '[A]ny right, fact, or question in issue and directly adjudicated on or necessarily involved in the determination of an action . . . on the merits is conclusively settled . . . and cannot again be litigated between the parties and privies.' "), *appeal dismissed and disc. review denied*, 672 S.E.2d 685 (mem.) (2009). We disagree with plaintiff's assertion that collateral estoppel may not apply to *Semelka I* because the administrative forum hardly "provide[d] [him] with a full opportunity to litigate his case." It is well-settled that a party is not entitled to

relitigate facts previously determined in a prior action, even if that prior action was held in an administrative capacity. *Swain v. Efland*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535 (finding parties cannot maintain both an administrative action and an action in superior court as "this would allow [parties] two bites of the apple, could lead to the possibility that different forums would reach opposite decisions, as well as engender needless litigation"), *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (mem.) (2001); *See also Univ. of Tenn. v. Elliott*, 478 U.S. 788, 797, 92 L. Ed. 2d 635, 645 (1986) ("[I]t is sound policy to apply principles of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity.").

Accordingly, we conclude that defendants' motion to dismiss raises a colorable assertion of collateral estoppel and defendants' appeal is properly before this Court. Having determined that findings from *Semelka I* may serve as a bar to plaintiff's whistleblower action, we now turn to address the merits of defendants' appeal.

B. Standard of Review

Defendants moved to dismiss plaintiff's complaint pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2022) (lack of subject matter jurisdiction); N.C. Gen. Stat. § 1A-1 Rule 12(b)(2) (2022) (lack of personal jurisdiction); N.C. Gen. Stat. § 1A-1 Rule 12(b)(6) (2022) (failure to state a claim upon which relief can be granted). However, defendants' arguments on appeal focus exclusively on the doctrine of collateral estoppel and plaintiff's ability to state a claim under the Whistleblower Act. Thus, we focus our analysis on Rule 12(b)(6). *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 32, 738 S.E.2d 819, 822 ("Because in this case the fact that defendant argues plaintiff is collaterally estopped from contesting relates to plaintiff's ability to state a claim, rather than a jurisdictional issue, it is properly analyzed under Rule 12(b)(6)[.]"), *disc. review denied*, 367 N.C. 236, 748 S.E.2d 544 (mem.) (2013).

This Court conducts a *de novo* review of a trial court's order on a motion to dismiss. *Sykes v. Blue Cross and Blue Shield of N.C.*, 372 N.C. 318, 324, 828 S.E.2d 489, 494 (citation omitted), *reh'g denied*, 372 N.C. 710, 830 S.E.2d 823 (mem.) (2019). "In doing so, the Court must consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " *Id.* (citations omitted). However, dismissal is proper when: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that

necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

C. Plaintiff's Whistleblower Claims

[2] Defendants argue the trial court erred in denying their motion to dismiss as plaintiff is precluded from establishing the elements of his whistleblower claims because *Semelka I* determined that his discharge was (1) "proper" and (2) "not retaliatory[.]" We agree.

In order to assert a *prima facie* showing of retaliatory termination in violation of the Whistleblower Act, "a plaintiff must establish: (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken[.]" *Manickavasagar v. N.C. Dep't of Pub. Safety*, 238 N.C. App. 418, 428, 767 S.E.2d 652, 658 (2014) (citation omitted). "There are at least three distinct ways for a plaintiff to establish a causal connection between the protected activity and the adverse employment action under the Whistleblower Act." *Newberne v. Dep't of Crime Control and Pub. Safety*, 359 N.C. 782, 790, 618 S.E.2d 201, 207 (2005).

"First, a plaintiff may rely on the employer's 'admission that it took adverse action against the plaintiff solely because of the plaintiff's protected activity.' " *Id.* (citation and brackets omitted). "Second, a plaintiff may seek to establish by circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual." *Id.* (citation omitted).

> [O]nce a plaintiff establishes a prime facie case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Id. at 791, 618 S.E.2d at 207-208 (citations omitted).

> Third, when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken. Cases in this category are commonly referred to as "mixed motive" cases.

Id. at 791, 618 S.E.2d at 208 (citations and internal quotation marks omitted). Contrary to the burden-shifting analysis of cases in the second category, "the ultimate burden of persuasion in a 'mixed motive' case may be allocated to the defendant once a plaintiff has established a prima facie case." *Id.* at 792, 618 S.E.2d at 208. "In order to shift the burden to the defendant, however, the plaintiff must first demonstrate 'by *direct evidence* that an illegitimate criterion was a substantial factor in the decision.' " *Id.* (emphasis in original) (citations omitted).

In the case *sub judice*, the question we are tasked with considering is plaintiff's ability to satisfy the third element of a whistleblower action: a causal connection between his report of health and safety concerns to university administration and his subsequent termination. *See id.* Plaintiff argues, primarily, that he is not collaterally estopped from pursuing a whistleblower claim as *Semelka I* did not involve a cause of action under the Whistleblower Act and only concerned questions of violation under the Tenure Policy. Specifically, plaintiff contends retaliation was only mentioned in context and due to its immateriality, plaintiff may still successfully prove his discharge was an act of unlawful retaliation. We disagree.

Plaintiff's arguments rest on the third theory of causation established by our Supreme Court in *Newberne*. Plaintiff argues that although he was terminated for violating the Tenure Policy, he may still "seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken." *Newberne*, 359 N.C. at 791, 618 S.E.2d at 208 (citation omitted). However, plaintiff's contention is misplaced as cases under the "mixed motive" theory of causation require plaintiffs to satisfy the initial burden that the "protected conduct was a 'substantial' or 'motivating' factor for the adverse employment action" with "*direct evidence* that an illegitimate criterion was a substantial factor in [the adverse action]." *Id.* at 792, 618 S.E.2d at 208 (emphasis in original) (citations omitted). Only upon this initial showing does the burden shift to defendant to "prove by a preponderance of the evidence that it would have reached the same decision as to [the employment action at issue] even in the absence of the protected conduct." *Id.* at 791-92, 618 S.E.2d at 208 (citations and internal quotation marks omitted). Here, a review of the allegations contained in the complaint, in addition to certain facts established in *Semelka I*, indicate plaintiff's inability to prove his report of health and safety concerns to Chancellor Folt played a substantial factor in his termination.

Plaintiff's complaint states that he retained the legal services of Mintz Levin "for purposes of assisting him in presenting" his concerns to the BOT "in an effort to protect . . . patients and staff." Plaintiff purportedly sought reimbursement of the legal fees because "his primary purpose in retaining [legal services] was not for personal benefit, but ultimately for the benefit of UNC-CH's School of Medicine." As alleged by plaintiff, it was this retention of legal counsel which led defendants to unlawfully retaliate against him. In fact, plaintiff contends,"[a]t no time did [he] ever exhibit a 'pattern of dishonesty' related to" his legal reimbursement request, yet defendants utilized this as a "pretext to retaliate against [him] for" reporting "health, safety, and hostile work environment concerns to [Chancellor Folt]" and "seeking to report the same to the [BOT] and potentially [the BOG]." Plaintiff argues that, in essence, the audit and internal investigation was used to wrongly characterize his request for reimbursement of legal fees as a violation of the Tenure Policy.

We disagree with plaintiff's interpretation of the facts underlying his termination. Despite plaintiff's assertion that the internal investigation was used as a pretext for retaliation, the facts indicate that the audit was conducted due to the "unusual" nature of plaintiff's request for reimbursement of legal fees and the ambiguity of his stated reasons for the reimbursement. Plaintiff reported to Mr. Collichio that the legal services were retained for consultations "concerning a book he might write, safety standards, drug development, staff burn-out and IRB issues." When plaintiff was asked for further explanation pertaining to his request, he provided partially redacted invoices and vague emails. Only then did Ms. Petree decide to conduct an audit to "ascertain whether his stated reasons for engaging Mintz Levin were indeed true" and not "for personal purposes." It was only upon a review of plaintiff's own communications with Mintz Levin did the audit reveal that plaintiff was discussing the potential of "large monetary settlements and promotions that he would like . . . in order for him to refrain from publicly disclosing his safety concerns." Consequently, the Faculty Hearings Committee concluded that despite plaintiff's ambiguity in his stated reasons for the reimbursement, "the specificity of his emails . . . dated January 1 and 6, 2016, make clear that [plaintiff] originally consulted with outside counsel because he was considering legal action against the University." Thus, the Committee ultimately concluded that plaintiff's deliberate obscurity of the need for outside legal consultation was "disingenuous and dishonest" and "constitute[d] misconduct of such a nature as to adversely reflect on [plaintiff]'s honesty, trustworthiness, and fitness to be a faculty member."

In conclusion, plaintiff cannot establish a *prima facie* case of whistleblower retaliation as his discharge was the result of legitimate, non-retaliatory reasons related to his misrepresentations in seeking reimbursement for $30,000 in personal legal fees. *Newberne*, 359 N.C. at 795, 618 S.E.2d at 210 (emphasis added) (citation omitted) ("[A] trial court ruling on a Rule 12(b)(6) motion to dismiss a whistleblowing claim should look at the face of the complaint to determine whether the factual allegations, if true, would sustain a claim for relief under *any* viable theory of causation."). Accordingly, plaintiff's arguments to the contrary are overruled.

III. Cross-Appeal

[3] On cross-appeal, plaintiff contends defendants' second amended motion to dismiss is a "nullity[,]" therefore the trial court's order dismissing claims against the individual defendants in their individual capacities is error. As indicated above, plaintiff is collaterally estopped from pursuing a cause of action under the Whistleblower Act, accordingly, remaining arguments pertaining to claims against the individual defendants are moot.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order denying defendants' motion to dismiss. Plaintiff's cross-appeal is dismissed as moot.

REVERSED; CROSS-APPEAL DISMISSED.

Judges HAMPSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
CLARENCE RAY GIDDERON

No. COA22-681

Filed 6 June 2023

Jury—criminal trial—reopening voir dire—after jury selection but before jury impaneled—colloquy—waiver

In a first-degree murder prosecution, the trial court did not abuse its discretion by declining to reopen the voir dire of a juror who, after jury selection but before the jury was impaneled, expressed concern because the other jurors had been asked questions during voir dire that she had not been asked. The trial judge conducted a colloquy with the juror confirming that, regardless of any unasked questions during voir dire, she would be able to serve as a fair and impartial juror. Further, defense counsel did not request additional voir dire when, after the court finished its colloquy with the juror, the court gave the parties an opportunity to do so; thus, defense counsel waived the right to raise the issue on appeal.

Appeal by defendant from judgment entered 3 December 2021 by Judge William A. Wood in Guilford County Superior Court. Heard in the Court of Appeals 9 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco J. Benzoni for the State.

Jarvis John Edgerton, IV, for the defendant-appellant.

TYSON, Judge.

Clarence Ray Gidderon ("Defendant") appeals from judgment entered on a jury's verdict for first-degree murder sentencing him to life imprisonment without possibility of parole. Our review reveals no error.

I. Background

Defendant was involved in a relationship with forty-seven-year-old Paige Rickard ("Rickard"). Rickard lived with her aunt, Robin Clodfelter. According to Clodfelter, Defendant was "extremely jealous and controlling over [Rickard]."

Defendant ate dinner with Rickard and Clodfelter on 29 March 2018 at a local church. Clodfelter's refrigerator was broken. She planned to visit a neighbor's house on the way home to obtain a couple cups of ice for the evening. Clodfelter walked behind Rickard and Defendant, and she heard Rickard ask Defendant to leave. Other neighbors also heard Defendant and Rickard arguing loudly as they walked by.

Defendant continued to walk beside Rickard, getting closer and closer to her. Clodfelter heard Defendant say: "Don't play me." Shortly thereafter, Defendant drew a knife and stabbed Rickard in the stomach. Clodfelter contemplated attacking Defendant, but determined she could not overcome him. She heard a cup fall out of Rickard's hand. Clodfelter ran to the closest neighbor's house and called 911. Law enforcement officers arrived shortly thereafter, Rickard was rushed to the hospital, and officers collected evidence from the crime scene. Defendant was taken into custody.

Rickard sustained five sharp force internal injuries on the left side of her body, which inflicted major damage to her spleen. She also suffered from an incised wound on her forehead. Rickard died several days later from complications arising from those wounds.

A jury indicted Defendant for first-degree murder on 11 June 2018. Defendant pled not guilty, and a trial was held. After jury selection, but before the jury was impaneled, Juror Six approached the court deputies. The juror stated she was concerned because other jurors had been asked questions during *voir dire* that she had not been asked.

Sheriff's Deputy Clapp immediately brought Juror Number 6's concerns to the court's attention:

> THE COURT: All right. Deputy Butler-Moore and Deputy Clapp have brought to my attention – I believe it comes through Deputy Clapp more than Deputy Butler-Moore. But Juror Number 6, who's Ms. Mackenzie on my list, Cory [sic] Mackenzie, C-O-R-A (verbatim) Mackenzie, has indicated to Deputy Clapp that there was a question that some of the other jurors w[ere] asked that she was not asked, but gave no indication that the information she has would have affected her ability to be fair in this case. Is that correct, Deputy Clapp?
>
> THE BAILIFF: Yes, Your Honor.
>
> THE COURT: Did she indicate to you in any way that the information she had would affect her ability to be fair?

THE BAILIFF: No, Your Honor.

THE COURT: But she did indicate that questions were asked of some jurors that were not asked of her; is that correct?

THE BAILIFF: Yes, sir.

THE COURT: Did she make any other comments?

THE BAILIFF: No, Your Honor.

The trial court called Juror Number 6 into open court and asked her additional questions.

THE COURT: I just wanted to ask you a few questions. Deputy Clapp and Deputy Butler-Moore both indicated that you attempted to give them some information; is that correct?

JUROR C. MACKENZIE (6): Yes. I realized that the line of questioning from the defense moved on because someone else had maybe a greater concern, but I didn't share some information that I think was related to some of your earlier questions.

THE COURT: Well, let me ask you some questions about that.

JUROR C. MACKENZIE (6): Okay.

THE COURT: Do you feel you could be a fair juror in this case?

JUROR C. MACKENZIE (6): I do.

THE COURT: Okay. And your concern is that some questions were asked of some jurors that perhaps were not asked of other jurors?

JUROR C. MACKENZIE (6): Yes.

THE COURT: But there was a – kind of a catch-all question asked by one or both of the attorneys, is there anything else that would affect your ability to be fair or words to that effect, and you did not speak up; is that correct?

JUROR C. MACKENZIE (6): I don't remember that sort of open-ended question from the defense. I do remember the DA asking if there was anything in his line of questioning.

> THE COURT: And whatever this information is that you were not provided perhaps because the specific question was not asked, in your opinion, does not affect your ability to be fair; is that correct?
>
> JUROR C. MACKENZIE (6): I don't think so.
>
> THE COURT: All right. Thank you, ma'am.
>
> JUROR C. MACKENZIE (6): Okay.
>
> (Juror C. Mackenzie departed the courtroom at 2:06 p.m.)
>
> THE COURT: Anything on that issue with Juror Number 6, [District Attorney]?
>
> [DISTRICT ATTORNEY]: No, Your Honor.
>
> THE COURT: [Defense Counsel]?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: All right. Well, we can bring all the jurors in, Deputy Clapp, or if someone could let Deputy Butler-Moore know.

Based upon the above colloquy, the trial court denied Defendant's request to re-open the *voir dire* for Juror Number 6, allowed Juror Number 6 to continue to serve on the jury, and impaneled the jury for trial.

The jury's verdict unanimously found Defendant to be guilty of first-degree murder on 3 December 2021. Defendant was sentenced as a prior record level VI offender to life imprisonment without possibility of parole. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2021).

III. Failure to Reopen Jury *Voir Dire*

Defendant argues the trial court abused its discretion by declining to reopen the *voir dire* of Juror Number 6 and failing to conduct an adequate inquiry or investigation.

A. Standard of Review

"The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the

trial court." *State v. Bond*, 345 N.C. 1, 17, 478 S.E.2d 163, 171 (1996) (citation omitted).

"In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559 (citations omitted), *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). "An abuse of discretion is shown only where the court's ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* at 267, 439 S.E.2d 558 (citations and internal quotation marks omitted).

B. Analysis

1. N.C. Gen. Stat. § 15A-1214

Our criminal procedure statutes provide:

> (g) If at any time after a juror has been accepted by a party, and *before the jury is impaneled*, it is discovered that the juror has made an incorrect statement during *voir dire* or that *some other good reason exists*:
>
> > (1) *The judge may examine*, or permit counsel to examine, *the juror to determine whether there is a basis for challenge for cause.*

N.C. Gen. Stat. § 15A-1214(g)(1) (2021) (emphasis supplied).

"[T]he decision whether to reopen examination of a juror previously accepted by the parties is a matter within the sound discretion of the trial court." *State v. Freeman*, 314 N.C. 432, 437, 333 S.E.2d 743, 747 (1985) (citing N.C. Gen. Stat. § 15A-1214(g)(1)) (explaining that, while the decision to reopen jury *voir dire* rests within the discretion of the trial court, once *voir dire* has been reopened, either party is allowed to exercise any remaining preemptory challenges for cause); *State v. Locklear*, 349 N.C. 118, 142, 505 S.E.2d 277, 291 (1998) (explaining "the extent and manner of the inquiry [by counsel] rests within the trial court's discretion").

2. State v. Boggess

Our Supreme Court explained a trial judge's role after a juror has been accepted, but before the jury has been impaneled, in *State v. Boggess*:

> [A] trial judge has leeway to make an initial inquiry when allegations are received before a jury has been impaneled that would, if true, establish grounds for reopening *voir dire* under N.C.G.S. § 15A–1214(g). As part of this initial

> investigation, the judge may question any involved juror and may consult with counsel out of the juror's presence. Based on information thus developed, the judge has discretion to reopen *voir dire* or take other steps suggested by the circumstances. Because the jury has not been impaneled and other potential jurors are still available, minimal disruption occurs if the judge resolves any doubts in favor of reopening *voir dire* and accords counsel the right to exercise any remaining peremptory challenges. If the judge at any point allows the attorneys to question the juror directly, *voir dire* has necessarily been reopened and the procedures set out in N.C.G.S. § 15A–1214(g)(1)–(3) are triggered. "[O]nce the examination of a juror has been reopened, 'the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror.' "

358 N.C. 676, 683, 600 S.E.2d 453, 457 (2004) (citation omitted).

3. State v. Adams

This Court also examined whether the trial court abused its discretion by failing to reopen *voir dire* in *State v. Adams*. 285 N.C. App. 379, 877 S.E.2d 721 (2022). In *Adams*, one of the jurors expressed his belief "Defendants should 'answer the questions themselves' " after he was selected to serve on the jury but before the jury was impaneled. *Id.* at 391, 877 S.E.2d at 730. The trial judge first called the juror to clarify his opinion, instructed the juror about a defendant's right to refrain from testifying, and gave the juror time to re-evaluate his opinion. *Id.*

The trial court ultimately denied defendant's motion to re-open jury *voir dire* "after inquiring into Juror Clark's opinion and only after determining Juror Clark would be able to follow the law." *Id.* at 393, 877 S.E.2d at 731. The trial court further explained "that reopening *voir dire* would 'open[ ] a Pandora's box' and cause delays during Defendants' trial, Defense counsel for both parties had already passed on Juror Clark, and Juror Clark gave repeated affirmations that he understood and could apply the law." *Id.* This Court affirmed the trial court's decision and concluded the trial court reached a reasoned decision and did not abuse its discretion. *Id.*

The facts before us are similar to those in *Adams*. Like in *Adams*, the trial judge called Juror Number 6 before the court and questioned her regarding the statements she had made to the deputies. *Adams*, 285 N.C. App. at 391, 877 S.E.2d at 730. The trial judge confirmed, regardless

of whether defense counsel asked Juror Number 6 the same questions as other jurors, that those unasked questions would not affect Juror Number 6's ability to serve as a fair and impartial juror. Juror Number 6 never expressed doubts about her impartiality, ability to serve as a juror, find the facts, and to fairly apply the law. To the contrary, the trial court's questioning further confirmed and solidified Juror Number 6's commitment to serve as a fair and impartial juror.

The decision whether to re-open *voir dire* rested within the trial court's discretion. Juror Number 6 had been selected by both parties without challenge and the jury was not yet impaneled. N.C. Gen. Stat. § 15A-1214(g)(1) (2021); *Boggess*, 358 N.C. at 683, 600 S.E.2d at 457 (citing *Id.* § 15A-1214(g)(1)); *Bond*, 345 N.C. at 17, 478 S.E.2d at 171; *Lee*, 335 N.C. at 268, 439 S.E.2d at 559; *Freeman*, 314 N.C. at 437, 333 S.E.2d at 747; *Locklear*, 349 N.C. at 142, 505 S.E.2d at 291. Defendant has failed to carry his burden on appeal to show any abuse in the trial court's exercise of its discretion. *Lee*, 335 N.C. at 267-68, 439 S.E.2d at 558-59; *Adams*, 285 N.C. App. at 393, 877 S.E.2d at 731.

The trial court provided counsel on both sides with the opportunity to request further *voir dire*, and both parties' counsel expressly declined the opportunity. *Id.* Defense counsel also failed to request additional *voir dire* when asked by the trial court and waived the right to challenge the issue on appeal. N.C. R. App. P. 10(a)(1). Defendant's argument is overruled.

IV. Conclusion

The decision whether to re-open *voir dire* rests within the trial court's sound discretion. N.C. Gen. Stat. § 15A-1214(g)(1); *Boggess*, 358 N.C. at 683, 600 S.E.2d at 457 (citing *Id.* § 15A-1214(g)(1)); *Bond*, 345 N.C. at 17, 478 S.E.2d at 171; *Lee*, 335 N.C. at 268, 439 S.E.2d at 559; *Freeman*, 314 N.C. at 437, 333 S.E.2d at 747; *Locklear*, 349 N.C. at 142, 505 S.E.2d at 291.

The trial court conducted a timely inquiry under the statute into Juror Number 6's comments, concerns, questions, and beliefs prior to impaneling the jury. *Adams*, 285 N.C. App. at 393, 877 S.E.2d at 731. Defendant has failed to show any abuse in the trial court's exercise of discretion in questioning Juror Number 6. *Id.*; *Lee*, 335 N.C. at 267-68, 439 S.E.2d at 558-59.

Defendant also failed to request re-opening of *voir dire* and expressly waived re-opening when asked by the trial court. N.C. R. App. P. 10(a)(1).

Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges ARROWOOD and RIGGS concur.

STATE OF NORTH CAROLINA
v.
RICHARD LEE HEFNER

No. COA22-435

Filed 6 June 2023

1. Criminal Law—jury instructions—habitual felon status—predicate offense—described as "crime" versus "felony"

In its jury instructions on habitual felon status, where the trial court referred to the State's burden of proof as having to show that defendant had been convicted of the "crime"—rather than the "felony"—of grand larceny in South Carolina as one of the predicate offenses (as requested by the State due to the South Carolina judgment not explicitly stating that the offense was a felony), there was no error because the State presented evidence from which the jury could determine that the offense constituted a felony under South Carolina law at the time it was committed.

2. Criminal Law—habitual felon status—proof of prior convictions—out-of-state conviction—sufficiency of evidence

The State presented sufficient evidence from which the jury could conclude that defendant had been convicted of three predicate felonies to attain habitual felon status, including the indictment and judgment from defendant's prior conviction in South Carolina of grand larceny, which listed the elements of grand larceny and the statute being violated, respectively, and which demonstrated that that offense constituted a felony under the statute then in effect.

3. Indictment and Information—habitual felon status—predicate offenses—facially valid

The indictment charging defendant with having attained habitual felon status was facially valid because it alleged three predicate

felony convictions, including one of an offense defendant committed in South Carolina (grand larceny), which constituted a felony under South Carolina law at the time it was committed.

Appeal by Defendant from judgment entered 28 May 2021 by Judge Thomas H. Lock in Jackson County Superior Court. Heard in the Court of Appeals 29 November 2022.

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

Appellate Defender Glenn Gerding by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

WOOD, Judge.

Richard Hefner ("Defendant") appeals from a judgment entered 28 May 2021 after being sentenced as a habitual felon. Based upon our reasoning below, we find no error in sentencing.

I. Factual and Procedural Background

On the evening of 29 December 2018, Defendant and his girlfriend, Ms. Jones, arrived at a Walmart in Sylva, North Carolina, with no items in their possession. The couple made their way back to the electronics section of the store and began looking at televisions. Defendant placed the television, a 43-inch Hisense valued at $278.00, in their shopping cart. When the television was placed into the shopping cart, an anti-theft device known as "spider-wire" was still on the device. Once the television was placed in the shopping cart, the couple proceeded to the front of the store. Briefly separating, Ms. Jones pushed the television through a closed cash register while Defendant walked through self-checkout. The two then met again at the exit. When asked by a store greeter to provide the receipt for the television, Defendant stated that they had attempted to return the device but were denied a refund. Defendant and Ms. Jones left Walmart with the television, placing the device in their vehicle. After Defendant and Ms. Jones left with the television, spider-wire was discovered in a toy aisle the two had walked down before leaving the store.

Subsequently, Defendant was arrested and Defendant was indicted by a grand jury on 1 July 2019 for felony larceny and possession of stolen goods. On this same day, the State obtained an indictment against Defendant charging him with attaining habitual felon status. On 8 December 2020, the State gave notice of its intent to seek an aggravated

sentence against Defendant based on four aggravating factors: Defendant was joined with more than one person in committing the offense and was not charged with committing a conspiracy; Defendant committed the offense while on pretrial release on another charge; Defendant has been found by a North Carolina court to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence; and the offense committed was during the time in which Defendant was on supervised or unsupervised probation, parole, or post-release supervision.

On 15 March 2021, the State obtained a superseding indictment on the attaining habitual felon status charge. The indictment alleged the following predicate felonies: (1) the felony of grand larceny in violation of South Carolina Code of Laws Section 16-13-30 which Defendant committed on 27 August 2005 and of which he was convicted on 25 October 2005; (2) the felony of possession of a stolen motor vehicle in violation of N.C. Gen. Stat. § 20-106 which Defendant committed on 5 November 2009 and of which he was convicted on 28 April 2010; and (3) the felony of possession of methamphetamine in violation of N.C. Gen. Stat. § 90-95(a)(3) which Defendant committed on 18 October 2016 and of which he was convicted on 3 July 2017.

Defendant was tried during the 24 May 2021 Criminal Session of Jackson County Superior Court and appeared *pro se* with appointed stand-by counsel, although he elected to be represented by counsel during one day of the jury trial. During the trial, the State called as its witness Mr. Kilby, the loss prevention employee for Walmart. Mr. Kilby testified that an hour before Defendant and Ms. Jones arrived at the store, he had inspected the televisions to ensure all of these devices were secured in spider-wire. Mr. Kilby recalled that when he observed Defendant and Ms. Jones walk towards the store's exit, he noticed that the television in their shopping cart was missing its spider-wire. Mr. Kilby confirmed that no 43-inch television had been purchased while Defendant and Ms. Jones were present in the store.

Testifying on his own behalf, Defendant stated that on the day in question, Ms. Jones told him she had purchased a television online and needed to pick it up at Walmart. Defendant testified that when they arrived at Walmart, they located the electronics section, and he placed the television in their shopping cart. According to Defendant, he then went to the bathroom. Once he returned, Defendant testified that he and Ms. Jones began arguing over the television purchase, at which point Ms. Jones decided to return the item. Defendant attempted to return the television without a receipt at the Customer Service desk but was told it must be returned at the Electronics Department. Defendant further

testified that Ms. Jones then changed her mind and elected to keep the television, and the couple moved towards the store's exit. Defendant stated that when they left, he showed the receipt of the television purchase to the Walmart greeter.

On 27 May 2021, the jury found Defendant guilty of felony larceny and felony possession of stolen goods. During the habitual felon phase of trial, the State introduced the following evidence of the South Carolina conviction: the arrest warrant, indictment, and judgment for grand larceny. The State called Jackson County Assistant Clerk Stevie Bradley to authenticate the exhibits for Defendant's three predicate felony convictions. Ms. Bradley testified that the South Carolina judgment reflected that "[t]he crime is grand larceny."

During the charge conference for the habitual felon trial, the State noted that the South Carolina judgment for grand larceny did not explicitly state that the charge was a felony, but the South Carolina statute in effect at the time Defendant committed the crime identified the offense as a felony, and this offense is substantially similar to North Carolina's offense of felony larceny. Further, the State argued that the question of whether the South Carolina conviction was a felony or a misdemeanor was a question of law, not a question of fact for the jury. The State also requested that the trial court replace the word "felony" with "crime" when giving the pattern jury instruction for habitual felon status, N.C.P.I.–Crim. 203.10, as it related to the South Carolina felony.

Defendant objected during the charge conference and stated: "Yeah, I just would like to say if it doesn't state in the actual code itself it's not a felony, I would like for it to stay the same, it's not a felony." Defendant's objection was overruled. The trial court concluded that the South Carolina conviction was a felony and agreed to instruct the jury as requested. The trial court instructed the jury as follows:

> For you to find the defendant guilty of being a habitual felon, the State must prove three things beyond a reasonable doubt. First, that on October 25, 2005, the defendant in the Court of General Sessions for Cherokee County, South Carolina, was convicted of the crime of grand larceny that was committed on August 27th, 2005, in violation of the law of the State of South Carolina.

On 28 May 2021, the jury found Defendant guilty of attaining habitual felon status. On this same day, Defendant admitted to the existence of two aggravating factors and an additional record point for purposes of sentencing; in exchange, the State dismissed other pending charges.

The trial court arrested judgment on the possession of stolen goods conviction. Additionally, the trial court found the existence of two aggravating factors, found Defendant to have 16 prior record points, and a prior record level of V. Defendant was sentenced in the aggravated range of 120-156 months incarceration. Defendant gave oral notice of appeal in open court.

II. Analysis

On appeal, Defendant challenges his habitual felon status based upon his 2005 South Carolina conviction, arguing that it "cannot constitute a predicate conviction for habitual felon purposes because, after June of 2010, the offense charged in the South Carolina indictment is no longer a felony in South Carolina." Based upon this alleged error, Defendant argues that (1) the trial court erred in its instruction to the jury on habitual felon status; (2) there was insufficient evidence to convict him of attaining habitual felon status; and (3) the indictment charging him with attaining habitual felon status was fatally defective. We review each of these arguments in turn.

A. Jury Instructions.

[1] First, Defendant argues that the trial court "deprived the jury of its fact-finding responsibilities by failing to instruct the jury that it had to determine whether he had been convicted of an offense which was a felony in South Carolina at the relevant time." Defendant contends that because the jury was instructed that they could find Defendant had attained habitual felon status if it found he was convicted of an offense which was a "crime" in South Carolina, not every essential element of the charged habitual felon status was submitted to the jury. Defendant further argues that since the "2005 South Carolina indictment obtained against [him] alleged conduct which was no longer a felony under South Carolina law in 2018" – the time period which Defendant committed the criminal conduct the State sought to habitualize – "the omission of this essential element was not harmless beyond a reasonable doubt." We disagree.

Whether the trial court erred in instructing the jury over the defendant's objection is a question of law reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Pursuant to N.C. Gen. Stat. § 14-7.1, a defendant who has been convicted of or pleaded guilty to three predicate felony offenses in any federal or state court "is declared to be [a] habitual felon and may be charged as a status offender[.]" N.C. Gen. Stat. § 14-7.1(a). A felony includes the following: (1) a felony in North Carolina; (2) an "offense that is a felony under the laws of another

state or sovereign that is substantially similar to an offense that is a felony in North Carolina" regardless of the sentence imposed; (3) an "offense that is a crime under the laws of another state or sovereign that does not classify any crimes as felonies" provided the offense meets several enumerated requirements; and (4) an "offense that is a felony under federal law[,]" excluding certain offenses related to intoxicating liquors. N.C. Gen. Stat. § 14-7.1(b)(1)–(4).

On the issue of whether the jury should have determined that the South Carolina grand larceny conviction was a felony, the State argues, "[w]hile the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court, whether a prior out-of-state conviction exists and whether it is a felony are questions of fact." However, the State makes a distinction that in this case, the "ultimate inquiry, is whether the jury was properly instructed and could determine whether the offense was a felony." We agree with this distinction.

The relevant statute, N.C. Gen. Stat. § 14-7.1 was amended in 2017 to include a subsection which addressed jurisdictions, such as New Jersey,[1] that do not distinguish between felonies or misdemeanors. 2017 N.C. Sess. Law 176, § 2(a) ("S.B. 384"). In jurisdictions which do not "classify any crimes as felonies," the amended statute provides the mechanism whereby convictions from those other jurisdictions can be treated as predicate felony convictions for attaining the status of habitual felon in North Carolina. N.C. Gen. Stat. § 14-7.1(b)(3). As a result of the N.C. Gen. Stat. § 14-7.1 amendment, the pattern jury instruction for habitual felon was also amended in 2019 to reflect this change to the statute. In keeping with the amended statute, the amended patterned jury instruction provides the option to use "crime" instead of "felony" language, such that it reads:

> For you to find the defendant guilty of being a habitual felon, the State must prove three things beyond a reasonable doubt:
>
> First, that on (name date) the defendant, in (name court) [was convicted of] [pled guilty to] the [felony] [crime] of

1. It is true that the New Jersey criminal code does not use the term "felony." *State v. Smith*, 181 A.2d 761, 767 (N.J. 1962), *cert. denied*, 374 U.S. 835, 83 S. Ct. 1879, 10 [L. Ed.] 2d 1055 (1963). Instead, all crimes are classified as a crime of the first, second, third, or fourth degree. N.J. Stat. Ann. § 2C:43-1 (2011).

> (name felony or crime), that was committed on (name date) in violation of the law of the [State of North Carolina] [State of (name other state)] [United States].

N.C.P.I.-Crim. 203.10. According to Defendant, without citing case law or any other authority, the option to use "crime" instead of "felony" is only "applicable when the jurisdiction from which the predicate conviction was obtained does not classify any crimes as felonies and the conviction cannot thus be identified as a felony in the jury instructions." In opposition, the State argues that the amended pattern jury instruction for habitual felon status gives the option of using either "felony" or "crime" as language to indicate predicate offenses, and that "this Court has not held that the use of 'crime' in other contexts constitutes error."

An error in a jury instruction is prejudicial and requires a new trial only if a defendant meets his or her burden of establishing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a). Assuming arguendo that the trial court's use of the word "crime" to instruct the jury on the charge of habitual felon was erroneous, we believe that the jury could still determine that Defendant's earlier South Carolina predicate offense constituted a felony under the applicable statute, so that there is not a reasonable possibility that the jury would have reached a different result. At trial, the State presented evidence showing that Defendant was convicted in 2005 of a felony – grand larceny – under South Carolina law.

In 2005, the relevant South Carolina statute stated:

> (A) Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personalty of which by law larceny may be committed, or of any fixture, part, or product of the soil severed from the soil by an unlawful act, or has a value of one thousand dollars or less, is petit larceny, a misdemeanor, triable in the magistrate's court. Upon conviction, the person must be fined or imprisoned not more than is permitted by law without presentment or indictment by the grand jury.
>
> (B) Larceny of goods, chattels, instruments, or other personalty valued in excess of one thousand dollars is grand larceny. Upon conviction, the person is guilty of a felony and must be fined in the discretion of the court or imprisoned not more than:

> (1) five years if the value of the personalty is more than one thousand dollars but less than five thousand dollars;
>
> (2) ten years if the value of the personalty is five thousand dollars or more.

S.C. Code Ann. § 16-13-30 (2005). The statute distinguished between petit larceny and grand larceny and set grand larceny as larceny of goods valued in excess of $1,000.00. In 2010, the South Carolina General Assembly amended the above statute to change the requisite monetary amount from $1,000.00 to $2,000.00. S.C. Code Ann. § 16-13-30 (2010).

However, Defendant's sentence and the incidents of his punishments are governed by statutes in effect at the time the crimes were committed. *See Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17, 22 (1981). Thus, the older version of the statute was in effect at the time Defendant committed the grand larceny crime and he had been convicted and sentenced already by the time of the new 2010 Amendment. Moreover, the relevant 2010 changes to S.C. Code Ann. § 16-13-30, via the session law, also included a savings clause which provided that the "amendment to § 16-13-30 does not affect liability incurred under the prior version of the statute." *State v. Brown*, 402 S.C. 119, 740 S.E.2d 493, 497 (S.C. 2013). While the monetary amount required to establish grand larceny was raised in an amendment five years after Defendant's conviction, the 2010 amendment did not change the classification of grand larceny as a felony. We, therefore, hold that because Defendant's 2005 South Carolina conviction for grand larceny constituted a felony during the time in which the offense was committed and was not reclassified by a later statutory amendment, it serves as a valid predicate conviction for Defendant attaining habitual felon status.

B. Attainment of habitual felon status.

[2] Next, Defendant argues the State failed to prove Defendant attained habitual felon status because the State did not put on sufficient evidence as to each element of the offense. Referencing previous contentions made in his first issue on appeal, Defendant again argues that "the State offered no evidence to prove to the jury beyond a reasonable doubt that [his] 2005 South Carolina conviction for grand larceny is a felony under the laws of South Carolina."

Defendant acknowledges in his brief that at trial, he did not move to dismiss the charge for insufficient evidence when the State rested and at the close of evidence; therefore, his insufficiency claim was not preserved for appellate review pursuant to Rule 10 of our Rules of Appellate

Procedure. N.C. R. App. P. 10. In turn, Defendant requests this Court to invoke Rule 2 of our Rules of Appellate Procedure to review the merits of his claim. In our discretion and in order to prevent manifest injustice to Defendant, we invoke Rule 2 to reach Defendant's raised issue. *State v. Batchelor*, 190 N.C. App. 369, 378, 660 S.E.2d 158, 164 (2008).

In this case, the State presented substantial evidence of Defendant's felony conviction for grand larceny in South Carolina. During the trial, the State introduced into evidence a certified copy of an indictment for the South Carolina offense alleging the following:

> That [Defendant] did in Cherokee County, on or about August 26, 2005, with the intent to permanently deprive the owner, take and carry away diamond ring from her 1994 Honda Accord valued at more than one thousand dollars, belonging to Priscilla Smith, in violation of 16-13-30 Code of Laws of South Carolina, 1976, as amended.

The State also admitted a copy of the judgment for the above offense which shows that Defendant pled guilty to grand larceny and that this offense is "in violation of § 16-13-30 of the S.C. Code of Laws[.]" Thus, the indictment listed the elements of grand larceny and the judgment described the offense as grand larceny, and together, these court records established the statute which was violated. As we have determined prior, the crime charged in South Carolina against Defendant constitutes a felony under the laws of South Carolina. Hence, Defendant's previous felony conviction serves as a valid predicate offense for the sentencing as a habitual felon. This offense was a felony because "grand larceny" is a felony under this statute. Based upon the record before us, the State presented sufficient evidence to demonstrate that Defendant's South Carolina grand larceny conviction was a predicate felony offense for his attaining habitual felon status.

C. Habitual Felon Indictment.

[3] Finally, Defendant argues that his habitual felon indictment was fatally defective because the indictment failed to allege three predicate felony convictions. Defendant continues to point to the 2010 amendment to South Carolina statute § 16-13-30 to argue that he is no longer charged with a crime that is a felony in South Carolina, so that the previous conviction does not serve as a valid predicate conviction for habitual felon purposes. According to Defendant, as a result of this invalid predicate offense, the indictment "failed to allege the essential elements of habitual felon status, rendering the indictment fatally defective and legally insufficient to confer jurisdiction upon the trial court." Thus,

Defendant argues that the trial court erred in trying him for attaining habitual felon status and entering judgment and commitment against him on the habitual felon indictment. We disagree.

This Court reviews *de novo* the sufficiency of an indictment. *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019). An indictment "is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner[.]" N.C. Gen. Stat. § 15-153. For a habitual felon status indictment, N.C. Gen. Stat. § 14-7.3 provides:

> [a]n indictment which charges a person with being [a] habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. § 14-7.3.

In this case, Defendant's habitual felon status indictment did not fail to charge an essential element as it related to the South Carolina conviction. The indictment clearly alleged the prior felony; the date the prior felony was committed; the name of the state against whom the felony was committed; the date that conviction was returned for the felony; and the identity of the court wherein the conviction took place. For the reasons discussed above, the evidence further established that Defendant's 2005 conviction of grand larceny serves as a valid predicate felony offense. The habitual felon indictment was therefore not fatally defective, because it laid out all essential elements of the offense, particularly that of the South Carolina predicate conviction. *See State v. Briggs*, 137 N.C. App. 125, 131, 526 S.E.2d 678, 682 (2000). Therefore, Defendant's argument is overruled.

III. Conclusion

We hold Defendant received a fair trial, free from prejudicial error, and find no error in sentencing.

NO ERROR.

Judges ZACHARY and GORE concur.

STATE OF NORTH CAROLINA
v.
DAVON SMITH

No. COA22-719

Filed 6 June 2023

1. Homicide—first-degree murder—jury instruction—lesser-included offense—premeditation and deliberation

The trial court in a first-degree murder prosecution did not err in declining to instruct the jury on the lesser-included offense of second-degree murder, where the State satisfied its burden of proving every element of the greater offense, including premeditation and deliberation. Defendant could not negate the element of premeditation and deliberation with evidence that someone else had bullied him into killing the victim where, under the law, only provocation by the victim (not a third party) may be considered when analyzing premeditation and deliberation. Some evidence indicated that defendant was angry with the victim but originally intended only to fight the victim rather than kill him; however, defendant presented no evidence that his anger disturbed his faculties and reason, and the fact that he might have lacked the intent to kill the victim at an earlier moment was not a reflection of his state of mind at the time of the killing.

2. Homicide—first-degree murder—sixteen-year-old defendant—jury instruction—intent, premeditation, and deliberation for adolescents

In a first-degree murder prosecution arising from events that occurred when defendant was sixteen years old, the trial court did not err in declining defendant's request for a special jury instruction that asked the jury to consider the differences between adult and adolescent brain function when determining whether defendant "intentionally killed the victim after premeditation and deliberation." Not only did defendant fail to present any evidence on adolescent brain function, but also the requested instruction was likely to mislead the jury as an incorrect statement of law, since a defendant's age is not a legally-recognized factor when analyzing whether that defendant murdered someone with premeditation and deliberation.

3. Evidence—hearsay—exception—recorded recollection—Rule 403 analysis—murder trial—witness's police interview—photo lineup identification

In a first-degree murder prosecution arising from a fatal shooting, the trial court did not err by admitting a video of a witness's police interview into evidence along with her photo lineup identification of defendant, as both constituted recorded recollections falling under the hearsay exception in Evidence Rule 803(5). The interview occurred only two days after the shooting, and therefore the witness spoke to police while her memory of the events was still fresh. Both the interview and the lineup identification correctly reflected the witness's knowledge where, although she denied remembering most of the interview and did not testify that her statements to police were correct, she also did not disavow her statements and even testified that "I told [police] the truth if I talked to them." Additionally, she identified her signature and initials on the pre-trial identification paperwork, and acknowledged identifying defendant during the lineup. Finally, because the evidence was highly probative of defendant's motive for shooting the victim, the court did not abuse its discretion in admitting the evidence over defendant's Rule 403 objection.

4. Identification of Defendants—photo lineup—impermissibly suggestive procedures—substantial likelihood of irreparable misidentification—murder trial

In a first-degree murder prosecution arising from a fatal shooting, the trial court's decision to admit a witness's photo lineup identification of defendant into evidence was upheld on appeal where, even if defendant had not failed to address whether police used impermissibly suggestive procedures to obtain the identification, he still failed to show that the procedures employed created a substantial likelihood of irreparable misidentification. The shooting occurred during the daytime, and the witness testified that she had seen the shooter's unobstructed face and recognized him as defendant. Further, the witness participated in the lineup less than six hours after the shooting and asserted in her identification packet that she was one-hundred percent sure that defendant was the shooter.

5. Evidence—murder trial—witness identifications of defendant—lay opinion testimony—that witnesses were forthcoming and unequivocal—plain error analysis

In a first-degree murder prosecution, where witnesses to a fatal shooting had identified defendant as the shooter to law enforcement,

the trial court did not commit plain error by allowing the detectives who interviewed the witnesses to testify that the witnesses were "forthcoming" and "unequivocal" when they identified defendant. Lay testimony concerning a witness's demeanor does not constitute an improper opinion as to that witness's credibility; at any rate, given other overwhelming evidence of defendant's guilt, the admission of the detectives' testimony could not have had a probable impact on the jury's verdict.

Judge MURPHY concurring in Parts II-A through II-D and concurring in result only in Parts II-E and II-F.

Appeal by defendant from judgment entered 24 June 2021 by Judge Forrest D. Bridges in Buncombe County Superior Court. Heard in the Court of Appeals 22 February 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

ARROWOOD, Judge.

Davon Smith ("defendant") appeals from judgment entered upon his conviction for first-degree murder. Defendant contents the trial court erred by: (1) failing to instruct the jury on second-degree murder; (2) failing to instruct the jury on intent, premeditation, and deliberation for adolescents; (3) admitting a video interview and identification of a witness; (4) admitting an identification of another witness because investigators were improperly suggestive during the interview; and (5) permitting officers to testify the witnesses were forthcoming when they identified defendant because that invaded the province of the jury. Defendant further contends that the "cumulative prejudice" of these alleged errors entitles him to a new trial. For the following reasons, we hold the trial court did not err.

I. Background

At 12:15 p.m. on 25 June 2017, Asheville Police Department ("APD") was dispatched to a shooting at the Pisgah View Apartments. Upon arrival, law enforcement located a victim "on the ground behind" one of the apartment buildings. The victim was "in a large pool of blood" and

surrounded by a crowd of people, some of whom were attempting to render aid. The victim was transported by EMS to the hospital but was later pronounced deceased.

The victim was identified as Rondy Samuel Shields, III ("Mr. Shields"), also known as "ManMan[.]" An autopsy revealed Mr. Shields was shot once, and the bullet "entered on the right side of [his] back . . . then exited . . . through the front of [his] neck." His cause of death was determined to be a gunshot wound to the back. Although five shell casings from a 40-caliber Smith & Wesson firearm were recovered from the scene, the casings produced no identifiable latent prints.

As part of the investigation, law enforcement also obtained a video of the shooting from one of the cameras at the apartment complex. The video showed two apartment complexes separated by a street, with a parked gold sedan in the lower right portion of the screen. At the beginning of the video, Mr. Shields can be seen in the distance walking up the street towards the camera. While Mr. Shields is walking, a woman in a pink shirt walks up to the gold sedan, and two vehicles drive by, a silver vehicle followed by a dark colored sedan. Although the silver vehicle leaves the view of the camera, the black sedan stops abruptly and then backs up. Then, as a person in a black hoodie comes into view in the bottom right-hand corner of the video, a female in a red shirt emerges from the back passenger side of the gold sedan.

When Mr. Shields sees the person in the black hoodie, he pauses, takes a few steps back, then starts running away behind the apartment complex. Although the woman in the red shirt approaches the person in the black hoodie and attempts to stop them, the person in the hoodie runs a few steps while shooting in the direction of Mr. Shields. A woman in a blue shirt emerges from the driver's seat of the gold sedan and the other woman from the vehicle begin to run away. As most are running away, another person in a white shirt, dark-colored jacket, and shorts emerges from the bottom right corner of the screen and runs towards the shooter. Then, the shooter and the person in the shorts both run out of frame in the same direction. From the video, law enforcement identified potential witnesses, and a suspect vehicle which they believed to be the vehicle defendant exited before the shooting occurred.

One potential witness identified from the video was Samantha Pulliam ("Ms. Pulliam"). Ms. Pulliam went to APD the afternoon of the shooting for an interview with Detective Jonathan Morgan ("Detective Morgan") and Detective Tracy Crowe ("Detective Crowe"). During the interview, Ms. Pulliam wrote out a statement and looked at photographs

of potential suspects, ultimately identifying defendant as the shooter. Ms. Pulliam's written statement read:

> I was sittin [sic] in Pisgah View pickin [sic] up my granddaughter [and her] mother Mellasia. A silver car pulled up the shooter "Bop" got out click [sic] the gun I grabbed his arm tried to stop him and he just kept shootin [sic] even after (ManMan) was [on] the ground then he got back in the car and left with 2 guys an [sic] possibly a female.

Furthermore, Ms. Pulliam identified Mahogany Fair ("Ms. Fair"), also known as "Hog," as someone who was on scene and picked her out of a photo lineup. That evening, Detective Morgan obtained a warrant for defendant's arrest for the first-degree murder of Mr. Shields. At the time of the shooting, defendant had just turned sixteen.

The next day, 26 June 2017, a silver Chevrolet Impala, believed to be the suspect vehicle from the surveillance video, was located at a different apartment complex. Pursuant to a search warrant, the vehicle was searched "for possible touch DNA[,]" processed for latent fingerprints, and trace taped. Although the fingerprints from the vehicle were not of "useful quality[,]" they were entered into the automated fingerprint identification system. The prints produced no potential suspects.

On 27 June 2017, Detectives Morgan and Crowe interviewed Mellasia Skyes ("Ms. Skyes"), someone Ms. Pulliam identified as being a witness to the shooting. Although Ms. Skyes initially denied knowing the shooter, she eventually admitted defendant, also known as "Bop," was her cousin, and identified him as the shooter in a lineup. Ms. Skyes stated in her recorded interview that Mr. Shields and defendant were arguing over Latrina or Trina ("Trina"), defendant's fourteen-year-old sister who allegedly had sex with Mr. Shields. Ms. Skyes further stated she had calmed defendant down earlier that day, but Ms. Fair was encouraging him to harm Mr. Shields. Ms. Skyes said that during the shooting and when defendant got out of the car, she heard someone yelling at defendant not to "let it slide."

Although law enforcement attempted to locate defendant for several months, they were unsuccessful until November. On 8 November 2017, U.S. Marshals, who were assisting in the search for defendant, got information that defendant was at a Motel 6 off Tunnel Road in room 123. Motel 6 records showed the room was rented 6 November to a Chad Case. Defendant was located inside the motel room, in the bathroom. The lights in the bathroom were off and defendant was "in the bathtub against the corner." Thereafter, on 4 December 2017, a Buncombe

County grand jury indicted defendant for first-degree murder and possession of a handgun by a minor.

The matter came on for trial in the Buncombe County Superior Court on 7 June 2021, Judge Bridges presiding. The State did not proceed with the possession of a handgun by a minor charge, so the only matter for trial was the first-degree murder charge.

As an initial matter, the trial court addressed defendant's pre-trial motions. Defendant filed a motion in limine, requesting an order prohibiting the State "from calling witnesses, including but not limited to [Ms. Pulliam] and [Ms. Skyes], to testify[,]" arguing there was "substantial likelihood the witnesses w[ould] deny or contradict their prior statements to law enforcement[.]" Defendant further requested the State be prohibited "from asking Ms. Pulliam questions about . . . defendant being the shooter[,]" or alternatively a *voir dire* of witnesses.

In court, defendant's attorney stated that he and his investigator spoke with Ms. Pulliam, and she told them she could not identify defendant and he was concerned the witness would contradict their prior statement and the State would impeach her with the prior statement. Defense counsel said that if the State was on notice of the contradiction, admission of the prior statement would be improper. The court denied the *voir dire* request, but found the State was "on notice" and "may be bound by what [Ms. Pulliam] says."

The court also addressed defendant's motion to suppress pretrial and in-court identification evidence. In this motion, defendant argued the lineup identification by Ms. Pulliam should be suppressed due to violations of the Eyewitness Identification Reform Act ("the Act"), Ms. Skyes's lineup identification should be suppressed for due process concerns, and both witnesses should not be allowed to do in-court identifications. Specifically, as to Ms. Pulliam, defendant argued the fact that Ms. Pulliam was not alone during the photo lineup, and her boyfriend was allowed to stay in the room with her, was a "substantial violation" of the Act, requiring suppression of both the lineup and any in-court identification. Both of defendant's pre-trial motions were denied.

Before the trial began, the State requested a show cause order and an arrest warrant for Ms. Pulliam, who was subpoenaed to be in court to testify but "failed to appear pursuant to the subpoena." Later that day, Ms. Pulliam was located, taken into custody, and brought to the courthouse to testify.

Ms. Pulliam testified that on 25 June 2017, she was with Ms. Skyes, who she identified as the woman in the video wearing the red shirt, and

Ms. Skyes's friends Nadia and Trina at the Pisgah View Apartments. Ms. Pulliam testified that she got "a glimpse" of the shooter's face and that she had "seen him previously in the" apartment complex. Although Ms. Pulliam stated she "didn't know" defendant, she was familiar with who he was "in passing" and recognized him as "Bop." Ms. Pulliam further testified that she did go to APD on the day of the shooting, but only because law enforcement "told [her] that [she] was on camera and that [she] had no choice." Ms. Pulliam's statement from her interview was admitted into evidence and published to the jury.

When questioned about the lineup identification that she also did that day, Ms. Pulliam stated she picked the person "that looked the closest" but she "wasn't a hundred percent [sure][.]" She further testified that she initialed the photograph of defendant in the lineup "because that resembled who it was and it turned out to be the same guy . . . sitting [in the courtroom] [that day]." When asked whether she saw the person in the courtroom that was shooting on 25 June 2017, Ms. Pulliam stated "correct[,]" and when asked to identify that person, she identified defendant. Ms. Pulliam also testified she did not see or hear Mr. Shields do anything to provoke defendant.

On cross, Ms. Pulliam denied telling defense counsel and his investigator that she could not identify defendant and stated the shooter did not have anything obstructing their face. When defense counsel showed Ms. Pulliam the video again and asked whether it appeared the shooter had on a mask, she admitted it did, "[f]rom that angle[.]" Furthermore, Ms. Pulliam acknowledged that during her interview she told detectives she grabbed the shooter, even though the video did not show that, but stated she "thought that [she] grabbed him because that's what [she] intended to do was [to] try to stop the situation." Lastly, Ms. Pulliam testified that she "thought [defendant] was arguing with his sister[,] [Trina,] again."

Next, the State called Ms. Skyes to the stand. Although Ms. Skyes testified she recalled being at the Pisgah View Apartments on 25 June 2017 with Ms. Pulliam and her friend Nadia, Ms. Skyes stated she did not "remember nothing [sic] from that day at all[,]" and denied Trina was there. Ms. Skyes further testified that she did not remember her interview with detectives on 27 June 2017 and stated three times that reading the transcript of the interview would not refresh her recollection. Ms. Skyes did, however, remember doing the photo lineup and picking out a picture of defendant, her cousin, but stated she did not think she was picking out the perpetrator. Furthermore, she testified she did not recall telling Detective Morgan she was very confident the person she identified in the lineup was the perpetrator.

Although Ms. Skyes stated she did recall going to the APD, she did not remember the substance of the interview. Ms. Skyes testified she "told [detectives] the truth if [she] talked to them[,]" but then later stated she did not remember if she told detectives the truth. At this point, the State moved to "admit [Ms. Skyes] recorded interview as a recorded recollection since she ha[d] insufficient knowledge to testify about [the interview.]" Outside the presence of the jury, the defense vehemently objected to the admission of the video, arguing the exception did not apply in this situation, the video would present a Constitutional confrontation issue, and under Rule 403, the probative value of the video interview was substantially outweighed by unfair prejudice.

The trial court, based on "the totality of the circumstances[,]" found the State satisfied the requirements of Rule 803(5) and the recorded interview could be played for the jury, but the transcript of the interview could not be admitted. Ms. Skyes was recalled to the stand and the recorded interview was played for the jury over defense counsel's objection.

After the video was played, Ms. Skyes testified that it did not refresh her recollection of her interview. Ms. Skyes did, however, acknowledge her signature on the photo lineup identification, but did not remember the other pictures in the lineup. The photo lineup identification where Ms. Skyes identified defendant as the shooter on 27 June 2017 was admitted into evidence over defense's objection.

During cross-examination, when asked whether the shooter had on a mask, Ms. Skyes testified they did, but then stated she thought so, but she did not remember. This was the first time Ms. Skyes ever mentioned the shooter wearing a mask. Furthermore, when asked if she continuously testified she could not remember anything because she "knew at the time [of the interview]" she could not ID the shooter because she "couldn't really see that person's face[,]" Ms. Skyes replied in the affirmative, and stated she was "just scared and ready to get out of the room."

The detectives who conducted the interviews of Ms. Skyes and Ms. Pulliam also testified for the State. Detective Crowe testified that Ms. Skyes was not forthcoming and "standoffish" at the beginning of the interview, but once her demeanor and story changed, she did not waver in her narrative and was unequivocal about the person they were discussing. Detective Morgan testified that Ms. Pulliam was cooperative and forthcoming in her interview, but that she "appeared much more reluctant to testify . . . in court[.]" Detective Morgan also testified that as part of the investigation, detectives identified a Facebook page belonging to defendant under the name "KaPo Bop." The "profile image" on the

account was a photograph of defendant, and on 5 May 2017 a photograph of defendant with Ms. Fair was uploaded to his Facebook account.

Sarah Ellis ("Ms. Ellis"), a forensic scientist with the North Carolina State Crime Lab, testified as to the DNA results from the Chevrolet Impala. Ms. Ellis tested "a swab from [the] driver's side front door interior of [the] Chevy Impala, a swab from [the] driver['s] side rear door interior of the same vehicle, a swab from [the] passenger side rear interior, and a swab from the passenger side front door interior" for DNA. Although most of the swabs produced DNA profiles that "were inconclusive due to complexity and/or insufficient quality of DNA recovered[,]" the swab from the rear passenger side interior produced a DNA profile that was a mixture of three contributors. Defendant and Mr. Shields were excluded as contributors to the major DNA profile, but the minor profile "was inconclusive due to complexity and/or insufficient quality of DNA."

The State also introduced, over defense's objection, three of defendant's recorded jail calls, from 11 November 2017 and 12 November 2017. In the calls, defendant discussed "Hog," inquired about how law enforcement got the Motel 6 room number, and stated he "ain't gonna [sic] run no more." Lastly, Chad Case ("Mr. Case") testified for the State. Mr. Case testified that on 6 November 2017, while he was at the BP on Tunnel Road, "[a] guy and a girl" approached him and offered him money to rent a room for them at the Motel 6 using his ID. Mr. Case booked the room in exchange for thirty dollars.

Defendant made a motion to dismiss at the close of the State's evidence, and at the close of all evidence, arguing the State presented insufficient evidence. Both motions were denied. Defendant did not present any evidence.

At the charge conference, defense counsel requested an instruction on the lesser-included offenses of involuntary manslaughter and second-degree murder. Defense counsel argued Ms. Skyes's statements in her interview that defendant "didn't want to shoot [Mr. Shields][,]" but someone was "in his ear . . . telling him to[,]" and that "witnesses [at the shooting] were egging him on," along with the fact that Mr. Shields was "having some kind of relationship with [defendant's] sister" all "warrant[ed] an instruction on manslaughter because that's classic heat of passion[.]" Defense counsel also requested a special instruction "on intent, premeditation and deliberation for adolescents[.]" The trial court declined to provide either instruction.

As part of the State's closing, they utilized a PowerPoint presentation of the evidence presented, including wording from Ms. Skyes's recorded interview. The defense objected, arguing the wording was "verbatim wording from the transcript that [the court] rule[d] was not to be admitted as an exhibit" and moved for a mistrial. The trial court found this was not the transcript, but a tool created by the State, and once brought to the court's attention the State was instructed to "take [it] down[,]" and a curative instruction was provided. Defendant's motion for a mistrial was denied.

On 22 June 2017, the jury found defendant guilty of first-degree murder and a sentencing hearing was set for 24 June 2021. Prior to the sentencing hearing, the State and defendant's counsel stipulated to several mitigating factors, including defendant's age at the time of the offense. Following the sentencing hearing, defendant was sentenced to life imprisonment with the possibility of parole. Defendant gave oral notice of appeal in open court.

II. Discussion

On appeal, defendant raises six issues. Specifically, defendant argues the trial court erred by: (1) failing to instruct the jury on second-degree murder; (2) failing to give the instruction on intent, premeditation, and deliberation for adolescents; (3) admitting the recorded interview with Ms. Skyes and her identification of defendant as the shooter; (4) admitting Ms. Pulliam's identification of defendant as the shooter when detectives used "impermissibly suggestive" interview tactics; and (5) permitting detectives to testify Ms. Pulliam and Ms. Skyes were "forthcoming and unequivocal when they identified" defendant as the shooter because this invaded the province of the jury. Defendant further argues that the "cumulative prejudice from the trial court's errors" entitle him to a new trial. We address each of defendant's arguments in turn.

A. Second-Degree Murder Jury Instruction

[1] First, defendant argues the trial court erred by failing to instruct the jury on the lesser-included offense of second-degree murder. Specifically, defendant contends the jury could have found defendant did not act with premeditation and deliberation since defendant was sixteen at the time, there was evidence defendant "react[ed] impulsively to the repeated provocation from [Ms.] Fair[,]" defendant had learned of Mr. Shield's relationship with his underage sister, and defendant "smoked marijuana on the day of the shooting." We disagree.

As an initial matter, we address two issues defendant raised in his brief. First, we note that although defendant claims he used marijuana

"earlier on the day of the shooting[,]" voluntary intoxication can only "negate the evidence of . . . specific intent if it is shown that the defendant was so intoxicated *at the time he committed the crime* that he was utterly unable to form the necessary specific intent." *State v. Williams*, 308 N.C. 47, 71, 301 S.E.2d 335, 350 (emphasis added) (citations omitted), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). "Evidence of mere intoxication, however, is not enough[.]" *State v. Williams*, 343 N.C. 345, 365, 471 S.E.2d 379, 390 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618, *reh'g denied*, 519 U.S. 1156, 137 L. Ed. 2d 231 (1997). Furthermore, voluntary intoxication is an affirmative defense, so evidence of "intoxication to a degree sufficient to negate *mens rea*" is the burden of defendant. *State v. Chapman*, 359 N.C. 328, 378, 611 S.E.2d 794, 830 (2005) (citation omitted). Here, no evidence of such intoxication was presented to the jury, nor does defendant make any argument that he was so intoxicated that he could not form intent.

Furthermore, although age may be a "factor" in the *Miranda* analysis, *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 180 L. Ed. 2d 310, 326-27 (2011), and in sentencing, *Roper v. Simmons*, 543 U.S. 551, 568, 161 L. Ed. 2d 1, 21 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 838, 101 L. Ed. 2d 702, 720 (1988), defendant has presented no case law that his age alone negates any element of first-degree murder. Accordingly, we need not consider these issues, and instead address whether defendant was entitled to an instruction based on his other arguments.

Since this alleged error was preserved for appeal, we review the trial court's decision *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted) ("Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo*, by this Court."). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citation omitted).

> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Sterling, 233 N.C. App. 730, 732-33, 758 S.E.2d 884, 886 (citation omitted), *disc. review denied and appeal dismissed*, 367 N.C. 523, 763 S.E.2d 142 (mem.) (2014).

"The substantive elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation." *State v. Guin*, 282 N.C. App. 160, 166, 870 S.E.2d 285, 290 (citation, internal quotation marks, and brackets omitted), *disc. review denied*, 876 S.E.2d 281 (mem.) (2022). By contrast, the elements of second-degree murder are: "(1) [the] unlawful killing (2) of a human being (3) with malice, but without premeditation and deliberation." *State v. Vassey*, 154 N.C. App. 384, 390, 572 S.E.2d 248, 252 (2002) (citation omitted), *disc. review denied*, 356 N.C. 692, 579 S.E.2d 96 (mem.), *and cert. denied*, 357 N.C. 469, 587 S.E.2d 339 (mem.) (2003).

Premeditation is a "thought beforehand for some length of time, however short." *State v. Horskins*, 228 N.C. App. 217, 221, 743 S.E.2d 704, 708 (citation omitted), *disc. review denied*, 367 N.C. 273, 752 S.E.2d 481 (mem.) (2013). However, murder is "committed with deliberation if it is done in a 'cool state of blood,' without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose." *Id.* at 221, 743 S.E.2d at 708 (citation omitted).

> "Cool state of blood" does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time *unless such anger or emotion was such as to disturb the faculties and reason*.

Id. at 221-22, 743 S.E.2d at 708-709 (emphasis added) (citation omitted).

"[P]remeditation and deliberation are not usually susceptible of direct proof and are therefore, susceptible of proof by circumstances from which the facts sought to be proven may be inferred." *State v. Faust*, 254 N.C. 101, 107, 118 S.E.2d 769, 772-73 (citations and quotation marks omitted), *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961). Factors relevant to the determination of whether the defendant acted with premeditation and deliberation include:

> Want of provocation on the part of deceased. The conduct of defendant before and after the killing. Threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased. The

> dealing of lethal blows after deceased has been felled and rendered helpless.

Id. at 107, 118 S.E.2d at 773 (citations omitted). "Additional factors include the nature and number of the victim's wounds, whether the defendant left the deceased to die without attempting to obtain assistance for the deceased, whether he disposed of the murder weapon, and whether the defendant later lied about what happened." *Horskins*, 228 N.C. App. at 222, 743 S.E.2d at 709 (citing *State v. Hunt*, 330 N.C. 425, 428-29, 410 S.E.2d 478, 481 (1991) (citations and quotation marks omitted)). "Premeditation and deliberation may [also] be inferred from the multiple shots fired by defendant." *Chapman*, 359 N.C. at 376, 611 S.E.2d at 828 (citations omitted).

Here, the State satisfied its burden of proving every element of the offense of first-degree murder and, despite defendant's argument, there was no evidence to negate any element, therefore the trial court did not err by declining to instruct the jury on second-degree murder. *See Sterling*, 233 N.C. App. at 733, 758 S.E.2d at 886; *see also State v. Leazer*, 353 N.C. 234, 240, 539 S.E.2d 922, 926 (2000) (citation omitted) ("Because there was positive, uncontradicted evidence of each element of first-degree murder, an instruction on second-degree murder was not required."). " 'A defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the [S]tate's evidence but not all of it.' " *Leazer*, 353 N.C. at 240, 539 S.E.2d at 926 (citation omitted). Furthermore " 'mere speculation [as to the rationales for defendant's behavior] is not sufficient to negate evidence of premeditation and deliberation.' " *Id.* (alterations in original) (citation omitted). Here, the evidence tended to show defendant arrived at the scene armed, fired multiple times as Ms. Shields' back was turned and he was attempting to flee, Mr. Shields did not provoke defendant at the time of the shooting, and defendant fled the scene leaving Mr. Shields to die.

Still, defendant argues a second-degree murder instruction was warranted since the jury could have found he acted without premeditation and deliberation because he had, at some indeterminate time earlier in the day, told Ms. Skyes he was only going to fight Mr. Shields, because he acted after being provoked and bullied by Ms. Fair, and because he "was angry at Mr. Shields for having sex with his younger sister[.]"

Defendant's argument regarding Ms. Fair is not supported by a review of the law related to provocation. Our case law recognizes evidence of provocation by the *deceased* may be considered in the

deliberation analysis, but provocation by a third-party is not. *State v. Elliott*, 344 N.C. 242, 271, 475 S.E.2d 202, 214 (1996) (emphasis added) (finding the trial court did not err by narrowing the scope to lack of provocation "by the deceased" since the instruction was based on pattern jury instructions and consistent with case law), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). This concept is consistent with our Supreme Court's established holding that duress and coercion are not valid defenses to first-degree murder, as the influence of a third person cannot excuse murder in the first-degree. *State v. Dowell*, 106 N.C. 722, 11 S.E. 525, 526 (1890) (" 'And, therefore, though a man may be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent.' "); *State v. Cheek*, 351 N.C. 48, 61, 520 S.E.2d 545, 553 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

Defendant's second argument, that Ms. Skyes's interview showed he was "angry" at Mr. Shields but agreed he was only going to fight the victim, is likewise without merit. Our case law holds that deliberation occurs in a "cool state of blood" if done in furtherance of revenge, even if defendant is angry at the time of the killing, as long as defendant's emotions are not "such as to disturb the faculties and reason." *Horskins*, 228 N.C. App. at 221-22, 743 S.E.2d at 708-709. Defendant presented no evidence his anger amounted to such a level. *See State v. Bedford*, 208 N.C. App. 414, 419, 702 S.E.2d 522, 528 (2010).

In fact, the interview with Ms. Skyes which defendant relies upon does not help this argument but hinders it. Ms. Skyes stated in the interview she had "talked [defendant] out of it and [she] had calmed him down earlier that day" and told defendant to "fight" Mr. Shields, but not shoot him, and defendant agreed. This statement is not sufficient to negate the element of premeditation and deliberation and to warrant an instruction of second-degree murder. Even if in some moment earlier in that day defendant did not have the intent to kill Mr. Shields, this is not a reflection of his state of mind and intent at the time of the shooting, as premeditation only requires some "thought beforehand . . . however short." *Horskins*, 228 N.C. App. at 221-22, 743 S.E.2d at 708. This argument is particularly unpersuasive when, later that day, defendant arrived at the crime scene with a gun and proceeded to fire five shots at the victim with the fatal shot striking him in the back as he ran away. Accordingly, we hold the trial court did not err by declining to provide defendant's requested instruction for second-degree murder.

B. Special Jury Instruction

[2] Next, defendant argues the trial court erred in failing to provide his requested special instruction on intent, premeditation, and deliberation for adolescents. Specifically, defendant contends this "novel" instruction "would have enabled the jury to determine . . . whether [defendant] had the necessary *mens rea* for first-degree murder[,]" and defendant was prejudiced by the by the trial court's failure to provide the instruction. We disagree.

"A trial court should give a specific jury instruction when '(1) the requested instruction [i]s a correct statement of law and (2) [i]s supported by the evidence, and . . . (3) the [pattern jury] instruction . . ., considered in its entirety, fail[s] to encompass the substance of the law requested and (4) such failure likely misle[ads] the jury.' " *State v. Steele*, 281 N.C. App. 472, 482, 868 S.E.2d 876, 884 (alterations in original) (citation omitted), *disc. review denied*, 878 S.E.2d 809 (mem.) (2022). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *State v. Guerrero*, 279 N.C. App. 236, 241, 864 S.E.2d 793, 798 (citation and internal quotation marks omitted). "[W]here the request for a specific instruction raises a question of law, 'the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.' " *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (citation omitted).

Here, defendant requested an instruction which stated, in pertinent part:

> In this case, you may examine the defendant's actions and words, and all of the circumstances surrounding the offense, to determine what the defendant's state of mind was at the time of the offense. However, the law recognizes that juveniles are not the same as adults. An adult is presumed to be in full possession of his senses and knowledgeable of the consequences of his actions. By contrast, the brains of adolescents are not fully developed in the areas that control impulses, foresee consequences, and temper emotions. Additionally, adolescents often lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.
>
> You should consider all the circumstances in the case, any reasonable inference you draw from the evidence, and differences between the way that adult and adolescent brains

> functions in determining whether the State has proved beyond a reasonable doubt that defendant intentionally killed the victim after premeditation and deliberation.

The trial court refused to provide this instruction, stating no evidence of adolescent brain development had been presented and although case law made a distinction between adults and juveniles for sentencing purposes, this was not an appropriate determination for the jury.

Although we agree the Supreme Court of the United States has stated "children are constitutionally different from adults for purposes of *sentencing*[,]" it has never found this difference relevant to a finding of guilt. *Miller v. Alabama*, 567 U.S. 460, 471, 183 L. Ed. 2d 407, 418 (2012) (emphasis added). In fact, the Supreme Court has articulated their decisions do not "suggest an absence of legal responsibility where crime is committed by a minor." *Eddings v. Oklahoma*, 455 U.S. 104, 116, 71 L. Ed. 2d 1, 12 (1982). Defendant concedes that no court has held such and we decline to announce a new legal precedent.

Here, even if the statements in defendant's proposed instructions are, arguably supported by current scientific research, they are not supported by the evidence, since no evidence was presented on adolescent brain function, and they are not a correct statement of the law. The instruction for first-degree murder provided by the trial court fully encompassed the elements of the offense. *Guin*, 282 N.C. App. at 166, 870 S.E.2d at 290; *see Steele*, 281 N.C. App. at 482, 868 S.E.2d at 884. Defendant's age is not considered nor contemplated in the analysis of premeditation and deliberation, therefore, this instruction would be incorrect and likely to mislead the jury. *Guin*, 282 N.C. App. at 166, 870 S.E.2d at 290; *see State v. Palmer*, 273 N.C. App. 169, 173, 847 S.E.2d 449, 452 (2020) (finding "[t]he trial court did not err in denying [d]efendant's request for a special jury instruction on lawful possession of a controlled substance where the requested instruction improperly characterized an exception as an element"); *see also Steele*, 281 N.C. App. at 483, 868 S.E.2d at 884. Accordingly, the trial court did not err.

C. Ms. Skyes's Interview and Identification

[3] Defendant next contends the trial court erred by playing the video of Ms. Skyes's 27 June 2017 interview and introducing her photo lineup identification of defendant because both were inadmissible hearsay and violated Rule 403. We note that this is the evidence that defendant extensively relies upon in his argument for the instruction on second-degree murder addressed above. This argument is without merit.

1. Hearsay Exception

"The admission of evidence alleged to be hearsay is reviewed *de novo* when preserved by an objection." *State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (citation omitted), *disc. review denied*, 370 N.C. 70, 803 S.E.2d 388 (mem.) (2017). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (citation omitted), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (mem.) (2001).

"Evidence of an out-of-court statement of a witness . . . may be offered as substantive evidence" if the evidence is "offered for the truth of the matter asserted and qualifie[s] as an exception under [North Carolina] hearsay rules." *State v. Ford*, 136 N.C. App. 634, 640, n. 1, 525 S.E.2d 218, 222, n.1 (2000). "Evidence which falls within a 'firmly rooted' hearsay exception is sufficiently reliable to prevent violation of a defendant's right to confrontation." *State v. Valentine*, 357 N.C. 512, 520, 591 S.E.2d 846, 854 (2003) (citations omitted); *State v. Leggett*, 135 N.C. App. 168, 175, 519 S.E.2d 328, 333 (1999) (finding Rule 803(5) is firmly rooted in North Carolina), *disc. review denied and appeal dismissed*, 351 N.C. 365, 542 S.E.2d 650 (mem.) (2000).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2022). Although "hearsay is not admissible[,]" our statutes provide exceptions to this general rule. *Id.* § 8C-1, Rules 802-803 (2022). One such exception is for recorded recollections. The relevant statute allows for the admission of such evidence if it meets the following criteria:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Id. § 8C-1, Rule 803(5) ("the Rule"). "While the Rule speaks of a 'memorandum or record,' the word record is broadly construed to include both audio and video recordings." *State v. Thomas*, 281 N.C. App. 159, 166, 867 S.E.2d 377, 385 (2021) (citations omitted), *disc. review denied*, 878 S.E.2d 808 (mem.) (2022).

Before hearsay can be admitted under this exception, the party offering the evidence must show: (1) the evidence "pertain[s] to matters about which the declarant once had knowledge;" (2) the declarant does not now have sufficient recollection of the matters; and (3) the evidence was made by declarant, or if made by someone other than declarant, was "examined and adopted . . . when the matters were fresh in [declarant's] memory[,]" and "reflect[ed] [declarant's] knowledge correctly." *State v. Love*, 156 N.C. App. 309, 314, 576 S.E.2d 709, 712 (2003) (citation omitted); *State v. Brown*, 258 N.C. App. 58, 68, 811 S.E.2d 224, 230-31, *disc. review denied*, 371 N.C. 340, 813 S.E.2d 853 (mem.) (2018). However, "the mere fact a statement is recorded is not enough to meet the requirement the statements contained therein reflected the witness's knowledge accurately at the time." *Thomas*, 281 N.C. App. at 167, 867 S.E.2d at 386 (citation omitted).

Here, defendant takes issue with two criteria: (1) "Ms. Skyes did not testify" that the matters were fresh in her mind when she participated in the interview and photo lineup; and (2) the interview and lineup did not correctly reflect her knowledge of the shooting. As to defendant's first issue, the trial court concluded Ms. Skyes's statement was made "only two days" after the shooting, and thus was made "while her memory of those events were still fresh[.]" Ms. Skyes's testimony to such a fact was not required, and the trial court can conclude from the fact that the interview occurred two days after the shooting that the matter was fresh in her memory at the time. *State v. Nickerson*, 320 N.C. 603, 608, 359 S.E.2d 760, 762 (1987) (finding the trial court "could properly conclude" the witness's statement, "made approximately five weeks after the incident[,]" was fresh in the witness's memory at the time the statement was made despite the defendant's contention that this was not shown).

Next, we consider whether the interview and lineup correctly reflect Ms. Skyes's knowledge of the event.

> The caselaw on whether the record correctly reflected the witness's knowledge at the time involves the far sides of the spectrum. On the one end, this Court has ruled the record did not correctly reflect the witness's knowledge at the time where the witness disagreed with or disavowed their prior statements on the stand.

Thomas, 281 N.C. App. at 167, 867 S.E.2d at 386 (citations omitted). However, "this Court has ruled that the record accurately reflected the witness's knowledge at the time when the person testified they recorded all the information they had at the time." *Id.* at 168, 867 S.E.2d at 386. In cases where the witness "did not testify the statements were correct

at the time, but [they] likewise did not disavow the statements on the stand[,]" unless the witness makes "any direct statements indicating she was lying," the court can find the witness relayed information that correctly represented their knowledge. *Id.* (finding the witness's testimony that she was "laying it all out" in her previous statement and no direct statement she was lying were enough for the court to properly conclude the hearsay statement correctly reflected her knowledge). Furthermore, "[t]his Court previously considered signing and dating a statement . . . to support a finding that the written statement correctly reflected the witness's prior knowledge." *Id.* at 169, 867 S.E.2d at 387.

Here, Ms. Skyes testified that she remembered being at the Pisgah View Apartments on 25 June 2017, she identified herself as the person in the red shirt in the surveillance footage, and she stated she did recall participating in a photo lineup and identified her signature and initials on the lineup packet. Ms. Skyes testified she picked out the photograph of defendant because detectives asked her to pick out "Bop[,]" but she did not think she was identifying the perpetrator. Furthermore, Ms. Skyes testified she did recall going to APD and speaking with detectives on 27 June, but repeatedly testified she did not remember the substance of the interview. Ms. Skyes also refused to review the transcript of the interview to refresh her recollection. When asked whether she told detectives the truth that day, she testified, "[y]es, I hope so. I don't remember nothing [sic] from that day. I told them the truth if I talked to them." However, later on direct examination when asked whether she told detectives the truth during her interview, Ms. Skyes stated she "didn't remember nothing [sic] from four years ago[.]"

We find no error in the trial court's decision. Although Ms. Skyes did not testify her statements to detectives in the interview were correct, she did not disavow her statements before the trial court made its decision, and at one point testified she told law enforcement the truth if she spoke to them. *See Thomas*, 281 N.C. App. at 167, 867 S.E.2d at 386. Furthermore, Ms. Skyes identified her signature and initials on the pre-trial identification paperwork, and acknowledged she picked out defendant, even though she claimed she did not think she was picking out the perpetrator. Accordingly, we find the interview and photo lineup were properly admitted.

Defendant further argues the trial court erred in admitting the video and playing it for the jury because it "violated" the rule of "proscription" which states that if admissible, the evidence can be read into the evidence but not offered as an exhibit unless offered by the other party. Defendant acknowledges that video evidence is a "record"

under the exception and does not provide any legal basis for this contention. Nor does defendant provide any basis for their contention that the State's PowerPoint slides containing quotes from the interview, which were taken down and a corrective instruction given, violated the Rule. Accordingly, this argument is likewise without merit.

2. Rule 403

Lastly, defendant contends the lineup and the interview, even if admissible, violated North Carolina Rule of Evidence 403 ("Rule 403"). "Rulings under [Rule 403] are discretionary, and a trial court's decision on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion." *Chapman*, 359 N.C. at 348, 611 S.E.2d at 811 (citations omitted). "A trial court will not be reversed for an abuse of discretion absent 'a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 46, 530 S.E.2d 281, 288 (2000) (citations omitted), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001).

Under Rule 403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2022). "Unfair prejudice . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Wilkerson*, 363 N.C. 382, 418, 683 S.E.2d 174, 196 (2009) (citation and internal quotation marks omitted), *cert. denied*, 559 U.S. 1074, 176 L. Ed. 2d 734 (2010).

Here, the trial court did not abuse its discretion in admitting the interview over defense's Rule 403 objection since it was highly probative of defendant's motive. Although the State is not required to prove motive for a first-degree murder, "[t]he existence of a motive is . . . a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible where the doing of the act is in dispute." *State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990) (citations and internal quotation marks omitted). Considering the high probative value of the interview and the information it contained about defendant's issue with Mr. Shields, we do not think it is substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion.

D. Ms. Pulliam's Identification

[4] Defendant next argues the trial court erred by admitting Ms. Pulliam's in-court and photo lineup identification of defendant "because

the procedures used by investigators to obtain the identification were so impermissibly suggestive that there was a substantial likelihood of irreparable misidentification."

As an initial matter, defendant makes several references to the recorded interview of Ms. Pulliam, which was not shown to the jury. Although it was admitted during the pre-trial motion to suppress hearing, defendant does not argue on appeal the trial court incorrectly denied this motion. Accordingly, we do not consider the video and limit our review to the evidence presented at trial.

"Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification." *State v. Wilson*, 313 N.C. 516, 528-29, 330 S.E.2d 450, 459 (1985) (citations omitted). This analysis requires a two-step determination. "First[,] we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification." *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984) (citations omitted). If not, we need not proceed with the analysis. *Id.* (citation omitted). However, "[i]f it is answered affirmatively, the second inquiry is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification." *Id.* (citation omitted). To determine whether the procedures are impermissibly suggestive, the court must examine "the totality of the circumstances" to determine whether the procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *Id.* (citation omitted).

In his brief, defendant did not make any arguments as to why the procedures detectives used were unnecessarily suggestive or conducive to misidentification. Rather, defendant's argument is based on the second step of the analysis. Accordingly, we find defendant's argument, based solely on the second prong of the test without meeting the first hurdle, is without merit. Nevertheless, we address defendant's argument as to the second step of the analysis.

> The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

State v. Grimes, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-95 (1983) (citation omitted).

Based on the totality of the circumstances, we find no error in the admission of Ms. Pulliam's identification of defendant. She saw him during the shooting in the daytime, she testified she got "a glimpse" of the shooter's face and that she had "seen him previously in the" apartment complex and recognized him as "Bop," and she stated he did not have anything obstructing his face. Ms. Pulliam participated in the lineup less than six hours after the shooting, and in her identification packet that she signed, she was "100%" sure defendant was the perpetrator. Even if she faltered on the stand, her credibility and the weight given to her identification of defendant was for the jury. *Hannah*, 312 N.C. at 293, 322 S.E.2d at 153 (citation omitted) ("[T]he credibility of the witness and the weight to be given his identification testimony is for the jury to decide.").

"Since we find the pretrial identification procedures free of the taint of impermissible suggestiveness, we hold the trial court properly admitted the in-court identification of defendant by [Ms. Pulliam]." *Id.* at 294, 322 S.E.2d at 153. Accordingly, this argument is without merit.

E. Detectives' Statements

[5] Defendant also contends the trial court plainly erred by allowing detectives to testify Ms. Skyes and Ms. Pulliam were "forthcoming" and "unequivocal" when they identified defendant as the shooter, because such statements invaded the province of the jury as they were improper lay opinions under Rule 701. Defendant argues "credibility determinations" are for the jury to decide, and thus the detectives should not have been allowed to "bolster [the witnesses'] identifications[.]" This argument is likewise without merit.

"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." N.C. R. App. P. 10(a)(1) (2023). However, "[i]n criminal cases, an issue that was not preserved by objection . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). Because defendant did not preserve any errors related to the testimony in question, this Court's review is limited to whether the trial court's actions constituted plain error.

Our Supreme Court has stated:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity[,] or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (citations and quotation marks omitted). "Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial." *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (citation omitted).

Under Rule 701, a lay witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2022). This Court has found that law enforcement's testimony concerning a witness's "demeanor does not constitute an opinion as to the credibility of [the witness] that is subject to Rule 701." *State v. Orellana*, 260 N.C. App. 110, 116, 817 S.E.2d 480, 485 (2018) (citing *State v. Gobal*, 186 N.C. App. 308, 317, 651 S.E.2d 279, 285 (2007), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (mem.) (2008)). Therefore, detectives' testimony that the witnesses were "standoffish" or "forthcoming" was admissible.

Furthermore, we do not believe detectives' testimony that Ms. Skyes did not waver in her narrative during her interview and was unequivocal about the person they were discussing once she changed her story is a comment on her credibility. This observation is based on his perception of the interview and is helpful considering the difference between her initial statement that she did not know the shooter and her later statement during her interview. *See State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997) (finding the detective's opinion about the witness's "demeanor was based on his personal observations" and "was

helpful to a clear understanding of his testimony concerning the differences between" the witness's first and second statement).

We do not believe the testimony by detectives were improper statements as to Ms. Skyes's credibility, as "[t]he cases in which this Court and [our] Supreme Court have reversed convictions based upon [a witness vouching for the credibility of another witness] generally involve testimony that directly comments on the credibility of the" witness. *State v. Dew*, 225 N.C. App. 750, 762, 738 S.E.2d 215, 223, *disc. review denied*, 366 N.C. 595, 743 S.E.2d 187 (mem.) (2013). Here, detectives did not directly comment on whether Ms. Skyes was telling the truth. *Gobal*, 186 N.C. App. at 318-19, 651 S.E.2d at 286 (finding detective's testimony that it was his "impression" the witness "told [him] the truth" was improper testimony as to the witness's credibility).

Even assuming *arguendo* that the statements were admitted in error, given the video of defendant shooting the victim in the back as he attempted to run away, and Ms. Pulliam's and Ms. Skyes's identifications of defendant as the perpetrator, such statements cannot rise to the level of plain error. Accordingly, this argument is without merit.

F. Cumulative Prejudice

Lastly, defendant argues the "cumulative effect of the preserved errors" requires this Court to grant defendant a new trial. As we have found no errors, we find no merit in this contention. *See State v. Beane*, 146 N.C. App. 220, 234, 552 S.E.2d 193, 202 (2001), *appeal dismissed*, 355 N.C. 350, 563 S.E.2d 562 (mem.) (2002).

III. Conclusion

For the foregoing reasons, we hold defendant received a fair trial free from prejudicial error.

NO ERROR.

Judge DILLON concurs.

Judge MURPHY concurs in Parts II-A through II-D and concurs in result only in Parts II-E and II-F.

STATE v. STORM

[289 N.C. App. 257 (2023)]

STATE OF NORTH CAROLINA
v.
KURT ANTHONY STORM, DEFENDANT

No. COA22-685

Filed 6 June 2023

Bailments—conversion of funds—by financial advisor—not a bailee

After a financial advisor (defendant) converted funds that plaintiff had asked him to invest on her behalf, his conviction for felony conversion of property by a bailee under N.C.G.S. § 14-168.1 was vacated because, as a matter of law, he was not a bailee when he took possession of the funds. Traditionally, a bailee is required to return the exact property to the bailor, but even where exceptions to that rule exist—such as when a bailor delivers a check to a third party on the bailee's behalf—they only exist in situations where the bailee exercises a limited degree of control over the transferred property for a specific purpose. Thus, where defendant's work involved making complex discretionary judgments about plaintiff's money as a fungible asset, and where defendant was never expected to return the "identical money" received, he did not qualify as a bailee.

Judge ARROWOOD concurring in judgment only by separate opinion.

Appeal by Defendant from judgment entered 17 February 2022 by Judge Lora Christine Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 7 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Llogan R. Walters, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

MURPHY, Judge.

Traditionally, a bailor-bailee relationship exists only where an item of personal property is to be returned to the bailor by the bailee. While narrow exceptions to this rule have previously led us to include the delivery of a check on behalf of a bailor by a bailee to a third party within

the definition of "bailment," we have never deviated—and do not now deviate—so far from the traditional definition of bailment that an investment adviser, whose work entails complex discretionary judgments about a client's money as a fungible asset, would qualify as a "bailee." Here, where, in the light most favorable to the State, Defendant agreed to act as an investment adviser for the alleged victim, his conversion of funds entrusted to him in that capacity could not have formed the basis of his conviction for conversion of funds by a bailee because he was not, as a matter of law, a bailee.

BACKGROUND

On or about June of 2014, Audrey Lewis discontinued her employment at American National Insurance Company after more than fifteen years to open her own insurance agency. Shortly thereafter, Lewis began attending networking meetings for small business owners hosted by Defendant Kurt Anthony Storm. Lewis kept attending these meetings through 2017, and she developed a friendship with Defendant, with the two frequently carpooling together.

In 2017, Lewis received a letter from American National indicating that she had over $25,000.00 in a retirement fund of which she was previously unaware. Hoping to reinvest the money and recalling from earlier in their relationship that Defendant was a financial adviser, Lewis contacted Defendant and asked him to invest the money on her behalf. In order to invest the money, Defendant set up an entity called A.R. Lewis, LLC ("ARL") on 10 April 2017 and created a bank account on its behalf. Defendant accepted approximately $6,300.00 in cash as a fee for his investment services, then further accepted a check for $17,500.00 in the name of ARL, ostensibly to invest on Lewis's behalf. After Lewis gave Defendant the money, their agreement was memorialized in the following *Promissory Note*:

> Agreement between Kurt Storm and ARLEWIS LLC- Audrey Renee Lewis [r]epresenting ARLewis LLC. Principal sum of $23,836.09 will be managed by Kurt Storm.
>
> **I. Promise to Pay**
>
> Kurt Storm agrees to pay 9% annual rate fixed earnings, credited monthly in cash.
>
> **II. Repayment**
>
> The amount this Promissory Note will be returned 12 months from inception unless death or Storm's inability to perform task [sic] associated with this role and/or mutual agreement of both parties.

III. Transfer of the Promissory Note – POD applies as well as this Note as fail-safe [sic]. Entire balance will be paid to ARLewis, LLC directly at office 2216 Meadowview Drive, Greensboro, NC 27407[.]

IV. Amendment; Modification; Waiver

No amendment, modification or waiver of any provision of this Promissory Note or consent to departure therefrom shall be effective unless by written agreement signed by both Borrower and Lender.[1]

V. Successors

The terms and conditions of this Promissory Note shall inure to the benefit of and be binding jointly and severally upon the successors, assigns, heirs, survivors and personal representatives of Kurt Storm and shall inure to the benefit of any holder, its legal representatives, successors and assigns.

VI. Governing Law

The validity, construction and performance of this Promissory Note will be governed by the laws of North Carolina, excluding that body of law pertaining to conflicts of law. Borrower hereby waives presentment notice of non-payment, notice of dishonor, protest, demand and diligence.

The parties hereby indicate by their signatures below that they have read and agree with the terms and conditions of this agreement in its entirety.

After several months, in October of 2017, Lewis contacted Defendant again to inquire as to where the funds went. Lewis made several failed attempts to call and email Defendant about the funds in October and November of 2017, including one period during which Defendant blocked Lewis's email. Defendant eventually informed Lewis that he was in poor health, then once again ceased contact until January of 2018. After Defendant stopped responding for the second time, Lewis indicated to Defendant in an email dated 11 January 2018 that she would report him to law enforcement unless she heard from him. After Lewis reported Defendant to law enforcement, Defendant responded that he

1. No party contends on appeal that this language in the *Promissory Note* rendered the agreement a loan rather than an investment.

would like to "work this out so [there will] be no bad blood," and the two arranged to meet at a restaurant. Upon meeting in person, Defendant presented Lewis with information about other accounts he had worked on but provided Lewis with no concrete details regarding the money she had given to him to invest. Nonetheless, in light of Defendant's presentation, Lewis was convinced that her money had been invested.

On 16 January 2018, having received Lewis's report, the Greensboro Police Department assigned Detective Michael Montalvo to investigate what had happened to the funds. After a phone call with Lewis on 25 January 2018 detailing substantially the aforementioned facts, Detective Montalvo called Defendant on 29 January 2018 seeking an explanation as to the funds' whereabouts. The call resulted in a follow-up meeting in person at Detective Montalvo's office on 8 February 2018. During the 8 February follow-up, Defendant said of the funds that he was "not off the hook" and that "[he knew] that [he had] to pay back th[e] money[,]" suggesting that he pay Lewis back in $150.00 installments once per month. Defendant then asked Detective Montalvo what kind of criminal proceedings he could expect to see as a result of the incident, and Montalvo explained that "if you just give [Lewis] the [$17,500.00] now, this goes away. There won't be any criminal charges." Defendant responded that he didn't have the money.

Detective Montalvo's subsequent investigations revealed no account into which the funds had ever been placed.

Defendant was indicted for obtaining property by false pretenses and felony computer access on 9 July 2018, then subsequently indicted for embezzlement on 6 May 2019 and conversion of property by bailee on 19 April 2021. The indictment for conversion of property by bailee read as follows:

> The jurors for the State upon their oath present that on or about the date of offense shown above and in the county named above the defendant named above unlawfully, willfully and feloniously did being entrusted with property, seventeen thousand five hundred dollars ($17,500.00) in good and lawful United States currency owned by Audrey Renee Lewis, as a bailee, fraudulently secrete the property with the fraudulent intent to convert it to the defendant's own use and/or convert the property to the defendant's own use. The value of the property was in excess of four hundred dollars ($400.00).

Defendant was tried on 15 February 2022. During trial, the State voluntarily dismissed the felony computer access charge. At the close of the State's evidence, Defendant moved to dismiss the charges of conversion of property by bailee and embezzlement. The trial court initially denied the motion; however, after Defendant renewed the motion at the close of all evidence and made a separate motion to dismiss for fatal variance between the indictment and evidence, the trial court dismissed the embezzlement charge. The jury convicted Defendant of the single remaining charge of felony conversion of property by bailee, and the trial court sentenced him to a suspended sentence of 6 to 17 months.

ANALYSIS

On appeal, Defendant argues the trial court erred in failing to dismiss the charge of felony conversion of property by bailee under N.C.G.S. § 14-168.1 because, as a matter of law, he did not qualify as a bailee when he took possession of the funds at issue. Defendant also separately argues the charge should have been dismissed due to fatal variance between the indictment and the evidence presented at trial. However, as we agree that Defendant was not a bailee for purposes of the conversion charge, we need not reach the fatal variance issue.

Under N.C.G.S. § 14-168.1,

> [e]very person entrusted with any property as *bailee*, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a Class 3 misdemeanor.

N.C.G.S. § 14-168.1 (2021) (emphasis added). "A bailment is created when a third person accepts the sole custody of some property given from another." *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 273, *disc. rev. denied*, 357 N.C. 457 (2003). Traditionally, the object of bailment is a specific item of real property.[2] *See Bailment*, Black's Law Dictionary 174 (11th Ed. 2019) (first emphasis added) ("A delivery *of personal property*

2. Older North Carolina caselaw uses the term "chattel," usually connoting specific physical items, to refer to the object of bailment. *See Cooke v. Foreman Derrickson Veneer Co.*, 169 N.C. 493, 494 (1915) ("At common law bailment contracts are largely implied from the character of the transactions. From the delivery of a chattel in bailment the law implies an undertaking upon the part of the bailee to execute the bailment purpose with due care, skill and fidelity."); *see also Chattel*, Black's Law Dictionary 295 (11th Ed. 2019) ("Movable or transferable property; personal property; esp[ecially] a physical object capable of manual delivery and not the subject matter of real property.").

by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose, usu[ally] under an express or implied-in-fact contract."); *e.g.*, *State v. Woody*, 132 N.C. App. 788, 789 (1999) (a computer); *Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 641 (2006) (potatoes); *Martin v. Cuthbertson*, 64 N.C. 328, 328 (1870) (a horse). Moreover, historically, a bailment relationship contemplated the return of the transferred item of personal property. *Sturm v. Boker*, 150 U.S. 312, 329-30 (1893) ("The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale.").

Though not archetypally an object of bailment, money can, under certain circumstances, act as such. In *State v. Eurell*, our Supreme Court stated that "[o]ne who receives money for safe keeping . . . is a bailee if under the agreement of the parties he is to return the identical money received, and debtor if he is to use the money and return its equivalent on demand." *State v. Eurell*, 220 N.C. 519, 519 (1941). And, in *State v. Minton*, we held—without discussion—that a bailor-bailee relationship existed where checks were provided to the defendant to, in turn, pay a third party. *State v. Minton*, 223 N.C. App. 319, 322 (2012), *disc. rev. denied*, 366 N.C. 587 (2013). However, we have also reiterated the principle that whether a bailment relationship has been created with respect to money depends on whether the agreement requires the use of "exact funds" as opposed to treating the money as fungible. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 212 N.C. App. 400, 405 (2011), *rev'd on other grounds*, 365 N.C. 520, 524 (2012) ("[W]e conclude it is unnecessary to address the bailment argument."); *also cf. United States v. Eurodif S. A.*, 555 U.S. 305, 320 (2009) ("[W]here a constituent material is untracked and fungible, ownership is usually seen as transferred, and the transaction is less likely to be a sale of services, as the [U.S. Supreme] Court explained years ago in distinguishing a common law bailment from a sale[.]").

The holding in *Minton*, especially in light of *Variety Wholesalers*, appears to be an extension of—albeit a deviation from—the principle that, "where a *consignment* relationship [exists] between [two parties to an agreement], the relationship [is] also that of a bailment."[3] *Wilson*,

3. The notion of consignment as a specialized form of bailment appears to, in turn, be an extension of the traditional notion that goods transformed by a bailee may still be

176 N.C. App. at 641, 642 (emphasis added) (marks and citations omitted) ("A consignment is a type of bailment where the goods are entrusted for sale. . . . A consignment exists where a[] consignor leaves his property with a consignee who is substantially engaged in selling the goods of others, and will work to sell the goods on behalf of the consignor. After selling the goods, the consignee must account to the consignor with the proceeds from the sale."). As in a consignment relationship, the bailor in *Minton* entrusted the defendant with a specific check and asked the defendant, the bailee, to use the check in a particular transaction. *Minton*, 223 N.C. App. at 322. In that case, the transaction was a rental payment, though the transaction in a consignment relationship is the sale of the transferred property. *Id.* at 320; *Wilson*, 176 N.C. App. at 629; *see also Consignment*, Black's Law Dictionary 385 (11th Ed. 2019) ("[A] transaction in which a person delivers goods to a merchant for the purpose of sale[.]"). While the transaction in *Minton* lacked the accounting feature that otherwise conceptually tethered consignment to traditional bailment, *see Wilson*, 176 N.C. App. at 642, the limited nature of the control the bailee was meant to exercise in that case meant that the type of control exercised by the bailee generally resembled the specific, limited purposes for which bailors entrust property to bailees in more traditional bailment relationships.

In the instant case, the State argues, by analogy to *Minton*, that Defendant possessed Lewis's funds pursuant to a bailment relationship. This contention, however, deviates too far from the fundamental bailor-bailee paradigm. Bailment, by nature, involves a limited degree of control by the bailee over property transferred by the bailor "for a certain purpose[.]" *Bailment*, Black's Law Dictionary 174 (11th Ed. 2019). It usually involves a return of the exact property, *see Eurell*, 220 N.C. at 519; *Sturm*, 150 U.S. at 329-30; and, where narrow exceptions to that rule exist, they exist for arrangements in which the bailee exercises control in a specific enough manner so as to still resemble traditional bailment. *See Wilson*, 176 N.C. App. at 641; *Minton*, 223 N.C. App. at 322.

Here, to consider Defendant a "bailee" would be to allow these exceptions to swallow the rule. For purposes of this appeal, the uncontroverted status of Defendant's and Lewis's relationship was that of an investment adviser and advisee. *See* N.C.G.S. § 78C-2(1) (2021)

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the object of a bailment relationship. *See Powder Co. v. Burkhardt*, 97 U.S. 110, 116 (1877) ("[W]here logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer.").

(" 'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. 'Investment adviser' also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation."). Defendant was neither obligated nor expected to return the exact check given to him to Lewis. Moreover, unlike the defendant in *Minton*, Defendant was not tasked with simply acting as a courier for a check; rather, he was entrusted with a complex series of decisions concerning the investment of the funds as a fungible asset. While we express no opinion on the ongoing correctness of our opinion in *Minton* in light of its deviation from the fundamental precepts of bailment theory,[4] we decline to redouble that deviation here. Defendant was not a bailee, and we reverse the trial court's decision not to dismiss Defendant's charge on that basis.

Having so held, Defendant's remaining argument concerning fatal variance between the indictment and evidence presented at trial is moot. *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99 (1996) (citation omitted) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

CONCLUSION

Defendant's conversion of Lewis's funds could not have properly resulted in his conviction under N.C.G.S. § 14-168.1 because he was not a bailee. Accordingly, we vacate the judgment. *Woody*, 132 N.C. App. at 792.

VACATED.

Judge RIGGS concurs.

Judge ARROWOOD concurs in judgment only by separate opinion.

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4. Nor could we overturn that decision ourselves if we were so inclined. *In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

ARROWOOD, Judge, concurring in judgment only.

While I agree that our precedent compels the majority to hold that the trial court erred in failing to dismiss the felony conversion of property by a bailee charge, and their finding that defendant did not qualify as a bailee, I write separately to express my concern that a precedent, as ancient as the concepts of bailment and conversion itself, compels such a holding.

"A bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee." *Flexlon Fabrics, Inc. v. Wicker Pick-Up & Delivery Serv., Inc.*, 39 N.C. App. 443, 447, 250 S.E.2d 723, 726 (1979) (citation omitted). Delivery requires "the bailor [to relinquish] exclusive possession, custody, and control to the bailee . . . ." *Id.* (citations omitted). "[A]cceptance is established upon a showing directly or indirectly of a voluntary acceptance of the goods under an express or implied contract to take and redeliver them." *Id.* Although historically the law may have contemplated the return of the exact property, our case law has recognized exceptions where a bailee is not required to return the identical item to the bailor in all circumstances. *See Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 641, 627 S.E.2d 249, 259 (2006) (citations omitted) ("While the consignee may or may not receive the specific property of the consignment back, . . . this Court has recognized that a consignment creates a bailment between the parties.").

Precedent holds that when the subject of the bailment is money, a bailment relationship is only established if the bailee is required "to return the identical money received[.]" *State v. Eurell*, 220 N.C. 519, 520, 17 S.E.2d 669, 670-71 (1941) (finding that one who is expected "to return the identical money received" is a bailee); *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 212 N.C. App. 400, 405, 712 S.E.2d 361, 365, *review allowed, writ allowed*, 717 S.E.2d 371 (N.C. 2011) (finding the plaintiff could not prove a bailment relationship existed because the agreement between the parties "was not a sufficient meeting of the minds to establish a bailment relationship[,]" as the agreement did not show defendant was expected "to redeliver the exact funds"), *rev'd on other grounds*, 365 N.C. 520, 723 S.E.2d 744 (2012). From this language, it is unclear whether "exact funds" refers to the return of an identical sum, or the exact money left in the bailee's possession. Either way, I see no reason why the rule reiterated in *Eurell* and *Variety Wholesalers* should continue to shield defendants from liability in cases such as this, where investors have been entrusted with large sums of money for the benefit of a third-party and intentionally and wrongfully convert those funds prior to investing them.

If "exact funds" refers to the return of the exact amount, I do not see why Ms. Lewis's expectation of the return of more money should extinguish the bailment relationship. Ms. Lewis delivered the funds to defendant, relinquishing possession and control, and defendant accepted the funds. Furthermore, the promissory note between the parties showed that defendant was expected to return money to Ms. Lewis. That Ms. Lewis was expecting more than the initial investment, and defendant's title as an "investor" should be of no consequence.

If "exact funds" refers to the return of the exact investment Ms. Lewis initially made, I believe that our Supreme Court has expressed movement away from this requirement and would be receptive to the adoption of the exact sum requirement adopted by other jurisdictions. *See Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 528-29, 723 S.E.2d 744, 750-51 (2012) (finding in the context of conversion that defendant's assertion that the plaintiff could not "maintain a claim for conversion of money unless the funds in question [could] be specifically traced and identified[,]" and were "not commingled" was outdated, as this requirement "has been complicated as a result of the evolution of our economic system[,]" and in response to "this reality, numerous courts around the country have adopted rules requiring the specific identification of a sum of money, rather than identification of particular bills or coins[,]" thus as long as the plaintiff could show the "specific amount" that he transferred, where the funds originated, and which account the funds were transferred to, the funds were identifiable). Indeed, the movement away from the return of the "exact funds" in conversion cases has been adopted by other jurisdictions. *Nat'l Corp. for Hous. P'ship v. Liberty State Bank*, 836 F.2d 433, 436 (8th Cir. 1988) (citations omitted) (holding the "ancient rule" "requiring [the] return of the identical item has been liberalized in the case of bailment of fungible goods"); *Repplier v. Jacobs*, 149 Pa. 167, 169, 24 A. 194, 194 (1892) (finding that "[f]or all ordinary purposes, in law as in the business of life, *the same sum of money is the same money*, whether it be represented by the identical coin or not") (emphasis added).

For either situation, I see no reason why the rule requiring the return of the exact funds should continue to shield "investment advisors" from liability in conversion cases where they have been entrusted with large sums of money for the benefit of a third-party and intentionally and wrongfully convert those funds prior to investing them. Although I agree that precedent compels the findings set forth in the majority opinion, I think precedent from 1941 should be reconsidered by our Supreme Court.

Thus, I concur in judgment only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 JUNE 2023)

BATTEN v. WELCH No. 22-1052	Guilford (22CVS3160)	Affirmed in Part; Remanded in Part
CHAGARIS v. HARDEN No. 22-810	Iredell (20CVS2471)	Affirmed in Part, Reversed and Remanded in Part
CLARK v. GILLESPIE No. 22-535	Chatham (20CVS430)	Vacated and Remanded
E.D. v. CHARLOTTE-MECKLENBURG BD. OF EDUC. No. 23-16	Mecklenburg (22CVS1008)	Dismissed
GODLEY v. NEW HANOVER MED. GRP. No. 22-823	N.C. Industrial Commission (20-005666)	Affirmed
IN RE A.H.F. No. 22-778	Wake (19JT170) (19JT171)	Affirmed
IN RE A.N. No. 22-498	Stokes (19JA10)	Vacated and Remanded
IN RE B.S.T. No. 22-410	Guilford (17JT197) (17JT198) (17JT272)	Affirmed
IN RE C.P. No. 22-484	Robeson (21JA144)	Affirmed
IN RE D.T. No. 22-544	Craven (18JA79)	Affirmed
IN RE EST. OF SMITH No. 23-17	Union (21E1428)	Dismissed
IN RE H.K.S. No. 22-289	Mitchell (19JT42)	VACATED AND REMANDED IN PART; REVERSED IN PART.
IN RE J.C. No. 22-799	Harnett (18JT134) (18JT136-138)	Affirmed

IN RE L.I.C.M. No. 22-650	Wake (19JT140) (19JT141)	Affirmed
IN RE M.J.B. No. 22-497	Cabarrus (20JA194)	Vacated and Remanded
IN RE M.N. No. 22-472	Pitt (21JA4) (21JA5) (21JA6) (21JA7)	Affirmed
IN RE N.M. No. 22-674	Union (19JT191)	Affirmed
IN RE T.G. No. 22-504	Davie (20JA62)	Affirmed
IN RE W.J.M. No. 22-733	Durham (22SPC567)	Vacated and Remanded
IN RE Z.R.B. No. 22-686	Yadkin (18JT48) (18JT49) (18JT50) (18JT51) (18JT52)	Affirmed
N.C. DEP'T OF PUB. SAFETY v. LOCKLEAR No. 22-890	Office of Admin. Hearings (21OSP01175)	Affirmed
NATIONSTAR MORTG., LLC v. MELARAGNO No. 22-743	Mecklenburg (18CVS9595)	Affirmed
ROGERS v. WELLS FARGO BANK, N.A. No. 22-978	Caldwell (20CVS1241)	Affirmed
SKENES v. INGLE No. 22-459	Alamance (19CVD1335)	Affirmed
SRIPATHI v. RAYALA No. 22-816	Wake (20CVD718)	Affirmed
STATE v. ABEE No. 22-832	Cleveland (20CRS1261-62)	No Error

STATE v. CANTEY No. 22-693	Lenoir (17CRS51622) (17CRS51690) (17CRS52335) (19CRS50807)	Dismissed
STATE v. CRABTREE No. 22-936	Union (18CRS52801) (18CRS708510-11)	No Error
STATE v. CROTTS No. 22-697	Cleveland (20CRS52547) (21CRS466)	No Error
STATE v. CURTIS No. 22-596	Catawba (16CRS3883-84) (17CRS79) (18CRS4221)	No Error
STATE v. DeLEON No. 22-468	Sampson (19CRS51140-41)	Affirmed
STATE v. HORTON No. 22-988	Duplin (20CRS51388)	Dismissed
STATE v. JONES No. 22-454	Anson (19CRS51177-78) (20CRS398-99)	No error in part, vacated in part, and remanded for resentencing
STATE v. JOYNER No. 22-718	Iredell (16CRS51997) (17CRS53659) (17CRS53660) (20CRS50308) (21CRS803)	REMANDED FOR CORRECTION OF CLERICAL ERRORS
STATE v. MILLS No. 22-900	Henderson (18CRS53520)	No Error
STATE v. MOREFIELD No. 22-470	Cleveland (20CRS55031) (21CRS19)	No Error
STATE v. SIPES No. 22-604	Wake (19CRS222967)	No Error
STATE v. SMITH No. 22-774	Cleveland (18CRS2073) (18CRS55562) (19CRS1807)	No Error

STATE v. WIGGINS No. 22-265	Pitt (19CRS57455)	No Error
STATE v. WILLIAMS No. 22-395	Buncombe (18CRS92442) (21CRS331)	No Error

IN RE CHASTAIN

[289 N.C. App. 271 (2023)]

IN THE MATTER OF PATRICIA BURNETTE CHASTAIN

No. COA22-649

Filed 20 June 2023

1. Clerks of Court—removal proceeding—inadmissible evidence—presumed ignored except for credibility purposes

In a proceeding to remove respondent from serving as county clerk of superior court, the trial court on remand from a prior appeal was presumed to have disregarded inadmissible evidence and to have considered only acts alleged in the charging affidavit when determining whether the standard for disqualification had been met pursuant to Article VI, section 8 of the North Carolina Constitution. Although the court's order permanently disqualifying respondent from office referred to acts that were not in the charging affidavit, the court noted that it had not considered those acts as grounds for disqualification but only with regard to respondent's credibility as specifically allowed by the appellate opinion previously issued in the case.

2. Clerks of Court—removal proceeding—corruption or malpractice—multiple incidents—considered in the aggregate

In a proceeding to remove respondent from serving as county clerk of superior court, there was no prohibition on the trial court's application of the corruption or malpractice standard for disqualification—under Article VI, section 8 of the North Carolina Constitution—by considering multiple incidents of alleged misconduct in totality rather than individually in isolation.

3. Clerks of Court—removal proceeding—corruption or malpractice—sufficiency of findings—evidentiary support

In a proceeding to remove respondent from serving as county clerk of superior court based on multiple incidents of misconduct where respondent exceeded the scope of her authority and undermined the administration of justice and the authority of other judicial officials, the trial court did not err in entering an order permanently disqualifying respondent from office pursuant to Article VI, section 8 of the North Carolina Constitution where its challenged findings of fact were supported by competent evidence, and where those findings in turn were sufficient to support the court's conclusions of law (aside from a portion of one ultimate finding that did not affect the outcome).

4. Clerks of Court—removal proceeding—corruption or malpractice—willful misconduct—egregious in nature

In a proceeding to remove respondent from serving as county clerk of superior court, the trial court properly entered an order permanently disqualifying respondent from office where its conclusion that respondent acted in a manner which met the corruption or malpractice standard pursuant to Article VI, section 8 of the North Carolina Constitution was supported by evidence that respondent willfully persisted in misconduct by exceeding the scope of her authority as clerk, including by visiting a criminal defendant in a detention center even though the defendant had already appeared before a judge, demanding a magistrate's time despite having no authority over magistrates, using vulgarities in relation to a judge in the presence of citizens, and interfering in a civil dispute in which a judge had already issued no-contact orders.

5. Clerks of Court—removal proceeding—constitutional interpretation—disqualification versus removal

In a proceeding to remove respondent from serving as county clerk of superior court pursuant to N.C.G.S. § 7A-105 (which provides for suspension or removal based on willful misconduct), a panel of the Court of Appeals noted its disagreement with a prior appellate opinion in the same case which interpreted Article VI, section 8 of the North Carolina Constitution as authorizing removal of a superior court clerk and thereby erroneously (in the current panel's view) effectuated section 7A-105 as a procedural mechanism for disqualification under Article VI. By contrast, the current panel would interpret the same constitutional provision (which is titled "Disqualifications for office") as only authorizing disqualification, as differentiated from Article IV, section 17 (titled "Removal of Judges, Magistrates, and Clerks") which by its plain language specifically authorizes removal and, thus, is the only constitutional provision for which 7A-105 was intended to be a procedural mechanism for removal of clerks.

Judge WOOD dissenting.

Appeal by Respondent from order entered 5 April 2022 by Judge Thomas H. Lock in Franklin County Superior Court. Heard in the Court of Appeals 8 February 2023.

Zaytoun Ballew & Taylor, PLLC, by Matthew D. Ballew, Robert E. Zaytoun, and Claire F. Kurdys, for Respondent-Appellant.

Fox Rothschild LLP, by Kip D. Nelson and Elizabeth Brooks Scherer, and Davis, Sturges & Tomlinson, PLLC, by Conrad B. Sturges, III, for Affiant-Appellee.

GRIFFIN, Judge.

Respondent Patricia Burnette Chastain appeals from an order permanently disqualifying her from serving in the Office of Clerk of Superior Court of Franklin County. This is Respondent's second appeal in this matter. Our Court addressed Respondent's first appeal in *In re Chastain*, 281 N.C. App. 520, 869 S.E.2d 738 (2022) ("*Chastain I*"), and remanded the matter for proceedings consistent with the Court's opinion.

In this appeal, we address Respondent's contention the trial court erred in its application of the appropriate standard for disqualification for office under Article VI of the North Carolina Constitution. Upon review of the trial court's application of the standard, together with Respondent's conduct, we hold the trial court properly disqualified Respondent from office as her conduct in office amounted to nothing less than corruption or malpractice.

I. Factual and Procedural Background

In 2014, Respondent was elected to serve as Franklin County Clerk of Superior Court. She was reelected to a second term in 2018. In July 2020, Affiant Jeffrey Thompson commenced this proceeding, pursuant to N.C. Gen. Stat. § 7A-105, seeking removal of Respondent from office. Upon motion by Respondent and a subsequent hearing on the matter on 10 September 2020, the Senior Resident Superior Court Judge of Franklin County, Judge Dunlow, was recused by Judge J. Stanley Carmical. Accordingly, on 28 September 2020, Judge Thomas H. Lock, the Senior Resident Superior Court Judge of Johnston County, presided over the removal hearing, which concluded on 30 September 2020. Following the hearing, on 16 October 2020, Judge Lock issued an order ("2020 Order") permanently removing Respondent from serving in the office of Clerk of Superior Court of Franklin County. On 4 May 2020, Respondent appealed the 2020 Order to this Court. On 1 February 2022, for reasons further explained in *Chastain I*, our Court vacated the 2020 Order and remanded the matter for further proceedings consistent with that panel's opinion.

Upon remand, Judge Lock again presided over the matter which came on for hearing on 16 March 2022. On 5 April 2022, Judge Lock entered an order ("2022 Order") permanently disqualifying Respondent

from serving in the Office of Clerk of Superior Court of Franklin County in accordance with Article VI of the North Carolina Constitution. On 4 May 2022, Respondent filed notice of appeal from the 2022 Order.

II. Standard of Review

Upon removal proceedings against a clerk of superior court, the affiant bringing the charges must prove grounds for removal exist by clear, cogent, and convincing evidence. *In re Cline*, 230 N.C. App. 11, 20–21, 749 S.E.2d 91, 98 (2013). As such, we review the trial court's findings of fact, of which Respondent challenges, to determine whether they are supported by clear, cogent, and convincing evidence, and in turn, whether those findings support its conclusions of law. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (internal marks and citations omitted). Challenged findings of fact are binding on appeal if supported by competent evidence. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). Likewise, findings of fact which remain unchallenged are also binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). We review the trial court's conclusions of law de novo. *State v. Biber*, 365 N.C. 162, 171, 712 S.E.2d 874, 880 (2011).

III. Analysis

Respondent contends the trial court erred in permanently disqualifying and removing her from serving in the Office of Clerk of Superior Court of Franklin County, as it failed to properly apply the standard for disqualification under Article VI of the North Carolina Constitution.

At the outset, we recognize this Court is bound by our Court's previous decision in *Chastain I*. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same [C]ourt is bound by that precedent, unless it has been overturned by a higher [C]ourt."); *see also State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133 (2004) ("While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher [C]ourt."). Thus, we analyze Respondent's contentions in accordance with our Court's opinion in *Chastain I*.

A. The Standard

Our Court's decision in *Chastain I* analyzed two constitutional avenues under which a superior court clerk of a county in North Carolina

may be removed—Article IV and Article VI of our State Constitution. *See Chastain*, 281 N.C. App. at 524, 869 S.E.2d at 742. Article IV, section 17, authorizes the removal of a superior court clerk who engages in misconduct. *Id.* at 523, 869 S.E.2d at 741 (citing N.C. Const. art. IV, § 17(4)). Alternatively, Article VI, section 8, authorizes the removal of a superior court clerk "as a consequence of being disqualified from holding any office under Article VI where she is 'adjudged guilty of corruption or malpractice in any office.' " *Id.* at 524–25, 869 S.E.2d at 742 (quoting N.C. Const. art. VI § 8) (emphasis omitted).

After addressing both avenues for removal, the Court held "the Article IV avenue could not serve as the basis for Judge Lock's decision to remove [Respondent] from office," as our Constitution conferred jurisdiction to consider Respondent's removal, under Article IV, only upon the Senior Regular Resident Superior Court Judge, Judge Dunlow. *Id.* at 524, 869 S.E.2d at 742. Additionally, our Court held Respondent could be properly removed by Judge Lock, under Article VI, if Judge Lock were to find her conduct in office met the corruption or malpractice standard supplied by Article VI, section 8, of our State Constitution because, "unlike Article IV, Article VI does not specify any procedure or confer authority on any particular judge or body to make disqualification determinations[.]" *Id.* at 525, 869 S.E.2d at 742.

Our Court had not considered the removal of a clerk of superior court before *Chastain I*. Thus, the Court relied on precedent concerning the removal of other elected officials, primarily judges, and defined this corruption or malpractice standard to include, at a minimum, "acts of willful misconduct which are egregious in nature[.]" *Id.* at 528, 869 S.E.2d at 745.

The prior panel of this Court held willful misconduct requires more than just intent to commit an offense, but rather purpose and design in doing so. *Id.* (*citing State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940)). Similarly, this Court found willful misconduct in office to be more than an error in judgment or a mere lack of diligence. *Id.* at 528, 869 S.E.2d at 744 (citing *In re Martin*, 302 N.C. 299, 316, 275 S.E.2d 412, 421 (1981) (internal marks and citations omitted)). Instead, willful misconduct may, but is not required to, encompass conduct involving moral turpitude, dishonesty, or corruption. *Id.* The Court reiterated that where a judge knowingly and willfully persists in misconduct of which the judge knows, or should know, to be acts of willful misconduct in office "and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office." *Id.* (quoting *In re Martin*, 302 N.C. at 316, 275 S.E.2d at 421);

see also In re Hunt, 308 N.C. 328, 338, 302 S.E.2d 235, 240 (1983) ("[C]onduct prejudicial to the administration of justice, if knowingly and persistently repeated, would itself rise to the level of willful misconduct in office, which is a constitutional ground for impeachment and disqualification for public office." (citing *In re Peoples*, 296 N.C. 109, 157–58, 250 S.E. 2d 890, 918 (1978))).

This Court set a framework for what constitutes willful misconduct, defining the standard to include only acts of willful misconduct which are egregious in nature. *Chastain*, 281 N.C. App. at 528, 869 S.E.2d at 745. We understand egregious acts to be those that are extremely or remarkably bad. *Egregious*, Black's Law Dictionary 652 (11th ed. 2019). In tailoring its definition, the Court relied heavily upon our Supreme Court's decision in *In re Peoples*—even so far as to say a respondent's actions would meet the standard if said acts of willful misconduct were, at a minimum, as egregious as those in *Peoples*. *Chastain*, 281 N.C. App. at 528, 869 S.E.2d at 744; *see also In re Peoples*, 296 N.C. at 156–57, 250 S.E.2d at 917–18.[1]

The Court in *Chastain I* established this general definition of the corruption or malpractice standard. However, the application of the standard, as to the disqualification and consequential removal of clerks, has yet to be addressed. This is the task before this Court. We look to precedent addressing the application of the standard as to other elected officials, while recognizing the conduct which amounts to corruption or malpractice will necessarily differ based on the elected office held by the respondent.

B. Application of the Standard

Respondent contends the trial court erred in applying the corruption or malpractice standard defined by our Court in *Chastain I*. Specifically, Respondent argues her conduct did not rise to meet the standard and the trial court only concluded otherwise because it considered acts alleged outside the charging affidavit and considered the evidence in totality rather than isolation. Further, Respondent explicitly challenges the trial court's Findings of Fact 17, 19, 30, 37, 45, and 46; and Conclusions of Law 3, 5, 7, 9, and 10.

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1. Our Supreme Court disqualified the judge from holding further judicial office under Article VI, section 8, where evidence of his misconduct included, among other things, he: dismissed several cases without trial or the defendants present and without the knowledge of the district attorney; maintained a personal file where he indefinitely held cases he caused to be removed from the active trial docket; paid the clerk money he obtained from several defendants in cases he disposed of in absence of those defendants.

1. Consideration of Acts Outside the Charging Affidavit

[1] Respondent argues the trial court erred in applying the corruption or malpractice standard by relying on acts outside the charging affidavit to make the necessary findings and conclusions for disqualification under said standard. Specifically, Respondent argues the trial court considered incidents with Judge Davis and District Attorney Waters to support its findings that Respondent acted with notice, knowledge, and intent such that her conduct met the corruption or malpractice standard.

Our General Assembly codified the procedural mechanism for removal of clerks in N.C. Gen. Stat. § 7A-105 which states, inter alia, "the procedure [for removal of a clerk of superior court] shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides[.]" N.C. Gen. Stat. § 7A-105 (2021). In interpreting this statute, our Court, in *Chastain I*, recognized, pursuant to our Supreme Court's holding in *In re Spivey*, "any procedure to remove an elected official must afford that official due process." *Chastain*, 281 N.C. App. at 528–29, 869 S.E.2d at 744–45 (citing *In re Spivey*, 345 N.C. 404, 413–14, 480 S.E.2d 693, 698 (1997) (holding our Constitution does not prohibit our General Assembly from enacting methods for removal "so long as [the officers] whose removal from office is sought are accorded due process of law")).

Our Court held in *Chastain I*, that Judge Lock, in rehearing any case pertaining to Respondent's removal, was limited to considering only those acts alleged in the charging affidavit, as Respondent had both the due process and statutory right to notice of the acts for which her removal was being sought. *Chastain*, 281 N.C. App. at 529, 869 S.E.2d at 745. Our Court noted, however, the trial court was permitted to consider facts not alleged in the charging affidavit as a means to assess Respondent's credibility. *Id.* at 529, 869 S.E.2d at 745; *see State v. Johnson*, 378 N.C. 236, 242, 861 S.E.2d 474, 482 (2021) (" 'The weight, credibility, and convincing force of such evidence is for the trial court, who is in the best position to observe the witnesses and make such determinations.' " (quoting *Macher v. Macher*, 188 N.C. App. 537, 540, 656 S.E.2d 282, 284 (2008))).

Though the trial court is limited in what it can consider during proceedings for removal of a clerk, we are cognizant that, "[w]here, as here, the trial judge acted as the finder of fact, it is presumed that he disregarded any inadmissible evidence that was admitted and based his judgment solely on the admissible evidence that was before him." *In re Cline*, 230 N.C. App. 11, 27, 749 S.E.2d 91, 102 (2013) (citing *Bizzell v. Bizzell*, 247 N.C. 590, 604–06, 101 S.E.2d 668, 678–79 (1958)) (internal

quotation marks and citations omitted). Consequently, this Court will only find reversible error where it affirmatively appears the action of the court was influenced by the consideration of inadmissible evidence. *See Bizzell*, 247 N.C. at 604–05, 101 S.E.2d at 678.

Here, evidence not contained in the charging affidavit, which had been previously introduced in the first removal proceeding against Respondent, was excised from the record. Notably, counsel for Respondent stated:

> Certain things came into evidence. [Affiant's counsel] put certain things into the evidence that was not in the affidavit. None of that—that's been excised. That's out of this record now. Particularly the matters relating to fixing the tickets, allegedly, that the DA testified to, as well as going to the district court judge repeatedly to strike orders of arrest. That's—that's not—that's not here before you.

Not only were these allegations excised from the record upon which the trial court relied in making its findings and conclusions here, but the trial court further confirmed its declination in considering this evidence by unequivocally stating within its findings and conclusions, it had not relied upon this evidence except to consider Respondent's credibility as authorized by this Court in *Chastain I*. In Finding of Fact 14, the trial court stated:

> Respondent's interactions with Mr. Waters and Judge Davis described in the preceding two paragraphs were not specifically alleged in the charging affidavit. Hence, the court has not considered the evidence concerning them as a potential basis for removal. However, this evidence has been considered to assess Respondent's credibility[.]

Similarly, in Finding of Fact 48, the trial court stated:

> As to evidence related to Respondent's conduct discussed at the evidentiary hearing but not alleged in the charging affidavit, the court has not considered such evidence as grounds for Respondent's disqualification from office.

Thereafter, the trial court concluded in Conclusion of Law 4:

> Respondent's repeated requests to District Attorney Michael Waters on behalf of persons seeking the reduction or dismissal of criminal charges and her repeated ex parte requests to Judge John Davis to strike orders

> of arrest for persons charged with criminal offenses were not specifically alleged in the charging affidavit and were not considered by this court as a potential basis for removal. However, this evidence was considered to assess Respondent's credibility[.]

These Findings and Conclusion demonstrate the trial court's abstention from relying on evidence outside the charging affidavit for purposes other than considering Respondent's credibility. Moreover, Judge Lock acted as the fact finder. Thus, we presume he only used this evidence to assess credibility pursuant to our decision in *Chastain I*.

We hold the trial court did not err as it properly excluded acts outside the charging affidavit from consideration when making the necessary findings and conclusions for the disqualification of Respondent under the corruption or malpractice standard.

2. Conduct Considered in Totality rather than Isolation

[2] Respondent argues the trial court erred in applying the standard by considering Respondent's conduct in totality rather than in isolation. Accordingly, Respondent challenges Conclusions of Law 9 and 10.

Removal proceedings against Respondent were initiated pursuant to N.C. Gen. Stat. § 7A-105 which states, in part, "[a] clerk of superior court may be suspended or removed from office for willful misconduct[.]" N.C. Gen. Stat. § 7A-105. Our Court in *Chastain I* stated: "we construe the language 'willful misconduct' in Section 7A-105 in the context of an Article VI hearing to include only those acts of willful misconduct which rise to the level of 'corruption or malpractice' in office." *Chastain*, 281 N.C. App. at 528, 869 S.E.2d at 744. The Court further noted, "Judge Lock lacked authority to rely on any acts of [Respondent] that did not rise to this level to support his sanction under Article VI." *Id.*

This Court did not limit the scope of Judge Lock's review to only those acts which independently rose to meet the corruption or malpractice standard under Article VI. Instead, the Court simply instructed that, upon remand, Judge Lock could not base his sanction—Respondent's disqualification—upon any act which did not rise to the corruption or malpractice standard. Further, the Court's holding instructed the trial court to limit its review to "whether the acts alleged in the charging affidavit before [Judge Lock] rose to the level of 'corruption or malpractice' in office under Article VI of our Constitution." *Chastain*, 281 N.C. App. at 530, 869 S.E.2d at 745–46. Neither instruction by this Court forbids or limits the trial court from considering Respondent's actions in totality

in order to conclude those actions met the standard for disqualification under Article VI.

Further, in defining the corruption or malpractice standard, this Court relied on precedent which allowed for such aggregation. Specifically, this Court in *Chastain I* quoted *In re Martin* stating, "[w]e do note that our Supreme Court has stated that 'persistent' acts of 'misconduct' may rise to the level of '[willful] misconduct.' " *Chastain*, 281 N.C. App. at 528, 869 S.E.2d at 744 (quoting *Martin*, 302 N.C. at 316, 275 S.E.2d at 421). This shows our Court did not intend the "any acts" language to limit the scope of the trial court's review to only those acts by Respondent which independently rose to meet the standard. Accordingly, we hold the trial court did not err in applying the standard where it considered Respondent's actions in totality rather than in isolation.

Nonetheless, we address Respondent's contention as to the trial court's Conclusions of Law 9 and 10, which state:

> 9. Even if Respondent's acts of misconduct viewed in isolation do not constitute willful misconduct, her knowing and persistently repeated conduct prejudicial to the administration of justice itself rises to the level of willful misconduct, is equivalent to corruption or malpractice under Article VI of the Constitution of North Carolina, and warrants permanent disqualification from office.
>
> 10. . . . Even if each act of misconduct was insufficient to warrant disqualification from office independently, the cumulative effect of the willful misconduct is that it was egregious in nature, was equivalent to corruption or malpractice under Article VI, § 8 of the Constitution of North Carolina, and warrants permanent disqualification from office.

Respondent argues these Conclusions of Law improperly lump all of Respondent's isolated conduct together to find it collectively rose to meet the standard. Our Court in *Chastain I* never limited the trial court's review to only acts which independently rose to the standard. Thus, the trial court did not err in Conclusions of Law 9 or 10.

3. Findings of Fact 17, 19, 30, 37, 45, and 46; and Conclusions of Law 3, 5, and 7

[3] Respondent specifically challenges the trial court's Findings of Fact 17, 19, 30, 37, 45, and 46; and Conclusions of Law 3, 5, and 7.

a. Finding of Fact 17

Respondent argues Finding of Fact 17 "erroneously states that [Respondent] 'went to the Franklin County Detention Center and demanded that she be allowed access to Machada for the purpose of having him complete an affidavit of indigency.' " However, the relevant portion of Finding of Fact 17 states:

> Respondent went to the Franklin County Detention Center and sought access to Machada for the purpose of having him complete an affidavit of indigency.

Respondent contends this Finding is erroneous as there is no testimony or evidence in the record suggesting she "demanded" anyone in the jail allow her access to Machada. However, not only is Finding of Fact 17 void of the word "demand," of which Respondent takes issue, but Respondent's testimony at the hearing indicates that on 7 March 2017, she went to the Franklin County Detention Center to see Machada and spoke with him for ten minutes. Finding of Fact 17 is supported by competent evidence and is therefore binding on appeal.

b. Finding of Fact 19

Respondent argues the trial court erred in Finding of Fact 19 which states:

> When Sheriff Winstead learned of this incident, he banned Respondent from further visits in the detention center.

Respondent contends "this incident" refers to the erroneous facts described in Finding of Fact 17 and the record is void of evidence that Sheriff Winstead ever learned of Respondent's "demand," or that Sheriff Winstead ever offered any testimony as to the specific reason he decided not to let Respondent return to the jail. Finding of Fact 19 is not erroneous as to its reference of "this incident," for, as mentioned above, the word "demand" does not appear in Finding of Fact 17. Further, the trial court did not err where it relied on Finding of Fact 17 in making Finding of Fact 19, as Finding of Fact 17 is supported by competent evidence.

Moreover, Sheriff Winstead testified at the September 2020 hearing as to Respondent being banned from the jail:

> Q: All right. Have you been present for any of [Respondent's] trips to the jail?
>
> A: No, I have not.

> Q: Okay. Are you aware of incidents that have occurred while she has been at the jail?
>
> . . .
>
> A: Yes.
>
> . . .
>
> Q: All right. As a result of incidents, have you taken any action?
>
> A: I have.
>
> Q: And what is that action?
>
> A: I do not allow [Respondent] to come in our facilities or the sheriff's office, jail, or magistrate's office.
>
> . . .
>
> Q: As a result of any of the Machada incidents, have you had to take any action with regard to the clerk?
>
> A: As a result to the Machada incidents. I mean that was one of the incidents that was brought as far as not letting her back into the jail.

This testimony provides evidentiary support for Finding of Fact 19. Because Finding of Fact 19 is supported by competent evidence, it is binding on appeal.

c. Conclusion of Law 3

Respondent argues the trial court erred in Conclusion of Law 3, which states:

> When Respondent, without the knowledge or authorization of the presiding district court judge, demanded access to the county jail for the purpose of obtaining an affidavit of indigency from a murder defendant knowing that the defendant already had been appointed counsel and afforded a first appearance before the district court judge, her conduct was an inappropriate intervention into the case and was an act beyond the legitimate exercise of Respondent's authority notwithstanding the Rules of the North Carolina Commission on Indigent Defense Services. Her actions were an effort to undermine Judge Davis' authority. Such willful misconduct was egregious

> in nature and is equivalent to corruption or malpractice under Article VI of the Constitution of North Carolina.

Respondent contends this Conclusion of Law is clearly erroneous as it relies upon a fact with no support from the record by stating Respondent decided to see Machada in jail "knowing that [Machada] already had been appointed counsel." Respondent further asserts there is not a separate finding within the trial court's order to support this fact.

The above portion of Conclusion of Law 3 challenged by Respondent serves as an ultimate finding. An "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact and should be distinguished from the findings of primary, evidentiary, or circumstantial facts." *In re Z.A.M.*, 374 N.C. 88, 97, 839 S.E.2d 792, 798 (2020) (quotations and citations omitted). However, regardless of whether the trial court's statement is considered a finding of ultimate fact or a conclusion of law, there must be adequate evidentiary findings of fact to support the ultimate finding or conclusion of law. *Id.* (quotations and citations omitted). Nevertheless, "[w]here there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions." *Black Horse Run Property Owners Association-Raleigh, Inc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 621 (1987) (citations omitted); *see also In re Estate of Skinner*, 370 N.C. 126, 139–40, 804 S.E.2d 449, 458 (2017).

We agree with Respondent that the portion of Conclusion of Law 3, which indicates Respondent went to the detention facility knowing Machada had been appointed counsel, is not supported by record evidence. In fact, although Respondent testified she understood Judge Davis had conducted Machada's first appearance, she stated she was not aware a lawyer had already been appointed. As such, this portion of Conclusion of Law 3, which we deem an ultimate finding, is not supported by adequate evidentiary findings of fact and is therefore erroneous.

Regardless, there are sufficient findings of fact to support Conclusion of Law 3. The trial court's additional findings in this Conclusion are supported by Respondent's own testimony, stating, upon arriving at her office the morning of the incident, "[t]he staff stated that Judge Davis had come early that morning and gotten one of the staff to go with him to the magistrate's office and to do the preliminary hearing." Despite Respondent testifying she was unable to find an affidavit of indigency within Machada's file, she was informed of Judge Davis's involvement in the Machada case and did not inquire as to the affidavit of indigency before going to the detention center to meet with Machada.

This evidence, in combination with the trial court's unchallenged findings of fact, are sufficient to support Conclusion of Law 3. Therefore, regardless of whether a portion of this conclusion is erroneous, the ultimate conclusion is not.

The trial court did not err in Conclusion of Law 3.

d. Finding of Fact 30

Respondent contends the trial court erred in a portion of Finding of Fact 30, which states:

> Respondent told the Diazes that she was telling them the law in this matter, and that Judge Davis "legally" did not have the right to enter the orders he had entered.

Respondent argues Finding of Fact 30 erroneously states Respondent told the Diazes "that Judge Davis did not have the right to enter the orders he had entered" as both the body camera footage and transcript of the same show otherwise. However, the body camera footage captured during Respondent's conversation with Adam Diaz proves the opposite. Respondent references the order entered by Judge Davis and its contents, stating: "[Judge Davis] legally can't say that." This statement, within the footage, provides sufficient evidence to support the above Finding. Because Finding of Fact 30 is supported by competent evidence, it is binding on appeal.

e. Finding of Fact 37

Respondent contends Finding of Fact 37 erroneously states:

> Respondent's statements to the Diazes again evidenced a sympathy for Ms. Gayden and a calculated decision to act on Ms. Gayden's behalf in her legal dispute with the Diazes. Respondent knew or should have known that her conduct in the dispute was well beyond the legitimate exercise of her authority and severely undermined the administration of justice. It moreover evidenced contempt for the legitimacy of Judge Davis' lawful orders.

Respondent argues this Finding is not supported by competent evidence because Respondent had a genuine interest in hearing the concerns of both parties. Further, Respondent argues she engaged in a voluntary discussion with the Diazes, listened intently as they explained their concerns, and wished the Diazes happiness and peace from the long-running ordeal. Respondent contends there exists no evidence that her conduct was a calculated decision to intervene in the dispute solely to support Gayden's position.

To the contrary, the body camera footage, obtained during Respondent's conversations with both Gayden and the Diazes, provides sufficient evidence to support this Finding. On 27 December 2019, Respondent met with Gayden outside her home, and sympathized with Gayden as to the conflict with the Diazes stating, "anything more I am going to look at as pure harassment, pure harassment, and it's not right. It's not right, and we're not going to put up with it." Further, Respondent repeatedly told Gayden that Adam Diaz was abusing the legal system by continually calling 911 and even expressed pity toward Gayden's position in the conflict noting, "it sounds like, to me, that at this point, you're getting picked on." Respondent then left Gayden and went to the Diaz home to address the issue. The footage depicts Respondent arriving at the Diaz home, and stating she was there to mediate. The video further shows Respondent positioning herself as an advocate for Gayden as she argued with Adam Diaz about every issue over which he expressed concern. Additionally, Respondent consistently referred to Adam Diaz's behavior, in calling 911, as an abuse of the judicial process. At one point, the officer on scene had to pull Respondent aside to correct her, stating he believed the Diazes were doing the right thing by calling 911 and had not been abusing the system. While, by the end of her encounter with the Diazes, Respondent was somewhat friendly, she entered the conversation with animosity toward the Diazes.

This body camera footage is, in itself, sufficient evidence to support Finding of Fact 37.

f. Conclusion of Law 5

Respondent contends the trial court improperly relied upon Finding of Fact 30 in making Conclusion of Law 5, which states:

> By intervening into the legal dispute between Ann Elizabeth Gayden and Adam and Sarah Diaz, and by engaging in that conduct on 27 December 2019 described in paragraphs 25 through 37 of the above Findings of Fact and that subsequent conduct on 31 December 2019 described in paragraph 38 of those Findings, Respondent engaged in conduct which tended to undermine the authority of John Davis, breed disrespect for his office and the legal processes already in place, and diminish the high standards of the office of Clerk of Superior Court.

Of the findings of fact mentioned here—Findings of Fact 25-38—Respondent only challenges Findings of Fact 30 and 37, which, as stated above, are supported by competent evidence. These Findings, with

the other twelve unchallenged findings, support Conclusion of Law 5. Therefore, the trial court did not err in Conclusion of Law 5.

g. Finding of Fact 45

Respondent challenges a portion of the trial court's Finding of Fact 45, which states:

> . . . Mr. Arnold heard Respondent say, "I just talked with the chief magistrate and he's not going to do a thing." He then heard Respondent say, "F[---] John Davis" or "F[---], I'm not calling John Davis" or "I don't give a f[---] about John Davis."

Respondent argues this Finding is erroneous as it is not supported by competent evidence because Magistrate Arnold admitted he did not know exactly what phrase Respondent used but that it could have been any of the three. Magistrate Arnold testified at the hearing: "The second thing [Respondent] said was, . . . either, f[---] John Davis; f[---], I'm not calling John Davis, or I don't give a f[---] about John Davis." Finding of Fact 45 includes this exact language without asserting that Magistrate Arnold knew exactly what Respondent said. Finding of Fact 45 is supported by competent evidence and is therefore binding on appeal.

h. Finding of Fact 46

Respondent argues the trial court erred in Finding of Fact 46 as it "erroneously concludes from the evidence [Respondent] did, in fact, say, 'F[---] John Davis.' " Respondent's argument lacks merit as the quoted language appears nowhere in Finding of Fact 46, which states:

> Under N.C. Gen. Stat. § 7A-146, the chief district court judge of each judicial district is charged with the supervision of the magistrates in the judge's district. The clerk of Superior Court has no supervisory authority over magistrates.

Because Respondent's argument here does not correspond with the challenged Finding, Respondent's argument lacks merit and is overruled. Thus, Finding of Fact 46 is binding on appeal.

i. Conclusion of Law 7

Respondent challenges a portion of Conclusion of Law 7 which states:

> By publicly attempting to exercise authority over Chief Magistrate James Arnold on 25 June 2020—conduct outside the scope of her official responsibilities—and thereafter using vulgarity in the presence of members of the

> public to describe her feelings toward Chief District Court Judge Davis, Respondent, at a minimum, engaged in conduct prejudicial to the administration of justice which brings her office into disrepute[.]

Respondent argues this Conclusion erroneously states Respondent engaged in improper conduct by using vulgarity to describe her feelings toward Judge Davis. However, Finding of Fact 45, which was supported by competent evidence, indicates Respondent used vulgarity to describe her feelings toward Judge Davis. Because the trial court's findings of fact support this Conclusion, the trial court did not err.

4. Respondent's Conduct and Resulting Disqualification

[4] We now review Respondent's conduct to determine whether the trial court properly disqualified Respondent from office, having concluded she acted in a manner which rose to the corruption or malpractice standard.

Respondent addresses four instances of misconduct—The Affidavit of Indigency, The Gayden/Diaz Home Visit, The Magistrate Arnold Phone Call, and The Audit—arguing her actions do not rise to the corruption or malpractice standard.

a. Respondent's Conduct

The trial court's Findings of Fact reflect the following:

The Affidavit of Indigency

On or about 6 March 2017, the defendant, Machada, was arrested for first-degree murder. On 7 March 2017, Sheriff Winstead informed the District Attorney, Mr. Waters, he did not want to transport Machada to the courtroom for a first appearance as he considered Machada dangerous and a security risk. District Attorney Waters then asked Judge Davis to conduct Machada's first appearance in the county jail and Judge Davis agreed. Machada was uncommunicative during his first appearance. Thus, Judge Davis did not ask Machada to complete an affidavit of indigency regarding the appointment of counsel.

Later that day, Respondent looked at Machada's file and did not find a completed affidavit of indigency. A member of Respondent's staff told her Judge Davis had conducted Machada's first appearance earlier that morning. Notwithstanding this information and without speaking to Judge Davis, Respondent went to the Franklin County Detention Center, met with Machada, and had him complete an affidavit of indigency.

After discovering Respondent's actions in visiting with Machada, Sheriff Winstead banned Respondent from further visits in the detention center, as well as the Sheriff's Office and Magistrate's Office. Sherriff Winstead stated the Machada incident was only one of the incidents involving the Respondent he considered in making the decision.

The Gayden/Diaz Home Visit

On 27 December 2019, Respondent went to the neighboring properties of Ann Gayden and Adam and Sarah Diaz to mediate an ongoing dispute between the two. Respondent was aware of the dispute and knew Judge Davis had entered no-contact orders against Gayden and in favor of the Diazes. These orders were still in effect. Respondent called the Sheriff's Office and asked a deputy to meet her at the properties. Deputy Dailey met Respondent on scene and witnessed interactions between Respondent and both Gayden and the Diazes. He captured the interactions on his body camera. Respondent went to Gayden and told her she believed Gayden was being picked on and harassed. Respondent also told Gayden that Adam Diaz was abusing the system by calling 911 and would be criminally charged if he continued to do so.

Next, Respondent went to the Diaz home and confronted Adam Diaz, stating, "I have a right and an obligation lawfully to come out here and mediate this." Respondent also stated she had jurisdiction over the entire county and was obligated by law to mediate the case. Respondent continued to refer to Adam Diaz's behavior, in calling 911, as an abuse of the judicial process until Deputy Dailey pulled her aside and told her it was not. Additionally, in speaking about the restraining order, Respondent told Adam Diaz, "as far as I'm concerned its for both of you" and even stated, in reference to the order, "[Judge Davis] legally can't say that." When Adam Diaz told Respondent she was speaking contrary to what Judge Davis had told them, she responded: "I'm telling you the law." When the Diazes complained Gayden had a drinking problem, Respondent told them to request Gayden have an assessment. The Diazes said they had asked for one previously but the judge said "they didn't have the power to do that[.]" Respondent then stated, "yes you do. Based on the evidence that I've heard, this would help her[,]" even noting she had the authority to, and would, order Gayden's assessment herself.

On 31 December 2019, Respondent directed one of her employees to file a copy of Gayden's deed containing the easement across the Diazes' property in two of the lawsuits Gayden had filed against the Diazes. In both case files, Respondent handwrote "Ms. Ann Gayden has legal right of way to travel per easement to her property" in the margin of the deed.

Respondent did not consult with and was not authorized by Judge Davis or any other district court judge before she did so, nor did she inform any district court judge or the Diazes' attorney she had placed this document in the case files thereafter.

The Magistrate Arnold Phone Call

On 25 June 2020, Franklin County Chief Magistrate James Arnold received a phone call from Respondent. She was yelling and often incoherent during the conversation. Respondent said she was at Magistrate Arnold's office and had several people with her who wanted to talk with a magistrate. She then demanded Magistrate Arnold send a magistrate to talk with the people. Magistrate Arnold stated he would not send a magistrate without knowing more information and asked Respondent to let him speak with the people, but she refused. Respondent threatened to give out Magistrate Arnold's personal phone number or post her own number on the door of the Magistrate's Office. Magistrate Arnold requested she not do either and said he would talk with her the next day. He suggested she contact Judge Davis if she wanted to complain about the Magistrate's Office. Respondent stated she was not going to call Judge Davis and Magistrate Arnold ended the phone call. Nearly 30 to 45 seconds later, Magistrate Arnold's cell phone rang. He knew Respondent was calling and could tell, after answering, she had inadvertently called. Magistrate Arnold heard Respondent say, "I just talked with the chief magistrate and he's not going to do a thing." He then heard Respondent say, "F[---] John Davis" or "F[---], I'm not calling John Davis" or "I don't give a f[---] about John Davis."

The Audit

Pursuant to the North Caroline State Auditor's duty to periodically examine and report on the financial practices of state agencies and institutions, the State Auditor's office conducted a performance audit of the Franklin County Clerk of Court's office for the period from 1 July 2019 through 31 January 2020. The Auditor thereafter published a written report of the Auditor's findings. Although the Auditor found no evidence of embezzlement or misappropriation of funds, several deficiencies in internal control and instances of noncompliance that were considered reportable were identified, including: untimely completion of bank reconciliations; failure to identify and transfer unclaimed funds to the State Treasurer or rightful owner; failure to compel estate inventory filings or fee collection; failure to compel inventory filings or assess and collect sufficient bonds for estates of minors and incapacitated adults; and failure to accurately disburse trust funds held for minors and incapacitated adults.

Further, in Respondent's response to the audit, she admitted: new employees were not properly trained in preparing bank reconciliations or on the escheat process; her office failed to document evidence of its requests to compel estate inventory filings; her staff made unintentional mistakes in calculating inventory fees and not collecting the required amounts; and monitoring procedures were not in place to ensure the reconciling adjustments were entered into the financial management system, to ensure funds were transferred and apparent owners notified, to ensure inventories were compelled timely and bonds were sufficient for the guardianship estates, or to ensure trust funds were accurately disbursed.

b. Resulting Disqualification

Our Court in *Chastain I* defined the corruption or malpractice standard to include acts of willful misconduct which are egregious in nature. *See supra* III.A. Upon remand, the trial court relied on this definition to disqualify Respondent. Thus, we do the same, noting as our Supreme Court did in *In re Peoples*, that in order to properly appraise Respondent's conduct we need only ask one question: "What would be the quality of justice and the reputation of the courts, if every clerk, exercised the duties of her office in the manner Respondent did here?" *See Peoples*, 296 N.C. at 156, 250 S.E.2d at 917.

Respondent was the Clerk of Superior Court of Franklin County for six years. This time in office is significant. Respondent knew, or should have known, the duties and ethical responsibilities of her office. *See* N.C. Gen. Stat. § 7A-103 ("Authority of clerk of superior court."). Conversely, Respondent continually acted outside the scope of her position as Clerk and engaged in misconduct. This misconduct not only undermined the authority of Judge Davis and other judges in the county but brought the judicial system into disrepute.

Respondent knew Judge Davis had already conducted Machada's first appearance. Nonetheless, she went to the detention center, without advisement from Judge Davis, and held a meeting with Machada. In doing so, Respondent acted in a manner prejudicial to the administration of justice and undermined the authority of Judge Davis. Additionally, Respondent was willfully persisting in misconduct such that Sherriff Winstead testified he had prior issues with Respondent—to the extent that, upon learning of this incident, he was forced to ban Respondent from entering the Sheriff's Office, jail, and Magistrate's Office.

In another instance, Respondent, despite knowing the Clerk of Superior Court has no supervisory authority over magistrates, called Magistrate Arnold and demanded he send a magistrate to speak with

people waiting outside the Magistrate's Office. Further, Respondent unequivocally acted with conduct prejudicial to the administration of justice which inevitably brought the judicial office into disrepute by speaking with absolute vulgarity about Judge Davis stating: "F[---] John Davis" or "F[---], I'm not calling John Davis" or "I don't give a f[---] about John Davis." This was done in the presence of citizens of Franklin County.

Even without considering the above instances, Respondent's conduct in the Gayden/Diaz dispute, alone, was sufficient to warrant her disqualification. There is no procedure which calls for the mediation of actions like the one in which Gayden and the Diazes were involved. Respondent also engaged a represented party as the Diazes had an attorney in this matter. The Clerk of Superior Court certainly understands their role is not to try and practice law, much less with a represented party. Regardless, Respondent went to the properties of each and professed it was her legal duty to mediate their dispute. Despite being aware of the order issued by Judge Davis concerning the matter, Respondent continued to try and mediate the situation. These acts with Respondent's additional statements severely undermined the administration of justice and the authority of Judge Davis as Respondent made claims about the order stating, "[Judge Davis] legally can't say that." Moreover, Respondent did not have the authority to modify official court files in connection with the Gayden-Diaz dispute. Yet, she instructed a member of her staff to file several deeds on which she made handwritten notes without authorization and without notifying anyone thereafter.

Here, Respondent knowingly persisted in misconduct as she consistently acted beyond the scope of her authority as Clerk. Further, she acted in a manner prejudicial to the administration of justice in continuing to undermine the authority of both Judge Davis and other judges within the district by questioning their judgment, condemning court orders, and in altering and filing deeds without authorization. The Clerk of Superior Court knows that these actions are beyond the duties of that office. Respondent's conduct rose to meet the corruption or malpractice standard as Respondent's actions constituted willful misconduct which was egregious in nature.

Having reviewed the above instances of Respondent's conduct, we hold Respondent was properly disqualified as her conduct amounted to corruption or malpractice.

C. *Chastain I*

[5] Notwithstanding our holding here, we emphasize our discrepancies with the Court's opinion in *Chastain I*.

Undoubtedly, in congruence with our Court's opinion in *Chastain I*, we recognize Article IV, section 17, authorizes the removal of a superior court clerk who engages in misconduct. N.C. Const. art. IV, § 17. Further, we agree that, pursuant to Article IV, section 17(4), none other than Judge Dunlow could preside over Respondent's removal proceeding. *Chastain*, 281 N.C. App. at 522, 869 S.E.2d at 741 ("Article IV confers on a single individual, the authority to remove the elected Clerk in a county; namely, the senior regular resident Superior Court Judge in that same county. Accordingly, no other judge may be conferred with jurisdiction over the subject matter of removing a Clerk for misconduct under Article IV.").

However, our Court in *Chastain I* held, as an alternative, Article VI, section 8, authorizes the removal of a superior court clerk "as a consequence of being disqualified from holding any office under Article VI where she is 'adjudged guilty of corruption or malpractice in any office.' " *Chastain*, 281 N.C. App. at 524–25, 869 S.E.2d at 742 (quoting N.C. Const. art. VI § 8) (emphasis omitted). With this, we disagree.

Article VI, section 8 of our Constitution states:

> The following persons shall be disqualified for office:
>
> . . . any person who has been adjudged guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored to the rights of citizenship in the manner prescribed by law.

N.C. Const. art. VI, § 8. This article concerns disqualification for office, not removal from office. Based on the plain language contained in the constitutional provisions—Article IV, section 17(4), specifically references removal while Article VI, section 8, concerns only disqualification—coupled with the fact that Article IV, section 17, is specifically titled "Removal of Judges, Magistrates, and Clerks" while Article VI, section 8, is titled "Disqualifications for office" we can be certain that Article VI is a disqualification provision only and not one of removal. For, if it was intended Article VI serve, alongside Article IV, as an additional means for removal from office, Article VI would have been drafted in the same manner as Article IV.

Further, our Court in *Chastain I* erroneously effectuates N.C. Gen. Stat. § 7A-105 as a procedural mechanism for disqualification under Article VI of our State Constitution when it was only intended as a procedural mechanism for removal of clerks under Article IV.

Chapter 7A, section 105, of the North Carolina General Statutes, titled "§ 7A-105. Suspension, removal, and reinstatement of clerk[,]" states:

> A clerk of superior court may be suspended or removed from office for willful misconduct or mental or physical incapacity, and reinstated, under the same procedures as are applicable to a superior court district attorney, except that the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides, and the hearing shall be conducted by the senior regular resident superior court judge serving the county of the clerk's residence. If suspension is ordered, the judge shall appoint some qualified person to act as clerk during the period of the suspension.

N.C. Gen. Stat. § 7A-105. This statute is a procedural mechanism for removal of clerks under Article IV of our State Constitution alone, as, by its plain language, the statute offers no guidance as to how someone may be disqualified for office.

However, our Court, in *Chastain I*, relied on *Peoples* to hold otherwise. In *Peoples*, our Supreme Court noted the long, complicated history of Article VI, section 8, specifically citing a major revision in our State Constitution in 1971. *Peoples*, 396 N.C. at 165, 250 S.E.2d at 922. Our Supreme Court further explained the revision "extended the bar against office holding persons found guilty of committing a felony against the United States or another state and substituted the phrase 'adjudged guilty' for the term 'convicted.' " *Id.* at 166, 250 S.E.2d at 923. Moreover, the Court concluded:

> [T]he substitution of the term "adjudged guilty" for the term "convicted" permits the General Assembly to prescribe proceedings in addition to criminal trials in which an adjudication of guilt will result in disqualification from office.

Id. Relying on this conclusion, the Court in *Peoples* analyzed N.C. Gen. Stat. § 7A-376, a statute which bars a judge from future judicial office when he has been removed for willful misconduct stating, in relevant part:

> (b) Upon recommendation of the Commission, the Supreme Court may . . . remove any judge for willful misconduct in office, . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. . . . *A judge who is removed for any of the foregoing reasons . . . is disqualified from holding further judicial office.*

N.C. Gen. Stat. § 7A-376 (2021) (emphasis added). The Court held this statute was enacted pursuant to the General Assembly's power to "prescribe proceedings in addition to criminal trials in which an adjudication of guilt will result in disqualification from office" under Article VI. *Peoples*, 296 N.C. at 166, 250 S.E.2d at 923. Further, the Court held, through this statute, the General Assembly was acting within its power when it made disqualification from judicial office a consequence of removal. *Id.*

Like the Court in *Peoples*, we too recognize the General Assembly's right to prescribe procedure for disqualification, but unlike the Court in *Peoples*, we must apply N.C. Gen. Stat. § 7A-105, a statute which can be distinguished from section 7A-376 as it applies only to clerks, not judges, and lacks any reference to disqualification at all. Further, we must presume our General Assembly intentionally refrained from, or has yet to consider, including disqualification as a consequence of removal under section 7A-105 as the General Assembly included specific language referencing disqualification as a consequence of removal under section 7A-376. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations omitted) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *see also State v. McCants*, 275 N.C. App. 801, 822, 854 S.E.2d 415, 430 (2020).

Aside from noting the General Assembly can provide a procedural mechanism for disqualification of clerks but has yet to do so, we must point out that our Court in *Chastain I* sought to hold removal proper as a consequence of disqualification. *See Chastain*, 281 N.C. App. at 524, 869 S.E.2d at 741. Our Supreme Court in *Peoples* only held the General Assembly acted within their authorization to create a statute, concerning judges, under which disqualification was a consequence of removal and not vice versa. As *Peoples* and *Chastain I* differ in this way, we find no authority under which removal has been considered as a consequence of disqualification.

While we recognize a person currently in office, who is disqualified for any future office pursuant to Article VI, section 8, after being adjudged guilty of corruption or malpractice in office, should likely be removed from the office they currently hold, neither our Constitution nor our General Statutes provide for removal upon disqualification.

We do not take issue with the Court's interpretation of the corruption or malpractice standard under Article VI. We only note the Court's application of the standard as to removal, together with its application

and recognition of N.C. Gen. Stat. § 7A-105 as a procedural mechanism for disqualification, was in error as the standard applies only to disqualification and the statute only serves as a procedural mechanism for removal. As such, our Court, in *Chastain I*, should have remanded the matter for further proceedings by Judge Dunlow under Article IV without instructing on an alternative method for removal.

IV. Conclusion

In congruence with our Court's opinion in *Chastain I*, we hold the trial court did not commit error in ordering Respondent permanently disqualified from serving in the Office of Clerk of Superior Court of Franklin County, pursuant to Article VI of the North Carolina Constitution, as Respondent's conduct amounted to nothing less than corruption or malpractice.

AFFIRMED.

Judge FLOOD concurs.

Judge WOOD dissents by separate opinion.

WOOD, Judge, dissenting.

The outcome of this matter is of significant importance to North Carolina jurisprudence and future interpretation of the North Carolina Constitution. Review of an order removing an elected judicial official is one of the "most serious undertaking[s]" in which an appellate court may engage. *In re Hayes*, 356 N.C. 389, 406, 584, S.E.2d 260, 270 (2002). Our Supreme Court has instructed that Article VI "expressly limit[s] disqualifications to office for those who are *elected by the people* to those disqualifications set out in the Constitution." *Baker v. Martin*, 330 N.C. 331, 339, 410 S.E.2d 887, 892 (1991) (emphasis added). Article VI, Section 8 requires that "any person who has been adjudged guilty of corruption or malpractice in any office" shall be disqualified from holding office. Because this is an ultimate consequence, conduct must rise to the high constitutional standard of *egregious* and willful misconduct so as to constitute "corruption or malpractice" before an elected official may be permanently disqualified from office. Because I believe the trial court's findings of fact do not support its conclusion that Ms. Chastain's actions were so *egregious* as to warrant permanent disqualification from office, I respectfully dissent from the majority opinion.

I. Background

Ms. Chastain began service as the Franklin County Clerk of Superior Court on 1 May 2013, having been appointed by the Honorable Judge Robert J. Hobgood, who was the senior Resident Superior Court Judge of Franklin County. The people of Franklin County, thereafter, elected Ms. Chastain to be their Clerk of Superior Court in 2014 and re-elected her to that position in 2018. It is clear from the record that, over the course of her service as Clerk of Superior Court, animosity grew between Ms. Chastain and certain officers of the court and other civil servants in Franklin County.

This animosity climaxed in 2020 after a local attorney commenced an action seeking the removal of Ms. Chastain from office, pursuant to N.C. Gen. Stat. § 7A-105, by filing an affidavit alleging that she had committed acts of willful misconduct. The charging affidavit alleged several acts of misconduct that the affiant had not personally witnessed. Superior Court Judge Thomas H. Lock presided over the matter during a hearing which took place from 28 September 2020 to 30 September 2020. On 16 October 2020, the trial court ordered that Ms. Chastain be removed from office and permanently disqualified from holding office as Clerk of Superior Court. Ms. Chastain appealed. For reasons further explained in *Chastain I*, this Court vacated the order and remanded the matter to the trial court on 1 February 2022. This Court reasoned, if Senior Resident Superior Court Judge John Dunlow were to hear the matter on remand, the court could utilize the lesser standard specified in Article IV to remove Ms. Chastain from office. If, however, Judge Lock were to rehear the matter, the court could only utilize the higher standard specified in Article VI.

On remand, Judge Lock again presided over the matter and ordered that Ms. Chastain be permanently disqualified and removed from office, this time in professed accordance with Article VI of the North Carolina Constitution. Ms. Chastain once more appeals to this Court pursuant to Article IV, Section 17(4) of our Constitution, alleging, among other things, that the trial court committed error when it concluded that the alleged misconduct merited her disqualification and removal from office.

II. Standard of Review

In Clerk of Superior Court removal proceedings before the trial court, the Affiant bringing charges bears the burden of proof, by "clear, cogent and convincing evidence," that grounds exist for removal. *In re Cline*, 230 N.C. App. 11, 21, 749 S.E.2d 91, 98 (2013). Accordingly, we must determine whether the trial court's "findings of fact are adequately

supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law." *In re Hill*, 368 N.C. 410, 416, 778 S.E.2d 64, 68 (2015).

When reviewing the conduct of an elected Clerk of Superior Court, it must be noted that our Supreme Court held:

> Absent evidence to the contrary, it will always be presumed "that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. . . . Every reasonable intendment will be made in support of the presumption."

Styers v. Phillips, 277 N.C. 460, 473, 178 S.E.2d 583, 591 (1971) (quoting *Huntley v. Potter*, 255 N.C. 619, 628, 122 S.E.2d 681, 687 (1961)).

We review the trial court's conclusions of law *de novo* on appeal. *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

III. Discussion

Our elected judicial officials, including our Clerks of Superior Court, are entrusted by the people with the administration of justice on their behalf. N.C. Const. art. I, § 2. Thus, where our elected officials are "drawn from the same fountain of authority, the people," and where our Constitution allows for the removal of an elected official by a like official, such removal must be effectuated with the utmost care and respect for the people's will—and not purely as a result of internal, oligarchical enmity. The Federalist No. 51 (James Madison).

The Clerk of Superior Court is a constitutional officer, whose office is established by Article IV, Section 9(3) of our Constitution. Our Constitution provides the avenues by which an elected Clerk may be removed. As *Chastain I* reasoned, Article VI is the only constitutional provision applicable to the disqualification and, consequentially, removal of an elected clerk when a judge other than the senior resident superior court judge adjudicates the matter. *Chastain I*, 281 N.C. App. 520, 529, 869 S.E.2d 738, 745 (2022). Though the senior resident superior court judge could have presided over the matter under the Rule of Necessity as explained in *Chastian I*, Judge Lock presided, and therefore, Article VI is the controlling constitutional provision.

Under Article VI, Section 8, "any person who has been adjudged guilty of corruption or malpractice in any office" shall be disqualified from holding public office. N.C. Const. art. VI, § 8. If a person elected to public office becomes disqualified from office, it necessarily follows that the person may no longer serve in that office and must be removed. *See Chastain I*, 281 N.C. App. at 527, 869 S.E.2d at 744 (discussing removal under Article VI). For purposes of disqualification after being "adjudged guilty of corruption or malpractice," removal from office is effectuated upon adjudication. By the plain language of this provision, it is clear the drafters intended only for the most egregious conduct to apply, including disqualification by impeachment, being found guilty of treason, being found guilty of a felony, or being adjudged guilty of corruption or malpractice in office. This Court construed this "corruption or malpractice" standard "to include at a minimum acts of willful misconduct *which are egregious in nature*." *Id.* at 528, 869 S.E.2d at 744 (emphasis added) (citing *In re Peoples*, 296 N.C. 109, 166, 250 S.E.2d 890, 923 (1978)). Implicit in this expression and as supported by our caselaw, the "corruption or malpractice" standard of Article VI requires more than mere "misconduct" or even "willful misconduct"; it requires *egregious* and willful misconduct.

The North Carolina Supreme Court has defined corruption as "[t]he act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." *State v. Agnew*, 294 N.C. 382, 392–93, 241 S.E.2d 684, 691 (1978) (quoting *State v. Shipman*, 202 N.C. 518, 540, 163 S.E. 657, 669 (1932)). It requires proof of an unlawful or fraudulent intent. *Id.* Multiple other crimes resulting from misconduct in public office are set forth in our General Statutes. *See* N.C. Gen. Stat. §§ 14-228 to -248 (2022). Offenses of public office which require a corrupt or fraudulent intent or involve leveraging public office to unlawfully obtain a material benefit are charged as felonies; whereas charges of failure to properly discharge duties or misuse of confidential information are misdemeanors. *Id.*

Being "adjudged guilty of malpractice" is not defined under our statutes. I agree with the proposition advanced by Respondent that, arguably, the nearest analogy is a civil claim for professional malpractice damages. To establish a civil claim for professional malpractice, the plaintiff must show: the nature of the defendant's profession; the defendant's duty to conform to a certain standard of conduct; a breach of duty; and proximate cause of harm to the claimant. *Reich v. Price*, 110 N.C. App. 255, 258, 429 S.E.2d 372, 374 (1993), *cert. denied*, 334 N.C. 435, 433 S.E.2d 178 (1993). In contrast, for the criminal offense of willful

failure to discharge duties in office under N.C. Gen. Stat. § 14-230, which is subject to only a misdemeanor sentence and subsequent removal from office, it must be evidenced that the defendant is an official of a state institution; the official willfully failed to discharge the duties of his office; and the act or omission resulted in injury to the public. *State v. Birdsong*, 325 N.C. 418, 422, 384 S.E.2d 5, 7 (1989). It can be inferred then that "malpractice in office" under Article VI requires at a minimum not only the specific intent to willfully violate one's official duties under the law but also proof that such conduct was *egregious* and proximately caused injury to the claimant or the public.

In re Peoples provides helpful context under this high standard. 296 N.C. 109, 250 S.E.2d 890 (1978). There, our Supreme Court disqualified a former district court judge from holding any elected office pursuant to Article VI after the Judicial Standards Commission instituted an action against him and recommended he be removed from office. For several years, the judge had, among other things, repeatedly removed certain cases from the active trial docket and into the judge's indefinitely pending "personal file" and had accepted money from defendants for "court costs" that were never received by the clerk's office. *Id.* at 155–56, 250 S.E.2d at 917. Prior to a hearing on the action brought by the Judicial Standards Commission, the judge in that case resigned, and the removal power of Article IV no longer had effect. However, our Supreme Court permanently disqualified him from public office under Article VI due to the egregious nature of the judge's conduct. Discussing what "guilty" means in Article VI, our Supreme Court held that "[t]he word *guilty* connotes evil, intentional wrongdoing and refers to conscious and culpable acts." *Id.* at 165, 250 S.E.2d at 922. *In re Peoples* is one of the only cases that directly contemplates Article VI, and its holding reinforces the notion that disqualification under Article VI is an extreme consequence.

For lack of caselaw regarding Article VI disqualifications, Ms. Chastain provides this Court with an exhaustive list of cases involving the removal of elected officials under Article IV. Article IV allows for the removal of a clerk of superior court "for misconduct or mental or physical incapacity." N.C. Const. art. IV, § 17. Article IV's "misconduct" standard presents a lesser standard than Article VI's "corruption or malpractice" standard, *Chastain I*, 281 N.C. App. at 525, 869 S.E.2d at 742, yet all of our Article IV cases evidence acts substantially more egregious in nature than Ms. Chastain's alleged misconduct, even when viewed in the light most damning to Ms. Chastain.

In one example, our Supreme Court upheld the removal of a district attorney who, while in the early morning hours at a bar, repeatedly

yelled "ni–er" to another patron and engaged in "other improper conduct" before being forcefully removed. *In re Spivey*, 345 N.C. 404, 408, 480 S.E.2d 693, 695 (1997). In another case, a district court judge was removed for accepting multiple cash bribes. *In re Hunt*, 308 N.C. 328, 330, 302 S.E.2d 235, 236 (1983). Still more, a superior court judge was properly removed after eliminating conditions of a probationer without notice to the district attorney, sexual misconduct, and coercing an assistant district attorney to "help" the judge's former mistress in a DWI case. *In re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983); *see also In re Sherill*, 328 N.C. 719, 403 S.E.2d 255 (1991) (judge possessed marijuana, cocaine, and drug paraphernalia); *In re Cline*, 230 N.C. App. 11, 749 S.E.2d 91 (2013) (district attorney repeatedly and publicly accusing a judge of "intentional and malicious conduct" such that his "hands are covered with the blood of justice" and other invectives made with actual malice).

In the present matter, Ms. Chastain's conduct, even if willful and considered in isolation or combination, was not *egregious* as to merit her disqualification and removal from the elected office of Clerk of Superior Court. The trial court relied upon four instances of misconduct in its findings of fact before concluding that Ms. Chastain's conduct "warrant[ed] permanent disqualification from office."

A. Affidavit of Indigency

In the first instance, the trial court found that Ms. Chastain "demanded access to the county jail for the purpose of obtaining an affidavit of indigency from a murder defendant knowing that the defendant already had been appointed counsel." The findings as to this event are as follows:

> 15. On or about 6 March 2017, the Franklin County Sheriff's Office arrested an individual named Oliver Funes Machada for the first degree murder of his mother by decapitating her. Sheriff Kent Winstead telephoned District Attorney Waters and asked him to come to the crime scene. Later that day, either a district court judge or Indigent Defense Services appointed provisional counsel for Machada.
>
> 16. The next morning, 7 March 2017, the Sheriff informed Mr. Waters that he did not want to transport Machada to the courtroom for a first appearance because he considered Machada dangerous and a security risk. Mr. Waters then asked Chief District Court Judge John Davis if he would conduct Machada's first appearance

in the county jail, and Judge Davis agreed. Machada was uncommunicative during his first appearance. Judge Davis did not ask Machada to complete an affidavit of indigency regarding the appointment of counsel.

17. Later that day, Respondent looked at Machada's court file and observed that there was not a completed affidavit of indigency in it. A member of Respondent's staff told her that Judge Davis already had conducted Machada's first appearance earlier that morning. Notwithstanding this information and without speaking to Judge Davis, Respondent went to the Franklin County Detention Center and sought access to Machada for the purpose of having him complete an affidavit of indigency. In so doing, Respondent interfered with a matter that Judge Davis already had addressed.

18. Rules 1.4 and 2A.2 promulgated by North Carolina Commission on Indigent Defense Services require a defendant to complete and sign a sworn affidavit of indigency in every case in which counsel is appointed. Rule 1.1(4) further provides: "When these rules describe the functions a court performs, the term 'court' includes clerks of superior courts." Nonetheless, Respondent's intervention in these proceedings, after Machada already had been afforded a first appearance, was improper.

19. When Sheriff Winstead learned of this incident, he banned Respondent from further visits in the detention center.

From this, the trial court concluded as a matter of law that, by having the defendant fill out this indigency form after he had been appointed counsel, Ms. Chastain's actions were "an inappropriate intervention into the case and was an act beyond the legitimate exercise of Respondent's authority notwithstanding the Rules of the North Carolina Commission on Indigent Defense Services" and "were an effort to undermine Judge Davis'[s] authority" and that "[s]uch willful misconduct was egregious in nature and is equivalent to corruption or malpractice under Article VI." I disagree.

The trial court recognized that Ms. Chastain had the authority and responsibility under "Rules 1.4 and 2A.2 promulgated by North Carolina Commission on Indigent Defense Services" to "require a defendant to complete and sign a sworn affidavit of indigency in every case in which

counsel is appointed." The trial court further found that "Rule 1.1(4) further provides: 'When these rules describe the functions a court performs, the term "court" includes clerks of superior courts.' " Yet despite recognizing this responsibility, the trial court found Ms. Chastain's conduct to be improper. Truly, respect for a judge's authority, especially by one employed in the administration of justice, is necessary for the proper reverence of our institution. Perhaps it was true that Ms. Chastain, on this occasion, succumbed in some small way to that familiar tinge of frustration and took matters upon herself to complete that which the judge neglected to do. The record does more than hint at the animosity surrounding the officials here. However, this single occurrence of alleged misconduct, if it could be called misconduct at all, was not so egregious as to support the disqualification and removal of a democratically elected clerk from office under Article VI.

I also note that Ms. Chastain testified that she was unaware that an attorney had actually been appointed to Machada prior to his signing an affidavit of indigency, and no evidence was introduced to challenge this understanding. Nevertheless, even taken as true, the findings do not support the conclusion that Ms. Chastain's actions breached the high standard of egregious and willful misconduct necessary to warrant disqualification from office.

B. Dispute Between Neighbors

In the second instance, the trial court found that Ms. Chastain improperly intervened in an easement dispute between two neighbors, against one of whom Judge Davis had previously entered a no-contact order. The dispute had been ongoing between the parties for several years. The trial court found the following:

> 25. On the morning of 27 December 2019, a Franklin County resident named Ann Elizabeth Gayden came to the Office of the Clerk of Superior Court and complained to Respondent about an ongoing dispute with her neighbors, Adam and Sarah Diaz, concerning an easement. Respondent was familiar with Ms. Gayden and was aware of the dispute. Respondent specifically was aware that Chief District Court Judge John Davis, pursuant to Chapter 50-C of the General Statutes of North Carolina, had entered no-contact orders *against* Ms. Gayden and *in favor* of the Diazes on 20 February 2019, and Respondent knew those orders were still in effect.
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> 26. Respondent decided to go [to] the properties of Ms. Gayden and the Diazes. She called the Franklin

County Sheriff's Office and asked that a deputy meet her there. Although Respondent testified that she believed Ms. Gayden was experiencing some sort of crises, she also testified that she went to the Diazes' residence for a social visit. Respondent's testimony in this regard was inconsistent. The court further finds it to be disingenuous and an attempt to minimize the seriousness of her interference in the Gayden-Diaz dispute.

27. Sheriff's Deputy Justin Dailey was dispatched to the scene, and he arrived at approximately 11:18 a.m. on 27 December 2019. He thereafter witnessed the interactions between Respondent and Ms. Gayden and Respondent and the Diazes. Deputy Dailey moreover recorded these interactions on the body camera he was wearing. Deputy Dailey's recording was received in evidence as Affiant's Exhibit 1.

28. Respondent met first with Ms. Gayden, who was visibly upset. Respondent told Ms. Gayden, among other things, that Ms. Gayden legally owned the easement and had a right to enter the driveway, that she (Respondent) was going to enter an order that day, that she thought Ms. Gayden was afraid and scared, and that Ms. Gayden was "getting picked on." Respondent further stated that if he (Adam Diaz) continued "to do this", Respondent was going to call 911 and he would be charged. Respondent moreover told Ms. Gayden that Respondent, by law, could mediate any case and said that was what she was doing.

29. Respondent knew that she did not have the authority to enter orders or to interfere with Judge Davis's prior orders in this matter. Respondent falsely led Ms. Gayden to believe otherwise, thereby undermining the normal judicial process, including Judge Davis' judicial authority. Respondent's statements to Ms. Gayden furthermore evidenced a sympathy for her and a deliberate decision to intervene on her behalf in Ms. Gayden's legal dispute with the Diazes.

30. Thereafter, Respondent went to the residence of the Diazes and met them outside their home. The Diazes also were visibly upset. Respondent introduced herself, told the Diazes that she had jurisdiction over the entire county, and falsely stated that she was obligated to

mediate their case. Mr. Diaz told Respondent that there was already a restraining order against Ms. Gayden in place, and Respondent replied that, as far as Respondent was concerned, the restraining order was for both of them. Mr. Diaz stated that Ms. Gayden continued to operate a tractor on the easement and to loiter on it in violation of the court order, to which Respondent replied that she thought Ms. Gayden was videotaping the Diaz property to prove that she (Gayden) was not doing anything. Respondent told the Diazes that she was telling them the law in this matter, and that Judge Davis "legally" did not have the right to enter the orders he had entered.

31. Respondent's false and misleading statements to the Diazes were made with the intent to undermine Judge Davis' prior order and judicial authority, and were made to benefit Ms. Gayden.

32. Respondent's false and misleading statements also were made to intimidate the Diazes into believing that she would influence or change the Diazes legal rights relating to the easement dispute, particularly if the Diazes did not permit Ms. Gayden to use the easement as Respondent deemed fit. In so doing, Respondent misstated the scope of her authority in an effort to affect the proceedings.

33. Respondent was aware the Diazes were represented by counsel, namely, Jeffrey Scott Thompson (the Affiant), in their cases against Ms. Gayden, but Respondent told the Diazes they should hire another attorney in connection with the dispute. Respondent knew or should have known that it was improper for the Clerk of Court to recommend a particular attorney or to disparage an attorney to that attorney's clients.

34. Respondent finally told the Diazes to give it (the dispute) one more court date and that the orders could be extended if needed. Respondent shook hands with the Diazes, gave them her business card and personal cell phone number, and departed the scene.

35. The no-contact orders that Judge Davis had entered on 20 February 2019 did not restrain any conduct or activity by the Diazes. Respondent knew or should have known this fact.

36. There are no procedures in place in the Ninth Judicial District for the mediation of Chapter 50-C actions. Respondent was aware that she had no legal authority to conduct mediation or to compel the parties to a lawsuit to mediate it. Her statements to the parties that she was obligated by law to mediate the matter were false.

37. Respondent's statements to the Diazes again evidenced a sympathy for Ms. Gayden and a calculated decision to act on Ms. Gayden's behalf in her legal dispute with the Diazes. Respondent knew or should have known that her conduct in the dispute was well beyond the legitimate exercise of her authority and severely undermined the administration of justice. It moreover evidenced contempt for the legitimacy of Judge Davis' lawful orders.

38. On 31 December 2019, Respondent, at the request of Ms. Gayden, directed one of her employees to file a copy of Ms. Gayden's deed containing the easement across the Diazes' property in two of the lawsuits Ms. Gayden had filed against the Diazes. In both case files (Franklin County File Numbers 19 CVD 444 and 19 CVD 445), Respondent handwrote the following words in the margin of the deed: "Ms. Ann Gayden has legal right of way to travel per easement to her property." Respondent wrote these words without the authorization of Chief District Court Judge John Davis, and without consulting any other district court judge about her action. Respondent did not thereafter inform any district court judge or the Diazes' attorney that she had placed this document in these case files. Respondent knew she did not have the authority to modify official court files in connection with the Gayden-Diaz dispute.

39. The incident of 27 December 2019 involving Respondent's interactions with Ms. Gayden and the Diazes was widely reported in the Franklin County news media and on Raleigh television station WRAL. Clips from Affiant's Exhibit 1 were included in the WRAL news broadcasts.

The trial court concluded that, because Ms. Chastain intervened in that matter and made false and misleading statements, Ms. Chastain "engaged in conduct which tended to undermine the authority of Judge

Davis, breed disrespect for his office and the legal processes already in place, and diminish the high standards of the office of Clerk of Superior Court." He found this occurred after Judge Davis and the District Attorney rebuked Ms. Chastain for "acting outside the scope of her official responsibilities." Thus, the trial court concluded that "[s]uch willful misconduct was egregious in nature . . . and independently warrants permanent disqualification from office."

I join with the trial court's reprimand of Ms. Chastain in this instance; it is not the place of a Clerk of Superior Court to interject herself into the legal dispute of two neighbors and make false statements, even for the purposes of ameliorating the situation. However, this, too, is not an instance of *egregious* misconduct warranting her disqualification from office and, thus, does not support the trial court's conclusion of law. Ms. Chastain's initiative, though misplaced, produced no injury to any individual, was exercised with parties who did not have an action pending before her, was not an "evil, intentional wrongdoing," and stands as comparatively innocent with the cases cited above wherein elected officials were removed under a lesser standard than required here. Having worked with the disputes between these warring neighbors for many years, Ms. Chastain was more than familiar with the parties involved. Ms. Chastain did not personally gain any benefit from mediating a truce here, which might otherwise imply some level of corruption. Though she may have harbored sympathies for one party over the other, this does not weigh into a consideration of corruption or malpractice.

To be clear, I am reiterating the high standard necessary to disqualify a citizen, particularly an elected official, from office. Though she may have acted beyond the scope of her position, as the majority holds, this overstep cannot be held to have been egregious or to proximately cause injury to the public so as to invoke her disqualification under Article VI, Section 8.

C. Magistrate Call

In the third instance, the trial court found that Ms. Chastain "attempt[ed] to exercise authority over Chief Magistrate James Arnold . . . and thereafter us[ed] vulgarity in the presence of members of the public to describe her feelings toward Chief District Court Judge Davis." The trial court's findings are as follows:

> 41. Respondent said she was at Mr. Arnold's office located in the Sheriff's Office. The magistrate's office was unattended at the time because the office was short-staffed.

There was a sign posted on the door of the magistrates' office instructing members of the public to call 911 if they needed a magistrate after normal business hours.

42. Respondent told Mr. Arnold that she had some people with her, and he could hear people talking in the background. Respondent stated that she had received several complaints about the hours the magistrates' office was open. Mr. Arnold told Respondent that a magistrate was on call 24 hours a day, to which Respondent replied that she was open 24 hours a day.

43. Respondent told Mr. Arnold that the people with her wanted to talk with a magistrate and demanded that he send a magistrate to the office to talk with them. The Respondent did not say what the people with her wanted and she did not claim that they were experiencing any sort of emergency. Mr. Arnold stated that he would not send a magistrate without knowing more and he asked Respondent to let him speak with the people. Respondent refused.

44. Respondent threatened to give Mr. Arnold's private telephone number to the people with her, and he stated that she should not do that. Respondent then told him that she was going to post her own telephone number on the magistrates' door, to which Mr. Arnold replied that Respondent was not a magistrate. Mr. Arnold told Respondent he would talk with her the next day and suggested that she call Chief District Court Judge John Davis if she wanted to complain about the magistrates' office. Respondent stated she was not going to call Judge Davis, and Mr. Arnold ended the telephone call.

45. About 30 to 45 seconds later, Mr. Arnold's cell phone rang again. He could tell from his phone's caller ID feature that Respondent was the person calling. He answered his telephone and could hear Respondent talking to other people whom he also could hear in the background. Respondent did not say anything to Mr. Arnold, and he quickly concluded that she had inadvertently called him without realizing she had done so. Mr. Arnold heard Respondent say, "I just talked with the chief magistrate and he's not going to do a thing." He then heard Respondent say, "F[---] John Davis" or "F[---], I'm not calling John Davis" or "I don't give a f[---] about John Davis." Regardless of

> Respondent's exact words, she made highly inappropriate and vulgar statements in the presence of others with the intent to undermine the public's respect for Judge Davis and Mr. Arnold and for their judicial authority.
>
> 46. Under N.C. Gen. Stat. § 7A-146, the chief district court judge of each judicial district is charged with the supervision of the magistrates in the judge's district. The clerk of Superior Court has no supervisory authority over magistrates.

As with the previous instances, the trial court concluded Ms. Chastain attempted to exercise authority over the magistrate and that conduct was "outside the scope of her official responsibilities—and thereafter us[ed] vulgarity in the presence of members of the public to describe her feelings toward Chief District Court Judge Davis." The court concluded that she "at a minimum, engaged in conduct prejudicial to the administration of justice which brings her office into disrepute." The court further concluded that, while acting in her official capacity, her conduct was "intentional and knowing, and she acted with a specific intent to accomplish a purpose which she knew or should have known was beyond the legitimate exercise of her authority" and that this instance "independently warrants permanent disqualification from office."

Although the trial court could not determine the exact words Respondent used, it found that "she made highly inappropriate and vulgar statements in the presence of others with the intent to undermine the public's respect for Judge Davis and Mr. Arnold and for their judicial authority." However, words, and the meaning behind them, are important and necessary in determining someone's intent. From the trial court's findings of the four potential statements that may have been made by Respondent, there are four different interpretations and intentions that could be found. Furthermore, Magistrate Arnold testified, while he believed he heard Respondent say the curse word at issue, he did not know what phrase she actually said. Instead, he testified that that the most he could say is that he heard her say a single phrase which, for all he knew, could very well have been, "F__, I am not calling John Davis." Accordingly, such evidence cannot support the trial court's conclusion that Respondent used "vulgarity in the presence of members of the public to describe her feelings toward Chief District Court Judge Davis."

The trial court's finding that the Clerk of Superior Court does not have supervisory authority over magistrates is correct; however, under North Carolina law, the Clerk of Superior Court has the statutory obligation to nominate all magistrates for selection by the senior resident

superior court judge of the district. N.C. Gen. Stat. § 7A-171 (2022). As such, it does not strain credibility that Respondent may have felt authorized or obligated to call the chief magistrate when she found the magistrate's office unmanned. Implicit with the official duty of nominating magistrates is the obligation of the Clerk to keep herself informed about the job performance of the magistrates in her district so she can make an intelligent decision as to whether to renominate any such individuals in the future.

The trial court's findings do not support the conclusion that Ms. Chastain's actions rise to the level of egregious and willful misconduct demanded of Article VI's "corruption or malpractice" standard to warrant disqualification from office.

D. Periodic Audit

In the fourth instance, the trial court found that Ms. Chastain's "deficiencies in the oversight of the financial and accounting responsibilities of the Clerk of Superior Court . . . evidenced a gross unconcern for her fiduciary duties . . . and demonstrated a reckless disregard for the high standards of her office." This instance stemmed from a periodic audit of the clerk's office. The trial court found the following:

> 20. Pursuant to the North Carolina State Auditor's duty to periodically examine and report on the financial practices of state agencies and institutions, State Auditor Beth A. Wood's office conducted a performance audit of the Franklin County Clerk of Court's office for the period from 1 July 2019 through 31 January 2020. The Auditor thereafter published a written report of the Auditor's findings. (Affiant's Exhibit 10)
>
> 21. The Auditor identified the following deficiencies in internal control and instances of noncompliance that were considered reportable under the Government Auditing Standards issued by the Comptroller General of the United States:
>
> - Untimely completion of bank reconciliations;
> - Failure to identify and transfer unclaimed funds to the State Treasurer or rightful owner and failure to notify apparent owners;
> - Failure to compel estate inventory filings or fee collection;

- Untimely or failure to compel inventory filings or assess and collect sufficient bonds for estates of minors and incapacitated adults; and
- Failure to accurately disburse trust funds held for minors and incapacitated adults.

22. The Auditor found no evidence of embezzlement or misappropriation of funds by the Respondent or any employee of the Clerk of Court's office.

23. In respondent's written response to the audit, included in the Auditor's Report, Respondent admitted, among other things, that: new employees were not properly trained in preparing bank reconciliations; monitoring procedures were not in place to ensure the reconciling adjustments were entered into the financial management system; new employees were not properly trained on the escheat process; monitoring procedures were not in place to ensure funds were transferred and apparent owners were notified; her office failed to document evidence of its requests to compel estate inventory filings; her staff made unintentional mistakes in calculating inventory fees and not collecting the required amounts; monitoring procedures were not in place to ensure inventories were compelled timely and bonds were sufficient for the guardianship estates; and new employees were not properly trained and monitoring procedures were not in place to ensure trust funds were accurately disbursed.

24. By the time of the audit, Respondent had been in office more than 6 years and knew or reasonably should have known the accounting and fiduciary responsibilities of the Office of Clerk of Superior Court. Nonetheless, she willfully and persistently failed to perform some of the core duties of her responsibilities as Clerk of Court.

The trial court concluded that these deficiencies "evidenced a gross unconcern for her fiduciary duties . . . and demonstrated a reckless disregard for the high standards of her office." The court concluded that "Respondent's lack of oversight of her office constituted willful misconduct in office that was egregious in nature, is equivalent to corruption or malpractice . . . and independently warrants permanent disqualification from office" under Article VI of our Constitution.

Yet, as with the other instances, the deficiencies revealed by the Auditor's report could hardly be said to constitute the *egregious* and willful misconduct necessary to disqualify and, consequently, remove an elected official from office pursuant to Article VI. The audit did not reveal any criminal or material misconduct by Respondent or anyone in her office. It did identify areas where improvements could be made regarding the training and monitoring of staff members. It is not appropriate to equate temporary deficiencies in the training and monitoring of employees with intentional and knowing misuse of office. The audit found no evidence of "knowing misuse" of office or bad faith intent to violate the law. Willful misconduct requires "more than an error of judgment or a mere lack of diligence," and acts of "negligence or ignorance," in the absence of bad faith intent to violate the law, do not rise to the level of willful misconduct. *In re Nowell*, 293 N.C. 235, 248–49, 237 S.E.2d 246, 255 (1977).

E. Cumulative Consideration of Actions

The trial court, in the alternative to finding independent grounds to support the requirements of Article VI, concluded that the instances listed above, when considered together, constituted *egregious* and willful misconduct sufficient to disqualify Ms. Chastain from office. I disagree. While our Supreme Court in *In re Martin* asserts that "if a judge knowingly and wil[l]fully persists in indiscretions and misconduct which . . . constitute wil[l]ful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office," 295 N.C. 291, 305–06, 245 S.E.2d 766, 775 (1978), the holding is inapplicable here. Ms. Chastain did not "persist in indiscretions and misconduct." As noted above, the instances the trial court noted were singular, isolated occurrences, separated by substantial time, place, and parties involved. Further, in *Chastain I*, this Court held that "Judge Lock lacked authority to rely on any acts of Ms. Chastain that did not rise to [corruption or malpractice] to support his sanction under Article VI." 281 N.C. App. at 528, 869 S.E.2d at 744. The trial court cannot commingle and combine conduct that is not egregious and willful to reach the highest bar of corruption and malpractice under Article VI.

Because the caselaw relied upon by the parties and the trial court involve the removal or disqualification of elected judges or district attorneys, I take this opportunity to clarify a matter concerning the standard of conduct of a Clerk of Superior Court. Though the procedure for removing a Clerk of Superior Court may be the same as that necessary for the removal of district attorneys and judges, the standards

are not the same. For example, district attorneys are held to the Rules of Professional Conduct governing lawyers. Thus, a trial court may consider removing a district attorney for violation of these standards which might be relevant if the lawyer were to "engage in conduct that is prejudicial to the administration of justice," "state or imply an ability to influence improperly a government agency or official," and "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." N.C. Rules of Pro. Conduct r. 8.4. Similarly, judges are held to the standards outlined in the Code of Judicial Conduct. A judge may be removed if that judge engages in conduct prejudicial to the administration of justice such as failing to "perform the duties of the judge's office impartially and diligently" or exhibiting "impropriety." N.C. Code of Judicial Conduct r. 2-3.

Clerks of Superior Court, by contrast, are not required to be licensed attorneys as a condition of holding office and, consequently, are not held to the same high standards as lawyers and judges. As the trial court noted in one of its findings, "there is no formal code of ethics applicable to Clerks of Court." Instead, this Court looks to the standard of "corruption or malpractice" as stated in our Constitution when determining if a Clerk of Superior Court was properly disqualified from office under Article VI. In an apparent nod to the Rules of Professional Conduct applicable to lawyers and judges under *In re Peoples*, the trial court concluded that Ms. Chastain's conduct was "prejudicial to the administration of justice." However, this is not the standard for disqualification of a Clerk of Superior Court under Article VI, Section 8.

I stress this is no mere firing of an employee. By being adjudged guilty of corruption or malpractice, Ms. Chastain is not only removed from elected office, but is forever prohibited from holding *any* elected office. As our Supreme Court long ago said of disqualification,

> It fixes upon the convicted party a stigma of disgrace and reproach in the eyes of honest and honorable men that continues for life. It is difficult to conceive of a punishment more galling and degrading in this country than disqualification to hold office, whether one be an office seeker or not.

Harris v. Terry, 98 N.C. 131, 133, 3 S.E. 745, 746 (1887). Perhaps the greater injury rests upon the people of Franklin County who elected Ms. Chastain as their Clerk of Superior Court multiple times. Our system is not wholly democratic (and this, perhaps, for good reason), but, when adjudicating the disqualification of an elected official, care for the

people's will is requisite to the proper respect for their sovereignty. The trial court here did not respect that sovereignty.

IV. Conclusion

The will of the people must not be cast aside by the stroke of a judge's pen without due consideration and just cause under the high standard set forth by our Constitution. Therefore, I respectfully dissent.

IN THE MATTER OF M.L.C.

No. COA22-784

Filed 20 June 2023

1. Termination of Parental Rights—personal jurisdiction—summons-related defect—waiver—general appearance by counsel

The trial court had personal jurisdiction over respondent mother in a termination of parental rights proceeding where, although there was no evidence that a summons had been issued or served on respondent and respondent did not appear at the termination hearing, any defect in service of process was waived because respondent had actual notice of the hearing (after having been personally served with the termination petition and two hearing notices) and her counsel made a general appearance on her behalf at the hearing.

2. Constitutional Law—effective assistance of counsel—termination of parental rights—no objection to personal jurisdiction

In a termination of parental rights proceeding, respondent failed to show that, but for her counsel's alleged deficient representation for failing to object to the trial court's lack of personal jurisdiction based on defective service of process, there was a reasonable probability that there would have been a different outcome. Although there was no evidence that a summons had been issued or served on respondent, any defect was waived given the record evidence that respondent had actual notice of the hearing (after having been personally served with the termination petition and two notices of hearing) and that her counsel made a general appearance on her behalf when she failed to appear at the hearing.

Appeal by Respondent-Mother from Order entered 27 June 2022 by Judge Hal G. Harrison in Watauga County District Court. Heard in the Court of Appeals 23 May 2023.

di Santi Capua & Garrett, PLLC, by Chelsea Bell Garrett, for Petitioner-Appellee Watauga County Department of Social Services.

David A. Perez for Respondent-Appellant Mother.

Parker Poe Adams & Bernstein LLP, by Stephen V. Carey, for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother appeals from an Order terminating her parental rights as to minor child, Mark.[1] Relevant to this appeal, the Record before us tends to reflect the following:

On 22 March 2021, the Watauga County Department of Social Services (DSS) filed a Juvenile Petition alleging Mark to be a neglected and dependent juvenile. The Petition alleged the following:

On or about 19 March 2021, DSS received a report regarding Mark, which prompted DSS to visit Mark and Respondent-Mother that same day. DSS found Respondent-Mother in an apartment, passed out on a couch, with another individual. A third individual was in a bedroom with Mark. Drug paraphernalia was found throughout the dwelling. Respondent-Mother appeared to be under the influence of an unidentified substance. On that same day, the trial court granted DSS an Order for Nonsecure Custody. Mark was initially placed with his maternal grandmother but was soon thereafter placed in the custody of a foster family, where he remained. Respondent-Mother was personally served by the Watauga County Sheriff's Department with a copy of the Juvenile Petition, Summons, and Order for Nonsecure Custody on 22 March 2021. On 23 November 2021, the trial court entered an Order adjudicating Mark to be a dependent juvenile.

On 13 April 2022, DSS filed a Petition for Termination of Parental Rights (Termination Petition). No summons was issued. However, DSS issued a Notice of Motion Seeking Termination of Parental Rights and

1. A pseudonym is used for the minor child designated in the caption as M.L.C.

a Notice of Termination of Parental Rights Hearing (Notice of Hearing). The Notice of Hearing specified the hearing would be held on "March 26-27, 2022." Respondent-Mother was served with the Termination Petition and the two notices, both personally by the Watauga County Sheriff's Department on 20 April 2022 and via certified mail.

On 27 March 2022—one of the noticed dates—the trial court held a hearing on the Termination Petition. Trial counsel for Respondent-Mother was present at the hearing and informed the trial court Respondent-Mother was present at the courthouse the day before the hearing—26 March 2022—and was advised to return the next day; however, Respondent-Mother failed to appear. As such, trial counsel made a Motion to Continue. The trial court denied the Motion. Respondent-Mother's trial counsel raised no issue regarding service, and the trial court expressly stated in its pre-trial findings that proper service was made. At the conclusion of the hearing, the trial court concluded grounds exist to terminate Respondent-Mother's parental rights, and it is in Mark's best interest that Respondent-Mother's parental rights be terminated. On 27 June 2022, the trial court entered an Order terminating Respondent-Mother's parental rights in Mark.[2] Respondent-Mother timely filed written Notice of Appeal on 8 July 2022.

Issues

The dispositive issues on appeal are: (I) whether the trial court properly obtained personal jurisdiction over Respondent-Mother; and (II) whether Respondent-Mother's trial counsel's performance was deficient or fell below an objective standard of reasonableness, affecting Respondent-Mother's fundamental right to a fair hearing.

Analysis

I. Personal Jurisdiction

[1] Respondent-Mother contends the trial court did not obtain personal jurisdiction over Respondent-Mother. Respondent-Mother contends this is so because: (1) there is no indication in the Record that a summons for the Termination Petition was ever issued and no such summons was ever served upon Respondent-Mother; and (2) "although Respondent-Mother appeared the day *before* the termination trial, she did not appear on the actual day of the termination trial."

2. Respondent-Mother does not challenge any of the trial court's Findings of Fact or Conclusions of Law.

"Jurisdiction over the person of a defendant is obtained by service of process upon him, by his voluntary appearance, or consent." *Hale v. Hale*, 73 N.C. App. 639, 641, 327 S.E.2d 252, 253 (1985). Under Rule 12(h)(1) of the North Carolina Rules of Civil Procedure, the "defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2021). "[S]ummons-related defects implicate personal jurisdiction . . . ." *In re K.J.L.*, 363 N.C. 343, 348, 677 S.E.2d 835, 838 (2009). "[A]ny form of general appearance 'waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons.' " *In re J.T.(I), J.T.(II), A.J.*, 363 N.C. 1, 4, 672 S.E.2d 17, 18 (2009) (quoting *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956) (citations omitted)). "Even without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction." *K.J.L.*, 363 N.C. at 346, 677 S.E.2d at 837 (citation omitted). Further, we note this Court has previously recognized "litigants often choose to waive the defense of defective service when they had actual notice of the action and when the inevitable and immediate response of the opposing party will be to re-serve the process." *In re Dj.L., D.L., & S.L.*, 184 N.C. App. 76, 85, 646 S.E.2d 134, 141 (2007).

Here, Respondent-Mother failed to appear at the termination hearing on 27 March 2022. However, Respondent-Mother appeared at the courthouse the day before, on 26 March 2022, and was instructed by her counsel to appear the following day. She failed to do so. Even assuming without deciding Respondent-Mother did not *herself* make a general appearance before the trial court in this proceeding—despite having actual notice of the Termination Petition and hearing and appearing on the first noticed date, 26 March 2022—trial counsel for Respondent-Mother appeared before the trial court on 27 March 2022 without objecting to personal jurisdiction.[3] And, to trial counsel's credit, he attempted to continue the proceeding to make further efforts to secure Respondent-Mother's presence. His general appearance was not one made in a manner that simply waived any possible defect—he ably cross-examined the sole witness in the matter, a DSS worker, and elicited testimony that was beneficial to Respondent-Mother's case. His

3. Respondent-Mother did not raise any objection to service or personal jurisdiction when she was present on 26 March 2022.

general appearance was more than just cursory, and as such, the trial court properly obtained personal jurisdiction over Respondent-Mother. *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980) ("[I]t has long been the rule in this jurisdiction that a general appearance by a party's attorney will dispense with process and service.").

II. Ineffective Assistance of Counsel

[2] Respondent-Mother next contends she received ineffective assistance of counsel because her trial counsel failed to object to the lack of personal jurisdiction on 27 March 2022. To the extent Respondent-Mother did in fact have an objection to the lack of personal jurisdiction—even after appearing before the trial court the day before—Respondent-Mother failed to demonstrate such an objection would affect the outcome of the termination hearing.

"When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re K.N.*, 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007) (citation and quotation marks omitted). The Juvenile Code provides: "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent," N.C. Gen. Stat. § 7B-602(a) (2021), and "[w]hen a petition [for termination of parental rights] is filed," the parent "has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right," N.C. Gen. Stat. § 7B-1101.1(a) (2021).

> When addressing a contention by a respondent that he or she received ineffective assistance of counsel, this Court has explained that: "Parents have a right to counsel in all proceedings dedicated to the termination of parental rights. Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless. To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive him of a fair hearing. To make the latter showing, the respondent must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings."

In re B.S., 378 N.C. 1, 5, 859 S.E.2d 159, 161-62 (2021) (quoting *In re G.G.M.*, 377 N.C. 29, 41-42, 833 S.E.2d 478, 487 (2021) (citations and quotation marks omitted)).

Thus, Respondent-Mother "must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *G.G.M.*, 377 N.C. at 42, 833 S.E.2d 487. Respondent-Mother has failed to do so. In fact, Respondent-Mother contends trial counsel "is able counsel but in regard to *this* particular instance of not having objected to the court not having obtained personal jurisdiction over his client . . . 'was deficient or fell below an objective standard of reasonableness.' " The Record before us reflects Respondent-Mother had actual notice of both the termination action and hearing. Indeed, Respondent-Mother acknowledges she was personally served by Watauga County Sheriff's Department with the Termination Petition, Notice of the Motion Seeking Termination of Respondent-Mother's Parental Rights, and Notice of the Termination Hearing.[4] A review of the Record also reveals trial counsel moved to continue the proceeding when Respondent-Mother, who was present at the courthouse the day before, failed to appear on the day the termination hearing began.

Thus, Respondent-Mother has failed to demonstrate that but for trial counsel's failure to object to the lack of personal jurisdiction, there would have been a different result in the termination hearing. Therefore, trial counsel's waiver of the defense of lack of personal jurisdiction based on defective service of process did not constitute deficient performance. Consequently, Respondent-Mother was not deprived of a fair hearing, and we affirm the trial court's Order terminating Respondent-Mother's parental rights in Mark.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order terminating Respondent-Mother's parental rights to Mark.

AFFIRMED.

Judges FLOOD and RIGGS concur.

4. Upon the filing of a motion for termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1102, a notice in the underlying abuse, neglect, or dependency matter must be prepared pursuant to N.C. Gen. Stat. § 7B-1106.1. Upon the filing of a petition for termination of parental rights, a summons must be issued pursuant to N.C. Gen. Stat. § 7B-1106.

JARMAN v. TWIDDY & CO. OF DUCK, INC.

[289 N.C. App. 319 (2023)]

THOMAS JARMAN AND JESSICA VAUGHN, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF GRESSY THOMAS JARMAN, PLAINTIFFS
v.
TWIDDY AND COMPANY OF DUCK, INC., ROGER STRICKER AND PATRICIA STRICKER, DEFENDANTS AND THIRD-PARTY PLAINTIFFS
v.
GEORGIA MAY, THIRD-PARTY DEFENDANT

No. COA22-422

Filed 20 June 2023

1. Contracts—vacation rental agreement—forum-selection clause—third-party beneficiaries

In a negligence, wrongful death, and negligent infliction of emotional distress action arising from the drowning death of a child in a pool at a vacation home that had been rented by the child's grandmother from defendants, the trial court did not err in declining to apply the third-party beneficiary doctrine to bind plaintiffs (the child's parents) to the vacation rental agreement's forum selection clause where there was no evidence that defendants and the grandmother intended to confer any legally enforceable rights on plaintiffs through the vacation rental agreement. Any benefit plaintiffs received through the vacation rental agreement—including the ability to use the vacation home as members of the grandmother's family, as provided by a provision restricting use of the premises to "You and Your family"—was incidental rather than direct.

2. Contracts—vacation rental agreement—forum-selection clause—equitable estoppel

In a negligence, wrongful death, and negligent infliction of emotional distress action arising from the drowning death of a child in a pool at a vacation home that had been rented by the child's grandmother from defendants, the trial court did not err in declining to apply the doctrine of equitable estoppel to bind plaintiffs (the child's parents) to the vacation rental agreement's forum selection clause where plaintiffs' complaint alleged no breach of duty owed to them under the vacation rental agreement and did not allege that the agreement conferred any direct benefit on them. Rather, plaintiffs' claims were grounded in legal duties arising from statutory or common law—not any asserted rights under the contract.

Appeal by Defendant/Third-Party Plaintiff Twiddy and Company of Duck, Inc. from Order entered 15 December 2021 by Judge John W.

Smith in Johnston County Superior Court. Heard in the Court of Appeals 16 November 2022.

Fox Rothschild LLP, by Matthew Nis Leerberg, Henson Fuerst, PA, by Carma L. Henson, and Silverman Thompson Slutkin & White, by Andrew George Slutkin and Ethan Shale Nochumowitz admitted pro hac vice, for Plaintiffs-Appellees Thomas Jarman and Jessica Vaughn.

Poyner Spruill LLP, by Dylan J. Castellino and Timothy W. Wilson, for Defendant/Third-Party Plaintiff-Appellant Twiddy and Company of Duck, Inc.

HAMPSON, Judge.

Factual and Procedural Background

Twiddy and Company of Duck, Inc. (Twiddy) appeals from an Order entered 15 December 2021 denying its Motion to Change Venue of an action brought by Thomas Jarman and Jessica Vaughn, individually and as administrators of the Estate of Gressy Thomas Jarman (Plaintiffs). The Record before us tends to reflect the following:

On 3 June 2019, Plaintiffs' minor child died after drowning in a pool at a vacation home in Corolla, North Carolina owned by Roger and Patricia Stricker (the Strickers).[1] At the time, the vacation home was rented by Georgia May (May)[2] under a Vacation Rental Agreement with Twiddy, a realty company located in Duck, North Carolina that served as the agent for the Strickers. Plaintiffs were not parties to the Vacation Rental Agreement but were staying at the vacation home with May and other family members.

Relevant to this case, the Vacation Rental Agreement between Twiddy and May provided:

> Twiddy . . . is the Agent for a VACATION HOME . . . . The owner . . . has given Agent the authority to enter into this Agreement . . . . This Agreement sets forth the terms under which You will lease the Premises through the Agent.
>
> . . . .

1. The Strickers are residents of Pennsylvania.

2. May is the grandmother of the minor child and a resident of Maryland.

1. THIS IS A VACATION RENTAL AGREEMENT UNDER THE NORTH CAROLINA VACATION RENTAL ACT . . . .

2. Agent, as agent of the Owner, hereby rents to You and You hereby rent from the Agent, the Premises in accordance with the terms and conditions contained in this Agreement . . . .

. . . .

4. Use and Tenant Duties. The use of the Premises is restricted to use by You and Your family . . . . The term "family" as used herein means parents, grandparents, children and extended family members vacationing at the Premises.

. . . .

17. Indemnification and Hold Harmless. You agree to indemnify and save harmless the Owner and Agent from any liabilities . . . arising from or related to any claim or litigation which may arise out of or in connection with Your use and occupancy of the Premises including but not limited to any claim or liability. . . which is caused, made, incurred or sustained by You as a result of any cause, unless caused by the grossly negligent or willful act of Agent or the Owner, or the failure of Agent or the Owner to comply with the Vacation Rental Act. . . . The terms "Tenant," "You," and "Your" as used in this Agreement shall include Tenant's heirs, successors, assigns, guests, invitees, representatives and other persons on the Premises during Your occupancy (without regard to whether such persons have authority under this Agreement to be upon the Premises), where the context requires or permits.

. . . .

21. Disputes: This Agreement shall be governed by and interpreted in accordance with the laws of the State of North Carolina, and shall be treated as though it were executed in the County of Dare, State of North Carolina. Any action relating to this Agreement shall be instituted and prosecuted only in the Dare County Superior Court, North Carolina. You specifically consent to such jurisdiction and to extraterritorial service of process. You shall be responsible for all legal fees and court costs incurred

> by Agent and Owner in the enforcement of their rights or Your obligations under this Agreement.
>
> **22. Miscellaneous:** You agree and have verified that for purposes of this vacation rental agreement that Your confirmation number shall serve as Your electronic signature and to be bound by same and in the same manner as if You had otherwise ordinarily executed the document. . . . Each section, subsection or paragraph of this Agreement shall be deemed severable . . . .

May electronically signed each individual paragraph of the Vacation Rental Agreement.

On 18 February 2021, Plaintiffs filed a Complaint against Twiddy and the Strickers (collectively, Defendants) in Superior Court in Johnston County, North Carolina, where Plaintiffs reside. The Complaint alleged claims of negligence, wrongful death, negligent infliction of emotional distress, and punitive damages. Defendants both filed responsive pleadings generally denying liability in the form of Motions, Answers, and Third-Party Complaints. The Third-Party Complaints joined May as Third-Party Defendant alleging the Plaintiffs' Complaint falls within the Indemnification and Hold Harmless provision of the Vacation Rental Agreement.

In their responsive pleadings, Defendants both included Motions to Change Venue. The Motions alleged the terms of the Vacation Rental Agreement included a mandatory forum-selection clause requiring this action be brought by Plaintiffs in Dare County, North Carolina. Defendants' Motions were heard on 28 October 2021 in Johnston County Superior Court. Defendants contended Plaintiffs should be bound by the Vacation Rental Agreement—specifically, the provision requiring "Any action relating to this Agreement shall be instituted and prosecuted only in the Dare County Superior Court, North Carolina"—as third-party beneficiaries to the Vacation Rental Agreement or by the doctrine of equitable estoppel. Defendants further contended the language of the Vacation Rental Agreement is broad enough to cover Plaintiffs' claims for negligence, wrongful death, negligent infliction of emotional distress, and punitive damages.

On 15 December 2021, the trial court entered its Order Denying Defendants' Motions to Change Venue. In its Order, the trial court included Findings of Fact:

> 14. Thomas Jarman did not sign the Vacation Rental Agreement.

15. Jessica Vaughn did not sign the Vacation Rental Agreement.

16. No evidence has been presented that Thomas Jarman ever read, or was aware, of the terms of the Vacation Rental Agreement.

17. No evidence was presented that Jessica Vaughn ever read, or was aware, of the terms of the Vacation Rental Agreement.

18. Plaintiffs were not parties to the Vacation Rental Agreement.

19. The signatories to the Vacation Rental Agreement did not intend to confer a direct benefit on Plaintiffs, and there was never a meeting of the minds that the plaintiffs would become parties or third[-]party beneficiaries to the contract.

20. Plaintiffs were not actively nor directly involved in the formation of the Vacation Rental Agreement.

21. Plaintiff[s'] causes of action are only based upon duties imposed on Defendants by North Carolina common law and North Carolina statutory law.

22. Plaintiffs' causes of action do not arise out of or relate to the Vacation Rental Agreement.

23. The Plaintiffs are not seeking the benefit of the Vacation Rental Agreement. Plaintiffs' causes of action exist separate and apart from the Vacation Rental Agreement entered into between Defendant Twiddy and Third-Party Defendant . . . May, and do not arise out of or relate to the Vacation Rental Agreement.

24. The Court distinctly makes no findings of fact regarding whether the forum-selection clause of the Vacation Rental Agreement should, or should not, be enforced against . . . May. That issue is not presently before this Court.

The trial court then concluded: Plaintiffs were not third-party beneficiaries of the Vacation Rental Agreement; Plaintiffs were not equitably estopped from denying the applicability of the forum-selection clause; and Plaintiffs' causes of action did not arise out of or relate to the Vacation Rental Agreement. Finally, the trial court concluded Johnston

County was a proper venue for this action pursuant to N.C. Gen. Stat. § 1-82. Twiddy timely filed written Notice of Appeal from the Order Denying Defendants' Motions to Change Venue on 10 January 2022.[3]

Appellate Jurisdiction

The trial court's Order Denying Defendants' Motions to Change Venue is an interlocutory order. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *McClennahan v. N.C. School of the Arts*, 177 N.C. App. 806, 807-08, 630 S.E.2d 197, 199 (2006) (citation and quotation marks omitted). "Generally, a party has no right to appeal an interlocutory order." *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 775, 501 S.E.2d 353, 354 (1998) (citing *N.C. Dep't of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995)). "However, 'an appeal is permitted . . . if the trial court's decision deprives the appellant of a substantial right [that] would be lost absent immediate review.' " *Id.* (citing *Page*, 119 N.C. App at 734, 460 S.E.2d at 334). " '[A]n immediate appeal is permitted where an erroneous order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party [that] would not be corrected if no appeal was allowed before the final judgment.' " *Id.* at 775-76, 501 S.E.2d 354-55 (quoting *Perkins v. CCH Computax, Inc.*, 106 N.C. App. 210, 212, 415 S.E.2d 755, 757, *reviewed on other grounds*, 332 N.C. 149, 419 S.E.2d 574, *decision reversed*, 333 N.C. 140, 423 S.E.2d 780 (1992)).

This Court has recognized an order denying a motion based on improper venue, which asserts venue is proper elsewhere, affects a substantial right because it " 'would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment.' " *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121-22, 535 S.E.2d 397, 401 (2000) (quoting *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984)). Likewise, orders addressing the validity of a forum-selection clause also affect a substantial right. *US Chem. Storage, LLC v. Berto Constr., Inc.*, 253 N.C. App. 378, 381, 800 S.E.2d 716, 719 (2017). Thus, Twiddy's appeal from the trial court's denial of Defendants' Motions to Change Venue is properly before us as the trial court's Order denying Defendants' Motions affects a substantial right.

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3. The Strickers did not separately appeal. Neither the Strickers nor May have made any appearance in this Court.

Issues

The key issues on appeal are whether, on the facts of this case, Plaintiffs—as non-signatories to the Vacation Rental Agreement—may be bound by the forum-selection clause contained in the Vacation Rental Agreement as (I) third-party beneficiaries or (II) by equitable estoppel.

Analysis

As a preliminary matter, the parties disagree on the standard of review we should apply to the trial court's Order in this case. Twiddy contends we should employ a de novo review. Plaintiffs assert our review is limited to whether the trial court abused its discretion in denying the change of venue.

"Generally, a trial court's denial of a motion to change venue 'will not be disturbed absent a showing of a manifest abuse of discretion.' " *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 407, 747 S.E.2d 292, 296 (2013) (quoting *Carolina Forest Ass'n, Inc. v. White*, 198 N.C. App. 1, 10, 678 S.E.2d 725, 732 (2009) (citation and quotation marks omitted)). Likewise, as a general proposition, "[w]e employ the abuse-of-discretion standard to review a trial court's decision concerning clauses on venue selection." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002) (citation omitted). In particular, we apply an abuse of discretion standard when the trial court issues an order regarding the enforceability of a venue-selection clause under a Rule 12(b)(3) motion. *See Wall v. Automoney, Inc.*, 284 N.C. App. 514, 529, 877 S.E.2d 37, 51 (2022), *rev. denied*, 384 N.C. 190, 884 S.E.2d 739 (2023); *see also SED Holdings, LLC v. 3 Star Props., LLC*, 246 N.C. App. 632, 636, 784 S.E.2d 627, 630 (2016); *Davis v. Hall*, 223 N.C. App. 109, 110, 733 S.E.2d 878, 880 (2012); *Cable Tel. Servs., Inc. v. Overland Contr'g., Inc.*, 154 N.C. App. 639, 645, 574 S.E.2d 31, 35 (2002); *Mark Grp. Int'l, Inc.*, 151 N.C. App. at 568, 566 S.E.2d at 162; *Appliance Sales & Serv., Inc. v. Command Elecs. Corp.*, 115 N.C. App. 14, 21, 443 S.E.2d 784, 789 (1994). We apply the abuse of discretion standard in these cases because the disposition of these cases is "highly fact-specific." *Cox*, 129 N.C. App. at 776, 501 S.E.2d at 355 (citation omitted). On the other hand, when a trial court is called upon to *interpret* a forum- or venue-selection clause as a matter of law, we review the trial court's decision de novo. *US Chem. Storage, LLC*, 253 N.C. App. at 382, 800 S.E.2d at 720.

In this case, we broadly apply an abuse of discretion standard to the trial court's Order because the central determination made by the trial court was whether to enforce the forum-selection clause in the Vacation

Rental Agreement between Twiddy and May as against Plaintiffs.[4] However, the trial court's decision not to enforce the forum-selection clause stemmed from its legal conclusions Plaintiffs were not third-party beneficiaries or estopped from denying the applicability of the forum-selection clause.[5] "[T]he trial court's articulation and application of the relevant legal standard is a legal question that is reviewed de novo." *Miller v. Carolina Coast Emergency Physicians, LLC*, 382 N.C. 91, 104, 876 S.E.2d 436, 447 (2022) (citation omitted). "And, whatever the standard of review, 'an error of law is an abuse of discretion.' " *Id.* (quoting *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2, 846 S.E.2d 634, 638 (2020)); *cf. LendingTree, LLC* , 228 N.C. App. at 407, 747 S.E.2d at 296 ("Therefore, although we apply abuse of discretion review to general venue decisions, we apply *de novo* review to waiver arguments." (citation omitted)).

I. Third-Party Beneficiaries

[1] On appeal, Twiddy first contends the trial court erred by failing to apply the third-party beneficiary doctrine to bind Plaintiffs to the forum-selection clause. The third-party beneficiary doctrine usually applies to allow a third-party to enforce a contract executed for their direct benefit. *See Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 650, 407 S.E.2d 178, 181 (1991). A party "is a third-party beneficiary if she can show (1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the plaintiff." *Holshouser v. Shaner Hotel Grp. Properties One Ltd. P'ship*, 134 N.C. App. 391, 399-400, 518 S.E.2d 17, 25 (1999), *aff'd*, 351 N.C. 330, 524 S.E.2d 568 (2000). Here, however, Twiddy contends that the Vacation Rental Agreement—existing between Twiddy and May and as otherwise generally enforceable—was executed for the direct benefit of Plaintiffs, and, thus, Plaintiffs—as third-party beneficiaries—should be bound by its provisions.

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4. Indeed, the parties agree the forum-selection clause itself is properly interpreted as mandatory and not permissive. The parties do, however, disagree as to whether—if the forum-selection clause was deemed enforceable as to Plaintiffs—Plaintiffs' claims in this case would otherwise fall within the scope of the forum-selection clause's language.

5. The trial court included these determinations as both findings of fact and conclusions of law. We view the trial court's application of the third-party beneficiary and equitable estoppel doctrines to be in the nature of conclusions of law. *See Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 412, 720 S.E.2d 785, 792 (2011) ("Generally, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." (citation and quotation marks omitted)).

In support of its position, Twiddy relies in large part on our decision in *LSB Fin. Servs., Inc. v. Harrison*, 144 N.C. App. 542, 548 S.E.2d 574 (2001). There, this Court affirmed a trial court's decision enforcing an arbitration clause in an agreement against a third-party to the agreement. *Id.* at 543, 548 S.E.2d 575. In that case, the plaintiff was a banking institution and the defendant was a former employee of the plaintiff. Under then-existing law, the plaintiff was not permitted to become a member of the National Association of Securities Dealers, Inc. (NASD) and, consequently, could not engage in the business of securities transactions unless it partnered with a NASD member. *Id.* The plaintiff partnered with a registered brokerage and the defendant served as a "dual employee" of the plaintiff and the securities brokerage. *Id.* at 543, 584 S.E.2d at 576. This allowed the defendant to serve as a broker under the supervision and control of the plaintiff. *Id.* The plaintiff was then permitted to share in the profits derived from the defendant's securities brokerage work. *Id.* In order to perform the securities brokerage work, the defendant was required to apply and register with NASD using a U-4 form. *Id.* at 543-44, 584 S.E.2d at 576. The U-4 registration form with NASD included an arbitration clause. *Id.* at 544, 584 S.E.2d at 576. The defendant voluntarily terminated her employment with the plaintiff and joined another brokerage. *Id.* The plaintiff sued the defendant alleging, among other things, a breach of a separate non-compete. *Id.* The defendant moved to compel arbitration against the plaintiff even though the plaintiff was not (and could not) be a party to the U-4 registration with NASD. *Id.*

Our Court explained the direct benefit the plaintiff received from the U-4: "plaintiff required defendant to sign the U-4 Form so that plaintiff would be in a lawful position to benefit from the business of securities transactions." *Id.* at 549, 548 S.E.2d at 579. As such, the plaintiff was an intended beneficiary of the U-4 registration and, therefore, deemed to be in privity of contract as a third-party beneficiary. *Id.* at 548, 548 S.E.2d 578-79. As a result, we held the plaintiff could be compelled to arbitrate its claims against the defendant.[6]

Indeed, the benefit the plaintiff received in *LSB Fin. Servs.* is illustrative of the type of benefit our Courts have required to show a direct—rather than incidental—benefit for purposes of invoking the third-party beneficiary doctrine. " 'A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit

6. Our decision in that case also found grounding in equitable estoppel and principles of agency.

on that person.' " *Revels v. Miss Am. Org.*, 182 N.C. App. 334, 336, 641 S.E.2d 721, 723 (2007) (quoting *Holshouser*, 134 N.C. App. at 400, 518 S.E.2d at 25). " 'It is not enough that the contract, in fact, benefits the [third-party], if, when the contract was made, the contracting parties did not intend it to benefit the [third-party] directly.' " *Id.* " 'As a general proposition, the determining factor as to the rights of a third[-]party beneficiary is the intention of the parties who actually made the contract.' " *Vogel v. Reed Supply Co.*, 277 N.C. 119, 128, 177 S.E.2d 273, 279 (1970) (quoting 17 Am.Jur.2d, Contracts § 304). " 'The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts.' " *Id.* "The Court, in determining the parties' intentions, should consider circumstances surrounding the transaction as well as the actual language of the contract." *Raritan River Steel Co.*, 329 N.C. at 652, 407 S.E.2d at 182.

In *LSB Fin. Servs.*, the whole purpose of the U-4 registration form was to allow the plaintiff to legally engage in securities brokering. The plaintiff was not only aware of the U-4 form but required the defendant (plaintiff's employee) to register with NASD. Not only did the defendant's registration confer upon the plaintiff the legal right to engage in securities brokering, but it also had the direct benefit of granting the plaintiff the right to be compensated for securities brokerage work, through the efforts of its employee.

In the case *sub judice*, unlike in *LSB Fin. Servs.*, the Vacation Rental Agreement between Twiddy and May was not intended to directly benefit Plaintiffs by vesting them with any legally enforceable right. Certainly, Plaintiffs, themselves, are not expressly designated as beneficiaries under the Vacation Rental Agreement. Moreover, as the trial court found, there was no evidence Plaintiffs ever read or were aware of the terms of the Vacation Rental Agreement. Further, there is no evidence Plaintiffs were active or involved in entering into the Vacation Rental Agreement. On the Record before us, there is no evidence of "the type of active and direct dealings which courts have required to confer third[-]party beneficiary status on a party not contemplated by the contract itself." *Hospira Inc. v. Alphagary Corp.*, 194 N.C. App. 695, 703, 671 S.E.2d 7, 13 (2009) (citation and quotation marks omitted).

Twiddy, nevertheless, contends the provisions of the Vacation Rental Agreement placed Plaintiffs in a class of persons intended to benefit from the contractual relationship between Twiddy and May. First, Twiddy points to the provisions restricting use of the vacation home to May and May's "family". Second, Twiddy relies on provisions of the indemnification clause. These provisions, however, do not provide any

direct benefit to Plaintiffs or evidence any intent to provide a direct benefit to Plaintiffs.

As an initial matter, by its very terms, the provision restricting use of the property does not purport to confer any benefit on May or any user of the property. The provision restricting use of the property provides:

> **4. Use and Tenant Duties.** The use of the Premises is restricted to use by You and Your family . . . . The term "family" as used herein means parents, grandparents, children and extended family members vacationing at the Premises.

It serves to expressly *restrict* May in whom she may invite to use the property during her tenancy. Further, the provision provides no legally enforceable right of access to the property by Plaintiffs (or other family members). *See Raritan River Steel Co.*, 329 N.C. at 652, 407 S.E.2d at 182. It merely grants May the ability to invite family members to use the property. As such, any benefit to Plaintiffs was purely incidental. Twiddy, nevertheless, contends—by virtue of this provision—Plaintiffs became lawful users of the property. To the contrary, however, this provision plainly supposes that in its absence, Plaintiffs (along with any number of others) could have been lawful users of the property. In any event, there is no evidence or showing this provision was intended to directly benefit Plaintiffs. Rather, the intent of this provision appears to be to provide uniformity in the types of users to whom Twiddy would rent the property on behalf of the Strickers. *See Revels*, 182 N.C. App. at 336-37, 641 S.E.2d at 724.

Likewise, the indemnity provision certainly itself provides no benefit to May or Plaintiffs. Rather, it is intended to attempt to cast a wide net over those from which Defendants might seek indemnification for damages. The provision provides:

> **17. Indemnification and Hold Harmless.** You agree to indemnify and save harmless the Owner and Agent for any liabilities . . . arising from or related to any claim or litigation which may arise out of or in connection with Your use and occupancy of the Premises including but not limited to any claim or liability. . . which is caused, made, incurred or sustained by You as a result of any cause, unless caused by the grossly negligent or willful act of Agent or the Owner, or the failure of Agent or the Owner to comply with the Vacation Rental Act. . . . The terms "Tenant," *"You," and "Your" as used in this Agreement shall include Tenant's*

> *heirs*, *successors*, *assigns*, *guests*, *invitees*, *representatives and other persons on the Premises during Your occupancy (without regard to whether such persons have authority under this Agreement to be upon the Premises)*, where the context requires or permits.

(emphasis added).

To be fair, Twiddy does not contend the indemnity provision itself provides any benefit to Plaintiffs. Instead, Twiddy asserts because the provision provides its definition of "You" and "Your" is "as used in this Agreement", then this definition should apply to the forum-selection clause which states: "You specifically consent to such jurisdiction and to extraterritorial service of process." As such, Twiddy argues Plaintiffs—as guests or invitees—should be bound as third-parties to the forum-selection clause. However, this argument ignores the fact the Vacation Rental Agreement expressly provides its provisions are severable and, indeed, May was required to execute each provision individually. *See Wooten v. Walters*, 110 N.C. 251, 254-55, 14 S.E. 734, 735 (1892) ("A contract is entire, and not severable, when by its terms, nature and purpose, it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other, and interdependent. . . . On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.").

Moreover, Twiddy's argument that "You" and "Your" as defined by the indemnity provision should be read uniformly into and throughout the Vacation Rental Agreement is defeated by the fact it is plainly apparent in the terms of the agreement itself that Defendants themselves intended no such thing. By way of illustration, employing the expansive definitions of "You" and "Your" to the provision restricting use of the property "by You and Your family" yields ludicrous results permitting practically anyone to use the property during May's tenancy resulting in essentially no restriction whatsoever. It would mean the property would be restricted to use by May and her heirs, successors, assigns, guests, invitees, representatives, and other persons on the Premises during May's occupancy (without regard to whether such persons have authority under this Agreement to be upon the Premises) . . . and their families (including extended families). In other words, use would not be restricted to just May and her family members—it could include everyone from non-family social guests and their families, delivery drivers

and their families, and even complete strangers who would otherwise be trespassers and their families. This would functionally obliterate the provision restricting use of the property. We decline to interpret the Vacation Rental Agreement to reach such an absurd result. *See Atl. Disc. Corp. v. Mangel's of N.C., Inc.*, 2 N.C. App. 472, 478, 163 S.E.2d 295, 299 (1968) ("A construction of a contract leading to an absurd, harsh or unreasonable result should be avoided if possible." (citing 51C C.J.S. Landlord and Tenant § 232(4), p. 594)). As such, it could not have been the parties' intent that these definitions of "You" and "Your" be applied throughout the Vacation Rental Agreement as Twiddy contends.[7] In turn, then, this provision evinces no intent on the part of the parties to directly benefit Plaintiffs or bind them to the Vacation Rental Agreement, including specifically to the forum-selection clause as third-party beneficiaries.

In summary, there is no showing on this Record that Defendants and May intended to confer any legally enforceable right on Plaintiffs via the Vacation Rental Agreement. Instead, the Record here reflects any benefit incurred by Plaintiffs through the Vacation Rental Agreement was incidental and not direct. As such, Twiddy has failed to show Plaintiffs were third-party beneficiaries to the Vacation Rental Agreement. In turn, we conclude the trial court did not err by declining to apply the third-party beneficiary doctrine to bind Plaintiffs to the forum-selection clause.

II. Equitable Estoppel

[2] Next, Twiddy contends the trial court also erred by failing to apply the doctrine of equitable estoppel to bind Plaintiffs to the forum-selection clause in the Vacation Rental Agreement. " 'Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.' " *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and quotation marks omitted)).

While Twiddy identifies no prior case where Courts have applied equitable estoppel to bind a party to a forum- or venue-selection clause, both parties again analogize this situation to cases involving arbitration clauses. In that context, we have recognized: " '[A] nonsignatory

7. We acknowledge the additional clause appended to the definition of "You" and "Your" in the indemnification provision which states: "where the context requires or permits." The parties make no argument as to how this clause operates in the context of the definition. It could modify "as used in this Agreement" or it could modify "other persons". It could have some other function entirely.

to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack an agreement to arbitrate.' " *Smith Jamison Constr. v. APAC-Atl., Inc.*, 257 N.C. App. 714, 717, 811 S.E.2d 635, 638 (2018) (quoting *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006)). " 'One such situation exists when the signatory is equitably estopped from arguing that a nonsignatory is not a party to the arbitration clause.' " *Id.* " 'In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.' " *Ellen*, 172 N.C. App. at 321, 615 S.E.2d at 732 (quoting *Schwabedissen*, 206 F.3d at 418). " 'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.' " *Id.* For example, "In *Schwabedissen*, the Fourth Circuit Court of Appeals noted that '[a] nonsignatory is estopped from refusing to comply with an arbitration clause "when it [is seeking or] receives a 'direct benefit' from a contract containing an arbitration clause." ' " *Id.*; *see also LSB Fin. Servs.*, 144 N.C. App. at 548, 548 S.E.2d at 579.

"[W]here the issue is whether the underlying claims are such that the party asserting them should be estopped from denying the application of the arbitration clause, a court should examine whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, assert a breach of a duty created by the contract containing the arbitration clause." *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 231, 721 S.E.2d 256, 263 (2012) (citation and quotation marks omitted). Even where a plaintiff's claims sound in tort and not contract, a plaintiff may not avoid arbitration where the claims at their root are an attempt to hold the opposing party to the terms of the contract. *See id.* at 232, 721 S.E.2d at 263. Nevertheless, where a party's claims "are dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law," equitable estoppel does not operate to require enforcement of an arbitration clause against a non-signatory even where the contract "provides part of the factual foundation" for plaintiffs' complaint. *Ellen*, 172 N.C. App. at 322, 615 S.E.2d at 732-33; *see also Smith Jamison Constr.*, 257 N.C. App. at 720-21, 811 S.E.2d at 640 (applying *Ellen* to conclude "Although the existence of the Subcontract '[p]rovide[s] part of the factual foundation for [the] complaint,' [the] claims . . . are 'dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law.' ").

Applying these analogous principles to this case, Plaintiffs' Complaint alleges no breach of duty owed to them by the Vacation Rental Agreement. The Complaint further makes no allegation the Vacation Rental Agreement conferred any direct benefit on them. Indeed, the Complaint includes no claim or allegation whatsoever arising out of the Vacation Rental Agreement itself.

To the contrary, the Complaint is grounded in claims for negligence and wrongful death dependent upon legal duties allegedly imposed on Defendants by North Carolina statutory or common law rather than contract law. *Ellen*, 172 N.C. App. at 322, 615 S.E.2d at 732. Twiddy contends, however, the provisions of the Vacation Rental Agreement operating to allow Plaintiffs to be permissive users of the property during May's tenancy and providing the Strickers "agree to provide the premises to You in a fit and habitable condition" forms the basis for Plaintiffs' claims.[8] Plaintiffs' Complaint makes no such allegations. For example, there is no claim Plaintiffs are entitled to any refund of rent paid as a result of any breach of the duty under the Agreement. Moreover, even if the Vacation Rental Agreement—including listing May's family as permissive users of the property—"provides part of the factual foundation" for Plaintiffs' Complaint,[9] "[P]laintiffs' 'entire case' does not 'hinge[ ] on [any] asserted rights under the . . . contract.' " *Ellen*, 172 N.C. App. at 322, 615 S.E.2d at 732-33 (citation omitted). As such, we conclude the doctrine of equitable estoppel did not require the trial court, under these facts and allegations, to bind Plaintiffs to the forum-selection clause in the Vacation Rental Agreement. *See Smith Jamison Constr.*, 257 N.C. App. at 721, 811 S.E.2d at 640.

* * * *

Thus, as a matter of law, on the facts and allegations of this case, Plaintiffs—as non-signatories to the Vacation Rental Agreement—may not be bound by the forum-selection clause contained in the Vacation Rental Agreement as third-party beneficiaries or by equitable estoppel. Therefore, the trial court did not err by declining to enforce the forum-selection clause against Plaintiffs in this action. Consequently,

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8. This agreement to provide the premises in fit and habitable condition really appears to be intended to provide Defendants with the opportunity to cure any defect or offer substitute performance prior to having to refund May's rental.

9. It bears mentioning both sets of Defendants, in their Answers, admit upon information and belief the allegation Plaintiffs and their minor child were lawful visitors and/or tenants at the time of the incident. Thus, how and whether Plaintiffs were permissive users of the property at the time is not even really at issue in the case.

the trial court did not abuse its discretion in denying the Motions to Transfer Venue.[10]

Conclusion

Accordingly, for the foregoing reasons, the trial court's 15 December 2021 Order denying the Defendants' Motions to Change Venue is affirmed.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

ROBERT ALEXANDER JOHNSON, PLAINTIFF
v.
NICOLE RENEE LAWING, DEFENDANT

No. COA22-754

Filed 20 June 2023

1. Child Custody and Support—motion to modify custody—reference to child's counseling records—not improper

The trial court did not err in its order denying a mother's motion to modify custody by referring in its findings to the child's counseling records—which had not been admitted into evidence—because the reference did not indicate an improper consideration of the records themselves but merely served to address the mother's contention that the child's father did not keep her informed of various appointments.

2. Child Custody and Support—motion to modify custody—best interests of the child—consideration of child's wishes—discretionary decision

The trial court did not abuse its discretion in its order denying a mother's motion to modify custody where, in determining the best interests of the child, the court considered all of the evidence and

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10. We express no opinion as to whether—if Plaintiffs were bound by the Vacation Rental Agreement—Plaintiffs' claims would fall within the scope of the forum-selection clause. Like the trial court, we also express no opinion as to whether the forum-selection clause applies to Defendants' third-party claims against May. We also express no opinion as to whether Defendants may have waived application of the forum-selection clause by bringing their third-party indemnification action in Johnston County.

made findings about the child's testimony and personal preferences, but declined to assign more weight to the child's wishes.

Appeal by Defendant from order entered 27 January 2022 by Judge Frederick B. Wilkins, Jr., in Surry County District Court. Heard in the Court of Appeals 10 May 2023.

Schiller & Schiller, PLLC, by David G. Schiller, for Plaintiff-Appellee.

J. Clark Fischer for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from the trial court's order dismissing her motion to show cause with prejudice and denying her motion to modify custody. Defendant argues that "the trial court abused its discretion by basing its ruling on matters not admitted into evidence and failing to make any findings about the wishes of the minor child and the expressed unhappiness of the child in his father's custody[.]" (capitalization altered). For the reasons stated herein, we affirm.

I. Procedural Background

On 15 June 2015, a final custody order was entered granting Plaintiff Robert Johnson primary custody, and Defendant Nicole Lawing visitation, of their minor son, Ian.[1] The custody order was modified on 7 February 2018 to suspend Defendant's overnight visitation "as long as she is residing with [her] parents at their current home, and until she moves."

Defendant filed a motion to modify custody on 1 October 2021, alleging that there had been a substantial change in circumstances and that it was in the child's best interest to modify the custody order. Defendant also filed a motion to show cause based on Plaintiff's alleged failure to keep Defendant informed of Ian's medical and school appointments. Defendant alleged, inter alia, that:

> A. The defendant has moved . . . . The defendant has lived at the residence for several years and the residence is suitable and conducive to raising the minor child.
>
> . . . .

1. We use a pseudonym to protect the identity of the minor child.

> E. The minor child has expressed a strong desire to live with the defendant. The minor child has begged the defendant to come live with her.
>
> F. The minor child has expressed that he does not see his dad, the plaintiff, very much and the plaintiff does not spend time with him. The plaintiff would not even allow the minor child to participate in sports unless the defendant paid for it. The plaintiff treats the child noticeably different than he does his other children.
>
> . . . .
>
> H. The minor child has had behavioral issues at school which the [defendant] believes is due to his living arrangements with the plaintiff's wife. . . .
>
> I. The plaintiff does not keep the defendant informed of important appointments including doctor and school appointments which is a violation of the order.
>
> J. On a couple of occasions the plaintiff has taken the minor child to see therapists and doctors because the minor child has expressed his desire to live with the defendant. The plaintiff did not disclose such appointments to the defendant in violation of the [c]ourt order. The plaintiff's actions are willful and without lawful excuse. . . .

After a hearing on 24 January 2022, the trial court entered a written order on 27 January 2022 dismissing Defendant's motion to show cause with prejudice and denying Defendant's motion to modify custody. Defendant timely appealed.

II. Discussion

Defendant argues that "the trial court abused its discretion by basing its ruling on matters not admitted into evidence and failing to make any findings about the wishes of the minor child and the expressed unhappiness of the child in his father's custody[.]" (capitalization altered).[2]

A custody order may be modified upon a showing that there has been a "substantial change of circumstances affecting the welfare of the

2. Defendant does not argue that the trial court erred by dismissing her motion to show cause, and this argument is thus deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

child[.]" *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998); *see also* N.C. Gen. Stat. § 50-13.7(a) (2022) (establishing that a custody order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party"). "The change in circumstances may have either an adverse or beneficial effect on the child." *Walsh v. Jones*, 263 N.C. App. 582, 587, 824 S.E.2d 129, 133 (2019) (citation omitted).

"The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). If the trial court determines that there has been a substantial change in circumstances that affects the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. *Id.*

"We review an order for modification of custody to determine if the findings of fact are supported by substantial evidence and if the conclusions of law are supported by the findings; the trial court determines the credibility and weight of the evidence." *Walsh*, 263 N.C. App. at 588, 824 S.E.2d at 134 (citation omitted). "Unchallenged findings of fact are binding on appeal." *Scoggin v. Scoggin*, 250 N.C. App. 115, 118, 791 S.E.2d 524, 526 (2016) (quotation marks and citations omitted). "If the findings of fact and conclusions of law are supported, then we review the trial court's decision regarding custody for abuse of discretion." *Walsh*, 263 N.C. App. at 588, 824 S.E.2d at 134 (citation omitted).

1. Counseling Records

[1] Defendant contends that "the trial court erred by considering records of the minor child that were never introduced into evidence." (capitalization altered).

Here, the trial court made the following finding of fact:

> It is undisputed that on August 25, 2020, September 8, 2020, and October 6, 2020 the plaintiff transported the parties' son . . . to Jodi Province Counseling Services for therapy sessions . . . and did not notify defendant prior to such sessions occurring. It is likewise undisputed that the defendant on October 12, 2020 and November 6, 2020 consulted with the therapist and did not notify the plaintiff that she was having consultations regarding the parties' child prior to doing so. Defendant was invited to sessions by the therapist on October 12, 2020, and did thereafter

> attend the same. (See the Treatment Plan, Comprehensive Clinical Assessment, and Service Notes of Jodi Province Counseling Services, PLLC filed herein.) These sessions continued to May 26, 2021, at which time the sessions were terminated due to the child having met all treatment goals, and each of the parties hereto reporting no further concerns. The parties were advised that further sessions if needed were available, however no further counseling nor therapy has occurred. The Treatment Plan, Comprehensive Clinical Assessment, and Service Notes of Jodi Province Counseling Services, PLLC filed herein shall be and remain sealed, not to be opened without express permission of the Court.

There is no indication that the trial court considered the counseling records in denying Defendant's motion to modify the custody order. Rather, the reference to the counseling records directly addresses Defendant's contention in her motion to show cause that "[P]laintiff does not keep the defendant informed of important appointments including doctor and school appointments which is a violation of the order." The trial court's reference to the counseling records in its single order that both dismissed Defendant's motion to show cause and denied Defendant's motion to modify custody did not amount to error.

2. Best Interests Determination

[2] Defendant next contends that "the trial court's order is fatally flawed because it failed to consider the minor child's expressed wishes to live with his mother and unhappiness with the current custodial agreement." (capitalization altered).

"[A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child[.]" *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013) (citation omitted). "The paramount consideration in matters of custody and visitation is the best interests of the child, and in determining such matters the trial judge may consider the wishes of a child of suitable age and discretion." *Reynolds v. Reynolds*, 109 N.C. App. 110, 112-13, 426 S.E.2d 102, 104 (1993) (quotation marks and citations omitted). "The expressed wish of a child of discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference." *Clark v. Clark*, 294 N.C. 554, 577, 243 S.E.2d 129, 142 (1978). "The preference of the child should be based upon a considered and rational judgment,

and not made because of some temporary dissatisfaction or passing whim or some present lure." *Id.*

Here, although the trial court concluded that "[t]here has been a change in the substantial circumstances of [Defendant,]" it also concluded that there was "no[] showing of how those changes will affect the bests interests of the minor child." In so concluding, the trial court made the following findings of fact:

> 10. The plaintiff does return from work each day, and the family sits and eats dinner together as a family, as has been their practice prior to and subsequent to the entry of the 2018 Order herein. The plaintiff describes his relationship with both the parties' child and his other children as loving, respectful, and good. He does keep all of his children in age appropriate activities and has attended to the emotional and educational needs of his son, [Ian], in an appropriate and timely manner.
>
> 11. [Ian] is a healthy 10 year-old boy who is very proud that he has had no cavities, is seldom sick, and who enjoys school. He is an A-B student, and has maintained that level this school year having brought all of his grades to A except for one B. He has only had four absences from school since kindergarten. He had one in first grade and three due to flu during the third grade, and he has never been tardy. The behavioral issues he experience[d] during first grade have been resolved, and each year he has had fewer minor behavior issues at school. He has always met or exceeded standards and progressed in all of his subjects, and is at or above grade level on his third grade End of Grade tests. Both his father and stepmother, and his mother review and assist him by going over his homework with him. He has expressed a desire to spend more time with his mother.

These findings show that the trial court considered [Ian's] testimony and his "desire to spend more time with his mother." However, the trial court also considered other evidence, including testimony from both parents, in concluding that "[a] modification of the existing Orders regarding custody . . . is not necessary to promote or foster [Ian's] best interests." Accordingly, that the trial court did not assign more weight to the child's "expressed . . . desire to spend more time with his mother" did not amount to an abuse of discretion.

III. Conclusion

The trial court did not err by referencing the counseling records in its order. Furthermore, the trial court did not abuse its discretion in its best interests determination by failing to assign more weight to the child's wishes. Accordingly, the trial court's order is affirmed.

AFFIRMED.

Judges DILLON and STADING concur.

GALYA MANN, PLAINTIFF
v.
HUBER REAL ESTATE, INC., PAUL HUBER, LEVEL CAROLINA HOMES, LLC, D.B.A. LEVEL HOMES, 2-10 HOME BUYERS WARRANTY, DEFENDANTS

No. COA22-956

Filed 20 June 2023

1. Fiduciary Relationship—real estate agent and buyer—purchase of home—reference to sales contract as "standard"—no duty breached—buyer's duty to read contract

In plaintiff buyer's action against defendant realtor, who served as plaintiff's real estate agent when she signed a contract to buy a house that ended up having multiple latent defects, the trial court properly granted summary judgment for defendant on plaintiff's breach of fiduciary duty claim. Specifically, defendant did not breach his duty of care to plaintiff when he referred to the sales contract as a "standard contract" where, although plaintiff assumed that the contract—which, among other things, disclaimed the warranty of merchantability, fitness for a particular purpose, and habitability—was "standard" among all builders and similar transactions (rather than being "standard" for the particular builder who sold the house), there was no evidence that defendant represented as much to plaintiff. Furthermore, plaintiff had a positive duty to read the sales contract before signing it, and she presented no evidence of special circumstances that would have absolved her of that duty.

2. Fiduciary Relationship—real estate agent and buyer—purchase of home—duty to advise buyer to seek legal advice

In plaintiff buyer's action against defendant realtor, who served as plaintiff's real estate agent when she signed a contract to buy a

house that ended up having multiple latent defects, the trial court properly granted summary judgment for defendant on plaintiff's breach of fiduciary duty claim. Specifically, there was no genuine issue of material fact as to whether defendant breached his duty to advise plaintiff to seek legal counsel before signing the sales contract, where defendant had satisfied this duty in writing through an exclusive buyer-agent agreement that plaintiff signed when she hired defendant. Because plaintiff never asked about the contract's legal terms and instead made only a general inquiry about whether the contract was "standard," defendant was not required to verbally advise plaintiff to seek legal advice about the contract.

3. Unfair Trade Practices—purchase of home—realtor's statement—reference to sales contract as "standard"

In plaintiff buyer's action against defendant realtor, who served as plaintiff's real estate agent when she signed a contract to buy a house that ended up having multiple latent defects, the trial court properly granted summary judgment for defendant on plaintiff's unfair and deceptive trade practices claim. There was no factual dispute about whether defendant referred to the sales contract—which, among other things, disclaimed the warranty of merchantability, fitness for a particular purpose, and habitability—as a "standard contract." Although plaintiff assumed that defendant meant the contract was "standard" among all builders and similar transactions (rather than being "standard" for the particular builder who sold the house), she never alleged that defendant actually told her that the contract was "standard" in that general sense. Furthermore, plaintiff did not argue that defendant's reference to the contract as "standard" was unfair or deceptive.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Plaintiff from order entered 4 August 2022 by Judge John M. Dunlow in Durham County Superior Court. Heard in the Court of Appeals 22 March 2023.

Klein & Sheridan, LC PC, by Benjamin Sheridan and Jed Nolan, for Plaintiff-Appellant.

Manning, Fulton & Skinner, P.A., by Lawrence D. Graham, Jr., and William C. Smith, Jr., for Defendants-Appellees.

COLLINS, Judge.

Galya Mann ("Plaintiff") appeals the trial court's order granting summary judgment in favor of Huber Real Estate, Inc., and Paul Huber (collectively, "Realtor"). Plaintiff argues that the trial court erred by granting Realtor's motion for summary judgment on her claims for breach of fiduciary duty and unfair and deceptive trade practices. We affirm the trial court's order.

I. Background

Plaintiff moved from Bulgaria to the United States and attended East Carolina University, where she obtained an undergraduate degree in supply chain management and a Masters of Business Administration degree. Since her graduation, she has owned her own business.

Plaintiff and her husband first owned a home together in Wilmington, North Carolina.[1] They sold that home and purchased a townhome in Clayton, North Carolina. Plaintiff was not involved in these transactions because she "didn't know much about the United States or anything related to real estate." When asked whether she read, reviewed, or signed any of the documentation for the purchase of the Clayton townhome, Plaintiff responded, "No. I am a spouse. I must have signed all the documents but that's all I did."

Plaintiff and her husband began looking for a new home in Durham, North Carolina, in 2018. Plaintiff and her daughter met Realtor in April of that year at an open house for a property that Realtor was showing. Plaintiff hired Realtor as her real estate agent for the sale of her Clayton townhome and in her search for a new home in the Raleigh-Durham area. On or about 14 August 2018, Plaintiff received an Exclusive Buyer Agency Agreement ("Agreement") from Realtor. Plaintiff testified at her deposition that she "most probably" read the document; could not remember if she discussed the document with Realtor; "[m]ost probably" asked Realtor to explain parts of the document to her, but could not remember; and did not ask a lawyer to help her decipher anything in the document that she did not understand. When asked whether she had enough time to review the document thoroughly before signing, Plaintiff responded, "My answer is I do not remember at this time."

Paragraph 10 of the Agreement states as follows:

> 10. **OTHER PROFESSIONAL ADVICE.** In addition to the services rendered to Buyer by the Firm under the

1. Plaintiff and her husband are separated, and he is not a party to this appeal.

> terms of this Agreement, Buyer is advised to seek other professional advice in matters of law, taxation, financing, insurance, surveying, wood-destroying insect infestation, structural soundness, engineering, and other matters pertaining to any proposed transaction. Although Firm may provide Buyer the names of providers who claim to perform such services, Buyer understands that Firm cannot guarantee the quality of service or level of expertise of any such provider. Buyer agrees to pay the full amount due for all services directly to the service provider whether or not the transaction closes. Buyer also agrees to indemnify and hold Firm harmless from and against any and all liability, claim, loss, damage, suit, or expense that Firm may incur either as a result of Buyer's selection and use of any such provider or Buyer's election not to have one or more of such services performed.

When asked whether she read and understood Paragraph 10 at the time of signing the agreement, Plaintiff responded, "I cannot comment what happened three years ago."

After looking at a home in the Sterling community that did not meet Plaintiff's family's needs, Plaintiff asked Realtor whether there were other options on the market. Realtor suggested the Brightleaf community in Durham, which was being developed by Level Carolina Homes, LLC ("Level Homes"). That day or the day after, Plaintiff drove around the Brightleaf community. Plaintiff, her husband, and Realtor met with Level Homes' sales representative a few days later. At that meeting, they "[m]ost probably" viewed the house they ultimately bought, "viewed some documents[,]" and "discuss[ed] interior selection." Plaintiff and her husband were "[m]ost probably" given a copy of the sales contract, but Plaintiff could not recall whether they took the contract home with them.

The following exchange took place between Realtor's attorney and Plaintiff at her deposition regarding her review of the contract:

> [Realtor's Attorney]. Did you have sufficient time to review the document before you signed it?
>
> [Plaintiff]. I don't believe so.
>
> [Realtor's Attorney]. You did not have sufficient time --
>
> [Plaintiff]. This is a large document.

[Realtor's Attorney]. Did you read the document before you signed it?

[Plaintiff]. We were concerned about the changes in the interior selection, that part we did go through.

[Realtor's Attorney]. The question is: Did you read this contract before you signed it?

[Plaintiff]. Not the full contract. We relied on our realtor who said that this was a standard contract.

[Realtor's Attorney]. So you did not read the full contract but relied on your realtor who said it was a standard contract?

[Plaintiff]. Yes.

[Realtor's Attorney]. Did the realtor, Mr. Huber, tell you not to read the contract?

[Plaintiff]. The realtor, Mr. Huber, gets 6 percent of the sale of this house to tell us this is the standard contract or not.

[Realtor's Attorney]. My question is: Did Mr. Huber tell you not to read this contract?

[Plaintiff]. I do not remember.

. . . .

[Realtor's Attorney]. Did you discuss the content of the contract with Mr. Huber?

[Plaintiff]. I asked Mr. Huber if this was a standard contract and he said it was a standard contract.

[Realtor's Attorney]. Did you understand that to mean it was the standard contract for all transactions or the standard contract for Level Homes transactions?

[Plaintiff]. I am not in the real estate so when I ask my real estate agent if this is standard contract, I'm assuming that he means this is standard contract period. For all transactions.

[Realtor's Attorney]. Even transactions that Level Homes was not involved in?

[Plaintiff]. Yes. All transactions. I'm guessing there are standard contracts and custom contracts.

Prior to signing the sales contract, Plaintiff asked Realtor to negotiate changes to the contract pertaining to the interior design of the home, which he did. Plaintiff only remembered discussing interior changes with Realtor and did not remember discussing any warranty, arbitration, or limitation of damages provisions with Realtor. Plaintiff and her husband e-signed the purchase contract on 19 August 2018 when they were "[m]ost probably at home." Plaintiff's initials appear at the bottom of each page and her signature appears on page 9.

The contract included provisions that disclaimed all warranties, including the warranty of merchantability, fitness for a particular purpose, and habitability; limited damages to the cost of repair or replacement; provided that the total damages may not exceed the total purchase price; and required that any disputes be resolved by arbitration. The contract also provided a limited warranty through 2-10 Home Buyers Warranty, which included a one-year warranty on workmanship and materials, a two-year warranty on systems, and a ten-year warranty on structural defects.

After Plaintiff moved into the home, she discovered numerous latent defects, including improper lot grading and drainage, improper shingle and gutter installation, foundation cracks, no moisture barrier in the crawlspace, improper mounting of the HVAC, electrical issues, water in the crawl space, plumbing problems, and biological growth. The repairs to Plaintiff's home were estimated to cost between $83,894.72 and $90,594.73.

Plaintiff filed an unverified complaint against Realtor, Level Homes, and 2-10 Home Buyers Warranty. Against all defendants, Plaintiff brought claims for unfair and deceptive trade practices and civil conspiracy. Against Realtor, Plaintiff also brought claims for breach of fiduciary duty, negligence, and unjust enrichment. Against Level Homes, Plaintiff also brought claims for negligence, fraudulent inducement, unjust enrichment, and unconscionable contract. Against 2-10 Home Buyers Warranty, Plaintiff also brought claims for fraudulent inducement, unjust enrichment, and unconscionable contract.

Level Homes moved to dismiss or, in the alternative, to stay the proceedings and compel arbitration.[2] Realtor answered and moved to dismiss for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. By orders entered 16 November 2021, the trial court denied Level Homes' motion to dismiss and deferred its decision

2. This motion is not in the record but is referenced in the trial court's order deciding the motion.

on the motion to stay and compel arbitration, and denied Realtor's Rule 12(b)(6) motion to dismiss.

Realtor moved for summary judgment in April 2022. Realtor's motion came on for hearing on 11 July 2022 and by order entered 4 August 2022, the trial court allowed Realtor's motion for summary judgment on all claims. Plaintiff timely appealed.

II. Discussion

Plaintiff contends that the trial court erred by granting Realtor's motion for summary judgment on her breach of fiduciary duty and unfair and deceptive trade practices claims.[3]

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2022). "The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact." *Inland Constr. Co. v. Cameron Park II, Ltd., LLC*, 181 N.C. App. 573, 576, 640 S.E.2d 415, 418 (2007) (quotation marks and citation omitted).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2022). In other words, "[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (quotation marks and citations omitted).

"In the course of a trial court's ruling on a motion for summary judgment, [a] verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible

3. Plaintiff does not appeal the trial court's order granting summary judgment on her claims for negligence, unjust enrichment, and conspiracy.

in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Hampton v. Scales*, 248 N.C. App. 144, 149, 789 S.E.2d 478, 483 (2016) (quotation marks and citations omitted). However, the trial court may not consider unverified pleadings when ruling on a motion for summary judgment because they do not comply with the requirements of Rule 56(e). *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999), *disc. review improvidently allowed*, 352 N.C. 145, 531 S.E.2d 213 (2000); *Weatherford v. Glassman*, 129 N.C. App. 618, 623, 500 S.E.2d 466, 470 (1998). Here, Plaintiff's complaint was not verified; thus, it could not be considered in deciding Realtor's summary judgment motion. *See Hampton*, 248 N.C. App. at 149, 789 S.E.2d at 483; *see also Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (2011).

"We review a trial court's order granting summary judgment de novo." *Archie v. Durham Pub. Sch. Bd. of Educ.*, 283 N.C. App. 472, 474, 874 S.E.2d 616, 619 (2022) (citation omitted). This de novo review requires a two-part analysis: (1) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) whether the moving party is entitled to judgment as a matter of law. *Fayetteville Publ'g Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 428, 665 S.E.2d 518, 524 (2008).

A. Breach of Fiduciary Duty

Plaintiff first contends that the trial court erred by granting Realtor summary judgment on her breach of fiduciary duty claim because there were genuine issues of material fact precluding summary judgment.

"[T]he relationship between a real estate agent and his or her client is by, definition, one of agency, with the agent owing a fiduciary duty to the buyer in all matters relating to the relevant transaction."[4] *Cummings v. Carroll*, 379 N.C. 347, 374-75, 866 S.E.2d 675, 695 (2021) (citation omitted).

> A real estate agent has the fiduciary duty to exercise reasonable care, skill, and diligence in the transaction of business entrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so. The care and skill required is that generally

4. Realtor is a real estate broker. The fiduciary duties owed to a client by a real estate broker are the same as those owed by a real estate agent. *See, e.g.*, *Sutton v. Driver*, 211 N.C. App. 92, 100, 712 S.E.2d 318, 323 (2011).

> possessed and exercised by persons engaged in the same business. This duty requires the agent to make a full and truthful disclosure to the principal of all facts known to him, or discoverable with reasonable diligence and likely to affect the principal. The principal has the right to rely on his agent's statements, and is not required to make his own investigation.

Id. at 375, 866 S.E.2d at 695 (quoting *Brown v. Roth*, 133 N.C. App. 52, 54-55, 514 S.E.2d 294, 296 (1999)). A real estate agent also has a duty to "disclose any material facts known to the agent and to discover and disclose to the principal all material facts about which the agent should reasonably have known." *Id.* (quotation marks, italics, and citation omitted).

1. Standard Contract

[1] Plaintiff first asserts that "[t]here is a factual dispute that should be sent to a jury over whether [Realtor] breached the fiduciary duty by calling the sales contract a 'standard contract.' " However, as the parties agree that Realtor referred to the contract as "standard," the issue is not a question of fact, but is rather whether Realtor was entitled to judgment as a matter of law on Plaintiff's breach of fiduciary claim.

At Plaintiff's deposition, the following exchange took place between Plaintiff and Realtor's attorney:

> [Realtor's Attorney]. Did you discuss the content of the contract with Mr. Huber?
>
> [Plaintiff]. I asked Mr. Huber if this was a standard contract and he said it was a standard contract.
>
> [Realtor's Attorney]. Did you understand that to mean it was the standard contract for all transactions or the standard contract for Level Homes transactions?
>
> [Plaintiff]. I am not in the real estate so when I ask my real estate agent if this is standard contract, I'm assuming that he means this is standard contract period. For all transactions.
>
> [Realtor's Attorney]. Even transactions that Level Homes was not involved in?
>
> [Plaintiff]. Yes. All transactions. I'm guessing there are standard contracts and custom contracts.

In Realtor's affidavit, he averred as follows:

> I have sold a number of "spec" homes for large volume builders in different neighborhoods, and I cannot recall a situation in which I was involved that the particular builder's standard form contract was not used. If I told Plaintiff her contract was "standard" it was to communicate that it was Level Home's standard contract, which I believed because it was on Level Homes' pre-printed form, and presented to Plaintiff on our first visit to the Level Homes . . . sales office. I did not tell her this particular contract was "standard" among all builders and all similar transactions.

(Emphasis omitted).

Furthermore, at Realtor's deposition, the following exchange took place between Realtor and Plaintiff's attorney:

> [Plaintiff's Attorney]. Do you know whether or not you told Ms. Mann this was a standard contract?
>
> [Realtor]. To best of my recollection, I told her that all builders use their own standard contracts.
>
> [Plaintiff's Attorney]. Why would you use the word standard in that sentence?
>
> [Realtor]. It's just a generality.
>
> [Plaintiff's Attorney]. What does it mean to you in that context?
>
> [Realtor]. It means that they have their own standard. It means that they use their own -- their own forms.

Plaintiff admits that when she and Realtor first met with a Level Homes' sales representative, she and her husband were "[m]ost probably" given a copy of the sales contract. Realtor averred that the contract "was on Level Homes' pre-printed form, and presented to Plaintiff on our first visit to the Level Homes . . . sales office[.]" Plaintiff testified that when she asked Realtor if "this was a standard contract[,]" Realtor "said it was a standard contract." Plaintiff further testified that she "guess[ed] there are standard contracts and custom contracts." However, Plaintiff testified that she "assum[ed]" that Realtor meant "this is standard contract period . . . for all transactions." But there is no evidence that Realtor told Plaintiff it was the standard contract for all transactions or that Realtor's remark could reasonably be construed to mean as much.

Plaintiff asserts that she could rely solely on Realtor's representation that the sales contract was a "standard contract" and forego her own review of the contract. Plaintiff is misguided.

According to well-established North Carolina law,

> one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was wilfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained. If unable to read or write, he must ask that the paper be read to him or its meaning explained.

Williams v. Williams, 220 N.C. 806, 809-10, 18 S.E.2d 364, 366 (1942) (citations omitted). "It is well established in North Carolina that '[o]ne who signs a written contract without reading it, when he can do so understandably[,] is bound thereby unless the failure to read is justified by some special circumstances.' " *Marion Partners, LLC v. Weatherspoon & Voltz, LLP*, 215 N.C. App. 357, 359, 716 S.E.2d 29, 31 (2011) (first alteration in original) (quoting *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962)). As a result, a litigant's " 'duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity.' " *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963) (quoting *Furst v. Merritt*, 190 N.C. 397, 402, 130 S.E. 40, 43 (1925)).

Here, Plaintiff has failed to present evidence that special circumstances absolved her of the duty to read the contract. Plaintiff thus had a positive duty to read the sales contract and her failure to do so "is a circumstance against which no relief may be had, either at law or in equity." *Mills*, 259 N.C. at 362, 130 S.E.2d at 543 (quoting *Furst*, 190 N.C. at 402, 130 S.E. at 43).

In summary, Realtor's reference to the sales contract as a "standard contract" did not amount to a breach of fiduciary duty and Realtor was entitled to judgment as a matter of law.

2. Legal Advice

[2] Plaintiff also argues that a factual question arises over whether Realtor advised Plaintiff to seek legal advice prior to signing the contract.

Realtor attached to his motion for summary judgment the Agreement, signed by both Plaintiff and Realtor, which states in relevant part:

"*Buyer is advised to seek other professional advice in matters of law*, taxation, financing, insurance, surveying, wood-destroying insect infestation, structural soundness, engineering, and other matters pertaining to any proposed transaction" and that "*Buyer also agrees to indemnify and hold Firm harmless from and against any and all liability, claim, loss, damage, suit, or expense that Firm may incur* either *as a result of* Buyer's selection and use of any such provider or *Buyer's election not to have one or more of such services performed*." (Emphasis added).

Janet Thoren, Director of Regulatory Affairs and Legal Counsel for the North Carolina Real Estate Commission, submitted an affidavit and testified consistent with her affidavit by deposition. Thoren averred that her "division conducts administrative prosecutions of licensed real estate brokers when probable cause is found to believe they have violated Chapter 93A or the Commission's codified rules" and that she is "knowledgeable of and familiar with the various laws, regulations, rules, and guidance that govern any person or entity in the state of North Carolina licensed as a real estate broker and involved in the real estate brokerage business." She further averred that, because the Commission "has not investigated the facts alleged in this particular case[,]" she "cannot give an opinion about what should or should not have been done in this particular case by any licensed broker involved." Thoren's affidavit further states as follows:

> 5. Notwithstanding the above, the standard of care required of real estate licensees in the state of North Carolina includes, but is not limited to, advising a client to seek legal counsel for matters of law, including interpretation of purchase contracts. That duty is incorporated into and facilitated by paragraph 10 of the Exclusive Buyer Agency Agreement, Standard Form 201 ("Form 201"). Because the advice does not have to be verbal, in my opinion, if a buyer does not question the form or content of legal documents such as the purchase contract, the buyer agent's duty to advise a client to seek legal counsel regarding transactional documents may be satisfied in writing. Form 201 may satisfy that requirement.
>
> 6. In North Carolina, it is common and accepted for builders selling new home construction to utilize their own contracts drafted by their own attorneys and to require the use of such forms by any potential buyers of their product. These types of contracts are sometimes referred to as the builder's "standard" contract. Real estate brokers are not

> educated on such contracts and have no authority to provide opinions or offer legal advice on their terms, including but not limited to effects of different warranties, and arbitration clauses or other dispute resolution provisions. Real estate brokers are prohibited by law from offering legal advice or interpreting contract language.

Here, the following exchange took place between Plaintiff and Realtor's attorney at Plaintiff's deposition:

> [Realtor's Attorney]. Did you and Mr. Huber discuss the warranty provisions in the contract?
>
> [Plaintiff]. I don't think we went into detail but the interior changes.
>
> [Realtor's Attorney]. Did Mr. Huber make any representations or warranties to you about what the warranty provisions stated in the contract?
>
> [Plaintiff]. As I told you, that is as much as I remember.
>
> [Realtor's Attorney]. So you don't remember discussing the warranty provision in the contract?
>
> [Plaintiff]. I don't believe we discussed the warranty provisions.
>
> [Realtor's Attorney]. Did you and Mr. Huber discuss the arbitration provision in the contract before you signed it?
>
> [Plaintiff]. No.
>
> [Realtor's Attorney]. Did you and Mr. Huber discuss the limitation of damages provision in the contract before you signed it?
>
> [Plaintiff]. I don't believe so.

Plaintiff's inquiry about whether the contract was "standard" was not an inquiry about the legal terms of the contract; it was, at most, a general inquiry about whether the contract was "custom" in some way. Plaintiff admits that there was no discussion about the various legal terms of the contract that she now complains of and that her focus was on the interior changes to the home, which Realtor negotiated for her. Because Plaintiff made no inquiry into the legal terms of the contract which, according to Thoren, may have required Realtor to verbally advise Plaintiff to seek legal advice, Realtor's duty to advise Plaintiff

to seek legal counsel regarding the contract was satisfied in writing through the Agreement signed by Plaintiff.

Plaintiff relies on *Cummings* to support her assertion that the Agreement did not insulate Realtor from liability; such assertion is inapposite here. In *Cummings*, the exclusive buyer agency agreement attempted to limit the defendants-real estate agents' fiduciary duties by providing, inter alia, that they had only a duty to disclose "material facts related to the property or concerning the transaction of which they had actual knowledge[.]" 379 N.C. at 375, 866 S.E.2d at 695-96 (quotation marks and brackets omitted). In holding that "[t]he fiduciary duty that a real estate agent owes to his or her principal arises from the agency relationship itself . . . rather than upon the nature of the contractual provisions governing any specific agent-principal relationship[,]" the Court noted that "a real estate agent is obligated to '*discover and disclose*' those material facts that may affect [plaintiffs'] rights and interests or influence [plaintiffs'] decision in the transaction rather than to simply disclose those of which the agent has 'actual knowledge.' " *Id.* at 376, 866 S.E.2d at 696 (quotation marks and citation omitted). Here, however, the Agreement did not limit Realtor's fiduciary duties, but rather, consistent with Realtor's fiduciary duties, advised Plaintiff to seek other professional advice in addition to the services rendered by Realtor.

Accordingly, there is no genuine issue of material fact regarding whether Realtor advised Plaintiff to seek legal advice prior to signing the sales contract.

B. Unfair and Deceptive Trade Practices

[3] Plaintiff next contends that the trial court erred by granting Realtor summary judgment on the unfair and deceptive trade practices claim because Realtor unfairly and deceptively informed Plaintiff that Level Homes' contract was "standard."

Section 75-1.1 of our General Statutes provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful. N.C. Gen. Stat. § 75-1.1(a) (2022). To establish a prima facie claim for unfair and deceptive trade practices, "the plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, . . . and (3) the act proximately caused injury to the plaintiff." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995) (citation omitted). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539,

548, 276 S.E.2d 397, 403 (1981) (citation omitted). "A practice is deceptive if it has the tendency to deceive . . . ." *D C Custom Freight, LLC v. Tammy A. Ross & Assocs.*, 273 N.C. App. 220, 228, 848 S.E.2d 552, 559 (2020) (citation omitted). Whether an act or practice is unfair or deceptive is a question of law. *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 172, 684 S.E.2d 41, 50 (2009).

As discussed in more detail above, there is no factual dispute about whether Realtor called the sales contract a "standard contract." Plaintiff does not argue that Realtor told her that the contract was a standard contract for all transactions, only that she "assum[ed] that he mean[t] this is standard contract period. For all transactions." Furthermore, Plaintiff does not argue that Realtor's reference to the contract as "standard" to communicate that it was Level Homes' standard contract, rather than a standard contract for all transactions, was unfair or deceptive.

Accordingly, the trial court did not err by granting Realtor summary judgment on Plaintiff's unfair and deceptive trade practices claim.

III. Conclusion

The trial court did not err by granting Realtor summary judgment on Plaintiff's breach of fiduciary duty and unfair and deceptive trade practices claims because there is no genuine issue of material fact and Realtor was entitled to judgment as a matter of law. Accordingly, the trial court's order is affirmed.

AFFIRMED.

Judge DILLON concurs.

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

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

I concur in that portion of the majority's opinion affirming the trial court's grant of summary judgment with respect to Plaintiff's claim for unfair and deceptive trade practices. However, I respectfully dissent from the majority's holding affirming summary judgment in favor of Realtor for Plaintiff's claim for breach of fiduciary duty. Accordingly, I would hold that the trial court erred by granting summary judgment on Plaintiff's claim for breach of fiduciary duty because Realtor had a

duty to refer Plaintiff to an attorney when she questioned whether the contract was standard.

There is no question that a realtor owes a fiduciary duty to their clients. *Brown v. Roth*, 133 N.C. App. 52, 54, 514 S.E.2d 294, 296 (1999). Such duty "is not prescribed by contract, but is instead imposed by operation of law." *Cummings v. Carroll*, 379 N.C. 347, 376, 866 S.E.2d 675, 696 (2021) (citation and internal quotation marks omitted). Based on this fiduciary duty, a realtor must "exercise reasonable care, skill, and diligence in the transaction of business [e]ntrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so." *Brown*, 133 N.C. App. at 54, 514 S.E.2d at 296 (citation and internal quotation marks omitted). Generally, what is "reasonable" in the context of negligent behavior depends on the circumstances and is therefore a question for the jury. *Forbes v. Par Ten Grp., Inc.*, 99 N.C. App. 587, 595-96, 394 S.E.2d 643, 648 (1990) (citation and internal quotation marks omitted), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (mem.) (1991).

"This duty requires the agent to 'make a full and truthful disclosure [to the principal] of all facts known to him, or discoverable with reasonable diligence' and likely to affect the principal." *Brown*, 133 N.C. App. at 54-55, 514 S.E.2d at 296 (citations omitted). "In sum, . . . a real estate broker has a duty to make full and truthful disclosure of all known or discoverable facts likely to affect the client. And, the client may rely upon the broker to comply with this duty and forego his or her own investigation." *Sutton v. Driver*, 211 N.C. App. 92, 100, 712 S.E.2d 318, 323 (2011). In cases concerning whether a realtor fulfilled their fiduciary duty to their client, "the relevant issue . . . is whether the record discloses the existence of a genuine issue concerning the extent to which [the realtor] exercised a level of diligence consistent with applicable professional standards." *Cummings*, 379 N.C. at 376-77, 866 S.E.2d at 696 (citation omitted).

Here, I would hold the trial court erred by granting summary judgment to Realtor on Plaintiff's breach of fiduciary duty claim, because there is a genuine issue of fact as to whether Realtor breached their fiduciary duty to Plaintiff regarding the contract between the builder and Plaintiff. The Director of Regulatory Affairs and Legal Counsel for the North Carolina Real Estate Commission, Janet Thoren ("Ms. Thoren") testified as an expert. Ms. Thoren wrote in her affidavit that when a buyer questions a contract, the "standard of care" requires agents to advise the client to seek legal advice regarding the documents. However, "if a buyer *does not question the form or content of legal documents*

. . . the buyer agent's duty to advise a client to seek legal counsel regarding transactional documents may be satisfied in writing[,]" by the agreement. Ms. Thoren, reiterated this sentiment in her deposition, stating that "if the buyer has questions about [a] contract" the broker "should refer the buyer to an attorney[.]" Still, Ms. Thoren confirmed that despite this general advice, she could not opine on whether Realtor violated any rules, since she had not investigated this incident.

During the summary judgment hearing, Plaintiff's attorney argued that Plaintiff asked Realtor whether the contract from the builder was "standard . . ., to which he replied yes, this is a standard contract[,]" thus she "relied on [Realtor]" and "forewent her own investigation." Plaintiff's attorney specifically argued that Plaintiff's inquiry about whether the builder's contract was standard "warranted a referral to an attorney[,]" which Realtor failed to provide. Realtor's attorney countered that although his "client [didn't] recall that specific exchange, . . . he sa[id] that if he was asked [whether the contract was standard], he would have said yeah, this is [the builder's] standard contract."

Based on these arguments, the record, and there being no specific guidance from the commission, I would hold there is a genuine issue of material fact as to whether Realtor breached his fiduciary duty to Plaintiff by failing to advise her, verbally, at the time she signed the agreement with the builder, to seek legal counsel to answer her question about whether the contract was standard, since she was questioning the form of the contract. I do not believe that boiler plate language in the agreement relied upon by the majority is sufficient to satisfy the obligations under the facts set forth in this case. Therefore, I would vacate the trial court's order granting summary judgment on Plaintiff's claim for breach of fiduciary duty and remand for a trial on this issue. Thus, I dissent.

MAYNARD v. CROOK

[289 N.C. App. 357 (2023)]

ARNOLD MAYNARD, JENNIFER MAYNARD, AND HAROLD ELLIS, PLAINTIFFS
v.
JUNE CROOK, DEFENDANT

No. COA22-794

Filed 20 June 2023

1. Torts, Other—failure to state a claim—slander of title—special damages—invasion of privacy—physical intrusion by non-party upon property

In a legal dispute between adjacent property owners over access to a right-of-way on defendant's driveway, the trial court properly dismissed defendant's counterclaim for slander of title under Civil Procedure Rule 12(b)(6) (failure to state a claim) where the damages that defendant alleged—namely, expenses she incurred to defend against a temporary restraining order that plaintiffs obtained to prevent her from impeding their access to the right-of-way—did not constitute special damages. The trial court also properly dismissed under Rule 12(b)(6) defendant's counterclaim for invasion of privacy where, rather than alleging that plaintiffs physically intruded upon her home or private affairs, defendant alleged that "many strangers" and "potential purchasers" of plaintiffs' property—in other words, non-parties to the case—had trespassed on her property.

2. Civil Procedure—judgment on the pleadings—as to counterclaims—no motion before the court—pleadings not yet "closed"—improper

In a legal dispute between adjacent property owners over access to a right-of-way on defendant's driveway, the trial court erred in dismissing defendant's counterclaims under Civil Procedure Rule 12(c), which allows a party to move for judgment on the pleadings "after the pleadings are closed." To begin with, there was no Rule 12(c) motion as to defendant's counterclaims for the court to rule on, since plaintiffs had only moved for judgment on the pleadings as to their own claims. At any rate, a Rule 12(c) motion as to defendant's counterclaims would have been improper because plaintiffs had not replied to those counterclaims, and therefore the pleadings had not yet "closed."

3. Civil Procedure—order dismissing counterclaims—under Rule 12(b)(6)—motions under Rules 52, 59, and 60

After the trial court entered an order in a property-related action dismissing defendant's counterclaims under Civil Procedure

Rule 12(b)(6), the court did not abuse its discretion in denying defendant's Rule 59 motion for a new trial where the order dismissing defendant's counterclaims was issued in response to a pre-trial motion and where no trial on the merits had yet occurred. Further, because defendant filed her amended counterclaims after the court had already properly dismissed her original counterclaims, the court did not abuse its discretion in denying defendant's Rule 60 motion for relief from the dismissal order without addressing defendant's request to amend her counterclaims. However, because the order dismissing defendant's counterclaims included extensive factual findings that went beyond a mere recitation of undisputed facts forming the basis of the court's decision, the court did abuse its discretion in denying defendant's Rule 52(b) motion requesting that the court amend the order to remove those improper findings.

Appeal by Defendant from orders entered 3 February, 4 February, 9 February, and 13 June 2022 by Judge Josephine Kerr Davis in Durham County Superior Court. Heard in the Court of Appeals 11 April 2023.

Oak City Law, LLP, by Robert E. Fields III and Samuel Pinero, for Plaintiffs-Appellees Arnold Maynard and Jennifer Maynard; Anderson Jones, PLLC, by Todd A. Jones and Lindsey E. Powell, for Plaintiff-Appellee Harold Ellis.

Bugg & Wolf, P.A., by William J. Wolf, for Defendant-Appellant.

COLLINS, Judge.

Defendant June Crook appeals from the trial court's orders denying certain motions as moot, dismissing her counterclaims, denying her motion for sanctions, denying her Rule 52 and 59 motions to alter or amend the order dismissing her counterclaims, and denying her Rule 60 motion for relief from the order dismissing her counterclaims. Defendant contends that the trial court erred by dismissing her counterclaims and abused its discretion by denying her Rule 52, 59, and 60 motions.

Because Defendant's complaint failed to sufficiently allege claims for slander of title and invasion of privacy, the trial court did not err by dismissing her counterclaims under Rule 12(b)(6). However, the trial court erred by dismissing her counterclaims under Rule 12(c). Furthermore, although the trial court did not abuse its discretion by denying Defendant's Rule 59 and 60 motions, the trial court abused its

discretion by denying her Rule 52 motion. We therefore affirm in part and reverse in part and remand with instructions.

I. Procedural Background

Plaintiffs Arnold Maynard and Jennifer Maynard entered into a contract with Plaintiff Harold Ellis (collectively, "Plaintiffs") to purchase a 10.001-acre tract of land ("the Property") in Bahama, North Carolina. Ellis represented to the Maynards that the Property was accessible from a 60-foot public right-of-way. However, Defendant, who owns the tract of land adjacent to the Property, claimed that the right-of-way, upon which her driveway is situated, is her property and prevented Plaintiffs from accessing the Property from the right-of-way.

Plaintiffs filed suit on 26 April 2021, seeking a temporary restraining order, preliminary injunction, and permanent injunction to prevent Defendant from impeding their access to the right-of-way. The trial court granted a temporary restraining order on 30 April 2021.

Defendant moved to dissolve the temporary restraining order and to dismiss Plaintiffs' claims pursuant to Rule 12(b)(6). Thereafter, Defendant filed an answer and counterclaims for invasion of privacy, slander of title, and unfair and deceptive trade practices. Plaintiffs moved for judgment on the pleadings pursuant to Rule 12(c) as to the relief sought in their complaint and for dismissal of Defendant's counterclaims pursuant to Rule 12(b)(6) on 30 July 2021.

Defendant filed a motion for sanctions against Ellis pursuant to Rules 33, 34, and 37 on 6 January 2022. Defendant moved for summary judgment on Plaintiffs' claims on 10 January 2022.

On 27 January 2022, Defendant voluntarily dismissed her counterclaim for unfair and deceptive trade practices. Plaintiffs voluntarily dismissed their claims without prejudice on 2 February 2022.

After hearings on 14 September 2021 and 3 February 2022,[1] the trial court entered an order on 3 February 2022 denying as moot the following: Plaintiffs' motion for judgment on the pleadings as to their own claims and as to Defendant's unfair and deceptive trade practices counterclaim,[2] Plaintiffs' motion for a preliminary injunction, Defendant's

1. No transcript of these hearings appears in the Record, but they are referenced in the trial court's orders.

2. There is no motion for judgment on the pleadings as to Defendant's unfair and deceptive practices counterclaim in the Record.

motion to dismiss, and Defendant's motion for summary judgment. The trial court entered an order on 4 February 2022 dismissing with prejudice pursuant to Rules 12(b)(6) and 12(c) Defendant's counterclaims for invasion of privacy and slander of title. On 7 February, Defendant filed "Amended Counterclaims" for invasion of privacy, slander of title, malicious prosecution, and to quiet title. By written order entered 9 February 2022, the trial court denied Defendant's motion for sanctions against Ellis.

Defendant filed a "Motion to Amend and Motion for Relief pursuant to Rules 52, 59, and 60" on 14 February 2022, moving for "Amendment pursuant to Rule 52, to Alter or Amend pursuant to Rule 59(e), and for Relief pursuant to Rule 60(b) from this [c]ourt's Order Dismissing Defendant's Counterclaims entered on February 4, 2022." Defendant's motion requested, in relevant part, that the trial court:

> 1. Enter an Order pursuant to Rule 60 of the North Carolina Rules of Civil Procedure vacating ab initio this [c]ourt's Order entered on February 4, 2022 Dismissing Defendant's Counterclaims;
>
> 2. In the alternative, vacating ab initio this [c]ourt's Order entered on February 4, 2022 and entering a new Order dismissing Defendant's Counterclaims for failing to state a claim, without findings of fact[.]

After a hearing on 23 February 2022,[3] the trial court denied the motion by written order entered 13 June 2022.

On 22 June 2022, Defendant filed a notice of appeal from the 3 February order denying motions as moot, the 4 February order dismissing Defendant's counterclaims, the 9 February order denying Defendant's motion for sanctions, and the 13 June order denying Defendant's Rule 52, 59, and 60 motions.[4]

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3. No transcript of this hearing appears in the Record.

4. Although Defendant's notice of appeal includes the 3 February order denying motions as moot and the 9 February order denying Defendant's motion for sanctions, Defendant's brief does not address these issues and they are thus deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

II. Discussion

A. Motion to Dismiss

[1] Defendant first contends that the trial court erred by granting Plaintiffs' Rule 12(b)(6) motion to dismiss her counterclaims for slander of title and invasion of privacy.

A counterclaim survives the dismissal of the plaintiff's original claim. *See Jennette Fruit v. Seafare Corp.*, 75 N.C. App. 478, 482, 331 S.E.2d 305, 307 (1985). The standard of review for dismissal of a counterclaim is the same as the standard of review that governs dismissal of a complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b) (2022). "In considering a motion to dismiss under Rule 12(b)(6), the Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Izzy Air, LLC v. Triad Aviation, Inc.*, 284 N.C. App. 655, 657, 877 S.E.2d 65, 68 (2022) (quotation marks and citation omitted). "We review de novo a trial court's order on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6)." *Bill Clark Homes of Raleigh, LLC v. Town of Fuquay-Varina*, 281 N.C. App. 1, 5, 869 S.E.2d 1, 3 (2021) (citation omitted).

1. Slander of Title

"The elements of slander of title are: (1) the uttering of slanderous words in regard to the title of someone's property; (2) the falsity of the words; (3) malice; and (4) special damages." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 30, 588 S.E.2d 20, 28 (2003) (citations omitted).

"Facts giving rise to special damages must be alleged so as to fairly inform defendant of the scope of plaintiff's demand." *Stanford v. Owens*, 46 N.C. App. 388, 398, 265 S.E.2d 617, 624 (1980) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 9(g) (2022) ("When items of special damage are claimed each shall be averred."). "[G]eneral damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case." *Penner v. Elliott*, 225 N.C. 33, 35, 33 S.E.2d 124, 126 (1945) (quotation marks and citations omitted). "[S]pecial damages are usually synonymous with pecuniary loss[,]" *Iadanza v. Harper*, 169 N.C. App. 776, 779, 611 S.E.2d 217, 221 (2005), and are "[t]hose which are the actual . . . result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case[.]" *Canady v. Mann*, 107 N.C. App. 252, 257, 419 S.E.2d 597, 600 (1992) (quotation marks and citation omitted).

Here, Defendant's complaint alleges the following regarding special damages:

> 47. Ms. Crook has incurred substantial expenses defending against the Temporary Restraining Order. Ms. Crook has incurred extensive attorneys' fees, surveying fees, and expert fees to date.
>
> 48. Ms. Crook is entitled to damages in excess of $25,000 arising from the wrongfully obtained Temporary Restraining Order.
>
> . . . .
>
> 75. As a result of Mr. Harold Ellis' slanderous statements regarding Ms. June Crook's title to the Crook Homestead, Ms. June Crook has suffered damages in the form of repeated intrusions unto her property by strangers who had been mislead (sic) by Mr. Ellis' false advertising and the invasion of her privacy.

The relatively few slander of title cases decided in our state establish that the slander of title must interfere with the sale of property or otherwise cause specific monetary harm. *See Cardon v. McConnell*, 120 N.C. 461, 462, 27 S.E. 109 (1897) ("[U]nless the plaintiff shows . . . a pecuniary loss or injury to himself, he cannot maintain [a slander of title] action."); *see also Selby v. Taylor*, 57 N.C. App. 119, 121-22, 290 S.E.2d 767, 769 (1982) (holding that plaintiff sufficiently alleged special damages where "because of the . . . writing published by defendants, . . . others did not bid on the property and plaintiff, as a result of that suffered a $20,000 loss").

Expenses incurred in defending against an action are not the natural and proximate consequence of the slander of title and do not constitute special damages. *See Allen v. Duvall*, 63 N.C. App. 342, 348-49, 304 S.E.2d 789, 793 (1983), *rev'd on other grounds*, 311 N.C. 245, 316 S.E.2d 267 (1984), *on reh'g*, 311 N.C. 745, 321 S.E.2d 125 (1984). In *Allen*, this Court explained:

> The plaintiffs have cross-assigned error to the court's failure to include their attorney fees as part of the damages. We believe the court was correct in refusing to do so. The plaintiffs argue that as a direct result of the slander of their title, they had to retain attorneys. If this were a proper element of damages, it should be included in every case in which a person retains an attorney as a result of

> some damage done to him. We believe the court was correct in not including legal fees as a part of the damages.

Id.

Defendant does not allege an interference with the sale of her property or specific monetary harm, but instead alleges that she "has incurred substantial expenses defending against the Temporary Restraining Order" and has "incurred extensive attorneys' fees, surveying fees, and expert fees to date." As these expenses do not constitute special damages, Defendant has failed to sufficiently allege special damages. Accordingly, the trial court did not err by granting Plaintiffs' motion to dismiss Defendant's slander of title counterclaim under Rule 12(b)(6).

2. Invasion of Privacy

The tort of invasion of privacy by intrusion into seclusion is defined as "the intentional intrusion physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [where] the intrusion would be highly offensive to a reasonable person." *Toomer v. Garrett*, 155 N.C. App. 462, 479, 574 S.E.2d 76, 90 (2002) (quotation marks and citation omitted). "The kinds of intrusions that have been recognized under this tort include physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another." *Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 288, 618 S.E.2d 768, 771 (2005) (quotation marks and citations omitted).

Here, Defendant's complaint alleges, in part:

> 54. As a result of Mr. Harold Ellis' false advertising, potential purchasers have entered Ms. Crook's property and approached her on her property.
>
> 55. Upon information and belief, as a result of Mr. Ellis' false assertion that Crook Driveway is actually a public right of way, many strangers have been disregarding Ms. Crook's "No Trespassing" sign near the entrance of her home and have driven down Crook Driveway and almost to her house before turning around. Upon information and belief, these were potential purchasers of the Ellis Property who were investigating the alleged public access.
>
> 56. On other occasions, strangers would approach June Crook's home and demand access to the Ellis property through Crook Driveway.

> 57. While falsely advertising the Ellis Property, Mr. Harold Ellis and his real estate agent attempted to place a "For Sale" sign at the entrance to Ms. June Crook's property, in an intentional attempt to cause strangers to travel down Crook Driveway.
>
> . . . .
>
> 64. Despite having knowledge that there was no public right of way existing alongside June Crook's Property, Harold Ellis and Arnold and Jennifer Maynard filed a Complaint . . . seeking an *ex parte* temporary restraining order and preliminary injunction restraining June Crook from the use of her Property.
>
> 65. The actions of Harold Ellis and Arnold and Jennifer Maynard constitute an invasion upon the privacy of June Crook. The actions of Harold Ellis and Arnold and Jennifer Maynard intruded upon the solitude, seclusion, private affairs and personal concerns of June Crook.
>
> 66. The actions of Harold Ellis and Arnold and Jennifer Maynard willfully, intentionally, maliciously and recklessly intruded upon the privacy of June Crook.
>
> 67. Any reasonable person would be highly offended by the constant harassment by potential purchasers and subsequent attempt to *ex parte* restrain Ms. Crook's use of her Property.
>
> 68. June Crook has been damaged by the intrusion of her privacy committed by Harold Ellis and Arnold and Jennifer Maynard.

The complaint does not allege that Plaintiffs intruded, physically or otherwise, upon Defendant's home or private affairs. While Defendant's complaint alleges that "potential purchasers" and "many strangers" have physically entered her property, Defendant cites no authority, and we find none, supporting the proposition that a claim for invasion of privacy lies where an individual, other than the individual against whom the cause of action is asserted, physically intrudes upon a defendant's home. Furthermore, we have found no authority to support Defendant's proposition that filing a lawsuit is the kind of intrusion that has been recognized under this tort.

As the allegations in Defendant's complaint failed to sufficiently state a claim for invasion of privacy, the trial court did not err by granting Plaintiffs' Rule 12(b)(6) motion to dismiss.

B. Motion for Judgment on the Pleadings

[2] Defendant contends that the trial court erred by dismissing her counterclaims pursuant to Rule 12(c) because "[t]here was no motion for judgment on the pleadings before the [c]ourt."

We review a trial court's order granting a motion for judgment on the pleadings de novo. *Benigno v. Sumner Constr., Inc.*, 278 N.C. App. 1, 3-4, 862 S.E.2d 46, 49 (2021). Rule 12(c) permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed . . . ." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2022). Rule 7(a) sets forth a limited list of permissible pleadings and states:

> There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

N.C. Gen. Stat. § 1A-1, Rule 7(a) (2022). The rule's express provision that "[t]here shall be . . . a reply to a counterclaim" contemplates that the pleadings do not "close" until a reply to a counterclaim is filed. *See, e.g.*, *Flora v. Home Fed. Sav. & Loan Ass'n*, 685 F.2d 209, 211 n.4 (7th Cir. 1982) ("Fed. R. Civ. P. 7(a) prescribes when the pleadings are closed. In a case such as this when, in addition to an answer, a counterclaim is pleaded, the pleadings are closed when the plaintiff serves his reply." (citation omitted)); *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005) ("[T]he pleadings are closed [under Rule 7(a)] for the purposes of Rule 12(c) once a complaint and answer have been filed, assuming . . . that no counterclaim or cross-claim is made." (citations omitted)).

Here, the trial court's order dismissed Defendant's counterclaims under Rules 12(b)(6) and 12(c). As discussed above, the trial court did not err by dismissing Defendant's counterclaims under Rule 12(b)(6). However, the trial court erred by dismissing Defendant's counterclaims under Rule 12(c) because there was no motion for judgment on the

pleadings as to Defendant's counterclaims before the court; moreover, such a motion would have been improper because the pleadings had not yet closed. Plaintiffs moved for judgment on the pleadings pursuant to Rule 12(c) as to their own claims but did not move for judgment on the pleadings as to Defendant's counterclaims. Even assuming arguendo that Plaintiffs' Rule 12(c) motion purported to move for judgment on the pleadings as to Defendant's counterclaims, dismissing Defendant's counterclaims under Rule 12(c) was improper because Plaintiffs had not replied to Defendant's counterclaims, and thus the pleadings had not yet closed. Accordingly, the trial court erroneously dismissed Defendant's counterclaims pursuant to Rule 12(c).

C. Rule 52, 59, and 60 Motions

[3] Defendant next contends that the trial court abused its discretion by denying her "Motion to Amend and Motion for Relief pursuant to Rules 52, 59, and 60[.]" (capitalization altered). Specifically, Defendant argues that "[t]he form of the trial court's order of dismissal is clearly erroneous, inappropriate, and highly prejudicial" in that it "contains clearly erroneous factual statements inconsistent with [Defendant's] allegations and erroneous statements of law that are inappropriate to include in such an order."

A challenge to a trial court's decision to grant or deny relief pursuant to N.C. Gen. Stat. § 1A-1, Rules 52, 59, or 60 is reviewed under an abuse of discretion standard. *Burnham v. S&L Sawmill, Inc.*, 229 N.C. App. 334, 346, 749 S.E.2d 75, 84 (2013). "An abuse of discretion is shown only when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Paynich v. Vestal*, 269 N.C. App. 275, 278, 837 S.E.2d 433, 436 (2020) (quotation marks and citation omitted).

1. Rule 52 Motion

Rule 52(b) governs amendments to findings of fact made by a trial court and states, "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." N.C. Gen. Stat. § 1A-1, Rule 52(b) (2022). "The primary purpose of a Rule 52(b) motion is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court." *Branch Banking & Tr. Co. v. Home Fed. Sav. & Loan Ass'n*, 85 N.C. App. 187, 198-99, 354 S.E.2d 541, 548 (1987). "If a trial court has omitted certain essential findings of fact, a motion under Rule 52(b) can correct this oversight and avoid remand by the appellate court for further findings." *Id.* (citation

omitted). By its plain language, Rule 52(b) also allows the trial court to amend, and thus omit, erroneous findings.

The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact, to make clear what was decided for purposes of res judicata and estoppel, and to allow for meaningful appellate review. *See War Eagle, Inc. v. Belair*, 204 N.C. App. 548, 551, 694 S.E.2d 497, 500 (2010); *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 382, 542 S.E.2d 676, 678 (2001). As resolution of evidentiary conflicts is not within the scope of Rule 12 and findings of fact in a Rule 12 order are not binding on appeal, an order granting a Rule 12(b)(6) motion to dismiss generally should not include findings of fact. *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979); *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 258 (2012); *Tuwamo v. Tuwamo*, 248 N.C. App. 441, 446, 790 S.E.2d 331, 336 (2016).

The trial court may, however, recite the undisputed facts that form the basis of its decision. *See, e.g.*, *Capps v. Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 529 (1978) (opining that, when deciding a motion for summary judgment, "in rare situations it can be helpful for the trial court to set out the *undisputed* facts which form the basis for his judgment"); *see also Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 189, 594 S.E.2d 809, 813 (2004) ("[F]indings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." (quotation marks and citation omitted)). When this is done, any findings should clearly be denominated as "uncontested facts" and not as the resolution of contested facts. *War Eagle*, 204 N.C. App. at 551-52, 694 S.E.2d at 500 (commenting on the presence of detailed findings of fact in a trial court's order granting summary judgment).

Because an order granting a Rule 12(b)(6) motion to dismiss generally should not include findings of fact, a Rule 52(b) motion requesting that the trial court add such findings is improper. However, a Rule 52(b) motion to remove erroneous findings of fact is not improper and is reviewed for an abuse of discretion. *See Burnham*, 229 N.C. App. at 346, 749 S.E.2d at 84.

Here, the trial court made extensive findings of fact that go beyond a mere recitation of undisputed facts forming the basis of its decision. Instead, the findings mischaracterize the allegations set forth in Defendant's complaint and resolve evidentiary conflicts in a manner that decides ownership of the Property, which is the central issue in the

action Plaintiffs voluntarily dismissed, thereby creating the danger of a future claim of collateral estoppel.

Based on this unique set of procedural and factual circumstances, the trial court abused its discretion by denying Defendant's Rule 52(b) motion requesting that the court "enter[] a new [o]rder dismissing Defendant's Counterclaims for failing to state a claim, without findings of fact[.]"

2. Rule 59 Motion

Rule 59 addresses new trials and amendments to judgments and states, "[a] new trial may be granted to all or any of the parties and on all or part of the issues" for any of the nine grounds enumerated in the statute. N.C. Gen. Stat. § 1A-1, Rule 59(a) (2022). Additionally, a party may move to "amend the judgment under section (a) of this rule . . . ." N.C. Gen. Stat. § 1A-1, Rule 59(e) (2022). However, "Rule 59(e) is available only on the grounds enumerated in Rule 59(a) and they apply only after a trial on the merits." *Doe v. City of Charlotte*, 273 N.C. App. 10, 19, 848 S.E.2d 1, 8 (2020). Thus, "litigants cannot bring a motion under Rule 59(e) to seek reconsideration of a pre-trial ruling by the trial court." *Id.*

Here, as there was no trial on the merits and the order dismissing Defendant's counterclaims was issued in response to a pre-trial motion, the trial court did not abuse its discretion by denying Defendant's Rule 59 motion.

3. Rule 60(b) Motion

Rule 60(b) provides for relief from a judgment or order for various reasons, including mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, and "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2022).

Defendant asserts that "[t]he order denying the motion to amend or alter the order of dismissal also failed to address [Defendant's] request to be allowed to amend her counterclaims." Defendant's amended counterclaims were filed on 7 February, after the order dismissing her counterclaims was entered on 4 February. Because Defendant's counterclaims were properly dismissed under Rule 12(b)(6) before she filed her amended counterclaims, the trial court did not abuse its discretion by not addressing Defendant's request to amend her counterclaims.

III. Conclusion

The trial court did not err by granting Plaintiffs' motion to dismiss Defendant's counterclaims under Rule 12(b)(6) because Defendant's

complaint failed to sufficiently state claims for slander of title and invasion of privacy. Furthermore, the trial court did not abuse its discretion by denying Defendant's Rule 59 and 60 motions. Accordingly, we affirm in part. However, the trial court erred by dismissing Defendant's counterclaims under Rule 12(c) and abused its discretion by denying Defendant's Rule 52 motion. Accordingly, we reverse in part and remand to the trial court with instructions to enter a new order summarily dismissing Defendant's counterclaims under Rule 12(b)(6).

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.

Chief Judge STROUD and Judge FLOOD concur.

NORTH CAROLINA STATE BOARD OF EDUCATION, PETITIONER
v.
MATTHEW J. MINICK, RESPONDENT

No. COA22-303

Filed 20 June 2023

Administrative Law—judicial review—service—through party's attorney

In a case involving a teacher challenging his suspension from his job, where petitioner (N.C. Board of Education) sought judicial review of the administrative law judge's final decision reversing the teacher's suspension, petitioner's attempted service upon the teacher—through the teacher's attorney, at the attorney's address—was insufficient to establish personal jurisdiction pursuant to N.C.G.S. § 150B-46, which requires service upon all parties of record to the proceedings. The teacher's apparent directives that he be served through his attorney did not negate the fact that strict compliance with N.C.G.S. § 150B-46 is required for proper service.

Appeal by petitioner from order entered 21 September 2021 by Judge Mark E. Klass in Superior Court, Orange County. Heard in the Court of Appeals 4 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zach Padget, for petitioner-appellant.

Mary-Ann Leon for respondent-appellee.

The McGuinness Law Firm, by J. Michael McGuinness and Verlyn Chesson Porte, for amicus curiae N.C. Association of Educators.

STROUD, Chief Judge.

Petitioner appeals an order granting respondent's motion to dismiss. Because petitioner failed to properly serve respondent, we affirm.

I. Background

A detailed factual background is not needed for this case as the only issue on appeal is service. In relevant part, petitioner is the North Carolina Board of Education ("Board"), and respondent ("Mr. Minick") is a North Carolina teacher. Respondent was suspended from his job as a teacher and filed a "Petition for a Contested Case Hearing" ("CCH Petition") with the Office of Administrative Hearings ("OAH") in August 2020. On the CCH Petition form, Mr. Minick printed the address of his attorney in the space labeled "Print your full address," and in the space labeled "Print your name" Mr. Minick printed "Matthew J. Minick, by and through his attorney, Narendra K. Ghosh[.]" In September 2020, on the same day, Attorney Ghosh withdrew and Mr. Minick's second counsel, Attorney Mary-Ann Leon, filed a Notice of Appearance.

In January of 2021, an Administrative Law Judge ("ALJ") heard the CCH Petition. On 23 March 2021, the ALJ filed a final decision reversing the Board's suspension of Mr. Minick. On 21 April 2021, the Board then filed a Petition for Judicial Review of the ALJ's final decision ("Petition"). The Certificate of Service for the Petition was filed 23 April 2021, and indicates the Petition was served on OAH and Mr. Minick in care of his attorney Mary-Ann Leon:

> Matthew Minick
> c/o Mary-Ann Leon[1]
> The Leon Law Firm, P.C.
> 704 Cromwell Drive, Suite E
> Greenville, NC 27858

1. "C/o" in a mailing address means the enclosed document is addressed to the first party listed and has been placed "in the care of" the second party listed, to be forwarded to the first party. *See, e.g.*, *Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 17-18, 351 S.E.2d 779, 780-81 (1987) (using "c/o" to send mail to the second listed party, to be directed to the first listed party).

Nothing in the record indicates the Board attempted to serve the Petition on Mr. Minick in any manner other than through his attorney.

On 9 June 2021, Mr. Minick filed a motion to dismiss the Petition because he was not served but rather only his attorney had been served. Mr. Minick requested that the Petition be "dismissed for lack of personal jurisdiction" under North Carolina General Statute § 150B-46.[2]

The Board filed a response to Mr. Minick's motion on 25 June 2021. The response asserted service was adequate because the CCH Petition listed Mr. Minick's own name, "by and through his attorney" on the line for his name. Further, Mr. Minick's second attorney's Notice of Appearance filed with OAH directed that any documents filed should be served on her, not on Mr. Minick:

> MARY-ANN LEON, of The Leon Law Firm, P.C., gives notice to the Court of her appearance on behalf of the Petitioner in this matter, MATTHEW J. MINNICK, [sic] and requests all future documents, calendars, or other information relating to this matter, either transmitted by the court or by counsel, be served upon her.

The Board asserted its service upon Ms. Leon was sufficient for personal jurisdiction.

On 21 September 2021, without findings of fact or conclusions of law, the trial court granted Mr. Minick's motion to dismiss:

> The Court, having considered the relevant pleadings in this matter, the arguments of the parties' counsel, and the proffered and other relevant authorities, and, in particular, having reviewed N.C. Gen. Stat. § 150B-46, GRANTS [Mr. Minick's] Motion to Dismiss.

The Board appealed.

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2. Mr. Minick's motion to dismiss also cited North Carolina Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction but did not cite North Carolina Rule of Civil Procedure 12(b)(5) for insufficiency of service of process. This appears to be a procedural distinction without a difference. In this case, North Carolina General Statute § 150B-46 governs service, but according to our precedent this statute is a jurisdictional rule; failure to effect service pursuant to North Carolina General Statute § 150B-46 deprives the trial court of personal jurisdiction. *See, e.g.*, *Tobe-Williams v. New Hanover County Bd. of Educ.*, 234 N.C. App. 453, 460-61, 759 S.E.2d 680, 687 (2014) (concluding that, although the petitioner failed to serve the petition pursuant to North Carolina General Statute § 150B-46, the respondent board waived the issue of lack of personal jurisdiction by submitting to the jurisdiction of the trial court by arguing the merits of the case at the hearing).

II. Service

The Board contends that by serving Mr. Minick through his attorney, the service was "consistent with [Mr. Minick's] own directives in this matter[.]" Mr. Minick counters that service on his attorney does not satisfy the conditions of North Carolina General Statute § 150B-46.

A. Standard of Review

We review the Board's appeal *de novo* for whether Mr. Minick was properly served:

> Plaintiff asserts the trial court erred by granting Defendant's motion to dismiss for lack of personal jurisdiction. This Court has previously held "[w]here there is no valid service of process, the court lacks jurisdiction over a defendant, and a motion to dismiss pursuant to Rule 12(b) should be granted." *Davis v. Urquiza*, 233 N.C. App. 462, 463-64, 757 S.E.2d 327, 329 (2014) (citation omitted). "On a motion to dismiss for insufficiency of process where the trial court enters an order without making findings of fact, our review is limited to determining whether, as a matter of law, the manner of service of process was correct." *Thomas & Howard Co. v. Trimark Catastrophe Servs.*, 151 N.C. App. 88, 90, 564 S.E.2d 569, 571 (2002) (alteration and citations omitted).

Patton v. Vogel, 267 N.C. App. 254, 256-57, 833 S.E.2d 198, 201 (2019). Further, questions of statutory interpretation are questions of law also reviewed *de novo*. *Applewood Properties, LLC v. New South Properties, LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013).

B. Service under North Carolina General Statute § 150B-46

Both parties agree that Mr. Minick was to be served pursuant to North Carolina General Statute § 150B-46 which states in relevant part:

> Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were *parties of record* to the administrative proceedings. Names and addresses of such parties shall be furnished to the petitioner by the agency upon request.

N.C. Gen. Stat. § 150B-46 (2021) (emphasis added).

Strict compliance with the service requirement of North Carolina General Statute § 150B-46 is necessary for the trial court to acquire personal jurisdiction over an appeal from an administrative agency:

> For seventy years, our Supreme Court has held: there can be no appeal from the decision of an administrative agency except pursuant to specific statutory provisions therefore. Obviously then, the *appeal must conform to the statute granting the right* and regulating the procedure.

Aetna Better Health of North Carolina, Inc. v. North Carolina Department of Health and Human Services, 279 N.C. App. 261, 268, 866 S.E.2d 265, 270 (2021) (emphasis in original) (citation, quotation marks, and brackets omitted). Service requirements under North Carolina General Statute § 150B-46 are jurisdictional; a case is properly dismissed where a party is not properly served. *Id.* at 269, 866 S.E.2d at 270 (citation omitted). For the trial court to exercise personal jurisdiction over Mr. Minick, as a "part[y] of record to the administrative proceedings," the Board was required to serve the Petition upon Mr. Minick within 10 days of the Petition being filed with the trial court, by personal service or certified mail. N.C. Gen. Stat. § 150B-46.

There is no dispute Mr. Minick was a party to the administrative proceeding and service upon him was required. The dispositive question here is whether service *upon Mr. Minick's attorney*, by certified mail, constitutes service *upon Mr. Minick* for purposes of satisfying the jurisdictional prerequisites set forth in North Carolina General Statute § 150B-46: if so, Mr. Minick was properly served; if not, Mr. Minick was not properly served.

We first address the parties' arguments regarding *Follum v. North Carolina State University*, 198 N.C. App. 389, 679 S.E.2d 420 (2009), and *Butler v. Scotland County Board of Education*, 257 N.C. App. 570, 811 S.E.2d 185 (2018); the cases relied upon by Mr. Minick in his motion to dismiss the Petition. The Board seeks to distinguish these cases and asserts "[t]his Court's holdings in the cases of *Follum* and *Butler* do not support dismissal of the Board's Petition" because "[t]he facts in *Follum* and *Butler* are inapplicable to this case." The Board argues that, although the petitioner in *Follum* served his petition for judicial review on the respondent's attorney of record in that case, *see Follum*, 198 N.C. App. at 391, 679 S.E.2d at 421, and although the petitioner in *Butler* also served his petition for judicial review upon the attorney for the respondent, *see Butler*, 257 N.C. App. at 571, 811 S.E.2d at 187, these cases are distinguishable from the present case because the Board "did serve [Mr.

Minick] with a copy of its Petition" when the Board "specifically directed its certified mailing to [Mr. Minick] *at his attorney's address*," (emphasis added), consistent with Mr. Minick's "directive" to serve him at his second attorney's address as established by his use of his first attorney's address on the CCH Petition. The Board also notes Mr. Minick's motion to dismiss shows Mr. Minick had actual knowledge of the Petition. Mr. Minick argues both cases are controlling and not distinguishable. Mr. Minick asserts "[i]n both cases, as here, the dispositive issue was that the attorney [served] was not the party." (Brackets added.)

Although both *Follum* and *Butler* are cases where the petitioner was the individual party, and not the respective licensing board or employer, the procedural posture for both cases is similar. In *Follum*, the petitioner filed a contested case petition alleging North Carolina State University ("NCSU"), the respondent, demoted him without cause and failed to post employment positions he qualified for. *Follum*, 198 N.C. App. at 390-91, 679 S.E.2d at 421. OAH dismissed the petition after NCSU filed a motion pursuant to North Carolina Rule of Civil Procedure 12(b) to dismiss for lack of personal jurisdiction, subject matter jurisdiction, and failure to state a claim. *Id.* at 391, 679 S.E.2d at 421. OAH mailed a copy of the decision to Mr. Follum and to NCSU's attorney of record, Ms. Potter. *Id.*

Mr. Follum then filed a petition for judicial review seeking review of the decision. *Id.* Mr. Follum served the petition on NCSU's attorney but "did not serve respondent's process agent nor any other individual employed by respondent." *Id.* NCSU filed a motion to dismiss for insufficiency of process "asserting that petitioner had failed to properly serve the [p]etition for [j]udicial [r]eview." *Id.* Mr. Follum then served the petition on NCSU's process agent. *Id.* at 391, 679 S.E.2d at 421-22. The trial court held a hearing and concluded, among other issues not applicable to this appeal, that NCSU's attorney of record "was not an individual who could properly receive service." *Id.* at 391-92, 679 S.E.2d at 422. Mr. Follum appealed to this Court. *Id.* at 392, 679 S.E.2d at 422.

On appeal, Mr. Follum asserted he properly served NCSU the petition by serving NCSU's attorney of record, although by the time he later did serve NCSU's process agent the petition was untimely. *Id.* This Court disagreed. *Id.* After a review of *Davis v. North Carolina Dept. of Human Resources*, 126 N.C. App. 383, 485 S.E.2d 342 (1997), *aff'd in part*, *rev'd in part on other grounds*, 349 N.C. 208, 505 S.E.2d 77 (1998) (affirmed in part as to issue of service), this Court determined:

> that in order to comply with section 150B-46, at the very least, petitioner did have to serve said petition upon a

> "person at the agency[,]" i.e., a person at the agency that was a party to the administrative proceedings. [*Davis*, 126 N.C. App.] at 388, 485 S.E.2d at 345. Here, *as respondent's counsel of record*, Ms. Potter was charged with representing respondent's interests; however, Ms. Potter is an employee of the Department of Justice and a member of the Attorney General's staff, not of NCSU. As such, as set out in *Davis*, Ms. Potter does not qualify as a "person at the agency[,]" and service of the Petition for Judicial Review upon her does not comply with section 150B-46. *Id.*

Follum, 198 N.C. App. at 394, 679 S.E.2d at 423 (emphasis added). This Court determined serving a party's attorney is not sufficient under North Carolina General Statute § 150B-46. *See id.*

Mr. Follum also argued, similar to the Board's argument here, that service in *Follum* satisfied North Carolina General Statute § 150B-46 because he was unable to acquire a physical street address to which he could mail the petition; he was only able to find a post office box address. *Id.* Mr. Follum claimed a private letter carrier would not deliver to a post office box, and a provision of Rule of Civil Procedure 4 therefore allowed service upon NCSU's attorney. *Id.* This Court rejected the argument that service on a party's attorney was sufficient when a petitioner could not secure a mailing address for a respondent. *Id.* First, the issue was controlled by North Carolina General Statute § 150B-46, not Rule of Civil Procedure 4(j)(4)(c), and second, the record indicated "petitioner was aware of [NCSU's process agent's] physical street address[.]" *Id.* at 395, 679 S.E.2d at 424. The Court ultimately concluded "petitioner's service of his [p]etition for [j]udicial [r]eview upon Ms. Potter . . . did not comply with the mandates of section 150B-46 *because Ms. Potter is not a party of record to the administrative proceedings*," *id.* (emphasis added), even though she had been "charged with representing [NCSU's] interests," *id.* at 394, 679 S.E.2d at 423, and the petitioner failed to serve the petition on any proper party within the 10-day window provided in North Carolina General Statute § 150B-46. *Id.* at 395, 679 S.E.2d at 424. Service under North Carolina General Statute § 150B-46 requires service upon a party of record, and not upon an attorney representing the party's interests. *See id.*

This Court's analysis in *Butler* is equally instructive. *See generally Butler*, 257 N.C. App. 570, 811 S.E.2d 185. The petitioner, Mr. Butler, was a career teacher; he was placed on suspension and the school board later terminated his employment during a review hearing. *Id.* at 571, 811 S.E.2d at 187. Mr. Butler filed a "Notice of Appeal and Petition for Judicial

Review" from the hearing before the school board. *Id.* The school board filed a motion to dismiss asserting Mr. Butler failed to properly serve the petition upon the school board. *Id.* The trial court held a hearing, then entered an order granting the motion to dismiss, and Mr. Butler appealed to this Court. *Id.*

After a brief discussion determining that North Carolina General Statute § 150B-46 controlled the issue of service, this Court concluded that: "It is undisputed that Butler's petition failed to comply with N.C. Gen. Stat. § 150B-46 in several respects. . . . Second, Butler failed to personally serve the Board within ten days of the filing of the petition by means of either personal service or certified mail." *Id.* at 573, 811 S.E.2d at 188. After further review of the applicability of provisions of the Administrative Procedures Act in school board appeals, this Court, citing *Follum*, 198 N.C. App. at 395, 679 S.E.2d at 424, held the petitioner's "appeal was deficient in" the same manner because the petitioner:

> failed to comply with N.C. Gen. Stat. § 150B-46's service requirements in that instead of personally serving the Board with his petition within the ten-day time limit he *simply served a copy of his petition upon the attorney for the Board*. Thus, his petition for judicial review was properly dismissed by the trial court.

Butler, 257 N.C. App. at 578, 811 S.E.2d at 191 (emphasis altered).

While facts of these cases vary, as noted by the Board, the dispositive issue does not. In each case, the petitioners failed to comply with North Carolina General Statute § 150B-46 because they failed to personally serve respondents as parties to the administrative proceedings below but instead served an attorney representing the respondents. Although service on an attorney of record would be appropriate in many other types of cases under Rule 4 of the North Carolina Rules of Civil Procedure, North Carolina General Statute § 150B-46 controls service in this context. *See Davis*, 126 N.C. App. at 388, 485 S.E.2d at 345 (" '[W]here one statute deals with a particular subject or situation in specific detail, while another statute deals with the subject in broad, general terms, the particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary.' *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154-55, 423 S.E.2d 747, 751 (1992). In the present case, G.S. 150B-46 deals with the service of a petition for judicial review of an agency decision, while Rule 4 applies generally to service in all civil matters. Therefore, since G.S. 150B-46 is more specific and there is no legislative intent to the contrary, its terms control.").

Here, the Board only "served" Mr. Minick by mailing a copy of the Petition to his attorney's address. The Board argues that service upon Mr. Minick's second attorney was appropriate because Mr. Minick "directed" the Board to do so by listing his first attorney's address on the original CCH Petition. The Board argues Mr. Minick's decision to print his first attorney's address on the line labeled "Print your full address here" on the CCH Petition was a "directive" to serve Mr. Minick at that address, or apparently any future counsel's address. In the cases discussed above, the attorneys who were served all had appeared in the proceedings and were already representing the respondents, but this Court in each case held service upon the attorney was not sufficient. *See Butler*, 257 N.C. App. at 578, 811 S.E.2d at 191; *Follum*, 198 N.C. App. at 395, 679 S.E.2d at 424. Thus, the mere appearance of the attorney as counsel in the case does not constitute a "directive" to serve the attorney for purposes of North Carolina General Statute § 150B-46. The CCH Petition does not include any language to indicate that, by printing an address other than his own on the CCH Petition, Mr. Minick waived the statutory service requirements in North Carolina General Statute § 150B-46. *See Aetna*, 279 N.C. App. at 268, 866 S.E.2d at 270 (noting that after the petitioner asserted an agreement existed for counsel to serve all pleadings via email, "[t]he superior court explicitly rejected these assertions and found, 'there was no such agreement' and 'with respect to this judicial review proceeding in particular, there was no evidence or argument that the Department or any other party agreed to waive the statutory service requirements necessary to vest jurisdiction in the superior court for a petition for judicial review' "). The fact that the Board "directed" the Petition to Mr. Minick after mailing it to his attorney's office does not change the fact that the Board only sent a copy of the Petition to Mr. Minick's attorney, but not Mr. Minick.[3]

The Board also noted, "Moreover, [Mr. Minick's] Motion to Dismiss acknowledged timely receipt of the Board's Petition." But in each case discussed above, it appears the respondent had actual notice of the petitions for review. *See Butler*, 257 N.C. App. at 571, 811 S.E.2d at 187; *Follum*, 198 N.C. App. at 391, 679 S.E.2d at 421-22. Even if Mr. Minick had actual notice of the Petition, this notice does not render service upon his attorney compliant with North Carolina General Statute § 150B-46. *See Butler*, 257 N.C. App. at 571, 811 S.E.2d at 187; *Follum*, 198 N.C. App. at 391, 679 S.E.2d at 421-22.

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3. There was no dispute regarding Mr. Minick's address or the Board's knowledge of his address. The record shows the Board previously served Mr. Minick correspondence related to his license suspension at Mr. Minick's home address.

Strict compliance with North Carolina General Statute § 150B-46 is required for proper service of a party, and without such compliance there is no personal jurisdiction. *Aetna*, 279 N.C. App. at 268-69, 866 S.E.2d at 270 (determining service upon counsel was inadequate to serve a party under North Carolina General Statute § 150B-46). Accordingly, the trial court correctly concluded Mr. Minick was not properly served and thus granted his motion to dismiss.

III. Conclusion

Service upon Mr. Minick's attorney did not satisfy the North Carolina General Statute § 150B-46 service requirement. We affirm the trial court's order granting Mr. Minick's motion to dismiss.

AFFIRMED.

Judges MURPHY and GORE concur.

SOUTHLAND NATIONAL INSURANCE CORPORATION IN REHABILITATION, BANKERS LIFE INSURANCE COMPANY IN REHABILITATION, COLORADO BANKERS LIFE INSURANCE COMPANY, IN REHABILITATION, AND SOUTHLAND NATIONAL REINSURANCE CORPORATION, IN REHABILITATION, PLAINTIFFS

v.

GREG E. LINDBERG, GLOBAL GROWTH HOLDINGS, INC. F/K/A ACADEMY ASSOCIATION, INC., AND NEW ENGLAND CAPITAL, LLC, DEFENDANTS

No. COA22-1049

Filed 20 June 2023

1. Contracts—memorandum of understanding—restructuring of insolvent insurers—severability of illegal provision

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants), where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, and then failed to complete the restructuring plan by the deadline under the MOU, the trial court—ruling in favor of plaintiffs on their breach of contract claim—did not err in enforcing the remainder of the MOU after severing one of its unenforceable provisions (regarding the amendment of loan

agreements between plaintiffs and defendants' affiliated companies). The validity of the MOU's remaining provisions did not depend upon the unenforceable provision, nor did the unenforceable provision constitute a "main purpose" or an "essential feature" as defined in the MOU. Further, the inclusion of a severability clause in the MOU suggested that the parties intended the MOU to be divisible.

2. Fraud—fraudulent inducement—memorandum of understanding —restructuring of insolvent insurers—no due diligence—reasonable reliance

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants), where defendants bought out plaintiffs, caused $1.2 billion held for plaintiffs' policyholders to be invested into defendants' non-insurance affiliate companies, entered into a "Memorandum of Understanding" (MOU) with plaintiffs memorializing a restructuring plan to facilitate repayment of plaintiffs' debts, and then failed to complete the restructuring plan by the deadline under the MOU, the trial court properly held defendants liable for fraudulently inducing plaintiffs to enter into the MOU and two other related agreements. The record showed that defendants made representations about their ability to perform under the MOU while knowing that performance under the MOU was impossible, and plaintiffs relied on those representations when entering into the MOU and other agreements. Further, although plaintiffs failed to conduct due diligence before entering these agreements, their reliance on defendants' representations was reasonable where: (1) the duty of due diligence applicable to sophisticated business entities in real property sales transactions did not apply to plaintiffs, (2) discovery of defendants' fraud could not have been easily verified, and (3) defendants were in the best position to know whether they could perform under the MOU's terms.

3. Damages and Remedies—fraud—compensatory and punitive damages—in relation to specific performance on breach of contract claim—election of remedies—judgment not self-executing

In an action brought by a group of insolvent insurers (plaintiffs) against a business owner and his company (defendants), who bought out plaintiffs and then failed to carry out a debt restructuring plan for plaintiffs under an agreement between the parties, the trial court—which awarded the remedy of specific performance on plaintiffs' breach of contract claim—erred in declining to award compensatory and punitive damages on plaintiffs' claim for fraud.

Although plaintiffs had elected the remedy of specific performance under the agreement, the doctrine of election of remedies did not bar plaintiffs from recovering both specific performance and monetary damages because each remedy related to a separate wrongdoing by defendants (breach of contract and fraud, respectively). Furthermore, because the trial court's judgment conditioned the assessment of compensatory damages on whether the appellate court determined that specific performance was an available remedy, the judgment was not self-executing and therefore was vacated (as to remedies available to plaintiffs on their fraud claim).

Appeal by defendants and cross-appeal by plaintiffs from order and judgment entered 18 May 2022 by Judge A. Graham Shirley II in Wake County Superior Court. Heard in the Court of Appeals 26 April 2023.

Fox Rothschild by Matthew Nis Leerberg, Troy D. Shelton, Nathan W. Wilson for petitioner-appellants, cross-appellees.

Condon Tobin Sladek Thorton PLLC by Aaron Z. Tobin for petitioner-appellants, cross-appellees.

Williams Mullen by Wes J. Camden, Caitlin M. Poe, Lauren E. Fussell for respondent-appellees, cross-appellants.

FLOOD, Judge.

I. Facts and Procedural Background

Southland National Insurance Corporation, Bankers Life Insurance Company, Colorado Bankers Life Insurance Company, and Southland National Reinsurance Corporation (collectively "Plaintiffs") are insolvent insurers who were purchased by Greg. E. Lindberg ("Lindberg") in 2014. Lindberg, along with Global Growth Holdings, Inc., formerly known as Academy Association, Inc. and New England Capital, LLC (collectively, "Defendants"), appeal from the trial court's order that held Defendants liable for breach of contract and fraud. Plaintiffs cross-appeal on the narrow issue of whether the trial court erred in failing to award them compensatory and punitive damages in addition to specific performance. The facts that underlie the case are as follows.

The Plan

In 2014, Lindberg re-domesticated Plaintiffs to North Carolina in order to take advantage of this State's favorable regulations. Prior to this

re-domestication, acting as owner of Plaintiffs, Lindberg made a special agreement with former Commissioner of Insurance, Wayne Goodwin, allowing Lindberg to invest up to forty percent of Plaintiffs' assets into affiliated business entities. Lindberg then invested up to forty percent of Plaintiffs' money into the purchase of other, non-insurance companies, also owned by Lindberg. Simply put, Lindberg created a scheme in which he caused $1.2 billon held for Plaintiffs' policyholders to be invested into other non-insurance companies that he also owned or controlled.

In November 2016, Wayne Goodwin lost his seat as Commissioner of Insurance to Mike Causey (the "Commissioner"), who reduced the cap on affiliated investments from forty percent to ten percent. Lindberg struggled to untangle his affiliated investments and, as the deadline for diversification drew near, the North Carolina Department of Insurance (the "NCDOI") grew concerned that there would be a "mismatch between investments and policyholder liabilities." In other words, because Lindberg had invested so much of Plaintiffs' money into affiliated companies, the NCDOI worried that Plaintiffs might experience a shortfall on their obligation to pay individual policyholders.

Upon realizing an impending shortfall, on 18 October 2018, the Commissioner, Plaintiffs, and Lindberg entered into a Consent Order placing Plaintiffs under administrative supervision. The NCDOI placed an out-of-state company, Noble Consulting Services ("Noble"), in charge of the administrative supervision with Noble's CEO and owner, Mike Dinius ("Dinius") as the main point of contact. During the period of Administrative Supervision, Defendants agreed to deadlines by which they were required to reduce their affiliated investments. Dinius conducted an analysis and concluded it would be virtually impossible for those deadlines to be met. In an effort to avoid the shortfall, in May 2019 Plaintiffs agreed to negotiate a restructuring of the affiliated business entities' obligations. The negotiations around restructuring resulted in a Memorandum of Understanding (the "MOU"), the enforceability of which is central to this case.

While negotiating the terms of the MOU, Defendants maintained total access and control over the portfolios of their affiliated companies—which, by the terms of the MOU were called Specified Affiliated Companies ("SACs"). During this time, Plaintiffs had no equity interest, control, or visibility into the SACs or several tiers of holding companies above them, though they could have asked for that information at any time. Plaintiffs opted to rely on the representations and warranties provided by Defendants. Dinius and members of Plaintiffs' management team were aware that some of the SACs had obligations to third

parties, but trusted Defendants' representations and warranties regarding their ability to uphold the terms of the MOU, regardless of those obligations. When asked at trial if during the course of negotiating the MOU, Defendants ever said "[h]ey, Mr. Dinius, look, you know, we're not sure everything in here is right so don't hold us to it," Dinius replied "[n]o, they did not." Dinius further stated that the representations and warranties made in the MOU were "very important[,]" and "[s]ince Lindberg controlled all of these entities, we were relying on him to tell us if he could effectuate this or not."

On 27 June 2019, the parties entered into several agreements—the MOU, an Interim Amendment to Loan Agreement ("IALA"), and a Revolving Credit Agreement (the "Revolver"). The IALA provided debt relief to Defendants of more than $100 million by deferring interest payments for a period of six months and modifying the underlying loans' interest rates and maturity dates, effectively allowing Defendants more time to repay the loans. Meanwhile, under the terms of the Revolver, Plaintiff Colorado Bankers Life Insurance Company provided a $40 million revolving line of credit to a company owned by Defendants.

The MOU

The MOU, in essence, was an agreement to adjust and restructure debts to facilitate repayment, requiring Lindberg to relinquish control of the SACs by making them subsidiaries of a New Holding Company (the "NHC"). The NHC would be managed by an independent board of qualified individuals whose primary goal would be protecting the best interests of Plaintiffs' policyholders.

Of multiple opening recitals in the MOU, one states the parties . . .

> intend that this MOU and the transactions contemplated herein will serve to protect the best interests of the policyholders of each of the North Carolina Insurance Companies . . . [.] In so doing, the Parties also intend to increase the long-term equity value of the [SACs], so long as it is consistent with the protection of the best interest of the Policyholders and in accordance with North Carolina law.

After the recitals, the MOU enumerated four Articles. Article I bound the parties to execute and deliver the Interim Loan Amendments attached to the MOU, a document that granted debt relief to Defendants. Article II titled "Global Restructuring" sought to restructure most of the revenue-generating businesses within Lindberg's portfolio of companies

that owed money to Plaintiffs. Under Article II, the NHC would use the revenue from these companies in Lindberg's portfolio to pay down the debts owed to Plaintiffs. Importantly, Article II also required the parties to restructure the SACs "to become subsidiaries, either directly or indirectly," of the NHC "on or before [30 September 2019]." Article III titled "Global Loan Amendments" allowed the NHC to make additional, future amendments to the loans on which the SACs were the ultimate borrowers, ensuring that any new loans entered into had protections and benefits for Lindberg. The MOU did not require that Article II and Article III be implemented contemporaneously.

Finally, Article IV titled "Additional Terms and Conditions" contained representations and warranties that:

> a. Each of the Recitals, Schedules, and Exhibits to this MOU are true and accurate in all respects;
>
> . . .
>
> e. The execution of the MOU and the consummation of the transaction set forth in the MOU do not violate any law;
>
> . . .
>
> g. The execution of the MOU and the consummation of the transactions set forth in the MOU do not result in a breach of, constitute a default under, or result in the acceleration of any contract to which any of them is a party or is bound or to which any of their assets are subject[.]
>
> h. The execution of the MOU and the consummation of the transactions set forth in the MOU do not create in any party the right to accelerate, terminate, modify, cancel, or require any notice or consent under any contract to which any of them is a party or is bound or to which any of their assets are subject[.]

Additionally, Article IV contained two important clauses: a severability clause and a specific performance clause. The severability clause stated that "[a]ny term or provision of this MOU that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof . . . [.]" Under the specific performance clause, the parties agreed that a nonbreaching party "shall be entitled to specific performance . . . in addition to any other remedy to which they are entitled at law or in equity."

On the same day the parties entered into the MOU, IALA, and Revolver, Plaintiffs consented to being placed into Rehabilitation pursuant to N.C. Gen. Stat. § 58-30-75. During Rehabilitation, a moratorium was placed on policyholder surrenders, and Plaintiffs' obligation to pay policyholders was suspended. During the period of Rehabilitation and upon execution of the MOU, Defendants had either direct or indirect control over most of the SACs and the authority to contribute those entities to the NHC.

The Breach

Two weeks before the deadline to perform under Article II of the MOU, George Vandeman ("Vandeman") acting as a chairman for Defendant Academy Association, Inc., sent a communication to Plaintiffs stating that the restructuring plan set forth under Article II could not be accomplished because:

> i. Seller notes . . . are subject to breach and acceleration upon reorganization;
>
> ii. The debt reduction from the IALA and the reorganization may result in adverse tax consequences to Lindberg; [and]
>
> iii. The reorganization will trigger certain changes in control provisions in contracts with third-parties[.]

On 30 September 2019, Defendants failed to contribute the SACs to the NHC, thus breaching Article II of the MOU. On 1 October 2019, Plaintiffs filed suit in Wake County Superior Court alleging breach of the MOU and fraud. Plaintiffs requested specific performance of the MOU, compensatory damages, and punitive damages.

The Trial Court's Order and Judgment

After a bench trial, the trial court entered a judgment in favor of Plaintiffs, ordering specific performance but not compensatory or punitive damages. First, the trial court held that Article III of the MOU was unenforceable because it was an agreement to agree, making it severable from the rest of the MOU. Upholding the remainder of the MOU, the trial court found Defendants breached Article II by failing to perform by the 30 September 2022 deadline, and awarded specific performance.

Next, the trial court concluded that Defendants fraudulently induced Plaintiffs to sign the MOU by making false representations and warranties under Article IV regarding the execution and performance of

obligations. Specifically, the trial court found that Defendants fraudulently represented that performance under the MOU was duly authorized and

> (2) [did] not violate any law; (3) would not result in a breach of, constitute a default under, or result in the acceleration of any contract to which any of them is a party or is bound or to which any of their assets are subject; and (4) [did] not create in any party the right to accelerate, terminate, modify, cancel or require any notice or consent under any contract to which any of them is a party or is bound or to which any of their assets are subject.

The trial court further found that the fraudulent representations and warranties made to Plaintiffs in the MOU caused Plaintiffs to enter into two other agreements—the IALA and the Revolver—to their detriment. The trial court declined to award any remedy for Plaintiffs' fraud claim because they had elected the remedy of specific performance. Instead, the trial court stated that "if an appellate Court should determine that specific performance is not an available remedy this Court would enter an award of punitive damages in the amount of three times compensatory damages."

On 26 May 2022, the trial court entered an Amended Judgment and Order to correct clerical errors. Defendants filed a Notice of Appeal of the Amended Judgment and Order on 13 June 2022. Plaintiffs then filed a Conditional Notice of Cross-Appeal, seeking review of the trial court's failure to award fraud damages. As part of their Cross-Appeal, Plaintiffs also filed a request for Judicial Notice on 19 January 2023, which this Court denied by order.

II. Jurisdiction

An appeal lies of right directly to this Court from any final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Argument

On appeal, Defendants argue that Article III was an essential part of the MOU and without it, the entire agreement was rendered unenforceable. Further, if the MOU was entirely unenforceable, then the trial court erred when it found fraudulent inducement. For the reasons set forth below, we disagree.

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the

trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

B. Severance of Article III

[1] Plaintiffs and Defendants agree the trial court correctly concluded Article III was an unenforceable agreement to agree. Defendants, however, contend Article III was essential to the MOU's main purpose, and severing it rendered the entire MOU unenforceable. After a thorough review, we conclude the trial court did not err when it enforced the remainder of the MOU after severing Article III.

1. Main Purpose

Defendants argue Article III was a main purpose and an essential feature of the MOU upon which other provisions depended. We disagree.

To determine whether an unenforceable provision is a "main purpose" or "essential feature," the Court must look at whether other provisions of the contract are dependent on the unenforceable one. *See Robinson, Bradshaw, & Hinson, P.A. v. Smith*, 129 N.C. App. 305, 314, 498 S.E.2d 841, 848 (1998) (holding that despite one section of a contingency-fee contract being invalid, the remainder of the contract is still enforceable because it is severable and not the main purpose or essential feature of the agreement). Put another way, severance of an unenforceable provision is appropriate when the other provisions "are in no way dependent upon the enforcement of the illegal provisions for their validity." *Am. Nat'l Elec. Corp. v. Poythress Commer. Contractors, Inc.*, 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) (citations omitted).

To argue that a contract's main purpose may not be severed, Defendants cite to *Green v. Black*, a case in which the parties entered into a written agreement where the defendant was to repay the plaintiff for a personal loan. *Green v. Black*, 270 N.C. App. 258, 840 S.E.2d 900 (2020). The agreement included a provision stating that, should the defendant default, a new agreement would be drafted that would include a "mutually agreed upon payment schedule for the remaining amount due." *Green*, 270 N.C. App. at 260, 840 S.E.2d at 902. This Court held that the provision was void for uncertainty and was therefore unenforceable, but upheld the remainder of the agreement. *Id.* at 265, 840 S.E.2d at 905–06. This Court further concluded that the parties' intended main purpose was to "memorialize an agreement to exchange money for

a promise to pay the money back with interest on a certain date[,]" and because of that, a sentence regarding what would happen in the event of default was severable. *Id.* at 264, 840 S.E.2d at 905.

Unlike the parties in *Green*, the parties in this case expressly memorialized the MOU's main purpose, leaving nothing for this Court to demystify. At the time of signing, the parties agreed that the MOU's main purpose was "to protect the best interests of the policyholders[,]" and "in so doing, the parties also intend to increase the long-term equity value of the [SACs], *so long as it is consistent with the protection of the best interests of the Policyholders*[.]" (emphasis added).

Defendants attempt to convince this Court that the MOU's main purpose was not only to rehabilitate Plaintiffs' companies, but to ensure Lindberg would continue to benefit from the overall transaction. This argument ignores another of Defendants' motivations: to make money using capital provided by hardworking, North Carolina policyholders.

2. Severability

Defendants further argue that because Article III was the main purpose of the MOU, severing it rendered the remainder of the MOU unenforceable. We disagree.

"It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners . . . ." *Ussery v. Branch Banking and Trust Co.*, 368 N.C. 325, 336, 777 S.E.2d 272, 280 (2015) (quoting *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 693–94, 51 S.E.2d 191, 199 (1949) (Stacy, C.J. , Dissenting)). " 'A contract is entire, and not severable, when, by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other, and interdependent.' " *Mebane Lumber Co. v. Avery & Bullock Builders, Inc.*, 270 N.C. 337, 341, 154 S.E.2d 665, 668 (1967) (quoting *Wooten v. Walters*, 110 N.C. 251, 254, 14 S.E. 734, 735 (1892)). On the other hand, this Court has held that a contract may be severable when it has two or more parts that are "not necessarily dependent on each other, nor is it intended by the parties that they shall be." *Kornegay v. Aspen Asset Group, LLC*, 204 N.C. App. 213, 226, 693 S.E.2d 723, 734 (2010) (quoting *Mebane Lumber Co.*, 270 N.C. at 342, 154 S.E.2d at 668). A court may sever an unenforceable provision and enforce the balance of the contract only when the other provisions "are in no way dependent upon the enforcement of the illegal provisions for their validity." *Am. Nat'l Elec. Corp.*, 167 N.C. App. at 101, 604 S.E.2d at 317. While not determinative, the decision to include a severability clause in an agreement may provide

general guidance when determining the parties' intent. *See Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 421-22, 276 S.E.2d 422, 434-35 (1981) ("[A] severability is relevant to a decision only when the validity of a particular provision of the Act is at issue."); *see also* 15 Williston on Contracts § 45:6 (4th ed) ("The parties' intent to enter into a divisible contract may be expressed in the contract directly, through a so-called 'severability clause[.]' ").

Defendants argue "[t]he rest of the MOU depended on [Article III,]" and "Article III was the key to maximizing the value of the SACs to pay back Plaintiffs investments." To support this argument, Defendants make several points. First, as evidence of the entangled purpose of Articles II and III, Defendants point to the fact that performance under the two articles was due on the same day, stating that the articles were dependent on each other "because of the nature of insurance rehabilitation." Next, Defendants claim that, standing alone, Article II left Lindberg vulnerable because it allowed the NHC and Plaintiffs to bind themselves (and ultimately Lindberg) to potentially risky financing agreements. Further, without Article III, the SACs would no longer enjoy the protection of a right to cure within thirty days after notice of default. Finally, Article III provided Lindberg a "success fee" of 1.5% of all the debt that was paid down—a significant benefit which, without Article III, Lindberg would no longer be entitled to.

Defendants' evidence of Article III's intrinsic entanglement with the remainder of the MOU is attenuated at best. As the trial court noted in its Amended Judgment and Order, "the other Articles of the MOU can and have been implemented and enforced notwithstanding the failure of the Parties to complete [Article III]." A review of the Record leads us to the same conclusion: Article II and Article III were not necessarily dependent on each other, nor did the parties intend they be. *See Kornegay*, 204 N.C. App. at 213, 693 S.E.2d at 723 (holding a contract was divisible because there were two distinct promises, each of which could be performed without the other). Importantly, as of the publishing of this opinion, Defendants and Lindberg have enjoyed the benefit of millions of dollars of debt relief provided by Plaintiffs, yet continue to claim the MOU is unenforceable.

Further, despite each Article under the MOU having the common purpose of rehabilitating Plaintiffs, performance of the parties under each Article was separate and distinct. Under Article I, Plaintiffs promised to grant debt relief to Defendants; under Article II Defendants promised to reorganize the SACs under the NHC; finally, under Article III, both parties would amend loan agreements from Plaintiffs to some of the SACs

in the future. We further note that the amendments and restructuring outlined in Article III were to take place *after* the SACs were transferred to the NHC. These facts tend to show that each article required independent performance during different times and could involve independent breach. Further, while it may be true that without Article III Lindberg would be left in a financially vulnerable situation, protecting Lindberg was not the primary purpose of the MOU. Rather, the primary purpose was to protect Plaintiffs' policyholders, as concluded above. Finally, taking into consideration all "four corners" of the MOU and the promises contained therein, this Court gleans the parties intended the MOU to be divisible given the inclusion of a severability clause. *See Ussery*, 368 N.C. at 336, 777 S.E.2d at 280. For those reasons, we conclude the trial court did not err when it enforced the remainder of the MOU after severing Article III. *See Kornegay*, 204 N.C. App. at 213, 693 S.E.2d at 723.

C. Fraudulent Inducement

[2] Next, Defendants appeal from the trial court's finding of fraudulent inducement, arguing that Plaintiffs' reliance on the representations and warranties under Article IV was per se unreasonable because they are sophisticated entities and failed to conduct any due diligence prior to entering into the MOU. We disagree.

To prevail on their claim that the trial court erred when it found Defendants liable for fraudulent inducement, Defendants must show that none of the evidence relied on by the trial court in reaching its conclusion was competent. *Sisk v. Transylvania Cmty. Hosp. Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010). To determine the competency of the trial court's evidence supporting its conclusion that Defendants fraudulently induced Plaintiffs, we begin by analyzing whether all the elements of fraud are met. We then examine whether Plaintiffs' reliance on Defendants' representations was reasonable.

1. Fraud

Defendants assert the trial court erred in finding they fraudulently induced Plaintiffs to enter into the MOU, IALA and Revolver. The elements of fraud are: "(1) false representation or concealment of a past or existing material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injured party." *Whisnant v. Carolina Farm Credit*, 204 N.C. App. 84, 94, 693 S.E.2d 149, 156–57 (2010) (citation omitted) (cleaned up).

Here, there is no disputing that Plaintiffs were deceived by Defendants, and they suffered economic injury as a result. Therefore,

this Court turns its attention to the remaining three elements to determine whether Defendants' conduct amounted to fraud.

With respect to the first three elements, the Record tends to show that Defendants made representations and warranties that were calculated to deceive Plaintiffs regarding their obligations to third parties and ability to perform under the terms of the MOU. Specifically, under Article IV, Defendants represented that

> [t]he execution of the MOU and the consummation of the transactions set forth in the MOU do not create in any party the right to accelerate, terminate, modify, cancel, or require any notice or consent under any contract to which any of them is a party or is bound or to which any of their assets are subject[.]

Two weeks before performance was due, however, Vandeman, acting as a chairman for Defendant Academy Association, Inc., sent an email to Plaintiffs stating that the restructuring plan set forth under Article II could not be accomplished because:

> i. Seller notes . . . are subject to breach and acceleration upon reorganization;
>
> ii. The debt reduction from the IALA and the reorganization may result in adverse tax consequences to Lindberg; [and]
>
> iii. The reorganization will trigger certain changes in control provisions in contracts with third-parties[.]

Put plainly, Defendants made representations about their ability to perform under the MOU, then just two weeks before performance was due, cited those exact representations as the reason why they *could not* perform. Relying on these representations, Plaintiffs entered into the MOU, IALA, and Revolver, which provided Defendants debt relief of more than $100 million and a $40 million revolving line of credit. The facts in the Record show Defendants were in the best position to understand whether they could perform under the MOU's terms because Lindberg controlled the SACs. Further, because Lindberg understood the intricacies of the SACs' business structures, he knew performance under the MOU was impossible, yet made representations that induced Plaintiffs to enter into the contract. For those reasons, we hold the trial court did not err in finding Defendants' actions satisfied the elements of fraud. *See Whisnant*, 204 N.C. App. at 94, 693 S.E.2d at 156–57.

2. Reasonable Reliance

Next, we consider whether Plaintiffs' reliance on Defendant's fraudulent representations was reasonable. To prevail on a fraud claim, a plaintiff must prove they actually relied on misrepresentations and that their reliance was reasonable. *Cobb v. Pa. Life Ins. Co.*, 215 N.C. App. 268, 277, 715 S.E.2d 541, 549 (2011). "Reliance is not reasonable if a plaintiff fails to make any independent investigation . . . [.]" *State Props., LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002). Reliance will not be considered unreasonable, however, "if the plaintiff can show that 'it was induced to forego additional investigation by defendant's misrepresentations.' " *Hudgins v. Wagoner*, 204 N.C. App. 480, 491, S.E.2d 436, 445 (2010) (citations omitted). Additionally, if a defendant's representations "could not be readily or easily verified," a plaintiff's reliance is more likely to be regarded as reasonable. *Phelps-Dickson Builders L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005). The reasonableness of a party's reliance is an issue of fact for the fact finder. *Marcus Bros. Textiles v. Price Waterhouse, LLP*, 350 N.C. 214, 224, 513 S.E.2d 320, 327 (1999). "Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Sisk*, 364 N.C. at 179, 695 S.E.2d at 434 (quoting *Tillman v. Com. Credit Loans, Inc.*, 362 N.C. 93, 100–01, 655 S.E.2d 362, 369 (2008)). Competent evidence is evidence that a "reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, 233 N.C. App. 620, 625, 757 S.E.2d 494, 499 (2014) (citing *In re Adams*, 240 N.C. App. 318, 320-21, 693 S.E.2d 705, 708 (2010)).

Defendants claim that Plaintiffs' reliance was per se unreasonable because Plaintiffs are sophisticated business entities entering into a multi-billion-dollar deal, yet chose to forego conducting any due diligence prior to signing the MOU. Plaintiffs concede they failed to conduct due diligence; however, for the reasons discussed below, we hold their reliance was reasonable under the circumstances.

Defendants cite to several cases involving the sale of real property in which a plaintiff failed to conduct due diligence prior to entering into a contract. There is, however, one important difference between the cases cited and the facts of our current case: this was not a purchase. The MOU was a temporary agreement to help Plaintiffs out of Rehabilitation and, eventually, back into the ownership and control of Lindberg. The MOU functioned as a stop gap to avoid impending financial ruin, and as such, functioned very differently than would an MOU for a real property transaction. Here, the only thing being bought under the MOU was time.

Further, while it is true Plaintiffs had unfettered access to Defendants' accountings, the facts show that Lindberg was in the best position to understand the complex scaffolding of each SAC's business structure. Collectively, these complex structures involved: multiple tiers of operating and holding companies; loans that had been syndicated and repackaged, then transferred several times; underlying loan agreements and sellers' notes; equity equivalence agreements; and third-party financing agreements. Plaintiffs lacked the time and expertise to determine whether the representations and warranties were accurate, and ascertaining that information would have involved a complex legal analysis. The veracity of Defendants' representations could not have been "readily or easily verified," and moreover, Plaintiffs had no reason to believe Lindberg would make false statements, considering he stood to benefit from the MOU's success as well. *See Phelps-Dickson Builders L.L.C.*, 172 N.C. App. at 439, 617 S.E.2d at 671.

Here, because the MOU did not govern a sale, we do not hold Plaintiffs to the same heightened standard as the sophisticated business entities in the case law to which Defendant cites. Further, Plaintiffs' reliance on Defendants' representations was reasonable because discovery of Defendants' fraud would not have been readily or easily verified, and Defendant was in the best position to know whether the MOU, as written, could be effectuated. *See id.* at 439, 617 S.E.2d at 671. For those reasons, we hold the trial court relied on competent evidence to reach its conclusion and affirm the fraud judgment against Defendants.

D. Damages

[3] On cross-appeal, Plaintiffs argue that the trial court erred when it failed to award damages for Defendants' fraud. Conversely, Defendants argue the trial court correctly concluded Plaintiffs were not entitled to compensatory or punitive damages for fraud, reasoning that it would amount to "double recovery," running afoul of the election of remedies doctrine.

After a review of the Record, we agree with Plaintiffs.

1. Standard of Review

"Since this case was tried before a judge sitting without a jury, this Court is bound by the trial court's findings which are supported by competent evidence, even if evidence exists to sustain contrary findings. [R]eview of the trial court's conclusions of law is de novo." *Hickory Orthopaedic Ctr., P.A. v. Nicks*, 179 N.C. App. 281, 286, 633 S.E.2d 831, 834 (2006) (quotation omitted).

2. Election of Remedies Doctrine

"The fact finder . . . has broad discretion in awarding damages to ensure that the plaintiff is made whole and the wrongdoer does not profit from its conduct." *TradeWinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 850, 733 S.E.2d 162, 174 (2012). The "doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." *Smith v. Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954).

Our Supreme Court's precedent demonstrates that remedies for both breach of contract and fraud may coexist. In *Parker v. White*, our Supreme Court held that a party who has been fraudulently induced to enter into a contract may either repudiate the contract or "affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action for deceit the damages caused by the fraud." 235 N.C. 680, 688, 71 S.E.2d 122, 128 (1952). Affirming the contract ends the defrauded party's right to rescind the contract, but does not excuse breach of that agreement. *See Hutchins v. Davis*, 230 N.C. 67, 73, 52 S.E.2d 210, 214 (1949) (holding that affirming a contract does not prevent the defrauded party from recovering by filing a new action or counterclaim for damages sustained as a result of fraud).

Here, the doctrine of election of remedies does not bar Plaintiffs from recovering for both specific performance and for monetary damages because each remedy relates to a separate and distinct wrongdoing by Defendants. Defendants breached the MOU on 1 October 2019 when they failed to reorganize the SACs. Defendants' fraudulent conduct, however, occurred on 27 June 2019 when the MOU, IALA, and Revolver were executed.

It is true that Plaintiffs made one election of remedy relating to their breach of contract claim—specific performance. Plaintiffs' election of specific performance, however, does not preclude them from recovering monetary damages for fraud. These harms are not mutually exclusive and neither are their remedies.

3. Conditional Judgment

A conditional judgment is "one whose force depends upon the performance or nonperformance of certain acts[.]" *Hagedorn v. Hagedorn*, 210 N.C. 164, 165, 185 S.E. 768, 769 (1936). Put another way, if an order is not self-executing, it is "therefore, conditional and void." *Cassidy v. Cheek*, 308 N.C. 670, 674, 303 S.E.2d 792, 795 (1983).

Here, in its judgment, the trial court found Defendants liable for fraud and stated that "if an appellate Court should determine that specific performance is not an available remedy this Court would enter an award of punitive damages in the amount of three times compensatory damages." The conditional assessment of compensatory damages in the event this Court determined specific performance is not available makes the trial court's judgment "not self-executing." *See id.* at 674, 303 S.E.2d at 795. For that reason, we vacate the trial court's judgment only as it pertains to remedies available to Plaintiffs for Defendants' fraud, and we remand for further proceedings consistent with this opinion.

IV. Conclusion

We hold the trial court's conclusions of law were supported by findings of fact based on competent evidence. *See Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176. For those reasons, this Court affirms the trial court's conclusions that the MOU was enforceable after severing Article III, and that Defendants are liable for fraud. This Court further vacates and remands the trial court's order and judgment only as it relates to remedies available to Plaintiffs for Defendants' fraud.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and WOOD concur.

STATE v. COLT

[289 N.C. App. 395 (2023)]

STATE OF NORTH CAROLINA
v.
KARL DAVID COLT, DEFENDANT

No. COA22-514

Filed 20 June 2023

1. Confessions and Incriminating Statements—corpus delicti rule—concealment of death of child—no body found—extrajudicial confession

In defendant's prosecution for concealment of the death of a child who did not die of natural causes, the trial court did not err by denying defendant's motion to dismiss because the State presented sufficient evidence and satisfied the corpus delicti rule. Although the child's body could not be found, the State presented substantial independent evidence tending to establish the trustworthiness of defendant's extrajudicial confession—including the suspicious circumstances under which the child was missing, the discovery of discarded children's items in a hidden campsite where defendant told investigators the body might have been concealed, defendant's text messages to a person who lived in the home with the child that "[the mother] killed or abused her child" and "[y]ou didn't report the crime to the cops just like I didn't," and the fact that defendant was not under arrest when he made the incriminating statements to law enforcement.

2. Evidence—relevance—unfair prejudice—Confrontation Clause—deceased child's mother in prison for murder

In defendant's prosecution for concealment of the death of a child who did not die of natural causes, the trial court did not err by allowing a witness to testify that the child's mother was in prison for second-degree murder. The testimony was relevant to whether the child was deceased; it was not unfairly prejudicial because other substantial evidence established that the child had died of unnatural causes; and, even assuming the testimony raised a Confrontation Clause issue regarding the mother's guilty plea, any potential error would be harmless in light of other evidence establishing that the child had died of unnatural causes.

Chief Judge STROUD concurring in a separate opinion.

Appeal by defendant from judgment entered 26 April 2021 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 11 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marissa K. Jensen, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

FLOOD, Judge.

Karl David Colt ("Defendant") appeals from the trial court's Judgment sentencing him to 80 to 108 months' imprisonment. Defendant argues the State failed to satisfy the *corpus delicti* rule primarily because the minor victim's body was never found, and the State did not present sufficient evidence establishing the minor victim died. Defendant further argues the trial court erred in admitting testimony regarding the minor's mother's conviction for second-degree murder because, among other reasons, the testimony was an inadmissible testimonial statement.

After careful review, we conclude that the *corpus delicti* rule was satisfied because substantial independent evidence established the trustworthiness of Defendant's confession. We further conclude the trial court did not err in overruling Defendant's objections to testimony that the mother was in prison for second-degree murder.

I. Factual and Procedural History

Defendant was indicted on 8 September 2020 for concealment of the death of a child who did not die of natural causes. On 26 April 2021, a jury found Defendant guilty. Defendant was sentenced to an aggravated range of 80 to 108 months' imprisonment.

The evidence presented at trial tended to show Kayla Clements ("Clements") gave birth to a baby boy, Kaceyn, on 11 March 2016. In the spring of 2016, shortly after Kaceyn was born, Clements and Kaceyn moved into the apartment of Clements's younger sister, Sandi. Clements and Kaceyn lived with Sandi until October 2016. Sandi testified that, while Clements and Kaceyn lived in her apartment, Kaceyn spent most of his time in a Graco Pack 'n Play (the "Pack 'n Play"). Sandi further testified that the Pack 'n Play had a blue frame with a green cover, and the green cover had animals around the trim.

Kaceyn's father, Jose Jimenez ("Jimenez"), had periodic visits with Kaceyn after his birth, but Clements stopped allowing Jimenez to see

Kaceyn in late 2016. At trial, testimony confirmed that the last time Jimenez saw Kaceyn was 12 September 2016. While no exact date was given, trial testimony also revealed Jimenez allegedly made arrangements with Clements to see Kaceyn in "late 2016," but Clements always came up with last minute excuses for why she could not meet Jimenez.

In late 2017, Jimenez hired a private investigator and an attorney to help locate Kaceyn, but they could not find him. Jimenez testified that Clements visited Florida in 2017 for "about four or five months" and did not bring Kaceyn with her.

On 8 February 2018, Captain Shawn Harris ("Captain Harris") of the Wayne County Sheriff's Office (the "WCSO") received a call from an officer of the Goldsboro Police Department who had spoken with Jimenez about a missing child. Because the officer believed the case originated outside the jurisdiction of Goldsboro, he introduced Jimenez to Captain Harris. Jimenez explained to Captain Harris that Clements had stopped allowing him to see Kaceyn, and Jimenez's attempts to find Kaceyn with the help of a private investigator failed. As of 8 February 2018, Jimenez had not found Kaceyn, but he did know Clements was in the Carteret County Jail, as confirmed by Captain Harris, who testified she was there on a civil contempt order.

Based on this meeting with Jimenez, the WCSO opened a case on Kaceyn, and on 12 February 2018, it requested the help of the State Bureau of Investigation (the "SBI") in what was officially considered a missing person investigation. Agent Aaron Barnes ("Agent Barnes") of the SBI was assigned to the case.

Through the joint investigation of the WCSO and SBI (collectively, "investigators"), investigators determined the following. On or around 1 October 2016, Clements and Kaceyn moved out of Sandi's apartment and into a home in Goldsboro, North Carolina, (the "Home"). Clements and Kaceyn lived in the Home from approximately October 2016 through November 2016. Jared Greene ("Greene") and Phillip Goff ("Goff") also resided at the Home. Clements had a romantic relationship with Goff, and Greene had a romantic relationship with Defendant, who regularly visited the Home on weekends.

On 15 February 2018, Agent Barnes and two other detectives involved with the investigation interviewed Defendant. Investigators requested to interview Defendant based on his contacts with Clements, Greene, and Goff. This interview was audio recorded, and the recording was played at trial in the presence of the jury.

In the 15 February 2018 interview, Defendant confirmed that he visited Greene, Clements, and Goff at the Home on weekends from August 2016 until approximately May 2017.

During the interview, Defendant stated "at one time there was a child [in the Home], but I do not know what ever happened to the child after that." Defendant confirmed the child in the home was Clements's. Defendant described the Home as "a small cinder block house." Defendant described Kaceyn as an "infant," but guessed he was likely younger than a year old. In October 2016,[1] when Defendant saw Kaceyn for the first time, he observed Kaceyn in a playpen and noticed Kaceyn had bruises on his face that Defendant thought could have been the result of "shaken baby" syndrome. Defendant further told investigators the next time he saw Kaceyn, Kaceyn seemed to have trouble breathing, had a severely swollen head, and appeared braindead. Defendant stated he did not think Kaceyn could have survived without medical treatment.

When investigators asked Defendant if he knew where Kaceyn was, Defendant told investigators he thought it was possible Clements and Goff hid Kaceyn's body in a wooded area across the street from the Home where Goff frequently set up a campsite. Defendant described the campsite as being "a good distance" and not fully visible from the road, with a beaten down path with cut down branches leading to the campsite. Defendant drew investigators a map detailing where the campsite was in comparison to the Home.

Following the interview, investigators confirmed Defendant's statements that the home was a small cinder block residence with a wooded area across the street. On 16 February 2018, investigators searched the wooded area and found "a dark blue or purple . . . Graco playpen frame," a stuffed teddy bear, an inflatable pool toy, and a piece of fabric with a Hello Kitty design on it. Agent Barnes also confirmed that the wooded area contained a campsite due to the presence of a stone fire pit and logs for sitting, and the campsite was not visible from the road.

At trial, the State presented the jury with the Graco playpen frame found in the wooded area. After the playpen frame was set up, the State asked Sandi if the playpen frame found in the woods matched the dimensions of the Pack 'n Play Clements used for Kaceyn while

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1. Defendant told investigators he did not know the exact date, but it was right after Hurricane Matthew because road closures made it difficult for him to drive to the Home. During the trial, Judge Bland took judicial notice that Hurricane Matthew passed through North Carolina on 9 October 2016.

living with Sandi. Sandi confirmed the frame found in the woods had the same dimensions as Kaceyn's Pack 'n Play. Sandi testified that Kaceyn's Pack 'n Play had a loose end-rail that prevented the Pack 'n Play from standing up properly.

Agent Barnes confirmed Greene had moved to Florida when Agent Barnes traveled to Florida to interview Greene regarding Kaceyn's disappearance. During the interview, Greene showed Barnes texts in which Defendant stated, "[I'm] getting screwed in this case by [Clements] killing her baby," "[Clements] killed or abused her child," and "[y]ou didn't report the crime to the cops just like I didn't[.]" At trial, Agent Barnes read these text messages to the jury.

On 27 March 2018, investigators interviewed Defendant a second time. This interview was also recorded and played at trial in the presence of the jury. Defendant claimed he overheard Clements tell Goff that Kaceyn had died, and they needed to "get rid" of Kaceyn. Even though, in his first interview, Defendant stated he thought Kaceyn may have been buried in the woods across from the home, in this interview, Defendant told investigators Clements and Goff made plans to hide the body somewhere around "Grasshopper's home." Grasshopper was a woman who frequently sold methamphetamine to Defendant, Clements, and Goff. Defendant claimed Clements told Goff that Grasshopper's house would be an excellent place to get rid of the body.

According to Defendant, when Clements, Goff, Greene, and Defendant were preparing to leave the Home, Clements went into her room to, presumably, get herself and the baby ready. When Clements came out of the room, she had the baby carrier completely covered with a tan blanket. Defendant drove Clements, Greene, and Goff to Grasshopper's house "around midnight." While at Grasshopper's house, Goff waited in the car while everyone else went inside. About "twenty to thirty minutes later," Clements, Greene, and Defendant returned to the car after purchasing methamphetamine from Grasshopper, and the carrier was empty and the blanket was wadded up in a ball.

Defendant hypothesized Goff could have disposed of Kaceyn's body in a "line of trees" located on the right side of Grasshopper's house. Defendant told investigators that, when Goff, Clements, Defendant and Greene all returned home that night, Goff and Clements told the other two not to say anything about what took place that night. Defendant stated in the second interview that he felt bad that he did not call for help, and one of his biggest mistakes was failing to tell people about Kaceyn's death or report it to law enforcement.

Agent Barnes testified that through his investigation, he determined "Grasshopper" was an individual named Sonya Mendez who sold methamphetamine. Throughout the course of his investigation, Agent Barnes never found anyone who saw Kaceyn after October 2016. At the time he was last seen, Kaceyn would have been only eight months old, and by the time the investigation began, he would have been almost two years old.

On 13 July 2018 an arrest warrant was issued for Defendant for concealment of the death of a child. On 8 September 2020, a grand jury indicted Defendant for concealment of death of a child who did not die of natural causes.

At trial, Defendant's counsel motioned for mistrial numerous times. The first motion for mistrial was based upon Agent Barnes's testimony that Clements was in prison for second-degree murder. During Agent Barnes's testimony, the State asked him where Clements presently was, and Agent Barnes testified that she was "currently in the North Carolina Department of Corrections." The State then asked, "[d]o you know why?" Defendant's counsel then objected on various grounds, including the Confrontation Clause, relevancy, unfair prejudice, and a run-around of the *corpus delicti* rule.

The trial court overruled Defendant's counsel's objection, allowing the State to ask why Clements was in the North Carolina Department of Corrections. Upon questioning by the State, Agent Barnes answered, "[f]or second-degree murder." Defendant's counsel motioned for mistrial due to this testimony, and the trial court denied the motion.

In a renewed motion for mistrial, Defendant's counsel added as another ground for mistrial the trial court's ruling that there was sufficient evidence to satisfy the *corpus delicti* rule. The trial court denied the motion.

At trial, Defendant's counsel also motioned to dismiss on the basis of insufficiency of the evidence and failure to satisfy the *corpus delicti* rule. The trial court denied the motion, finding Defendant's confession was supported by substantial independent evidence tending to establish its trustworthiness, and finding the State presented substantial evidence of each essential element of the crime charged.

Defendant did not testify or present evidence at trial. A jury convicted Defendant of concealment of the death of a child who did not die of natural causes, and the trial court sentenced Defendant in the aggravated range of 80 to 108 months' imprisonment.

II. Jurisdiction

Appeal lies of right directly to this Court from any final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2021). "A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issues

The issues before this Court are whether the trial court erred by: (1) denying Defendant's *corpus delicti* challenge and motion to dismiss, and (2) overruling Defendant's objections to Agent Barnes's testimony that Clements was in prison for second-degree murder. We will address these issues in turn.

IV. Analysis

A. *Corpus Delicti* Challenge

[1] On appeal, Defendant argues the State failed to satisfy the *corpus delicti* rule because it did not present evidence to strongly corroborate Defendant's extrajudicial statements to law enforcement. We disagree.

1. Standard of Review

"We review *de novo* the trial court's denial of a motion to dismiss." *State v. DeJesus*, 265 N.C. App. 279, 284, 827 S.E.2d 744, 748 (2019). "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).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation and internal quotation marks omitted) (alteration omitted).

"Upon a defendant's motion to dismiss for insufficient evidence, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of such offense." *DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 748. "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). "Whether a defendant's extrajudicial confession may survive a motion to dismiss depends upon the satisfaction of the *corpus delicti* rule." *DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 749.

2. Relevant Law

"[A]n extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985). When the State substantially relies upon an extrajudicial confession, the reviewing court applies the *corpus delicti* rule "which requires some level of independent corroborative evidence in order to ensure that a person is not convicted of a crime that was never committed." *DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 749 (internal quotation marks omitted). *Corpus delicti*, meaning the body of the crime, consists of "the injury or harm constituting the crime," and a showing that "th[e] injury or harm was caused by someone's criminal activity." *Parker*, 315 N.C. at 231, 337 S.E.2d at 492. A defendant's confession ordinarily furnishes the proof necessary to show "the defendant was the perpetrator of the crime." *State v. Trexler*, 316 N.C. 528, 533, 342 S.E.2d 878, 881 (1986).

The *corpus delicti* rule itself is rooted in three policy factors:

> first, the shock which resulted from those rare but widely reported cases in which the "victim" returned alive after his supposed murderer had been convicted; and secondly, the general distrust of extrajudicial confessions stemming from the possibilities that a confession may have been erroneously reported or construed, involuntarily made, mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual[;] and, thirdly, the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.

DeJesus, 265 N.C. App. at 285, 827 S.E.2d at 749.

"[T]o be relied on to prove the *corpus delicti* . . . the trustworthiness of the confession" must be "established by corroborative evidence." *Id.*

at 235, 337 S.E.2d at 494. Our Supreme Court expanded the strict rule that always required independent proof of the *corpus delicti* and adopted in its place the "trustworthiness version" of the rule. *Id.* at 230, 337 S.E.2d at 492. Under this version, "the adequacy of corroborating proof is measured not by its tendency to establish the *corpus delicti* but by the extent to which it supports the trustworthiness of the admissions." *Id.* at 230, 337 S.E.2d at 492 (quotation marks omitted). This applies especially to the instant case where the victim's body cannot be found. *See State v. Cox*, 367 N.C. 147, 153, 749 S.E.2d 271, 276 (2013) (carefully applying the trustworthiness version of the *corpus delicti* rule is especially important in those cases where there is no body to be found).

Under the trustworthiness version of the *corpus delicti* rule, "the State need not provide independent proof of the *corpus delicti* so long as there is substantial independent evidence tending to establish the trustworthiness of the defendant's extrajudicial confession." *DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749 (quotation marks omitted). "Such substantial independent evidence may includ[e] facts that tend to show the defendant had the opportunity to commit the crime, as well as other *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession." *DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749 (emphasis in original) (quotation marks omitted). We may look to the totality of the circumstances to determine whether the evidence strongly corroborates a defendant's confession. *State v. Sweat*, 366 N.C. 79, 85, 727 S.E.2d 691, 696 (2012) ("Under the totality of the circumstances, the State strongly corroborated essential facts and circumstances embraced in defendant's confession."); *see also DeJesus*, 265 N.C. App. at 286, 827 S.E.2d at 750 ("[T]ogether with the [d]efendant's opportunity to commit the[] crimes and the circumstances surrounding his statement to detectives provide *sufficient corroboration to engender a belief in the overall truth of [d]efendant's confession*.") (emphasis added). Where there is no contention that a defendant's "extrajudicial confession was the product of deception or coercion," the trustworthiness of a defendant's confession is "bolstered." *DeJesus*, 265 N.C. App. at 286, 827 S.E.2d at 750 (quotation marks omitted); *see also Cox*, 367 N.C. at 154, 749 S.E.2d at 277 ("The trustworthiness of [the] defendant's confession is thus further bolstered by the evidence that defendant made a voluntary decision to confess.").

It is unnecessary for the State to present "independent evidence of *each element* of the crime to show [that the d]efendant's confession . . . [is] trustworthy. . . . The State need only show corroborative evidence tending to establish the reliability of the confession—not the reliability of each part of the confession which incriminates the defendant."

State v. Messer, 255 N.C. App. 812, 822, 806 S.E.2d 315, 323 (2017) (emphasis added) (quotations omitted).

3. Elements of the Crime

The elements of the concealment of death charge are: (1) failure to notify law enforcement of the death of a child; (2) intent to conceal the death of a child; (3) the victim was a child who is less than sixteen years of age; and (4) knowing or having reason to know the child did not die of natural causes. *See* N.C. Gen. Stat. §§ 14-401.22(a1), (e) (2021).

Here, substantial evidence of the first element exists because Defendant never discussed Kaceyn's death with law enforcement until investigators interviewed him, corroborating Defendant's confession that one of his biggest mistakes was failing to tell people about Kaceyn's death or report it to law enforcement. *See* N.C. Gen. Stat. §§ 14-401.22(a1), (e). Additionally, there is substantial evidence of the third element because Sandi's trial testimony that Kaceyn was born on 11 March 2016 corroborates Defendant's confession that Kaceyn was an infant likely younger than a year old. *See* N.C. Gen. Stat. §§ 14-401.22(a1), (e). Accordingly, we must determine whether at trial, the State presented substantial independent evidence tending to establish the trustworthiness of Defendant's confession as it relates to the second element, the intent to conceal the death of a child, and the fourth element, knowing or having reason to know the child did not die of natural causes. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749; *see also* N.C. Gen. Stat. §§ 14-401.22(a1), (e).

Defendant argues that numerous pieces of evidence the State presented at trial were either not significant or corroborative, or both. Defendant grounds this argument primarily on his assumption that the State did not satisfy what he views was its threshold burden to prove, independently of Defendant's statements to investigators, that Kaceyn was dead. We conclude, however, in view of the totality of the evidence presented at trial, the State strongly corroborated Defendant's statements to investigators. *See Sweat*, 366 N.C. at 85, 727 S.E.2d at 696.

a. Intent to Conceal the Death of a Child

First, we must determine whether substantial independent evidence tends to establish that Kaceyn was, in fact, dead. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749; *see also Messer*, 255 N.C. App. at 822, 806 S.E.2d at 323. We determine that substantial evidence tends to support Kaceyn's death, satisfying the first policy factor justifying the *corpus delicti* rule: that no one should be convicted of a crime for a death that did not occur. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749.

Evidence presented at trial tended to show the following. Jimenez had periodic visits with Kaceyn after Kaceyn's birth, but he was unable to see Kaceyn anymore after Clements made excuses as to why she could not meet with Jimenez, likely because Clements no longer had Kaceyn. Jimenez's testimony as to when he last saw Kaceyn, in late September 2016, matches Defendant's statements to investigators that Defendant last saw Kaceyn right after Hurricane Matthew, which passed through North Carolina on 9 October 2016. Jimenez's attempts to find Kaceyn with the help of a private investigator and an attorney failed in late 2017. Clements traveled to Florida for four or five months in 2017, but she did not have Kaceyn with her. Jimenez could not find Kaceyn in late 2017, and Clements did not travel to Florida with Kaceyn, likely because Kaceyn was deceased. Law enforcement failed to find Kaceyn even after Jimenez's report of his missing child. These facts clearly establish that Kaceyn was missing under inherently suspicious circumstances.

Moreover, the evidence discovered across the road from the Home establishes the trustworthiness of Defendant's confession that Kaceyn was dead. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749. Investigators confirmed there was a stone fire pit and logs, which were invisible from the road, corroborating Defendant's statements to investigators that there was a hidden campsite across the road from the Home. In the campsite area, law enforcement found a stuffed teddy bear, an inflatable pool toy, fabric with a Hello Kitty design on it, and a "blue or purple" Graco playpen frame. The discovery of the children's items in the woods at a minimum supports an inference of an attempt to discard a deceased baby's items at the hidden campsite.

Defendant argues that the dark blue or purple playpen discovered at the campsite does not match the one in which Clements kept Kaceyn at Sandi's apartment, but Sandi's testimony that Kaceyn spent most of his time in a blue playpen closely aligns with Defendant's statements to investigators.

Therefore, in view of the totality of the circumstances and in the light most favorable to the State, we conclude the discarded children's items, taken together with the fact that no one had seen Kaceyn since October 2016 at the latest, constitutes strong corroboration of Defendant's confession that Kaceyn was dead. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749; *see also Sweat*, 366 N.C. at 85, 727 S.E.2d at 696; *see also Rose*, 339 N.C. at 192, 451 S.E.2d at 223.

Second, substantial evidence tends to establish Defendant's intent to conceal the death of a child. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749. Defendant's texts to Greene in which Defendant stated,

"[Clements] killed or abused her child" and "[y]ou didn't report the crime to the cops just like I didn't" demonstrate that Defendant knew a crime occurred yet purposely failed to report it to law enforcement. Defendant argues his texts are not independent evidence, as required by *Parker*, 315 N.C. at 236, 337 S.E.2d at 495, because they are Defendant's own words. Defendant's text messages to Greene, however, are evidence independent of Defendant's statements to investigators.

Accordingly, substantial independent evidence tends to establish Defendant's intent to conceal Kaceyn's death. *See DeJesus*, 265 N.C. App. at 284–85, 827 S.E.2d at 748–49.

b. Death by Unnatural Causes

Finally, substantial evidence tends to establish that Defendant knew or had reason to know Kaceyn did not die of natural causes. *See DeJesus*, 265 N.C. App. at 284–85, 827 S.E.2d at 748–49. Defendant's text to Greene strongly corroborates Defendant's confession because these statements show Kaceyn's death was not natural. *See* N.C. Gen. Stat. §§ 14-401.22(a1), (e).

Substantial evidence also tends to establish that Defendant frequented the Home at the same time Clements and Kaceyn lived there and likely would have been aware of the suspicious circumstances surrounding Kaceyn's disappearance. Defendant himself related these circumstances to law enforcement, corroborating his statements to investigators that he did not think Kaceyn could survive without medical treatment as Kaceyn had bruises, trouble breathing, a severely swollen head, and appeared braindead.

Accordingly, substantial independent evidence regarding Defendant's knowledge of Kaceyn's unnatural death tends to establish the trustworthiness of Defendant's confession. *See DeJesus*, 265 N.C. App. at 284–85, 827 S.E.2d at 748–49.

4. Voluntariness of the Confession

We note that there is no challenge to the voluntariness of Defendant's statements to law enforcement. Defendant was not under arrest during either of his recorded interviews with law enforcement. Because Defendant's confession was voluntary, its trustworthiness is bolstered, and the second factor justifying the *corpus delicti* rule—guarding against the untrustworthiness of an involuntary confession—is satisfied. *See DeJesus*, 265 N.C. App. at 286, 827 S.E.2d at 750; *Parker*, 265 N.C. App. at 285, 827 S.E.2d at 750.

We, therefore, find the *corpus delicti* rule is satisfied because there is substantial independent evidence tending to establish the trustworthiness of Defendant's confession. *See DeJesus*, 265 N.C. App. at 285, 827 S.E.2d at 749; *see also Sweat*, 366 N.C. at 85, 727 S.E.2d at 696. Moreover, Defendant's confession itself constitutes substantial evidence that he was the perpetrator of the crime. *See Parker*, 315 N.C. at 231, 337 S.E.2d at 492; *see also DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 748. Because there was substantial evidence of each element of the crime charged and that Defendant was the perpetrator, the trial court properly denied the motion to dismiss. *See DeJesus*, 265 N.C. App. at 284, 827 S.E.2d at 748.

B. Testimony that Clements Was in Prison for Second-Degree Murder

[2] Next, Defendant argues the trial court erred by allowing Agent Barnes's testimony regarding Clements's conviction for second-degree murder because it: (1) was irrelevant because there was no questioning by the prosecutor or testimony by Agent Barnes connecting Clements's whereabouts to Kaceyn's death; (2) was unfairly prejudicial because it likely would lead jurors to believe that Clements killed Kaceyn and therefore, Defendant must have concealed Kaceyn's death; and (3) constituted a violation of the Confrontation Clause.

1. Rule 401

Defendant argues the State did not sufficiently connect its questioning about Clements's conviction for second-degree murder, and the testimony was therefore irrelevant pursuant to N.C. R. Evid. 401. We disagree.

"Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard[,] . . . such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quotation marks omitted).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401. Agent Barnes's testimony that Clements was in prison for second-degree murder was directly relevant to the fact that Kaceyn died because at trial, the jury heard testimony regarding the texts Defendant sent to Greene which stated, "[Clements] killed or abused her child." Such evidence was relevant because it made it more probable that Kaceyn was deceased. *See* N.C. R. Evid. 401.

Accordingly, the trial court did not err by allowing such testimony because it was relevant to whether Kaceyn was dead. *See* N.C. R. Evid. 401; *see also Dunn*, 162 N.C. App. at 266, 591 S.E.2d at 17.

2. Rule 403

Defendant argues evidence of Clements being in prison for second-degree murder was unfairly prejudicial.

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (internal quotation marks and citations omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. R. Evid. 403.

Defendant specifically argues Agent Barnes's testimony regarding Clements's second-degree murder conviction unfairly prejudiced Defendant because it could have led the jurors to conclude Clements murdered Kaceyn, and Defendant must be guilty of concealing Kaceyn's death. This evidence was not unfairly prejudicial because, as addressed above in Section IV, substantial evidence established that Kaceyn died of unnatural causes. *See* N.C. R. Evid. 403.

Therefore, Agent Barnes's testimony did not unfairly prejudice Defendant, and the trial court did not err by overruling Defendant's objections. *See* N.C. R. Evid. 403; *see also Whaley*, 362 N.C. at 160, 655 S.E.2d at 390.

3. U.S. Const. amend. VI; N.C. Const. art. I, § 23

Defendant argues Agent Barnes's testimony that Clements was in prison for second-degree murder violated Defendant's constitutional right to confront witnesses against him.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). "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. Harris*, 242 N.C. App. 162, 164, 775 S.E.2d 31, 33 (2015).

Under both our Federal and State Constitutions, defendants have the right to confront witnesses against them. U.S. Const. amend. VI;

N.C. Const. art. I, § 23. The hallmark of a defendant's right to confront witnesses against him or her is cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177, 194 (2004). A witness's testimonial statements are inadmissible against a defendant unless at trial the witness "was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id*. at 54, 124 S. Ct. at 1365, 158 L. Ed. 2d. at 183.

Defendant reasons that Clements's conviction occurred because of her guilty plea, so testimony regarding her conviction equates to evidence of her guilty plea and therefore constitutes testimonial evidence against Defendant. While no North Carolina case directly addresses whether a witness's testimony regarding the murder conviction of a defendant in a different case constitutes a testimonial statement, we did find a Fourth Circuit case that is instructive. The guilty plea of a defendant from a different case does not constitute testimonial evidence. *United States v. Kuai Li*, 280 F. App'x 267, 269 (4th Cir. 2008) (federal district court did not err when it took judicial notice of guilty plea entered by a corrupt government official who assisted the defendant in the crime "because the taking of such notice did not result in the admission of a testimonial statement"). On appeal, a Confrontation Clause violation may be found to be a harmless error in light of other evidence inculpating a defendant. *United States v. Banks*, 482 F.3d 733, 741 (4th Cir. 2007).

Here, as an initial matter, Agent Barnes did not testify regarding how Clements's conviction for second-degree murder came about. As far as the jury members knew, it could have resulted from a jury conviction or from a guilty plea. Even if Agent Barnes's testimony somehow notified the jury of Clements's guilty plea, however, we need not decide whether that constituted a testimonial statement. Any potential error would be harmless in light of the other evidence establishing that Kaceyn died of unnatural causes. *See Banks*, 482 F.3d at 741.

Accordingly, the trial court did not commit prejudicial error by allowing Agent Barnes's testimony regarding Clements's whereabouts. *See Banks*, 482 F.3d at 741.

V. Conclusion

We hold the trial court did not err in denying Defendant's motion to dismiss because there was sufficient evidence presented at trial, and the State satisfied the *corpus delicti* rule. We further hold that even if testimony that Clements was in prison for second-degree murder constituted testimonial evidence, any potential Confrontation Clause error

was a harmless error in light of other evidence implicating Defendant in concealing Kaceyn's death.

AFFIRMED.

Judge CARPENTER concurs.

Chief Judge STROUD concurs in a separate opinion.

STROUD, Chief Judge, concurring.

While I agree with the majority that the trial court properly denied Defendant's motion to dismiss and would ultimately conclude there was no prejudicial error, I write separately as I do not agree with the analysis in section IV. B. 1 and 2 regarding Rules of Evidence 401 and 403.

As noted by the majority, Agent Barnes testified before the jury regarding his investigation of Kaceyn's disappearance. The State asked him "Now, through your investigation, do you know where Kayla Clements is now?" and he answered, "She is currently in the North Carolina Department of Corrections." The State then asked, "Do you know why?" At this point, Defendant objected and asked "to be heard outside the presence of the jury." Outside the presence of the jury, Defendant stated grounds for the objection in detail, including the Confrontation Clause and the *Bruton* rule,[1] as well as the lack of the relevance of the evidence, unfair prejudice under Rule 403, and due process.

1. The *Bruton* rule stems from *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968). "In *Bruton*[,] the United States Supreme Court held that at a joint trial, admission of a statement by a nontestifying codefendant that incriminated the other defendant violated that defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *State v. Evans*, 346 N.C. 221, 231, 485 S.E.2d 271, 277 (1997) (citing *Bruton*, 391 U.S. at 126, 20 L. Ed. 2d at 479), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998). Furthermore, "[t]he principles set out in *Bruton* apply only to the extrajudicial statements of a declarant who is unavailable at trial for full and effective cross-examination. *Nelson v. O'Neil*, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971). Where the declarant takes the stand and is subject to full and effective cross-examination, a codefendant implicated by extrajudicial statements has not been deprived of his right to confrontation." *Evans*, 346 N.C. at 232, 485 S.E.2d at 277; *see State v. Hardy*, 293 N.C. 105, 118, 235 S.E.2d 828, 836 (1977) (summarizing the North Carolina Supreme Court's interpretation of the *Bruton* rule).

Defendant argued,

> They're trying to take an admission from a codefendant and use it to prove something here. Now that admission by Ms. Clements is admissible against her, but it is not admissible against my client. Now the State had every ability to issue a writ and have Ms. Clements come and testify here at this trial. They chose not to do so and they chose not to put her on the list, so this absolutely would violate the rules in Bruton and the confrontation clause, and therefore it is inadmissible testimony.

The discussion and voir dire regarding these objections continued at length, for 18 pages of transcript. Ultimately, based on the State's representation it would limit the question to Clements's imprisonment for second-degree murder; the trial court then overruled Defendant's objection. The State then asked Agent Barnes again in the presence of the jury why Clements was incarcerated, and Agent Barnes testified she was incarcerated for second-degree murder. Defendant then renewed his prior objections and moved to strike Agent Barnes's testimony, which the trial court overruled.

It is entirely reasonable to expect the jury would *assume* the victim was Kaceyn, but the identity of the victim was the primary reason for Defendant's objection to the question and the trial court's ruling on the objection. At oral argument of this case before this Court, the State could not articulate *any* reason the evidence that Clements was incarcerated for second-degree murder could be relevant *except* that it would tend to show Kaceyn was deceased. Clements was not there to testify as a witness. Nor did the State present a certified record of Clements's conviction. Instead, the State sought to rely upon the jury's logical assumption of a fact – that Clements was imprisoned for *Kaceyn's* murder – when the trial court had already ruled Agent Barnes could not testify to this fact. Defendant objected to the evidence of the identity of the victim of Clements's second-degree murder conviction for several reasons and the trial court did not allow this evidence to be presented, and yet the majority opinion still finds the evidence of the second-degree murder conviction relevant and admissible *because* the jury would likely infer Kaceyn must have been the victim of the murder.

The majority opinion is correct that the only way the second-degree murder conviction could possibly be relevant in this case was if Kaceyn was the victim. The fact that Clements was imprisoned for murdering *someone* would not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2021). In other words, the fact that Clements murdered *someone* does not aid the jury in determining if Kaceyn was actually deceased or if Defendant concealed the death of Kaceyn. This unrelated crime would not "make the existence of any fact that is of consequence to the determination . . . more probable or less probable." N.C. Gen. Stat. § 8C-1, Rule 401. "While our law no longer strictly forbids stacking inferences upon each other, in this case the link between the circumstances proved by direct evidence and the inferences drawn from these circumstances stretches too far" because there was no evidence presented that Clements was imprisoned for Kaceyn's murder, and the State did not question Agent Barnes on the identity of the victim of the second-degree murder, as it represented to the trial court. *State v. Lamp*, 383 N.C. 562, 571, 884 S.E.2d 623, 629 (2022) (citation omitted).

The testimony regarding Clements's imprisonment for second-degree murder was not relevant, but even worse, the only way it could be relevant is that the jury's logical assumption would be that Kaceyn was the victim. And this was the very reason for Defendant's objections and the State's tacit acknowledgement at trial of the merit of Defendant's objections based upon the Confrontation Clause and the *Bruton* case by the State's agreement not to elicit testimony as to the identity of the victim. The trial court should have sustained Defendant's objection to this testimony under Rule 401. *See* N.C. Gen. Stat. § 8C-1, Rule 401. Therefore, there would be no need to engage in a Rule 403 analysis regarding prejudicial versus probative value. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2021) ("*Although relevant*, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." (emphasis added)).

But although this evidence should have been excluded, I agree the error was not prejudicial in this case. This one sentence of testimony did not prejudice Defendant considering the substantial amount of evidence tending to show Kaceyn was deceased and regarding the circumstances of his death, and therefore the trial court properly denied Defendant's motion to dismiss. *See generally State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981) ("It is well-established that the burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error. The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction[.]" (citation omitted)). Therefore, there was no prejudicial error.

Thus, I write separately to concur in result only.

STATE v. FURTCH

[289 N.C. App. 413 (2023)]

STATE OF NORTH CAROLINA
v.
DAMIAN LEWIS FURTCH

No. COA22-643

Filed 20 June 2023

1. Appeal and Error—petition for writ of certiorari—denial of motion to suppress—intent to appeal

Where defendant clearly intended to appeal from the trial court's order denying his motion to suppress, as evidenced by his counsel's announcement in open court about defendant's intent, but lost his right to appeal because he failed to appeal the trial court's judgment entered upon his guilty plea, the appellate court granted defendant's petition for writ of certiorari to review the suppression order.

2. Search and Seizure—motion to suppress—supporting affidavit—facts not included—court's discretion to consider merits

In a drugs prosecution, although the supporting affidavit accompanying defendant's motion to suppress did not contain facts supporting the motion, the trial court properly exercised its discretion when it elected to address the merits of the motion rather than summarily denying it.

3. Search and Seizure—traffic stop—extension—inquiries incident to stop—in support of mission

In a drugs prosecution, the trial court properly denied defendant's motion to suppress drugs found in his vehicle during a traffic stop where the court's challenged findings about the distance traveled by an officer to catch up to defendant's vehicle and the amount of time the officer took to conduct a pat-down of defendant's person were supported by competent evidence. Further, the court's conclusions of law that the searches of defendant's person and vehicle after defendant was stopped for following another vehicle too closely and driving erratically did not impermissibly extend the stop since they were conducted in the ordinary course of inquiries incident to the stop and were permitted as precautionary measures to ensure the officer's safety. Likewise, a K-9 sniff for drugs that was unrelated to the reasons for the traffic stop did not unreasonably prolong the duration of the stop.

Appeal by Defendant from judgment entered 16 November 2021 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 11 April 2023.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for the State-Appellee.

COLLINS, Judge.

Defendant Damian Lewis Furtch appeals from judgment entered upon his guilty plea to two counts of trafficking in methamphetamine; possession with intent to manufacture, sell and/or deliver a Schedule II controlled substance; and maintaining a vehicle used for keeping and selling a controlled substance. Defendant argues that the trial court erred by denying his motion to suppress because the traffic stop was unconstitutionally extended and the narcotics investigation exceeded the scope of the traffic stop. We grant Defendant's petition for writ of certiorari and affirm the trial court's denial of the motion to suppress.

I. Background

Detective Jacob Staggs and Detective Josh Hopper with the Henderson County Sheriff's Office were performing drug interdiction on 18 February 2019 as part of the Crimes Suppression Unit. The Crimes Suppression Unit is generally responsible for patrolling high crime areas. Staggs and Hopper's vehicle was positioned facing northbound on U.S. 25 South, "the road that goes from Henderson County into Greenville County toward Travelers Rest."

That night, Staggs had received a "whisper tip" from the Narcotics Unit to be on the lookout for a silver minivan. Shortly before midnight, Staggs spotted a silver minivan following a white pickup truck too closely and got behind the minivan to run its tag through dispatch. While observing the minivan and trying to find a safe place to conduct a traffic stop, the minivan "failed to maintain lane control, kept weaving in its lane, [and] hitting the line[.]"

Staggs initiated the traffic stop and approached the vehicle from the passenger side. Staggs explained to Defendant that he was "kind of weaving" and "kind of . . . following too closely[,]" and asked him for his driver's license. Defendant told Staggs that he was heading to

Hendersonville to visit family. When Staggs asked Defendant where his family lived, Defendant told him Black Mountain, "which [was] kind of odd" to Staggs because Black Mountain is not in Hendersonville. While Staggs was speaking with Defendant, K-9 Deputy Cory Smith with the Henderson County Sheriff's Office arrived on the scene.

After retrieving Defendant's license, Staggs went back to his patrol vehicle, ran Defendant's license through dispatch, and made sure he had no outstanding warrants. Hopper remained standing at the rear of Defendant's vehicle. Staggs confirmed that Defendant had a valid license and no outstanding warrants before writing him a warning citation for following too closely and failing to maintain lane control.

After printing the citation and "highlight[ing] certain things that are important," Staggs exited his patrol vehicle and spoke briefly with Smith. Smith asked Staggs to have Defendant step out of the car for safety while the K-9 conducted the free air sniff.

Staggs then approached Defendant and asked him to exit the vehicle so he could "explain the warning citation[.]" Staggs frisked Defendant for weapons before explaining the warning citation. As Staggs was explaining the citation to Defendant, Smith notified Staggs that the K-9 had alerted on Defendant's vehicle. Staggs finished explaining the citation to Defendant and then explained that they had probable cause to search his vehicle because the K-9 had alerted to narcotics. During the search, the officers discovered an envelope containing 474 grams of methamphetamine.

Defendant was charged with two counts of trafficking in methamphetamine; possession with intent to manufacture, sell and/or deliver a Schedule II controlled substance; and maintaining a vehicle used for keeping and selling a controlled substance. Defendant filed a motion to suppress, which was denied after a hearing on 15 November 2021 by written order entered 24 November 2021. Defendant subsequently pled guilty to the charges and reserved the right to appeal from the denial of his motion to suppress. The trial court sentenced Defendant to 177 to 225 months' imprisonment.

II. Discussion

A. Petition for Writ of Certiorari

[1] We first address this Court's jurisdiction to hear Defendant's appeal. "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b)

(2021). To properly appeal the denial of a motion to suppress after a guilty plea, a defendant must: (1) prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the suppression order, and (2) timely and properly appeal from the final judgment. *State v. Jackson*, 249 N.C. App. 642, 645, 791 S.E.2d 505, 508 (2016).

Here, Defendant timely gave notice that he intended to appeal the denial of his motion to suppress, and the reservation of this right was noted in the transcript. Furthermore, Defendant, through trial counsel, announced in open court that he "would be giving notice of appeal . . . as to the motion to suppress and the [c]ourt's ruling on that motion." However, Defendant failed to appeal, either in open court or in writing, from the trial court's judgment entered upon his guilty plea, as is required by N.C. Gen. Stat. § 15A-979(b). Accordingly, Defendant lost his right to appeal the trial court's order denying his motion to suppress.

Recognizing this failure, Defendant has filed a petition for writ of certiorari. North Carolina Rule of Appellate Procedure 21(a) provides, inter alia, that "[a] writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a). "Whether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion of this Court." *State v. Biddix*, 244 N.C. App. 482, 486, 780 S.E.2d 863, 866 (2015) (citation omitted). Here, it is apparent that the trial court and the prosecutor were aware of Defendant's intent to appeal the denial of the motion to suppress prior to the entry of Defendant's guilty plea, and Defendant lost his appeal through no fault of his own. *See State v. Cottrell*, 234 N.C. App. 736, 740, 760 S.E.2d 274, 277 (2014) (granting petition for writ of certiorari where "it is apparent that the State was aware of defendant's intent to appeal the denial of the motion to suppress prior to the entry of defendant's guilty pleas and . . . defendant has lost his appeal through no fault of his own"). Accordingly, we grant Defendant's petition for writ of certiorari and address Defendant's appeal on the merits.

B. Motion to Suppress

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). "When supported by competent evidence, the trial court's

factual findings are conclusive on appeal, even where the evidence might sustain findings to the contrary." *State v. Hall*, 268 N.C. App. 425, 428, 836 S.E.2d 670, 673 (2019) (citation omitted). "Unchallenged findings of fact are binding on appeal." *State v. Fizovic*, 240 N.C. App. 448, 451, 770 S.E.2d 717, 720 (2015) (citation omitted). "We review the trial court's conclusions of law on a motion to suppress de novo." *State v. Ladd*, 246 N.C. App. 295, 298, 782 S.E.2d 397, 400 (2016) (italics and citation omitted). "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) (quotation marks, italics, and citations omitted).

1. Supporting Affidavit

[2] As an initial matter, Defendant argues that "[i]f, in this case, defense counsel made a minor procedural error, with respect to the format of his suppression motion–one that was not objected to by the State or noted by the trial court–[Defendant] should still have his claims considered by this Court." (quotation marks and citation omitted).

A motion to suppress "must be accompanied by an affidavit containing facts supporting the motion" and "may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated." N.C. Gen. Stat. § 15A-977(a) (2021). The trial court may summarily deny a motion to suppress if the motion does not allege a legal basis for the motion, or the affidavit does not support the ground alleged as a matter of law. N.C. Gen. Stat. § 15A-977(c) (2021). While the trial court has the authority to summarily deny a motion to suppress that fails to comply with the required procedural formalities, the trial court also has the discretion to refrain from summarily denying such a motion that lacks an adequate supporting affidavit if it chooses to do so. *State v. O'Connor*, 222 N.C. App. 235, 239-40, 730 S.E.2d 248, 251 (2012).

Here, the affidavit accompanying Defendant's motion to suppress states:

> That upon information and belief and after discussion with the above captioned defendant, review of discovery provided by the State including officer reports and documents produced in connection with this case, review of video evidence provided in discovery, the undersigned attorney has reason to believe that all alleged in the attached Motion to Suppress is accurate and alleged in good faith.

Although the accompanying affidavit did not include facts supporting the motion, the trial court, in its discretion, refrained from summarily denying Defendant's motion to suppress and conducted an evidentiary hearing addressing the merits of the issues raised by Defendant's motion. *Id.* at 241, 730 S.E.2d at 252. The merits of Defendant's appeal from the trial court's order denying his motion to suppress are therefore properly before this Court.

2. Traffic Stop

[3] Defendant argues that "Staggs deviated from the mission of the stop and unconstitutionally extended it[.]"

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. "Article I, Section 20 of the North Carolina Constitution similarly prohibits unreasonable searches and seizures." *State v. Thorpe*, 232 N.C. App. 468, 477, 754 S.E.2d 213, 220 (2014) (citation omitted).

"A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quotation marks and citation omitted). "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166 (2012) (quotation marks and citation omitted). "[T]o detain a driver beyond the scope of the traffic stop, the officer must have the driver's consent or reasonable articulable suspicion that illegal activity is afoot." *Id.* (citation omitted). "An officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *O'Connor*, 222 N.C. App. at 238, 730 S.E.2d at 250-51 (quotation marks and citations omitted).

"The reasonable duration of a traffic stop, however, includes more than just the time needed to write a ticket. Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop." *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (quotation marks, brackets, and citations omitted). "Such inquiries may involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *State v. France*, 279 N.C. App. 436, 441, 865 S.E.2d 707, 712 (2021) (quotation marks and citation omitted).

"In addition, an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Bullock*, 370 N.C. at 258, 805 S.E.2d at 673 (quotation marks and citation omitted). "As a precautionary measure to protect the officer's safety, a police officer may as a matter of course order the driver and passengers of a lawfully stopped car to exit his vehicle during a stop for a traffic violation." *State v. Jones*, 264 N.C. App. 225, 231, 825 S.E.2d 260, 265 (2019) (quotation marks and citation omitted). Furthermore, because " 'traffic stops remain lawful only so long as unrelated inquires do not *measurably* extend the duration of the stop,' a 'frisk that lasts just a few seconds . . . d[oes] not extend the traffic stop's duration in a way that would require reasonable suspicion.' " *Id.* (quoting *Bullock*, 370 N.C. at 262-63, 805 S.E.2d at 676-77). "[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission." *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676.

"[T]he Fourth Amendment permits an officer to conduct an investigation *unrelated* to the reasons for the traffic stop as long as it [does] not lengthen the roadside detention." *France*, 279 N.C. App. at 442, 865 S.E.2d at 712 (quotation marks and citations omitted). Thus, "an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop." *State v. Warren*, 242 N.C. App. 496, 499, 775 S.E.2d 362, 365 (2015).

a. Findings of Fact

Defendant challenges portions of findings of fact 14 and 22.

Finding of fact 14 states:

> The undersigned cannot find as a fact what distance was traveled by Deputy Staggs while he was catching up to the minivan. The traffic at that time was neither "light" nor "heavy." Generally, the vehicle traffic at that time was traveling 65 m.p.h., more or less. Deputy Staggs did not operate his blue lights or his siren, until such time as he had been behind the minivan for sufficient time to observe the minivan weave within its lane again.

Defendant contends that "[b]ecause Staggs testified he was parked at mile marker 3 and the stop occurred at mile marker 8, the trial court's finding that it could not determine what distance Staggs followed the

minivan is unsupported." However, the trial court also made the following unchallenged findings of fact:

> 11. . . . Deputy Staggs observed that, in his opinion, the silver minivan was following too closely behind an older model white pickup truck. At the time, Deputy Staggs['] vehicle was parked at about Mile Marker 3. . . .
>
> . . . .
>
> 13. . . . Deputy Staggs departed from his stationary position, and operated his vehicle away from the shoulder of the highway for the purpose of following the silver minivan.
>
> 15. At such time as Deputy Staggs turned on his blue lights (no siren), the minivan promptly moved to the right-hand lane and safely came to a stop along the shoulder. The point of the stop, at about mile marker 8, was about five miles from the location where Deputy Staggs first observed the minivan.

The challenged portion of finding of fact 14, when viewed in conjunction with these findings, indicates that the trial court could not find as a fact the distance Staggs traveled after departing from his stationary position before catching up to the minivan. The trial court's findings of fact that "Deputy Staggs['] vehicle was parked at about Mile Marker 3" and that "[t]he point of the stop, at about mile marker 8, was about five miles from the location where Deputy Staggs first observed the minivan" are supported by competent evidence. When asked at the suppression hearing at what mile marker he was positioned, Staggs testified, "At that point in time I want to say 3." Furthermore, Staggs testified that "I stopped him around mile marker 8, getting close to Interstate 26 there." However, there is no competent evidence in the record to support any finding as to what distance Staggs traveled after departing from his stationary position before catching up to the minivan. Thus, the trial court did not err by declining to "find as a fact what distance was traveled by Deputy Staggs while he was catching up to the minivan."

Finding of fact 22 states:

> Upon printing of the warning citation, Deputy Staggs got out of his vehicle, approached the Defendant's car from the rear, and asked the Defendant to get out and come around to where the Deputy was. The Defendant complied immediately. The Deputy asked the Defendant whether he

> had any weapons, to which the Defendant replied that he did not. The Deputy told the Defendant that he was going to perform a quick patdown for weapons; the Defendant promptly complied with the Deputy's requests. The Deputy did so in a matter of not more than about 10 seconds.

Defendant contends that "[t]he trial court's finding that the pat-down 'did not last longer than about 10 seconds' is unsupported to the extent it implies the pat-down did not last longer than 10 seconds in total." The challenged portion of this finding indicates that the trial court found that the pat-down itself, rather than the entire encounter, lasted for about ten seconds. In making this finding, the trial court considered Staggs' dash cam video. Staggs begins his pat down of Defendant at 8:16 of the dash cam video and concludes the pat down at 8:27. Thus, the trial court's finding of fact that Staggs frisked Defendant for "not more than about 10 seconds" is supported by competent evidence.

Accordingly, the trial court's findings of fact are supported by competent evidence.

b. Conclusions of Law

Defendant contends that conclusions of law 8, 13, 15, and 19 are not supported by the trial court's findings of fact.

Conclusion of law 8 states:

> Deputy Staggs['] conversation immediately following the stop of the Defendant's vehicle, was relatively short, and was directly related to the purpose of the stop. The conversation did nothing to change Deputy Staggs' reasonable suspicion that the Defendant's vehicle was following the white pickup truck too closely, and in fact the conversation appeared to confirm that belief.

This conclusion of law is supported by finding of fact 19, which states, in part:

> [Staggs] told the Defendant why he had stopped him – to the effect of you were "kind of following too close." The Defendant agreed, although the undersigned does not take this agreement by the Defendant as an admission, but instead, merely that instead of denying knowledge of such allegation, the Defendant agreed.

Although the trial court did "not take this agreement by Defendant as an admission," the trial court noted that "instead of denying knowledge

of such allegation, the Defendant agreed." This finding supports the trial court's conclusion of law that Staggs' conversation with Defendant "appeared to confirm" that Defendant was following too closely.

Conclusions of law 13, 15, and 19 state:

> 13. Deputy Staggs' explanation of the warning citation after the Defendant was directed to get out of his vehicle took no longer than it would have had the Defendant remained in his vehicle, save for the time required for the brief "pat-down" and the time it took to walk the few steps to the guardrail beside the Deputy Staggs' vehicle. Had Deputy Staggs explained the warning citation to the Defendant while the Defendant remained in the vehicle, he could not have explained the citation and then handed it to the Defendant without being on the highway side of the Defendant's vehicle, in the lane of travel of the highway, thus presenting a safety issue. Deputy Staggs' direction of the Defendant to exit his vehicle for this purpose was lawful.
>
> 15. Deputy Staggs had the authority to direct the Defendant to step out of his vehicle during the stop, to "pat-down" or frisk the Defendant, and to explain the warning citation to the Defendant provided that he did not extend the stop of the Defendant unnecessarily to do so; in fact, the stop was not extended unnecessarily to complete these acts.
>
> 19. The cursory search of the Defendant's vehicle did not extend the stop of the Defendant's vehicle, and was completed prior to the completion of the lawful purposes of the stop.

Staggs initiated the traffic stop after observing a silver minivan following a white pickup truck too closely, "fail[ing] to maintain lane control, . . . weaving in its lane, [and] hitting the line[.]" At that point, Staggs was legally authorized to detain Defendant for "the length of time reasonably necessary to accomplish the mission of the stop[.]" *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (citations omitted). Upon approaching the vehicle, Staggs informed Defendant of the reason for the stop and requested his identification. Staggs then returned to his patrol vehicle to run Defendant's license through dispatch and make sure he had no outstanding warrants. Such inquiries are "ordinary inquiries incident to the traffic stop." *Id.* (quotation marks, brackets, and citation omitted).

Upon writing a warning citation for left of center and following too closely, Staggs asked Defendant to step out of the vehicle to explain the warning citation. Staggs was permitted to order Defendant out of the car as a precautionary measure to protect his safety. *Jones*, 264 N.C. App. at 231, 825 S.E.2d at 265. Likewise, Staggs' pat down of Defendant did not measurably extend the duration of the traffic stop in a way that would require reasonable suspicion. *Bullock*, 370 N.C. at 263, 805 S.E.2d at 677 ("So this very brief frisk did not extend the traffic stop's duration in a way that would require reasonable suspicion."). Although unrelated to the mission of the traffic stop, the K-9 free air sniff did not prolong the stop because it took place while Staggs was explaining the ticket to Defendant. *Warren*, 242 N.C. App. at 498-99, 775 S.E.2d at 365.

At no point during the traffic stop did any of the officers' actions "convert the encounter into something other than a lawful seizure[.]" *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). For the entirety of the traffic stop, Staggs was either " 'diligently pursu[ing] the investigation[,]' conducting 'ordinary inquiries incident to [the traffic] stop[,]' or taking necessary 'precautions in order to complete [his] mission safely.' " *France*, 279 N.C. App. at 444, 865 S.E.2d at 714 (quoting *Rodriguez v. United States*, 575 U.S. 348, 354-56 (2015)). Although the K-9 free air sniff was unrelated to the reasons for the traffic stop, it did not prolong the traffic stop and was therefore permissible. *Id.*

Accordingly, the trial court did not err by denying Defendant's motion to suppress.

III. Conclusion

As the trial court's findings of fact are supported by competent evidence and the trial court's findings of fact support its conclusions of law, the trial court did not err by denying Defendant's motion to suppress. Accordingly, we grant Defendant's petition for writ of certiorari and affirm the trial court's denial of Defendant's motion to suppress.

AFFIRMED.

Chief Judge STROUD and Judge FLOOD concur.

STATE OF NORTH CAROLINA
v.
BRITTANY MICHELLE JACKSON

No. COA22-922

Filed 20 June 2023

Motor Vehicles—fleeing to elude arrest—intent—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of felony fleeing to elude arrest where the State presented sufficient evidence of defendant's intent to elude two officers, who were trying to conduct a traffic stop after defendant's car ran a stop sign. The evidence showed that, after one of the officers pulled up behind defendant's vehicle and activated his patrol car's emergency signals, defendant made several abrupt turns, drove ten to fifteen miles per hour over the speed limit, ran multiple stop signs, repeatedly drove in the oncoming lane of traffic, and passed several well-lit areas in a residential neighborhood; additionally, the officer saw marijuana being thrown out of defendant's car during the chase; then, during her arrest, defendant was noncooperative and combative with the officers, and even tried to provoke a crowd that had formed around them by rolling down the patrol car window and shouting.

Appeal by Defendant from judgment entered 7 March 2022 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State-Appellee.

Stephen G. Driggers for Defendant-Appellant.

COLLINS, Judge.

Defendant Brittany Michelle Jackson appeals from judgment entered upon jury verdicts of guilty of misdemeanor possession of marijuana and misdemeanor fleeing to elude arrest with a motor vehicle. Defendant argues that the trial court erred by denying her motion to dismiss the charge of fleeing to elude arrest because the State presented insufficient evidence that she had the specific intent to elude arrest. We find no error.

I. Background

On 28 October 2020, Defendant attended a barbeque with her son at an apartment complex in Selma, North Carolina. Around 7 pm, Defendant left the complex to drive another individual to the store. Selma Police Detective Justin Vause and Officer Joseph Atkinson were parked in a marked police vehicle where they could "watch the duly regulated stop sign" leading out of the apartment complex. Vause watched Defendant drive through the stop sign at 10 miles per hour without braking and began to follow her. Vause pulled in behind her and activated his lights and sirens to conduct a traffic stop. Defendant "made an abrupt turn" onto another street and "went into the oncoming lane and continued to travel in the oncoming lane of travel." "At that time[,] the vehicle turned on its hazard lights and increased its speed" from a very slow speed to about 35 to 40 miles per hour in a residential area marked as a 25 mile-per-hour zone.

Defendant called 911 as she put her hazard lights on. She did not initially stop because she did not know the area and did not know if the marked car behind her was an "actual police officer." During the 911 call, the operator told Defendant that it was a police officer in the car behind her.

Defendant kept driving and then made an abrupt right turn onto a different street, turning into the oncoming lane of light traffic. She continued to travel in the oncoming lane. Defendant then made another right turn onto a different street and continued to maintain a speed over the legal limit; she only "slow[ed] down enough to make [the vehicle's] turn" and "then [she] increase[d] its speed back up." Defendant did not stop for the posted stop signs at either turn. During the pursuit, Defendant and Vause passed several well-lit areas including a church, fire station, EMS station, and civic center.

Defendant made a final right turn and traveled back towards the apartment complex for approximately one mile with "numerous patrol vehicles behind" her. Defendant's speed remained above the speed limit, fluctuating between 30 to 45 miles per hour in the 25 mile-per-hour residential zone. When Defendant made the final right turn, Vause saw that "the passenger window was down, and at that time, there [were] objects being thrown out of the vehicle." Vause then smelled an overwhelming odor of marijuana in his patrol vehicle.

Upon arrival at the apartment complex, Defendant parked in the "very back" area of the complex. Vause parked, exited his vehicle, approached the driver's side, and commanded Defendant to get out of

the car. Defendant did not comply. Vause "beat on the window to tell [Defendant] to open the window" and tried "to open the door and the door was locked." After a few moments, Defendant opened the door and Vause was able to remove Defendant from the vehicle. Defendant was "belligerent," "argumentative," and "jumping in [Vause's] face," and Vause placed Defendant in handcuffs. As Defendant was being placed under arrest, around 50 to 60 people gathered at the scene. Defendant continued to be argumentative and "act out" as Vause placed Defendant inside his patrol car; Defendant then unrolled the patrol car's window with her foot and shouted at the group of people to provoke the crowd. Vause and a female officer put Defendant in leg shackles to keep her from rolling any windows down and from further provoking the crowd.

On 7 December 2020, Defendant was indicted for possession with intent to manufacture, sell, or distribute marijuana; possession of marijuana paraphernalia; and felony fleeing to elude arrest with a motor vehicle.[1] The case came on for trial on 28 February 2022. After the State's evidence and again after all the evidence, Defendant moved to dismiss the charge of felony fleeing to elude arrest for insufficient evidence. The trial court denied the motion.

The jury found Defendant not guilty of possession of marijuana paraphernalia but guilty of misdemeanor possession of marijuana and misdemeanor fleeing to elude arrest with a motor vehicle. Defendant was sentenced to 30 days' imprisonment; the trial court then suspended the sentence and placed Defendant on 12 months' supervised probation. Defendant gave notice of appeal in open court.

II. Discussion

Defendant argues that the trial court erred by failing to dismiss the charge of fleeing to elude arrest with a motor vehicle because the State failed to present sufficient evidence of Defendant's intent to elude arrest.

A. Standard of Review

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of

1. N.C. Gen. Stat. § 20-141.5(a) provides that a violation of the section constitutes a Class 1 misdemeanor. However, N.C. Gen. Stat. § 20-141.5(b) provides that, if two or more aggravating factors are present at the time the violation occurs, a violation of the section shall be a Class H felony. These aggravating factors include, inter alia, reckless driving as proscribed by N.C. Gen. Stat. § 20-140 and driving when the person's driver's license is revoked. N.C. Gen. Stat. § 20-141.5(b)(3), (5) (2022). These two aggravating factors were listed on Defendant's indictment.

the crime and that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (citations omitted). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* (citations omitted). "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* at 249-50, 839 S.E.2d at 790 (quotation marks and citations omitted). We disregard a defendant's evidence except to the extent it favors or clarifies the State's case. *State v. Graves*, 203 N.C. App. 123, 125, 690 S.E.2d 545, 547 (2010) (citation omitted). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Golder*, 374 N.C. at 250, 839 S.E.2d at 790 (citations omitted).

B. Discussion

N.C. Gen. Stat. § 20-141.5(a) provides, "It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." N.C. Gen. Stat. § 20-141.5(a) (2022). "[A] defendant accused of violating N.C. Gen. Stat. § 20-141.5 must actually intend to operate a motor vehicle in order to elude law enforcement officers . . . ." *State v. Woodard*, 146 N.C. App. 75, 80, 552 S.E.2d 650, 654 (2001). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. McDaris*, 274 N.C. App. 339, 344, 852 S.E.2d 403, 407-08 (2020) (citation omitted).

Considered in the light most favorable to the State, the evidence tends to show the following: Defendant ran a stop sign after leaving the apartment complex. Vause pulled in behind Defendant and Defendant saw Vause turn on his vehicle's emergency equipment. She abruptly turned right onto a different street, traveling into the oncoming lane of travel. Defendant then increased her speed, drove 10 to 15 miles per hour above the posted 25 mile-per-hour speed limit, made a series of abrupt right turns, drove through several stop signs, again swerved into the oncoming lane, and passed several well-lit areas in a residential neighborhood, including a fire station and an EMS station. During Vause's pursuit, marijuana was thrown out of the car that Defendant was driving. When Defendant pulled over, she initially refused to comply

with Vause's commands to roll her window down and open her door, and then was combative with the officers and tried to provoke the crowd that had formed at her arrest. After arrest, she continued to provoke the crowd by rolling down the patrol car's window and shouting.

"This is not a case of a nervous motorist taking a moment longer than necessary to stop for an officer in order to pull into a well-lit or populated parking lot to stop instead of stopping on a dark or empty highway[.]" *State v. Cameron*, 223 N.C. App. 72, 76, 732 S.E.2d 386, 389 (2012). The State's evidence is substantial evidence tending to show Defendant intended to evade officers. *See id.* (evidence that defendant intentionally drove away from a law enforcement officer "at a high rate of speed while committing traffic violations and seriously endangering herself, many law enforcement officers, and anyone else on the road along the way" was sufficient to survive a motion to dismiss). Accordingly, the trial court properly denied Defendant's motion to dismiss.

III. Conclusion

As the evidence, viewed in the light most favorable to the State, is substantial evidence of each element of the crime of fleeing to elude arrest, the trial court did not err by denying Defendant's motion to dismiss.

NO ERROR.

Judges TYSON and RIGGS concur.

STATE v. MILLER

[289 N.C. App. 429 (2023)]

STATE OF NORTH CAROLINA
v.
SANTARIO KENDELL MILLER

No. COA22-453

Filed 20 June 2023

1. Appeal and Error—invited error—affirmative actions—redacted video

The appellate court rejected the State's argument that defense counsel invited error, thus waiving appellate review of the admission of portions of a videotaped interview between law enforcement and defendant, by cooperating with the State to determine the appropriate redactions to the interview and agreeing to the admission of the redacted video and its publication to the jury. Because defense counsel did not take any affirmative action to introduce the redacted interview, the invited error doctrine did not apply.

2. Evidence—video interview—plain error analysis—substantial evidence of guilt

In defendant's murder trial, even assuming that the trial court erred by admitting portions of a redacted interview between defendant and law enforcement, there was no plain error because defendant could not show prejudice in light of the substantial other evidence of defendant's guilt—including testimony from two eye witnesses who picked defendant out of a photo lineup and identified him as the shooter in court and surveillance footage showing someone near the bus stop when the victim was shot wearing clothes that the defendant had been wearing.

3. Sentencing—prior record level—proof of prior convictions—copy of records maintained by Department of Public Safety

In sentencing defendant for first-degree felony murder and possession of a firearm by a felon, the trial court did not err in its calculation of defendant's prior record level where the State satisfied its burden to prove defendant's prior convictions by submitting a printout of the computerized criminal record maintained by the Department of Public Safety, as permitted pursuant to N.C.G.S. § 15A-1340.14(f).

Appeal by Defendant from judgments entered 9 November 2021 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brian D. Rabinovitz, for the State.

Mecklenburg County Public Defender Kevin P. Tully, by Assistant Public Defender Julie Ramseur Lewis, for Defendant.

COLLINS, Judge.

Defendant appeals from judgments entered upon jury verdicts of guilty of first degree murder on the basis of felony murder and possession of a firearm by a felon. Defendant argues that the trial court plainly erred by admitting certain portions of a redacted recording of an interview between law enforcement and Defendant and erred in calculating Defendant's prior record level. Even assuming for the sake of argument that the challenged portions of the interview were erroneously admitted, their admission did not rise to the level of plain error. Furthermore, the trial court did not err in its prior record level calculation.

I. Factual Background and Procedural History

Defendant was indicted on 9 July 2018 for first degree murder and possession of a firearm by a felon. He was tried beginning 1 November 2021. At trial, the State presented eight witnesses and 39 exhibits, including video surveillance footage of the area and a redacted recording of the interview between law enforcement and Defendant. Defendant did not present any evidence. The State's evidence tended to show the following:

During the late night and early morning of 20-21 May 2018, Defendant, Shalamar Venable, Marquis Hines, Dean Hough, and several other individuals were gathered at a bus stop in Charlotte. Hines and Hough testified that Defendant left the bus stop for one to two hours before returning with another man, whom Hough identified as "Damien." Upon returning, Defendant confronted Venable regarding drugs and money that Defendant believed Venable owed him. When Venable denied that she owed Defendant money, Defendant pulled out a revolver.

Hines testified that, after Defendant pulled out the revolver, Defendant punched Venable and fired a shot past her. Venable then stepped toward Defendant, and Defendant shot her two to three times. Hines and another man tried to approach, but Defendant pointed the revolver at them, and they retreated. As Hines was retreating, he turned back and saw Defendant going through Venable's pockets. Upon reaching the nearby woods, Hines called 911.

Hough testified that, after Defendant pulled out the revolver, Hough began walking away from the scene. When Hough was a short distance from the scene, he heard four or five gunshots and looked back to see Defendant and Damien leaving the scene. Hough returned to the scene to find Venable on the ground and called 911.

Venable was taken to the hospital where she was pronounced dead. The medical examiner determined that she had suffered four gunshot wounds, and that two of them were responsible for her death.

Police interviewed Hines and Hough separately after the shooting and showed them photographic lineups of six individuals, one of whom was Defendant. When Hines was shown the photo lineup, he identified two individuals as possibly the shooter, one of whom was Defendant. Hines said that his confidence that Defendant was the shooter was 7 out of 10, and that his confidence that the other individual was the shooter was 7 or 8 out of 10. At trial, Hines identified Defendant as the shooter.

When Hough initially viewed the photo lineup, he did not pick anyone out. Upon reviewing the lineup a second time, he identified Defendant as possibly the shooter, noting that the picture of Defendant "looks the same. From his eyes, on down, his whole face." At trial, Hough identified Defendant as the shooter.

Defendant was arrested on 29 June 2018 and interviewed by two detectives. The recording of the interview was redacted upon agreement between the State and Defendant, and the redacted version of the interview was published to the jury during Defendant's trial. During the interview, Defendant initially denied any knowledge of, or involvement in, the events surrounding Venable's death. Detectives confronted Defendant with purported statements from eyewitnesses identifying Defendant as the shooter and showed Defendant surveillance video depicting someone near the bus stop when Venable was shot wearing clothes like those Defendant had been wearing. Upon viewing the surveillance footage, Defendant remarked that the figure in the video "looks just like me, but I don't know."

Defendant then admitted to being in the area on the night of the shooting with another man whom Defendant identified as a "dope fiend." Defendant stated that he had confronted Venable regarding drugs, and that the dope fiend began to argue with Venable. Defendant said he did not want to get involved so he left the area. Defendant heard gunshots but continued about his business because it did not involve him. Defendant continued to deny that he had shot Venable for the duration of the interview.

On 9 November 2021, the jury returned guilty verdicts for first degree felony murder[1] and possession of a firearm by a felon. Defendant was sentenced to life imprisonment without the possibility of parole for his first degree murder conviction and 17 to 30 months' imprisonment to begin at the expiration of his life sentence for his possession of a firearm by a felon conviction. Defendant gave oral notice of appeal in open court.

II. Discussion

A. Defendant's Recorded Interview

Defendant first argues that the trial court plainly erred by admitting certain portions of the recorded interview between law enforcement and Defendant because the challenged portions of the recording contained hearsay and inadmissible character evidence, were unfairly prejudicial, regarded Defendant's pre-arrest silence, and/or shifted the burden of proving his innocence.

1. Preservation and Standard of Review

[1] "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C. R. App. P. 10(a)(1). "[A]n issue that was not preserved by objection . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

Defendant acknowledges that he did not object to the admission of the statements that he now argues were admitted in error. However, Defendant specifically and distinctly argues that the admission of these statements amounts to plain error. Thus, the evidentiary issues are reviewable for plain error. *See id.*

The State argues that Defendant invited any error and waived appellate review because, "(1) Defendant, through counsel, actively cooperated with the State to determine the appropriate redactions to his videotaped interview; (2) the redactions to the video were for the benefit of Defendant; and (3) Defendant agreed to the admission of the redacted video and its publication to the jury."

"[U]nder the doctrine of invited error, a party cannot complain of a charge given at his request, or which is in substance the same as one

1. The jury did not find Defendant guilty of first degree murder on the basis of malice, premeditation, and deliberation.

asked by him[.]" *Sumner v. Sumner*, 227 N.C. 610, 613, 44 S.E.2d 40, 41 (1947) (citations omitted); *see also 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."). The invited error doctrine is codified by N.C. Gen. Stat. § 15A-1443(c), which states, "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2021). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Crane*, 269 N.C. App. 341, 343, 837 S.E.2d 607, 608 (2020) (citation omitted).

Our courts have consistently applied the invited error doctrine when a defendant's affirmative actions directly precipitate error. *See*, *e.g.*, *id.* at 345, 837 S.E.2d at 609-10 (applying invited error doctrine where defense counsel elicited the testimony at issue on cross-examination); *State v. Roseboro*, 344 N.C. 364, 373, 474 S.E.2d 314, 318 (1996) (applying invited error doctrine where "defendant unequivocally agreed" to limit the purpose of certain testimony); *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416, (2001) (applying invited error doctrine where defendant requested evidence be admitted "despite explicit warnings by the trial court that defendant's statement had not been properly redacted").

On the other hand, our courts have declined to apply the invited error doctrine where such specific and affirmative actions are absent. *See*, *e.g.*, *State v. Chavez*, 270 N.C. App. 748, 757, 842 S.E.2d 128, 135 (2020) (holding invited error doctrine did not apply where defendant "did not request the [erroneous] instruction, but merely consented to it"), *rev'd on other grounds*, 378 N.C. 265, 861 S.E.2d 469 (2021); *State v. Harding*, 258 N.C. App. 306, 311, 813 S.E.2d 254, 259 (2018) (holding invited error doctrine did not apply where defendant "failed to object, actively participated in crafting [a portion of] the challenged instruction, and affirmed it was 'fine' ").

Here, the record reflects that Defendant agreed with the State on certain portions that were redacted from the interview, and that Defendant did not object to the redacted interview being published to the jury. The record does not reflect that Defendant took any affirmative action to introduce the redacted interview. Accordingly, the invited error doctrine does not apply.

2. Analysis

[2] Even assuming for the sake of argument that the challenged statements were erroneously admitted, Defendant has failed to establish that the error constituted plain error.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted).

Here, absent the complained of portions of the redacted interview, the jury heard from two eyewitnesses who picked Defendant out of a photo lineup as the likely shooter and identified Defendant as the shooter in court. Both eyewitnesses gave testimony that Defendant had previously been at the bus stop with Venable; that Defendant left for one to two hours and returned with another man; and that, upon returning, Defendant argued with and subsequently shot Venable. The jury also heard Defendant's eventual version of events that corroborated both eyewitnesses' testimonies in every respect except as to who shot Venable. Additionally, the jury saw video surveillance footage depicting someone near the bus stop when Venable was shot wearing clothes like those Defendant had been wearing. The jury also saw Defendant being shown that footage and stating, "it looks just like me," shortly before changing his story to the version of events that corroborated both eyewitnesses' testimonies.

In light of this substantial evidence of Defendant's guilt, Defendant cannot show that, "absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Accordingly, the admission of the challenged statements, if error, did not amount to plain error.

B. Prior Record Level Calculation

[3] Defendant next argues that the trial court erred in calculating his prior record level because the State failed to prove Defendant's prior felonies.

The determination of a defendant's prior record level is a conclusion of law, which is reviewed de novo. *State v. Black*, 276 N.C. App. 15, 17, 854 S.E.2d 448, 451 (2021) (citation omitted).

The State must prove each of a felony offender's prior convictions by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f) (2021). To satisfy its burden, the State must prove both "that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." *Id.*

The State may prove a defendant's prior convictions by submitting "[a] copy of records maintained by the Department of Public Safety[.]" *Id.* § 15A-1340.14(f)(3). Additionally, a record from the Department of Public Safety "bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true." *Id.* § 15A-1340.14(f).

Here, the trial court checked the box on Defendant's Prior Record Level Worksheet indicating that, in making its determination about Defendant's prior record level, "the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH." The DCI-CCH is a computerized criminal record maintained by the North Carolina State Bureau of Investigation ("NCSBI"). *See* 14B N.C. Admin. Code 18A.0102(6) (2021) (defining CCH as "computerized criminal history record information"); *id.* 18A.0102(19) (2021) (defining DCI as the "Division of Criminal Information" within the NCSBI). The NCSBI is administratively located within the Department of Public Safety. N.C. Gen. Stat. § 143B-915 (2021). Thus, a DCI-CCH is a record maintained by the Department of Public Safety and may be used to prove Defendant's prior convictions pursuant to N.C. Gen. Stat. § 15A-1340.14(f).

By submitting Defendant's DCI-CCH to the trial court, as indicated by the court on Defendant's Prior Record Level Worksheet, the State satisfied its burden to prove Defendant's prior convictions by a preponderance of the evidence. Accordingly, the trial court did not erroneously calculate Defendant's prior record level.

III. Conclusion

Because Defendant has failed to demonstrate plain error, and because the State met its burden to prove Defendant's prior convictions, we conclude that Defendant received a fair trial free from prejudicial error.

NO PLAIN ERROR AND NO ERROR.

Chief Judge STROUD and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES ALLEN MINYARD

No. COA22-962

Filed 20 June 2023

Constitutional Law—right to be present at trial—waiver—need for sua sponte competency hearing—harmless error

At a trial for multiple sexual offenses where, during jury deliberations, defendant passed out and was removed from the courtroom after intentionally overdosing on drugs and alcohol, the trial court was not required to sua sponte conduct a competency hearing to determine whether defendant had the capacity to voluntarily waive his constitutional right to be present during the remainder of his trial, as there was no substantial evidence of anything (such as a history of mental illness) tending to cast doubt on defendant's competency before his intentional overdose. Even if the court had erred, such error was harmless where the trial court was able to observe defendant throughout the trial and conducted two colloquies with defendant both before and after the overdose incident; defendant was represented by able counsel (who did not move for further inquiry into defendant's competency), was able to actively participate in the proceedings, and did not exhibit any bizarre or concerning behaviors before overdosing; and the jury was specifically instructed not to hold defendant's absence from the courtroom against him.

Appeal by defendant from order entered 22 December 2021 by Judge Robert C. Ervin in Burke County Superior Court. Heard in the Court of Appeals 24 May 2023.

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

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

TYSON, Judge.

This Court allowed James Allen Minyard's ("Defendant") Petition for Writ of *Certiorari* ("PWC") on 12 August 2022 to review the 22 December

order of the Burke County Superior Court, allowing in part and denying in part Defendant's motion for appropriate relief ("MAR"). We affirm and remand.

I. Background

This Court's prior opinion sets forth the facts underlying this case in greater detail. *See State v. Minyard*, 231 N.C. App. 605, 606, 753 S.E.2d 176, 179, *disc. rev. denied*, 367 N.C. 495, 797 S.E.2d 914 (2014) (R. N. Hunter, J.). This Court unanimously held "the trial court did not err in denying Defendant's motions to dismiss, nor in choosing not to conduct a *sua sponte* competency hearing after Defendant voluntarily intoxicated himself and waived his right to be present during a portion of the proceedings." *Id*. at 627, 753 S.E.2d at 191-92.

Facts pertinent to Defendant's MAR are: Defendant was indicted for first-degree sexual offense and six counts of taking indecent liberties with a minor on 14 September 2009. Defendant was also indicted as attaining habitual felon status on 13 June 2011. The cases proceeded to trial on 13 August 2012. The trial court dismissed one count of taking indecent liberties with a minor and the first-degree sexual offense charge after the close of the State's evidence. The trial court allowed the charge of attempted first-degree sexual offense and the five remaining charges of taking indecent liberties with a minor to proceed to trial. Defendant testified for over thirty-five minutes immediately before the defense rested its case-in-chief on 15 August 2012. After closing arguments, after instructing and submitting the case to the jury, the trial court instructed Defendant to remain inside the courtroom, unless he needed to speak with his attorney, while the jury was deliberating.

The trial court recessed from 2:10 p.m. until 2:38 p.m., when the jury asked for a transcript of the victim's recorded interview. As the trial court was reconvening to bring the jury back into the courtroom, Defendant's counsel informed the trial court that Defendant was "having a little problem." With Defendant present in the courtroom the trial court informed all parties he would respond to the jury's question by stating no written transcript existed of the victim's interview on the DVD they were shown. The jury returned to their deliberations.

Around this time Defendant was having problems staying "vertical" and the trial court advised as follows:

> [Defendant] you've been able to join us all the way through this. And let me suggest to you that you continue to do that. If you go out on us, I very likely will revoke your conditions of release. I'll order you arrested. We'll

> call emergency medical services; we'll let them examine you. If you're healthy, you'll be here laid out on a stretcher if need be. If you're not healthy, we will continue on without you, whether you're here or not. So do you very best to stay vertical, stay conscious, stay with us.

The trial court recessed until the jury requested to re-watch the last ten minutes of the DVD. The trial court informed the parties it would allow this request. The trial court resumed proceedings and noted:

> All right, all counsel, all parties are present. Defendant is present, and the Defendant is not - - is in the courtroom but is not joining us at the defense table, and has not come up at the request of the Court. I have a report that he has overdosed. That is, he has taken medication, so much medication that he's at a point where he might not be functioning very well.

A defense witness, Evelyn Gantt, informed the trial court Defendant had consumed eight Alprazolam pills because: "He was just worried about the outcome and I don't know why he took the pills." Defendant was taken into custody and the trial court ordered for him to be examined by emergency medical services. Defendant was led from the courtroom to receive medical attention. Subsequently, the jury had another question. Before the jury was brought back into open court, the trial court allowed both sides an opportunity to be heard. The trial court found Defendant had disrupted the proceedings by leaving the courtroom against the instructions of trial court and had voluntarily overdosed on drugs, based upon the following findings of facts:

> The Court finds Defendant left the courtroom without his lawyer.
>
> The Court finds that while the jury was in deliberation — the jury had a question concerning an issue in the case — and prior to the jurors being returned to the courtroom for a determination of the question, the Court directed the Defendant to — who was in the courtroom at that point — to return to the Defendant's table with his counsel. Defendant refused, but remained in the courtroom. The Court permitted that.
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> The Court noticed that after the question was resolved with the juror, that while the jury was out in deliberations working on Defendant's case, the Defendant took an

> overdose of Xanax. While he was here in the courtroom and while the jury was still out in deliberations, Defendant became lethargic and slumped over in the courtroom.
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> . . . .
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> The Court finds that outside of the jury's presence the Court noted that Defendant was stuporous and refused to cooperate with the Court and refused reasonable requests by bailiffs.
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> . . . .
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> The Court finds that Defendant's conduct on the occasion disrupted the proceedings of the Court and took a substantial amount of time to resolve how the Court should proceed. The Court finally ordered that Defendant's conditions of pretrial release be revoked and ordered the Defendant into the custody of the sheriff, requesting the sheriff to get a medical evaluation of the Defendant.
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> The Court finds that Defendant, by his own conduct, voluntarily disrupted the proceedings in this matter by stopping the proceedings for a period of time so the Court might resolve the issue of his overdose.
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> The Court notes that the — with the consent of the State and Defendant's counsel that the jurors continued in deliberation and continued to review matters that were requested by them by way of question.
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> The Court infers from Defendant's conduct on the occasion that it was an attempt by him to garner sympathy from the jurors. However, the Court notes that all of Defendant's conduct that was observable was outside of the jury's presence.
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> The Court notes that both State and Defendant prefer that the Court not instruct jurors about Defendant's absence. And the Court made no reference to Defendant being absent when jurors came in with response to — or in response to question or questions that had been asked.

When the jury returned to the courtroom, the trial court instructed the jurors Defendant's absence should not be considered in weighing evidence or determining guilt. The trial court allowed the jury's requests to review portions of the victim's interview preserved on the DVD.

A jury found Defendant guilty of five counts of taking indecent liberties with a child, one count of attempted first-degree sexual offense, and of attaining habitual felon status. After the jury entered its verdict, the trial court amended its prior findings after emergency medical services indicated Defendant had purportedly consumed "fifteen Klonopin" and two forty-ounce alcoholic beverages. Defendant returned to the courtroom the next morning and was present and declined to testify at the habitual felon proceeding and the sentencing phases of the other charges.

Defendant was sentenced to concurrent sentences of 225 to 279 months imprisonment as a habitual felon for the attempted first-degree sexual offense and 121 to 155 months for the five counts of taking indecent liberties with a child on 15 August 2012.

On prior appeal, Defendant's appellate counsel argued, *inter alia*, the trial court erred by not pausing the trial and conducting a *sua sponte* competency hearing when Defendant passed out after ingesting eight Alprazolam or possibly fifteen Clonazepam pills and two forty-ounce alcoholic beverages during a break in the proceedings. On 7 January 2014 this Court filed a unanimous opinion holding no error had occurred at trial. The North Carolina Supreme Court denied Defendant's petition for discretionary review.

Defendant wrote a letter to Superior Court Judge Jerry Cash Martin, which the trial court received on 2 October 2015. Defendant asserted he was a diabetic and he had been temporarily affected by low blood sugar at his trial. Defendant argued "under the 5th, 8th, and 14th amendment[s] the trial should have been stopped and a mental health hearing should have been scheduled at a later date to see if [he] was fit to continue or not." Judge Robert C. Ervin treated Defendant's 2 October 2015 letter as a MAR and denied the MAR by order entered 5 October 2015.

Defendant filed a *pro se* "kitchen sink" second MAR on 24 February 2018 arguing: (1) he was denied a speedy trial; (2) he received ineffective assistance of counsel; (3) the trial court engaged in misconduct by stating Defendant was "drunk and over-dos[ed]" and by failing to conduct a competency hearing; (4) his sentence violated double-jeopardy; (5) a witness for the State committed perjury; (6) prosecutorial misconduct; (7) he was entitled to an instruction on a lesser-included offense; and, (8) he was convicted of an offense that no longer exists. *Jennings v. Sheppard*, 2:21-cv-00449-JFA-MGB (D.S.C. Feb. 22, 2022) (referring to the defendant's MAR as a "kitchen sink").

Judge Ervin denied Defendant's MAR by order entered 21 March 2018 holding, *inter alia*, Defendant had failed to establish he was

prejudiced by being voluntarily absent from a portion of his trial. This Court denied Defendant's PWC by order entered 24 January 2019. The Supreme Court of North Carolina denied Defendant's PWC by order entered 1 April 2020.

Defendant filed yet another MAR in Burke County Superior Court on 21 May 2021. Defendant asserted he was entitled to a new trial based on the Supreme Court of North Carolina's opinion in *State v. Sides*, 376 N.C. 449, 852 S.E.2d 170 (2020). Defendant argued the trial court erred by failing *sua sponte* to inquire, without motion or inquiry from counsel, into his competency after he purportedly fell into a stupor during jury deliberations due to overdosing on benzodiazepines. Judge Ervin requested briefing on four issues: (1) whether *Sides* applies to this case; (2) if so, whether *Sides* is legally distinguishable; (3) if not, whether the trial court's actions constituted a competency hearing; and, (4) if not, whether Defendant has to show the trial court's failure to hold a competency hearing prejudiced him. The trial court appointed counsel for Defendant and held a hearing on the MAR on 20 December 2021.

Judge Ervin entered an order allowing in part and denying in part the MAR on 22 December 2021. Judge Ervin concluded the trial court's failure to conduct a competency proceeding prior to the habitual felon and sentencing phases was prejudicial error and vacated Defendant's habitual felon verdict. Judge Ervin held, although *Sides* applied to Defendant's case and substantial evidence could raise a *bona fide* doubt of Defendant's competency, "[t]he failure to conduct a *sua sponte* capacity evaluation was harmless error in th[at] portion of the proceeding [after jury deliberations had begun]" and denied Defendant's claim for a new trial.

Defendant filed another PWC on 26 May 2022. This Court allowed Defendant's PWC to review Judge Ervin's 22 December 2021 order denying in part Defendant's MAR. The State did not cross-appeal nor seek further review of the order.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 15A-1422(c)(3), 7A-32(c) (2021) and N.C. R. App. P. 21(a).

III. Issues

Defendant argues the trial court erred in denying him a new trial based upon *Sides*, and also holding the trial court's error did not occur during a "critical phase" of trial, and is subject to harmless error review.

IV. Award of a New Trial

A. Standard of Review

This Court reviews a trial court's ruling on a MAR "to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted).

B. Analysis

Criminal defendants possess a Constitutional right to be present at all stages of their trial. *See Kentucky v. Stincer*, 482 U.S. 730, 745, 96 L. Ed. 2d 631, 647 (1987). The Supreme Court of the United States has also held a defendant may waive his right, in non-capital cases, to be present where he "voluntarily absents" himself. *See Taylor v. United States*, 414 U.S. 17, 19, 38 L. Ed. 2d 174, 177 (1973).

The Supreme Court of North Carolina has recognized a "[t]rial court has a constitutional duty to institute, sua sponte [sic], a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977); *see also* N.C. Gen. Stat. § 15A-1002 (2021). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007) (citation and quotation marks omitted).

When a defendant's capacity to proceed is questioned during the trial, the court must determine whether a hearing is necessary, and must decide "whether there was substantial evidence before the trial court as to [the defendant's] lack of capacity to truly make such a voluntary decision" to absent himself from the trial. *Sides*, 376 N.C. at 459, 852 S.E.2d at 177. A trial judge must conduct a fact-intensive inquiry when evaluating whether a *sua sponte* competency hearing is necessary. *See id.* "The method of inquiry [rests] within the discretion of the trial judge, the only requirement being that [the] defendant be accorded due process of law." *State v. Gates*, 65 N.C. App. 277, 281, 309 S.E.2d 498, 501 (1983).

A defendant "must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound

reason for remaining away" in order to voluntarily waive his right to be present at trial. *Taylor*, 414 U.S. at 17 n.3, 38 L. Ed. 2d at 177 n.3 (citation omitted).

This Court has previously held: "[e]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant" to an inquiry into a defendant's competency. *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000).

Defendant's MAR allegations and the trial court's granting in part and denying in part of relief was based upon its application of *State v. Sides*. In *Sides*, the Supreme Court reviewed a defendant's appeal, who was charged with four counts of felony embezzlement. After the first three days of trial, the defendant intentionally ingested sixty Xanax tablets. *Id.* at 450, 852 S.E.2d at 172. A doctor evaluated the defendant and recommended she be involuntarily committed, checking the box on the petition form describing her as " 'mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness.' " *Id.*

A magistrate found reasonable grounds to conclude the defendant required involuntary commitment, and she began a period of commitment. *Id.* at 451, 852 S.E.2d at 172. A psychiatrist evaluated her the next day, and noted the defendant remained suicidal and required inpatient stabilization. *Id.*

Our Supreme Court held the trial court erred by presuming the defendant's suicide attempt was a voluntary waiver of her right to be present at the trial. After her attempt, the trial court sought information on whether the absence was voluntary or involuntary. *Id.* at 451, 852 S.E.2d at 173. The trial court recessed the proceedings after reviewing draft orders from the State. *Id.* at 452, 852 S.E.2d at 173.

The trial court in *Sides* intended to wait until the following Monday, when the defendant would be released or the trial court would have access to her medical records. *Id.* at 452-53, 852 S.E.2d at 173-74. Proceedings resumed on the following Monday, while the defendant remained hospitalized. *Id.* at 453, 852 S.E.2d at 174. The trial court read the defendant's medical records, which included the recommendation from doctors for her to remain hospitalized, as well as information about her mood disorder history and her pharmacy of prescriptions: Haldol for agitation, Vistaril for anxiety, Trazodone to aid sleep, and 100 milligrams of Zoloft daily. The trial court reviewed the medical records and

confirmed with defense counsel that they had not observed anything, which would indicate the defendant lacked competency to proceed at trial. *Id.* The trial court ruled defendant "voluntarily by her own actions made herself absent from the trial" over defense counsel's objection. *Id.* at 454-455, 852 S.E.2d at 174.

The Court in *Sides* held that while a defendant may voluntarily waive the constitutional right to be present at trial, the defendant may only waive the right when she is competent. *Id.* at 456, 852 S.E.2d at 175. The trial court erred "by essentially skipping over the issue of competency and simply assuming that [the] defendant's suicide attempt was a voluntary act that constituted a waiver of her right to be present during her trial, [and] both the majority at the Court of Appeals and the trial court had 'put the cart before the horse.' " *Id.* at 457, 852 S.E.2d at 176. "Once the trial court had *substantial evidence* that [the] defendant may have been incompetent, it should have sua sponte [sic] conducted a competency hearing to determine whether she had the capacity to voluntarily waive her right to be present during the remainder of her trial." *Id.* (emphasis supplied).

Our Supreme Court held:

> In such cases, the issue is whether the trial court is required to conduct a competency hearing before proceeding to determine whether the defendant made a voluntary waiver of her right to be present, or, alternatively, whether it is permissible for the trial court to forego a competency hearing and instead assume a voluntary waiver of the right to be present on the theory that the defendant's absence was the result of an intentional act.

Id. at 457, 852 S.E.2d at 175–76.

Our Supreme Court further held:

> [T]he issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a sua sponte competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case. *Our holding should not be interpreted as a bright-line rule that a defendant's suicide attempt automatically triggers the need for a competency hearing in every instance.* Rather, *our decision is based on our consideration of all the evidence in the record when viewed in its totality.*

Id. at 466, 852 S.E.2d at 182 (emphasis supplied).

Before oral arguments were presented but after briefing was completed in this case, the Supreme Court of North Carolina reviewed this Court's unanimous analysis of a similar issue in *State v. Flow*, 384 N.C. 528, 549, 886 S.E.2d 71, 87 (2023).

> The morning of the sixth day of the trial before the jury was to be charged, Defendant was being escorted from the Gaston County Jail. At some point, Defendant indicated he had forgotten his glasses in his cell and asked if he could go and get them. Defendant was standing over the ledge of the second-floor mezzanine. Detention officers reported to the second-floor mezzanine after being told Defendant was "hanging" on the second-floor mezzanine approximately sixteen feet off of the ground. Detention officers told Defendant not to jump, but Defendant jumped feet first. Defendant fell onto a metal table and landed on the ground. Defendant suffered injuries to his left leg and ribs. Defendant was transported to the hospital and underwent surgery to reduce a fracture in his femur.
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> The trial court conducted a hearing to determine whether Defendant's absence was voluntary. The trial court considered and denied Defendant's counsel's motion for the court to make further inquiry into his capacity to proceed.
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> The trial court ruled Defendant had voluntarily absented himself from the proceedings, and the trial would continue without Defendant present. The jury charge, jury deliberations, and sentencing commenced without Defendant present. Defendant's counsel objected to each phase proceeding outside of Defendant's presence.

State v. Flow, 277 N.C. App. 289, 295, 859 S.E.2d 224, 228 (2021).

Unlike in *Sides*, nothing in the defendant's prior record, conduct, or actions in Flow's had provided the trial court or anyone else with notice or evidence he may have been incompetent. Our Supreme Court noted:

> Although the trial court declined to specifically consider whether defendant had manifested a "suicidal gesture" at the time of his jump [from a second floor courthouse balcony], we do not deem the trial court's approach to connote inadequate contemplation by the tribunal of the evidence presented on defendant's capacity. Suicidality does not automatically render one incompetent; conversely, a defendant may be found incompetent by way

> of mental illness without being determined to be suicidal. However, a defendant cannot be found to have acted voluntarily if he lacked capacity at the time of his conduct in question. Logically, competency is a necessary predicate to voluntariness. By receiving evidence concerning defendant's state of mind leading up to, and at the time of, his apparent suicide attempt, the trial court was able to determine whether defendant had acted voluntarily and had thereby waived his right to be present at all stages of his trial. Clearly, the trial court considered all information relative to defendant's capacity which was presented to it and found, implicitly at least, that defendant was competent to proceed to trial. Therefore, *the trial court was not required to make a specific determination regarding whether defendant's acts amounted to a suicidal gesture.*

Flow, 384 N.C. at 548-49, 886 S.E.2d at 86 (emphasis supplied) (internal citations, quotation marks, and brackets omitted).

Defendant argues a "bona fide doubt of his capacity and competency arose during trial when he became 'stuporous' and non-responsive." Aside from the act and side effects brought about by Defendant's alleged voluntary ingestion of mind and mood altering sedatives and alcohol, Defendant does not offer any prior history or evidence, much less substantial evidence, to support his assertions. Defendant did not exhibit bizarre behavior at any point during his trial or during his 35 minutes of testimony charging and submitting the case to the jury prior to assertedly ingesting Alprazolam and consuming two forty-ounce alcoholic beverages.

No substantial evidence tended to alert the court or counsel nor cast doubt on Defendant's competency prior to his voluntary actions after all the evidence was presented, the case was submitted, and the jury had commenced deliberations. The trial court was able to observe Defendant over and throughout the course of the trial and was able to conduct two colloquies directly with Defendant prior to and after the incident. Unlike in *Sides*, the trial court was not presented with *any evidence of a history* of Defendant's mental illness. The trial court did not err in denying Defendant's MAR.

Judge Ervin's order from the MAR heading granted Defendant relief for his attaining habitual status and ordered: "The judgment entered against the defendant in these cases is vacated and the jury's verdict determining that the defendant was an [sic] habitual felon is also vacated. The remainder of the defendant's Motion for Appropriate

Relief is denied. The defendant's cases will be rescheduled for further proceedings concerning his alleged status as an habitual felon and for re-sentencing."

The State failed to cross appeal or seek further review of the MAR order vacating Defendant attaining habitual felon status and ordering another habitual felon status hearing and resentencing on the issue. These unappealed portions of the order are not before this Court and remain undisturbed.

Neither party cited, briefed, nor filed a Memorandum of Additional Authority for either this Court's unanimous opinion in *Flow* nor the Supreme Court's affirmance opinion thereof until three days prior to arguments. *See* N.C. R. Pro. Conduct 3.3(a)(2) ("A lawyer shall not knowingly: fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]").

V. Structural and Harmless Error

Presuming, without deciding, the trial court erred by *sua sponte* not holding a further competency inquiry or hearing, any purported error is not structural and is harmless beyond a reasonable doubt.

In *Flow*, the Supreme Court of North Carolina examined the defendant's statutory and due process challenges to his competency to proceed during trial following his volitional and intentional acts. Defendant here only asserts due process challenges under the Constitution of the United States and not under the North Carolina Constitution.

A. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). "When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts." *State v. Ortiz-Zape*, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013) (quoting *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012)).

By enacting N.C. Gen. Stat. § 15A-1443(b), our General Assembly "reflects the standard of prejudice with regard to violation[s] of the defendant's rights under the Constitution of the United States, as set out in the case of *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967)." N.C. Gen. Stat. § 15A-1443 official cmt. (2021). The burden falls "upon the State to demonstrate, beyond a reasonable doubt, that

the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2021); *see also Brecht v. Abrahamson*, 507 U.S. 619, 630, 123 L. Ed. 2d 353, 367 (1993); *Chapman*, 386 U.S. at 24; 17 L. Ed. 2d at 710-11; *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331.

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24, 17 L. Ed. 2d at 708; *see also Davis v. Ayala*, 576 U.S. 257, 267, 192 L. Ed. 2d 323, 332-33 (2015); N.C. Gen. Stat. § 15A-1443(b).

B. Analysis

Defendant asserts the trial court's failure to *sua sponte* hold additional inquiry into his competency is "structural error and is reversible *per se*." *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004).

The Supreme Court of the United States has made "a distinction between structural errors, which require automatic reversal, and all other errors, which are subject to harmless-error analysis. *Arnold v. Evatt*, 113 F.3d 1352, 1360 (4th Cir. 1997). "The United States Supreme Court emphasizes a strong presumption against structural error." *State v. Polke*, 361 N.C. 65, 74, 638 S.E.2d 189, 195 (citing *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)), *cert. denied*, 552 U.S. 836, 169 L. Ed. 2d 55 (2006).

Structural errors are rare Constitutional errors, which prevent a criminal trial from "reliably serv[ing] its function as a vehicle for determination of guilty or innocence." *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 (citation omitted).

The Supreme Court of North Carolina has held:

> The United States Supreme Court has identified only six instances of structural error to date: (1) complete deprivation of right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); (2) a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927); (3) the unlawful exclusion of grand jurors of the defendant's race, *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986); (4) denial of the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); (5) denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); and[,] (6)

> constitutionally deficient jury instructions on reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). *See Johnson v. United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718, 728 (identifying the six cases in which the United States Supreme Court has found structural error).

Polke, 361 N.C. at 73, 638 S.E.2d at 194.

The United States Court of Appeals for the Fourth Circuit has warned "judges should be wary of prescribing new structural errors unless they are certain that the error's presence would render every trial in which it occurred unfair." *Arnold*, 113 F.3d at 1360. Defendant's alleged "structural error" does not fall under any of the six cases in which the Supreme Court of the United States has identified as structural error. This alleged Constitutional error, like all other Constitutional errors not so identified by the Supreme Court of the United States, is subject to harmless error review. Defendant's *per se* argument is overruled.

The State argues any purported error was harmless beyond a reasonable doubt because Defendant was competent throughout his trial and testimony and any alleged doubt to his competency did not arise until after all evidence was presented, closing arguments had been completed, the jury was charged, the case was submitted, and jury deliberations had begun. Defendant argues a criminal defendant possesses a Constitutional right to be present at all stages of their trial. *See Stincer*, 482 U.S. at 745, 96 L. Ed. 2d at 647.

Defendant had actively participated in his trial and testified extensively on his own behalf. The trial court noted:

> Defendant's counsel has not suggested anything that the defendant could have done during the course of responding to the jury's requests that would have altered the outcome of [the] jury's deliberations and this Court does not believe that the defendant's inability to participate in this stage of this trial would have affected the outcome.

The State correctly notes Defendant was represented by able and competent counsel, who was present and did not question or move for further inquiry. Defendant did not exhibit any bizarre or concerning behaviors during his trial prior to leaving the courtroom contrary to instruction, and voluntarily ingesting a controlled substance and alcohol while the jury was deliberating his guilt. No substantial evidence tended to alert or cast doubt upon Defendant's competency prior to his actions

at trial in intentional disregard of the trial court's express instructions for him to remain in the courtroom unless conferring with counsel.

The trial court was able to observe Defendant throughout the course of the trial and was able to conduct two colloquies directly with Defendant in open court with his counsel present prior to and after the incident. Reviewing the trial transcript, it is reasonable to infer from the trial court's observations and statements, and Defendant's actions after hearing all the evidence against him and having just testified at length, Defendant was able to "read the room" and observe the probable impact of the evidence and his credibility on the jury. Defendant, possibly for the first time, realized the gravity of his multiple assaults and predatory crimes on a young boy and the probable consequences and accountability he was facing. This view is also supported by Gantt, Defendant's witness, who told the trial court Defendant had consumed eight Alprazolam pills because, "[h]e was just worried about the outcome" of an extended prison sentence.

Defendant's counsel and the State did not wish to be heard on the issue. Defendant's pretrial release was revoked, he was taken into custody, examined by emergency medical personnel at the scene, and taken to the hospital for further observation and treatment. The laboratory results in the record from the hospital does not demonstrate elevated or abnormal levels of glucose to support asserted diabetes nor any debilitating health issue Defendant asserted to explain his voluntary behaviors.

Defendant was returned to court after his voluntary behaviors and in hospital medical review. Defendant had been free on bond and release and no evidence showed the jury viewed his behaviors. The jury was specifically instructed, with consent of the State and Defendant's counsel, not to hold his absence from the courtroom against him. *See State v. Daniels*, 337 N.C. 243, 275, 446 S.E.2d 298, 318 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995) (This Court presumes that jurors follow the trial court's instructions.).

VI. Conclusion

It is not the proper role of the trial court judge to sit as a second-chair defense counsel with his able counsel present. "[I]t's [the judge's] job to call balls and strikes and not to pitch or bat." Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate, 109 Cong. 56 (Statement of John G. Roberts, Jr.).

The trial court was not presented with any evidence of a prior history of Defendant's mental illness to provoke *sua sponte* further

inquiry. *Sides* is inapplicable to the facts and Defendant's actions before us. *Sides*, 376 N.C. at 459, 852 S.E.2d at 177. On the issues before this Court, the trial court properly denied Defendant's MAR.

Without prior indications, the trial court was not required in the absence of motion or inquiry to *sua sponte* further inquire into Defendant's capacity to proceed following his intentional acts to intoxicate himself or to voluntarily absent himself from trial. Presuming, without deciding, any error occurred under the analysis in *Sides* or *Flow*, the State has shown it was harmless error beyond a reasonable doubt. The order denying Defendant's MAR is affirmed.

In accordance with Judge Ervin's order on the MAR hearing, including those portions where no appeal was filed or further review sought by the State: "The judgment entered against the defendant in these cases is vacated and the jury's verdict determining that the [D]efendant was an habitual felon is also vacated. The remainder of the [D]efendant's Motion for Appropriate Relief is denied. The [D]efendant's cases will be rescheduled for further proceedings concerning his alleged status as an habitual felon and for re-sentencing." The jury's guilty verdicts on the remaining substantive crimes remain undisturbed. *It is so ordered.*

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS AND FOR RESENTENCING.

Judges ZACHARY and STADING concur.

TILLMAN v. JENKINS

[289 N.C. App. 452 (2023)]

LASHUNDA TILLMAN, PLAINTIFF
v.
SASHA JENKINS, DEFENDANT

No. COA22-531

Filed 20 June 2023

1. Child Custody and Support—temporary custody order—interlocutory appeal—"temporary" order not temporary

Although a temporary child custody order is normally interlocutory and not immediately appealable, the trial court's "temporary custody order" was not temporary where, at the time of the appeal, the paternal grandmother had had "temporary" custody of the mother's children for nearly three years and where the most recent "temporary" order failed to state a clear and specific reconvening time for a permanent custody hearing. Therefore, the Court of Appeals had jurisdiction to hear the mother's appeal from the order.

2. Child Custody and Support—standing—grandparent initiation of custody proceeding—allegations of unfitness

In a child custody dispute between a mother and her children's paternal grandmother, the grandmother had standing to initiate the custody proceeding because she adequately alleged that the mother had acted inconsistently with her parental status—with allegations including that the mother lacked stable housing, was unable to physically and financially care for the children, and had acted in a manner inconsistent with her constitutionally protected rights to parent the children.

3. Child Custody and Support—permanent custody order—application of best interest standard—parent's fitness and constitutionally protected status—required finding

In a child custody dispute between a mother and her children's paternal grandmother, where the trial court's "temporary custody order" was in substance actually a permanent custody order, the trial court erred by applying the "best interest of the child" standard without first finding that the mother was unfit or had acted inconsistently with her constitutionally protected status as the children's parent.

Appeal by Defendant from order entered 12 November 2021 by Judge Karen D. McCallum in Mecklenburg County District Court. Heard in the Court of Appeals 25 January 2023.

Wray Law Firm, PLLC, by Tiasha L. Wray and Gregory Hunt, for Defendant-Appellant.

Offit Kurman, P.A., by Kyle A. Frost and K. Mitchell Kelling, for Plaintiff-Appellee.

COLLINS, Judge.

Defendant-Mother appeals from an order granting "temporary care, custody and control" of her two minor children to Plaintiff-Grandmother, the children's paternal grandmother. Mother argues that the trial court erred by using the "best interest of the child" standard to award Grandmother custody without first finding that Mother was unfit or had acted inconsistently with her constitutionally protected status as the children's natural parent. Because the trial court's order was a permanent custody order and the trial court did not find that Mother was unfit or had acted inconsistently with her constitutionally protected status, the trial court erred by using the "best interest of the child" standard to determine custody of the children. The order is vacated and the matter is remanded with instructions.

I. Factual Background and Procedural History

Mother is the biological mother of two children who were born in 2012. Mother's former husband ("Father") was the biological father of the children. Mother and Father divorced in 2015 and entered into a parenting agreement in June 2016, whereby Father was awarded primary physical custody of the children and Mother was awarded visitation. In May 2020, Father was killed by a member of Mother's family. Grandmother filed a "Motion to Modify Child Custody, *Ex Parte* Motion for Emergency Custody[,] and Motion for Attorney's Fees" in July 2020.[1] The trial court entered an "Ex Parte Temporary Emergency Custody Order" on 28 July 2020, awarding temporary custody of the children to Grandmother, granting supervised visitation to Mother, and scheduling the matter for hearing on 5 August 2020.

After hearings on 5 August and 3 November 2020, the trial court entered an "Order for Supervised Visitation" in January 2021, finding, in relevant part:

1. This pleading is not in the record on appeal but is referenced in various pleadings and orders.

> 8. Father was murdered by a member of [Mother's] family on May 23, 2020, while the minor children were present and witnessed the murder.
>
> . . . .
>
> 11. That after the murder Mother refused visitation to Grandmother who practically raised the minor children since they were months old, and that this was not in the best interest of the minor children.
>
> . . . .
>
> 14. That on August 5, 2020 [Grandmother's] *Ex Parte* Motion for Emergency Custody was heard by the court and this court finds that said emergency still exists.
>
> 15. The minor children have been through the trauma of witnessing their father's murder and Mother continues to put them in an environment where they are around family members who are constantly threatening the [G]randmother and other family members, and this is not in the best interest of the minor children.

Based on its findings, the trial court concluded that the parties were properly before the court and that the court had jurisdiction over the matter. Based on its findings and conclusions, the trial court ordered, in relevant part:

> 1. []Grandmother's *Ex Parte* Motion for Emergency Custody is GRANTED.
>
> 2. []Grandmother is awarded temporary physical and legal custody of the minor children.
>
> 3. []Mother is granted supervised visitation with Carolina Solutions every other week for a period of four (4) hours.
>
> . . . .
>
> 15. That pending further orders of the court, the court retains jurisdiction over the parties for enforcement and/or modification of said Order hereto and of the subject matter herein.

At a hearing on 17 September 2021, the trial court dismissed Grandmother's "Motion to Modify the Parenting Agreement that was

entered on 23 June 2016."[2] Mother's attorney sent an email to individuals at the children's school, stating in part:

> We appeared in court this morning and the pending custody action [Grandmother] had against [Mother] were dismissed by the court. As such, there aren't any pending custody actions or any custody orders in effect. Given the recent change of events, we ask that you disregard any custody orders previously provided to you as they no longer have any legal effect. And, it is our expectation that the children be released to [Mother] upon request.

In response, Grandmother's attorney emailed the following message to individuals at the school: "All, No order dismissing [Grandmother's] action has been entered by the Court at this time. Please also be advised we are filing a Motion for Emergency custody shortly." After the hearing, Mother apparently went to pick up the children from school. That same day, Grandmother filed a new "Complaint for Child Custody and Child Support and Attorney's Fees[;] Motion for Ex Parte Emergency Custody and Attorney's Fees, or in the Alternative a Motion for Temporary Parenting Arrangements," seeking an emergency custody order granting her temporary exclusive care, custody, and control of the children or, should the court not grant emergency custody, temporary primary custody of the children.

On 22 September 2021, the trial court entered a new "Ex Parte Temporary Emergency Custody Order," finding that "[Grandmother] alleges that Mother is mentally unstable and incapable of providing care for the minor child"; "Mother tried to remove the minor children from school"; and "[Grandmother] is concerned that Mother may flee the jurisdiction with the minor children." The trial court awarded Grandmother temporary care, custody, and control of the children and scheduled the matter for hearing on 30 September 2021. Mother answered Grandmother's complaint on 27 September 2021, denying Grandmother's material allegations, and moved to dismiss the complaint pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

---

2. The record does not contain a "Motion to Modify the Parenting Agreement that was entered on 23 June 2016," an order dismissing the motion, or a transcript of the 17 September 2021 hearing. The motion is referenced in various pleadings and orders. It is assumed that the "Motion to Modify the Parenting Agreement" and the "Motion to Modify Child Custody" filed in July 2020, also not in the record, are the same motion. The 17 September 2021 hearing is referenced in Mother's counsel's email to the children's school and Grandmother's complaint filed on that date.

The matter came on for a review of emergency custody on 30 September 2021. At the hearing, the trial court heard only Grandmother's case-in-chief, which included testimony from Grandmother, one of the children's teachers, and the children's therapist. The trial court did not allow Mother to present evidence. At the close of Grandmother's case, Mother moved to dismiss Grandmother's claim for emergency custody, pursuant to North Carolina Rule of Civil Procedure 41(b). The trial court granted Mother's motion to dismiss "based on the fact that there is no emergency." However, the trial court announced that it was inclined to enter a temporary custody order. Mother objected on the ground that Grandmother presented no evidence challenging Mother's fitness as the children's natural parent. The trial court advised the parties to return for a hearing on 4 October 2021 "to address the issue of whether or not the court had authority to enter a temporary custody order without considering or having any evidence regarding Mother's unfitness, or conduct in a manner inconsistent with Mother's parental right."

At the 4 October 2021 hearing, the trial court acknowledged that a permanent custody order would require the court to find that Mother had waived her constitutionally protected status but determined it had the authority to enter a temporary custody order pursuant to N.C. Gen. Stat. § 50-13.5(d)(2) without a showing that Mother had waived her constitutionally protected status. The trial court stated that it would deny Grandmother's motion for emergency custody, refrain from ruling on Grandmother's motion for a temporary parenting arrangement until a later hearing, and enter a temporary order continuing primary custody with Grandmother.[3]

Mother then inquired about scheduling a permanent custody hearing:

> [MOTHER]: [] When can we come back to be heard on permanent custody? How short are these temporary orders going to be in place if my client's constitutional rights are not going to be considered?
>
> THE COURT: Okay. So let's give a 90-day review.
>
> [MOTHER]: 90-day review for temporary? Or -- because, I mean, Your Honor, you know how Mecklenburg County

3. The trial court noted that, because it determined no emergency existed, it would have to hear Grandmother's motion for a temporary parenting arrangement for Mother to put on evidence. Instead, the trial court entered its temporary order based solely on Grandmother's evidence during the emergency custody hearing.

> temporary orders work. And this last one was just in place -- an emergency order was in place for over a year. So I guess my next question would be can we get on a trial calendar to be heard on permanent custody sooner than later?
>
> . . . .
>
> THE COURT: --- [W]e're going to have a 90-day review date, and then after that we'll set a custody date.
>
> [MOTHER]: So we're looking at at least six months?
>
> THE COURT: It's a school year. I'm not going to move them out of school ---

The trial court announced, "I will give them the traditional shared schedule for the holidays based on the CMS school schedule, or even year for one parent, odd for the other."

On 12 November 2021, the trial court entered a "Temporary Custody Order" finding:

> 12. At the September 30, 2021 emergency return hearing, the court heard evidence from [Grandmother], the minor children's teachers and their therapist.
>
> 13. At the close of [Grandmother's] evidence, counsel for Mother moved to dismiss [Grandmother's] claim for emergency custody pursuant to Rule 41(b).
>
> 14. The Court granted counsel's Rule 41 motion, but the Court was inclined to enter a temporary custody order, to which counsel for Mother objected on the grounds that [Grandmother] provided no evidence challenging Mother's fitness as required in actions brought by non-parents.
>
> . . . .
>
> 16. On October 4, 2021, after arguments from counsel, the Court found it had authority to enter a temporary custody order pursuant to N.C.G.S 50-13.5(d)(2) and that Plaintiff was not required to make a showing challenging Mother's protected status, but rather, the standard for the court's consideration was best interest.
>
> 17. Mother was not provided an opportunity to present any evidence or her case and chief.

The order denied Grandmother's claim for emergency custody, concluded that "[i]t is in the best interests of the minor children and would promote their general welfare, for their custody to be primarily with the [Grandmother], as hereinafter set out with more specificity[,]" and awarded Grandmother "temporary care, custody and control" of Mother's children. Mother was given visitation of the children weekly from Friday to Monday, Thanksgiving break in even years starting in 2022, Christmas break in 2021 and then half of Christmas break in subsequent years, Mother's Day, and spring break in even years. The order scheduled a "review hearing 90 days from the entry of this order on a date to be determined by the court." Mother appealed.

II. Discussion

A. Appellate Jurisdiction

[1] We first address this Court's jurisdiction to hear this appeal. "As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation omitted). "An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree." *Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000) (citation omitted). "A temporary child custody order is normally interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits." *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (2012) (citation omitted). However, the trial court's designation of a custody order as temporary is not sufficient to render the order interlocutory and not subject to appeal. *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546. Rather, "whether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009) (citation omitted).

"A temporary order is not designed to remain in effect for extensive periods of time or indefinitely[.]" *LaValley v. LaValley*, 151 N.C. App. 290, 292 n.5, 564 S.E.2d 913, 915 n.5 (2002) (citation omitted). A "[t]emporary custody order[] resolve[s] the issue of a party's right to custody pending the resolution of a claim for permanent custody." *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546 (citation omitted). Where "the trial court fails to state a 'clear and specific reconvening time' in its otherwise temporary order, it will be treated as a permanent one." *Maxwell v. Maxwell*, 212 N.C. App. 614, 618, 713 S.E.2d 489, 492 (2011). Furthermore, where an order states a reconvening time, but the time interval between the two hearings is not reasonably brief, the order will be treated as a permanent

one. *See Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546 (holding that "a year is too long a period to be considered as 'reasonably brief,' in a case where there are no unresolved issues"). Whether the time interval between hearings is reasonably brief "must be addressed on a case-by-case basis." *LaValley*, 151 N.C. App. at 293 n.6, 564 S.E.2d at 915 n.6.

Here, Grandmother was awarded temporary physical and legal custody of the children on 28 July 2020. Grandmother retained temporary physical and legal custody by order entered in January 2021. Grandmother's motion to modify Mother's parenting agreement with Father was dismissed 17 September 2021, but Grandmother was again awarded temporary care, custody, and control of the children on 22 September 2021. The trial court entered yet another "Temporary Custody Order" on 12 November 2021, again awarding primary custody to Grandmother and establishing a shared holiday schedule designed to last indefinitely.

Although the order scheduled the matter "for a review hearing 90 days from the entry of this order on a date to be determined by the court[,]" the trial court informed the parties that the 90-day hearing was only to review the temporary custody arrangement, that "after that we'll set a custody date[,]" and that it was "not going to move [the children] out of school[.]"

Grandmother has now had "temporary" custody of Mother's children since 28 July 2020—almost three years. Two years passed between the entry of the initial temporary order and the potential date of a permanent custody hearing after the school year ended in the summer of 2022. The chronic temporary, and thus interlocutory, orders have evaded appellate review and avoided addressing whether Mother is unfit or has acted inconsistently with her parental rights. Furthermore, the "Temporary Custody Order" failed to state a clear and specific reconvening time for a permanent custody hearing.

For the foregoing reasons, the "Temporary Custody Order" was not temporary, but was instead a permanent custody order. Accordingly, this Court has jurisdiction to hear Mother's appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(2) as she appeals from a final order.

B. Standing

[2] Mother first argues that Grandmother lacked standing to initiate a custody proceeding.

Whether a party has standing to initiate a custody proceeding is a question of law reviewed de novo. *Thomas v. Oxendine*, 280 N.C. App.

526, 531, 867 S.E.2d 728, 733 (2021). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Wellons v. White*, 229 N.C. App. 164, 173, 748 S.E.2d 709, 717 (2013) (quotation marks and citation omitted).

N.C. Gen. Stat. § 50-13.1(a) provides, "Any parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]" N.C. Gen. Stat. § 50-13.1(a) (2021). The statute "grants grandparents the broad privilege to institute an action for custody . . . ." *Eakett v. Eakett*, 157 N.C. App. 550, 552, 579 S.E.2d 486, 488 (2003). "Although grandparents have the right to bring an initial suit for custody, they must still overcome the parents' constitutionally protected rights." *Thomas*, 280 N.C. App. at 531, 867 S.E.2d at 733 (quotation marks and citation omitted). Thus, to have standing to initiate a custody action against a parent, the grandparent must allege the parent is "unfit or has engaged in conduct inconsistent with their parental status." *Id.* (citations omitted).

Here, Grandmother alleged the following:

> 24. Upon information and belief, Mother has not had stable housing, moving repeatedly, or staying with various family members, largely due to her inability to retain stable employment.
>
> 25. The minor children have been seeking therapy due to the sudden death of their father. The children's therapist . . . has indicated that they are flourishing in their current environment and they should maintain their current school life balance and routine. . . .
>
> 26. [Mother] did not support therapy for the minor children and upon information and belief would not abide by any recommendations regarding therapy for the minor children.
>
> 27. Upon information and belief, Mother is unable to physically and financially care for the minor children. Mother, by her own actions, has not provided a suitable environment that is conducive of the best interests and welfare of the minor children.
>
> 28. There is a substantial risk of serious physical and emotional injury to the minor children while in Mother's custody.
>
> . . . .

> 33. [Mother], by her own actions, has acted in a manner inconsistent with the constitutionally protected rights to parent the minor children with regard to the upbringing and care of the minor children.

Grandmother adequately alleged that Mother had acted inconsistently with her parental status. Accordingly, Grandmother had standing to initiate this action.

C. Custody Determination

[3] Mother next argues that the trial court erred when it applied the "best interest of the child" standard to determine custody of her children without first finding that Mother was unfit or had acted inconsistently with her constitutionally protected status as the children's natural parent.

Whether a trial court applied the correct legal standard to determine custody is a question of law reviewed de novo. *Blanchard v. Blanchard*, 279 N.C. App. 280, 284, 865 S.E.2d 693, 697 (2021).

In custody actions between a parent and nonparent, the parent's constitutionally protected right to make decisions concerning the care, custody, and control of their children must prevail unless the court finds that the parent is unfit or has acted inconsistently with their constitutionally protected status. *Price v. Howard*, 346 N.C. 68, 73, 484 S.E.2d 528, 531 (1997) (citation omitted). If a natural parent is not unfit or has not acted in a manner inconsistent with their constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. *Id.* at 79, 484 S.E.2d at 534 (citations omitted). Only if "such conduct is properly found by the trier of fact, based on evidence in the record, [should] custody [] be determined by the 'best interest of the child' test . . . ." *Id.* at 79, 484 S.E.2d at 535.

Here, the parties do not dispute that the trial court made no finding that Mother was unfit or had acted inconsistently with her constitutionally protected status as the children's natural parent prior to applying the best interest of the child standard in its determination to grant Grandmother custody. The trial court acknowledged it would be required to find that Mother had waived her constitutionally protected status to enter a permanent order, but determined that it had the authority "to enter a temporary custody order pursuant to N.C.G.S. 50-13.5(d)(2)[,] and that [Grandmother] was not required to make a showing challenging Mother's protected status, but rather, the standard

for the court's consideration was best interest." However, as discussed above, the trial court's "Temporary Custody Order" was a permanent order. Accordingly, the trial court was required to find Mother unfit or that her conduct was inconsistent with her constitutionally protected status before applying the "best interest of the child" standard to determine custody of the children. The trial court's failure to do so was error.

III. Conclusion

Because the trial court erred by applying the "best interest of the child" standard without first finding that Mother was unfit or had acted inconsistently with her constitutionally protected status as the children's natural parent, the trial court's order is vacated and the matter is remanded with instructions to the trial court to hold a permanent custody hearing and enter a permanent custody order within 60 days of the issuance of this opinion. Nothing herein shall be interpreted as preventing the trial court from entering a temporary custody order to govern the custody of the children pending the entry of the permanent custody order within the next 60 days.

VACATED AND REMANDED WITH INSTRUCTIONS.

Judges ARROWOOD and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 JUNE 2023)

AZIZ v. HEATHERSTONE HOMEOWNERS ASS'N, INC. No. 22-819	Cabarrus (18CVS2531)	No error in part and vacated in part.
IN RE A.C. No. 22-709	Buncombe (20JA306) (20JA307)	Affirmed in Part, Vacated in Part, and Remanded for Correction of Clerical Error
IN RE A.G. No. 22-656	Cumberland (21JA157) (21JA158)	Affirmed
IN RE FORECLOSURE OF ALMANZAR No. 22-911	Wake (21SP1014)	Affirmed
IN RE J.A.H. No. 22-945	Guilford (17JT333) (18JT421) (20JT94)	Affirmed
IN RE L.M. No. 22-655	Cumberland (20JA375) (20JA376) (20JA377) (20JA378)	Affirmed
IN RE N.G. No. 22-722	Mecklenburg (18JT325)	Affirmed
STATE v. EUBANKS No. 22-451	Gaston (19CRS59605)	No Error.
STATE v. GALLOWAY No. 22-960	Forsyth (20CRS318) (20CRS51941-43)	No Error
STATE v. KENNEDY No. 22-676	Caswell (17CRS50575) (18CRS208) (18CRS209)	No Plain Error in Part, No Error in Part
STATE v. LOCKLEAR No. 22-308	Carteret (20CRS51579) (20CRS525)	No plain error

STEELE v. N.C. DEP'T OF PUB. SAFETY No. 23-77	N.C. Industrial Commission (TA-28162)	Affirmed

BOULWARE v. UNIV. OF N.C. BD. OF GOVERNORS

[289 N.C. App. 465 (2023)]

KIENUS PEREZ BOULWARE, PETITIONER
v.
THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS,
EX REL. WINSTON-SALEM STATE UNIVERSITY BOARD OF TRUSTEES, RESPONDENT

No. COA22-840

Filed 5 July 2023

Public Officers and Employees—termination—football coach—violation of employment contract—failure to report gun on campus

The trial court's order affirming the final decision of the Winston-Salem State University (WSSU) Board of Trustees terminating petitioner football coach's employment was affirmed by the Court of Appeals where petitioner's clear violation of his employment contract in failing to report to police the potential presence of a gun in a dorm room created grounds for termination. The appellate court rejected petitioner's arguments on appeal as lacking merit—contrary to petitioner's argument, WSSU consistently advocated multiple grounds for petitioner's termination (including the violation of his employment contract), and petitioner failed to identify any conflicts in the evidence or to challenge the sufficiency of the evidence to support any specific finding of fact.

Appeal by defendant from judgment entered 31 January 2022 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 7 June 2023.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for the petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kari R. Johnson, for the respondent-appellee.

TYSON, Judge.

Kienus Perez Boulware ("Boulware") appeals from orders entered on 31 January 2022, which denied his request for relief and affirmed the decision of the Winston-Salem State University ("WSSU") Board of Trustees. We affirm.

I. Background

Boulware began his employment with WSSU on 4 January 2010. He was employed as head coach for five years and agreed to a fixed-term contract for 48 months set to terminate on 31 December 2020.

Boulware's contract set forth his duties, which included management and supervision of the football team as well as "other duties . . . as may be assigned." The contract stated he could be terminated for just cause for a significant or repetitive violation of the duties set forth in the contract, as well as a "significant or repetitive violation of any law, regulation, rule, constitutional provision or bylaw of the institution."

Boulware was assigned the duty of serving as a Campus Security Authority ("CSA"), a person who assists the University in complying with The Clery Act, which tasks universities with reporting crimes and keeping a public crime log. As part of his training as a CSA, Boulware signed a letter that explained the types of crimes he was obligated to report.

> Our university has a responsibility to notify the campus community about any crimes which pose an ongoing threat to the community, and, as such, campus security authorities are obligated by law to report crimes to the university police department. Even if you are not sure whether an ongoing threat exists, immediately contact the university police department.

On 4 April 2019, two WSSU football players were involved in an altercation during practice and fought again in the weightroom after practice. Boulware intervened and sent the players home. Later that morning, he was informed the altercation had reignited in the players' dorm room.

On his way to the dorms, Boulware contacted the father of one of the students and he was informed of a possibility a gun was involved. Boulware arrived at the dorm room with an assistant coach, engaged with the players, but did not contact WSSU Police. The players were asked if there was a gun in the room. All answered no and no formal search occurred. A bag with a substance, possibly marijuana, was found in the room, but no gun was seen. Boulware gave the bag to the student's father, who had arrived, and he disposed of it. Boulware attempted to inform the Athletic Director, but he could not reach him. He never informed the WSSU Police Department or the Director of Athletics, instead contacting only the Office of Student Conduct.

On 23 April 2019, Chancellor Elwood L. Robinson signed a Notice of Intent to Discharge Boulware for cause. The Chancellor listed Clause 5 of the Boulware's employment contract, WSSU EHRA Personnel Policies, Section 300.2.1 of the UNC Policy Manual and Section 611 of the Code of the University of North Carolina Board of Governors. Those policies list causes for discharge including, but not limited to, incompetence, unsatisfactory performance, neglect of duty, or misconduct that interferes with the capacity of the employee to perform effectively the requirements of his or her employment.

Boulware requested a hearing before the WSSU's EHRA Grievance Committee on 29 April 2019. The hearing was originally scheduled for 30 May 2019 but was continued until 23 July 2019 per Boulware's request. Boulware and WSSU were represented by counsel at the hearing.

After hearing evidence and testimony, the Grievance Committee recommended Boulware's termination be affirmed. The Grievance Committee drafted a decision letter, which outlined the termination procedures for Boulware. The procedures initially described and outlined in the letter applied to at-will employees, which did not include Boulware, who held a non-faculty ERHA position exempt from the State Human Resources Act. Consequently, the letter incorrectly stated it was being sent to WSSU's Board of Trustees, but the letter was instead re-routed to Chancellor Robinson when WSSU attorneys realized the procedures described in previous letters to Boulware were inconsistent with the UNC System's Code. The decision letter Boulware received outlined the wrong procedures, but the process was handled correctly and properly sent to Chancellor Robinson. Boulware's attorneys consented to the change in procedure via email. Chancellor Robinson adopted the Grievance Committee's recommendation on 22 November 2019.

On 3 December 2019, Boulware gave notice of appeal to WSSU's Board of Trustees. The Board of Trustees issued its Final Decision upholding his termination on 5 March 2020.

Boulware filed a Petition for Judicial Review requesting his termination of employment contract be reversed on 1 June 2020. He asserted the WSSU Board's Final Decision violated his constitutional protections, was made upon unlawful procedures, was affected by errors of law, was unsupported by substantial evidence, and constituted an abuse of discretion.

Boulware's First Petition for Judicial Review was heard on 3 September 2020. On 28 September 2020, Judge Gottlieb entered an order stating: "Boulware's grievance was properly referred to the

Grievance Committee for an impartial, fact-finding hearing and the Grievance Committee's Recommendation was properly issued." However, the Court nevertheless concluded that, because of the procedural errors, the review and decision were:

> made upon unlawful procedure within the meaning of N.C. Gen. Stat § 150B-51(b)(3); and (ii) was affected by other error of law within the meaning of N.C. Gen. Stat § 150B-51(b)(4).

The court vacated the final decision of the Board of Trustees and remanded the matter for impartial review of the Grievance Committee's Recommendation with subsequent review, if necessary and requested, as provided by the UNC system's code.

The record, including the transcript from the Committee's hearing, was reviewed by Dr. Kimberly van Noort, Senior Vice President for Academic Affairs and Academic Officer for The University of North Carolina System. Dr. van Noort issued a decision on 15 December 2020 agreeing with the Grievance Committee's recommendation to terminate Boulware's contract and employment. Boulware responded by submitting a notice of appeal to the WSSU Board of Trustees.

WSSU's Board of Trustees unanimously affirmed Dr. van Noort's decision on 7 May 2021. Board Chair Harris and the original board attorney did not participate in the appeal, due to concerns raised by Boulware.

Boulware filed a Second Petition for Judicial review on 7 June 2021 based upon the same contentions from the First Petition: asserting violations of constitutional provisions; unlawful procedures; errors of law; lack of substantial evidence; and, abuse of discretion. On 21 July 2021, Boulware requested Judge Gottlieb to rule upon unresolved issues from the First Petition. After this hearing, Judge Gottlieb declined to rule on the First Petition, ruling any unresolved issues from the First Petition were intrinsically intertwined with the issues raised in the Second Petition. Anything not specifically addressed in the prior order should be addressed in the Second Petition.

The case was heard on 11 January 2022. Judge Morgan issued his ruling, consolidating both the First and Second Petitions, affirming the final decision of the WSSU Board of Trustees, and denying all relief for Boulware on 31 January 2022.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

Boulware argues the Final Decision to terminate his employment was not supported by substantial evidence because all decisions were based on a misapprehension of law.

Boulware also argues that the trial court erred as a matter of law because the WSSU changed its justification for dismissing Boulware's appeal *post hoc* after the case was remanded for impartial review. Boulware lastly contends the conclusions of law are not supported by proper findings of fact because the substantive findings are mere recitations of evidence.

IV. Standard of Review

This Court examines the trial court's order for errors of law by completing two steps: "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994).

The trial court's review of the issues was governed by N.C. Gen. Stat. § 150B-51 which reads in part:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted [ ]
>
> . . .
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to . . . subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c) (2021).

Under the whole record test, "if the agency's findings are supported by substantial evidence, they must be upheld." *Sack v. N.C. State Univ.*, 155 N.C. App. 484, 491, 54 S.E.2d 120, 127 (2002). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." *In re Denial of NC Idea's Refund*, 196 N.C. App. 426, 433, 675 S.E.2d 88, 94 (2009) (internal citations and quotations omitted).

V. Misapprehension of Law

Boulware argues the Final Decision to terminate his employment was not supported by substantial evidence because all decisions were based upon a misapprehension of The Clery Act. 20 U.S.C. § 1092(f) (2018) (tasking universities with reporting crimes and keeping a public crime log). He argues WSSU relied upon a misapprehension of The Clery Act as a basis for their argument against him, and substantial evidence does not exist to support the Board's decision. *Id.*

Substantial evidence tends to show Boulware engaged in a significant violation of his assigned contractual duties. Boulware signed his CSA training letter on 7 November 2019 and acknowledged his awareness and understanding of his duty to *immediately* report any on-going threats to the university's police department even if unsure whether an on-going threat existed.

Boulware testified he was aware of the possibility of a gun being involved in the altercation between his players, yet instead of contacting law enforcement, he engaged with numerous people, including the agitated players and the father of one of the players inside the dorm for over two hours. Despite being made aware of the potential presence of a gun, Boulware never searched for one nor informed university police of this allegation. This testimony alone is a substantial violation, and his failure to comply risked serious harm or even death of students, staff, or the public.

Clear and substantial evidence of a violation of Boulware's contractual obligations was presented and substantiated his termination.

VI. *Post Hoc* Change in Justification

Boulware argues that the trial court erred as a matter of law because WSSU changed its justification for dismissing Boulware *post hoc* after the case was remanded for impartial review. He asserts the initial focus to justify the termination of his contract was a violation of The Clery Act, but when Judge Gottlieb remanded for an impartial review, WSSU utilized a different theory.

The initial letter of termination to Boulware from 25 April 2019 was introduced at trial. In the opening sentences, the letter notifies the intent to dismiss based on "WSSU EHRA Personnel Policies, Section 300.2.1 of the UNC Policy Manual and Section 611 of The Code of the University of North Carolina Board of Governors." The letter describes Boulware's failure to contact law enforcement and its potential impact on campus safety. All of these assertions allegedly occurred before any reference to The Clery Act. In the initial briefs to the Superior Court, WSSU asserted Boulware was terminated for failure to fulfill both his contractual and legal obligations to notify university police officers of a serious safety concern. This assertion is consistent with Dr. Van Noort's impartial review after remand, as well as the Board of Trustee's decision, to unanimously uphold the review.

These documents from the hearings provide clear and substantial evidence WSSU had stated numerous grounds for Boulware's termination, beginning in the initial letter. WSSU consistently maintained these arguments throughout the multiple review levels, including the current appeal before this Court.

VII. Findings of Fact

Boulware contends the conclusions of law are not supported by proper findings of fact because the substantive findings are mere recitations of evidence.

Judge Morgan's Findings of Fact utilizes direct quotes from testimony. Boulware does not identify any conflicts in the evidence or testimony, and he does not challenge the sufficiency of the evidence to support any specific Finding of Fact. A significant portion of the Findings of Fact Boulware cites as relying upon direct testimony are taken directly from Boulware's testimony, which neither side disputes. "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *Moore v. Moore*, 160 N.C. App. 569, 572, 587 S.E.2d 74, 75 (2003) (internal quotations and citation omitted).

No conflicting evidence is shown, and Boulware does not contend the Findings of Fact are not supported by the evidence. This Court has previously stated where "[p]laintiff does not challenge any of the trial court's findings of fact as unsupported by the evidence[,]" the findings of fact "are binding on appeal." *Garrett v. Burris*, 224 N.C. App. 32, 34, 735 S.E.2d 414, 416 (2012). Without conflicts in the Findings of Fact,

and no contention the Findings of Fact are not supported by competent evidence, Boulware's argument is overruled.

VIII. Conclusion

Boulware's argument asserting the Final Decision to terminate his employment contract was not supported by substantial evidence, due to a misapprehension of The Clery Act, fails. Boulware's clear violation of his employment contract created grounds for termination whether or not The Clery Act was asserted as a ground.

Boulware's argument WSSU changed its justification for termination midway through the legal process and reviews also fails. Documents entered at trial provide clear and substantial evidence to support WSSU had stated multiple grounds for Boulware's termination, not solely his violation of The Clery Act. These factors are found in the initial termination letter, and WSSU consistently maintained these arguments throughout the multiple levels of review.

Boulware's challenges to the substantive findings as mere recitations of evidence and the purportedly unsupported conclusions of law are without merit. Boulware fails to identify any conflicts in the evidence or testimony and does not challenge the sufficiency of the evidence as not supporting any specific findings of fact. The Findings of Fact are binding upon appeal. *Moore*, 160 N.C. App. at 572, 587 S.E.2d at 75; *Burris*, 224 N.C. App. at 34, 735 S.E.2d at 416. These findings of fact support the conclusions of law. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judge MURPHY and Judge STADING concur.

FOXX v. DAVIS

[289 N.C. App. 473 (2023)]

THOMAS A. FOXX AND WIFE, VIRGINIA A. FOXX, PLAINTIFFS
v.
WALTER GLEN DAVIS, JR., TRUSTEE OF THE WALTER GLEN DAVIS, JR. REVOCABLE LIVING TRUST DATED THE 9TH DAY OF JUNE, 2005 AND FLORENCE S. DAVIS, DEFENDANTS

No. COA22-1014

Filed 5 July 2023

1. Declaratory Judgments—scope of easement obligation—"maintenance and repair" of road—plain language—paving excluded

In an action to determine whether the grantees (defendants) of a road easement—under which defendants agreed to share the cost of the road's "maintenance and repair"—were obligated to pay for their portion of paving the road, the trial court did not err by granting defendants partial summary judgment on their declaratory judgment claim where it correctly concluded that paving over the existing gravel road constituted an improvement and thus was excluded from the terms "maintenance" and "repair" as used in the easement.

2. Reformation of Instruments—deed—mutual mistake—three-year statute of limitations—time of discovery—claim barred

In a dispute over the terms of a road easement that had been granted to defendants—under which defendants agreed to pay a certain percentage of the cost of the road's "maintenance and repair" subject to subsequent property owners' obligations—defendants' reformation claim, on the basis of mutual mistake, was barred by the three-year statute of limitations. Defendants waited to file their claim over five years after they should have discovered any alleged mistake when they entered into an agreement with plaintiffs to exempt another adjacent property owner from any road maintenance obligations.

3. Unjust Enrichment—scope of easement—road improvement excluded—no voluntary acceptance of benefit

In an action to determine whether the grantees (defendants) of a road easement—under which defendants agreed to share the cost of the road's "maintenance and repair"—were obligated to pay for a portion of paving the road, the trial court did not err by determining that plaintiffs could not recover from defendants the cost of paving the road under a theory of unjust enrichment, where defendants affirmatively rejected plaintiffs' proposal to have the road paved

and where their continued use of the road after it was paved did not amount to voluntary acceptance of the paving.

4. Contracts—breach of contract claim—easement obligation—cost of road maintenance—calculation of damages

In an action to determine whether the grantees (defendants) of a road easement—under which defendants agreed to share the cost of the road's "maintenance and repair"—were obligated to pay for their portion of paving the gravel road, although defendants were not liable for the paving pursuant to the terms of the easement, the trial court correctly determined that defendants were liable on plaintiffs' breach of contract claim for the portion of the work that was done to prepare and rebuild the gravel base of the road, which constituted repair and maintenance. Where the trial court based its calculation of the cost owed by defendants on its erroneous decision to reform the deed, the matter was remanded for recalculation of the damages based on the original deed.

Appeal by Plaintiffs and cross-appeal by Defendants from orders entered 19 January 2021 by Judge R. Gregory Horne, 5 January 2022 by Judge Nathaniel J. Poovey, and 11 May 2022 and 18 May 2022 by Judge Kimberly Y. Best, and judgment entered 8 June 2022 by Judge Kimberly Y. Best in Watauga County Superior Court. Heard in the Court of Appeals 25 April 2023.

Miller & Johnson, PLLC, by Nathan A. Miller, for Plaintiffs-Appellants/Cross-Appellees.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt and Joseph T. Petrack, for Defendants-Appellees/Cross-Appellants.

COLLINS, Judge.

This appeal arises from a dispute between the parties involving paving a road running through an easement. Plaintiffs appeal from orders granting Defendants' motion for partial summary judgment on their declaratory judgment action; Defendants' motion for summary judgment on their reformation claim ("Reformation Order"); and Defendants' motion to amend the Reformation Order.

Plaintiffs also appeal, and Defendants cross-appeal, the trial court's judgment entered after a bench trial. Plaintiffs argue that the trial court erred by concluding that Defendants were not liable for a portion of

the cost of paving the road under a theory of unjust enrichment and by concluding that Defendants were liable only in the amount of $9,900 for breach of contract. Defendants argue that the trial court erred by concluding that they were liable for breach of contract.[1]

We hold as follows: The trial court did not err by granting Defendants' motion for partial summary judgment on their declaratory judgment action. However, the trial court erred by granting Defendants' motion for summary judgment on their reformation claim and their subsequent motion to amend the Reformation Order.

The trial court did not err in its judgment by concluding that Defendants were not liable for a portion of the cost of paving the road under a theory of unjust enrichment. Furthermore, the trial court did not err by concluding that Defendants were liable for breach of contract. However, the trial court erred by concluding that Defendants were liable for the breach in the amount of $9,900.

Accordingly, we affirm in part, reverse in part, and remand.

I. Background

Plaintiffs Thomas Foxx and Virginia Foxx owned multiple tracts of real property in Watauga County. Plaintiffs entered into a contract with Defendants Walter Glen Davis, Jr., and Florence Davis in February 1997 for the purchase of a 10-acre tract of Plaintiffs' property (the "Davis Property").[2] In May 1997, Plaintiffs conveyed to Defendants by general warranty deed the Davis Property and an easement across an adjoining tract of Plaintiffs' property to access the Davis Property. Concerning the easement, the deed stated, in relevant part:

> There is also conveyed herewith a perpetual, non-exclusive right-of-way and easement for purposes of ingress, egress and regress 50 feet in width leading from N.C. Highway 105 to the [Davis Property] . . . .
>
> By acceptance of this deed, Grantees . . . hereby agree to share in the maintenance and repair of the road to be

1. Plaintiffs' notice of appeal includes the trial court's order setting aside an entry of default against Defendants. However, Plaintiffs make no argument pertaining to this order on appeal and any issue pertaining to this order is abandoned. *See* N.C. R. App. P. 28(a); N.C. R. App. P. 28(b)(6).

2. Walter Glen Davis, Jr., conveyed by quitclaim deed his one-half undivided interest in the Davis Property to himself as trustee of the Walter Glen Davis, Jr., Revocable Living Trust in August 2005, and he is therefore a party to this action in his capacity as trustee.

> constructed by Grantors from N.C. Highway 105 to the [Davis Property] . . . . Until such time as Grantors convey property to third parties together with an easement to use said road, Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road. Grantors hereby covenant and agree to obligate each additional property owner who is conveyed an easement to use said road to share equally in Grantees' 80% obligation for maintenance and repair.

A 12-foot-wide gravel road leading from NC Highway 105 to the Davis Property was constructed by Plaintiffs in 1997 and is known as Rime Frost.

In April 2016, Plaintiffs conveyed a 55.225-acre tract of their property to the Blue Ridge Conservancy by warranty deed ("Conservancy Deed"). Thereafter, Plaintiffs and Defendants entered into a contract which essentially relieved Blue Ridge Conservancy of any obligation to contribute to maintenance or repair of Rime Frost. The contract between Plaintiffs and Defendants stated, in relevant part:

> WHEREAS, the deed from FOXX to DAVIS . . . contained provisions whereby FOXX agreed to pay a portion of the cost of maintenance and repair of a road leading from U.S. Highway 105 to the property conveyed to DAVIS and to obligate additional property owners who may be conveyed an easement to use said road to share in DAVIS' obligation for maintenance and repair of the road. . . .
>
> . . . .
>
> WHEREAS, FOXX, DAVIS and the DAVIS TRUST, each desire to (i) terminate the provisions contained in the deeds requiring road maintenance contribution . . . as those provisions may apply because of the conveyance of the . . . 55.225 acres, and (ii) to release Blue Ridge Conservancy, its successors and assigns, as owners of the 55.225 acre tract from the aforesaid responsibilities as contained in the deed . . . . Except for the specific release of Blue Ridge Conservancy, its successors and assigns, as owners of the 55.225 acre tract, from the responsibilities contained in the above referenced deeds, the obligations of FOXX, DAVIS AND the DAVIS TRUST in all other respects remain unchanged.

Plaintiffs obtained a proposal from Moretz Paving on 4 September 2019 to pave Rime Frost from the point where it crosses the Watauga River to the point where it splits near the parties' driveways. Moretz Paving's total estimate was $64,900 and was broken down as follows: the preparation of the stone base for paving totaled $19,800, and the application of the asphalt totaled $45,120. Mr. Foxx met with Mr. Davis to discuss the proposal, and Mr. Davis stated that he would discuss the proposal with Mrs. Davis. Plaintiffs did not receive any further response from Defendants regarding the proposal.

Plaintiffs sent Defendants a letter on 8 November 2019, which stated:

> After talking with Glen and sending you both a copy of the paving proposal over 6 weeks ago, we have not heard from you. I also left [Mrs. Davis] a recorded message on her phone on Monday, November 4. However, we could not wait longer to hear from you if we were to get on the spring/summer schedule for 2020 and, therefore, we have submitted the signed contract for the work to be done.
>
> Based upon your General Warranty Deed of May 7, 1997, but adjusted in your favor since we now live here on the property, we would share equally in the cost of this section of road work.

Defendants sent an email to Plaintiffs on 13 November 2019, which stated, "[we] have both reviewed the proposal and discussed it, and we do not wish to participate in the paving of the farm road." Plaintiffs had Rime Frost paved by Moretz Paving in July 2020 for a total cost of $64,900.

Plaintiffs filed suit against Defendants in August 2020, asserting claims for breach of contract, termination of easement, and unjust enrichment/quantum meruit. Defendants moved to dismiss Plaintiffs' termination of easement claim, which was granted by written order entered 19 January 2021. On 8 February 2021, Defendants filed an answer and counterclaims for declaratory judgment, accounting, and recoupment. Defendants' declaratory judgment action asked the trial court to decide the following:

> a. Does the Easement prohibit Plaintiffs from placing any impediments within the 50-foot easement area shown on the plat recorded in Plat Book 13, Page 179, Watauga County, North Carolina Public Registry?

b. What activities are included within the scope of the terms "maintenance" and "repair" as those terms are used in the Easement?

c. Does paving Rime Frost from the point where Rime Frost crossed the Watauga River to the point where Rime Frost splits near the driveways between the Plaintiffs' and Defendants' respective properties constitute an "improvement," rather than "maintenance" or "repair" of the road, and, thus, fall outside the scope of the Easement?

d. What portion of purported funds that were paid for the work Plaintiffs allege in their Complaint was for "improvements" to Rime Frost?

e. What portion of purported funds that were paid for the work Plaintiffs allege in their Complaint was for "maintenance" and "repair" of Rime Frost as those terms are used in the Easement?

f. Was the obligation to pay for maintenance and repairs to Rime Frost contained in the Easement (i.e., 'Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road') modified by the Conservancy Deed?

g. Did the Conservancy Deed violate Plaintiffs' covenant to obligate each additional property owner who is conveyed an easement to use Rime Frost to share equally in Defendants' 80% obligation for maintenance and repair?

h. Was the obligation to pay for maintenance and repairs to Rime Frost contained in the Easement (i.e., 'Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road') modified by the November 8, 2019 letter from Plaintiffs to Defendants?

Defendants filed amended counterclaims, asserting an additional claim for reformation of the easement based on mutual mistake. Defendants alleged, in part, that "[t]he shared mutual understanding of Plaintiffs and Defendants at the time of entering into the [purchase contract] was that Plaintiffs would sell additional tracts of land from the Plaintiffs' Property and with each sale, Defendants' obligation to pay for road maintenance would be reduced proportionately[.]"

Defendants moved for partial summary judgment on their declaratory judgment action. The trial court granted the motion by order entered 5 January 2022, declaring that:

> a. Resurfacing of the gravel roadway within the Easement with asphalt, concrete, or other hot-mix or non-gravel compacted material constitutes an improvement and therefore does not fall within the scope of the terms "maintenance" and "repair," as used in the Easement;
>
> b. In the present action, Plaintiffs' asphalt paving over the existing gravel roadway in the Easement from the point where the Easement crosses the Watauga River to the point of intersection of the Easement and Plaintiffs' driveway constituted an improvement and therefore fell outside of the scope of the terms "maintenance" and "repair," as used in the Easement; and
>
> c. The terms "maintenance" and "repair," as used in the Easement, do not include the maintenance or repair (as herein interpreted) of the asphalt paving over the existing gravel roadway in the Easement from the point where the Easement crosses the Watauga River to the point of intersection of the Easement and Plaintiffs' driveway.

The parties filed competing motions for summary judgment on Defendants' reformation claim. The trial court denied Plaintiffs' motion and granted Defendants' motion for summary judgment.[3] In its Reformation Order, the trial court reformed the easement to read, in pertinent part: "Until such time as Grantors convey[] property to third parties together with an easement to use said road, Grantors shall pay 50% of the cost of maintenance and repair of said road and Grantees shall pay 50% of the cost of maintenance and repair of said road."

Defendants voluntarily dismissed the portion of their declaratory judgment action, which petitioned the trial court to decide whether the easement was modified by the Conservancy Deed, and whether the Conservancy Deed violated Plaintiffs' covenant to obligate each additional property owner to share equally in Defendants' 80% obligation for maintenance and repair. Additionally, Defendants moved to amend the Reformation Order to further state: "Grantors hereby covenant and agree to obligate each additional property owner who is conveyed an

3. The parties also filed competing motions for partial summary judgment on Defendants' declaratory judgment action, but the trial court did not rule on the motions.

easement to use said road to share equally in Grantees' 50% obligation for maintenance and repair." The trial court granted Defendants' motion by written order entered 18 May 2022. That same day, Defendants voluntarily dismissed the remainder of their declaratory judgment action, as well as their claims for accounting and recoupment.

A bench trial was held on 18 May 2022 on Plaintiffs' remaining claims for unjust enrichment and breach of contract. The trial court entered a written judgment on 8 June 2022, concluding, in relevant part, that Defendants were not liable to Plaintiffs under the theory of unjust enrichment, but that Defendants were liable to Plaintiffs in the amount of $9,900 for breach of contract.

Plaintiffs filed a timely notice of appeal from the trial court's orders and judgment. Defendants filed a timely notice of appeal from the trial court's judgment.

II. Discussion

A. Summary Judgment

Plaintiffs argue that the trial court erred by granting Defendants partial summary judgment on their declaratory judgment action and summary judgment on their reformation claim.

1. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2022). "In ruling on a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party." *Keller v. Deerfield Episcopal Ret. Cmty., Inc.*, 271 N.C. App. 618, 622, 845 S.E.2d 156, 160 (2020) (quotation marks and citation omitted).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *Badin Shores Resort Owners Ass'n v. Handy Sanitary Dist.*, 257 N.C. App. 542, 549, 811 S.E.2d 198, 204 (2018) (citation omitted). "This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that an affirmative defense would bar the claim." *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 909 (2008) (citation omitted).

When the movant properly supports its motion for summary judgment pursuant to this rule, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2022). Furthermore, affidavits, both supporting and opposing, must be made "on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 604-05, 676 S.E.2d 79, 83 (2009) (quotation marks and citation omitted).

We review a trial court's order granting summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Under de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower [court]." *Archie v. Durham Pub. Sch. Bd. of Educ.*, 283 N.C. App. 472, 474, 874 S.E.2d 616, 619 (2022) (quotation marks and citation omitted).

2. Declaratory Judgment

[1] Plaintiffs contend that the trial court erred by declaring that paving Rime Frost "constituted an improvement and therefore fell outside of the scope of the terms 'maintenance' and 'repair,' as used in the Easement" and that "[t]he terms 'maintenance' and 'repair,' as used in the Easement, do not include the maintenance or repair . . . of the asphalt paving over the existing gravel roadway[.]"

An easement created by a deed is a contract and is therefore interpreted in accordance with general principles of contract law. *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). "The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made[.]" *Id.* "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citation omitted). "In construing contracts[,] ordinary words are given their ordinary meaning unless it is apparent that the words were used in a special sense. The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense." *Badin Shores Resort Owners Ass'n*, 257 N.C. App. at 557, 811 S.E.2d at 208 (quotation marks and citation omitted). "When the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court." *RME Mgmt., LLC v. Chapel H.O.M. Assocs.*,

LLC, 251 N.C. App. 562, 567, 795 S.E.2d 641, 645 (2017) (quotation marks and citation omitted).

Here, the deed creating the easement states, in pertinent part:

> By acceptance of this deed, Grantees . . . hereby agree to share in the maintenance and repair of the road to be constructed by Grantors from N.C. Highway 105 to the [Davis Property] . . . . Until such time as Grantors convey property to third parties together with an easement to use said road, Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road. Grantors hereby covenant and agree to obligate each additional property owner who is conveyed an easement to use said road to share equally in Grantees' 80% obligation for maintenance and repair.

The deed does not define the terms "maintenance" or "repair," and we therefore interpret these terms in their plain, ordinary, and popular sense in construing the contract. *Badin Shores Resort Owners Ass'n*, 257 N.C. App. at 557, 811 S.E.2d at 208. "Maintenance" is defined as "to keep in an existing state (as of repair)[.]" *The Merriam-Webster Dictionary* 431 (2016). "Repair" is defined as "to restore to good condition[.]" *Id.* at 613. Paving Rime Frost did not constitute maintenance or repair because it did not keep the gravel road in an existing state or restore the gravel road to good condition. Rather, paving Rime Frost constituted an improvement because it enhanced the quality of the road. *See id.* at 361 (defining "improve" as "to enhance or increase in value or quality"). Thus, under the plain language of the easement, paving Rime Frost was not maintenance or repair, but rather was an improvement.

Furthermore, the road Plaintiffs constructed from N.C. Highway 105 to the Davis Property in 1997 was "a gravel road . . . 12 feet wide with probably six inches of gravel on it." The easement thus indicates that the parties' intent was for Defendants to share in the maintenance and repair of Rime Frost as a gravel road.

Accordingly, the trial court did not err by granting Defendants partial summary judgment on their declaratory judgment claim.

3. Reformation

[2] Plaintiffs contend that the trial court erred by reforming the deed to reduce Defendants' road maintenance and repair obligation from 80% to 50% based on mutual mistake. Plaintiffs specifically argue that Defendants' reformation claim is barred by the statute of limitations.

"Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Branch Banking & Trust Co. v. Chi. Title Ins. Co.*, 214 N.C. App. 459, 463, 714 S.E.2d 514, 517-18 (2011) (quotation marks and citation omitted). "A mutual mistake is one common to both parties to a contract . . . wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." *Id.* (quotation marks and citation omitted). When a party seeks to reform a contract based on mutual mistake, the burden of proof lies with the moving party to prove the mutual mistake by clear, cogent, and convincing evidence. *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 748 (2003).

Under N.C. Gen. Stat. § 1-52, an action for relief on the ground of mistake must be brought within three years of "the discovery by the aggrieved party of the facts constituting the . . . mistake." N.C. Gen. Stat. § 1-52(9) (2022). "A plaintiff 'discovers' the mistake–and therefore triggers the running of the three-year limitations period–when he actually learns of its existence or should have discovered the mistake in the exercise of due diligence." *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 244, 768 S.E.2d 604, 608 (2015) (citation omitted).

Here, the purchase contract, dated 5 February 1997, states, in relevant part:[4]

> Davis will agree to share in a percentage of the road maintenance until further development occurs, at which time a POA will be formed. This percentage will be 80% Davis, and 20% Foxx. Each new homeowner will share equally in the 80% share. Foxx will not share in the maintenance after five (5) homeowners are present or no longer uses the road for farming or residential use.

Likewise, the deed creating the easement, dated 7 May 1997, states:[5]

> By acceptance of this deed, Grantees . . . agree to share in the maintenance and repair of the road to be constructed by Grantors from N.C. Highway 105 to the property conveyed herein as shown on the above-referenced plat. Until

4. The Davises are Defendants in this case and the Foxxes are Plaintiffs.

5. Grantees are Defendants in this case and Grantors are Plaintiffs.

> such time as Grantors convey property to third parties together with an easement to use said road, Grantors shall pay 20% of the cost of maintenance and repair of said road and Grantees shall pay 80% of the cost of maintenance and repair of said road.

Furthermore, on 17 August 2005, Walter Glen Davis, Jr., conveyed by quitclaim deed his one-half undivided interest in the Davis Property to himself as trustee of the Walter Glen Davis, Jr., Revocable Living Trust. The quitclaim deed included the verbiage from the 7 May 1997 deed regarding maintenance and repair of the road. Defendants also entered into an agreement with Plaintiffs on 15 April 2016 to "terminate the provisions contained in the deeds requiring road maintenance contribution" as to Blue Ridge Conservancy, and to "release Blue Ridge Conservancy, . . . as owners of the 55.225 acre tract from the aforesaid responsibilities as contained in the deed[.]"

Defendants should have discovered any mutual mistake by 15 April 2016 at the latest, after entering into the agreement with Plaintiffs to exempt Blue Ridge Conservancy from any road maintenance obligations. Because Defendants did not file their reformation claim until 3 August 2021, more than five years later, it is barred by the statute of limitations, and the trial court erred by granting Defendants' motion for summary judgment. Furthermore, the trial court erred by granting Defendants' motion to amend the Reformation Order to add that Plaintiffs "agree to obligate each additional property owner who is conveyed an easement to use said road to share equally in Grantees' 50% obligation for maintenance and repair" because Defendants' reformation claim is barred by the statute of limitations.

B. Judgment

Plaintiffs and Defendants argue that the trial court made erroneous conclusions of law in its judgment entered after a bench trial on Plaintiffs' remaining claims for unjust enrichment and breach of contract.

1. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether those findings support the conclusions of law and ensuing judgment." *Ward v. Ward*, 252 N.C. App. 253, 256, 797 S.E.2d 525, 528 (2017) (citation omitted). "Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those

findings." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted). The trial court's conclusions of law are reviewable de novo on appeal. *Donnell-Smith v. McLean*, 264 N.C. App. 164, 168, 825 S.E.2d 672, 675 (2019).

2. Unjust Enrichment

[3] Plaintiffs argue that the trial court erred by concluding that Defendants were not liable for a portion of the cost of paving the road under a theory of unjust enrichment.

A prima facie claim for unjust enrichment has five elements: (1) "one party must confer a benefit upon the other party"; (2) "the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances"; (3) "the benefit must not be gratuitous"; (4) "the benefit must be measurable"; and (5) "the defendant must have consciously accepted the benefit." *JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, 230 N.C. App. 537, 541-42, 750 S.E.2d 555, 559 (2013) (quotation marks, emphasis, and citations omitted).

"Not every enrichment of one by the voluntary act of another is unjust." *Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982). "Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for [its] value." *Rhyne v. Sheppard*, 224 N.C. 734, 737, 32 S.E.2d 316, 318 (1944).

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

> 21. In 2019, the Plaintiffs asked Moretz Paving, Inc. to give them a proposal for paving Rime Frost from where the pavement ends just after the bridge crossing the Watauga River to where the Plaintiffs' driveway intersects with Rime Frost.
>
> 22. Moretz Paving, Inc. dispatched Robert Stroup, an estimator with Moretz Paving, Inc. to estimate the cost and prepare the proposal for the paving of Rime Frost for the Plaintiffs.
>
> . . . .
>
> 24. Mr. Stroup prepared an estimate on September 4, 2019 for the total amount of $64,900.00. . . .

> . . . .
>
> 34. Plaintiffs notified Defendants of their desire to pave Rime Frost and of the costs and asked Defendants to participate by sharing equally in the cost of the paving of Rime Frost.
>
> 35. On November 13, 2019, Defendants informed the Plaintiffs via email that they were not going to participate in the paving. . . .
>
> 36. In July of 2020, Plaintiffs had Moretz Paving, Inc., repair[] and prepare[] the gravel base and pave[] Rime Frost from where the pavement ended after the Watauga River bridge to Plaintiffs' driveway.
>
> . . . .
>
> 39. There was never an agreement between the parties to share in the asphalt costs.
>
> . . . .
>
> 42. Defendants did not voluntarily accept the paving of Rime Frost, and in fact refuse[d] the paving before the work commenced.

These findings of fact are supported by competent evidence, including, inter alia, Defendants' lack of response after Mr. Foxx met with Mr. Davis to discuss the proposal, and Defendants' email to Plaintiffs specifically declining to participate in the paving of Rime Frost.

Plaintiffs contend that Defendants voluntarily accepted the paving of Rime Frost because Defendants "never stated they weren't going to voluntarily accept the paving and find another way to reach their home[,]" and Defendants "continue to utilize the pavement more than once a day." However, Defendants affirmatively rejected Plaintiffs' proposal to pave Rime Frost and Defendants' continued use of Rime Frost to access their property does not constitute a voluntary acceptance of the paving. *See Rhyne*, 224 N.C. at 737, 32 S.E.2d at 318. The findings of fact support the trial court's conclusion of law that Plaintiffs failed to prove that Defendants "are liable to Plaintiffs for the asphalt under the legal theory of quantum meruit[6]/unjust enrichment because Defendants did

6. "*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment." *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998) (citations omitted).

not voluntarily accept the paving of Rime Frost, and in fact refused the paving before the work commenced."

Accordingly, the trial court did not err by concluding that Plaintiffs could not recover under a theory of unjust enrichment.

3. Breach of Contract

[4] Defendants argue that the trial court erred by concluding that they were liable for breach of contract and awarding Plaintiffs $9,900, one-half of the cost of preparing Rime Frost for paving. Plaintiffs assert that the trial court correctly concluded that Defendants were liable for breach of contract, but erred by only awarding them one-half of the cost of preparing Rime Frost for paving based upon the reformed deed.

The trial court made the following pertinent findings of fact:

> 26. The preparation of the stone base for the paving of Rime Frost was $19,800.00.
>
> 27. The application of the asphalt, including all materials and labor cost $45,120.00.
>
> 28. Mr. Stroup determined that 660 tons of gravel would be needed to repair and prepare Rime Frost for paving as the road had 2 to 3 inches of gravel in most places and 6 inches in some places.
>
> 29. Mr. Stroup testified that the industry standard for a gravel road is 6 inches of gravel and if you are going to do the work right then you would need to compact it.
>
> . . . .
>
> 31. Heather Isaacs with Moretz Paving, Inc. as a Senior Administrative Assistant noted in her testimony that you might not wet a gravel road as a repair.
>
> . . . .
>
> 33. The [c]ourt finds that the testimony of Robert Stroup and Heather Isaacs aren't inconsistent and that to repair and maintain a gravel road it requires adding the base gravel to depth of 6 inches, to compact it and to wet it.

Robert Stroup with Moretz Paving testified, in relevant part, as follows:

> Q. How much gravel base was there on the road?
>
> A. Gravel base applied was 600, I mean, yeah, 660 tons.

Q. I understand that. How much on the road already existed, if you know?

A. Well I can't answer that. You know, two to three inches in places, and then there might be five, six in another.

. . . .

Q. What exactly goes into the prepped to pave? What exactly consists of that work?

A. Stone is added and bladed with a mower grader, and then to prep it, to pave, you add water to it and take a laboratory roller and compact it and it's ready to pave. The prep to pave is the compaction process of getting it ready to pave it.

. . . .

Q. Have you ever outside of Moretz Paving, have you ever worked on repairing a gravel road without paving it?

A. Yes, sir, but not to the extent of compacting it like you are. It's a whole different process, prepping to paving, just getting it down on your driveway where you can drive over it.

Q. If someone had a gravel road, driveway, and simply wanted it to be repaired on an annual basis, do you know what type of work would go into that?

A. Yes, sir. As a general rule you would, in most cases in this country people just take their farm tractor and put a blade on it and drag it and that's the end of it. To do it properly it needs to be bladed and get the proper elevations on it to where the water would run to where it's supposed to go and then compact it. But very seldom does that happen. It's an expense that as a general rule folks don't want to go to.

Q. So there's a difference between preparing a road to pave it compared to repairing a gravel road?

A. Yes, sir, very definitely.

Heather Isaacs with Moretz Paving testified, in relevant part, as follows:

> Q. Mr. Stroup testified earlier, I asked him about whether there was any difference in preparing a road to pave it versus maintaining and repairing an existing gravel road. And I'll represent to you, I believe as you were in the courtroom, that he said that there was a difference. Would you agree that there's a difference between those two things?
>
> A. Yes, absolutely.
>
> Q. What do you believe the difference would be between those two things?
>
> A. Besides cost –
>
> . . . .
>
> Q. When you said besides cost, what would be the difference in cost?
>
> A. Well if you're just repairing a gravel road, you're not going to have as much man hours. You're not going to have – if you're doing a repair, sometimes you can get away with a little bit less material as well. But to repair something correctly as far as just repairing just a gravel road, if I'm just going to repair a gravel road, I would go in with a motor grader, I would lay the stone down, and then I would roll it. But you know, whenever you're prepping it to pave it you have to actually wet that. And you're probably not going to take the time to wet just a repair gravel [sic]. . . .

Stroup's testimony indicates that maintaining a gravel road involves adding stone and "[t]o do it properly it needs to be bladed . . . and then compact[ed]." Isaacs' testimony indicates that maintaining a gravel road involves laying stone, using a motor grader, and rolling the gravel. Although Isaacs testified that "you're probably not going to take the time to wet just a repair gravel[,]" the trial court determined the credibility of the witnesses and the weight to be given their testimony in making its findings of fact. *See Kirkhart v. Saieed*, 98 N.C. App. 49, 54, 389 S.E.2d 837, 840 (1990) ("The trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony, and draws the reasonable inferences therefrom." (quotation marks and citation omitted)). Therefore, the trial court's findings of fact are supported by competent evidence and are conclusive on appeal. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845.

The trial court's findings of fact support the trial court's following conclusions of law:

> 11. The [c]ourt concludes that [Defendants], breached its obligation under the Easement to pay their share of maintenance and repair of Rime Frost.
>
> 12. That Rime Frost is a private road for which the Plaintiffs and Defendants are to share in the repair and maintenance of Rime Frost in the same manner as it was initially constructed . . . .
>
> 13. That the preparation work and materials to rebuild the gravel base as performed by Moretz Paving, Inc. constitutes repair and maintenance as set forth in the Easement.
>
> 14. The total cost of the repair and maintenance of the gravel base of Rime Frost, as performed by Moretz Paving, Inc., was $19,800.00.

However, because the trial court erred by reforming the deed to reduce Defendants' maintenance and repair obligation from 80% to 50%, the trial court erroneously concluded that "Defendants are responsible for 50% of the cost of the repair and maintenance of the gravel base of Rime Frost, as performed by Moretz Paving, Inc. which totals $9,900.00." Thus, although the trial court did not err by awarding Plaintiffs a portion of the costs associated with preparing Rime Frost for paving, the trial court erroneously calculated the costs based upon the reformed deed. Accordingly, we reverse and remand to the trial court for recalculation of damages based upon the original deed.

III. Conclusion

We affirm the trial court's order granting Defendants' motion for partial summary judgment on their declaratory judgment action because paving Rime Frost did not constitute maintenance or repair. However, we reverse the trial court's orders granting Defendants' motion for summary judgment on their reformation claim and their subsequent motion to amend the Reformation Order because Defendants' reformation claim is barred by the statute of limitations. Furthermore, we affirm the part of the trial court's judgment concluding that Defendants were not liable for a portion of the cost of paving the road under a theory of unjust enrichment because Defendants did not voluntarily accept the benefit. Finally, we reverse the part of the trial court's judgment concluding that Defendants were liable for breach of contract in the amount of $9,900

and remand to the trial court to recalculate damages based upon the original deed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges TYSON and RIGGS concur.

JACOB GAVIA, PLAINTIFF
v.
MIKEN GAVIA, DEFENDANT

No. COA22-651

Filed 5 July 2023

1. Child Custody and Support—child support—gross income—daycare expenses—lack of evidentiary support

In a child support action between the mother and father of two children, the trial court's order was vacated and the matter remanded to the trial court because several findings of fact—about the parties' respective monthly gross incomes, the amount paid by the father for the children's health insurance, and the amount spent by the father on daycare expenses—either did not match the parties' testimony or were not supported by any evidence.

2. Child Custody and Support—child support—improper decree—non-party ordered to pay children's insurance—lack of in loco parentis status

In a child support action between the mother and father of two children, the trial court's decree that the mother's husband was required to obtain supplemental health insurance to cover the children was improper where the mother's husband was not a party to the proceedings and, even if he had been, there was no evidence that he had assumed in loco parentis status of the parties' children.

3. Appeal and Error—child support order—amount challenged—lack of evidence to review findings

In a child support matter in which the appellate court vacated the trial court's order and remanded on the basis that several findings regarding the parties' respective incomes and various expenses were not supported by evidence, the appellate court was unable to evaluate, based on a similar lack of evidence, whether the trial

court abused its discretion in ordering the father to pay monthly child support in the amount of $461.00.

4. Child Custody and Support—child support—purported consent order between the parties—validity—lack of evidence in appellate record

In a child support matter in which the appellate court vacated the trial court's order on the basis that several findings of fact were not supported by the evidence, the appellate court concluded there was insufficient evidence from which it could determine whether the parties entered into a consent agreement or whether the trial court's order was intended to constitute a consent judgment. Although there was some indication that the parties had discussed certain issues during a break in the proceedings and that the trial court spoke with the parties' counsel in chambers, nothing in the transcript of the proceedings or in the order demonstrated that the parties gave their unqualified consent to a permanent child support order.

5. Child Custody and Support—child support—prospective—deviation from guidelines—lack of findings

In a child support matter in which the appellate court vacated the trial court's order on the basis that several findings of fact regarding the parties' respective incomes and various expenses were not supported by the evidence, there was also a lack of evidence to support the trial court's deviation from the North Carolina Child Support Guidelines, which it did when, instead of ordering the father to pay support starting from the date the mother requested it in her responsive pleading, the court ordered the father to begin paying support after the hearing was held. The matter was remanded for additional findings, based on new or existing evidence according to the trial court's discretion.

Appeal by defendant from order entered 19 April 2022 by Judge Stephen A. Bibey in Hoke County District Court. Heard in the Court of Appeals 8 February 2023.

No brief filed for plaintiff-appellee father.

Jody Stuart Foyles for defendant-appellant mother.

STADING, Judge.

Miken Gavia ("mother") appeals from an order entered in Hoke County District Court awarding her joint child custody and monthly child support.

I. Background

Mother and Jacob Gavia ("father") married on 16 July 2011 and have two minor children together. On 8 October 2018, father filed for divorce, child custody, child support, equitable distribution, and attorney's fees. Mother answered and counterclaimed for the same. The trial court subsequently entered an order granting father's claim for absolute divorce. Mother has since remarried. A hearing was held on 13 April 2022 to determine child custody and child support. After the hearing, the trial court entered an "order on permanent child custody and child support" on 19 April 2022. Thereafter, mother filed her notice of appeal.

II. Jurisdiction

The 19 April 2022 order fully resolves the issues of child custody and child support, and no other claims remain pending. Therefore, our Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

On appeal, we address: (1) whether findings of fact nos. 12, 13, 15, 16, 17, 18, and 19 are supported by competent evidence, (2) whether the trial court erred in ordering child support in the amount of $461.00 per month, (3) whether a valid consent order existed between the parties, and (4) whether the trial court erred by failing to order arrears.

A. Findings of Fact Nos. 12, 13, 15, 16, 17, 18, and 19

"The trial court is given broad discretion in child custody and support matters" and the court's "order will be upheld if substantial competent evidence supports the findings of fact." *Meehan v. Lawrence*, 166 N.C. App. 369, 375, 602 S.E.2d 21, 25 (2004) (citation omitted). Thus, on appeal, this Court must determine "whether a trial court's findings of fact are supported by substantial evidence [and also] must determine if the trial court's factual findings support its conclusions of law." *State v. Smart*, 198 N.C. App. 161, 165, 678 S.E.2d 720, 723 (2009) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted).

1. Findings of Fact Nos. 12, 13, 15, 16, and 17

[1] We first consider mother's argument that findings of fact nos. 12, 13, 15, 16, and 17 are not supported by competent evidence. Mother maintains that the record lacks evidence to support the dollar amounts in each cited finding. In relevant part, the trial court's order contained the following findings of fact:

> 12. That Plaintiff father is employed with Lee Electric with a monthly gross income of $7,494.00.
>
> 13. That Defendant mother is employed with a law firm with a monthly gross income of $2,665.00.
>
> . . .
>
> 15. That Plaintiff father provides monthly healthcare premium expenses for the minor children in the amount of $270.90.
>
> 16. That Plaintiff father provides monthly daycare expenses for the minor children in the amount of $967.50.
>
> 17. That based upon Worksheet B of the North Carolina Child Support Guidelines, the recommended child support amount of $461.00 payable from Plaintiff father to Defendant mother.

At trial, both parties testified to approximations of their monthly incomes. Father testified that he made between $4,000 and $5,000 monthly before taxes. Mother testified that she made $2,800 monthly before taxes, and her annual salary was $37,000. Mother gave the only testimony about insurance, stating that "[father] carries the insurance through his employer." Any testimony about daycare only referenced times, explaining that it was before and after school. No other evidence contradicted this testimony from either party.

The only evidence of the parties' respective incomes is the unrebutted testimony of each witness providing general dollar amounts of the earnings before taxes that do not match the gross incomes found by the trial court. Other than the fact that "[father] carries the insurance through his employer," there is no evidence of the amount paid as found in the trial court's order. Likewise, there was no evidence of the amount paid for daycare expenses. Consequently, there is no evidence to support the trial court's inputs resulting in "the recommended child support amount of $461.00 payable from . . . father to . . . mother." If documents substantiating income and expenses were produced to the trial court,

they were not admitted into evidence. Thus, there is not substantial evidence adequate to support these contested findings of fact. Accordingly, we vacate the order and remand to the trial court. "On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct further proceedings including a new evidentiary hearing if necessary." *Jain v. Jain*, 284 N.C. App. 69, 77, 874 S.E.2d 663, 669 (2022) (citation omitted).

2. The Trial Court's Finding of Fact No. 19

[2] Next, we consider mother's argument that competent evidence does not support finding of fact no. 19, that requires her current husband—a nonparty to the suit—to provide medical insurance to the parties' children. At the 13 April 2022 hearing, mother testified that her current husband was a member of the military. Subsequently, the trial court announced in its ruling:

> In regards to mom being married now to a military member . . . because . . . I have ordered that there is continued legal as well as shared custody would mean that these two children would be available to be registered [in DEERS] through your spouse's insurance and a program in . . . TRICARE . . . and . . . would be eligible for supplemental insurance to the insurance coverage meaning that you will still have the primary responsibility, but should for some reason or another . . . his company doesn't provide the opportunity, you're still under the obligation.

The trial court memorialized this portion of its ruling as finding of fact no. 19 in its order:

> 19. That Defendant mother shall, through her military husband, enroll the minor children into the DEERs system so that they may be enrolled into Tricare for supplemental insurance coverage. Defendant mother shall provide Plaintiff father with any identification cards or health insurance information necessary to allow Plaintiff father to utilize such coverage.

"Generally, a judgment is in a form that contains findings, conclusions, and a decree. The decretal portion of a judgment is that portion which adjudicates the rights of the parties." *Spencer v. Spencer*, 156 N.C. App. 1, 13–14, 575 S.E.2d 780, 788 (2003) (citation omitted). Comparatively, "[f]indings of fact are statements of what happened in space and time." *Dunevant v. Dunevant*, 142 N.C. App. 169, 173, 542

S.E.2d 242, 245 (2001) (citation omitted). Finding of fact no. 19 contains an "*unequivocal directive*" that mother's new husband "enroll [the parties' child] into Tricare." *Spencer*, 156 N.C. App. at 14, 575 S.E.2d at 788. Thus, although this directive was listed as a finding of fact, it is properly classified as a decree of the trial court.

Regardless of the classification of finding of fact no. 19, for judicial efficiency on remand, we first address whether the trial court erred by decreeing an unequivocal directive to a nonparty. At the hearing, mother's testimony indicated that she was a dependent on her current husband's health insurance. Therefore, this decree listed as finding of fact no. 19 commanded mother's current husband—an individual not named as a party in the pending litigation—to act pursuant to the trial court's order. In *Geoghagan v. Geoghagan*, this Court stated that a "necessary party is a party that is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without [its] presence as a party." 254 N.C. App. 247, 249–50, 803 S.E.2d 172, 175 (2017) (internal quotation marks and citation omitted). This Court has also described a necessary party as "one whose interest will be directly affected by the outcome of the litigation." *Id.* (internal quotation marks and citation omitted). While couched in terms suggesting the order was directed at mother, the trial court's decree required her current husband to obtain supplemental health insurance through his employer and assume any resulting financial implications. Therefore, her current husband is a necessary party since his interests are directly affected by the outcome of the litigation.

Assuming *arguendo*, that mother's current husband was a party to the current suit, N.C. Gen. Stat. § 50-13.4(b) (2023) provides that "the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing." Moreover, if found to be liable, "any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support." *Id.* Accordingly, in North Carolina, a stepparent can voluntarily assume secondary child support obligations if the evidence supports finding they are *in loco parentis* to a child. "The term 'in loco parentis' has been defined by this Court as a person in the place of a parent or someone who has assumed the status and obligations of a parent without a formal adoption." *Duffey v. Duffey*, 113 N.C. App. 382, 384–85, 438 S.E.2d 445, 447 (1994) (citations omitted) (finding that defendant—a

party to the suit—stood *in loco parentis* by voluntarily assuming obligations to support his stepchildren). However, absent such evidence and findings, there is no duty for a person to support stepchildren. *Id.*

In the present matter, the record does not contain any evidence that would permit a finding that mother's current husband assumed *in loco parentis* status of the parties' children. Nonetheless, at this juncture, an inquiry of this nature is premature in the absence of the necessary party. In its current form, the trial court's order directs a nonparty to act, and the trial court lacked the power to require his action or affect his rights without him first being joined as a party. *See Geoghagan*, 254 N.C. App. at 250, 803 S.E.2d at 175. Accordingly, we vacate and remand the trial court's order for further proceedings that: (1) do not require the actions of or affect the rights of a nonparty, or (2) for joinder of the necessary party. *See id.*

3. Finding of Fact No. 18

While mother's headings in her brief and her proposed issues on appeal indicate that she assigns error to finding of fact no. 18, her brief contains no argument against it. Thus, this Court will consider any issue she asserts for finding of fact no. 18 as abandoned, and the finding will be deemed conclusive on appeal. N.C. R. App. P. 28(b)(6) (2023); *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998).

B. Decree of Child Support Amount

[3] In mother's next assignment of error, she maintains that the trial court erred by ordering child support in the amount of $461.00 per month. "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441–42, 567 S.E.2d 834, 837 (2002) (citations omitted). When determining whether the trial court erred in the award of child support, "the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Here, the trial court's order decrees "[t]hat . . . father shall pay as permanent child support to . . . mother the sum of $461.00 per month for child support[.]" Mother argues that this amount ordered by the trial court is unsupported by competent evidence. As stated above in subsection A, there is not substantial evidence to support the trial's court's findings of fact. As explained by our Supreme Court:

> Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). Since this Court can only consider evidence on the record, and the findings of fact were not supported by evidence, we are precluded from ruling on this issue at this time. N.C. R. App. 3(c)(1) (2023).

C. Valid Consent Orders

[4] Next, we consider mother's argument that the parties did not enter into a valid consent order. The record shows that after testimony but just before announcing its ruling, the trial court took a short break to speak with counsel in chambers. There is no recitation in the record of the contents of the conversation. While we can speculate that the parties crafted an oral agreement, our "review is solely upon the record on appeal." N.C. R. App. P. 3(c)(1). Upon announcing its ruling, the trial court recalled that mother made a salary of $37,000 but "is to provide proof of her actual income to her . . . attorney," and father is "to provide the actual gross income to his attorney." Also, upon referencing health insurance, the trial court appeared to address father by saying "you will still have the primary responsibility," to which father responded in the affirmative. Following another recess, the trial court inquired if "counsel had an opportunity to discuss . . . the proposed order [with their clients]." In response, father's attorney stated, "Yes . . . we worked on child support during the break. We have provided proof of income to both parties and we will report . . . that the child support amount is $461 payable by . . . father to . . . mother beginning May 1st." Then, the trial court asked the attorneys if "by consent they're agreeing to a permanent child support order being entered?" Attorneys for both parties responded in the affirmative.

The validity of a consent judgment rests upon the "unqualified consent" of the parties, and the judgment is void if such consent does not exist at the time the court approves the agreement and promulgates it as a judgment. *Rockingham Cnty. DSS ex rel. Walker v. Tate*, 202 N.C. App. 747, 750, 689 S.E.2d 913, 916 (2010) (citation omitted). "The parties' failure . . . to acknowledge their continuing consent to the proposed

judgment, before the judge who is to sign the consent judgment, subjects the judgment to being set aside on the ground the consent of the parties was not subsisting at the time of its entry." *Id.* In *Tevepaugh v. Tevepaugh*, this Court found that an agreement was not to become a judgment "*until* it was signed by the presiding judge and the judge was not to sign it *until* he had reviewed it with the parties and each of them had acknowledged they understood the legal effect of the [a]greement." 135 N.C. App. 489, 493, 521 S.E.2d 117, 120–21 (1999) (emphasis original).

On 13 April 2022, the trial court announced portions of its ruling in open court with both parties present. Subsequently, father's attorney prepared and signed the proposed order with the words "approved via fax + text 4/18/22" in the signature block for mother's attorney. The signatures of either party do not appear on the order. This proposed order contained income and expenditure amounts which were not reviewed with or acknowledged by the parties in the trial court. It is unclear from the appellate record whether the trial court intended the order to be a valid consent judgment. However, in any event, neither the transcript of the 13 April 2022 proceeding, nor the four corners of the order, permit us to find unqualified consent by the parties. Thus, as to the decree of support from father to mother in the amount of $461.00, absent findings of fact founded by substantial evidence and factual findings supporting a resulting conclusion of law, or a valid consent order between the parties, the trial court erred by ordering that amount of child support. On remand, if the parties wish to enter a consent order, they may do so consistent with existing precedent.

D. Prospective Child Support

[5] Lastly, mother argues that the trial court erred in not ordering prospective child support. After the hearing, there was a discussion between the trial court and attorneys agreeing that "there are no arrears." In the decretal portion of the order, the trial court declined to order "arrears" to mother. Arrears is defined as "[a]n unpaid or overdue debt." *Arrears*, *Black's Law Dictionary* (7th ed. 1999). In North Carolina, there are two types of child support arrears. Retroactive support, or prior maintenance, is child support ordered for a period of time before a complaint is filed. *Briggs v. Greer*, 136 N.C. App. 294, 300, 254 S.E.2d 577, 586 (2000) (citation omitted). This is available when a custodial parent seeks reimbursement from the noncustodial parent for expenditures made on behalf of a child before the action was commenced, in which case "the trial court must set out specific findings of fact in a reimbursement award for retroactive support." *Id.* (citation omitted). Mother did

not seek such reimbursement in this matter. Since prior maintenance was not requested, the trial court's use of the term arrears necessarily referred to prospective child support. Prospective child support includes the portion of the child support award representing "that period from the time a complaint seeking child support is filed to the date of trial." *State v. Hinton*, 147 N.C. App. 700, 706, 556 S.E.2d 634, 639 (2001) (citation omitted).

"If the trial court decides not to order prospective child support, it must show that it properly deviated from the Guidelines and include appropriate findings of fact to justify the deviation." *State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 351, 620 S.E.2d 899, 902–03, 2005 (citation omitted). Since finding of fact no. 12 held that "there are no arrears," and child support began "before the 1st day of May 2022, and a like sum shall be paid on or before the 1st day of each consecutive month thereafter," the trial court did not order prospective child support. Mother requested child support in her answer filed 17 December 2018. Father provided child support in the amount of $313.68 starting on 1 September 2019. Even so, there are no findings in the trial court's order to support a deviation from the North Carolina Child Support Guidelines. Accordingly, we remand to the trial court for further findings of fact and conclusions of law consistent with this opinion.

IV. Conclusion

For the foregoing reasons, we vacate the trial court's order. "On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct further proceedings including a new evidentiary hearing if necessary." *Jain*, 284 N.C. App. at 77, 874 S.E.2d at 669.

VACATED AND REMANDED.

Judges MURPHY and HAMPSON concur.

IN RE A.H.

[289 N.C. App. 501 (2023)]

IN RE A.H.

No. COA22-683

Filed 5 July 2023

1. Child Abuse, Dependency, and Neglect—neglect—single incident—child crossed busy road—unsupported findings and conclusion

The trial court erred by adjudicating respondent-father's nine-year-old daughter as neglected—based on an incident where she got out of her father's vehicle and was nearly hit by traffic as she ran across a busy street—where several findings of fact challenged by respondent either were not supported by the evidence, contradicted the evidence, or were mere recitations of testimony and where the remaining findings of fact were insufficient to support the court's conclusion of neglect. The single incident, and respondent's response or lack of response to it—neither following his daughter to ensure her safety nor contacting the department of social services after learning it had taken custody of his daughter—were insufficient to rise to the level of neglect.

2. Child Abuse, Dependency, and Neglect—dependency—availability of alternative childcare arrangements—DSS's evidentiary burden not met

The trial court erred by adjudicating respondent-father's nine-year-old daughter as dependent—based on an incident where she got out of her father's vehicle and was nearly hit by traffic as she ran across a busy street and where respondent neither followed her to ensure her safety nor contacted the department of social services (DSS) after learning it had taken custody of his daughter—where DSS failed to meet its burden of introducing evidence that no alternative childcare arrangements were available to respondent.

Judge FLOOD dissenting.

Appeal by Respondent-Father from orders entered 20 and 24 May 2022 by Judge Thomas B. Langan in Stokes County District Court. Heard in the Court of Appeals 23 May 2023.

Leslie Rawls for Petitioner-Appellee Stokes County Department of Social Services.

Mercedes O. Chut for Respondent-Appellant Father.

James N. Freeman, Jr., for Appellee Guardian ad Litem.

RIGGS, Judge.

Respondent-Appellant Father M.H. appeals from adjudication and disposition orders placing his daughter, A.H. ("Aerin"),[1] in the custody of the Stokes County Department of Social Services ("DSS") on the bases of neglect and dependency. He contends, in part, that the trial court's findings are inadequate to support those adjudications because the findings concern a single incident that is insufficient to establish neglect or dependency under our child protection statutes and caselaw. After careful review, we agree with Father and reverse both the adjudication and disposition orders on these bases without reaching any remaining arguments.

I. FACTUAL AND PROCEDURAL HISTORY

On the afternoon of 4 October 2021, Father picked up nine-year-old Aerin and her two stepsiblings from a bus stop after elementary school in King, North Carolina. Father, who was previously separated from Aerin due to incarceration, had only recently been granted temporary legal and physical custody of Aerin on 27 May 2021 through a case with Aerin's biological mother. Following the filing of the petition in this matter, Aerin's biological mother relinquished all parental rights on 15 December 2021.

Aerin and Father began arguing on their drive from the bus stop, eventually leading Aerin to leave Father's truck before they reached their destination for fear of potential corporal punishment. After Aerin exited the vehicle, Father attempted to follow Aerin in his truck but was unable to do so due to difficulty maneuvering the vehicle and its attached trailer around the area's numerous cul-de-sacs. To keep up with his daughter, Father exited his truck and pursued her on foot down Sheraton Road; Aerin saw her father following and took off towards Newsome Road, which runs near Sheraton Road. Father aborted the chase before Aerin reached Newsome Road because he had been forced to leave the other two children in the vehicle, with no adult present with them.

Bystander Jimmy Shearin was also driving home on 4 October 2021 after picking up his grandson from elementary school. Mr. Shearin was

1. We use a pseudonym to protect the privacy and identity of the minor child and for ease of reading. *See* N.C. R. App. P. 42(b).

driving a van behind a dump truck down Newsome Road when he saw Father chasing after Aerin on foot down Sheraton Road. He watched Aerin run across Newsome Road and into the path of the oncoming dump truck; he also observed that Father did not follow Aerin across the road, as he had turned away and started walking back up the side street just as she started crossing the road and before she ran in front of the truck.

Mr. Shearin slowed his vehicle and began to watch Aerin to make sure she was safe, following her as she walked towards a nearby business. He then pulled into the business's parking lot and asked Aerin if she was okay. Aerin was crying and screaming and thus too upset to respond immediately. Mr. Shearin eventually calmed Aerin down and coaxed her into his vehicle, telling her that he had his grandson with him, that she would be safe in his car, and that nobody would see her due to the vehicle's tinted windows. Aerin explained to Mr. Shearin that she was fleeing from her father and was afraid that he would come get her. Mr. Shearin called law enforcement after listening to Aerin and turned her over to them once they arrived on the scene.

DSS immediately received a child protective services report in connection with the incident, and social worker Valerie Neal responded within an hour. Ms. Neal interviewed Aerin, who reported that she ran from her father after being scolded for sharing the family's personal housing information with her teacher and being threatened with a "whoop[ing]." Ms. Neal also spoke with Aerin's stepmother, who met Ms. Neal at the parking lot. The stepmother misrepresented her husband's involvement in the day's events, telling Ms. Neal that her brother had been the man who picked up Aerin and subsequently chased her down Sheraton Road. Ms. Neal conducted a home inspection a short time later and, after an investigation totaling roughly two hours, executed a verified petition alleging abuse and neglect. DSS filed the petition the following day. Father did not contact DSS during the two-hour window between the start of the investigation and the execution of the petition, nor did he contact DSS the following morning before the petition was filed.

The trial court held an adjudication hearing on 23 February 2022. Mr. Shearin testified first, consistent with the above recitation of the facts. Ms. Neal testified next, but the trial court limited her recounting of Aerin's interview to corroborative purposes only.

Father also testified, explaining that at the time of the incident he was on parole and had a pending absconsion violation; that violation

was later dismissed and he completed his parole with zero violations. He explained that he was unable to reach Aerin on foot during the chase because he was not physically fit enough, and that he had to abandon pursuit because he had two young children back in his truck. He was unequivocal in testifying that he never saw a dump truck on Newsome Road. He further testified that he eventually caught up to Aerin in his truck, stating that a crowd had gathered and that Aerin was in the custody of a woman who was hurling racial epithets and threats at him while refusing to turn over the child. He denied seeing or encountering Mr. Shearin. He also told the trial court that he had been on the phone with his wife the entire time, and elected to leave Aerin with the woman because he did not want to get into a physical altercation, he had to meet his pregnant wife at a nearby gas station to direct her to the scene, and he believed that Aerin was at least safe with the woman and crowd for the time being. Father testified that he did not meet up with his wife in the confusion, who instead headed directly to the scene and met with Ms. Neal. Father then testified that he dropped off the two children in his truck with their aunt; within an hour, he was able to make contact with his wife who informed him Aerin was in DSS custody. Per that same testimony, Father arrived at his home in Greensboro later that evening.

Aerin's stepmother testified after her husband. She confirmed that she was not honest in her statements to Ms. Neal regarding Father's involvement in the incident and admitted to being uncooperative because she did not trust Ms. Neal. Aerin also took the stand, with her testimony mirroring the description of events testified to by Mr. Shearin.

The trial court ultimately adjudicated Aerin neglected and dependent, and adjudication and disposition orders were entered placing Aerin in DSS custody. Father timely appeals.

II. ANALYSIS

Father presents several principal arguments on appeal, including that the findings of fact are unsupported by the evidence and/or insufficient to support the adjudications of both neglect and dependency. We agree with Father that several of the trial court's findings are unsupported or otherwise improper, and that the remaining findings do not establish neglect or dependency. We therefore reverse the trial court's adjudication order and its subsequent disposition order.

A. Standard of Review

A trial court's adjudication order is reviewed "to determine (1) whether the findings of fact are supported by clear and convincing

evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation and quotation marks omitted). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.*

B. Neglect

[1] Father challenges several findings as unsupported by the evidence or inadequate to support a determination of neglect. First, he contends that the findings fail to show that he knew Aerin was in danger when she ran across Newsome Road. Next, he asserts the findings that Father and his wife failed to look after Aerin after she fled from her father are likewise unsupported. He further challenges several findings concerning Father's treatment of Aerin and his post-release supervisory status. Finally, he contends that even if all findings are supported by the evidence, they fail to establish neglect or dependence. We address each contention in turn.

1. Unsupported or Erroneous Findings

Father properly identifies Findings of Fact 33, 39 through 42, 44, and 45 as unsupported by the evidence. Finding of Fact 33 states, in relevant part, that "[Aerin] stated, Daddy thought I'd gotten run over, so he just walked back to his truck." Aerin's conjecture as to her father's state of mind is insufficient to support a proper finding of fact, and we strike this portion of Finding of Fact 33. *See In re K.L.T.*, 374 N.C. 826, 843, 845 S.E.2d 28, 41 (2020) (noting inferences in findings of fact "cannot rest on conjecture or surmise" (citation and quotation marks omitted)). Findings of Fact 39 through 42, which merely restate Ms. Neal's testimony without any apparent evaluation of its credibility, are likewise improper. *See In re A.E.*, *J.V.*, *E.V.*, *A.V.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (disregarding findings that recited testimony "without any indication that the trial court evaluated the credibility of the relevant witness or resolved any contradictions in his or her testimony"). Finally, Findings of Fact 44 and 45 misstate Father's post-release supervision status based on the uncontroverted testimony of record and are stricken to the extent that they conflict with that evidence.

2. Remaining Findings Regarding Newsome Road Incident

Assuming their competency and propriety, and acknowledging that the trial court repeatedly noted that it did not consider Father to be credible, the remaining findings establish the trial court's determination as to Father's involvement in what transpired on Newsome Road as follows:

12. Mr. Shearin, returning home from the school pickup, turned onto Newsome Road . . . . Driving on Newsome Road, his van was directly behind a dump truck.

. . . .

14. As Mr. Shearin drove down Newsome Road and approached Sheraton Road on his left, he noticed a young black child in a pink shirt. She was running out of Sheraton Road, from the left, and into Newsome Road. A black man was chasing the child. She darted directly in front of the dump truck without stopping, and Mr. Shearin believed [Aerin] had been hit by the dump truck.

15. As the child began her dash in front of the dump truck, Mr. Shearin observed the black man, who had been chasing the child, stop at the side of the road, turn around, and walk back up Sheraton Road. The black man did not follow the child across the road nor remain to see if she was okay. The black man turned and walked away before the child was directly in front of the dump truck.

. . . .

28. On 10/4/21, [Aerin] . . . rode the bus home, along with [her step-siblings], and was met by her father . . . . [Father] was driving a truck with a work trailer attached.

. . . .

30. . . . [Father] told [Aerin] he was tired of her telling other people their business. He stated . . . he was going to whoop her.

31. Afraid of her father, [Aerin] got out of the truck and began walking away. [Father] told her to get back into the truck, but [Aerin] refused. He followed her in his truck but was unable to keep up with her, because he had to maneuver his truck in the cul de sacs of the neighborhood.

32. . . . [Father] started chasing after her, so she began running. She ran out into Newsome Road in front of a big truck . . . .

33. . . . [Aerin] saw her father get into the truck and drive away. She never saw her father again that day.

. . . .

> 52. After he left the scene on Newsome Road, [Father] drove from Newsome Road . . . and went inside a 711 convenience store to get drinks for [the other two children]. He did not return to the scene of the incident.

In sum, the above findings establish that Father: (1) chased Aerin on foot because he could not keep up in his truck and trailer; (2) pursued Aerin until she reached Newsome Road, at which time he turned around to return to his truck with two other minor children; (3) could not have seen Aerin cross in front of the dump truck, as he had already turned away; and (4) proceeded to take care of the other two minor children by stopping at a convenience store without returning to Newsome Road.

As for Father's involvement in the DSS investigation, the trial court's pertinent findings, assuming their competency and propriety, are as follows:

> 59. No respondent was able to make a proper plan for [Aerin] on 10/5/2021. Her father . . . left and did not return to the scene.
>
> 61. . . . [Father] left the scene of the incident and did not return nor inquire about his child.

These findings thus establish only that Father did not contact DSS between the events of Newsome Road and the filing of the petition less than 24 hours later.[2]

3. Conclusion of Neglect

The above findings are insufficient to support a legal conclusion of neglect. The findings as to what Mr. Shearin and Aerin observed at the scene in no way establish whether *Father* perceived a dangerous situation and was thus neglectful in failing to attend to it. In fact, consistent with all the testimony, the trial court found that Father had turned his back *as* she crossed Newsome Road and *before* she ran in front of the dump truck, and thus did not witness what transpired. Aerin's actions in darting into the road, standing alone, do not constitute neglect. *See In re Stumbo*, 357 N.C. 279, 288-89, 582 S.E.2d 255, 261 (2003) ("[A] circumstance that probably happens repeatedly across our state, where a toddler slips out of a house without the awareness of the parent or care

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2. To the extent the trial court relied on findings regarding Father's failure to contact DSS *after* the filing of the petition in reaching its neglect determination, that reliance is improper. *See*, *e.g.*, *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006) ("[P]ost-petition evidence is admissible for consideration of the child's best interest in the dispositional hearing, but not an adjudication of neglect[.]").

giver . . . does not in and of itself constitute 'neglect[.]' "). No evidence or findings establish additional facts that Father saw or could have seen an oncoming dump truck or dangerous traffic on the road—or that he could have done anything at all to stop Aerin from crossing in front of it when she did so—such that his decision to turn around and tend to the other children in his care was so negligent as to be legal neglect, and no such evidence appears of record. *See In re V.M.*, 273 N.C. App. 294, 300, 848 S.E.2d 530, 535 (2020) (holding a trial court's findings regarding neglect were inadequate when they only "support a determination that a tragic and unfortunate accident occurred here—an accident which might have been preventable with the benefit of hindsight, but which respondent-mother had no way of knowing would occur, nor any means to prevent it"). It is axiomatic that "[t]he absence of evidence is not evidence," *Cnty. of Durham by and through Durham DSS v. Burnette*, 262 N.C. App. 17, 23, 821 S.E.2d 840, 846 (2018), and DSS—not Father—bore the burden of positively proving additional facts showing actions amounting to neglect as alleged in the petition. The trial court similarly had the duty to find those additional facts from the evidence were it to adjudicate Aerin neglected.

It is true that, consistent with the trial court findings, there is no dispute in the record that Father did not return to Newsome Road to try and locate his daughter. However, the trial court found that he had two other small children to care for and watch after at the time. And Father's testimony explains that he: (1) left the scene for a gas station a half-mile away to look after two other children in his care; (2) tried to locate his pregnant and stressed wife so that he could direct her to Aerin; (3) believed that Aerin was safe in the nearby parking lot with the crowd of people; and (4) in less than two hours, learned from his wife that his daughter was safely in the custody of DSS. While the trial court was free to reject Father's testimony as incredible,[3] the remaining

3. That Father left to try and meet his wife and later learned Aerin was safe within two hours of the event does not appear in the trial court's findings of fact. What findings were made appear to credit Father's testimony at points and discredit them at others, all without consistently identifying which specific portions of Father's testimonial statements were considered credible. Indeed, Finding of Fact 54's blanket finding, stating only that "[t]he Court does not find [Father] to be credible," suggests that *all* of his testimony was not deemed credible despite the trial court's plain reliance on portions thereof for several of its findings. While a trial court can deem some aspects of a witness's testimony credible and some not, the trial court's findings referencing and recounting a witness's testimony must nonetheless "include[] an indication concerning whether the trial court deemed the relevant *portion* of the testimony credible." *In re H.B.*, 384 N.C. 484, 490, 886 S.E.2d 106, 111 (2023) (citation and quotation marks omitted) (emphasis added).

findings—Findings of Fact 59 and 61—simply state that he did not return to Newsome Road; that fact, standing alone, does not establish that his decision to tend to the other two minors in his care amounted to neglect under the law. *See Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258; *V.M.*, 273 N.C. App. at 300, 848 S.E.2d at 535. Indeed, the uncontroverted evidence and findings show that Aerin was safely in the care of Mr. Shearin, law enforcement, and later DSS within minutes of the event.[4] The findings do not set forth facts demonstrating that his failure to return to the scene, standing alone, was so negligent as to amount to neglect.[5]

Father's lack of contact with DSS in the less-than-24-hour period between the incident at Newsome Road and DSS's filing of its petition does not bridge this gap. There was no evidence introduced showing that he ever had an opportunity to contact DSS or was informed of Ms. Neal's contact information. What evidence was introduced shows that Ms. Neal received a report at 3:15 p.m., arrived at Newsome Road around 4:00 p.m., began her home inspection between 5:30 and 5:45 p.m., executed her verified petition before a magistrate later that evening, and filed the petition the following day. Again, "the absence of evidence is not evidence," *Cnty. of Durham*, 262 N.C. App. at 23, 821 S.E.2d at 846, and DSS failed to meet its burden of introducing evidence proving Father's failure to contact DSS after business hours on the 4th and on the morning of the 5th before the filing of the petition amounted to neglect, particularly when the only evidence that was introduced—credible or not—shows Father knew that his wife had already met with DSS and that Aerin was safe in DSS custody.

C. Dependency

[2] To adjudicate a minor dependent, a trial court 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 P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Findings as to both prongs are required. *Id.*

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4. The trial court's order states that its determination of neglect rested, in no small part, on "[Father's] willful conduct of turning away and leaving [Aerin] on the busy roadway." But, "when determining whether a child is neglected, the circumstances and conditions surrounding the child are what matters, *not the fault or culpability of the parent*." *In re Z.K.*, 375 N.C. 370, 373, 847 S.E.2d 746, 748-49 (2020) (emphasis added).

5. For example, the trial court might have found from the evidence that Father decided to leave Aerin at Newsome Road not out of concern for the other children in his care, but because he was afraid of being arrested on the outstanding absconsion violation. Pointedly, the trial court made no such finding.

At a minimum, DSS failed to introduce evidence of—and the trial court thus failed to make adequate findings concerning—the second prong. While it is true that Father did not contact or provide DSS with any alternative arrangements, this cannot meet *DSS's burden* of showing no such arrangements exist. *In re K.C.T.*, 375 N.C. 592, 596-97, 850 S.E.2d 330, 334 (2020). That Father's wife did not immediately offer to take custody of Aerin or share Father's contact information with DSS, or that he was not immediately available within 24 hours to DSS, is not evidence that no alternative childcare arrangements were available to Father, and those facts cannot relieve DSS of its evidentiary burden. *See P.M.*, 169 N.C. App. at 428, 610 S.E.2d at 406 (reversing a conclusion of dependency because a finding that "the juvenile is dependent based on the fact that he does not have a parent who is capable of properly caring for him in that his father is incarcerated and his mother does not comply with court ordered protection plans set out for the protection of the juvenile" failed to adequately address the second dependency prong).

III. CONCLUSION

For the foregoing reasons, we hold that numerous findings of fact in the trial court's adjudication order are unsupported or improper, and the remaining findings fail to establish neglect or dependency. We therefore reverse the trial court's adjudication order and the disposition order based thereon.

REVERSED.

Judge HAMPSON concurs.

Judge FLOOD dissents by separate opinion.

FLOOD, Judge, dissenting.

Despite the majority's and Respondent-Father's narrow framing of the issue, our task is not to address whether the "single isolated incident" of Aerin running across the road alone can support neglect; rather, the issue is whether, under the totality of the evidence—including Respondent-Father's inaction *after* Aerin ran across the road—the trial court made sufficient findings of fact to support the ultimate conclusion of neglect. I conclude it did, and therefore would hold the trial court did not err. I respectfully dissent.

I. Adjudicating Neglect

Respondent-Father presents several arguments on appeal, including that the findings of fact are not supported by clear and convincing competent evidence. The majority does not address the challenged findings, concluding that even if the findings are supported, they do not establish neglect or dependency.

Our standard of review instructs that "[t]he role of this Court in reviewing a trial court's adjudication of neglect . . . is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re V.M.*, 273 N.C. App. 294, 296, 848 S.E.2d 530, 533 (2020) (citation and internal quotation marks omitted). "[T]he trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re R.B.*, 280 N.C. App. 424, 430, 868 S.E.2d 119, 124 (2021) (citation omitted). "Clear and convincing evidence is an intermediate standard of proof, greater than the preponderance of the evidence standard applied in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in most criminal cases." *In re J.L.*, 264 N.C. App. 408, 419, 826 S.E.2d 258, 266 (2019) (internal citations and quotation marks omitted). "Findings supported by competent evidence are 'binding on appeal.' " *In re J.R.*, 243 N.C. App. 309, 312, 778 S.E.2d 441, 443 (2015) (citation omitted).

A. Findings of Fact Supported by Competent Evidence

First, I agree with the majority that Findings of Fact 33, 39 through 42, 44, and 45 are unsupported by the evidence, and therefore, I do not consider them in this analysis. As for the remaining findings, a robust review shows the challenged findings are supported by competent evidence that is clear and convincing.

1. Findings that Respondent-Father Left Aerin in a Dangerous Situation

Respondent-Father contends the findings that he left Aerin in a dangerous situation stem from subjective opinion and speculation and have no evidentiary support. I disagree.

a. Findings of Fact 14, 15, and 16

Respondent-Father argues Findings of Fact 14, 15, and 16 may support Mr. Shearin's belief, but they do not support findings regarding what Respondent-Father saw, thought, or intended.

Findings of Fact 14, 15, and 16 state:

> 14. As Mr. Shearin drove down Newsome [R]oad and approached Sheraton Road on his left, he noticed a young [] child in a pink shirt. She was running out of Sheraton Road, from the left, and into Newsome Road. [Respondent-Father] was chasing the child. She darted directly in front of the dump truck without stopping, and Mr. Shearin believed she had been hit by the dump truck.
>
> 15. As the child began her dash in front of the dump truck, Mr. Shearin observed [Respondent-Father], who had been chasing the child, stop at the side of the road, turn around, and walk back up Sheraton Road. [Respondent-Father] did not follow the child across the road nor remain to see if she was okay. [Respondent-Father] turned and walked away before the child was directly in front of the dump truck.
>
> 16. As soon as the dump truck moved forward and turned left, out of the way, Mr. Shearin slowly drove down Newsome Road, looking for the little girl, believing she had been hit. When he didn't see her, he believed she was under the dump truck.

Although trial court is required to make findings of fact that are supported by clear and convincing evidence and in turn support the legal conclusions, *see In re V.M.*, 273 N.C. App. at 296, 848 S.E.2d at 533, the trial court here is not required to make findings that support what Respondent-Father perceived. Contrary to the majority's conclusion that the findings establish Respondent-Father "could not have seen Aerin cross in front of the dump truck, as he had already turned away," the uncontroverted evidence shows he was watching Aerin as she ran into the road. Moreover—whether Respondent-Father actually saw Aerin cross in front of the dump truck or not—I cannot reconcile the fact that Respondent-Father watched his nine-year-old child run into a busy road and walked away from her with the conclusion that it was not a dangerous situation.

Mr. Shearin testified that he was driving behind a dump truck on Newsome Road when he saw "a young girl in a pink shirt" run into the road, in front of the dump truck. He further testified that the girl was being chased by a man. When asked about Respondent-Father's reaction to Aerin running onto the road, Mr. Shearin stated, "he just turned around and walked back the other way."

Similarly, Aerin testified that she did not see the dump truck on the road because she "was too busy looking at [her] dad." When asked if she was looking back at Respondent-Father as she ran across Newsome Road, she answered in the affirmative. The trial court found the testimonies of both Mr. Shearin and Aerin to be credible. Thus, Mr. Shearin's testimony is correctly summarized in Findings of Fact 14, 15, and 16.

Findings of Fact 14, 15, and 16, therefore, are supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

b. Finding of Fact 32

Respondent-Father contends Finding of Fact 32 is an insufficient finding of fact because it merely describes Aerin's testimony.

Finding of Fact 32 states:

> 32. According to [Aerin], [Respondent-Father] followed her to the corner of Sheraton Road, got out of his truck, and ordered [Aerin] into the vehicle. Then, he started chasing after her, so she began running. She ran into Newsome Road in front of a big truck, which she said honked at her. She recalled she was looking behind her at her daddy, as she ran from him, and when she got out into the road, she heard the dump truck honk at her.

Our Supreme Court has held " '[r]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge' absent an indication concerning 'whether [the trial court] deemed the relevant portion of [the] testimony credible.' " *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (alterations in original) (emphasis in original) (citation omitted).

Here, in Finding of Fact 38, which is discussed in greater detail below, the trial court found Aerin's testimony to be credible. This finding of credibility is sufficient to transform Aerin's testimony reflected in Finding of Fact 32 into a finding of fact. *See In re A.E.*, 379 N.C. at 185, 864 S.E.2d at 495. As Finding of Fact 32 is supported by Aerin's testimony, it is therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

2. Findings as to Failure to Check on Aerin

Respondent-Father challenges the findings that neither he nor Ms. Harris attempted to check on Aerin after she ran across the road as "erroneous and speculative."

a. Findings of Fact 51 and 61

Respondent-Father argues Finding of Fact 51 and portions of Finding of Fact 61 that state he did not attempt to inquire about his child are unsupported because the trial court heard no evidence Respondent-Father had an opportunity to speak with DSS before it filed the petition.

Finding of Fact 51 states: "[Respondent-Father] noted he never called [Ms.] Neal about the events of [4 October 2021]." Similarly, the challenged portion of Finding of Fact 61 provides: "[Respondent-Father] left the scene of the incident and did not return nor inquire about his child. . . . " First, Finding of Fact 51 does not state Respondent-Father failed to contact Ms. Neal prior to her filing the petition; rather, it states Respondent-Father *never* called Ms. Neal about the events of 4 October 2021. Respondent-Father's own testimony supports this finding. Respondent-Father testified that he never spoke with Ms. Neal, and Ms. Neal likewise testified that she never spoke with Respondent-Father.

Finding of Fact 51 is, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

As for the challenged portion of Finding of Fact 61, Respondent-Father never returned to the scene or inquired about Aerin. Respondent-Father testified that after he left Aerin on Newsome Road, he drove to a 7-Eleven convenience store. From the 7-Eleven, Respondent-Father dropped his two step-children off with Ms. Harris's sister and then drove to Greensboro, North Carolina.

The challenged portion of Finding of Fact 61 is, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

b. Findings of Fact 50, 55 and 61

Respondent-Father argues portions of Findings of Fact 50, 55, and 61 are unsupported by the evidence because the trial court did not hear evidence that Ms. Harris had the opportunity to pack clothes for Aerin or turn over her book bag before DSS filed the petition.

Findings of Fact 50, 55, and 61 state, in pertinent part:

> 50. . . . . [Aerin] had no clothes beyond those she was wearing and needed clothing to wear to school the next day.
>
> . . . .

> 55. . . . . Ms. Neal asked [Ms.] Harris to provide [Aerin] with clothes for one night and her bookbag for school the next day. [Ms.] Harris said she had nothing that belonged to [Aerin]. [Ms.] Harris said a friend had [Aerin's] book bag but would not give [Ms. Neal] the name of the friend nor any contact information.
>
> . . . .
>
> 61. . . . . [Ms.] Harris made no effort to provide the child's clothes or her book bag, which was last observed to be in [Respondent-Father's] truck.

Aerin testified that after she was taken into DSS custody, they had to take her to get clothes before she could go to her first foster parent. Aerin had to go to the clothing pantry because the only clothes she had were the clothes she was wearing on 4 October 2021. Ms. Neal also testified that she took Aerin to get clothes at the DSS clothing closet because Ms. Harris would not provide clothes for Aerin.

The challenged portion of Finding of Fact 50 is, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

Findings of Fact 55 and 61 are likewise supported by competent evidence. Ms. Neal testified that she asked Ms. Harris if she could have clothes for Aerin and her book bag for school the following day. Ms. Harris told Ms. Neal none of Aerin's belongings were in the home, and there was nothing Ms. Harris could provide for Aerin. When Ms. Neal asked whether Aerin had a book bag for school, Ms. Harris would not tell Ms. Neal where it was. No evidence in the Record indicates that Ms. Harris offered to bring Aerin her clothes or her book bag once she could retrieve them from wherever they were or attempted to assist in any way.

Findings of Fact 55 and 61 are, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

c. Findings of Fact 52, 59, and 61

Respondent-Father argues Finding of Fact 52 and portions of Findings of Fact 59 and 61 that state he never returned to the scene of the incident are "misleading" because the trial court did not hear evidence that Respondent-Father could have returned to the scene and taken Aerin home after she crossed Newsome Road.

As Respondent-Father's arguments take issue with what the trial court did *not* find, and the inferences that stem from the findings the trial court did make, I reiterate our standard of review here: the findings of fact must be supported by "clear and convincing competent evidence." *In re R.B.*, 280 N.C. App. at 430, 868 S.E.2d at 124 (citation omitted). Findings of fact that are supported by such evidence are deemed conclusive, even where some evidence supports contrary findings. *See id.* at 430, 868 S.E.2d at 124.

Findings of Fact 52, 59, and 61 state:

> 52. After he left the scene on Newsome Road, [Respondent-Father] drove from Newsome Road to Main Street, King, and went inside a 7/11 convenience store to get drinks for [the other minor children.] He did not return to the scene of the incident.
>
> . . . .
>
> 59. . . . . [Respondent-Father] left and did not return to the scene. . . . .
>
> . . . .
>
> 61. . . . . [Respondent-Father] left the scene of the incident and did not return nor inquire about his child. . . .

As previously determined, Respondent-Father did not return to the Belmont Place Drive residence; he instead left King and drove to Greensboro.

Findings of Fact 52, 59, and 61 are, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

d. Findings of Fact 59, 60, and 61

Respondent-Father argues Findings of Fact 59 through 61 are actually conclusions of law.

"The labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review." *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018). When a trial court "labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*." *Id.* at 605, 814 S.E.2d at 598. "[A]ny determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law. Any determination reached through 'logical reasoning from the evidentiary facts' is more

properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (cleaned up).

Findings of Fact 59, 60, and 61 state:

> 59. No respondent [sic] was able to make a proper plan for [Aerin] on [4 October 2021]. Her father, [Respondent-Father] left and did not return to the scene. [Ms.] Harris did not offer to make a plan for the child, [sic] during her interview with [Ms.] Neal. Finally, [] the child's mother[] was unable to be located on [4 October 2021].
>
> 60. [Respondent-Father] threatened to physically punish [Aerin], who was afraid of her father. [Aerin's] emotional response to the events of [4 October 2021], including crying, screaming, and initially being [in]consolable, support the grave impact the events had on [Aerin].
>
> 61. Neither [Ms.] Harris nor [Respondent-Father] was suitable to provide care and supervision of [Aerin] on [4 October 2021]. [Respondent-Father] left the scene of the incident and did not return nor inquire about his child. [Ms.] Harris called [Aerin] a "pathological liar" and did not inquire about her safety and wellbeing after the incident. [Ms.] Harris made no effort to provide the child's clothes or her book bag, which was last observed to be in [Respondent-Father's] truck.

Findings of Fact 59, 60, and 61 do not include an exercise of judgment or application of legal principles, but instead were reached through logical reasoning from the evidence presented to the trial court and are appropriately categorized as findings of fact. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675. As such, this Court must determine whether the challenged findings are supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443. Having already concluded Findings of Fact 59 and 61 are supported by competent evidence, I turn to Finding of Fact 60.

Respondent-Father argues Aerin did not suffer actual injury nor was she at risk of injury from corporal punishment, and "grave impact" does not convey potential injury as required to support an adjudication of neglect. This argument invites an incorrect inquiry. Finding of Fact 60 does not need to show Aerin suffered actual injury; rather, it needs to be supported by competent evidence, which it is. Aerin testified that she was afraid of her father. Mr. Shearin and Ms. Neal also testified that Aerin expressed extreme fear of her father. Ms. Neal included in her initial

report that Aerin was afraid of Respondent-Father. Moreover, Mr. Shearin testified that Aerin was "screaming, crying, you know, just hysterical . . . she couldn't even talk." Based on this testimony, the trial court made a reasonable inference that the events of the day had a serious impact on Aerin. *See In re K.L.T.*, 374 N.C. 826, 843, 845 S.E.2d 28, 41 (2020) (holding the trial court is permitted to make reasonable inferences based on the weight it assigns particular evidence).

Finding of Fact 60 is, therefore, supported by competent evidence. *See In re J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443.

The above referenced challenged findings of fact are supported by competent evidence that is clear and convincing. *See In re V.M.*, 273 N.C. App. at 296, 848 S.E.2d at 533. Based on a comprehensive review of these findings, I conclude the findings establish Respondent-Father (1) knew Aerin ran into a busy roadway, (2) left Aerin on the side of the road, and (3) never made any attempts to check on Aerin's well-being by either returning to Newsome Road or contacting DSS.

3. Trial Court's Fact-Finding Obligation

Respondent-Father argues the trial court did not fulfill its fact-finding obligation by determining Respondent-Father's testimony was not credible. This argument is unsupported by our case law.

"It is the province of the trial court when sitting as the fact-finder to assign weight to particular evidence and to draw reasonable inferences therefrom." *In re K.L.T.*, 374 N.C. at 843, 845 S.E.2d at 41. It is not this Court's role to review "[e]videntiary issues concerning credibility, contradictions, and discrepancies," as these are for the trial court to resolve. *Sergeef v. Sergeef*, 250 N.C. App. 404, 406, 792 S.E.2d 192, 193 (2016). Moreover, the trial court is not required to explain its reasoning so long as it makes a finding of credibility. *See Matter of H.B.*, 384 N.C. 484, 490, 886 S.E.2d 106, 111 (2023) (concluding the trial court fulfilled its duty to evaluate the evidence by finding " . . . the said report to [be] both credible and reliable."); *see also In re A.E.*, 379 N.C. at 185, 864 S.E.2d at 495.

In Findings of Fact 49 and 52, the trial court determined Respondent-Father's testimony was not credible. The trial court fulfilled its obligation to make a finding of credibility, and it is not our role to review these findings. *See Sergeef*, 250 N.C. App. at 406, 792 S.E.2d at 193.

Having concluded the findings of fact are supported by clear and convincing competent evidence and that the trial court fulfilled its fact

finding obligation, I now turn to whether the findings of fact support the conclusions of neglect. *See In re V.M.*, 273 N.C. App. at 296, 848 S.E.2d at 533.

B. Conclusions of Neglect

Bound by our well-established standard of review, I conclude the above findings are sufficient to support a legal conclusion of neglect.

A neglected juvenile is one whose parent "does not provide proper care, supervision or discipline" or "creates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2021). "In general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful. However, not every act of negligence on part of the parent results in a neglected juvenile." *In re V.M.*, 273 N.C. App. at 297, 848 S.E.2d at 533 (citations omitted). "In order to constitute actionable neglect, the conditions at issue must result in '*some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment.*' " *In re K.L.T.*, 374 N.C. at 831, 845 S.E.2d at 34 (emphasis added) (citation omitted). Neglect has most often been found when the "conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). "This Court is required to consider the totality of the evidence to determine whether the trial court's findings sufficiently support its ultimate conclusion that [Aerin] is a neglected juvenile." *In re F.S.*, 268 N.C. App. 34, 43, 835 S.E.2d 465, 471 (2019).

To further the position that one single act of negligent parenting is insufficient to support a showing of neglect, Respondent-Father and the majority cite to *In re Stumbo*, 357 N.C. 279, 582 S.E.2d 255 and *In re H.P.*, 278 N.C. App. 195, 862 S.E.2d 858 (2021). Relying on these cases to support the contention that one single act of neglect is insufficient to support an adjudication of neglect is misplaced.

In *In re Stumbo*, DSS began an investigation after receiving an anonymous call about an unsupervised two-year-old playing naked in the driveway of a house. 357 N.C. at 280, 582 S.E.2d at 256. The issue in that case was whether the single incident of the unsupervised two-year-old was sufficient to constitute neglect. *Id.* at 287, 582 S.E.2d at 260. Our Supreme Court concluded the evidence in the record did not constitute a report of "neglect" because it was factually incomplete. *Id.* at 285, 582 S.E.2d at 259. The record lacked any information regarding the contents of the anonymous phone call, the length of time the child was outside

unsupervised, the character of the surrounding area, or whether this incident had happened before. *Id.* at 282, 585 S.E.2d at 258. Contrary to what the majority and Respondent-Father appear to argue—that a single incident is insufficient for a finding of neglect—*In re Stumbo* did not hold as an absolute that an isolated incident of neglect could *never* support an adjudication of neglect. Moreover, unlike the situation in *In re Stumbo*, the case before us does not involve an incident of a "toddler slip[ing] out of a house without the *awareness* of the parent or care giver—no matter how conscientious or diligent the parent or care giver might be." *See id.* at 288, 582 S.E.2d at 261. Here, Respondent-Father was fully aware he left his nine-year-old child on the side of the road with strangers.

In *In re H.P.*, a social worker observed a naked three-year-old running barefoot in the snow. 78 N.C. App. at 199, 862 S.E.2d at 863. Just days later, DSS received another report that the three-year-old was walking down the street alone in the rain. *Id.* at 199, 862 S.E.2d at 864. Subsequently, DSS filed petitions alleging the three-year-old, as well as respondent-mother's other children, were neglected and dependent. *Id.* at 200, 862 S.E.2d at 864. At the adjudication hearing, DSS relied on "Exhibit A," which was a summary of DSS's history with the family, including all the reports DSS received over a span of four years. *Id.* at 200, S.E.2d at 864. The trial court then relied solely on Exhibit A in making its forty-seven findings of fact. *Id.* at 202, 862 S.E.2d at 866. No other evidence was presented at the hearing, none of the individuals who made the reports testified at the hearing, respondent-parents did not testify, DSS's testimony largely consisted of reading from Exhibit A, and this Court concluded Exhibit A was "contradictory on its face." *Id.* at 203–04, 862 S.E.2d at 866–67. This Court noted the only two uncontested substantive findings made by the trial court—the toddler running naked in the snow and walking alone in the street—were insufficient to constitute neglect. *Id.* at 208, 862 S.E.2d at 869. Specifically, these instances could not constitute neglect because the trial court did not make any findings that the children "experienced, or were at risk of experiencing, physical, mental, or emotional harm," and the conclusions of neglect were therefore unsupported by the findings of fact. *Id.* at 208, 862 S.E.2d at 869.

In re V.M. is likewise instructive for the case at bar. In *In re V.M.*, the trial court adjudicated an infant neglected based on a single incident where he was fed a bottle that had been unknowingly mixed with alcohol instead of water. 273 N.C. App. at 295, 848 S.E.2d at 532. This Court reversed the trial court's order, holding "[t]he trial court did not find that respondent-mother knew, or even reasonably could have

discovered, the danger of alcohol in the bottles. The trial court did not find the respondent-mother's behavior fell 'below the normative standards imposed upon parents by our society.' " *Id.* at 299, 848 S.E.2d at 535. This Court found the trial court's "most glar[ing]" omission to be that the infant suffered "some physical, mental, or emotional impairment," or was at a substantial risk of such impairment. *Id.* at 300, 848 S.E.2d at 535. This Court did *not* hold, however, that the trial court could *not* have concluded the infant was neglected, explicitly stating:

> Had the court engaged in more detailed analysis, offered additional factual findings, explained what steps respondent-mother would or should have taken, determined that the danger was in some way foreseeable, or even just offered more than a token conclusion, we might be able to uphold such a determination. But the analysis in this case was cursory and conclusory, at best.

Id. at 300, 848 S.E.2d at 535.

These cases consistently demonstrate this Court's conclusion that insufficient findings cannot support conclusions of neglect. These cases do not indicate, however, that one act of parental negligence—such as the issue before us has been framed—can *never* support a conclusion of neglect. Rather, the inquiry into whether the trial court erred in adjudicating a juvenile as neglected is extremely fact-intensive.

I reiterate my view that the issue before us is not whether a single, isolated incident alone can support neglect. This Court must consider whether, under the totality of the evidence of this particular case, the trial court made sufficient findings of fact to support the ultimate conclusion of neglect. *See In re F.S.*, 268 N.C. App. at 43, 835 S.E.2d at 471.

At the outset, I agree with Respondent-Father that Findings of Fact 57 and 58 are more properly categorized as conclusions of law because they contain applications of legal principles. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675–76 ("The determination of neglect requires the application of the legal principles put forth in N.C. Gen. Stat. [§ 7B-101(15)] and is therefore a conclusion of law."). As such, they will be reviewed *de novo*. *See In re Estate of Sharpe*, 258 N.C. App. at 605, 814 S.E.2d at 598.

The challenged findings state:

> 57. There was a substantial risk to [Aerin] of serious physical injury, when the father turned around, walked away, and left [Aerin] on a busy roadway on [4 October 2021].

> [Respondent-Father] did not provide proper care of his child, when he left her running into a busy roadway of [sic] Newsome Road.
>
> 58. Based on a [sic] totality of the circumstances, including [Respondent-Father]'s willful conduct of turning away and leaving [Aerin] on the busy roadway, [Aerin] was in an environment injurious and did not receive proper care and supervision.

Respondent-Father argues Findings of Fact 57 and 58 do not support the conclusion that he "willfully or negligently" abandoned Aerin on Newsome Road. Further, he argues "all witnesses agreed" Respondent-Father was following Aerin to get her back in the truck and "off the road," and there is no evidence he could have prevented Aerin from crossing the road. This argument is factually inaccurate and misplaced.

Respondent-Father's argument is factually inaccurate because the witnesses do *not* agree Respondent-Father was following Aerin to get her back in his truck and off the road. All witnesses agreed Respondent-Father was following Aerin *until* she ran across Newsome Road. As Aerin was crossing the road, Respondent-Father turned around, got back in his truck, drove away, and did not return that day.

Respondent-Father's argument is misplaced because it focuses on the sole fact of Aerin crossing the road. Respondent-Father is likely correct that he could not have prevented Aerin from crossing the road: it was an unfortunate series of events that led to Aerin running from her father and into potentially grave danger. What Respondent-Father and the majority do not appear to consider—and what I find most troubling—are his actions *after* Aerin crossed the road. Respondent-Father did not stay to see if Aerin made it safely to the other aside, he did not stay on the roadside with her, and there is no evidence he inquired about her during the rest of the day. Even assuming Respondent-Father did not see the dump truck, his nine-year-old, hysterical daughter had just run into a busy roadway during school pickup traffic. The majority also seems to give credence to Respondent-Father's claim that he believed Aerin was safe with a crowd of people. Not only was this "crowd of people" never corroborated by any other witnesses, but the trial court also determined Respondent-Father's testimony was not credible. It is also difficult to see how leaving a child with strangers on the side of the road is akin to "safety."

Respondent-Father's actions on 4 October 2021 constituted neglect because leaving Aerin on the side of the road, with no regard for her well-being, constituted "severe or dangerous conduct" which could have potentially resulted in injury to Aerin. *See In re Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258. Moreover, there is no evidence in the record Respondent-Father attempted to call anyone in DSS on 4 October 2021 to inquire about his daughter, even though he testified that he knew she was in DSS custody.

Respondent-Father compares this incident to those in *In re Stumbo* and *In re H.P.*, where the juveniles also faced traffic risks, but he argues his nine-year-old daughter knew not to "play in traffic." Respondent-Father further argues Aerin was unharmed, and the fact that she arrived safely on the other side of the road weighs against any conclusion that she could not safely navigate busy roads. Based on the testimony of Mr. Shearin, however, it appears Aerin "safely" crossed the road by a stroke of sheer luck. Aerin testified she was not even looking at the road as she ran into it, which is clear evidence she did not safely navigate the road.

Further distinguishing this case from *In re Stumbo* and *In re H.P.*, the trial court here made sixty-four detailed findings of fact based on corroborated testimony of Aerin, Mr. Shearin, and Ms. Neal, which can hardly be considered "factually incomplete." *See In re Stumbo*, 357 N.C. at 285, 582 S.E.2d at 259. The trial court in this case conducted a detailed analysis of the events that transpired on 4 October 2021 and the impact the events had on Aerin. *See id.* at 300, 848 S.E.2d at 535. Moreover, the trial court's conclusions included the most important element of a neglect case—that Aerin was "at a substantial risk of serious harm." *See id.* at 299, 848 S.E.2d at 534; *see also In re H.P.*, 278 N.C. App. at 208, 862 S.E.2d at 869; *In re K.L.T.*, 374 N.C. at 831, 845 S.E.2d at 34. This conclusion is supported by very detailed factual findings supporting more than a "token conclusion." *See In re V.M.*, 273 N.C. App. at 300, 848 S.E.2d at 535.

While I am cognizant of Respondent-Father's difficult situation —having two other young children with him in the truck—this incident occurred just blocks from the Belmont residence. Even if Respondent-Father could not have responsibly taken the other two children home and returned to check on Aerin, he could have returned to Newsome Road after he dropped his step-children off at their aunt's home. Instead, he left town. Respondent-Father's willful acts of walking away from Aerin as she reached Newsome Road, leaving Aerin with strangers, and never inquiring about her well-being was treatment of Aerin that fell "below the normative standards imposed upon parents by our society." *See In re V.M.*, 273 N.C. App. at 297, 848 S.E.2d at 533.

Based on the totality of the evidence and the findings of fact, I would hold the trial court did not err by concluding Aerin was neglected when Respondent-Father left her in an "environment injurious to her welfare" and that she was "at risk of physical, mental, and emotional impairment." *See In re K.L.T.*, 374 N.C. at 831, 845 S.E.2d at 34; *see also In re F.S.*, 268 N.C. App. at 43, 835 S.E.2d at 471.

II. Adjudicating Dependency

I further disagree with the majority that the trial court erred in adjudicating dependency. As the majority noted, the trial court is required to address the parent's ability to provide care and alternative childcare arrangements. *See In re P.M.*, 169 N.C. App. at 427, 610 S.E.2d at 406. Because I conclude the trial court fulfilled this duty, I would affirm the conclusion of dependency.

The trial court's Findings of Fact 59 and 62 addressed Respondent-Father's ability to provide care, supervision, and the availability of alternative childcare arrangements. Respondent-Father, however, challenges Findings of Fact 59 and 62 arguing there is no evidence to support the findings that he or Ms. Harris were unwilling to create a care plan for Aerin, DSS did not attempt to work with Respondent-Father "in the two hours before it decided to file a petition[,]" and DSS did not ask them to suggest appropriate childcare arrangements. This argument is unpersuasive.

Findings of Fact 59 and 62 state:

> 59. No respondent [sic] was able to make a proper plan for [Aerin] on [4 October 2021]. Her father, [Respondent-Father] left and did not return to the scene. [Ms.] Harris did not offer to make a plan for the child, [sic] during her interview with [Ms.] Neal. Finally, [] the child's mother[] was unable to be located on [4 October 2021].
>
> . . . .
>
> 62. At the time of the filing of the petition, [Aerin] needed placement and assistance because no parent or custodian was able and willing to provide for [her] care.

DSS could not have attempted to work with Respondent-Father because he left the scene, did not return to check on Aerin, and did not go to the Belmont residence. Respondent-Father made no attempts to contact DSS or inquire about Aerin even after he knew she was in DSS custody. Moreover, Ms. Harris testified that she did not cooperate with Ms. Neal.

It was clear from Ms. Harris's lack of cooperation with Ms. Neal that she was not willing to assist in finding an alternative childcare arrangement for Aerin. It is also clear DSS could not have asked Respondent-Father to assist in finding placement for Aerin because Respondent-Father left town; Ms. Harris represented to DSS that she did not have contact information for him and did not know his whereabouts.

Findings of Fact 59 and 62 are supported by clear and convincing evidence, and thus I would hold the trial court did not err in adjudicating Aerin dependent. *See In re R.B.*, 280 N.C. App. at 437, 868 S.E.2d at 128; *see also In re V.M.*, 273 N.C. App. at 296, 848 S.E.2d at 533.

III. Conclusion

Based on the above, I would hold the trial court did not err in adjudicating Aerin as neglected and dependent. For the foregoing reasons, I respectfully dissent.

IN THE MATTER OF N.B., N.W.

No. COA22-796

Filed 5 July 2023

Child Abuse, Dependency, and Neglect—temporary emergency jurisdiction—subsequent presence for more than six months—home-state jurisdiction

In a child abuse, dependency, and neglect case, the trial court had subject matter jurisdiction to enter an adjudication and initial disposition order where, at the outset of the proceedings, the court properly exercised temporary emergency jurisdiction and then, after the children and their mother had lived in North Carolina without interruption for more than six months and there was no custody order from any other state, transitioned to home-state jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.

Appeal by respondent-mother from order entered 1 July 2022 by Judge Angela C. Foster in Guilford County District Court. Heard in the Court of Appeals 6 June 2023.

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

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

Mary McCullers Reece for respondent-appellant mother.

ZACHARY, Judge.

Respondent-Mother appeals from the trial court's order adjudicating her child "Nancy"[1] to be a neglected and dependent juvenile, and her child "Nell" to be an abused and neglected juvenile, and maintaining the children's placement in the custody of the Guilford County Department of Health and Human Services ("DHHS"). She argues that the trial court lacked subject-matter jurisdiction over these proceedings. After careful review, we affirm.

I. Background

In 2020, Respondent-Mother lived in Tacoma, Washington, with her four children and her husband, who is the legal father of Nancy, her youngest daughter.[2] In or around October 2020, Respondent-Mother separated from her husband, and shortly afterward began the process of relocating with her children to North Carolina. At the end of October, Nell's aunt traveled to Tacoma to pick up Nell and one of Respondent-Mother's older children, and returned to High Point with them.

On 10 December 2020, DHHS received a report that Nell had disclosed to her aunt that she had been sexually abused by her stepfather, Respondent-Mother's husband. In January 2021, Respondent-Mother brought Nancy and another of her older children to live with relatives in Winston-Salem. DHHS contacted Respondent-Mother on 7 January and informed her of Nell's disclosure, but Respondent-Mother told the social worker that Nell had lied before and that she did not trust Nell's aunt. Respondent-Mother refused to complete a safety assessment with DHHS, and DHHS was unable to complete a child and family team meeting with Respondent-Mother.

After the family moved to North Carolina, Respondent-Mother's two older children relocated to Pennsylvania to live with their father. Respondent-Mother also traveled to Pennsylvania with Nancy.

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1. Consistent with the parties' stipulation, we use pseudonyms to protect the identities of the juveniles in accordance with N.C. R. App. P. 42(b).

2. As the trial court found as fact, the paternity of Nancy "ha[d] not been established through DNA paternity testing" as of the adjudication and disposition hearing; however, Respondent-Mother's husband is listed as Nancy's father on her birth certificate.

On 19 January 2021, DHHS filed juvenile petitions regarding all four of Respondent-Mother's children. DHHS alleged that Nell was an abused, neglected, and dependent juvenile; the other children were alleged to be neglected and dependent juveniles. By order entered that day, the trial court granted DHHS nonsecure custody of Nancy and Nell, but not the older children.[3] Nell was placed with her aunt, but DHHS was unable to take custody of Nancy, as she was in Pennsylvania with Respondent-Mother when DHHS filed the juvenile petitions.

Respondent-Mother and Nancy returned to North Carolina and appeared before the trial court on 4 February 2021, at which point DHHS took custody of Nancy and placed her with Nell's aunt as well. In its initial orders regarding the need for continued nonsecure custody of Nancy and Nell, the trial court indicated that it possessed temporary emergency jurisdiction pursuant to N.C. Gen. Stat. § 50A-204 (2021).

On 31 March 2022, the matter came on for adjudication and disposition hearings in Guilford County District Court. By then, Respondent-Mother had relocated to Charlotte and obtained housing through an organization assisting victims of domestic violence. She also completed the public housing application process and was placed on the waiting list for public housing in High Point. Nell's father was incarcerated in Pennsylvania and participated in the hearings by teleconference. However, Nancy's father did not participate in the hearings; he had not yet been served with the juvenile petitions, as his whereabouts were unknown.

On 6 July 2022, the trial court filed its adjudication and disposition order. As regards its jurisdiction over the matter, the trial court concluded:

> At the time of the filing of the juvenile petition[s], [DHHS] was acting under Temporary Emergency Jurisdiction pursuant to [N.C. Gen. Stat.] § 7B-500 and [N.C. Gen. Stat.] § 50A-204. However, at the time of the Adjudication Hearing, North Carolina had obtained Home State Jurisdiction pursuant to [N.C. Gen. Stat.] § 50A-102(7) in that both juveniles and [Respondent-M]other had lived in the State of North Carolina without interruption for a period exceeding six months and there was no existing Custody Order from any other State.

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3. DHHS ultimately filed a voluntary dismissal of the juvenile petitions regarding the older children, after it determined "that there were no safety concerns with the [Pennsylvania] home or with the[ir] father[.]"

The trial court adjudicated Nancy as a neglected and dependent juvenile, and Nell as a neglected and abused juvenile. The trial court continued DHHS's custody of Nancy and Nell, suspended Respondent-Mother's visitation with them, and relieved DHHS of its obligation to make reasonable efforts to reunify them with Respondent-Mother. Respondent-Mother timely filed notice of appeal.

II. Discussion

Respondent-Mother argues that the trial court erred by entering the adjudication and initial disposition order because "North Carolina did not have jurisdiction to enter non-temporary, non-emergency orders under" the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). For the reasons that follow, we disagree.

A. Standard of Review

Subject-matter jurisdiction is "the power of the court to deal with the kind of action in question[,]" *In re N.T.U.*, 234 N.C. App. 722, 724, 760 S.E.2d 49, 52 (citation omitted), *disc. review denied*, 367 N.C. 826, 763 S.E.2d 517 (2014), and, as a result, is "a threshold requirement for a court to hear and adjudicate a controversy brought before it," *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006). Whether a court possesses subject-matter jurisdiction is a question of law, which this Court reviews de novo on appeal. *N.T.U.*, 234 N.C. App. at 724, 760 S.E.2d at 52.

When conducting de novo review, "this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re T.N.G.*, 244 N.C. App. 398, 402, 781 S.E.2d 93, 97 (2015) (citation and internal quotation marks omitted). However, unchallenged findings of fact are binding on appeal. *N.T.U.*, 234 N.C. App. at 733, 760 S.E.2d at 57.

B. Analysis

On appeal, Respondent-Mother does not challenge any of the trial court's findings of fact, nor does she challenge the trial court's adjudications of Nancy as a neglected and dependent juvenile and Nell as an abused and neglected juvenile. Rather, her arguments are entirely concerned with the trial court's subject-matter jurisdiction over these proceedings.

Respondent-Mother contends that (1) the trial court erred by concluding that it had obtained home-state jurisdiction because North Carolina was not the home state at the inception of these proceedings, and (2) the trial court could not "create 'home[-]state' jurisdiction

for the adjudication simply by passage of time." She also asserts that the trial court erred by failing "to consult with the Washington courts, obtain an order [from Washington] declining jurisdiction, and make appropriate findings to support its order" in which the court exercises jurisdiction "beyond temporary emergency jurisdiction[.]" This appeal thus raises the question of whether (and under what conditions) temporary emergency jurisdiction under the UCCJEA may eventually ripen into home-state jurisdiction.

1. Subject-Matter Jurisdiction and the UCCJEA

Subject-matter jurisdiction "is conferred upon the courts by either the North Carolina Constitution or by statute." *M.B.*, 179 N.C. App. at 574, 635 S.E.2d at 10 (citation omitted). Our Juvenile Code provides that the trial court "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a).

Additionally, "the jurisdictional requirements of the [UCCJEA] must be satisfied for a court to have authority to adjudicate petitions filed pursuant to our Juvenile Code, even though the Juvenile Code provides that the district courts of North Carolina have exclusive, original jurisdiction over any case involving a juvenile." *M.B.*, 179 N.C. App. at 574, 635 S.E.2d at 10 (citation omitted). "The UCCJEA, which is designed to provide a uniform set of jurisdictional rules and guidelines for the national enforcement of child custody orders, is codified in Chapter 50A of the North Carolina General Statutes." *Id.* at 574–75, 635 S.E.2d at 10 (citation and internal quotation marks omitted).

Under the UCCJEA,

> a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the

more appropriate forum under [N.C. Gen. Stat. §] 50A-207 or [§] 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under [N.C. Gen. Stat. §] 50A-207 or [§] 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C. Gen. Stat. § 50A-201(a).

For the purposes of the UCCJEA, a "child-custody determination" is "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child" and "includes a permanent, temporary, initial, and modification order." *Id.* § 50A-102(3). " 'Initial determination' means the first child-custody determination concerning a particular child." *Id.* § 50A-102(8).

A child's "home state" under the UCCJEA is "the state in which [the] child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding[,]" including a proceeding on abuse, neglect, or dependency allegations. *Id.* § 50A-102(4), (7). A proceeding commences with "the filing of the first pleading[.]" *Id.* § 50A-102(5); *see*, *e.g.*, *T.N.G.*, 244 N.C. App. at 403, 781 S.E.2d at 97.

In this case, it is uncontested that the trial court did not have "home-state" jurisdiction pursuant to N.C. Gen. Stat. § 50A-201(a) at the commencement of the present proceedings, as neither juvenile had lived in North Carolina for six months prior to the filing of the petitions in this matter.

However, the UCCJEA also provides that the courts of this State may exercise "temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a). It is similarly uncontested that the trial court in this case properly exercised temporary emergency jurisdiction at the initiation of these proceedings. Accordingly, we must address the transition from temporary emergency jurisdiction to home-state jurisdiction under the UCCJEA.

2. Temporary Emergency Jurisdiction and Home-State Jurisdiction

Respondent-Mother first argues that "at the time of the petition, North Carolina did not have jurisdiction to make an initial custody decision" because it was not the children's home state pursuant to N.C. Gen. Stat. § 50A-201. Implicit in this argument is the proposition that a trial court cannot enter an initial child-custody determination while exercising temporary emergency jurisdiction pursuant to § 50A-204. This proposition is not supported by the text of the UCCJEA.

Section 50A-204(b) provides, in pertinent part:

> If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under [N.C. Gen. Stat. §] 50A-201 through [§] 50A-203, a child-custody determination made under this section becomes a final determination if it so provides, and this State becomes the home state of the child.

Id. § 50A-204(b). The plain language of this section thus contemplates that a court exercising temporary emergency jurisdiction may enter an initial child-custody determination, which "includes a . . . temporary . . . order." *Id.* § 50A-102(3). The trial court thus had jurisdiction to enter the initial, temporary nonsecure custody orders.

However, Respondent-Mother proceeds to argue that "North Carolina courts do not have jurisdiction to enter an adjudication order while exercising temporary emergency jurisdiction." The key issue, then, is under what conditions North Carolina "becomes the home state of the child" in order for a temporary child-custody determination to "become[ ] a final determination if it so provides[.]" *Id.* § 50A-204(b). Respondent-Mother asserts that the trial court could not "create 'home[-]state' jurisdiction for the adjudication simply by passage of time." However, this Court has previously concluded otherwise.

Respondent-Mother acknowledges two cases in which this Court determined that a trial court possessed home-state jurisdiction over termination-of-parental-rights proceedings after initially exercising temporary emergency jurisdiction over child-custody proceedings. *See N.T.U.*, 234 N.C. App. at 728, 760 S.E.2d at 54; *In re E.X.J.*, 191 N.C. App. 34, 43–44, 662 S.E.2d 24, 29–30 (2008), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009).

In *N.T.U.*, this Court "determined that the trial court properly exercised temporary emergency jurisdiction over the custody of [the juvenile] initially," before noting that the juvenile had "lived in North Carolina with his foster parents" for over a year and a half without "any custody proceedings instituted, or custody orders entered, in any state other than North Carolina." 234 N.C. App. at 728, 760 S.E.2d at 54. Accordingly, this Court "conclude[d] that North Carolina became [the juvenile]'s home state such that the trial court possessed jurisdiction to terminate [the r]espondent's parental rights pursuant to N.C. Gen. Stat. § 50A-201(a)." *Id.*

Similarly, in *E.X.J.*, this Court held that "the trial court had emergency jurisdiction to enter the initial nonsecure custody orders[,]" then recognized that, "[b]y the time of the filing of the petition and motion for termination of parental rights, [the children] and [the] respondent mother had been physically present in North Carolina for two years." 191 N.C. App. at 43, 662 S.E.2d at 29. Accordingly, "[g]iven the children's residency and the lack of any other custody proceedings or orders in other states, 'North Carolina became the home state wherein the trial court had jurisdiction under the UCCJEA to enter orders' terminating [the] respondents' parental rights." *Id.* at 44, 662 S.E.2d at 29–30 (quoting *M.B.*, 179 N.C. App. at 576, 635 S.E.2d at 11).

Respondent-Mother maintains that *N.T.U.* and *E.X.J.* do not control the case before us because "those cases involved [termination] petitions for which the respective departments of social services established standing by way of properly entered nonsecure custody orders." Yet both *N.T.U.* and *E.X.J.* relied upon our precedent in *M.B.*, which Respondent-Mother cannot successfully distinguish from the present case.

Unlike *N.T.U.* and *E.X.J.*, but like the present case, *M.B.* did not concern a termination-of-parental-rights proceeding commenced after a prior child-custody determination. Instead, *M.B.* concerned the trial court's authority to enter an initial child-custody determination while exercising temporary emergency jurisdiction, then to recognize that North Carolina had become the child's home state and order that the

child-custody determination become a final order pursuant to N.C. Gen. Stat. § 50A-204(b). 179 N.C. App. at 576, 635 S.E.2d at 11.

In *M.B.*, the child and both parents moved from New York to North Carolina between February and March of 2005, and in April of that year, DSS filed a juvenile petition alleging that the child was neglected. *Id.* at 572–73, 635 S.E.2d at 9. In June 2005, the trial court entered an order finding temporary emergency jurisdiction, adjudicating the child as neglected, and placing the child in the temporary custody of DSS. *Id.* at 573, 635 S.E.2d at 9. The trial court also ordered the parents and DSS to "provide any and all information and paperwork in relation to an alleged New York court proceeding concerning M.B., as such a proceeding may impact the trial court's subject[-]matter jurisdiction." *Id.*

During the process of appealing the trial court's temporary custody order, "DSS received a letter from Westchester County, New York, stating that there [we]re no pending matters or any orders regarding M.B." *Id.* at 574, 635 S.E.2d at 10. Accordingly, in October 2005, while the appeal was pending before this Court, the trial court entered an order "providing that (1) North Carolina [wa]s now the home state of M.B. because M.B. ha[d] been in North Carolina for over six months; and (2) the temporary child custody determination entered on 17 June 2005 [wa]s now the final order of custody." *Id.*

On appeal, this Court affirmed the trial court's initial invocation of temporary emergency jurisdiction. *Id.* at 576, 635 S.E.2d at 11. Furthermore, this Court determined that "any issue of temporary jurisdiction [wa]s now moot" and specifically cited the October 2005 order—as well as the fact that "M.B., M.B.'s mother, and [M.B.'s] father ha[d] been physically present in North Carolina for more than six months"—to support its conclusion that "North Carolina [wa]s now the home state under the UCCJEA[.]" *Id.* Although this Court in *M.B.* did not specifically refer to N.C. Gen. Stat. § 50A-204(b), it is apparent that the trial court's October 2005 order conformed with the provisions of that statute for the purposes of assuming home-state jurisdiction. *Id.*; *see also* N.C. Gen. Stat. § 50A-204(b).

DHHS contends on appeal that "[t]he relevant facts of *In re M.B.* are nearly identical to those in this case." We agree. As the trial court concluded—and as is supported by unchallenged (and therefore, binding) findings of fact, *N.T.U.*, 234 N.C. App. at 733, 760 S.E.2d at 57—"both juveniles and [Respondent-M]other had lived in the State of North Carolina without interruption for a period exceeding six months and there was no existing Custody Order from any other State" at the time the trial court entered the adjudication and disposition order. As such,

and as the trial court declared in its order, "North Carolina . . . obtained Home State Jurisdiction" under the UCCJEA.

Lastly, DHHS advances a pair of unpublished opinions[4] as persuasive authority for the application of the holding in *M.B.* to this case. Indeed, in *In re K.M.*, this Court "conclude[d] that North Carolina became the home state wherein the trial court had jurisdiction under the UCCJEA to enter orders adjudicating the juveniles abused, neglected, and dependent" where the trial court made unchallenged findings of fact concerning "the court's exercise of emergency jurisdiction, the juveniles' residency in North Carolina for over six months, and the lack of any other custody proceedings or orders in any other state[.]" 228 N.C. App. 281, 748 S.E.2d 773, 2013 WL 3356835, at *3 (2013) (unpublished). And in *In re L.C.D.*, this Court concluded that "North Carolina became [the child]'s home state after six months" of her continuous residence in nonsecure custody in the state and "[i]n the interim, no custody proceedings were instituted or custody orders entered in another state." 253 N.C. App. 840, 800 S.E.2d 137, 2017 WL 2437033, at *3 (2017) (unpublished).

In the case at bar, the trial court properly concluded that it had home-state jurisdiction at the time of the adjudication and disposition order. In that Respondent-Mother does not otherwise challenge the trial court's findings of fact or conclusions of law, the trial court's order is properly affirmed.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges ARROWOOD and GRIFFIN concur.

4. Although unpublished opinions do not have precedential value, "an unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point." *Zurosky v. Shaffer*, 236 N.C. App. 219, 234, 763 S.E.2d 755, 764 (2014).

STATE v. BURRIS

[289 N.C. App. 535 (2023)]

STATE OF NORTH CAROLINA
v.
KYLE ALLEN BURRIS, DEFENDANT

No. COA22-408

Filed 5 July 2023

1. Evidence—lay testimony—reckless driving—identity of driver—no personal observation—curative instruction

In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road and near which defendant was discovered trapped under a fence, although a trooper's testimony that he believed defendant was the driver of the truck was inadmissible because the trooper did not personally observe defendant driving, there was no reversible error where the trial court gave the jury a curative instruction to disregard the opinion testimony. Even assuming that the instruction was insufficient, defendant could not demonstrate that the trooper's testimony prejudiced him because he failed to object to other evidence of the trooper's belief that defendant was the driver.

2. Motor Vehicles—driving while impaired—reckless driving—motion to dismiss—sufficiency of evidence—identity of driver

In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road and crashed into a steel fence, the State presented sufficient evidence from which the jury could conclude that defendant was the driver of the truck, including that defendant was found alone at the scene—trapped under the steel fence outside of the vehicle, unresponsive, and bleeding—and was the owner of the truck.

3. Search and Seizure—warrantless blood draw—impaired driving—unconscious driver—exigent circumstances

In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road, there were sufficient exigent circumstances to justify a warrantless blood draw where defendant was found unconscious near the vehicle with severe injuries and extensive bleeding, defendant smelled of alcohol and there were open beer cans inside and outside the vehicle, the responding trooper spent an hour investigating and securing the scene while defendant was transported

to a hospital for medical treatment, and defendant was still unconscious when the trooper arrived at the hospital. Therefore, there was no reversible error in the admission of the results of the blood draw into evidence.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 11 August 2021 by Judge Jacqueline D. Grant in Buncombe County Superior Court. Heard in the Court of Appeals 8 March 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip T. Reynolds, for the State.

Kimberly P. Hoppin for the Defendant.

DILLON, Judge.

Defendant Kyle Allen Burris appeals from a judgment entered upon a jury verdict convicting him of driving while impaired and reckless driving to endanger. We conclude that Defendant received a fair trial, free of reversible error.

I. Background

On the evening of 22 November 2014, a law enforcement officer responded to a single-vehicle accident in Buncombe County. Upon arriving at the scene, the trooper saw a pickup truck off the right side of the road. The vehicle was up against a steel fence and had sustained extensive damage. The trooper found Defendant lying trapped under the steel fence outside the vehicle. Defendant was unresponsive and appeared to suffer from severe injuries. He was bleeding excessively. He smelled of alcohol. The trooper found open beer cans, both inside and outside the vehicle. Defendant was eventually taken to the hospital, still unconscious, while the trooper remained at the scene. The trooper was able to determine that Defendant was the owner of the vehicle, and there was no evidence at the scene that anyone else was riding in the vehicle when the wreck occurred.

Defendant was convicted by a jury in superior court for driving while impaired and reckless driving to endanger. Defendant timely appealed.

II. Analysis

Defendant raises two issues on appeal, which we address in turn.

A. Evidence That Defendant Was Driving the Vehicle

Defendant makes two arguments concerning the evidence that he was, in fact, driving the wrecked vehicle.

[1] First, Defendant contends the trial court erred when it allowed certain evidence showing the trooper believed Defendant driving the vehicle when it wrecked. This argument pertains to both Defendant's driving while impaired conviction and his reckless driving to endanger convictions, both of which required the State to prove that Defendant was driving the vehicle when the wreck occurred.

We agree that the trooper's opinion testimony that Defendant was the driver was inadmissible because the trooper did not personally observe Defendant driving the vehicle. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2021) (Lay testimony is generally confined to a witness's personal observations); *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980) (stating that "[o]rdinarily opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury.").

However, we conclude the admission of the trooper's opinion testimony does not constitute reversible error in this case. In so holding, we note the trial court gave a curative instruction regarding the trooper's opinion testimony. Specifically, the trial court expressly stated that the officer would be permitted to talk about what he observed during his post-crash investigation of the scene, but that he would not be permitted to "conclusively say [Defendant] was the driver". The trial court instructed the jury to disregard the trooper's opinion testimony, stating:

> The Court is going to sustain the defendant's objection to the extent [the officer] has referred to the defendant as "the driver." The jury is to disregard any testimony referring to the defendant as "the driver", because that's actually an issue that you will decide as the jury.

See State v. Black, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991) ("When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured.").

Further, assuming the trial court's curative instruction was insufficient, Defendant has failed to establish that he was prejudiced by the officer's statement, as Defendant failed to object to *other* evidence tending to show the trooper believed Defendant to be the driver. *See State v. Delau*, 381 N.C. 226, 237, 872 S.E.2d 41, 48 (2022) (holding that any error in allowing an officer to testify about the driver's identity was not prejudicial when the warrant application admitted without objection

contained the same information, the officer's conclusion that the defendant was driving). For example, Defendant did not object when the State offered the trooper's "Affidavit and Revocation Report" as evidence, which contained multiple references to Defendant as the driver.

[2] Second, Defendant argues the trial court erred when it denied Defendant's motion to dismiss the charges for insufficient evidence showing Defendant was the driver. To survive a motion to dismiss, there must be substantial evidence of each essential element of the crime and that the defendant is the offender. *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015). When considering the motion, evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference. *Id.* at 574, 780 S.E.2d at 826.

We conclude there was sufficient evidence from which the jury could find that Defendant was driving the vehicle when the crash occurred. In addition to the State's exhibits which were not objected to which described Defendant as the driver, there was evidence that Defendant was found alone at the accident scene and that Defendant was the owner of the vehicle. *See, e.g.*, *State v. Ray*, 54 N.C. App. 473, 475, 283 S.E.2d 823, 825 (1981) ("It is possible that other circumstantial evidence – such as … evidence as to the [defendant's] ownership of the automobile – in addition to the testimony of the officer [finding the defendant alone in a vehicle that was running]" would be sufficient to meet the State's burden of showing the defendant was driving the vehicle). When viewed in the light most favorable to the State, we conclude that the evidence was sufficient to survive Defendant's motion to dismiss.

B. Warrantless Blood Draw

[3] At trial, the jury was instructed it could convict Defendant of drunk driving *solely* on the grounds that Defendant's blood alcohol level was above the legal limit. N.C. Gen. Stat. § 20-138.1(a)(2) (2021). It was on this ground that Defendant was convicted of this charge. Defendant argues the trial court erred by denying his motion to suppress the warrantless blood draw, the results of which were the only evidence that his blood alcohol level exceeded the legal limit.

The evidence concerning the blood draw showed that Defendant was transported to the hospital, that the trooper went directly to the hospital after completing his work at the crash scene, and that the trooper obtained a blood sample from Defendant while Defendant remained unconscious.

Blood tests are considered a search under both the federal and North Carolina constitutions. *Schmerber v. California*, 384 U.S. 757, 767

(1966). Accordingly, "blood draws may only be performed after either obtaining a warrant, obtaining valid consent from the defendant, or under exigent circumstances with probable cause." *State v. Romano*, 369 N.C. 678, 692, 800 S.E.2d 644, 653 (2017).

Here, the trooper did not obtain a warrant prior to obtaining a blood sample from Defendant at the hospital.

Also, Defendant did not give *express* consent for the blood draw as he was unconscious throughout. Our General Assembly, however, has provided that a driver has given *implied* consent to a blood draw when he is found unconscious and there is reasonable grounds to suspect that he has been driving while impaired. N.C. Gen. Stat. § 20-16.2(b) (2021). Our Supreme Court has limited the scope of this statute by holding that the Fourth Amendment is violated when an unconscious driver is deemed as consenting to a blood draw based on this implied consent statute for purposes of an impaired driving prosecution. *See Romano*, 369 N.C. at 691, 800 S.E.2d at 652 (stating that Section 20-16(b) is not "a per se categorical exception to the warrant requirement.").

We, therefore, consider whether there were sufficient exigent circumstances to justify the trooper's action in not first obtaining a warrant before obtaining a draw of Defendant's blood. Our resolution of this issue is controlled by the recent United States Supreme Court decision in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

Mitchell, decided two years after our Supreme Court decided *Romano*, concerned the constitutionality of a warrantless blood draw from an unconscious motorist suspected of impaired driving in a state with an implied consent statute similar to our implied consent statute.

A four-judge plurality of the Court in *Mitchell* - sidestepping the issue as to whether prosecutors can rely on an implied consent statute to show consent by an unconscious driver to a blood draw – held that exigent circumstances "almost always" exist to conduct a warrantless blood draw where an unconscious driver is taken to the hospital[1]:

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1. The plurality opinion, authored by Justice Alito, garnered the votes of three other justices. Justice Thomas concurred in the judgment. Justice Thomas argued that the natural metabolism of alcohol in the blood means that exigent circumstances are present whenever someone is suspected of driving under the influence of alcohol. *Mitchell*, 139 S. Ct. at 2539-41 (Thomas, Justice concurring). Because Justice Alito's opinion is based on a narrower ground, it represents the Court's holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....' " (quoting *Gregg v. Georgia*, 428 U.S.153, 169 n. 15 (1976) (plurality opinion))).

> Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious []: With such suspects, too, a warrantless blood draw is lawful.
>
> … [U]nconsciousness does not just create pressing needs; it is *itself* a medical emergency. . . . Police can reasonable anticipate that . . . [the defendant's] blood may be drawn anyway, . . . and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing evidentiary value.
>
> * * *
>
> When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC [blood alcohol content] without offending the Fourth Amendment.

Id. at 2537-39. The Court, though, remanded that case to allow *the defendant* a chance to show his was the "unusual case" that would require a warrant, seemingly placing on the defendant the burden to make this showing where the State proves that the defendant was unconscious and needed treatment at a hospital:

> We do not rule out the possibility that in an unusual case *a defendant would be able to show* that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. *Because [the defendant] did not have a chance to attempt to make that showing*, a remand for that purpose is necessary.

Id. (emphasis added). In remanding the case, the Court was not saying that a defendant has the *initial* burden to prove a lack of exigent circumstances. The Court recognized the State has this burden of showing exigency but was stating that the State meets this burden by showing the defendant was unconscious and in need of medical

attention at a hospital. The Court then simply recognized that, where the State makes this showing, the defendant should have the opportunity to offer evidence of other facts to show a lack of exigency. *See State v. Mitchell*, 404 Wis.2d 103, 110-15 (2022) (after remand from the United States Supreme Court, Wisconsin intermediate appellate court concludes the defendant failed to meet his burden of showing his was an unusual case); *McGraw v. State*, 289 So.3d 836, 839 (Fla. 2019) (Florida Supreme Court remands so "[the defendant] can be given the opportunity to demonstrate" his was an unusual case which required a warrant); *Peoples v. Eubanks*, 160 N.E.3d 843, 864 (2019) (Illinois Supreme Court interprets *Mitchell* as stating "in cases where the "general rule" applies, the burden shifts to defendant to establish a lack of exigent circumstances."). *But see State v. Key*, 848 S.E.2d 315, 316 (South Carolina Supreme Court refusing to shift the burden to the defendant to show his to be an unusual case).

In the case before us, the trial court's findings show the State met its burden of showing exigency under *Mitchell*. It found in its written order that Defendant was unconscious and badly injured at the crash scene when the trooper arrived; the trooper spent an hour investigating and securing the scene during which Defendant was transported by ambulance to a hospital; the trooper then went directly to the hospital; and Defendant had been sedated and was still unconscious when the trooper arrived. Further, the trial court stated from the bench:

> As [the officer] testified, [Defendant] had become unresponsive. That his injuries were such [the officer] was concerned that he would probably have to undergo surgery, and it could even possibly lead to a fatality. And in those circumstances, the blood alcohol evidence would dissipate as more time passed. You don't know how long the defendant would have been in surgery, what additional medical treatment would have been rendered. And as a result of that, that would have created exigent circumstances that the Court finds not taking the time to go get a warrant from the magistrate's office, not knowing how long that will take, depending on when the magistrate was available, what's going on with the jail.
>
> So the Court finds that exigent circumstances existed, which justified getting the blood draw from the defendant. So again, the motion to suppress is denied.

However, we conclude that the matter need not be remanded. The *Mitchell* Court remanded the case before it to allow the defendant a

chance to offer evidence "[b]ecause [the defendant] did not have a chance to attempt to make that showing [that his was an unusual case]." *See Mitchell*, 139 S. Ct. at 2539. Here, though, the record shows Defendant did have that opportunity, as the *Mitchell* case was discussed at length at the hearing. And, on appeal, Defendant does not cite *Mitchell* or otherwise make any argument that he was not afforded the opportunity to make the showing at the hearing. We, therefore, conclude that the trial court did not commit reversible error by allowing the results of the warrantless blood draw into evidence.

NO ERROR.

Judge GORE concurs.

Judge TYSON concurs in part and dissents in part with separate opinion.

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

I concur with the majority's holding the trial court erred by allowing the state trooper, as a lay witness, to testify Defendant was the driver of the vehicle for either charge, because the trooper never observed Defendant drive, being seated behind the wheel, or even present inside of the vehicle. This error was cured by the trial judge's instruction to disregard this testimony.

The trial court erred in denying Defendant's motion to suppress the Defendant's blood alcohol concentration ("BAC") level, derived solely from the warrantless blood draw without the State proving probable cause and exigent circumstances, and where the jury was instructed solely on Defendant's BAC level as evidence to support Defendant's guilt. I respectfully dissent.

I. Fourth Amendment

The Fourth Amendment of the Constitution of the United States *guarantees*: "The right of the people to be *secure in their persons*, houses, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and *no Warrants shall issue*, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized*." U.S. Const. amend. IV (emphasis supplied).

The Supreme Court of the United States ruled:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Schmerber v. California, 384 U.S. 757, 770, 16 L. Ed. 2d 908, 919 (1966).

"The [Fourth] Amendment thus prohibits 'unreasonable searches,' . . . [and] the taking of a blood sample . . . is a search." *Birchfield v. North Dakota*, 579 U.S. 438, 455, 195 L. Ed. 2d 560, 575 (2016) (citations omitted). *Accord State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988).

The Supreme Court of North Carolina has held: "drawing blood . . . constitutes a search under both the Federal and North Carolina Constitutions." *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017) (citations omitted). "[B]lood draws may only be performed after either obtaining a warrant, obtaining valid consent from the defendant, or under exigent circumstances with probable cause." *Id.* at 692, 800 S.E.2d at 653.

The Supreme Court of the United States further held: Blood tests: (1) "require piercing the skin and extract[ion of] a part of the subject's body"; (2) are "significantly more intrusive than blowing into a tube"; and (3) place in the hands of law enforcement "a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, 579 U.S. at 463-64, 195 L. Ed. 2d at 580 (citations and internal quotation marks omitted).

Our Supreme Court adopted and interpreted the test in *Schmerber*, as "forbidding law enforcement authorities acting without a search warrant from requiring a defendant to submit to the drawing of a blood sample unless probable cause and exigent circumstances exist to justify a warrantless seizure of the blood sample." *State v. Welch*, 316 N.C. 578, 587, 342 S.E.2d 789, 794 (1986) (citing *Winston v. Lee*, 470 U.S. 753, 84 L. Ed. 2d 662 (1985) (clarifying how North Carolina courts construe the *Schmerber* factors). Without probable cause and exigent circumstances, or another exception to the warrant requirement, a warrantless search violates the Fourth Amendment to the Constitution of the United States and Article One, Section Nineteen of the North Carolina Constitution,

and any evidence illegally obtained must be excluded. *Id.*; U.S. Const. amend. IV; N.C. Const. art. 1, § 19.

The Supreme Court of the United States in *Schmerber* also explained the Fourth Amendment's warrant requirement is not a mere formality, but requires necessary judgment calls that are made "by a neutral and detached magistrate," and not "by the officer engaged in the often competitive enterprise of ferreting out crime." *Schmerber*, 384 U.S. at 770, 16 L. Ed. 2d at 919 (citation and quotation marks omitted). This default Constitutional requirement for and specificity of a warrant, and the further prohibition against General Warrants, serves as bulwark protections of individual liberties against warrantless searches and seizures, which violate the Fourth Amendment. A warrant issued "by a neutral and detached magistrate" also ensures a police officer is not the sole interpreter of the Constitution's protections and an individual's "interests in human dignity and privacy" are protected. *Id.*

A search conducted without a warrant is "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967) (citations and footnotes omitted). "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382, 189 L. Ed. 2d 430, 439 (2014) (citation omitted). The narrow exception of probable cause and exigent circumstances to the warrant requirement is necessarily limited. The burden to prove necessity and exigency to proceed without a warrant remains on the State and does not shift to Defendant. *See Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 80 L. Ed. 2d 732, 743 (1984) ("Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated,' and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." (internal citations omitted)).

The record and testimony show the trooper took an hour or two to complete his work at the scene before going directly to the hospital to confront Defendant. The trooper stated he went to the hospital, rather than a magistrate for a warrant, because Defendant might be headed into surgery. Upon arrival at the hospital, he located and "advised" the injured and unconscious Defendant of his chemical analysis rights for a Breathalyzer and asserted he could not perform a breath test on Defendant.

The trial court found exigent circumstances existed to deny Defendant's motion to suppress by holding:

> [T]he blood alcohol evidence would dissipate as more time passed. You don't know how long the defendant would have been in surgery, what additional medical treatment would have been rendered. And as a result of that, that would have created exigent circumstances that the Court finds justifies not taking the time to go get a warrant from the magistrate['s] office, not knowing how long that will take, depending on when the magistrate was available, what's going on with the jail.
>
> So the Court finds that exigent circumstances existed, which justified getting the blood draw from the defendant. So, again, the motion to suppress is denied.

None of these factors, individually or collectively, excuse the requirement of a warrant. "[T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Romano*, 369 N.C. at 687, 800 S.E.2d at 656 (citation and internal quotation marks omitted).

The majority's opinion cites *Mitchell v. Wisconsin*, 588 U.S. __, 204 L. Ed. 2d 1040 (2019), which neither party argues nor relies upon in their briefs, to support its conclusion. None of those facts or conditions in *Mitchell* support their result to allow the needle-extracted, unrestricted search under these facts to allow "a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, 579 U.S. at 463-64, 195 L. Ed. 2d 560, 566-67. *"[N]o Warrants shall issue*, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched*, and the persons *or things to be seized*." U.S. Const. amend. IV (emphasis supplied).

The majority's opinion unconstitutionally shifts the burden onto the Defendant *to prove the default necessity of a warrant!* The Fourth Amendment *guarantees and mandates the requirement of a warrant*, and their analysis of the narrow warrantless search exception becomes: why do you need a detached neutral magistrate upon "probable cause, supported by Oath or affirmation" to issue a specified search warrant before your bodily fluids are extracted and removed from your body, while injured, unconscious, and without restrictions? That result simply cannot be what the Founders and Framers intended. *Schmerber*, 384 U.S. at 770, 16 L. Ed. 2d at 919 (explaining necessary judgment calls are to be made "by a neutral and detached magistrate," and not "by the officer engaged in the often competitive enterprise of ferreting out crime").

The Bill of Rights was demanded to amend the Constitution to protect individuals from the interference and overreach of government officials, and, most specifically, to protect the privacy and rights of individuals, particularly those unconscious or utterly incapable, like infants and incompetents, of asserting their rights or providing informed consent. *See* Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. Rev. 1745, 1757 (2009) ("In the view of the Anti-Federalists, the Bill of Rights would set 'limits' and build 'barriers' against government abuse or enlargement of its powers. The purpose of the Bill of Rights would be to limit the exercise of delegated powers, thus providing a second limitation on the power of government. . . . But the Bill of Rights placed limits on even those enumerated powers, forbidding the federal government from using its enumerated powers to encroach on areas protected by the Bill of Rights."); *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 956 (1928) (Brandis, J., dissenting) (stating the Founders "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men").

II. Fifth Amendment

A law enforcement officer giving warnings and reading "rights" to an injured and unconscious person at a hospital, who is utterly incapable of understanding and giving informed consent, prior to demanding and compelling medical personnel to draw his blood without his knowledge is the height of hypocrisy. This warrantless blood extraction makes a mockery of both the Fourth Amendment's protections of "the right of the people to be secure in their persons" and the prohibitions "against unreasonable searches and seizures." U.S. Const. amend. IV.

The Fifth Amendment's right against self-incrimination, and *Miranda* warnings of the individual's "right to remain silent" were instituted to avoid compelled interrogations and testimony or evidence derived from "General Warrants" or warrantless searches. "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. While the Supreme Court of the United States has held "that forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self-incrimination," the Supreme Court also demanded a "blood test" must be based upon probable cause and ordered by a detached and neutral magistrate's warrant. *Mitchell*, 588 U.S. at __, 204 L. Ed. 2d at 1046 (citing *Schmerber*, 384 U.S. at 765, 16 L. Ed. 2d at 917).

"[T]hese fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." *Schmerber*, 384 U.S. at 769-70, 16 L. Ed. 2d at 919. The Supreme Court of North Carolina agreed and has also held: "[T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *State v. Romano*, 369 N.C. 678, 687, 800 S.E.2d 644, 656 (2017) (quotation marks omitted) (quoting *Missouri v. McNeely*, 569 U.S. 141, 165, 185 L. Ed. 2d 696, 715 (2013)).

The fact that a suspect fell unconscious at some point or was going into surgery does not equate to insufficient time for the trooper to seek and demonstrate probable cause to obtain a warrant. If an officer has the time to secure a warrant prior to the blood draw, "the Fourth Amendment mandates that they do so[,]"and the burden of the officer's failure to do so rests upon the State. *McNeely*, 569 U.S. at 152, 185 L. Ed. 2d at 707 (citation omitted).

The trooper testified, and the trial court found, the trooper did not obtain a warrant because there might be a line and he might have to wait on a magistrate to review his sworn affidavit for probable cause and application to issue the warrant. That is the point of requiring a warrant. The trooper's assertion is sheer conjecture. Even if true, no evidence was presented by the State to support this "reason" or "exigency" for failing to secure a warrant.

Presuming probable cause existed, exigent circumstances did not require an immediate warrantless blood draw, since the hospital would have already drawn Defendant's blood for typing and tests upon arrival. *See State v. Scott*, 278 N.C. App. 354, 861 S.E.2d 892 (2021) (involving blood samples taken upon defendant's arrival at the hospital and picked up a week after being drawn).

Additionally, the possibility of Defendant's death during surgery did not provide an exigency. If deceased, Defendant would not have been charged in any event.

The trial court's finding to support denial of Defendant's motion to suppress was:

> As [the trooper] testified, [Defendant] had become unresponsive. That his injuries were such [the trooper] was concerned that he would probably have to undergo surgery, and it could even possibly lead to a fatality. And in those circumstances, the blood alcohol evidence would

> dissipate as more time passed. You don't know how long the defendant would have been in surgery, what additional medical treatment would have been rendered. And as a result of that, that would have created exigent circumstances that the Court finds justifies not taking the time to go get a warrant from the magistrate[']s] office, not knowing how long that will take, depending on when the magistrate was available, what's going on with the jail.

All these stated reasons, considered individually or together, are pretextual to avoid the Fourth Amendment's requirement for a warrant. *McNeely*, 569 U.S. at 152, 185 L. Ed. 2d at 715 (explaining that if the police have time to secure a warrant before the blood draw, "the Fourth Amendment mandates that they do so").

The purported possibility the magistrate might be delayed, Defendant's unconsciousness, or possibility of BAC dissipation does not excuse the trooper's inaction and does not create an exigent circumstance to justify the trooper's failure to seek a warrant or to order or compel a medical professional to act contrary to Defendant's rights. The burden to show probable cause and the reasons for the absence of a warrant rests upon the State, not the Defendant. That burden does not shift. The State's evidence and this finding does not support the trial court's denial of Defendant's motion to suppress. Defendant's arguments have merit.

III. The State's Burden on Remand

The majority's opinion cites *Mitchell*'s purported exception to warrantless exigent circumstances exception by quoting: "We do not rule out the possibility that in an unusual case *a defendant would be able to show* that his blood would not have been drawn if police had not been seeking BAC information, *and* that police could *not have reasonably judged that a warrant application would interfere* with other pressing needs or duties." *Mitchell*, 588 U.S. at __, 204 L. Ed. 2d at 1052 (emphasis supplied). The burden to explain and show the absence of a warrant rests solely upon the State, not the Defendant, and judging the affidavit and application for a warrant and probable cause rests solely with the neutral detached magistrate, not the officer. *Schmerber*, 384 U.S. at 770, 16 L. Ed. 2d at 919 (explaining judgment calls are to be made "by a neutral and detached magistrate," and not "by the officer engaged in the often competitive enterprise of ferreting out crime").

I agree with the Supreme Court of South Carolina's refusal, upon very similar facts, to apply *Mitchell* in a manner to purportedly shift the

burden onto a defendant to show his to be an unusual case to challenge the warrantless extraction of his blood. *State v. Key*, 848 S.E.2d 315, 316 (S.C. 2020) ("We have carefully considered the *Mitchell* holding and conclude we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We hold the burden of establishing the existence of exigent circumstances remains upon the State."). *Accord McDonald v. United States*, 335 U.S. 451, 456, 93 L. Ed. 153, 158 (1948) ("We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."); *United States v. McGee*, 736 F.3d 263, 269 (4th Cir. 2013) ("The government bears the burden of proof in justifying a warrantless search or seizure.").

The State's brief and the trial court's findings concede the trooper had completed his work on the scene and avoided seeking the warrant from the magistrate because he did not want to wait in line or he pre-supposed the magistrate may be busy with other cases, the alcohol evidence may dissipate, and Defendant might die. None of these assertions or findings are exigent to supplant nor excuse the mandate of a warrant "supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

IV. Constitutional Error Standard of Review

"[B]efore a federal constitutional error can be held [to be] harmless, the court must be able to declare a belief [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710-11 (1967). *See also Davis v. Ayala*, 576 U.S. 257, 267, 192 L. Ed. 2d 323, 332-33 (2015); N.C. Gen. Stat. § 15A-1443(b) (2021).

The burden falls "upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b). *See also Brecht v. Abrahamson*, 507 U.S. 619, 630, 123 L. Ed. 2d 353, 368 (1993); *Chapman*, 386 U.S. at 24, 17 L. Ed. 2d at 711; *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012).

The General Assembly adopted the standard in *Chapman* and stated the General Statutes of North Carolina "reflects the standard of prejudice with regard to violation of the defendant's rights under the Constitution of the United States, as is set out in the case of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)." N.C. Gen. Stat. § 15A-1443 cmt. (2021).

"When violations of a defendant's rights under the United States Constitution [sic] are alleged, harmless error review functions the same way in both federal and state courts." *State v. Ortiz-Zape*, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013) (quoting *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331). *See also State v. Autry*, 321 N.C. 392, 399, 364 S.E.2d 341, 346 (1988) ("[Pre]suming *arguendo* that the search violated defendant's constitutional rights and that the evidence therefrom was improperly admitted at trial, we find any such error in its admission harmless beyond a reasonable doubt.").

Our Supreme Court also deemed the assertion an unconscious driver has consented to a blood draw based on this implied consent statute for purposes of an impaired driving prosecution to violate the Fourth Amendment. *See State v. Romano*, 369 N.C. at 691, 800 S.E.2d at 652-53 (stating that N.C. Gen. Stat. § 20-16(b) is not "a *per se* categorical exception to the warrant requirement").

The sole basis upon which the jury was instructed to find Defendant guilty of driving while impaired was his BAC level, the result of which was only obtained because of a warrantless blood sample taken without his knowledge or consent and while he was injured and unconscious.

The jury was not instructed on any other statutory grounds of appreciable impairment. While the State's other evidence of odor and beer cans on the scene may have been sufficient to survive a motion to dismiss, the State failed to establish that the erroneous admission of Defendant's BAC evidence, the only basis submitted to the jury, was harmless beyond a reasonable doubt. Defendant's conviction for driving while impaired is properly reversed.

V. Reckless driving to endanger

The majority and I agree the trooper's testimony asserting Defendant was the driver was inadmissible. Lay witness testimony is generally confined to a witness' personal observations. N.C. Gen. Stat. § 8C-1, Rule 701 (2021); *State v. Lindley*, 286 N.C. 255, 257, 210 S.E.2d 207, 209 (1974) (stating that "[o]pinion evidence is generally inadmissible 'whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts[ ]' " (citations omitted)). "[O]pinion evidence of a non-expert witness is [generally] inadmissible because it tends to invade the province of the jury." *State v. Malone-Bullock*, 278 N.C. App. 736, 740, 863 S.E.2d 659, 664 (2021) (citation and internal quotation marks omitted).

The majority and I also agree the trial court cured any improper testimony when it gave the jury the following curative instruction:

> The Court is going to sustain the defendant's objection to the extent [the trooper] has referred to the defendant as "the driver." The jury is to disregard any testimony referring to the defendant as "the driver", because that's actually an issue that you will decide as the jury.

Our Supreme Court has held that where a trial court sustains an objection and instructs the jury to disregard improper testimony, any prejudice is normally cured. *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991) ("The defendant objected[,] and his objection was sustained. The trial court then instructed the jury to disregard the statement. When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." (citation omitted)).

Defendant's charges of reckless driving to endanger does not *ipso facto* arise solely from Defendant's purported driving while impaired. Reckless driving to endanger is not a lesser-included offense of DWI. N.C. Gen. Stat. § 20-141.6(d) (2021) ("The offense of reckless driving under G.S. 20-140 is a lesser-included offense of the offense set forth in this section."). Some additional evidence, such as excessive speed or a passenger endangered by being located in the vehicle, is required. N.C. Gen. Stat. § 20-140(b) (2021) (providing that "[a]ny person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."); *see State v. Dupree*, 264 N.C. 463, 466, 142 S.E.2d 5, 7 (1965) ("The mere fact that defendant's automobile was on the left of the center line in the direction it was traveling when the collision occurred, without any evidence that it was being operated at a dangerous speed or in a perilous manner, except being on the wrong side of the road some 40 feet before the collision, does not show on defendant's part an intentional or wilful [sic] violation of G.S. [§] 20-140(b)[.]"). Without lawful evidence of Defendant's BAC, nor additional evidence of Defendant's "reckless driving to endanger," both of Defendant's convictions are properly vacated.

The failure to suppress the BAC, derived solely from extracted blood from a warrantless search, was erroneous and was not harmless beyond a reasonable doubt. On remand, the BAC evidence from the warrantless search should be suppressed and excluded from the jury. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
EDWARD JORGE GARDNER

No. COA22-781

Filed 5 July 2023

1. Homicide—second-degree murder—jury instruction—lesser included offense—voluntary manslaughter—heat of passion

The trial court in a second-degree murder prosecution did not err in declining to instruct the jury on the lesser included offense of voluntary manslaughter, where the evidence did not show that defendant acted "in the heat of passion" when he killed another man who had contacted him about meeting to have unprotected sexual intercourse. Although the victim was HIV-positive, nothing in the record indicated that defendant was made aware of this fact or that he and the victim even had sex at all; thus, the evidence did not support an inference that defendant engaged in unprotected intercourse with the victim and, upon discovering that the victim was HIV-positive, was provoked to kill the victim out of sudden distress over being exposed to HIV.

2. Homicide—second-degree murder—malice—jury instruction—lesser included offense—voluntary manslaughter—insufficiency of evidence

The trial court in a second-degree murder prosecution did not err in declining to instruct the jury on the lesser included offense of voluntary manslaughter, where the evidence was positive as to each element of the charged offense, including malice. Specifically, malice could be inferred from the nature of the crime and the circumstances of the victim's death where: the victim's car (with its license plate removed) was taken far off the road and set on fire with the victim locked inside the trunk, his body burning down to its skeletal remains; the victim's blood was found in a residence where defendant would stay; inside the residence, a large section of carpet had been removed and replaced with new carpeting, which had traces of bleach and blood stains around it; and a carpet cleaning machine inside the residence contained the victim's DNA. Further, regardless of whether it was improper for the court to opine that a voluntary manslaughter charge required stacking too many inferences upon each other, the court properly declined to instruct the jury on voluntary manslaughter where there was no evidence supporting such an instruction.

Appeal by Defendant from judgments entered 13 September 2021 and 13 October 2021 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State-Appellee.

Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.

COLLINS, Judge.

Edward Jorge Gardner ("Defendant") appeals from judgments entered upon jury verdicts of guilty of second-degree murder and burning personal property and Defendant's guilty pleas to attaining habitual felon status and possession of a telephone by an inmate. Defendant argues that the trial court erred by refusing his request for a jury instruction on the lesser-included offense of voluntary manslaughter. Defendant also includes two "non-meritorious arguments." We find no error.

I. Background

The evidence at trial tended to show the following: Ralph Dunbar was a 53 year-old gay man who was HIV-positive and used dating sites to meet men. On 9 June 2017, Dunbar told a co-worker, Eric Chavis, that he had met a man via Craigslist, was meeting him in person after work, and was nervous about the meeting. Dunbar then met up with and spoke with that man, William Alexander. After having a drink together, Alexander explained that he was not physically attracted to Dunbar and "not interested in doing anything with him," and the two men did not engage in any sexual activities. Dunbar asked Alexander whether he knew anyone who would be interested in having anal sex, and Alexander named Defendant.

Alexander explained that he met Defendant through an ad for a sexual encounter posted on Craigslist and knew Defendant by the name of "Jay." Over the course of two to three months, Alexander and Defendant had met approximately three times for sex. During one of these meetings, Defendant wanted to have anal sex but Alexander did not. Alexander helped Defendant post a social media ad for sex. After Dunbar expressed excitement about meeting up with Defendant, Alexander texted Defendant to see if he was interested; Defendant responded that he was. Dunbar and Defendant exchanged numbers and started a text conversation.

Dunbar and Defendant's text conversation lasted from 5:19 p.m. until 7:19 p.m. and contained the following messages:

[Defendant]: Hey . . . Jay here

[Dunbar]: How ya doin

[Defendant]: Good . . . just woke up from a nap

[Dunbar]: Want company?

[Defendant]: Yes

[Dunbar]: When?

[Defendant]: Well I need to get up and shower first

[Dunbar]: and I need to

[Defendant]: He will let u take a shower there wont he?

[Dunbar]: Probably. What time you want me there?

[Defendant]: Is an hour too long?

[Dunbar]: No.

[Defendant]: That's perfect.

[Defendant]: Are u gonna come tho?

[Dunbar]: K. I'll CALL you when I'm OTW

[Dunbar]: He'll yeah, I'm gonna come

[Defendant]: lol . . . ok

[Dunbar]: Nice!!! What's your question?

[Defendant]: Did you [f***] today?

[Dunbar]: No sir . . . .

[Dunbar]: I worked all day. Why?

[Defendant]: Thought yall might have

[Dunbar]: Nope. I was answering your ad. He was gracious and hooked me up

[Defendant]: Oh . . . cool

[Dunbar]: You have lube?

[Defendant]: Yes

[Dunbar]: Cool. Let me get done here. See ya soon.

[Defendant]: Ok . . . is that [pu***] safe?

[Dunbar]: Yessir. You prefer raw?

[Defendant]: Yes

[Dunbar]: Nice!!! Is that monster safe?

[Defendant]: Yes my [c***] is safe and clean

[Dunbar]: Cool. Same here.

[Dunbar]: No $$ exchange, right?

[Dunbar]: No $$ exchange, right?

[Defendant]: No

[Dunbar]: Cool. Call ya soon.

[Defendant]: Ok

[Dunbar]: I'm almost ready to leave. What's your address?

Dunbar and Defendant then had a series of incoming and outgoing telephone calls to each other until 8:20 p.m. Approximately six hours after setting up Dunbar and Defendant, Alexander texted Defendant to ask if he met up with Dunbar. Defendant responded affirmatively, saying that they had met and had a good time.

The following morning at approximately 5:30 a.m., Eric Simmons of the Greensboro Fire Department received a call about a fire off Falcon Ridge Road. Upon arrival, Simmons saw a car on fire, set back about 150 feet off the road, that had been burned down to its metal frame. While putting out the fire, Simmons pried open the locked trunk and discovered "white skeletal remains." Simmons notified police officers on the scene of the skeletal remains and protected the scene for evidence collection. Greensboro Police Detective Mike Matthews arrived on the scene to inspect the burned car and skeletal remains. While conducting his inspection, Matthews noticed that the car did not have a license plate and that there was a fresh cigarette lighter near the car. Matthews later determined that the car was a 2001 Ford Taurus and Dunbar was the owner. Matthews was also able to determine through a search of Dunbar's phone records that Defendant was the last person to call Dunbar. Detective Christa Leonard was called to the scene of the burned car and processed the following evidence: a green-in-color drink bottle; burned fabric; red melted wax; the fresh cigarette lighter first

spotted by Detective Matthews; and aluminum foil. Leonard also found the remnants of a wallet found under the skeletal remains in the trunk. A portion of the wallet appeared to have Dunbar's signature on it.

On 12 June 2017, Associate Chief Medical Examiner Lauren Scott performed an autopsy on the body found in the trunk of the burned Ford Taurus. Scott determined that the body was that of Dunbar and that the cause of death was "homicidal violence of undetermined means," meaning that death was due to homicide but the body was "too disrupted, too fragmented . . . to pinpoint a specific cause of death[.]" Scott explained that Dunbar's body was too badly burned to determine any injuries caused prior to the fire but that, based upon carbon monoxide testing, Dunbar was most likely dead prior to the fire being set. Scott prepared a "blood card" of Dunbar, whereby a sample of Dunbar's blood was placed on an absorbent card for use by a lab for further sampling, and Scott gave it to Detective Leonard.

On 19 June 2017, Leonard assisted with a search of an apartment where Defendant sometimes lived with his girlfriend of 10 years, Ashea Francis. In the apartment, Leonard found Defendant's driver's license and discovered that a four-by-four section of the carpet had been irregularly cut out. Around the cut-out section, there were spots where it looked like bleach had been poured onto the carpet. Under the new pieces of carpet and padding, the concrete floor had "reddish brown stains" on it. Leonard took an evidence swabbing of the reddish brown stains, but there was insufficient DNA on which to conduct an analysis. Leonard then discovered another stain on the linoleum floor at the base of the stairs, which appeared to be a blood stain, and took an evidence swabbing of the stain. The swabbing matched Dunbar's DNA. Leonard found a new roll of carpet in the master bedroom of the apartment and also found a carpet cleaning machine in the closet. Leonard took evidence swabbings from a reddish-brown substance found in the intake nozzle and inside basin of the carpet cleaning machine; both swabbings matched Dunbar's DNA. Later that same day, Sergeant John Ludemann went to another apartment where Defendant was located and executed a search warrant. While executing the warrant, Ludemann placed Defendant into handcuffs and noticed "significant burn marks" on Defendant's left arm and wrist.

Defendant's girlfriend, Francis, testified that Defendant sometimes lived with her and sometimes lived with his mother. Francis was not aware that Defendant engaged in sexual relations with men. Francis was out of town during the dates of 8-10 June 2017, but she testified that Defendant had been in Greensboro and had access to her apartment

during that time. Francis noticed the burns on Defendant's arm and asked Defendant about the burns; he told her that he got them from work. Francis did not cause the burns on Defendant's arm. Francis testified that she did not remove the four-by-four section of carpet in her apartment and did not give Defendant permission to remove the carpet. Francis also explained that she owned the carpet cleaner but had never cleaned up blood with it.

Special Agent Harrison Putnam, with the Federal Bureau of Investigation, was tendered and accepted by the trial court as an expert witness in cell phone site record analysis. Putnam analyzed Dunbar's and Defendant's cell phone records and reported his findings in Exhibit 128. His report indicated that, on the night of 9 June 2017, Defendant's and Dunbar's cell phones connected at least four calls between 7:00 p.m. and 9:00 p.m. Defendant's first call, made at 7:20:42 p.m., was placed to Dunbar's cell phone and connected with a cell site close to the Francis residence. Dunbar's cell phone records indicate a corresponding call with Defendant, connecting at approximately 7:20:44 p.m., and that Dunbar's cell phone connected with a cell site close to Dunbar's residence. Defendant made another call to Dunbar's cell phone at 8:06 p.m., and Defendant's cell phone connected with a cell site close to the Francis residence. Dunbar's cell phone records indicate a corresponding call with Defendant's at 8:06 p.m. and that Dunbar's cell phone connected with a cell site "south-southwest of the [Francis] residence." Dunbar then made two calls to Defendant's cell phone, one at 8:16 p.m. and another at 8:20 p.m., and those calls "used the same cell site" "that is nearest to the [Francis] address." Defendant's cell phone records indicate two corresponding calls with Dunbar at 8:16 p.m. and 8:20 p.m. and that Defendant's cell phone connected with a cell site close to the Francis residence. Putnam explained that the 8:16 p.m. and 8:20 p.m. calls between Dunbar and Defendant "used a cell site that is closer to the vicinity of the [Francis] residence[.]" After the 8:20 p.m. call, Dunbar's cell phone activity ceased. Defendant placed another call at 3:38 a.m., and his cell phone connected with a cell site that was southeast of the Francis residence and located in the general area of where the car fire was located.

Defendant was indicted in July 2017 and April 2020 on the charges of: (1) first-degree murder; (2) burning personal property; (3) having attained habitual felon status; and (4) possession of a telephone by an inmate. The charges of first-degree murder and burning personal property came on for jury trial on 30 August 2021. At the charge conference, the trial court indicated it would charge the jury on first-degree

and second-degree murder. Defendant requested the trial court instruct the jury on voluntary manslaughter; the trial court denied Defendant's request. The trial court noted Defendant's objection to this ruling and stated that it was "preserved for appellate review[.]" Three days later, the jury found Defendant guilty of second-degree murder and of burning personal property. Following the jury's verdict, Defendant pled guilty to attaining habitual felon status and possession of a telephone by an inmate.

Defendant was sentenced as a record level IV offender. The trial court imposed an active sentence of a minimum of 360 months' imprisonment on the second-degree murder conviction and ordered Defendant to pay $4500 in restitution. The trial court consolidated the burning personal property, habitual felon, and possession of a telephone by an inmate convictions, sentencing Defendant to 60-84 months' imprisonment, to begin at the expiration of the second-degree murder sentence. Defendant gave notice of appeal from his second-degree murder and burning personal property convictions.

II. Discussion

A. Jury Instruction

[1] Defendant first argues that the trial court erred by denying his request to charge the jury on voluntary manslaughter.

We review a trial court's decision regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). A trial court must give a requested jury instruction only if it is "correct in itself and supported by [the] evidence." *State v. Locklear*, 363 N.C. 438, 464, 681 S.E.2d 293, 312 (2009) (quotation marks and citation omitted). "A jury must be instructed on a lesser included offense only when evidence has been introduced from which the jury could properly find that the defendant had committed the lesser included offense." *State v. Woodard*, 324 N.C. 227, 232, 376 S.E.2d 753, 756 (1989) (citation omitted). When determining whether the evidence supports a jury instruction on a lesser-included charge, the trial court must consider the evidence in the light most favorable to the defendant. *State v. Clegg*, 142 N.C. App. 35, 46, 542 S.E.2d 269, 277 (2001).

"First-degree murder is the unlawful killing—with malice, premeditation and deliberation—of another human being." *State v. Arrington*, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994) (citations omitted). Second-degree murder is the unlawful killing of another human being with malice but without premeditation and deliberation. *State v. Arrington*, 371 N.C. 518, 523, 819 S.E.2d 329, 332 (2018) (citation omitted). Voluntary manslaughter

is a lesser included offense of first degree and second-degree murder. *See State v. Wrenn*, 279 N.C. 676, 681-82, 185 S.E.2d 129, 132 (1971). "In order to receive an instruction on voluntary manslaughter, there must be evidence tending to show a killing was committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect right of self-defense." *State v. Simonovich*, 202 N.C. App. 49, 53, 688 S.E.2d 67, 71 (2010) (quotation marks, brackets, and citations omitted).

Here, Defendant argues that the evidence tended to show that he acted in the heat of passion but does not assert that the evidence tended to show that he acted in imperfect self-defense.

To receive an instruction based on a theory of heat of passion, there must be evidence that: (1) defendant committed the act "in the heat of passion; (2) defendant's passion was sufficiently provoked; and (3) defendant did not have sufficient time for his passion to cool off." *State v. Bare*, 77 N.C. App. 516, 522-23, 335 S.E.2d 748, 752 (1985) (citation omitted). These elements may be shown by the State's evidence or by the defendant's evidence. *Id.* Mere speculation as to the elements is not sufficient. *State v. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 67 (1998).

Here, no evidence in the record supports a finding that Defendant acted "in the heat of passion." The evidence presented tended to show that Dunbar and Defendant texted about meeting to potentially have sex, but no evidence tended to show the two actually had sex. The evidence further showed that Dunbar did not disclose his HIV-status to Defendant via text, and instead responded yes when asked if he was "safe." While the record shows that Dunbar was HIV-positive, no evidence tended to show that Dunbar told Defendant he was HIV-positive, or that Defendant learned of this HIV-status and became angry.

Defendant theorizes that a juror "could've concluded that [Defendant] had penetrative anal sex with Dunbar" and "could've reasonably concluded [Defendant] was significantly concerned about having unprotected sex with another man who had an STD or HIV," and that this could have caused Defendant's "actions to spawn suddenly and passionately." These claims are pure speculation and are not sufficient. *See id.* Further, the record is devoid of evidence that Defendant's passion was sufficiently provoked. Additionally, Defendant does not address in his brief whether evidence tended to show sufficient time for his passions to cool.

As there was no "evidence tending to show a killing was committed in the heat of passion suddenly aroused by adequate provocation," the trial court did not err by refusing to give the instruction on the

lesser-included offense of voluntary manslaughter. *Simonovich*, 202 N.C. App. at 53, 688 S.E.2d at 71 (quotation marks, brackets, and citation omitted).

B. Non-meritorious arguments

[2] Defendant makes two other "non-meritorious arguments" on appeal, asserting that (1) the record evidence was not "clear and positive regarding second-degree murder" and (2) the trial court's "inference stacking holding is wrong."

1. Second-Degree Murder

Defendant argues that the State's evidence was not clear and positive as to the element of malice.

"Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on the lesser included offense is required." *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (citation omitted). "Second-degree murder is the unlawful killing of another person with malice, but without premeditation and deliberation." *State v. Cozart*, 131 N.C. App. 199, 203, 505 S.E.2d 906, 909 (1998) (citations omitted). Our Courts recognize three theories of proof of malice: (1) "express hatred, ill-will, or spite"; (2) an act inherently dangerous to human life that is done "in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) "a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Coble*, 351 N.C. 448, 450-51, 527 S.E.2d 45, 47 (2000) (quotation marks and citation omitted). Malice is a state of mind and thus rarely proven with direct evidence; it is ordinarily proven by circumstantial evidence from which malice may be inferred. *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 58 (2003). Malice may be inferred by the nature of the crime and the circumstances of the victim's death. *See State v. Rick*, 126 N.C. App. 612, 618, 486 S.E.2d 449, 452 (1997) (inferring implicit malice from the nature of the crime where the defendant was seen driving alone in the victim's car; the victim's house was in disarray; marks on the ground in the victim's backyard matched the same dimensions as the cement block that was used to weigh down the victim's body in water; and defendant left a note for a friend saying that he intended to kill himself because he had done something bad).

Here, as in *Rick*, implicit malice can be inferred by the nature of the crime and the circumstances of Dunbar's death: Dunbar's car was

taken about 150 feet off of the road and set on fire; Dunbar's body was locked in the trunk of the car and burned down to its skeletal remains; the license plate was removed from the car; Dunbar's blood was found in Francis' residence where Defendant would stay and where his driver's license was found; a four-by-four section of the carpet had been removed and replaced with new carpet and padding; there were bleach and blood stains found under and around the replaced carpet; and a carpet cleaning machine, located in Francis' residence, contained Dunbar's DNA in the intake nozzle and inside basin. This evidence supports the element of malice.

2. Inference Stacking

Defendant asserts that the trial court erred in refusing to charge voluntary manslaughter "because – from its perspective – it required too many inferences." While it is true that the trial court stated, "I stand by my legal reasoning that I may not base – a charge may not be based upon one inference layer[ed] upon another[,]" the trial court did not base its refusal to give a voluntary manslaughter instruction solely on inference stacking. The trial court explained that there was not "a scintilla of any such" evidence to support such an instruction and that any offense other than first-degree and second-degree murder would be "built upon the absence of evidence[.]" We agree that no evidence presented at trial tended to show and support an instruction on voluntary manslaughter, as there was no evidence presented of the element of heat of passion, and thus the trial court did not err by refusing to charge the jury on the lesser-included offense of voluntary manslaughter.

III. Conclusion

As no evidence tended to show that "a killing was committed in the heat of passion suddenly aroused by adequate provocation," the trial court did not err by refusing to instruct the jury on the lesser-included offense of voluntary manslaughter. *Simonovich*, 202 N.C. App. at 53, 688 S.E.2d at 71 (quotation marks, brackets, and citations omitted).

NO ERROR.

Judges TYSON and RIGGS concur.

STATE OF NORTH CAROLINA
v.
CALVIN RAY HOCUTT, DEFENDANT

No. COA22-851

Filed 5 July 2023

Evidence—hearsay—recorded recollection—foundation—examined and adopted—eyewitness drunk, legally blind, and suffering from short-term memory issues

In a prosecution for felony cruelty to an animal arising from the fatal shooting of a dog, the trial court committed plain error by admitting written hearsay as substantive evidence where the eyewitness who gave the statement (dictated to his son because the eyewitness could not read or write) was drunk (at the time of the shooting and at the time he made the statement), legally blind, and suffered from short-term memory issues. The eyewitness's signature on the statement was insufficient to establish the necessary foundation to admit the hearsay statement under Evidence Rule 803(5) because the statement was not read back to the eyewitness at the time it was transcribed so that he could adopt it when the matter was fresh in his memory, the eyewitness's in-court testimony contradicted his written statement, and the eyewitness could recall the events described in the written statement. Because the improperly admitted hearsay statement was the only evidence definitively identifying defendant as the person who shot the dog, the error had a probable impact on the jury's verdict and therefore required a new trial.

Appeal by Defendant from judgment entered 17 February 2022 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant-Appellant.

RIGGS, Judge.

Defendant Calvin Ray Hocutt appeals from a judgment entered after a jury found him guilty of felony cruelty to an animal. Mr. Hocutt contends, among other arguments, that the trial court committed plain error in admitting written hearsay as substantive evidence when: (1) the eyewitness who gave the written statement testified at trial that he was unable to remember the most incriminating portions of that statement; (2) that same witness testified he was drunk, legally blind, and suffered from short-term memory issues at the time the statement was made; and (3) the admission of the statement as substantive evidence and subsequent publication to the jury was contrary to the North Carolina Rules of Evidence and so prejudicial as to warrant a new trial. The State disagrees, countering that the written statement was admissible under the hearsay exception found in Rule 803(5), which allows for the admission of recorded hearsay "concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately . . . ." N.C. R. Evid. 803(5) (2021). Because we hold that the State failed to establish the necessary foundation to admit the disputed hearsay evidence under Rule 803(5), and because said hearsay was the only evidence introduced tending to show Mr. Hocutt as the perpetrator of the crime, we agree with Defendant that the trial court plainly erred and order a new trial.

I. FACTUAL AND PROCEDURAL HISTORY

On 21 March 2022, Michael Lozier and his father, Thomas "Tommy" Lozier, each lived in adjacent single-wide motorhomes that they rented from their neighbor, Jean "Rambo" Gelin, in Dudley, North Carolina. Michael was in his room that afternoon when he received a phone call from his stepmother asking him to come outside because she had heard a gunshot in the neighborhood. He met his father, who was drunk, in their shared driveway; the two did not think much of the event, as gunshots were common in the neighborhood.

Rambo returned home that evening after dark. One of his dogs, Campbell, was not in his usual place by Rambo's backdoor and, on the following morning, Rambo received a text message from Tommy's wife that Campbell had been shot the day before. Rambo met with Tommy and Michael in Rambo's front yard, and Tommy told Rambo that Mr. Hocutt had shot Campbell. Rambo called the Wayne County Sheriff's Department at Tommy's urging, and Deputy Brandon Elrod responded to the shooting.

When Deputy Elrod arrived, he met Michael, Tommy, and Rambo inside Rambo's fenced front yard. Campbell's body was also in the front

yard, and Deputy Elrod observed a small entry wound in the dog's chest. A search of the area for other evidence, such as shell casings, proved unsuccessful. Tommy did offer to give a statement; however, that statement was dictated to his son because Tommy could not read or write. Michael transcribed the following statement, as signed by Tommy:

> Yesterday about 5:00 pm I was in the nabors [sic] yard an [sic] I herd [sic] a gun shot at Rambo's house (121/ Brookterrace) an [sic] seen [Mr. Hocutt] runing [sic] away from Rambo's front gate with a rifle (22) back to his house[.] [Mr. Hocutt] then told me he shot the dog in the chest an [sic] killed him[.] I herd [sic] a real loud wine [sic] an [sic] then it stoped [sic] all together [sic].

At the time Tommy signed the document, no one read it back to him to confirm its accuracy. The document also did not disclose that Tommy was both legally blind and drunk at the time he saw Mr. Hocutt running from Rambo's house.

Detective Milburn Powers interviewed Rambo, Tommy, and Michael later that week. Detective Powers also obtained and executed a search warrant for Mr. Hocutt's home in an attempt to locate a small-caliber rifle, but no evidence was obtained as a result. Detective Powers subsequently learned that Mr. Hocutt did own such a rifle, but that it had been reported stolen on 4 April 2020.

Mr. Hocutt was indicted for felony cruelty to animals on 1 March 2021. Trial began on 15 February 2022 and, after jury selection, the trial court held a *voir dire* hearing regarding Tommy's recorded out-of-court statement. Michael testified first, telling the trial court that he transcribed his father's statement because his father could not read or write. He further testified that, while the trial court was on break after jury selection, he had spoken with Tommy, Mr. Hocutt, and Mr. Hocutt's father, Joshua Smith,[1] about Tommy's anticipated testimony. In that conversation:

> [Tommy] was saying to [Mr. Smith], . . . it weren't fair, you know . . . .
>
> . . . .
>
> [T]hat Rambo was kind of like, ah—you know, pushing him towards, you know . . . making it that, you know, the event . . . , whatever, you know, the statement that he

1. Mr. Smith was also Tommy's co-worker.

> wrote right there, he said he felt that he, you know, he was kind of pushed into making that statement by the deputy and Rambo and whoever, you know[.]

Michael then confirmed for the trial court that he was going to testify truthfully and without pressure from anyone else.

Tommy's *voir dire* testimony followed, during which he stated that his written statement was "pretty much [accurate] or close to it." He acknowledged that he signed it; when asked if his son wrote down what he had said, Tommy testified "I guess. I guess he did because he's sitting in the front seat and I'm in the back seat." He also testified that he was drunk when he saw Mr. Hocutt the day before, drunk at the time he gave the statement, and that he and Mr. Smith wanted to bring that to the prosecutor's attention. On cross-examination, Tommy testified that the written statement was never read back to him because "I had trust in my son that he was . . . filling it out as he was listening to it, I guess." Like Michael, he assured the trial court that he would testify truthfully, to the best of his recollection, and without influence.

Once the jury returned to the courtroom, the State called Michael as its first witness. Michael testified consistent with the above recitation of the facts, and Tommy's written statement was admitted into evidence without objection during this testimony. He further testified that Tommy was drunk on a daily basis, including on the dates in question, due to several tragic deaths in the family.

Tommy testified next. When asked if he saw Mr. Hocutt carrying anything on the day of the shooting, Tommy testified:

> And I'm, I'm not really sure that I remember, because I were drinking that day, I was drinking that day, but I, I was saying that—and I have short-term memory, and it's hard for me to remember my, my own birthday, and, um . . . as long as it's been since this happened . . . .

On follow-up questioning, he further testified:

> I heard a gunshot and I'd seen Calvin coming back from where his dog . . . [,] [m]e and [Mr. Smith[2]] was out there talking and when [Mr. Hocutt] come back, I mean . . . I can't—it's hard for me to remember, I know, I know he come across, back across the road, he told [Mr. Smith] too

2. Tommy would later contradict this detail, stating he was by himself in his yard when he heard the gunshot.

> the dog was dead or something, I don't know, I, I heard a gunshot, the dog is dead, and so I put two and two together.
>
> [THE STATE]: Did you see [Mr. Hocutt] with a gun?
>
> [TOMMY]: I seen him with something in his hand, I'm not going to say it was a gun, because I was impaired and, and, and—I still can't remember.

When presented with his written statement by the State, Tommy testified that he could not read or write and was legally blind, though he did confirm that he and his son had signed the statement. The prosecutor read the statement aloud for the jury and asked if that was "the statement as you recall on March 22?" Tommy replied as follows:

> I'm, I'm—I may have, yeah, I may have.
>
> . . . .
>
> I may have, I, I ain't going to be as for sure about it because I'm not going to jeopardize myself when I can't remember, you know, I don't know.
>
> [THE STATE]: Today you do not remember what you saw on March 22.
>
> [TOMMY]: Like I said, I seen him coming back, I don't—I couldn't have told you if it could have been a stick or it could have been a—now I couldn't tell you, but then that's what it looked like.
>
> [THE STATE]: And that's the statement [Mr. Hocutt] made to you then?
>
> . . . .
>
> [TOMMY]: I can't say about that now; I can't remember that.

The State then published the written statement to the jury without objection.

On cross-examination, Tommy confirmed to the jury that he was unable to read the statement and that he did not remember whether it had ever been read back to him. He also testified that he had memory issues, was legally blind, and was drunk at the time of the shooting. As for whether Mr. Hocutt had fired weapons in the neighborhood in the past, Tommy testified on redirect that law enforcement "had been over there two or three times about them—they practice—target practice

behind the house." Finally, on re-cross, Tommy gave the following testimony concerning what he witnessed Mr. Hocutt carrying:

> I didn't know what it was, I know—I know that they run the dog away from there, they run the dog away and the dog come back, this is what—that I saw, and then he kept over there and [Mr. Hocutt] went running and I don't know, I'm not going to say if he had a gun, if he had a stick, because [Mr. Smith] was the one that had a stick, he went over there and killed—killed his dog—because then I'd be mad too, and I don't, I don't . . . I don't know what to say.
>
> . . . .
>
> I can't say it weren't a gun, I can't—I don't know what it was. I don't want to say that it was a stick and it was a gun or if it was a gun it was a stick. Do you understand?

After the Loziers testified, Deputy Elrod, Detective Powers, and Rambo all took the stand. Deputy Elrod detailed his receipt of Tommy's statement and immediate search of Rambo's yard; Detective Powers recounted his interview with Tommy and search of Mr. Hocutt's home; and Rambo testified to his lack of prior interactions with Mr. Hocutt, his discovery of Campbell's body, and Tommy's statements to him that Mr. Hocutt killed Campbell.

Mr. Hocutt's counsel moved to dismiss the charge against him at the close of the State's evidence and renewed that motion at the close of all evidence. The trial court denied both motions and proceeded to the charge conference. During the conference, Mr. Hocutt's counsel offered no changes to the pattern jury instructions proposed by the trial court. At the conclusion of the charge conference, the trial court stated, without objection, that "I don't think there's any instruction that would relate to [Tommy's written statement], that statement. There's not an admission or a confession, just a statement by a witness. And we talked about witnesses already."

Following instruction and deliberation, the jury returned a guilty verdict. Mr. Hocutt was sentenced to six to 17 months' imprisonment, which was suspended for 18 months' special probation, including a four-month active term. Mr. Hocutt gave oral notice of appeal in open court.

II. ANALYSIS

Mr. Hocutt first argues that the admission of Tommy's written statement—and the repetition of that hearsay in testimony from Detective

Powers and Rambo—as substantive evidence without a limiting instruction amounted to plain error, asserting the statements do not fall within any applicable hearsay exception in the North Carolina Rules of Evidence. The State presents the counterargument that Rule 803(5) supplies just such an exception, at least as far as the written hearsay statement is concerned. After consideration of the Rule, our precedents, and the record in this case, we ultimately agree with Mr. Hocutt: Tommy's written statement was never "shown to have been made *or adopted by the witness when the matter was fresh in his memory*" as required by the Rule's plain language, N.C. R. Evid. 803(5) (emphasis added), and that statement—as well as the testimony from Detective Powers and Rambo repeating that hearsay—should not have been admitted as substantive evidence and without a limiting instruction. And, because Tommy's hearsay statements were the only evidence definitively identifying Mr. Hocutt as the person who shot Campbell, the trial court's error had a probable impact on the jury's guilty verdict. Finally, as our resolution of this issue requires a new trial, we decline to address the remaining arguments presented in Mr. Hocutt's brief.

A. Standard of Review

When evidence is admitted without objection, plain error review of that evidence's admissibility applies on appeal when expressly argued in the defendant's brief. N.C. R. App. P. 10(a)(4) (2022); *State v. Betts*, 377 N.C. 519, 523, 858 S.E.2d 601, 604 (2021). Under that standard:

> [A] defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326 (2012) (citations and quotation marks omitted).

B. Rule 803(5) and Tommy's Statement

As discussed above, Rule 803(5) allows as substantive evidence:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and

> accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

N.C. R. Evid. 803(5). Our Court has summarized this Rule as consisting of three necessary parts:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, *if made by one other than the declarant, to have been examined and adopted when the matters were fresh in her memory*.

State v. Love, 156 N.C. App. 309, 314, 576 S.E.2d 709, 712 (2003) (cleaned up) (citation omitted) (emphasis added). Under the third prong, "the record need not have been made by the witness herself; it is enough that she able to testify that (1) *she saw it at a time when the facts were fresh in her memory*, and that (2) it actually represented her recollection at the time." *State v. Spinks*, 136 N.C. App. 153, 159, 523 S.E.2d 129, 133 (1999) (cleaned up) (citation and quotation marks omitted) (emphasis added).

In *Spinks*, this Court examined a written out-of-court statement and held that it was inadmissible because it was not adopted by the declarant consistent with the Rule. There, the State's witness could not recall the events at issue and was presented with "a summary of [her] oral statement, as written by a police investigator in the course of his investigation of this case." *Id.* at 158, 523 S.E.2d at 133. However, "[w]hen asked whether she had read the document prior to signing it, [the witness] stated, 'I didn't even read it. I just signed this piece of paper.' " *Id.* She further testified that she could not remember some parts of the statement, leading the State to offer—and the trial court to accept—the written statement as substantive evidence under Rule 803(5) and over the defendant's objection. We ultimately held that this ruling was in error for failure to satisfy the Rule's third requirement:

> Here, the trial court erred in allowing the statement to be read into evidence without a showing that the statement 'was made or adopted by [the witness] when the matter was fresh in [her] memory and to reflect that knowledge correctly." Subsequent to the admission of the statement, [the witness's] testimony makes it clear that not only does she not recall the matters in the statement, she disagrees with some of the statements found therein. It appears

> from [the witness's] testimony that she did not write the statement herself, and that she did not read it before signing it. . . . Further, by the plain language of Rule 803(5), it was error to admit the written statement as an exhibit.

Id. (citation omitted).

The Rule's third prong is likewise unsatisfied here. It is undisputed Tommy did not write the statement attributed to him, as he is illiterate, legally blind, and was drunk on the day it was transcribed. There is likewise no dispute that he did not read the statement before signing it for the same obvious reasons. Finally, there was no testimony that anyone ever read the statement back to him at the time it was transcribed; to the contrary, he alternatingly testified that no one read it back to him or that he could not remember whether anyone did so. And while he did testify at trial that the statement appeared to be accurate, it cannot be said that he was adopting it "when the matter was fresh in his memory," N.C. R. Evid. 803(5), as he repeatedly testified that he could not recall key facts recounted in the written statement and, on one occasion, contradicted them.

Though the State argues that the statement was adequately adopted because Tommy signed the statement, *Spinks* makes clear that his signature on the statement is inadequate to satisfy the third prong of Rule 803(5) when: (1) it was never read back to him for adoption; (2) his in-court testimony contradicted the statements contained therein; and (3) he could not recall the events described. *Spinks*, 136 N.C. App. at 159, 523 S.E.2d at 133. Finally, the trial court likewise erred in admitting the statement as an exhibit, in contravention of the express provisions of the Rule. *Id.*

Though we hold that Tommy's statement was admitted without adequate foundation under Rule 803(5), nothing herein should be construed to hold that an illiterate witness's recorded recollection may never be admissible. An audio recording of a witness's statement presents a distinctly different set of circumstances than those found here. Alternatively, had the trial court heard testimony that the statement was read aloud to Tommy at the time it was recorded, and had Tommy testified that the statement read to him during *voir dire* matched his recollection of the statement as previously read to him, the trial court could have admitted the statement as substantive evidence under the Rule. And the residual hearsay exception allows the trial court to admit, in its discretion, a hearsay statement "not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of

trustworthiness[.]" N.C. R. Evid. 803(24) (2021). *See also State v. Reid*, 380 N.C. 646, 662, 869 S.E.2d 274, 287 (2022) (noting that admission of hearsay under the residual exception is in the trial court's discretion upon consideration of several trustworthiness factors). Finally, hearsay may sometimes be admissible as non-substantive evidence with an appropriate limiting instruction. N.C. R. Evid. 105 (2021). None of the above alternatives appears in this record, however, and we hold the trial court erred by admitting Tommy's hearsay statement as substantive evidence and without providing a limiting instruction.

C. Prejudice

Having shown error in the statement's admission as substantive evidence and without a limiting instruction, Mr. Hocutt argues that the mistake was so prejudicial as to amount to plain error because: (1) all the other evidence concerning the shooting was circumstantial; and (2) Tommy's remaining testimony was "only . . . that he could not remember if [Mr. Hocutt] had a gun and that [Mr. Hocutt] said the dog was dead." The State does not argue lack of prejudice, and instead rests on its predicate—and now rejected—argument that any admission of the statement was proper under Rule 803(5). We agree with Mr. Hocutt that the trial court's error was so prejudicial as to amount to plain error necessitating a new trial.

When Tommy's hearsay statements are excised from consideration, we can identify no remaining direct evidence that tends to show or identifies Mr. Hocutt as Campbell's killer. This case is thus distinct from cases in which the admission of hearsay, while erroneous, did not amount to plain error. *Cf. State v. Waddell*, 351 N.C. 413, 423, 527 S.E.2d 644, 651 (2000) (holding error in admitting hearsay testimony was inadequately prejudicial on plain error review of first-degree sex offense conviction because "there was abundant evidence of fellatio through defendant's own admissions to support his conviction").

Absent the admission of Tommy's hearsay statements as substantive evidence and without a limiting instruction,[3] the jury would be left only with Tommy's circumstantial testimony that Mr. Hocutt: (1) was

3. As noted above, Tommy's written hearsay statement that Mr. Hocutt killed Campbell was repeated in later testimony by Detective Powers and Rambo. Unlike Mr. Hocutt, the State makes no argument addressing the impact of this testimony on the prejudicial effect of the erroneous admission and publication of Tommy's hearsay statement. Given that this testimony should have been subject to the same limiting instruction and was given *after* the erroneous admission and publication of Tommy's written statement, said testimony increased the probative value of that inadmissible hearsay and appears to reinforce—rather than undercut—the prejudicial nature of the error committed below.

seen near Rambo's property carrying something; and (2) told Tommy and Mr. Smith that Campbell was dead. No other evidence placed Mr. Hocutt at the scene, and no other evidence suggested he was armed or shot Campbell. And Tommy's in-court testimony was itself of questionable veracity, given his other testimony that he was blind, drunk, and suffered from short-term memory loss at the time of the shooting. In light of this thin evidence and the lack of any contrary argument from the State, the admission of Tommy's out-of-court statement had a probable impact on the jury's verdict that Mr. Hocutt shot and killed Campbell intentionally and with malice.

III. CONCLUSION

For the foregoing reasons, we hold that the trial court plainly erred in admitting Tommy's hearsay statement as substantive evidence without adequate foundation, and Mr. Hocutt is entitled to a new trial.

NEW TRIAL.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
WILLIE LEGRAND, JR. A/K/A WILLIE LEGRANDE, DEFENDANT

No. COA22-586

Filed 5 July 2023

1. Robbery—attempted armed robbery—intent—implied demand—sufficiency of evidence

In a prosecution for attempted armed robbery and attempted first-degree murder, the State presented substantial evidence from which a jury could reasonably infer that defendant intended to rob the victim at gunpoint where defendant's actions in tapping his revolver against the car window and demanding that the victim open his door constituted an implied demand coupled with the threatened use of a gun.

2. Homicide—attempted first-degree murder—intent—multiple gunshots fired at victim—sufficiency of evidence

In a prosecution for attempted first-degree murder and attempted armed robbery, the State presented substantial evidence from

which a jury could infer that defendant intended to kill the victim, including that defendant fired multiple gunshots toward the victim as the victim ran away. Even though defendant argued that the first gunshot resulted from an accidental discharge during a struggle over the gun and that the other two shots did not come close to hitting the victim and were only meant to scare or warn the victim, the evidence was sufficient to survive defendant's motion to dismiss.

3. Sentencing—prior record level—out-of-state convictions—classification—substantial similarity

The trial court did not err when sentencing defendant (for possession of a firearm by a felon) as a prior record level V after the court made a finding that defendant's out-of-state felony convictions were substantially similar to North Carolina offenses and could be classified accordingly. The trial court reviewed the prior convictions in open court and fully executed the sentencing worksheet with its finding of substantial similarity, and defendant presented no evidence to overcome the presumption of regularity.

Appeal by Defendant from Judgment entered 02 September 2021 by Judge James P. Hill, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 21 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General John H. Schaeffer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant-Appellant (allowed as substitute counsel by order filed 20 December 2022 and filed Defendant-Appellant's Reply Brief on 7 February 2023; Record on Appeal and Defendant Brief filed by Paul F. Herzog, allowed to withdraw as attorney of record by order filed 21 December 2022).

RIGGS, Judge.

Defendant Willie Legrand, Jr., appeals from judgment following a jury verdict convicting him of possession of firearm by a felon, attempted robbery with a dangerous weapon, and attempted first-degree murder. Mr. Legrand raises three issues on appeal. In his first two issues, Mr. Legrand argues the trial court erred in denying his motion to dismiss the attempted armed robbery and attempted murder charges. Additionally,

he argues the trial court erred in calculating his prior record level. After careful review, we hold the trial court did not err.

I. FACTUAL AND PROCEDURAL HISTORY

On 19 October 2018, Defendant Willie Legrand, Jr. approached Richard Jurgensen, who was leaving a convenience store and returning to his parked car in Asheboro, North Carolina. After Mr. Jurgensen got into his car, Mr. Legrand yanked on Mr. Jurgensen's locked driver's side door handle. When the door did not open, Mr. Legrand told Mr. Jurgensen to, "Open the door, open the door," and he tapped on Mr. Jurgensen's window with a revolver while motioning for Mr. Jurgensen to exit. Mr. Jurgensen believed his only option was to open the door when Mr. Legrand stated, "What's the matter with you? Do you want to get shot. [sic]."

Upon exiting the car, Mr. Jurgensen tried to grab the gun from Mr. Legrand because he noticed the revolver was not cocked, and they began to struggle over the revolver. Mr. Jurgenson shoved Mr. Legrand, causing him to fall to the ground. When Mr. Legrand fell, his right arm hit the ground and the gun fired. Mr. Jurgensen ran for the store while shouting, "Help, robbery, call 911." Mr. Legrand got back on his feet and raised the gun in Mr. Jurgensen's direction. He fired a second gunshot that struck the wall of the convenience store approximately six feet away from Mr. Jurgensen. Mr. Legrand then fired a third shot which Mr. Jurgensen said was aimed above his head. Police arrived at the store to investigate, but Mr. Legrand left the site before the police arrived.

The State issued two sets of indictments. On 5 November 2018, the State charged Mr. Legrand with possession of firearm by a felon, attempted robbery with a dangerous weapon, second-degree kidnapping, and attempted first-degree murder. On 3 June 2019, the State alleged in its second set of indictments that Mr. Legrand was a habitual felon and violent habitual felon.

A jury trial began 30 August 2021 in the Randolph County Superior Court. The court denied Mr. Legrand's motion to dismiss all charges but later granted his renewed motion to dismiss the second-degree kidnapping charge. On 2 September 2021, the jury returned a guilty verdict on the remaining charges. Mr. Legrand pleaded guilty to the habitual felon and violent habitual felon charges.

The court proceeded with Mr. Legrand's sentencing on 2 September 2021. The State introduced Mr. Legrand's "criminal history record" in Exhibits 20 through 24. Mr. Legrand's criminal history included several

federal felony convictions. After reviewing the exhibits, the trial court found Mr. Legrand's out-of-state convictions were substantially similar to state offenses, noting:

> THE COURT: The [c]ourt, based upon the information presented, finds by preponderance of the evidence that any non-North Carolina offenses included in the stipulation as to prior conviction is substantially similar to North Carolina offenses, and North Carolina classification assigned to said respective offenses is accurate. [The c]ourt, therefore, concludes that defendant would be prior record level V for purposes of felony sentencing.

The trial court checked a box on Mr. Legrand's prior record level worksheet stating similar language:

> For each out-of-state conviction listed in Section V on the reverse, the [c]ourt finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section V is correct.

At the conclusion of the sentencing portion of the trial, the court imposed two sentences of life without the possibility of parole for the convictions of attempted murder and attempted armed robbery. Additionally, the court sentenced Mr. Legrand to 127 to 165 months imprisonment for the conviction of possession of firearm by a felon. The court entered a written judgment consistent with the sentence delivered from the bench at the conclusion of the trial. Mr. Legrand gave an oral notice of appeal on the record.

II. ANALYSIS

On appeal, Mr. Legrand argues the trial court improperly denied his motion to dismiss the attempted armed robbery and attempted murder charges for insufficient evidence. Additionally, Mr. Legrand argues the court improperly calculated his prior record level. After careful review, we hold the trial court did not err.

A. Motion to Dismiss the Attempted Armed Robbery

[1] Mr. Legrand argues the State's evidence did not support the intent element of attempted armed robbery. He reasons the State's evidence did not show he made an express demand for money or property; therefore, evidence of intent was insufficient. We disagree.

1. Standard of Review

This Court reviews *de novo* whether a trial court erred in denying a motion to dismiss for insufficient evidence on each element of a criminal offense. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). "In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence." *State v. Poole*, 154 N.C. App. 419, 424, 572 S.E.2d 433, 437 (2002) (quoting *State v. Hairston*, 137 N.C. App. 352, 354, 528 S.E.2d 29, 30 (2000)).

2. Denial of motion to dismiss attempted armed robbery was proper

Attempted robbery with a dangerous weapon requires "(1) the unlawful attempted taking of personal property from another, (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means,' and (3) danger or threat to the life of the victim." *State v. Wilson*, 203 N.C. App. 110, 114, 689 S.E.2d 917, 921 (2010) (quoting *State v. Torbit*, 77 N.C. App. 816, 817, 336 S.E.2d 122, 123 (1985)) (citation omitted). "The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery." *State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972). When reviewing a trial court's denial of a motion to dismiss for insufficient evidence, this Court considers "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. Lee*, 218 N.C. App. 42, 56, 720 S.E.2d 884, 894 (2012).

Mr. Legrand argues that because there was no spoken demand for money or property, the evidence was insufficient to support a charge of attempted robbery. However, Mr. Legrand's conduct along with Mr. Jurgensen's testimony supports a reasonable inference of attempted armed robbery. In *State v. Poole*, this Court affirmed the lower court's denial of a motion to dismiss when the State presented evidence showing the defendant pointed a gun at the victim and said "give it up" when the two were in a parking lot. 154 N.C. App. at 423-255, 572 S.E.2d at 436-38. The Court held that this evidence was sufficient to support a reasonable inference of intent for attempted robbery. *Id.* at 425, 572 S.E.2d at 437-38.

Similarly, here, the jury heard testimony that Mr. Legrand tapped on Mr. Jurgensen's window with a revolver and demanded Mr. Jurgensen

open his car door. Although Mr. Legrand argues his conduct could indicate his intent to commit crimes other than robbery, that argument fails because on these facts, a jury could reasonably infer an intent to commit attempted armed robbery. Specifically, based on this record, a jury could make a reasonable inference that Mr. Legrand made an overt act in furtherance of an attempted armed robbery and that he did so by way of an implied demand coupled with his use of a gun.

Relying erroneously on *Powell*, *Smith*, and *Davis*, Mr. Legrand argues that because the encounter did not happen in a retail setting, a jury cannot reasonably infer intent for robbery from his words. *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980); *State v. Davis*, 340 N.C. 1, 455 S.E.2d 627 (1995). However, Mr. Legrand misconstrues the central element of these decisions: "the gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery"—not the location of that overt act. *Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375. *Cf. State v. Jacobs*, 31 N.C. App. 582, 584, 230 S.E.2d 550, 551-52 (1976) (holding evidence of an overt act was insufficient where the defendant made no gesture indicating an intent to touch, no threatened use of a gun, and no express or implied demand). Here, Mr. Legrand displayed a gun, threatened its use, and made an obvious implied demand. As in *Poole*, we find that, on these facts, a jury could make a reasonable inference of attempted robbery.

Accordingly, we affirm the ruling of the trial court denying the motion to dismiss.

B. Motion to Dismiss the Attempted Murder Charge

[2] In his second issue on appeal, Mr. Legrand argues the trial court erred in denying the motion to dismiss the attempted murder charge for insufficient evidence of intent. We disagree.

1. Standard of Review

This Court considers whether a trial court erred in denying a motion to dismiss *de novo*. *State v. Crockett*, 368 N.C. at 720, 782 S.E.2d at 881.

2. Denial of motion to dismiss attempted murder charge was proper

To survive a motion to dismiss, the State must show sufficient evidence for each element of the attempted murder offense. *Lee*, 218 N.C. App. at 56, 720 S.E.2d at 894. "The essential elements of attempted

first-degree murder are: (1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation and deliberation accompanying the act; and (4) a failure to complete the intended killing." *State v. Foreman*, 270 N.C. App. 784, 789, 842 S.E.2d 184, 188 (2020) (quoting *State v. Cozart*, 131 N.C. App 199, 202-03, 505 S.E.2d 906, 909 (1998)).

Mr. Legrand argues that there was insufficient evidence for the jury to make a reasonable inference of the requisite intent. This Court has held intent to commit a felony may be inferred from the defendant's conduct during the incident in question. *State v. Lucas*, 234 N.C. App. 247, 254, 758 S.E.2d 672, 677 (2014) (citing *State v. Allah*, 231 N.C. App. 88, 92, 750 S.E.2d 903, 907 (2013)) (citation omitted). Where the State's evidence showed the accused fired multiple gunshots, then premeditation, deliberation, and specific intent to kill may be inferred. *State v. Chapman*, 359 N.C. 328, 377, 611 S.E.2d 794, 829 (2005).

Mr. Legrand contends the intent for attempted murder could not be inferred because the first gunshot resulted from an accidental discharge, the second gunshot landed six feet away from Mr. Jurgensen, and the third gunshot went well over Mr. Jurgensen's head. Additionally, Mr. Legrand maintains his gunshots could be construed as his attempt to scare or warn Mr. Jurgensen after they struggled over Mr. Legrand's gun, and Mr. Jurgensen shoved Mr. Legrand to the ground.

These arguments are unavailing. The State met the intent element when it presented evidence showing Mr. Legrand fired multiple gunshots. *State v. Allen*, 233 N.C. App. 507, 512-13, 756 S.E.2d 852, 858 (2014); *see also Chapman*, 359 N.C. at 377, 611 S.E.2d at 829 (holding premeditation, deliberation, and intent for attempted murder may be inferred where the defendant fired six to eight shots); *State v. Cain*, 79 N.C. App. 35, 47, 338 S.E.2d 898, 905 (1986) ("The requisite 'intent to kill' can be reasonably inferred by the defendant's use of a .357 magnum revolver, fired numerous times."); *State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604 (2003) (holding evidence of intent sufficient where the defendant fired at the victim when fleeing). Here, where the State's evidence showed that Mr. Legrand fired three gunshots, at least one of which was aimed at Mr. Jurgenson, the State presented sufficient evidence from which a jury could infer the requisite intent.

Mr. Legrand's next argument, centering on his contention that none of the bullets came close to hitting Mr. Jurgensen, is equally unavailing in light of this Court's ruling in *State v. Lyons*. 268 N.C. App. 603, 836

S.E.2d 917 (2019). In *Lyons*, this Court concluded that the jury could draw a reasonable inference of intent from the victim's testimony that the gun was pointed at her as she ducked just seconds before the gun was fired, regardless of whether the gun was actually pointed at her when the defendant pulled the trigger. *Id.* at 613, 836 S.E.2d at 924. The Court reasoned that "the standard of review on a motion to dismiss compels us to adopt the reasonable inference most favorable to the State from the evidence," which in that case was an inference that defendant aimed and fired a gun at the deputy, even though defendant argued he only fired a bullet to scare the deputy. *Id.* at 612-613, 836 S.E.2d at 924. Therefore, the Court affirmed the lower court's denial of the motion to dismiss.

This case tracks those facts from *Lyons*. Mr. Jurgensen saw Mr. Legrand aim his gun in Mr. Jurgensen's direction before firing the second gunshot. That alone establishes that the motion to dismiss was properly denied, but the jury heard further evidence from which it could have inferred that Mr. Legrand's ineffectual aim did not negate his intent, including the low lighting at the gas station and the fact that Mr. Legrand wore a hat that hung low over his face. The State presented sufficient evidence for a jury to reasonably infer the requisite intent. Therefore, we find no error in the lower court's ruling.

C. Determination of Prior Record Level

[3] On appeal, Mr. Legrand does not challenge the validity of his conviction for possession of a firearm by a felon but takes issue with his sentencing on that conviction. Therefore, we review only the sentencing as it pertains to his conviction for possession of firearm by a felon.

The trial court sentenced Mr. Legrand to a term of 127 to 165 months of active confinement for possession of a firearm by a felon based upon its findings that Mr. Legrand was a prior record level V and a habitual felon. Mr. Legrand argues the lower court erred in finding he was a prior record level V and argues he should be sentenced at a prior record level III status. Mr. Legrand argues that he is properly sentenced under prior record level III because the lower court could classify his out-of-state felony convictions as Class I felonies only, which, in turn, results in fewer points for the prior record level analysis. Mr. Legrand reasons the State failed to follow N.C. Gen. Stat. § 15A–1340.14(e), requiring the State to prove an out-of-state felony is substantially similar to a North Carolina offense before it attaches a more serious felony classification to an out-of-state offense. N.C. Gen. Stat. § 15A–1340.14(e) (2021).

1. Standard of Review

"The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal." *State v. Threadgill*, 227 N.C. App. 175, 178, 741 S.E.2d 677, 679-80 (2013).

2. Trial court properly considered prior offenses

The transcript of Mr. Legrand's trial indicates the court found substantial similarity between the crimes after reviewing State's exhibits 20, 21, 22, 23, and 24.

> THE COURT: The [c]ourt, based upon the information presented, finds by preponderance of the evidence that any non-North Carolina offenses included in the stipulation as to prior conviction is substantially similar to North Carolina offenses, and North Carolina classification assigned to said respective offenses is accurate.

The court confirmed this statement when it checked a box confirming it made this finding on Mr. Legrand's prior record-level worksheet.

Mr. Legrand argues the lower court did not make a proper finding because there is nothing in the transcript of the sentencing hearing where the trial court recounted or detailed the evidence from the State proving substantial similarity between Mr. Legrand's out-of-state offenses and North Carolina offenses. Given the Court's indication of review in open court and its full execution of the sentencing worksheet finding substantial similarity, this Court presumes the trial court reached this finding properly. *State v. Harris*, 27 N.C. App. 385, 386-87, 219 S.E.2d 306, 307 (1975) (quoting *State v. Stafford*, 274 N.C. 519, 528, 164 S.E.2d 371, 377 (1968)) ("Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed."). Mr. Legrand has submitted no evidence to the contrary, and thus has not carried his burden of overcoming the presumption of regularity. *See State v. Johnson*, 265 N.C. App. 85, 87, 827 S.E.2d 139, 141 (2019) ("If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights."). Therefore, we find no error.

III. CONCLUSION

After careful review of the issues, we hold that the State presented sufficient evidence of each element of the crimes such that a jury could make a reasonable inference of intent. Therefore, the trial court did not

err by denying the motions to dismiss. Additionally, we hold that Mr. Legrand did not show that the trial court erred in finding his prior federal crimes were substantially similar to North Carolina crimes for purposes of sentencing.

NO ERROR.

Judges MURPHY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
RYAN LEE MATTHEW TAYLOR

No. COA22-788

Filed 5 July 2023

1. Evidence—expert testimony—methodology—estimated vehicle speed during car crash

In a prosecution for second-degree murder and other crimes related to a hit-and-run car crash, the trial court did not abuse its discretion in allowing a state trooper, testifying as an expert in accident reconstruction, to estimate the speed of defendant's car at the moment defendant crashed the car into another vehicle, killing two people. The circumstances of the accident made it impossible to calculate the car's exact speed using either of two established scientific tests, and therefore the trooper relied on a crash reconstruction exercise with circumstances resembling those of the crash involving defendant; it was permissible for the trooper—without giving a specific speed—to compare the two crashes and opine that defendant's car was driving above the applicable speed limit based on the trooper's observations and knowledge about the speed and force needed to cause the kind of damage done to the crash victims' vehicle.

2. Evidence—other crimes, wrongs, or acts—prior pending DWI charge—car crash involving drunk driver—second-degree murder—malice

In a prosecution for second-degree murder and other crimes related to a hit-and-run car crash, including driving while impaired (DWI), the trial court did not err in admitting evidence of a prior, pending DWI charge against defendant to show intent, knowledge,

or absence of mistake under Rule of Evidence 404(b). Specifically, the evidence was properly introduced to show that defendant acted with malice—an essential element of second-degree murder—when he drove his car while intoxicated and subsequently crashed the car into another vehicle, killing two people.

3. Indictment and Information—facial invalidity—error conceded by State—conviction vacated and remanded

In a criminal case arising from a hit-and-run car crash, defendant's conviction for failure to comply with driver's license restrictions was vacated where the State conceded on appeal that the indictment charging him with that crime was facially invalid. The judgment, which consolidated the license restriction offense with other convictions that were valid, was vacated and the matter was remanded for resentencing (upon which, the trial court was directed to correct two other errors conceded on appeal by the State regarding defendant's prior record level and sentencing level for his driving while impaired conviction). Additionally, defendant's arguments on appeal relating to the license restriction charge were dismissed as moot.

Appeal by defendant from judgment entered 10 September 2021 by Judge Cynthia King Sturges in Vance County Superior Court. Heard in the Court of Appeals 24 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the plaintiff-appellee.

Patterson Harkavy LLP, by Narendra K. Ghosh, for the defendant-appellant.

TYSON, Judge.

Ryan Lee Matthew Taylor ("Defendant") appeals from judgments entered upon a jury's verdicts. We find no error in part, vacate in part, and remand.

I. Background

Ashira Jefferson, Kasi Thompson, Elijah Brown, and Kaija Richardson were driving to drop Richardson off at 1:00 a.m. on 5 May 2018 after eating dinner and attending a movie with friends in Henderson. Jefferson was driving a Honda sedan with Brown seated

in the passenger seat. Richardson was seated in the driver's side rear seat, and Thompson was seated in the passenger's side rear seat.

Drake Branson was also separately leaving the movie theater with his wife. As Branson was waiting to turn onto Raleigh Road, he noticed a Chevrolet Tahoe with aftermarket blue tint headlights approaching on Raleigh Road. As the Tahoe passed his location, Branson noticed the Tahoe make an erratic movement into the left lane, emit a loud revving sound, and pass the car, which had just pulled out in front of Branson's car. Branson pulled onto Raleigh Road and a few minutes later encountered Jefferson's Honda sedan off of the roadway and stopped in Richardson's yard. Branson pulled over and called 911. The Honda sedan displayed severe damage to the back of the vehicle and the roof had lifted open. Thompson was laying outside of the car in a ditch near the roadway. The roadway was littered with debris ejected from inside the car.

Emergency Medical Services ("EMS") responded to the scene at 1:23 a.m. Jefferson suffered a broken jaw. Thompson was unconscious and unresponsive with an open injury to the back of her head. Brown was removed from inside of the Honda sedan, suffering with seizures, which indicated a "traumatic brain injury."

Thompson and Brown were transported to Maria Parham Hospital and later transferred by helicopter to Duke University Hospital in Durham. Thompson died approximately two hours after the wreck occurred. Brown died four days later.

North Carolina State Highway Patrol Troopers, Michael Wilder and Christopher Lanham, responded to the scene at approximately 1:25 a.m. The troopers noticed a Chevrolet Tahoe with blue tint headlights located approximately fifty yards farther down Raleigh Road. The Chevrolet Tahoe had been driven through a fence and into the lot of a self-storage facility. The headlights on the Chevrolet Tahoe were illuminated, but the driver was not inside the vehicle nor at the scene. The troopers examined the Chevrolet Tahoe and determined no key was in the ignition and observed a cold six pack of beer in the front passenger side floorboard. Some of the containers had been opened. The vehicle had incurred severe front-end damage.

A canine unit was dispatched and a search was initiated for the vehicle's driver. The canine tracked a scent approximately one to two hundred yards through a barbed wire fence until encountering two railroad cars located on the other size of the U.S. Highway 1 Bypass bridge. Defendant was found lying under one of the railroad cars.

Trooper Lanham ordered him to come out. Defendant was wearing a dark blue T-shirt and khaki shorts. Trooper Lanham searched Defendant and located his ID in his pocket, as well as a key that fit into the ignition switch of the Chevrolet Tahoe, which was registered to Defendant. Defendant's DNA profile was later matched to DNA found on the driver and passenger side airbags inside the wrecked vehicle. Defendant told officers he had been a passenger in the vehicle and had "paid [a security guard named] Rick $20 to give me a ride from [the] 85 Bar."

The troopers noted Defendant was uncooperative, combative, and refused to answer questions. Trooper Lanhan also noted a strong odor of alcohol on Defendant's breath, his eyes were red and glassy, and his speech was slurred. Defendant admitted to consuming alcohol that evening. EMS accessed, treated, and transported Defendant to Maria Parham Hospital at 2:40 a.m. because of knee pain.

Defendant exhibited dangerous behavior at the hospital and was told to leave the emergency department. Defendant left and walked across the street to a Sheetz gas station at 3:05 a.m.

At 3:20 a.m., Trooper Wilder arrived at the hospital and discovered Defendant was no longer there, but located him across the street at the Sheetz gas station. Trooper Wilder placed Defendant under arrest and transported him to the magistrate's office. Defendant refused to provide a breath sample for chemical analysis. Trooper Wilder obtained a search warrant for Defendant's blood, which was drawn at Maria Parham Hospital at 4:56 a.m. The State Crime Laboratory ascertained Defendant's blood alcohol concentration to be .15 grams of alcohol per 100 milliliters of blood.

Trooper Wilder obtained a further search warrant for Defendant's cell phone on the afternoon of 6 May 2018. While executing that search warrant, Defendant told Trooper Wilder he would like to speak with him about the collision that had occurred. Defendant also admitted alcohol was involved in the crash. Defendant asserted the collision had occurred because "they pulled out in front of me." Defendant was unsure if the Chevrolet Tahoe had overturned during the wreck.

Trooper Wilder obtained still photographs from the camera located behind the self-storage facility. The photographs showed the Chevrolet Tahoe stopping on the property and Defendant being the only individual depicted on the cameras. The photographs also showed Defendant attempting to climb a barbed wire fence.

Christopher Wilson, a security guard at Bar 85, testified for the State. Wilson was working at the bar on the night of the incident. Wilson

observed Defendant enter the bar and saw him leave at approximately 12:04 a.m. Wilson stated Defendant was agitated about something, which had happened inside of the bar, and was "talking crazy." Defendant told Wilson "they won't let [him] back in, they [had kicked him] out." Defendant had a drink in his hand and left through the outdoor smoking section of the bar.

Defendant entered his Chevrolet Tahoe, backed into another vehicle parked behind him, and then drove forward. Defendant drove through the grass and a ditch instead of using the driveway exit onto the roadway from the parking lot.

Wilson also testified he had no knowledge of anyone named "Rick" being employed at Bar 85. While incarcerated after the accident, Defendant spoke with family members and discussed the accident, stating "if I wouldn't have had nothing to drink it would've been chalked up as just a[n] accident."

Defendant was indicted for two counts of felony death by motor vehicle, felony hit and run resulting in serious injury or death, reckless driving to endanger, failure to reduce speed, failure to comply with drivers license restriction, driving while impaired ("DWI"), and two counts of second-degree murder. A jury convicted Defendant of all charges.

The trial court arrested judgment on the two convictions of felony death by motor vehicle due to the convictions for second-degree murder. Defendant was sentenced in the presumptive range to 180-228 months for each of the second-degree murders. Defendant's convictions for felony hit and run, failure to reduce speed, failure to comply with license restrictions, and reckless driving were consolidated for judgment and Defendant was sentenced to 19-32 months. Defendant was also sentenced to six months for the DWI, with all sentences running consecutively. Defendant appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021).

III. Issues

Defendant argues the trial court: (1) erred by admitting expert testimony on speed; (2) erred by admitting evidence of an alleged prior DWI; (3) lacked jurisdiction over the license restriction charge because of a defective indictment; (4) erred by failing to dismiss the license restriction charge; (5) erred by sentencing him as a prior record level II

offender; and, (6) erred by imposing a Level Three DWI. Defendant also raised an ineffective assistance of counsel claim.

IV. Expert Testimony

A. Standard of Review

"Trial courts enjoy wide latitude and discretion when making a determination about the admissibility of [expert] testimony." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012) (citation omitted). A trial court's ruling on Rule 702(a) is reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). "A trial court may be reversed for abuse of discretion only upon showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

When error is asserted that "the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *State v. Parks*, 265 N.C. App. 555, 563, 828 S.E.2d 719, 725 (2019) (citations omitted).

B. Analysis

[1] Defendant argues the trial court erred in allowing an expert witness to testify about the speed of the Chevrolet Tahoe based upon unreliable methodology. North Carolina Rule of Evidence 702 governs testimony by an expert witness at trial:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021).

The Supreme Court of North Carolina has interpreted Rule 702(a) and examined Supreme Court of the United States' precedents interpreting Rule 702(a): *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999). Our Supreme Court held:

> the witness must be qualified as an expert by knowledge, skill, experience, training, or education. This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony. Expertise can come from practical experience as much as from academic training. Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise. As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

State v. McGrady, 368 N.C. 880, 889-90, 787 S.E.2d 1, 9 (2016) (citations and quotation marks omitted).

State Patrol Trooper Roderick Murphy, who was not one of the two investigating troopers on the night of the wreck, was tendered and admitted as an expert in crash reconstruction at Defendant's trial. Trooper Murphy was allowed to testify over Defendant's objection that the Chevrolet Tahoe's speed exceeded the forty-five-mile-per-hour speed limit on the highway at the time of the crash.

Trooper Murphy also testified he "was unable to use either of the two scientific tests he had to determine the rate of speed and therefore would not be able to give an accurate answer." Trooper Murphy based his opinion on his nineteen years of experience in law enforcement, specialized training in the fundamentals, tools, and methods of crash reconstruction, prior experience of over thirty crash reconstruction conferences he had attended with exercises and demonstrations.

Trooper Murphy analogized the wreck with a comparable exercise wherein a Dodge Charger had struck a Chevrolet Tahoe. This rear-end collision occurred at a known speed, which resulted in less damage than the wreck at bar. Defendant argues this comparable is not substantially similar to meet the reliability requirements of *Daubert* and Rule 702(a).

Given the specifics of this accident, which made the two established methods unreliable to calculate speed, no objective equation was available to calculate the speed Defendant's Chevrolet Tahoe was traveling at the time of the crash. Trooper Murphy did not give a specific speed, but gave an opinion based upon what he had observed and the speed and force necessary to inflict the extent of the rear end and roof damage observed to Jefferson's Honda sedan. Trooper Murphy's testimony established the principles and methods he had employed were "applied . . . reliably to the facts of the case[,]" per Rule 702(a)(3). N.C. Gen. Stat. § 8C-1, Rule 702(a)(3) (2021). Defendant was fully able to cross-examine and challenge this testimony and has failed to show the trial court abused its discretion by admitting this opinion testimony.

V. Rule 404(b)

Defendant argues the trial court erred in admitting evidence of a prior 2017 DWI incident, as not admissible under Rule 404(b). *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

A. Standard of Review

Our Supreme Court has held:

> 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. We review de novo the legal conclusions 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.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

B. Analysis

[2] Rule 404(b) 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, Rule 404(b) (2021).

The trial court admitted, over Defendant's objection, information about a pending 2017 DWI charge. The State argues the evidence of Defendant's prior traffic offenses is properly admitted under Rule 404(b) to show his intent, knowledge, or absence of mistake to support malice, an essential element of second-degree murder. Defendant argues the pending 2017 DWI charge is not "sufficiently similar to the circumstances at issue." *State v. Locklear*, 159 N.C. App. 588, 594, 583 S.E.2d 726, 731 (2003), *aff'd per curiam*, 359 N.C. 63, 602 S.E.2d 359 (2004).

This Court has allowed pending charges to be admitted to show malice, as long as the evidence is admissible under Rule 404(b). *See State v. Grooms*, 230 N.C. App. 56, 64, 748 S.E.2d 162, 168 (2013) ("our appellate courts have also upheld the admission of evidence of a defendant's pending charge for DWI to show malice when the circumstances surrounding the pending charge were sufficiently similar to those surrounding the charged offense.") (citation omitted).

In *State v. Jones*, evidence of the defendant's pending charge of driving while intoxicated was introduced to establish that the defendant had acted with malice. Our Supreme Court held the introduction of such evidence demonstrated: "that defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life. Thus, such evidence tended to show malice on the part of defendant and was properly admitted under Rule 404(b)." 353 N.C. 159, 172-73, 538 S.E.2d 917, 928 (2000). Defendant's argument is overruled.

VI. Indictment of License Restriction Charge

[3] Defendant argues, and the State concedes, the indictment for the license restriction charge and conviction was facially invalid. Defendant's conviction and judgment for failure to comply with license restrictions is vacated. Defendant's judgment, which consolidated this offense with other valid convictions and sentences imposed, is also vacated and this cause is remanded for resentencing. Defendant's additional arguments, including his assertion of an ineffective assistance of counsel ("IAC") claim, relate to the indictment of the license restriction charge, which we are vacating due to the State's concession, are dismissed as moot.

VII. Sentencing as Prior Record Level II

Defendant argues, and the State also concedes, the trial court erred by sentencing him as a prior record level II. The State concedes the trial court should have sentenced Defendant as a prior record level I. Defendant's judgments are vacated and upon remand is to be resentenced at the proper prior record level.

VIII. Level Three DWI Sentence

Defendant argues, and the State further concedes, the trial court erred by imposing a level three DWI sentence and the court should have imposed a level four DWI sentence. Defendant's DWI sentence is vacated and remanded to be resentenced at the proper level.

IX. Conclusion

The trial court did not err or abuse its discretion in admitting Trooper Murphy's testimony concerning Defendant's estimated vehicle speed. The trial court also did not err in admitting evidence of an alleged and pending prior DWI charge to show malice, knowledge, or absence of mistake under Rules of Evidence 404(b) and 403.

Defendant received a fair trial free from prejudicial error for his convictions of two counts of second-degree murder in 18-CRS-05126 and 18-CRS-051279; felony hit and run resulting in serious injury or death in 18-CRS-051234, DWI in 18-CRS-051233; reckless driving to endanger in 18-CRS-703002; and, failure to reduce speed in 18-CRS-703003. The State concedes the license restriction violation indictment was facially invalid and the trial court did not possess jurisdiction to enter judgment thereon.

The trial court erred in sentencing Defendant as a prior record level II offender. The trial court also erred when it sentenced Defendant as a level three DWI offender. Defendant's judgments, consolidated with his failure to comply with his license restrictions violation conviction, are vacated and remanded.

All of Defendant's judgments are remanded for resentencing. Defendant's remaining challenges of error are dismissed as moot or not argued. *It is so ordered.*

NO ERROR IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.

Judges ZACHARY and STADING concur.

ZANDER v. ORANGE CNTY.

[289 N.C. App. 591 (2023)]

ELIZABETH ZANDER AND EVAN GALLOWAY,
FOR THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS
v.
ORANGE COUNTY, NC, AND THE TOWN OF CHAPEL HILL, DEFENDANTS

No. COA22-691

Filed 5 July 2023

1. Counties—class action—assessment of school impact fees—summary judgment—potential inclusion of illegal fees—remand

In a class action filed against a county on behalf of two classes, one of which consisted of persons (the Feepayer Class) against whom the county had allegedly assessed ultra vires school impact fees under a statute (the Enabling Act) that was enacted to defray the costs of constructing "capital improvements" for schools, the trial court erred in granting summary judgment for the county and against the Feepayer Class. Although the county complied with the Enabling Act's procedural requirements for estimating total capital improvement costs, and it also properly included certain costs that were challenged on appeal, the record showed that the county may have assessed costs that did not constitute "capital improvements . . . to schools" under the Enabling Act. Therefore, a genuine issue of material fact existed concerning damages owed to the Feepayer Class, and the matter was remanded. Contrary to its argument, the Feepayer Class was not automatically entitled to a full refund of the impact fees, since the Enabling Act's clear intent was to make feepayers whole for illegal fees only.

2. Counties—class action—assessment of school impact fees—summary judgment—entitlement to refund—statutory requirements

In a class action filed against a county on behalf of two classes, one of which consisted of persons (Refund Class) seeking a refund of certain school impact fees assessed pursuant to a local statute (the Enabling Act), the trial court properly granted summary judgment in favor of the county. The Enabling Act provided that no refunds would be paid if the impact fees were reduced due to an "updated school impact fee study that results in changes to impact fee levels charged," but that refunds would be owed if the impact fees were reduced for "reasons other than an updated school impact fee study." Here, the county received a new set of

impact fee studies (which contained new data not seen in previous studies, and therefore were "updated" for purposes of the Enabling Act) and explicitly cited to those studies when enacting an impact fee reduction. Even if the studies were not strictly current and the county may have considered other factors in addition to the studies when reducing the fees, the Refund Class was still not entitled to a refund under the Enabling Act's refund provisions.

3. Appeal and Error—mootness—motion to strike—amended motion for summary judgment—no substantive amendment

In a class action filed against a county regarding the county's assessment of school impact fees, where plaintiffs moved to strike the county's amended motion for summary judgment and where the trial court—after denying plaintiffs' motion—granted summary judgment for the county, plaintiffs' argument on appeal that the court erred in denying their motion to strike was dismissed as moot. The county's amendments to its original summary judgment motion were not substantive and, therefore, had no bearing on the resolution of plaintiffs' appeal.

Judge STADING dissenting.

Appeal by Plaintiffs from an Order entered 17 June 2022 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 24 January 2023.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by William A. Robertson, Robert J. King, III, Daniel F. E. Smith, and Matthew B. Tynan, for Plaintiffs-Appellants.

Womble Bond Dickinson (US) LLP, by Sonny S. Haynes and James R. Morgan, Jr., for Defendants-Appellees.

RIGGS, Judge.

Plaintiffs Elizabeth Zander and Evan Galloway appeal from a summary judgment order dismissing their class action complaint brought against Defendants Orange County (the "County") and the Town of Chapel Hill[1] on behalf of persons: (1) who were assessed allegedly *ultra*

1. The parties agreed at trial and in their briefs to this Court that any claims against the Town of Chapel Hill are subsumed into the claims against the County; as such, we omit further discussion of the Town of Chapel Hill from this opinion.

vires school impact fees by the County (the "Feepayer Class"); or (2) who are allegedly entitled to a refund of some school impact fees due to a 2016 change in the fee schedule (the "Refund Class"). On appeal, Plaintiffs contend that the evidence conclusively establishes that both classes are entitled to relief and that there are no genuine issues of material fact for resolution at trial. After careful review, we agree that the County unlawfully included some costs not authorized by statute in calculating the impact fees and hold that the Feepayer Class is entitled to recoup the portion of the school impact fees that were assessed to cover those improper costs. However, because the evidence does not establish the amount of impact fees attributable to these impermissible costs, we remand the matter for further proceedings to determine the damages owed to the Feepayer Class. As to the Refund Class, we hold that the trial court properly granted summary judgment for the County because the forecast of evidence demonstrates that no refunds are owed under the applicable ordinance.

I. FACTUAL AND PROCEDURAL HISTORY

A. The Enabling Act

In 1987, the General Assembly enacted a statute authorizing the County to assess impact fees "to help defray the costs to the County of constructing certain capital improvements" necessitated by new residential development. 1987 N.C. Sess. Laws 617, ch. 460, § 17(b)(1) (hereinafter the "Enabling Act"). The Enabling Act defined "capital improvements" as follows:

> For purposes of this subsection, the term capital improvements includes the acquisition of land for open space and greenways, capital improvements to public streets, schools, bridges, sidewalks, bikeways, on and off street surface water drainage ditches, pipes, culverts, other drainage facilities, water and sewer facilities and public recreation facilities.

Id. § (b)(2).

The Enabling Act also established minimum procedures that the County must follow as it "endeavor[s] to approach the objective of having every development contribute" to a fund for capital improvements in a reasonable and fair manner. *Id.* § (c). Specifically, the County is required, "among other steps and actions," to:

> (1) Estimate the total cost of improvements by category (e.g., streets, sidewalks, drainage ways, etc.) that will be

> needed to provide in a reasonable manner for the public health, safety and welfare of persons residing within the County during a reasonable planning period not to exceed 20 years. The Board of County Commissioners may divide the County into two or more districts and estimate the costs of needed improvements within each district. These estimates shall be periodically reviewed and updated and the planning period used may be changed from time to time.
>
> (2) Establish a percentage of the total costs of each category of improvement that, in keeping with the objective set forth above, should fairly be borne by those paying the impact fee.
>
> (3) Establish a formula that fairly and objectively apportions the total costs that are to be borne by those paying impact fees among various types of developments. . . .

Id. The Enabling Act was later amended in 1993 to define the word "costs" as including loan obligations, lease payments, and installment sale contracts connected with capital improvements. 1993 N.C. Sess. Laws 313, ch. 642, § 4(a).

B. Impact Fee Studies and Ordinances

In 2003, the County enacted an ordinance designed to ensure adequate school capacity at specified service levels in the face of new development. ORANGE COUNTY, N.C., CODE OF ORDINANCES §§ 15-88, 88.2 (2003). The County began creating Schools Adequate Facilities Ordinance Technical Advisory Committee reports ("SAPFOTAC reports") to aid the process. The SAPFOTAC reports were limited, however, insofar as they only estimated the need for entirely new schools by type without considering expansion of existing school facilities or the capacity needs of schools individually.

The County also sought assistance in calculating future capital improvement costs and impact fees from consultants TischlerBise. In 2007, TischlerBise completed school impact fee reports (the "2007 Studies") for each school district operated by the County: (1) the Orange County School District ("OCSD"); and (2) the Chapel Hill-Carrboro School District ("CHCSD"). The 2007 Studies employed the "incremental expansion method" of estimating future capital improvement needs and attributable impact fee assessments by: (1) establishing the capital

cost per student at the County's desired level of service;[2] and (2) assessing that cost against different types of residential development based on their anticipated student generation, *i.e.*, the anticipated number of students added to the school system by each new residence type built.

First, TischlerBise identified the level of service by reference to the County's ordinances, which mandated the following levels of service by school type: 105% for elementary schools; 107% for middle schools; and 110% for high schools. From there, and based on current student enrollment data, TischlerBise calculated the capital improvements—such as acreage, building square footage, and number of portable classrooms—attributable to each individual student at the levels of service mandated by the County's ordinances. TischlerBise then estimated the current cost of each of these capital improvements per unit, *i.e.*, by acre, square foot, *etc.* Taking these numbers together, and after accounting for revenue credits attributable to non-impact fee funding sources, TischlerBise arrived at a net total capital improvement cost per individual student, separated by elementary, middle, or high school. Finally, TischlerBise calculated the maximum allowable impact fee for each residence type by multiplying the net capital improvement cost per student by the number of elementary, middle, and high school students generated from each new type of house built. TischlerBise relied on the estimated student generation data for the 2006-2007 school year in arriving at the maximum allowable impact fees.

Stated differently, TischlerBise estimated future capital improvement needs by calculating how much it would cost in capital improvements to maintain adequate school capacity levels on a per-new-student basis: as each new residence was built, an impact fee would be assessed to cover the capital improvement cost of adding the students generated by the residence to the school system without negatively impacting capacity. TischlerBise then provided maximum allowable impact fees by development type based on these calculations.

TischlerBise included the following costs as "capital improvements" in drafting the 2007 Studies: (1) construction; (2) land acquisition; (3) portable/temporary classrooms; (4) support facilities; (5) buses; and

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2. The term "level of service," as used by both the County and TischlerBise, refers to enrollment as expressed by percentage, so a school operating at a service level above 100% is overcapacity and, if that overage exceeds the County's accepted level of service, capital expenditures are needed to meet this overage in demand and growth. Obviously, growth needs cannot be accurately assessed without an understanding of where the school system's current capacity and level of service are.

(6) TischlerBise's consulting fee. For the five-year period beginning in 2008, TischlerBise estimated that the OCSD's "school local capital costs average approximately $6 million per year, or $30.4 million over five years," and the CHCSD's "school local capital costs average approximately $11.3 million per year, or $56.7 million over five years." The Reports advised the County that, based on these five-year estimates, assessing the maximum impact fees calculated by TischlerBise "would cover approximately 85 percent of [OCSD's] projected related capital improvement costs," and "approximately 84 percent of [CHCSD's] projected related capital improvement costs." TischlerBise also calculated anticipated student enrollment and housing development increases for the ten-year period beginning in 2007, relying on historical development data from the past 10 years.[3]

Following receipt of the 2007 Studies, the County enacted impact fees at 32% of the maximum calculated by TischlerBise beginning in 2009; that percentage then increased to 40% in 2010, 50% in 2011, and 60% in 2012. The County never assessed impact fees at 100% of the maximum calculated by TischlerBise under the incremental expansion method.

In 2014, TischlerBise provided the County with a new student generation rate study. Then, in 2016, TischlerBise completed an updated set of impact fee studies (the "2016 Studies") that accounted for new dwelling types and student generation data. The 2016 Studies anticipated $19MM in future capital costs over the next five years for the OCSD and $23.28MM for the CHCSD, while again estimating the anticipated student enrollment and housing development increases for the next 10 years.

The County adopted new impact fee schedules following the release of the 2016 Studies to account for the new housing types captured therein. It also amended the impact fee ordinance to provide as follows:

> If the Schedule of Public School Impact Fees . . . is reduced due to an updated school impact fee study that results in changes to impact fee levels charged, no refund of previously paid fees shall be made. If the Schedule of Public School Impact Fees . . . is reduced due to reasons

3. To the extent the dissent takes issue with the methodologies employed by TischlerBise in arriving at the total estimated improvements over the five-year period from 2007 to 2012 and the anticipated student generation and development rates for the 10-year period from 2007 to 2017, the plain language of the Enabling Act does not establish a specific means by which the County must calculate anticipated needed capital improvement costs within a reasonable period of 20 years or less.

> other than an updated school impact fee study, the difference between the old and new fees shall be returned to the feepayer . . . .

ORANGE COUNTY, N.C., CODE OF ORDINANCES § 30-35(e)(2) (2016) (hereinafter the "2016 Ordinance"). The new fee schedule resulted in the reduction of impact fees for some dwelling types and an increase for others. *Id.* The County did not offer refunds, reasoning that the impact fee reductions were "due to an updated impact fee study that result[ed] in changes to [the] impact fee levels charged[.]" *Id.*

C. Plaintiffs' Suit

Plaintiffs filed suit against the County on 6 February 2017, challenging the impact fee assessments and lack of refunds. On 3 March 2017, Plaintiffs filed an amended class action complaint alleging, *inter alia*, that: (1) the County failed to comply with the Enabling Act's fee-setting provisions and the fees were thus *ultra vires*; and (2) they were entitled to a refund due to the 2016 Ordinance's reduction in fees.

The trial court entered a case management order following class action certification. Under its terms, all motions for summary judgment were to be filed on or before 22 December 2021. Plaintiffs filed their motion for summary judgment on 30 November 2021, and the County did the same on 1 December 2021. Plaintiffs later filed an amended motion with exhibits on 22 December 2021, and the County followed suit on 1 February 2022. The County's amended motion for summary judgment did not include any substantive changes, and instead simply identified the pleadings and evidence on which the motion was based, including several affidavits with exhibits that were attached to the amended motion. Plaintiffs subsequently moved to strike the County's amended motion as untimely.

The above motions were heard on 14 March 2022. After taking the matter under consideration at the close of the hearing, the trial court entered a written order denying Plaintiffs' motion to strike and granting summary judgment for the County on 17 June 2022. Plaintiffs filed written notice of appeal on 28 June 2022.

II. ANALYSIS

Plaintiffs raise several arguments on appeal, divided amongst the Feepayer and Refund Classes. As to the Feepayer Class, Plaintiffs contend that the County: (1) failed to estimate the total cost of improvements in accordance with the Enabling Act's rate-setting procedures; (2) included improper costs in calculating its impact fees; and (3) owe

the Feepayer Class a full refund of all illegally assessed impact fees at 6% annual interest—totaling well in excess of $12MM—pursuant to N.C. Gen. Stat. § 160D-106 (2021). For the Refund Class, Plaintiffs assert that the impact fee reductions in the 2016 Ordinance were not solely caused by the updated 2016 Studies and refunds are therefore owed under the 2016 Ordinance's refund provision. Both classes, Plaintiffs posit, are owed attorney's fees. Lastly, Plaintiffs challenge the trial court's denial of their motion to strike the County's amended summary judgment motion.

A. Standards of Review

Orders granting summary judgment are reviewed de novo on appeal. *Bryan v. Kittinger*, 282 N.C. App. 435, 437, 871 S.E.2d 560, 562 (2022). Issues of statutory construction—including the construction of ordinances—raise questions of law subject to the same standard. *Thompson v. Union Cnty.*, 283 N.C. App. 547, 555, 874 S.E.2d 623, 630 (2022). We apply the *de novo* standard on review of a summary judgment order to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2021). A movant "bears the burden of bringing forth a forecast of evidence which tends to establish that there are no triable issues of material fact." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citation omitted). If the movant meets this burden, "the nonmoving party must then produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a *prima facie* case at trial." *Id.* (cleaned up). We consider the evidence in the light most favorable to the nonmovant, and "any doubt as to the existence of an issue of triable fact must be resolved in favor of the party against whom summary judgment is contemplated." *Id.*

Rulings on motions to strike, including motions to strike affidavits, are reviewed more deferentially for abuse of discretion. *Blair Concrete Servs., Inc. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002).

B. Feepayer Class Claims

[1] Plaintiffs present a tripartite argument on behalf of the Feepayer Class. First, Plaintiffs assert that the County, together with TischlerBise, failed to "[e]stimate the total cost of improvements by category (e.g., streets, sidewalks, drainage ways, etc.) that will be needed . . . during a reasonable planning period" and "estimate the costs of needed improvements within each [school] district" as required by the Enabling Act.

Enabling Act § (c)(1). Second, Plaintiffs allege that the County's calculation of impact fees included costs beyond the "costs to the County of constructing certain capital improvements" authorized and defined by the Enabling Act. *Id.* § (b)(1); *see also id.* § (b)(2) (defining "capital improvements"). Finally, and assuming merit under their first two contentions, Plaintiffs claim that the impact fees must be refunded *in toto* with interest as "illegally imposed . . . fee[s] . . . for development or a development approval not specifically authorized by law" under N.C. Gen. Stat. § 160D-106. We address each contention in turn.

1. Procedural Compliance with the Enabling Act

In challenging the procedures used by the County to set its impact fees, Plaintiffs identify two purported infirmities that allegedly contravene the Enabling Act, namely that the County and TischlerBise: (1) failed to estimate anticipated total capital improvement costs of schools over a "reasonable planning period[,]" Enabling Act § (c)(1); and (2) failed to tie the impact fees to specific needs for identified new schools, *id.* Neither assertion withstands scrutiny.

In rejecting Plaintiffs' first challenge, we note that the impact fee ordinance itself plainly states a 10-year planning period was used in setting the impact fee rates: "[f]ollowing their collection, funds shall be expended within ten (10) years, *the time frame coinciding with the public school facilities capital improvements program (CIP) school impact fee period.*" ORANGE COUNTY, N.C., CODE OF ORDINANCES § 30-35(c)(5) (2008) (emphasis added). Though Plaintiffs assert this could not have been the case because the County's 30(b)(6) designee and Director of Planning and Inspections testified that TischlerBise did not use a 10-year planning period, this overlooks the fact that *the County Board of Commissioners is not TischlerBise.*[4] The County was still free to use

4. To be clear, Plaintiffs explicitly claim that the County "confirm[ed] through its 30(b)(6) witness that a 10-year planning period was *not* used," and thus the 10-year planning period established by ordinance could not have been employed by the County. But Plaintiffs—and the dissent—overstate the witness's testimony; while he indeed testified that TischlerBise (rather than the County) did not use a 10-year planning period, when subsequently asked whether planning periods of less than ten years were used by the consultants, the witness testified that he would have to "look through the [TischlerBise] report[s] again" to identify the Reports' planning period because he "d[id] not know the answer" from memory. And, though he could not recall the exact planning period used, nothing suggests it was in excess of 20 years, and the witness ultimately testified that "[w]hat I do know is that [the planning period used by TischlerBise] was a reasonable period of time to assess the impacts for the public health, safety, and welfare of persons in the county." On the whole, the witness's testimony establishes that TischlerBise *did* use a planning period, but that the witness could not remember exactly what timespan it covered;

the 10 years of student generation and development estimates included in the Reports to arrive at the total anticipated needed capital improvement costs for the 10-year planning period established by ordinance. The County acknowledged as much in its responses to Plaintiffs' interrogatories: when asked to identify the planning period found in TischlerBise's 2007 Reports, the County identified the Reports' "projection of school improvement costs to 2012 *and* 2017." (Emphasis added). Contrary to Plaintiffs' and the dissent's arguments, the cited testimony from the County's 30(b)(6) designee does not speak to *the County's* use of the 2007 Reports' 10-year student generation and housing development estimates, alongside the Reports' estimated capital improvement costs per student, to anticipate total capital improvement costs to schools over the 10-year planning period stated in the ordinances. Thus, the County's reliance on TischlerBise's 2007 Studies does not disprove or contradict the County's use of a 10-year planning period.

Further, even if the County did not employ the ordinance's 10-year planning period and otherwise relied exclusively on TischlerBise's 2007 Reports to comply with the Enabling Act—as Plaintiffs assert and the dissent entertains—the Reports themselves estimated the total anticipated capital improvement costs to schools for a five-year period, stating OCSD's "school local capital costs average approximately $6 million per year, or *$30.4 million over five years*," and the CHCSD's "school local capital costs average approximately $11.3 million per year, or *$56.7 million over five years*." Again, the County's discovery responses explicitly identified this five-year estimate as a planning period used by TischlerBise in the 2007 Report. That the County's 30(b)(6) designee did not know and could not recall exactly which planning period TischlerBise used in its 2007 Reports does not contradict, impeach, or otherwise have evidentiary relevance to TischlerBise's clear estimate of the total anticipated capital improvement costs of schools over a five-year period in the Reports themselves.

The dissent notes that there is conflicting evidence as to whether a 10-year planning period or some other planning period was used. But genuine issues of fact are not always *material* to the litigation such as to

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conversely, the excerpted testimony did not address at all what planning period *the County* used. We are not, contrary to the assertion by the dissent, relying on the distinction between the County's witness and TischlerBise to "discount" any failure by the County to use a planning period. We instead simply recognize that the evidence, contrary to Plaintiffs' and the dissent's contentions, shows that the witness was testifying to his lack of definite knowledge concerning TischlerBise's utilized planning period rather than completely disclaiming any use of: (1) a planning period by TischlerBise; or (2) a 10-year planning period, consistent with the ordinance, *by the County*.

preclude summary judgment. *See Lowe v. Bradford*, 305 N.C. 366, 329, 289 S.E.2d 363, 366 (1982) ("An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." (citation omitted)). As explained above, the Feepayers and the dissent have not identified any evidence showing that the County did not utilize a 10-year planning period, let alone that *no* planning period of less than 20 years was used (or that a planning period exceeding 20 years was applied) such that the Enabling Act was violated. Thus, assuming there is a genuine issue as to whether the County used a five-year or a 10-year planning period based on its 30(b)(6) designee's testimony, that fact is not *material* to the Feepayer's claims because, whichever way that issue is resolved, it cannot establish non-compliance with the Enabling Act. We respectfully disagree with the dissent that a genuine issue of *material* fact exists as to this portion of the Plaintiffs' claims.

Plaintiffs' second procedural violation argument fares no better than their first. Under their reading of the Enabling Act, the County was required to predict and itemize each new school, facility expansion, or other capital improvement project needed over the planning period. But the plain language of the Enabling Act imposes no such specificity requirement. Instead, the Enabling Act broadly tasked the County with "*endeavor[ing] to approach* the objective of having every development contribute . . . that development's fair share of the costs of the capital improvements that are needed in part because of that development." Enabling Act § (c) (emphasis added). Consistent with that open-ended mandate, all that the Enabling Act necessitates is the County "[e]stimate the total cost of improvements *by category* (e.g., streets, sidewalks, drainage ways, etc.) that will be needed" over the planning period as between the two school districts. *Id.* § (c)(1) (emphasis added). The parenthetical following the word "category" makes clear that "schools" is a category to itself. *See id.* § (b)(2) (defining "capital improvements" to include "capital improvements to *public streets*, *schools*, bridges, *sidewalks*, bikeways, *on and off street surface water drainage ditches*, pipes, culverts, other drainage facilities, water and sewer facilities and public recreation facilities" (emphasis added)); *see also State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) ("All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation." (citation omitted)). As such, the County was merely required to estimate the total cost of school capital improvements between the two districts—no greater specificity or itemization is compelled by the Enabling Act. And even if more granularity

was necessary, the 2007 Studies included such detail by breaking down school capital improvement expenses by type into land acquisition costs, construction costs, and more.

Contrary to Plaintiffs assertion that the 2007 Studies relied on by the County did not estimate the total cost of capital improvements to schools as between the two school districts, those Studies expressly estimated that OCSD would incur a total of $30.4MM in school capital improvement costs over five years and CHCSD a total of $56.7MM over the same span, while including additional predictive data for the following 10 years. Thus, Plaintiffs have not put forth any evidence demonstrating that the County failed to comply with the procedural requirements of the Enabling Act.

2. The Impact Fee Calculations Included Impermissible Costs Beyond "Capital Improvements to . . . Schools"

Plaintiffs next assert that to the extent the County did engage in any capital improvement calculations, those calculations included impermissible costs, namely: (1) land acquisition; (2) support and transportation facilities; (3) portable classrooms; (4) buses; and (5) TischlerBise's consultant fee. Determining whether the County could appropriately include these items in its estimations and calculations of school impact fees requires us to construe and apply the following definition of "capital improvements" provided by the Enabling Act:

> For purposes of this subsection, the term capital improvements includes the acquisition of land for open space and greenways, capital improvements to public streets, schools, bridges, sidewalks, bikeways, on and off street surface water drainage ditches, pipes, culverts, other drainage facilities, water and sewer facilities and public recreation facilities.

Enabling Act § (b)(2). We are obliged to apply statutorily provided definitions when interpreting legislative acts. *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974).

a. Land Acquisition and Portable Classrooms

The parties first dispute whether purchasing real property constitutes a "capital improvement to . . . schools." Enabling Act § (b)(2). Plaintiffs note that land acquisition is expressly included as it relates to "open space and greenways" but is otherwise absent from the definition, *id.*, contending that land acquisition is therefore excluded from the other listed categories. *See, e.g.*, *Evans v. Diaz*, 333 N.C. 774, 779-80,

430 S.E.2d 244, 247 (1993) ("Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." (citations omitted)). However, this overlooks the definitional list's recursive quality; in the context of schools, the General Assembly used the term "capital improvements" to define itself, providing that "the term capital improvements includes . . . capital improvements to . . . schools[.]" Enabling Act § (b)(2). Thus, we interpret the statutory definition to: (1) identify the several categories of capital improvements for which impact fees may be assessed, *e.g.*, schools; and (2) *enlarge* the common definition of "capital improvements" to include land acquisition for projects that otherwise would not involve any improvement-related expenditures—like undeveloped "open space"—while maintaining the ordinary definition as it applies to schools and the other identified categories.

The ordinary definition of "capital improvement" includes land acquisition in addition to construction. *See Capital Improvement*, *Black's Law Dictionary* (11th ed. 2019) ("An outlay of funds to *acquire* or improve a fixed asset. – Also termed capital improvement; capital outlay." (emphasis added)). This also comports with how the term is used elsewhere in our General Statutes, particularly when referring to the State's powers to pay for and pursue "capital improvements." *See*, *e.g.*, N.C. Gen. Stat. § 143C-1-1(d)(5) (2021) (defining "capital improvement" under the State Budget Act as "[a] term that *includes real property acquisition*, new construction or rehabilitation of existing facilities, and repairs and renovations over one hundred thousand dollars ($100,000) in value" (emphasis added)); N.C. Gen. Stat. § 162A-211(a)(1) (2021) (defining "costs of constructing capital improvements" for purposes of sewer and water systems development fees as including both "[c]onstruction contract prices" and "[l]and acquisition cost"). Further, this Court has described the purchase of land as a proper expenditure from a county's "capital improvement fund." *See generally Davis v. Iredell Cnty.*, 9 N.C. App. 381, 176 S.E.2d 361 (1970) (upholding a county's use of "capital improvement fund" monies to buy land for a new judicial complex on constitutional and statutory grounds). Because the purchase of land falls within the ordinary meaning of the term "capital improvements," and such meaning accords with both statutory and case law, we hold that the Enabling Act allowed the County to assess school impact fees to buy new land for schools. *Cf. Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 20, 803 S.E.2d 142, 150 (2017) (defining the word "interest" in a statute based on a common dictionary definition that was "consistent with the manner in which 'interest' is used in other statutory provisions and judicial decisions").

Portable classrooms, too, appear to be "capital improvements to . . . schools," as they are "improvements" to real property under the commonly understood definition of the term. *See Improvement*, *Black's Law Dictionary* (11th ed. 2019) ("An addition to property, usu. real estate, whether *permanent or not*" (emphasis added)).[5] Indeed, Plaintiffs' counsel acknowledged at oral argument that these portable classrooms could be considered "capital improvements" for impact fee expenditure purposes. We therefore hold the County properly included this expense in calculating its impact fees.

b. Support and Transportation Facilities

Support and transportation facilities are certainly capital improvements; the question becomes whether they are "capital improvements to . . . schools," specifically. In their brief, Plaintiffs asserted that the word "school," for purposes of the Enabling Act, strictly and unambiguously means "a place where instruction is given: a building or group of buildings in which a school is conducted." *School*, *Webster's Third New International Dictionary* (3rd ed. 2002). Though a reasonable definition, Plaintiffs' counsel candidly conceded at oral argument that the question of what constitutes "capital improvements to . . . schools" is "a bit unclear." Rightly so; the limited definition offered by Plaintiffs is far from the only common one, with other ordinary definitions using more expansive terms to include all buildings used by an educational institution. *See*, *e.g.*, *School*, *The American Heritage Dictionary of the English Language* (4th ed. 2001) ("The building or group of buildings housing an educational institution"); *School*, *Webster's New World Dictionary and Thesaurus* (4th ed. 2010) ("a place or institution, with its buildings, etc., for teaching and learning"); *School*, *Oxford Dictionary of English* (1st ed. 2010) ("the buildings used by a school"). Though legislative bodies have sometimes sought to clarify what buildings and improvements constitute part of a "school" by using alternative, expressly defined language, no such effort was made regarding the Enabling Act. *See generally Appalachian Materials*, *LLC v. Watauga Cnty.*, 262 N.C. App. 156, 822 S.E.2d 57 (2018) (holding there was no ambiguity in the term "educational facility," which was defined by ordinance to include only "elementary schools, secondary schools, community colleges, colleges, and universities" as well as "any property owned by schools for instructional purposes").

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5. Though termed "portable classrooms," the law requires them to "be anchored in a manner required to assure their structural safety in severe weather[,]" N.C. Gen. Stat. § 115C-521(b) (2021), revealing them to be less "portable" than their name suggests.

Whether something is part of a "school" is itself a fact-specific inquiry, and the common understanding of the word will often conflict with Plaintiffs' preferred definition. For example, a cafeteria, administrative building, parking lot, or playground are not in-and-of themselves "place[s] where instruction is given" or "buildings in which a school is conducted," *School*, *Webster's Third New International Dictionary* (3rd ed. 2002), but construct them on an elementary school campus and they are invariably considered part of the "school."[6] We therefore reason that the word "school," as used in the Enabling Act, is broad and ambiguous, and could plausibly be read as either a limited reference to the buildings in which instruction occurs or a more expansive mention of all buildings and improvements used by a scholastic institution. *See*, *e.g.*, *Visible Props., LLC v. Vill. of Clemmons*, 284 N.C. App. 743, 754, 876 S.E.2d 804, 812 (2022) ("When there are two or more reasonable interpretations of the law, the law is ambiguous." (citation omitted)).[7] Because we are required to construe any ambiguity in the Enabling Act broadly, N.C. Gen. Stat. § 153A-4 (2021), we hold that "capital improvements to . . . schools" includes the support and transportation facilities considered in the County's establishment of its impact fees.

c. Buses and Consultant Fees

Unlike the aforementioned expenses, buses and TischlerBise's consultant fees are not "capital improvements to . . . schools" because they are not themselves "capital improvements" as the word is ordinarily understood. A bus and a consultant's report simply are not "acqui[sitions] [of] or improve[ments] [to] a fixed asset." *Capital Expenditure*, *Black's Law Dictionary* (11th ed. 2019). Nor are they "addition[s] to property[.]" *Improvement*, *Black's Law Dictionary* (11th ed. 2019).

The County's arguments to the contrary are unpersuasive. Though the County asserted in its brief and oral argument that TischlerBise's

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6. This is by no means an exhaustive list of examples, and the same may be said of countless other improvements like gymnasiums, athletic fields, sprinkler buildings, *etc.* *See*, *e.g.*, N.C. Gen. Stat. § 159D-37 (6a)a. (2021) (identifying, *inter alia*, libraries, laboratories, dormitories, dining halls, athletic facilities, laundry facilities, "and other structures or facilities related to these facilities or required or useful for the instruction of students, the conducting of research, or the operation of the institution" as "educational facilities").

7. In addition to arguing the merits of their claims, Plaintiffs assert they are owed attorney's fees on the basis that the County violated an unambiguous statute. *See* N.C. Gen. Stat. § 6-21.7 (2021) (providing that attorney's fees must be awarded if a county is found to have "violated a statute or case law setting forth unambiguous limits on its authority"). Our holding that the Enabling Act is ambiguous precludes such an automatic award of attorney's fees, though they may still be awarded in the sound discretion of the trial court. *Id.*

consultant fees relate to the "design" of future capital improvements, the reports in no way purport to "design" any capital improvements. The 2007 Studies do not, for example, include any architectural designs, traffic or environmental impact studies, or other necessary reports developed as part of a capital improvement project. As for buses, the County maintains that any expenses incurred from the operation or functioning of a school are "costs to the County of constructing certain capital improvements" recoupable under the Enabling Act. Enabling Act § (b)(1). But such a position is untenable; the County could not identify any school-related costs that fell outside this definition at oral argument, and this reading could logically reach everything from pencils to teacher salaries to cleaning supplies. In short, the County's reading would render the specific phrase "capital improvements" meaningless, and "a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). Because the evidence shows the County may have included improper costs in calculating its impact fees, the trial court erred in granting summary judgment for the County on this claim.

d. Remand Is Required

Though we hold that the County could not include buses and TischlerBise's consultant fees in calculating school impact fees, this does not fully resolve Plaintiffs' claims on behalf of the Feepayer Class. As noted in its brief, the County never set its impact fees at 100% of the maximum amounts calculated by TischlerBise, electing instead to impose fees ranging between 32% and 60% of that maximum amount at various times. The County thus may have calculated and assessed impact fees that did not incorporate or cover anticipated bus and consultant costs, as a review of the 2007 Studies shows that buses and consultant fees accounted for 4-6% of the maximum total impact fees calculated for the OCSD and 1-2% for the CHCSD. Further, the legislative findings in the County's ordinances reference the assessment of impact fees only to cover "new school *facilities*," ORANGE COUNTY, N.C., CODE OF ORDINANCES §§ 30-31.(2)-(4) (2008) (emphasis added), an undefined term whose ordinary meaning unambiguously does not include buses or consultant fees. That ordinance also explicitly states what the school impact fees may be spent on without express mention of buses or consultant studies:

> Funds shall be used for capital costs associated with the construction of new public school space, including new buildings or additions to existing buildings or otherwise converting existing buildings into new public school space

> where the expansion is related to new residential growth. Such capital costs include actual building construction; design, engineering, and/or legal fees; land acquisition and site development; equipment and furnishings; infrastructure improvements; and/or debt service payments and payments under leases through which to finance such costs.

Id. § 30-35(c)(1). Because the issue of what damages are owed to Plaintiffs is unsettled on the record, we remand the Feepayer claim for further proceedings to resolve this factual question.

Plaintiffs maintain that remand is not required because N.C. Gen. Stat. § 160D-106 requires the return of an illegally assessed fee *in toto* and does not provide for partial refunds. Even setting aside the unresolved factual question of whether improper costs were actually included in the County's final setting and expenditure of its school impact fees, we decline to adopt Plaintiffs' position because doing so would countenance an absurd result.

The statute at issue is designed to make plaintiffs whole for *illegal* fees only; nothing in the statute suggests it is intended to punish local governments while granting a windfall to plaintiffs. Section 160D-106 does not, for example, allow for punitive or treble damages. *Compare* N.C. Gen. Stat. § 160D-106, *with* N.C. Gen. Stat. § 75-16 (2021) (establishing treble damages for unfair and deceptive trade practice claims), *and* N.C. Gen. Stat. § 1D-15 (2021) (allowing for punitive damages in civil actions when certain aggravating factors are shown); *see also Houpe v. City of Statesville*, 128 N.C. App. 334, 351, 497 S.E.2d 82, 93 (1998) (holding a defendant could not pursue damages against a municipal government under punitive statute prohibiting blacklisting of employees because "punitive damages may not be recovered against a municipality absent statutory authorization, which [the blacklisting statute] fails to provide" (citations omitted)). Though it does allow for the recovery of interest, it does so at *less* than the legal rate imposed on ordinary compensatory civil judgments. *Compare* N.C. Gen. Stat. § 160D-106 (authorizing refunds at 6% interest), *with* N.C. Gen. Stat. §§ 24-1 & -5 (2021) (collectively establishing the legal interest rate for civil judgments at 8% unless varied by contract). The intent of the statute to make feepayers whole without enriching them is further reinforced by its title, "*Refund* of *Illegal* Fees." N.C. Gen. Stat. § 160D-106 (emphasis added); *see also Brown v. Brown*, 353 N.C. 220, 224, 539 S.E.2d 621, 623 (2000) ("Although the title of an act cannot control when the text is clear, the title is an indication of legislative intent." (citation omitted)); *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8,

727 S.E.2d 675, 681 (2012) ("[E]ven when the language of a statute is plain, the title of an act should be considered in ascertaining the intent of the legislature." (citation and quotation marks omitted)). That the statute contemplates "refunds" specifically undercuts any intent to award profits above and beyond the "illegal" amount paid. *See Refund*, *Oxford Dictionary of English* (1st ed. 2010) ("a *repayment* of a sum of money" (emphasis added)). And it does not otherwise appear that the statute was intended to encourage greater caution on the part of the County in assessing impact fees, particularly when: (1) the General Assembly elsewhere provided "local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of power," N.C. Gen. Stat. § 153A-4; and (2) the Enabling Act instructs the County to "*endeavor to approach* the objective of having every development contribute to a capital improvements fund," Enabling Act § (c) (emphasis added).

Said differently, allowing the Feepayers to profit (and not simply be made whole) by recovering the lawfully assessed portions alongside the much smaller unlawful portions would run contrary to N.C. Gen. Stat. § 160D-106's plain intent, as it would enrich the Feepayers and punish the County. We are required in such circumstances to deviate from the statute's plain language to avoid an absurd result that contravenes the legislature's manifest intent, particularly when the County was: (1) entitled to broad construction of any ambiguities, N.C. Gen. Stat. § 153A-4; and (2) given a broad mandate "to endeavor to approach" a fair assessment of fees, Enabling Act § (c). *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (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, . . . the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." (citations and quotation marks omitted)).

In sum, we hold that the trial court erred in granting summary judgment for the County against the Feepayer Class claims to the extent that the County acted outside its authority under the Enabling Act by including buses and TischlerBise's consultant fees in the calculation and assessment of school impact fees. Because there remains a genuine issue of material fact as to the damages, if any, owed to the Feepayer Class under this theory, we remand the matter to the trial court for further proceedings not inconsistent with this opinion.

C. Refund Class Claims

[2] The 2016 Ordinance provides that no refunds are to be paid if impact fees are "reduced due to an updated school impact fee study that results

in changes to impact fee levels charged." 2016 Ordinance, § 30-35(e)(2). Conversely, refunds are owed if the impact fees are "reduced due to reasons other than an updated school impact fee study." *Id.* Plaintiffs rely on these provisions to press two distinct arguments on behalf of the Refund Class: (1) the 2016 Studies were not "updated school impact fee stu[dies]" because they were not strictly up-to-date; and (2) even if the 2016 Studies were a cause of the reduction, they were not the sole cause of the rate changes, and refunds are therefore owed because the fees were reduced for additional "reasons other than an updated school impact fee study." *Id.* We disagree with both contentions.

1. The 2016 Studies Were Updated

Plaintiffs first argument is premised on the assertion that "updated" means "to bring up to date" and "including the latest facts." *Update & Up-to-date*, *Webster's Third New International Dictionary* (3rd ed. 2002). As a semantic matter, the common meaning of the word "updated" does not invariably refer to something that is absolutely current. *See*, *e.g.*, *Updated*, *Oxford Dictionary of English* (1st ed. 2010) (defining the adjective "updated" as something "made *more* modern or up to date" (emphasis added)). The 2016 Studies, which included new data over the 2007 Studies, were thus "updated" under the common meaning of the word.

As a factual matter, the 2016 Studies meet even Plaintiffs' preferred definition. They were published in August and September 2016 and were based on the "current average student generation rates," the "actual current" level of service data, and the school inventory data available at the time the reports were drafted. The County then set its new impact fee rates on 15 November 2016. Yet Plaintiffs fault the Studies only for failing to include data released and certified *on or after 18 November 2016*, weeks after the Studies were published and days after the new impact fees were adopted. While the modified impact fee rates did not go into effect until January 2017, this does not negate the fact that the 2016 Studies were "updated" and "up-to-date" at the time the County actually enacted the reduction in fees.

2. The Impact Fees Were Reduced Due to the Updated 2016 Studies

Plaintiffs' second argument on behalf of the Refund Class is likewise misplaced. The 2016 Studies were the only precipitants identified in the prefatory text of the 2016 Ordinance changing the impact fee schedule:

> WHEREAS, *to ensure impact fees remain proportional to actual impacts caused, the County initiated a technical study in 2015 to study the school impact fees* and

> determine the "maximum supportable impact fee" that could be charged for various new housing types, and
>
> WHEREAS, said *technical study was completed in August 2016*, and
>
> WHEREAS, the County has held the required public hearing on the proposed amendments to Chapter 30, Article II of the Code of Ordinances *and the impact fee studies*.
>
> BE IT ORDAINED by the Board of Commissioners of Orange County that Chapter 30, Article II—Education Facilities Impact Fee is hereby amended as depicted in the attached pages.

Orange County, N.C., Ordinance ORD-2016-034 (Nov. 28, 2016) (emphasis added).

Though Plaintiffs seek to impeach this legislative record based on the County's discovery responses and statements by the County's planning director, the county attorney, and individual commissioners suggesting that additional policy considerations were at play, our caselaw provides that generally, for purposes of statutory interpretation, the intentions of the legislating body are to be derived from the text of the enactment itself rather than statements of individuals. *N.C. Milk Comm'n v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555-56 (1967). *See also State v. Evans*, 145 N.C. App. 324, 329, 550 S.E.2d 853, 857 (2001) (holding that Governor James B. Hunt, Jr.'s press release stating an intention to "crack down on drunk drivers and let them know they'll pay the price" by tripling the civil driver's license revocation period was not competent evidence to show that the increased revocation period was intended to be punitive, and thus criminal, in nature). Indeed, the record reveals that these policy concerns, to the extent that they were considered by the County and its Board of Commissioners, were all resolved *in light of and in reliance on* the new data and analysis provided by the updated 2016 Studies. The record reflects that the updated 2016 Studies were both the precipitating and indispensable cause of the County's reduction in school impact fees, and the changes were not made "*due to reasons other than* an updated school impact fee study." 2016 Ordinance § 30-35(e)(2) (emphasis added).[8]

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8. The dissent asserts that reference to the 2016 Ordinance's prefatory language for the Commission's legislative intent renders application of the provision allowing for refunds "futile." But this is not inexorably true; if an ordinance reducing impact fees included a prefatory "whereas" clause explicitly *disclaiming* reliance on any updated impact

Even if Plaintiffs are correct that the County considered other policy implications in adjusting the impact fees, we decline to adopt Plaintiffs' reading of the 2016 Ordinance's refund provision; namely, that refunds are owed if impact fees are reduced for reasons in addition to an updated study. Such a reading would render ineffective the first clause of the refund provision that no refunds are owed "[i]f the Schedule of Public School Impact Fees . . . is reduced due to an updated school impact fee study that results in changes to impact fee levels charged." *Id*. When asked at oral argument for an example of when refunds would be owed under the 2016 Ordinance, counsel for Plaintiffs asserted that a TischlerBise study showing that impact fees were being assessed over the maximum amount allowed by law would "forc[e] the County to reduce its fees." But this is not quite right; TischlerBise, a private consulting firm, cannot "force" the Board of County Commissioners, as an independent legislative body, to take any action whatsoever. Only the limits placed on the County by law can do that. *See, e.g.*, *Rowe v. Franklin Cnty.*, 318 N.C. 344, 348-49, 349 S.E.2d 65, 68-69 (1986) (holding that a county's act "is *ultra vires* if it is beyond the purposes or powers expressly or impliedly conferred . . . by its . . . charter and relevant statutes and ordinances"). Rather, the County would only reduce the fees in this scenario for additional or other reasons: for example, the County Commissioners may have reduced the fees for the additional reason that they agreed with TischlerBise's analysis and methodology showing that *the law* compelled a reduction, or they may have disagreed with the study but nonetheless determined that a reduction was proper on other policy grounds.[9] Either way, refunds would be owed even under Plaintiffs' own hypothetical attempt at triggering the non-refund provisions of the 2016 Ordinance, and we will avoid a reading that renders any portion thereof "useless or redundant." *Porsh Builders, Inc.*, 302 N.C. at 556, 276 S.E.2d at 447.

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fee studies, then the 2016 Ordinance's provisions would plainly require refunds. So, too, would refunds be required if the impact fees were reduced and no updated studies had been done at all. In actuality, and as explained *infra*, it is the reading of the refund provision advocated by the Plaintiffs and adopted by the dissent that impermissibly renders a portion of the 2016 Ordinance a nullity.

9. Plaintiffs' counsel impliedly recognized these points at oral argument, stating on the one hand that, "if the study results indicated that the County had to [reduce fees] *to stay in compliance with the statute and the constitutional requirements for impact fees*, then that would be the study causing them to go down," while recognizing on the other that "the County . . . could have completely disregarded the TischlerBise studies." (Emphasis added).

Based on the above, we hold that the trial court properly granted summary judgment for the County on the Refund Class's claims. The 2016 Studies were "updated," and the impact fee reduction was "due to [those] updated school impact fee stud[ies]" within the meaning of the 2016 Ordinance. 2016 Ordinance § 30-35(e)(2). We therefore affirm the trial court's summary judgment order on this ground.

D. Plaintiffs' Motion to Strike

[3] Finally, Plaintiffs assert that the trial court erred in denying their motion to strike the County's amended motion for summary judgment. The amended motion did not substantively alter the original motion, while the affidavits attached to the amended motion were timely filed in opposition to Plaintiffs' motion for summary judgment. *See* N.C. R. Civ. P. 56(c) (2021) ("The adverse party may serve opposing affidavits at least two days before the hearing."). Because the portions properly subject to the motion to strike are not substantive and have no bearing on the resolution of this appeal, whether the trial court abused its discretion is moot. *See Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." (citation omitted)). We therefore decline to address this portion of Plaintiffs' appeal.

III. CONCLUSION

Plaintiffs, on behalf of the Feepayer Class, have demonstrated that there are genuine issues of material fact concerning the damages owed due to the assessment of impact fees to cover costs that do not fit within the Enabling Act's definition of "capital improvements to . . . schools,"—specifically the assessments for buses and the TischlerBise study—and the County has not shown that this claim is precluded as a matter of law. We therefore reverse the summary judgment order in part and remand for further proceedings on this claim. However, we hold that the Plaintiffs have failed to show any such genuine issue of material fact as to the Refund Class, and the trial court properly granted summary judgment for the County on these claims.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judge GORE concurs.

Judge STADING dissents by separate opinion.

STADING, Judge, dissenting.

I respectfully dissent from the majority's decision to affirm the trial court's order granting summary judgment for Orange County. In this matter, we consider whether Orange County exceeded the bounds of its delegated authority under 1987 N.C. Sess. Laws 616, ch. 460 § 17 ("the Session Law"), and subsequent amendments, through its calculation and exaction of impact fees before issuing a certificate of occupancy for any new residential housing unit. To collect the impact fees authorized under the Session Law, the Orange County Board of Commissioners adopted the "Educational Facilities Impact Fee Ordinance." ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, §§ 30-31 – 30-80 (1993) ("the Ordinance"). The Ordinance mandated that no "occupancy permit shall be issued for any new residential dwelling unit until the public school impact fees hereby required have been paid in full." *Id.* The Ordinance was later amended with updated impact fee schedules and a provision for reimbursement of fees if they were "reduced due to reasons other than an updated school impact fee study." ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, §§ 30-31 – 30-80 (2016).

The Session Law was intended to "help defray the costs to the County of constructing certain capital improvements, the need for which is created in part by the new development that takes place within the County." 1987 N.C. Sess. Laws 616, ch. 460, § 17(b). To lawfully fulfill this objective, the legislature provided mandatory steps for the County to determine the cost of capital improvements and a formula for calculating impact fees. 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). The North Carolina Constitution requires the General Assembly to "provide for the organization . . . of counties, cities and towns, and other governmental subdivisions" and authorizes it to "give such powers . . . as it may deem advisable." N.C. CONST. art. VII, § 1. "From the very formation of our State government, municipalities, in their various forms, have been considered creatures of the legislative will, and are subject to its control." *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 18, 789 S.E.2d 454, 457 (2016) (citations omitted). Logically, "[a]ll acts beyond the scope of the powers granted to a municipality are void." *City of Asheville v. Herbert*, 190 N.C. 732, 735, 130 S.E. 861, 863 (1925) (citations omitted).

Substantial evidence shows that when Orange County calculated the taxes at issue, it neglected to follow the protocol outlined and mandated by the General Assembly in the Session Law. While I agree with the majority that impact fees should not have been expended on buses and consultant studies, I am nevertheless precluded from reaching

consideration of impermissible costs because a jury should resolve the lawfulness of the impact fees as a preliminary matter. Similarly, there is a genuine issue of material fact to be resolved with respect to the contradictory evidence of underlying reasons for a reduction in impact fees.

I. The Session Law and the County Ordinance

A. The Session Law

To accommodate the demands of rapidly growing Orange County, the General Assembly passed the Session Law to authorize additional taxation within Orange County's planning jurisdiction. Section 17 read as follows: "Orange County may provide by ordinance for a system of impact fees to be paid by developers to help defray the costs to the County of constructing certain capital improvements, the need for which is created in substantial part by the new development that takes place within the County." 1987 N.C. Sess. Laws 616, ch. 460, § 17(b). The Session Law defined capital improvements to include: "the acquisition of land for open space and greenways, capital improvements to public streets, schools, bridges, sidewalks, bikeways, on and off street surface water drainage ditches, pipes, culverts, other drainage facilities, water and sewer facilities and public recreation facilities." *Id.*

The law provided for a mandatory, deliberate scheme that the County was required to follow to ensure that each development contributed to a capital improvement fund, a sum bearing a reasonable relationship to that development's fair share of necessary costs. 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). The Session Law's language outlined a three-step process:

> (1) Estimate the total cost of improvements by category (e.g., streets, sidewalks drainage ways, etc.) that will be needed to provide in a reasonable manner for the public health, safety and welfare of persons residing within the County during a reasonable planning period not to exceed 20 years. The Board of County Commissioners may divide the County into two or more districts and estimate the costs of needed improvements within each district. These estimates shall be periodically reviewed and updated and the planning period used may be changed from time to time.
>
> (2) Establish a percentage of the total costs of each category of improvement that, in keeping with the objective set forth above, should fairly be borne by those paying the impact fee.

> (3) Establish a formula that fairly and objectively apportions the total costs that are to be borne by those paying impact fees among various types of developments. . . .

Id. In sum, the legislation charged the County with (1) estimating the total cost of reasonable improvements by category over a planning period of 20 years or less, (2) establishing a percentage of those costs fairly assumed by the fee payer, and (3) establishing a formula apportioning the costs among different types of developments. In 1991, the legislature expanded the applicability of the Session Law from the "planning jurisdiction of Orange County" to "everywhere in Orange County." 1991 N.C. Sess. Laws 607, ch. 324, § 1. The law was amended again in 1993 to specifically permit Orange County to use impact fees for financing and leasing obligations. 1993 N.C. Sess. Laws 313, ch. 642, § 4(a).

B. The County Ordinance

In 1993, Orange County adopted an "Educational Facilities Impact Fee Ordinance" to provide for the system of impact fees. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, §§ 30-31 – 30-80 (1993). Until its repeal in 2017, the Ordinance was amended several times. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, §§ 30-31 – 30-80 (2017) (previously amended 1993, 1995, 1996, 2001, 2008, 2009, 2011, 2013, 2016). In 1993, the Ordinance set impact fees at $750 per residential dwelling unit for both Orange County and Chapel Hill-Carrboro School Districts. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-33 (1993). The impact fees changed over time as the Ordinance was amended. In 1995, the amended Ordinance set impact fees at $750 per residential dwelling unit in the Orange County School District and $1,500 per residential dwelling unit in the Chapel Hill-Carrboro School District. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-33 (1995). Additional amendments instituted more complex annual increases with additional categories of dwelling unit type. In 2008, the Ordinance was amended to incorporate figures derived from a report produced by the County's hired consultant. This amendment implemented maximum supportable impact fees, as calculated in the report, at 32% in 2009, 40% in 2010, 50% in 2011, and 60% in 2012. In doing so, the County adopted its hired consultant's calculations and underlying assumptions.

Each version of the Ordinance contained a clause under the subheading "Limitation on Expenditure of Funds" that stated, "[f]ollowing their collection, funds shall be expended within ten (10) years, the time frame coinciding with the public school facilities capital improvements

program (CIP) school impact fee period." ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, §§ 30-35(c)(5) (2017) (previously amended 1993, 1995, 1996, 2001, 2008, 2009, 2011, 2013, 2016). The Ordinance, as amended in 2016, contained a provision contemplating when reimbursement of fees shall be made:

> If the Schedule of Public School Impact Fees . . . is reduced due to an updated school impact fee study that results in changes to impact fee levels charged, no refund of previously paid fees shall be made. If the Schedule of Public School Impact Fees . . . is reduced due to reasons other than an updated school impact fee study, the difference between the old and new fees shall be returned to the feepayer . . . with interest. . . . If the Schedule of Public School Impact Fees . . . is increased, no additional fees shall be collected from new construction for which certificates of occupancy have been issued.

ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, § 30-35(e)(2) (2016).

II. Chronology of Actions by the County

A. Initial Calculation Method

A review of the record displays the County's course of action throughout the lifespan of the legislation. In the 1990s, the County used a process contained within a "Technical Report" to calculate the proportionate share of impact fees for financing public school capital needs. This report used a formula for "needed improvements" by multiplying "demand units" and "service standards." "Demand units" were derived by employing census data (later updated with additional data collection) to arrive at the average number of school-age children per residential housing unit. "Service standards" were determined by relevant square-footage standards and land area needed per student by type of school. The report then specified a reasonable cost calculation for the above-determined "needed improvements" multiplied by "cost per unit." The overall method also accounted for proportionality by employing several "factors." These factors included credit for projected sales-tax contributions, grants from the State, and revenue from property tax collections over a ten-year period using a present-value estimation for future payments.

Consistent with the Session Law, the "Technical Report" appeared to implement a ten-year planning period. This report quoted the portion of

the Session Law, directing Orange County to "estimate the total cost of improvements . . . that will be needed . . . during a reasonable planning period not to exceed 20 years." More importantly, the analysis specified that the ten-year timeframe is "the period of time within which the new school facilities listed [within the report] . . . will be needed." Moreover, the report listed that "both school districts have prepared ten-year school improvement planning programs which identify new public schools needed within the next 10 years to meet projected student enrollments."

Lastly, the "Technical Report" weighed the sufficiency of the benefits that are received by fee payers. The report noted the relevancy of temporal restriction on projected needs and established rational geographical districts that existed "in the form of the Chapel Hill-Carrboro School District and the Orange County School District." To address disparities in each district's population and cost of living, the report tabulated separate impact fees for each school district. This geographical distinction sought to ensure that residents of one district would not pay impact fees higher than necessary, nor pay for facilities they would never use. In practice, this limitation was exemplified by the need for a single new elementary school in the Orange County School District; meanwhile, the Chapel Hill-Carrboro School District required two new elementary schools, a new middle school, and expansion of an existing high school. Accounting for such differences in the calculation pursued the objective of fairly and objectively apportioning the costs.

B. Subsequent Calculation Method

In 2001, the County engaged Tischler & Associates, Inc., a consulting firm, to produce a report on "School Impact Fees" for both school districts. In that report, "[t]he basic formula used to derive the impact fee for both school districts is to multiply student generation rates by the net capital costs of public schools per student." A chart included in the report indicated that "student generation rates" were "public school students per housing unit" in the 2000–01 school year.

"Capital costs," reflected in a chart contained in the report, were comprised of average land costs based on past purchases, building costs derived from averages of "anticipated total project costs for five new schools," portable classroom costs determined by then-current prices, an enigmatic formula that estimated replacement costs of administrative facilities, and finally, cumulative transportation costs reliant upon 2001 figures. A credit was factored in for "future principal payments on existing General Obligation bonds." The consulting firm recommended implementation of this methodology based on its experience

that, "jurisdictions usually conclude that it is better to adopt impact fees based on current standards rather than desired levels of service" since the "latter approach creates existing deficiencies that must be corrected in a reasonable time from non-impact fee funding."

In 2007, the consultant, now TischlerBise, Inc. ("TischlerBise"), created a separate "School Impact Fees" report for each school district. These reports employed the "incremental expansion fee calculation" method to calculate the maximum supportable school impact fees for each district. According to TishclerBise, this method was "best suited for public facilities that will be expanded in regular increments, with [level of service] standards based on current conditions in the community." Also, this method used revenue "to expand or provide additional facilities, as needed, to accommodate new development."

TischlerBise's reports depicted the impact fee formula as the student per housing unit by type of unit (student generation rate), multiplied by the net local capital cost per student. The equation is visually represented as: Impact Fees = Student Generation Rate x Net Capital Cost per Student. The student generation rate stemmed from the system's average number of public school students per housing unit. The costs were "based on current levels of service . . . and project costs for each type of school facility (i.e., elementary, middle, and high), land for school sites, support facilities, portable classrooms, and buses." Finally, a credit was assessed for future revenue credits such as property taxes, and site-specific credits such as system improvements.

An in-depth look at the student generation rates by type of housing unit reveals that TishlerBise used an adjusted rate based on current enrollment from the 2006–07 school year. A detailed review of the formula to determine net capital cost per student shows that it consisted of several factors. First, construction costs were calculated using planned project costs in present dollars and previous project costs converted to "present-day costs" by using the "Marshall Valuation Service Comparative Cost Multipliers." These costs were expressed per square foot and multiplied by the square feet per student. The number of square feet per student was approximated by taking the existing facility square footage and dividing it by the current enrollment at each level. Second, a similar level of service calculation for land was employed by determining acre per student. An approximation of land value per acre of suitable sites was provided for each district "[p]er the Orange County Tax Assessor's office." As for portable classrooms, the consultant again applied its level of service formula to estimate costs. Next, to determine the costs of support facilities, the existing

building costs were divided by the current enrollment in each district. The costs of a shared transportation facility were assessed to both school districts. Vehicle costs were decided based on existing levels of service per district enrollment for the 2006–07 school year. Also included in TischlerBise's tabulation was a "consultant study cost per student," that required the feepayer to pay for the study (which assessed the fees to the feepayer). Finally, the calculation considered credits for present value on future principal payments of property taxes, paying down school bond debt per projected student enrollment.

After the total net local capital costs per student were determined by adding the above-listed categories, each district's maximum supportable impact fees were calculated by multiplying those costs by the student generation rate per level of school and housing unit type. These figures were expressed in a chart as fees at each level of school (elementary, middle, or high school) per housing unit type (single-family detached, single-family attached, multifamily, or manufactured home). Next, these numbers were summed to determine the maximum supportable impact fee per housing unit type. The report then recommended a "full update . . . every 3 to 5 years to reflect changes in development trends, infrastructure capacities, costs, funding formulas, etc." In contrast to the references contained in the 1990s report, the 2007 report did not mention the use of a planning period within the parameters set by the Session Law.

In 2016, Orange County again retained TischlerBise to complete another report to assess impact fees in each district. Like the earlier report, this report cited the "three basic methods for calculating impact fees" and favored the incremental expansion method. Unlike the prior report, student generation rates were further divided into more specific categories. There was no ascertainable use or articulation of a specific planning period to arrive at the rates. Costs were adjusted upwards in some cases (construction, portable classrooms in one district, support facilities, transportation in one district, consultant study), remained constant in others (portable classrooms in one district), or removed altogether (land, transportation in one district). Overall, in the Orange County School District, maximum impact fees were calculated much higher in each category of housing unit, with exceptions for the new categories of single-family detached of less than 800 square feet and age-restricted units. The Chapel Hill-Carrboro City School District assessments for maximum impact fees were higher for single-family attached and multifamily, and slightly lower for single-family detached and manufactured units.

III. Analysis

A. Standard of Review

This case presents cross-motions for summary judgment. Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). "[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (citations omitted). In other words, "[t]he court must view the evidence presented by both parties in the light most favorable to the nonmoving party." *Wilmington Star-News v. New Hanover Reg'l Medical Ctr.*, 125 N.C. App. 174, 178, 480 S.E.2d 53, 55 (1997) (citation omitted). The standard of review for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

B. Fee Payer Class

"Counties are instrumentalities and agencies of the State government and are subject to its legislative control; they possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them." *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965) (citations omitted). "They are authorized to exercise only those powers expressly conferred upon them by statute and those which are necessarily implied by law from those expressly given." *Davidson Cnty. v. High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987) (citations omitted). "Powers which are necessarily implied from those expressly granted are only those which are indispensable in attaining the objective sought by the grant of express power." *Id.* (citation omitted). Additionally, any such "statutorily granted powers" conferred upon a political subdivision "are to be strictly construed." *Id.* (citation omitted).

Here, in exercising its authority to tax, delegated by the Session Law, the County was required to "[e]stimate the total cost of improvements by category . . . that will be needed to provide in a reasonable manner . . . during *a reasonable planning period* not to exceed 20 years." 1987 N.C. Sess. Laws 616, ch. 460, § 17(c) (emphasis added). Since "the statutory language is clear and unambiguous, we must give effect to the plain and definite meaning of the language." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (citation omitted). In order to determine whether the County complied with

the unambiguous language of the Session Law, an analysis of the formula used by its hired consultant is necessary.

The formula used by TischlerBise to calculate the fees imposed on residential developments begins by determining the "student generation rate" (number of public school students per housing unit). This portion of the calculation considers estimated demand levels that would be relevant for determining, what if any, planning period was employed. As a starting point, the County provided "2005 student generation rates" to TischlerBise. The consultant multiplied the provided rates by "estimated housing units" (from a base year of 2006—07) to surmise the number of "estimated students." Then, the "adjusted student generation rates" used in TischlerBise's impact fee calculation were derived by dividing actual student population (from 2006—07 school year enrollment data) by "estimated students," and then multiplying this result by the County's 2005 student generation rate. After carefully reviewing TischlerBise's calculation, there is evidence that a planning period was not incorporated into the formula that ultimately determined impact fees. The language of the Session Law requires "a reasonable planning period not to exceed 20 years." 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). Therefore, an application of the plain meaning rule to the Session Law's language and employment of the principle of strict construction would preclude this Court from concluding that the trial court properly granted summary judgment for the County.

The majority's holding that the County complied with the Session Law's planning period requirement is overly reliant on language in the Ordinance that "funds . . . shall be expended within (10) ten years, the timeframe coinciding with the public school facilities capital improvements program (CIP) school impact fee period." Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-35(c)(5) (2008). However, these words mean nothing if the County's course of action pursuant thereto failed to follow its own requirements. Here, the paramount consideration is a thorough review of the calculations used in TischlerBise's reports that determined maximum supportable impact fees which were adopted by the County. Therefore, merely placing a window dressing of statutorily-compliant language in the Ordinance—the requisite planning period in this case—has no bearing if such planning period was not genuinely employed in the calculations implemented by the County upon taxing the citizenry.

Alternatively, the majority maintains that "even if the County did not employ the ordinance's 10-year planning period and otherwise relied exclusively on . . . TischlerBise's 2007 Reports . . . the Reports themselves

estimated the total anticipated capital improvement costs to schools for a five-year period, stating OCSD's 'school local capital costs average approximately $6 million per year, or *$30.4 million over five years*,' and the CHCSD's 'school local capital costs average approximately $11.3 million per year, or *$56.7 million over five years*.' " To the contrary, this "Cash Flow Projections" section of TischlerBise's 2007 reports is not a planning period, but a projection provided to the County showing that the "maximum supportable level" of impact fees (determined by their method of calculation) would cover 85% of capital costs over a period of five years. A summary of projected cash flow is not an ascertainable planning period used in the math of TischlerBise's 2007 reports.

The majority also discounts the impact of any flaws in the consultant's work by relying on "the fact that the County Board of Commissioners is not TischlerBise." This logic would withstand scrutiny if the County had independently used a system to tax its citizens that articulated needs by category ("estimate the total cost of improvements by category. . . that will be needed"), appropriately tailored within the confines of the Session Law ("in a reasonable manner for the public health, safety and welfare"), and within a specific period of time to accurately calculate demand ("during a reasonable planning period not to exceed 20 years"). 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). Nonetheless, the record is clear that the County applied percentages to the exact same numbers contained in their consultant's reports. In sum, the County's taxation scheme directly implemented the calculations (and any underlying assumptions) used by TischlerBise. Accordingly, if TischlerBise failed to use "a planning period" as mandated by the Session Law, the County also failed to do so.

Further, the majority maintains that "even if the County did not employ the ordinance's 10-year planning period and otherwise relied on TischlerBise's 2007 Reports," this action was compliant with the Session Law because "the County's discovery responses explicitly identified this five-year estimate [from the 'Cash Flow Projections' section of TischlerBise's 2007 reports] as a planning period." Even if strict construction of the Session Law somehow permits us to accept alternate or multiple planning periods, we face contradictory evidence in the record from a County 30(b)(6) witness—the Director of Planning and Inspections Department for Orange County. This witness stated that the planning period was not ten years, and "it depends" as to whether it was less than ten years. When asked if the planning period was less than nine years, his response was, "you look back seven years." After the inability to provide a planning period, the County witness offered, "[w]hat I do know is that it was a reasonable period of time to assess the

impacts for public health, safety, and welfare of persons in the county." The majority maintains that this evidence "shows that the witness was testifying to his lack of definite knowledge concerning TischlerBise's utilized planning period rather than completely disclaiming any use of: (1) a planning period by TischlerBise; or (2) a 10-year planning period. . . ." While the majority provides an explanation to the witness's answer, the other explanation—that he does not know because a planning period was not used—is equally plausible and ripe for the deliberation of a jury. On its face, the evidence of compliance with the Session Law is contradictory and leaves fact-finding to be done by the factfinder.

The majority opinion also rests on the assertion that "whether the County used a five-year or a 10-year planning period[,] . . . that fact is not *material* to the Feepayer's claims because, whichever way that issue is resolved, it cannot establish non-compliance with the Enabling Act." However, the Session Law plainly required the County to "estimate the total cost of improvements by category . . . during *a reasonable planning period* not to exceed 20 years . . . and *the planning period* used may be changed from time to time." 1987 N.C. Sess. Laws 616, ch. 460, § 17(c) (emphasis added). To limit the planning period at or under twenty years, it must be identifiable. And to change the planning period from time to time, it must be ascertainable. Therefore, suggesting that the planning period can be X (an unknown number), and that we can just assume that X is equal to or less than twenty years, does not permit the County to carry out the intent of the words of the Session Law. Also, a plain and definite meaning of "a planning period" and "the planning period" can only mean a singular planning period. Assuming *arguendo*, if the Session Law somehow permitted the County to use planning periods of both X and Y (both equal to or less than twenty years), there is evidence that TischlerBise's reports did not even employ such calculation. The use of "a reasonable planning period not to exceed twenty years," is material to the litigation. Here, the statute must be strictly construed and, unlike horseshoes and hand grenades, strict compliance with its provisions is required.

Moreover, logic requires that a planning period must be identified for use in the mathematical formula estimating the anticipated needs sought to be addressed by the Session Law and the taxes authorized thereunder. In other words, if the County does not properly calculate the demand side of the equation as required by the Session Law, it cannot determine the permitted levels of taxation. Accordingly, the failure to use "a planning period" is noncompliance with the Session Law and results in *ultra vires* fee collection. 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). The inability of the County and the majority to articulate

the planning period illustrates the point that the calculations used by TischlerBise, and adopted by the County, may not have employed a planning period. Likewise, the majority also claims that "the Feepayers and the dissent have not identified any evidence showing that the County did not utilize a . . . planning period of less than 20 years. . . ." However, this is to be expected since the evidence indicates there is an absence of a planning period in the math of the consultant. Evidence of noncompliance with the Session Law is a material fact, as "it would constitute or would irrevocably establish any material element of a claim. . . ." *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981) (citation omitted).

Here, summary judgment would be appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). Furthermore, "[w]hen considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Strickland v. Hedrick*, 194 N.C. App. 1, 9, 669 S.E.2d 61, 67 (2008) (citation omitted). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Id.* (citation omitted). Contrary to the ruling of the trial court, the record before us shows there is genuine issue of material fact as to the claims against the Defendant. The record contains evidence that the incremental expansion method of calculation, employed by TischlerBise and adopted by the County, did not estimate the costs of improvements to be made "during a reasonable planning period not to exceed 20 years." 1987 N.C. Sess. Laws 616, ch. 460, § 17(c). Accordingly, regarding the County's compliance with the Session Law, there is an issue of fact to be resolved by a jury of the citizens who stand to assume the benefits and detriments of those fees.

C. Refund Class

Unlike the rule of strict construction guiding our review of a county's legislatively granted powers, "[a] remedial statute must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained." *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (citation omitted). A "statute, being remedial, should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope." *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) (citations omitted). "The rules applicable

to statutes apply equally to the construction and interpretation of an ordinance adopted by the 'legislative body' of a municipality." *In re O'Neal*, 243 N.C. 714, 720, 92 S.E.2d 189, 193 (1956) (citation omitted).

At issue, the Ordinance as amended in 2016, provides that when a reduction in impact fees is made "due to an updated school impact fee study . . . no refund of previously paid fees shall be made." ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, § 30-35(e) (2016) (repealed 2017). However, refunds shall be made if there is a reduction in fees "due to reasons other than an updated school impact fee study." *Id.* § 30-35(e)(2). Based on these provisions, plaintiffs posit two arguments: (1) that the 2016 TischlerBise impact fee studies were not "updated school impact fee stu[dies]" because they did not contain up-to-date data, and (2) the reduction in fees was "due to reasons other than an updated school impact fee study." Whereas the majority finds that both contentions lack merit, I would hold that the second issue creates a genuine issue of material fact, rendering the trial court's order of summary judgment inappropriate.

A review of the record shows that, on 11 December 2008, the Board of Commissioners of Orange County voted to implement annually increasing impact fees. Thereafter, in 2016, TischlerBise completed school impact fee reports for each school district. The maximum supportable impact fees calculated by TischlerBise were increased in each category of housing unit (excepting the new subcategory of single-family detached less than 800 square feet) from the last effective rates assessed under the 2008 Ordinance. *Id.* § 30-35(e). Nonetheless, on 15 November 2016, the County adopted the calculations from the report and assessed a percentage to these maximum figures that "feels fair." As a result of the numbers provided and the percentage selected (43% percent of the maximum supportable impact fee), effective 1 January 2017, fees for some categories from each district were reduced from their previous levels. At the same meeting, the Board updated the subsection on "Reimbursement of fees" to read: "[i]f . . . reduced due to an updated school impact fee study . . . no refund of previously paid fees shall be made." However, "[i]f . . . reduced due to reasons other than an updated school impact fee study, the difference between the old and new fees shall be returned to the feepayer. . . ." *Id.*

The record provides several possibilities as the impetus for the reduction in school impact fees. On 19 October 2016, the County attorney sent an email cautioning the Board of Commissioners about the North Carolina Supreme Court's recent posture towards impact fees. The email further warned the Board of Commissioners of "another keep

your head down aspect," perceiving that the status of the legislature with respect to the real estate lobby, made the timing of the proposed ordinance amendment "less than desirable." According to the County's planning director, this correspondence "would have been something that if they were to update their impact fees . . . they needed to keep these things in mind when they proceeded with making adjustments." The County's response to interrogatories provided another possible reason for the change in fee levels: "[a] breakeven point of 43% of the MSIF [maximum supportable impact fees] was used to achieve the same revenues in the first year as compared to the 2008 Fee Schedule." Compared to the reports produced by TischlerBise in 2007, the 2016 reports supported nearly across-the-board increases in school impact fees for both school systems. Nonetheless, on 15 November 2016, the County adopted the calculations from the 2016 reports and assessed a percentage to these increased maximum numbers that "feels fair" and thereby lowered impact fees for most housing categories.

Despite the preceding possibilities, the majority points to the following prefatory text of the Ordinance as amended in 2016, in which the County identifies the 2016 study as the precipitant for changes inthe fee rate:

> WHEREAS, *to ensure impact fees remain proportional to actual impacts caused, the County initiated a technical study in 2015 to study the school impact fees* and determine the "maximum supportable impact fee" that could be charged for various new housing types, and
>
> WHEREAS, said *technical study was completed in August 2016*, and
>
> WHEREAS, the County has held the required public hearing on the proposed amendments to Chapter 30, Article II of the Code of Ordinances *and the impact fee studies*.
>
> BE IT ORDAINED by the Board of Commissioners of Orange County that Chapter 30, Article II—Education Facilities Impact Fee is hereby amended as depicted in the attached pages.

ORANGE COUNTY, N.C., ORANGE COUNTY CODE OF ORDINANCES ch. 30, art. VI, § 30-35(e) (2016) (repealed 2017) (emphasis added). We should not accept the mention of the 2016 study in the prefatory language of the amended Ordinance as superior to and unchallenged by other contrary evidence that should be viewed "in a light most favorable to the

nonmoving party." *Strickland*, 194 N.C. App. at 9, 669 S.E.2d at 67. While the prefatory language of the amended Ordinance suggests one possible precipitant, overreliance on this text turns a blind eye to other evidence in the record.

Consider an ordinance, such as the remedial ordinance at issue, which requires a determination of causation. If the prefatory language always unquestionably governs in the face of evidence to the contrary, then the inclusion of the language of the amended Ordinance mandating that refunds shall be made if there is a reduction in fees "due to reasons other than an updated school impact fee study" was unnecessary and futile. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-35(e)(2) (2016) (repealed 2017). Deference to the prefatory language to this end does not broadly construe the amended Ordinance "in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained." *O & M Indus.*, 360 N.C. at 268, 624 S.E.2d at 348 (citation omitted).

Next, the majority opinion seeks to square this circle by negating the discovery responses from the County and citing principles of statutory interpretation, in stating that "the intentions of the legislating body are to be derived from the text of the enactment rather than the statement of individuals." Such consideration might rule the day if our inquiry was one of pure statutory construction—seeking to derive the legislature's intent from an ambiguous enactment. However, here, we seek to determine whether there is a genuine issue of material fact as to whether the County complied with the unambiguous language of the amended Ordinance. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *Savage v. Zelent*, 243 N.C. App. 535, 538, 777 S.E.2d 801, 804 (2015). An application of this standard does not permit this Court to discount the discovery responses and statements by the County's planning director, the County's attorney, and individual commissioners. Dismissing the "reasons other than an updated school impact fee study" in the record as "policy concerns" does not negate their role in causation. Orange County, N.C., Orange County Code of Ordinances ch. 30, art. VI, § 30-35(e)(2) (2016) (repealed 2017). Being remedial, the rules of construction governing interpretation of the amended Ordinance do not provide us the latitude to ignore evidence of some reasons—including policy reasons—for the reduced fees.

The record reflects several potential "reasons other than an updated school impact fee study" for which the County reduced impact fees. Considering these other possible reasons contained in the record, broad construction of the County's self-imposed requirement for refunds "due

to reasons other than an updated school impact fee study" shows that a genuine issue of material fact exists. *Id.* § 30-35(e). As such, I would reverse the trial court's grant of summary judgment and allow a jury to fulfill its proper role as the finder of fact.

IV. Conclusion

Under a *de novo* standard of review of summary judgment, when viewing the evidence presented by both parties—the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits—in the light most favorable to the nonmoving party, there are genuine issues of material fact. As to the fee payer class, there is evidence that TischlerBise's method of calculating impact fees, adopted by the County, did not use a planning period. Employment of a planning period is not evident in the consultant's method of calculation, nor is it known to the County's own 30(b)(6) witness. Since there is a genuine dispute of material fact as to whether the County used a planning period, the impact fees may have been *ultra vires*. For the refund class, the record contains evidence that impact fees were reduced for reasons other than an updated school impact fee study. The County's own 30(b)(6) witness cited concerns of "timing" and "the nature of the General Assembly." Thus, there is a genuine issue of material fact as to whether the County complied with the refund provision required by its Ordinance as amended in 2016. Accordingly, I respectfully dissent from the majority and would hold that the trial court's order granting summary judgment for Orange County must be reversed.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JULY 2023)

BETTS v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 22-324	N.C. Industrial Commission (X59367)	REMANDED IN PART AND AFFIRMED IN PART
FOXX v. STREET No. 23-73	Mitchell (22CVS77)	Affirmed.
FOXX v. STREET No. 23-71	Mitchell (22CVS75)	Affirmed.
IN RE A.H. No. 22-833	Guilford (21JA84) (21JA85) (21JA86) (21JA87)	Affirmed
IN RE A.L. No. 22-916	Guilford (20JT75) (20JT76)	Affirmed
IN RE A.L.J.W. No. 22-986	Randolph (21JT41) (21JT42)	Affirmed
IN RE A.M.H.B. No. 22-711	Pender (20JT33)	Affirmed
IN RE C.L. No. 22-946	Franklin (20JT28) (20JT29)	Reversed
IN RE C.T. No. 22-843	Lincoln (20JA22) (20JA23) (20JA24) (20JA25)	Vacated and Remanded
IN RE EST. OF CORBETT No. 22-526	New Hanover (16E1551)	No Error
IN RE EST. OF CORBETT No. 22-618	New Hanover (16E1551)	AFFIRMED IN PART AND DISMISSED IN PART
IN RE J.S. No. 22-878	Union (20JT143)	Vacated and Remanded

IN RE K.S. No. 22-942	Person (17JT74) (17JT75)	Affirmed
IN RE M.N.-R.S. No. 22-759	Wilkes (20JA95)	Vacated and Remanded
IN RE N.W. No. 22-355	Johnston (21JA39) (21JA40) (21JA41) (21JA42) (21JA43)	REVERSED IN PART; VACATED IN PART AND REMANDED.
IN RE S.G.S. No. 22-868	Buncombe (19JT140)	Affirmed
IN RE T.A.C. No. 22-857	Ashe (21JT21) (21JT22)	Reversed and Remanded
IN RE WILL OF LANCE No. 22-1048	Transylvania (20E31)	Affirmed
IN RE Z.A.G. No. 22-815	Buncombe (19JT173)	Affirmed
MONDA v. MATTHEWS No. 22-1041	Davie (21CVS335)	Affirmed
RODRIGUEZ v. MABE STEEL, INC. No. 22-999	N.C. Industrial Commission (21-001716)	Affirmed
SMITH v. PIEDMONT TRIAD ANESTHESIA, P.A. No. 22-464	Forsyth (16CVS5181-82)	Affirmed
STATE v. DANCY No. 22-1055	Person (20CRS51060) (20CRS701806)	NO ERROR; NO PREJUDICIAL ERROR
STATE v. FORD No. 23-23	Pitt (21CRS56504)	NO ERROR IN PART, VACATED IN PART AND REMANDED FOR RESENTENCING
STATE v. GANNON No. 22-827	Johnston (20CRS51476)	Affirmed

STATE v. GARCIA No. 22-791	Wake (19CRS209718)	No Error
STATE v. McCARTY No. 22-388	Onslow (16CRS57559) (17CRS58110-11)	NO ERROR; NO PLAIN ERROR; NO INEFFECTIVE ASSISTANCE OF COUNSEL.
STATE v. McCORMICK No. 22-690	Cumberland (19CRS3012) (19CRS51622) (19CRS54261-62)	No Error
STATE v. PAINTER No. 22-864	Wayne (16CRS54517-18)	No Error
STATE v. PURVIS No. 22-897	Pitt (20CRS56642-43) (20CRS56646-47) (20CRS56673)	Vacated in part and Remanded
STATE v. STOKES No. 22-898	Onslow (16CRS56184) (17CRS50499) (19CRS50295) (20CRS310-11)	No Error
STATE v. THOMPSON No. 22-682	Mecklenburg (12CRS253233-35) (12CRS253237) (12CRS55383-85) (12CRS55387-89) (12CRS55391) (12CRS55394)	Affirmed.
TUEL v. TUEL No. 23-20	Johnston (17CVD1533)	Vacated and Remanded
UNDERWOOD v. INGLES MKTS., INC. No. 23-42	N.C. Industrial Commission (18-001543)	Affirmed
WALSH v. STREET No. 23-72	Mitchell (22CVS76)	Affirmed.

IN RE A.J.

[289 N.C. App. 632 (2023)]

IN THE MATTER OF A.J., J.C., J.C.

No. COA22-522

Filed 18 July 2023

1. Evidence—hearsay—child neglect and dependency proceeding—statements by child to social workers—residual exception—statement by party opponent

An order adjudicating a mother's oldest child as neglected and her two younger children as neglected and dependent was reversed and remanded where the trial court had based multiple factual findings on inadmissible hearsay statements made by the middle child to social workers (regarding altercations between the child and the mother). The statements were inadmissible under the residual hearsay exception (Evidence Rule 803(24)) because the court did not enter any findings showing that it had considered the different circumstances under which the exception would apply. Additionally, the court erred in admitting the statements under the hearsay exception for statements made by a party opponent (Rule 801(d)), since only the mother—not the child who made the statements—was a party opponent to the petitioner-complainant in the proceeding. Furthermore, the mother showed that she was prejudiced by the court's error where, absent the improperly admitted hearsay evidence, the record did not support the court's adjudications.

2. Child Abuse, Dependency, and Neglect—adjudication—neglect—improper care or supervision—environment injurious to welfare—sufficiency of evidence and findings

The trial court erred in adjudicating a mother's three children as neglected on grounds that they received improper care or supervision from the mother and lived in an environment injurious to their welfare. Firstly, the court's findings describing a series of altercations between the mother and the middle child—absent any admissible evidence of physical harm to the child—were insufficient to show that the middle child was improperly disciplined. Secondly, because the middle child was residing in a voluntary kinship placement at all relevant times, the record did not support a conclusion that the middle child lived in an injurious environment under her mother's care. Thirdly, the court made no findings regarding the youngest child and only one relevant finding about the eldest child, which was insufficient to establish neglect. Finally, none of the evidence and findings established that the eldest and youngest children

lived in a home where the middle child was neglected, and therefore they could not be adjudicated as neglected on that ground.

3. Child Abuse, Dependency, and Neglect—adjudication—dependency—ability to care for or supervise—alternative child care arrangements—sufficiency of findings

The trial court erred in adjudicating a mother's two younger children as dependent where, in determining whether a juvenile is dependent, the court was required to enter findings of fact addressing both prongs of N.C.G.S. § 7B-101(9)—the parent's ability to care for or supervise the children, and the availability of appropriate alternative child care arrangements—but the court failed to enter any findings or conclusions regarding the first prong. Regarding the second prong, although both children lived in voluntary placements with relatives for several years before the juvenile petitions were filed, the evidence did not support a finding that those placements were necessary due to an unwillingness or inability on the mother's part to parent her children.

Appeal by respondent-mother from order entered 22 March 2022 by Judge Lee Teague in Pitt County District Court. Heard in the Court of Appeals 13 July 2023.

The Graham Nuckolls Conner Law Firm, PLLC, by Jon G. Nuckolls, for petitioner-appellee Pitt County Department of Social Services.

North Carolina Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche and Brittany T. McKinney, for guardian ad litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky L. Brammer, for respondent-appellant mother.

TYSON, Judge.

Respondent is the mother of four-year-old A.J. ("Amanda"), thirteen-year-old J.C. ("Jade"), and fifteen-year-old J.C. ("Juliet"). *See* N.C. R. App. P. 42 (pseudonyms are used throughout the opinion to protect the identity of the juveniles). She appeals from an order entered 22 March 2022, adjudicating Amanda as a neglected juvenile, and Jade and Juliet as neglected and dependent juveniles, and placing the children into the custody of the Pitt County Department of Social Services ("DSS"). Respondent argues, and we agree, the inadmissible evidence and the

trial court's findings thereon are insufficient to support its conclusions and adjudications. We reverse and remand.

I. Background

In June 2021, DSS received a report alleging neglect and improper discipline based on an incident between Respondent and Jade. DSS created a safety plan with Respondent, in which she agreed to refrain from physical discipline and to begin to receive mental health services for herself and the children. Respondent also agreed to allow Jade and Juliet to continue residing with their maternal great aunt, with whom they had resided since 2018.

In November 2021, the Washington County Department of Social Services ("WCDSS") sent DSS a report of another altercation between Respondent and Jade. On 21 December 2021, WCDSS responded to a report alleging Respondent had locked Jade out of the house. WCDSS, DSS, and Respondent were unable to identify a temporary safety placement for Jade.

On 22 December 2021, DSS filed juvenile petitions alleging Amanda was a neglected juvenile and alleging Jade and Juliet were neglected and dependent juveniles, based upon these three reported incidents. DSS also obtained nonsecure custody of Jade, and she was placed into the care of her maternal great aunt. Juliet remained in the voluntary care of her maternal great aunt, and Amanda, the youngest daughter, has remained in Respondent's care.

On 8 February 2022, DSS filed a notice it intended to present hearsay statements at the adjudication hearing purportedly made by Jade and Juliet. DSS asserted their statements, made to DSS and WCDSS social workers, fell under the residual hearsay exception of N.C. Gen. Stat. § 8C-1, Rule 803(24) (2021).

The petitions were heard on 17 February 2022. During the adjudicatory phase, DSS presented testimony from a DSS social worker and a WCDSS social worker, each of whom testified to statements purportedly made to them by Jade. Respondent's counsel objected before, during, and after the social workers introduced the hearsay statements, but the court overruled the objections each time and allowed the statements to be admitted into evidence.

On 22 March 2022, the trial court entered an order adjudicating all three children as neglected juveniles and adjudicating both Jade and Juliet as dependent juveniles. The court later determined the children's best interests demanded for them to be placed into DSS' custody. Respondent timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(3) (2021).

III. Issues

Respondent argues the trial court erred by: (1) admitting hearsay statements purportedly made by Jade, (2) adjudicating all three children as neglected, (3) adjudicating Jade and Juliet to be dependent, and (4) concluding the children's best interests demanded for all of them to be removed from their parent and family and placed into DSS custody.

IV. Standard of Review

This Court reviews an adjudication "to determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the court's findings, in turn, support its conclusions of law." *In re J.R.*, 243 N.C. App. 309, 312, 778 S.E.2d 441, 443 (2015) (citation and internal quotation marks omitted). "When reviewing findings of fact in a juvenile order, the reviewing court 'simply disregards information contained in findings of fact that lack sufficient evidentiary support' and examines whether the remaining findings support the trial court's determination." *In re A.J.L.H.*, 384 N.C. 45, 52, 884 S.E.2d 687, 693 (2023) (quoting *In re A.C.*, 378 N.C. 377, 394, 861 S.E.2d 858 (2021)). The trial court's conclusions of law are reviewed *de novo*. *Id.*

V. Analysis

A. Findings of Fact

[1] The trial court's order contains eighteen adjudicatory findings of fact, eight of which Respondent challenges in whole or in part:

> 5. The Department received a report relating to the Juveniles beginning on June 6, 2021, alleging neglect and improper discipline on the part of the Respondent Mother. The specific allegations were that the Juvenile, [Jade], was observed limping by another family member and later disclosed once Respondent Mother was gone that she had been in a physical altercation with the Respondent Mother. The Juvenile did not want to get out of the car and the Respondent Mother began twisting her leg trying to remove her from the car. The Juvenile locked herself in the car to get away from the Respondent Mother. The Respondent Mother then took a shovel and broke the window. Thereafter, the Respondent Mother beat the Juvenile

with a belt buckle in the head and all over her body. She also choked and threatened to kill the Juvenile. The Respondent Mother admitted to the Department Social Worker that the altercation occurred. The Respondent Mother admitted she broke (sic) the car window in today's testimony.

. . .

7. Another report was received on November 16, 2021 that the Respondent Mother had choke slammed the Juvenile, [Jade], and threw her out of the car. This incident was reportedly witnessed by a family member over a video call. During the hearing . . . Respondent Mother yelled out, "I did it." when the choke slam was testified to.

8. On December 21, 2021, the Juvenile, [Jade], had agreed to go with Respondent Mother thinking she would be able to get her Christmas gifts and return to her [great] aunt's home, where she had been living for several years. Instead, the Juvenile discovered that Respondent Mother planned to enroll her in school in Washington County, which upset the Juvenile.

9. On December 21, 2021, there was another report made that the Respondent Mother locked the Juvenile outside in the cold weather because she refused to babysit her two-year-old sister. When [the WCDSS social worker] arrived at the home, he discovered that law enforcement had to handcuff Respondent Mother just to get her to calm down. [He] observed Respondent Mother was "cussing and fussing" and demanding that the child, [Jade] come inside. [The social worker] confirmed that [Amanda], the 2-year-old child, was present and witnessed Respondent Mother's outbursts and being handcuffed. This was upsetting to the 2-year-old. Respondent Mother's behavior was unstable.

10. Neighbors, who witnessed the child's distress had let the Juvenile, [Jade], in their home to wait for assistance, as they were concerned about her.

11. The Juvenile, [Jade], is very afraid of Respondent Mother and does not want to be in her care. The Juvenile has refused to get out of the Social Worker's car, fearful

> that the Respondent Mother would kill her. The Juvenile, [Jade], confirmed there had been prior physical altercations with Respondent Mother.
>
> 12. The Respondent Mother suffers from mental and psychological illnesses as a result of traumatic experiences throughout her life, including witnessing the murder of the Juveniles' father. In 2016, Respondent Mother was the driver of a vehicle involved in an accident where two others were killed. The Respondent Mother suffered injuries that required hospitalization. The Respondent Mother has denied mental health diagnosis. The Respondent Mother has presented as extremely hostile and aggressive throughout the hearing of this matter as evidenced by numerous outbursts in the Courtroom and aggressive comments directed toward other participants in this proceeding.
>
> 13. The Respondent Mother also has a history of drug use, specifically marijuana.

Respondent argues the trial court, over multiple objections, erroneously admitted hearsay statements purportedly made by Jade. We agree.

DSS's notice of its intent to offer hearsay statements specifically indicated the proffered statements purportedly fell under the residual exception of N.C. Gen. Stat. § 8C-1, Rule 803(24) (2021). However, at the hearing, DSS changed its position from that basis asserted in the notice and appeared to argue Jade's statements were admissible because the social worker had

> direct knowledge. He had this conversation with the juvenile and he, as he testified, had a conversation with the Respondent-Mother, both of which are parties to the case, and anything that the mom said, I would argue, is an admission of the Respondent-Mother and the juvenile as well. Her statement should be allowed in, as she is a party to the case as well.

Over objections, the trial court ruled the statements were admissible because "the juvenile is a party to the action with the admission by the party as well."

The trial court's determination and ruling were erroneous under either of the possible hearsay exceptions noticed or presented by DSS at the hearing. In order to admit hearsay under the residual exception, the trial court must

> determine whether (1) proper notice has been given; (2) the hearsay statement is not specifically covered elsewhere; (3) the statement possesses circumstantial guarantees of trustworthiness; (4) the statement is material; (5) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and (6) the interest of justice will be best served by admission.

In re W.H., 261 N.C. App. 24, 27, 819 S.E.2d 617, 620 (2018) (citation omitted).

Such "careful consideration" must be reflected in the trial court's findings. *In re F.S.*, 268 N.C. App. 34, 41, 835 S.E.2d 465, 470 (2019). As no such findings were made, either during the hearing or in the order, Jade's purported hearsay statements were not properly admitted under this exception and should have been excluded upon objection. *Id.* at 42, 835 S.E.2d at 470.

A statement made by a party opponent is

> admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.

N.C. Gen. Stat. § 8C-1, Rule 801(d) (2021).

In abuse, neglect, and dependency actions, the parents are party opponents to the petitioner-complainant. *In re J.M.*, 255 N.C. App. 483, 489, 804 S.E.2d 830, 834 (2017). The trial court erred in concluding Jade, a juvenile, was a "party to the case," and, as her statements do not fall under any of the exceptions outlined in Rule 801(d), her purported statements were not admissible. Respondent's objections should have been sustained.

Neither DSS nor the guardian *ad litem* contest or argue Respondent's assertion of Jade's purported statements constituted inadmissible hearsay. Instead, they contend Respondent failed to establish the

inadmissible hearsay statements were prejudicial and argue the findings were supported by other properly admitted clear and convincing evidence. Respondent counters and contends the prejudice to her is "readily apparent," as the trial court's conclusions are unsupported by a factual basis, absent the inadmissible hearsay evidence. *In re F.S.*, 268 N.C. App. at 41, 835 S.E.2d at 470. We agree.

At the hearing, the DSS social worker acknowledged DSS was still investigating the allegations in all three reports, and the majority of the evidence to support the unsubstantiated allegations was based upon Jade's purported statements. We disregard the challenged findings, or portions thereof, which rely upon Jade's inadmissible hearsay statements or those which are otherwise unsupported. *In re A.J.L.H.*, 384 N.C. at 52, 884 S.E.2d at 693. This includes the entirety of Finding of Fact 13, as it relies solely upon inadmissible hearsay, and the entirety of Finding of Fact 7, as the only portion not solely based on Jade's inadmissible hearsay statements was apparently a misapprehension by the court.

The order identifies 16 November 2021 as the date the report "was received," by DSS, which tracks the language of the petitions. The testimony at hearing indicates WCDSS received the report 9 November 2021. Respondent asserts this discrepancy supports her assertion and argument that the trial court's findings were merely improper recitations of allegations in the petitions and do not reflect an adjudication of the evidence and findings of facts. However, it appears: (1) the report was first received by WCDSS, which then forwarded the report to DSS; and, (2) only one event allegedly occurred in November 2021.

Moreover, no properly admitted evidence supports any allegations from November 2021. When the court sought clarification on what the allegation of "choke-slammed" meant, Respondent objected and the transcript shows she stated she "didn't do it[,]" and not that she did. The properly admitted evidence, including Respondent's testimony and the social worker's testimony concerning their knowledge of the reports, supports portions of Findings of Fact 5, 8, 9, 10, 11, and 12.

Finding of Fact 5 has sufficient evidence to support an argument had occurred between Jade and Respondent on or about 6 June 2021. Jade purportedly refused to her mother's instruction to get out of the car, Respondent allegedly slapped and hit Jade with a belt, Jade locked herself in the car, and Respondent broke the vent window to unlock the car and to gain access. The remainder of Finding of Fact 5 is unsupported by properly admitted evidence.

The alleged 21 December 2021 incident, as described in Findings of Fact 8, 9, 10, and 11, finding another argument occurred between Jade and Respondent is supported by sufficient evidence. Jade was allegedly upset by Respondent's intention to enroll her in a school located in Washington County. Neighbors allegedly saw Jade standing outside and invited her to come into and wait inside their house.

Police officers allegedly told a WCDSS social worker they had handcuffed Respondent prior to his arrival. Respondent began "arguing and cussing" when the social worker called the child's maternal great aunt. The social worker allegedly believed Jade was "afraid" because, as had occurred with Respondent earlier, Jade remained inside the DSS vehicle, recalcitrant and disobeying instructions, and had refused Respondent's instructions for her to exit the DSS vehicle and go inside of Respondent's home. Amanda was two years old and was allegedly present during the incident. The remainder of these findings are unsupported by properly admitted evidence.

Sufficient evidence supports portions of Finding of Fact 12, finding Respondent had experienced several severe traumatic events in her life, had denied diagnoses of mental illness, and had outbursts during the hearing. However, no clear and convincing evidence and no expert medical testimony were presented to show or prove Respondent "suffers from mental and psychological illnesses as a result of traumatic experiences[.]"

"Without the improperly admitted hearsay evidence, [and with the lack of any other clear and convincing evidence,] the record does not support the trial court's conclusion[s]." *In re F.S.*, 268 N.C. App. at 41, 835 S.E.2d at 470. Respondent has established she was prejudiced by the trial court's erroneous admission of hearsay and other unsupported testimony. *Id.*

B. Neglect

[2] The trial court concluded all three children were neglected juveniles as defined in N.C. Gen. Stat. § 7B-101(15), as they did "not receive proper care, supervision or discipline from [their] parent, guardian, custodian or caretaker and [they] live[d] in an environment injurious to their welfare." "In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect *by an adult who regularly lives in the home*." N.C. Gen. Stat. § 7B-101(15) (2021) (emphasis supplied).

The unsupported findings of fact, as discussed above, are insufficient to support an adjudication that Jade was neglected. An argument

between a parent and child or use of corporal punishment, with no evidence of any resulting marks, bruising, or other injury, does not constitute neglect. *In re Thompson*, 64 N.C. App. 95, 98-99, 306 S.E.2d 792, 794 (1983) (concluding that a child who is repeatedly "disciplined so severely that bruises and internal abrasions [can be] a 'neglected' juvenile"); *See State v. Varner*, 252 N.C. App. 226, 228, 796 S.E.2d 834, 836 (2017) ("[O]ur Supreme Court has recognized that, as a general rule, a parent . . . is not criminally liable for inflicting physical injury on a child in the course of lawful administering corporal punishment." (citation omitted)); *In re C.B.*, 180 N.C. App. 221, 224, 636 S.E.2d 336, 338 (2006) (holding the respondent's punishment by "spanking [or] whipping that resulted in a bruise" and not "serious injury" did not constitute abuse under N.C. Gen. Stat. § 7B-101(1)).

Similarly, the supported findings regarding the June and December 2021 incidents are insufficient to establish Respondent's improper care or supervision of her children. Respondent testified that she felt it was necessary to break the car vent window after Jade had locked herself inside the vehicle and refused Respondent's instructions to open the door or exit the vehicle. Respondent testified she only used "light force" to break a vent window only to unlock the car.

Respondent's intention to enroll Jade in school located in Washington County, where Respondent lived, allegedly precipitated the December incident. The place of the family's residence and choice of their children's school is a parent's prerogative under parental care, custody, and control. Testimony at the hearing shows Respondent believed a school transfer was necessary, due to Jade's aggressive behavior at her current Greene County school. No record evidence supports a finding Respondent had locked Jade out of the home. Instead, a recalcitrant and undisciplined pattern of behavior is shown by Jade locking herself inside of and refusing to leave a car when she does not get her way, or disagrees and argues with Respondent.

Moreover, the evidence establishes that during all relevant periods and with Respondent's permission, Jade had been residing with her grandmother and later with her maternal great aunt. Where a child is residing in a voluntary kinship arrangement prior to any DSS involvement, and no evidence or adjudicatory findings support a conclusion the child has been subjected to harm in the parent's primary care, custody, and control, "the findings and evidence do not support a conclusion" of the child "living in an environment injurious to her welfare and not receiving proper care and supervision." *In re B.P.*, 257 N.C. App. 424, 434, 809 S.E.2d 914, 920 (2018). A child or DSS personnel disagreeing

with or preferring a different path to a parent's prerogatives and decisions for their child is not neglect. With no supporting evidence, the trial court erred in adjudicating Jade as a neglected juvenile. *Id.* at 434, 809 S.E.2d at 920.

The trial court's evidentiary findings center around the incidents between Jade and Respondent. The court made no evidentiary findings whatsoever concerning Juliet, who lived with her great aunt, and only one relevant finding concerning two-year-old Amanda. Though Amanda's presence while Respondent was "arguing and cussing" speaks "to the quality of [her] home environment[,]" that single finding does not support a conclusion and adjudication Amanda was neglected. *In re J.C.M.J.C.*, 268 N.C. App. 47, 58, 834 S.E.2d 670, 678 (2019).

As the evidence fails to establish Jade was a neglected juvenile, the trial court also erred in, *ipso facto*, adjudicating Juliet, who was living at her maternal great aunt's home, and two-year-old Amanda as neglected juveniles. *Cf. In re G.C.*, 384 N.C. 62, 68, 884 S.E.2d 658, 662 (2023) (evidentiary findings establishing neglect of one child *residing in the home* may support an ultimate finding another child was neglected).

The trial court also made a finding regarding Amanda's "agitation" during the hearing and Respondent's unwillingness to remove Amanda from the proceedings. The purpose of an adjudicatory hearing is to determine only "the existence or nonexistence of any of the conditions alleged in a petition." N.C. Gen. Stat. § 7B-802 (2021). The trial court failed to make findings to show this interaction was relevant or admissible in any manner as adjudicatory evidence concerning the allegations in the petition. *In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 870 (2015) (providing that post-petition evidence may be considered where it is relevant to "a fixed and ongoing circumstance" as alleged in the petition).

C. Dependency

[3] The trial court concluded Jade and Juliet were "dependent" juveniles as their "parent, guardian or custodian is unable to provide for [their] care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2021).

"In determining whether a juvenile is dependent, 'the trial court 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 B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)).

"Findings of fact addressing *both prongs must be made before* a juvenile may be adjudicated as dependent, and the *court's failure to make* these findings *will result in reversal* of the court." *Id.* (emphasis supplied).

The trial court failed to make any evidentiary findings or conclusions regarding Respondent's ability to care for or to supervise Jade and Juliet. The supported findings, as detailed above, address Respondent's arguments with Jade; no findings or conclusions show Respondent's behavior rendered her "wholly unable to parent" Jade or Juliet. *In re H.L.*, 256 N.C. App. 450, 458, 807 S.E.2d 685, 690 (2017).

While the trial court referenced Respondent's purported mental state, as concluded above, no evidence supports a finding that Respondent suffered from "mental and psychological illnesses," let alone "serious psychological problems" that impaired her ability to care for and supervise her children. *See In re T.B.*, 203 N.C. App. 497, 503, 692 S.E.2d 182, 186 (2010) (concluding that the mother's "suicidal ideation and tendencies," "chronic state of stimulus overload," and diagnoses of "Chronic Post Traumatic Stress Disorder, Major Personality Disorder, Major Depressive Disorder, and Dependent Personality Disorder" impaired her ability to parent her children).

We also reject DSS' and the guardian *ad litem's* assertion Respondent is unable to care for Jade and Juliet without constant assistance. The trial court failed to make any findings, other than her witnessing the murder of her older girl's father and being hospitalized from an automobile accident, regarding Respondent's reasons and permissions for Jade's and Juliet's voluntary placement with their grandmother and later their maternal great aunt for several years prior to the juvenile petitions.

The evidence also does not support a finding such a placement was necessary due to Respondent's unwillingness or inability to parent. Testimony shows Jade and Juliet originally went to live with their grandmother while Respondent recovered from injuries suffered from her car accident. After their grandmother's death and with Respondent's permissions, Jade and Juliet voluntarily went to live with their grandmother's sister: their maternal great aunt. Respondent testified she was willing and able to care for Jade and Juliet and to continue to parent Amanda. No evidence was presented to the contrary.

As the trial court failed to make sufficient findings, we conclude the trial court erred in adjudicating Jade and Juliet as dependent juveniles. *See In re J.A.G.*, 172 N.C. App. 708, 716, 617 S.E.2d 325, 332 (2005). That adjudication is reversed.

VI. Conclusion

The trial court erred in admitting the objected-to hearsay statements purportedly made by Jade to WCDSS and DSS social workers. Respondent was prejudiced by the court's error. The findings of fact, unsupported by properly admitted evidence, are insufficient to support the trial court's adjudications either that Jade, Juliet, and Amanda were neglected, or that Jade and Juliet were dependent. The 22 March 2022 order is reversed and this cause is remanded for dismissal. *See In re F.S.*, 268 N.C. App. at 47, 835 S.E.2d at 473. In light of our holding, we need not address Respondent's arguments concerning disposition. *It is so ordered.*

REVERSED AND REMANDED.

Judges FLOOD and RIGGS concur.

IN THE MATTER OF A.J.L.H., C.A.L.W., M.J.L.H.

No. COA20-267-2

Filed 18 July 2023

Child Abuse, Dependency, and Neglect—abuse and neglect—visitation—four biological parents—findings and conclusions required for each parent

In an abuse and neglect matter involving three children, where the trial court was required to determine the visitation rights of four different biological parents (the mother and three different men who each fathered one of the children), the trial court abused its discretion in awarding supervised visitation to one of the fathers while denying all visitation to the other parents. The court not only failed to make factual findings or conclusions of law addressing why only one parent was entitled to visitation with his child, but it also failed to enter specific findings and conclusions evaluating each individual parent's entitlement to visitation with their respective children.

Appeal by respondents from order entered 13 December 2019 by Judge Tonia A. Cutchin in Guilford County District Court. This case was originally heard in the Court of Appeals 17 November 2020. *See In re A.J.L.H.*, 275 N.C. App. 11, 853 S.E.2d 459 (2020). Upon remand from the Supreme Court of North Carolina.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Social Services.

Leslie C. Rawls, for the mother-appellant.

Benjamin J. Kull for respondent-father appellant.

Tin, Fulton, Walker & Owen, PLLC, by Cheyenne N. Chambers, for guardian ad litem.

TYSON, Judge.

This case was returned to this Court on remand from the Supreme Court of North Carolina to address Respondents' remaining arguments concerning the disposition order. *In re A.J.L.H.*, 384 N.C. 45, 47, 884 S.E.2d 687, 695-96 (2023), (hereinafter "*A.J.L.H. II*"), reversing and remanding *In re A.J.L.H.*, 275 N.C. App. 11, 853 S.E.2d 459 (2020) (hereinafter "*A.J.L.H. I*"). We reverse the orders of the trial court regarding visitation and remand for further findings of facts and conclusions of law.

I. Background

This matter involves the adjudication of Margaret as an abused and neglected juvenile, and the adjudication of Margaret's two younger siblings, Chris and Anna, as neglected juveniles. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identities of the juveniles). The facts and procedural history are set forth in the Supreme Court's opinion:

> Respondent-mother is the mother of Margaret, Chris, and Anna. Respondent-father lives with respondent-mother and the children but is the biological father only of the youngest child, Anna. The fathers of Margaret and Chris are not parties to this appeal.
>
> In May 2019, the Guilford County Department of Health and Human Services [("DHHS")] received a report of inappropriate discipline of Margaret. According to the report, Margaret "became extremely upset" following an incident at school and told school personnel that "she would be getting a whipping from her step-father just like she had done the previous day." The report noted that there were three marks on Margaret's back "where the skin was broken and appeared to be from a belt mark" as

well as red marks on Margaret's arms. The report further indicated that respondent-mother arrived at the school and stated that Margaret "was going to be punished again when she went home" and that Margaret "was afraid to go home."

The next day, DHHS received a second report that Margaret had a new injury on the upper part of her back or neck "that appeared to be like a silver dollar." Margaret explained that she "was hit" but would not give any details. Margaret was shaking and hiding under a desk, and she explained that she did not want to go home because "they" were "going to hurt me."

In response to this report, a social worker, Lisa Joyce, went to Margaret's school that day to speak with her. Joyce found Margaret under a desk in the school counselor's office. Margaret appeared nervous and told Joyce that she was afraid to go home. Margaret told Joyce that respondent-father hit her with a belt buckle, causing the marks on her back, and that respondents punished her by making her sleep on the floor without covers and stand in the corner for hours at a time. Joyce observed marks on Margaret's lower back and at the base of her neck, consistent with the two reports.

After speaking to Margaret, Joyce met with respondent-mother to discuss the allegations. Respondent-mother stated that Margaret "has been lying a lot lately" and that she knew about the marks on Margaret's back. She explained that the marks were "from the disciplinary action that she had asked respondent-father to perform" but that the marks were "accidental" due to Margaret moving around and causing respondent-father to hit her back instead of her buttocks area.

Respondent-mother also told Joyce "that she does take the bed privileges away for lying, that she does make Margaret stand in the corner from about 3:30 PM to around 6:00 PM," and that after stopping for dinner, "the child goes back to standing in the corner until it's bedtime." When asked about the frequency of punishment, respondent-mother stated "that recently it had been occurring about every day" due to Margaret's behavior. When Joyce expressed the view that the discipline seemed

"extreme to be using on the child," respondent-mother responded that she did not feel like what she was doing was wrong and she "felt like that this was appropriate."

Joyce also spoke with respondent-father. He reported to Joyce that he had physically disciplined Margaret in the days leading up to the DHHS reports and that he did so to "discourage the child from lying." Respondent-father also confirmed that Margaret "is made to stand in the corner for two to three hours at a time" and "made to sleep on the floor" as additional forms of discipline. When asked how often these disciplinary actions were happening, respondent-father stated that "it had been occurring a lot" in the past two months. Joyce asked whether respondent-father thought the practices were appropriate, and he responded that "he didn't see anything wrong with the disciplinary practices that they were using."

DHHS entered into a safety plan with respondents, under which Margaret was placed with her maternal grandmother. Chris and Anna remained in the home with respondents. Respondent-mother was charged with misdemeanor child abuse, and respondent-father was charged with assault on a child under the age of twelve in connection with their discipline of Margaret.

Between May and August 2019, DHHS social workers made home visits to check on Chris and Anna. They found no issues of concern. On 8 August 2019, DHHS held a meeting with respondents. The DHHS staff members explained their concerns about Margaret's discipline to respondents; however, respondents continued to defend their discipline of Margaret, with respondent-mother explaining that she was trying to "teach" Margaret that if Margaret continued misbehaving "she could end up in jail." Respondents did not commit to stop disciplining Margaret as they had in the past and did not acknowledge that these repeated, daily disciplinary measures—including whippings with a belt—were inappropriate for a nine-year-old child.

The following day, DHHS filed juvenile petitions alleging that Margaret was abused and neglected and that three-year-old Chris and three-month-old Anna were neglected. DHHS obtained custody of all three children.

> After a hearing in which the trial court received evidence concerning the facts described above, the court entered an adjudication and disposition order on 13 December 2019. In the order, the trial court adjudicated Margaret an abused and neglected juvenile and adjudicated Chris and Anna as neglected juveniles. In its disposition order, the court placed Margaret with a relative and Chris and Anna in foster care. The court determined that it was not in the children's best interests for respondents to have any visitation with the children while they worked on their case plans with DHHS. The court also scheduled a review hearing for several months after the date of the order.

In re A.J.L.H. II, 384 N.C. at 48-50, 884 S.E.2d at 690-91 (alternations in original omitted) (footnote omitted).

In the prior appeal, this Court vacated and remanded the order adjudicating Margaret as an abused and neglected juvenile. *In re A.J.L.H. I*, 275 N.C. App. at 21-23, 853 S.E.2d at 467-68. This Court explained the trial court's findings relied on inadmissible hearsay statements from Margaret, concluding it was "apparent the trial court's abuse adjudication [wa]s heavily reliant and intertwined with its findings based on inadmissible evidence." *Id.* at 23, 853 S.E.2d at 468. The matter was remanded to the trial court "for a new hearing at which the trial court should make findings on properly admitted clear and convincing evidence and make new conclusions of whether" Margaret is an abused or neglected juvenile. *Id.* If the trial court again found Margaret was an abused or neglected juvenile, this Court instructed the trial court to "order generous and increasing visitation between Margaret and her mother." *Id.* at 25, 853 S.E.2d at 469.

This Court further held the adjudications of Chris and Anna as neglected juveniles should be reversed, because those adjudications were "based solely on its conclusion Margaret was purportedly abused and neglected." *Id.* at 24, 853 S.E.2d at 468.

DHHS timely filed a petition for discretionary review to our Supreme Court pursuant to N.C. Gen. Stat. § 7A-31 (2021), and the guardian *ad litem* joined the request for review.

The Supreme Court allowed the petition, *In re A.J.L.H. II*, 384 N.C. at 51, 884 S.E.2d at 692, and reversed this Court's decision regarding Margaret's out-of-court statements, concluding: (1) Margaret's testimony was best classified as an out-of-court statement offered for a

purpose other than to prove the truth of the matter asserted and should not be considered hearsay; and, (2) this Court should have "simply disregard[ed] information contained in findings of fact that lack[ed] sufficient evidentiary support and examine[d] whether the remaining findings support[ed] the trial court's determination." *Id.* at 52, 884 S.E.2d at 692-93 (citation and internal quotation marks omitted).

Our Supreme Court also re-affirmed appellate review of a trial court's best interests assessment regarding a visitation decision made pursuant to N.C. Gen. Stat. § 7B-905.1 is for an abuse of discretion. *Id.* at 56-57, 884 S.E.2d at 695. "In the rare instances when a reviewing court finds an abuse of that discretion, the proper remedy is to vacate and remand for the trial court to exercise its discretion. The reviewing court should not substitute its own discretion for that of the trial court." *Id.* at 48, 884 S.E.2d at 690.

II. Issues

We review whether the trial court abused its discretion when it failed to provide for any visitation between Respondents and their children with their parents.

III. Dispositional Order for Visitation

Respondents argue the trial court abused its discretion when: (1) it prohibited *any* visitation between Respondent parents and their three children; and, (2) it concluded DHHS had made reasonable efforts to avoid taking custody of the children. They also assert "it was not reasonable for DHHS to seek custody of these children because of the parents' refusal to agree with the blanket accusation DHHS leveled against them." They also argue the trial court abused its discretion and erred by failing to consider and make the required factors and determinations to support any finding it was in the children's best interests to deny visitation.

A. Standard of Review

"The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and 'appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion.' " *A.J.L.H. II*, 384 N.C. at 57, 884 S.E.2d at 695 (quoting *In re K.N.L.P.*, 380 N.C. 756, 759, 869 S.E.2d 643, 646 (2022)).

"Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re K.N.L.P.*, 380 N.C. at 759, 869 S.E.2d at 646 (citation omitted).

"The standard of review that applies to an [assertion] of error challenging a dispositional finding is whether the finding is supported by competent evidence. A finding based upon competent evidence is binding on appeal, even if there is evidence which would support a finding to the contrary." *In re B.C.T.*, 265 N.C. App. 176, 185, 828 S.E.2d 50, 57 (2019) (citation and quotation marks omitted). Dispositional findings must be based upon properly admitted and clear cogent and convincing evidence. *Id.*

B. Analysis

After initially concluding a parent is either unfit or has acted inconsistent with his or her parental rights, "even if the trial court determines that visitation would be inappropriate in a particular case . . . it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration." *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (citation omitted). A trial court may only "prohibit visitation or contact by a parent when it is in the juvenile's best interest consistent with the juvenile's health and safety." *Id.*

> [E]ven if the trial court determines . . . that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a [visitation] plan [is] inappropriate in light of the specific facts under consideration.

In re K.C., 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009).

When denying *all* visitation, this Court has required the trial court to find factors such as: (1) whether the parent denied visitation has a "long history with CPS"; (2) whether the issues which led to the removal of the current child are related to previous issues which led to the removal of another child; (3) whether a parent minimally participated, or failed to participate, in their case plan; (4) whether the parent failed to consistently utilize current visitation; and, (5) whether the parent relinquished their parental rights. *See In re J.L.*, 264 N.C. App. at 422, 826 S.E.2d at 268 (analyzing a trial court's compliance with N.C. Gen. Stat. § 7B-905.1 regarding the visitation provisions awarded in a permanency planning order).

Here, the trial court was constitutionally and statutorily required to assess whether and to the extent visitation should be awarded to four different parents for each of their respective children. Respondent-mother's

visitation with all three children, Respondent-Father's visitation with Anna, Chris's biological father's visitation, and Margaret's biological father's visitation. The order contains and recites the history and current compliance to case plans for all four individuals.

The trial court, however, failed to find and make conclusions of law addressing the factors applicable to visitation for *each child with each parent*. The trial court also failed to conduct an individualized evaluation of the factors affecting *each parents'* visitation rights with his, her, or their children. The transcript shows the trial court only had the following brief exchange:

> THE COURT: In addition, the Court will also deny the request for visits between the juvenile [Anna], [Chris], and [Margaret] in reference to [respondent-mother]. The Court will also deny the request for visits in reference to [respondent-father] and [Anna].
>
> However, the Court will grant the request for visits between [Chris's biological father] and the juvenile [Chris] whereby he shall visit with this juvenile once per week for two hours, supervised by the Department.
>
> . . .
>
> The motion to place the juveniles [Anna] and [Chris] with [respondent-father's] relatives is denied. The request to attend medical appointments is also denied. However, the request for shared parenting is granted, via e-mail only.
>
> . . .
>
> [DHHS Attorney]: And Your Honor, a visitation order for [Margaret's biological father].
>
> THE COURT: No visits.

The trial court made no findings or conclusions regarding why only one parent, Chris's biological father, was entitled to supervised visitation with his child, but the other three biological parents were denied any and all visitation, placement with children's family or relatives, or presence and participation in their medical care. For example, the trial court found respondent-father had complied with his case plan, had maintained employment, had provided safe housing, and had significantly fewer legal infractions on his record than Chris's biological father, who was provided visitation. Neither the record nor the order provides a

finding or explanation for the objectively disparate treatment accorded to Chris's biological father and the other three parents involved in the matter, nor the denial of family or relative placement, and participation in the children's medical appointments.

The trial court failed to make specific determinations for each parent regarding unfitness or conduct inconsistent with their parental rights and, only after then, to determine whether parental visitation was in the best interests of each of their children. This absence demonstrates the trial court failed to make the required findings and conclusions and prejudicially erred in disposition. These failures: render the order manifestly unsupported by reason, demonstrate the conclusions of law were unsupported, lack legal validity, and constitutes an abuse of discretion. *In re K.N.L.P.*, 380 N.C. at 759, 869 S.E.2d at 646; *In re J.L.*, 264 N.C. App. at 421, 826 S.E.2d at 268.

IV. Conclusion

After reviewing the remaining dispositional questions remanded to this Court, we hold the trial court failed to make required and specific determinations of fact to demonstrate the trial court made supported conclusions of law. Upon remand, the trial court is to make the required findings of fact and conclusions of law concerning visitation, family placement, and parental involvement in medical treatment in the best interests of *each child for each respective parent of each child*. *In re K.N.L.P.*, 380 N.C. at 759, 869 S.E.2d at 646; *In re J.L.*, 264 N.C. App. at 421, 826 S.E.2d at 268.

We vacate those dispositional portions of the 23 October 2019 Adjudication and Disposition Order and remand for further proceedings. *It is so ordered.*

VACATED IN PART AND REMANDED.

Chief Judge STROUD and Judge HAMPSON concur.

REINTS v. WB TOWING INC.

[289 N.C. App. 653 (2023)]

JOHN REINTS, PLAINTIFF
v.
WB TOWING INC., DEFENDANT

No. COA22-1031

Filed 18 July 2023

1. Appeal and Error—timeliness of appeal—dismissal orders—tolling—Rule 52(b) motion

In an appeal from three orders entered in a negligence action—a dismissal order (for failure to join a necessary party), a post-dismissal order, and an amended post-dismissal order—the Court of Appeals lacked jurisdiction to consider the merits of the dismissal order because plaintiff filed his notice of appeal more than thirty days after the dismissal order was entered, thus making the appeal untimely pursuant to Appellate Rule 3(c). Plaintiff's Civil Procedure Rule 52(b) motion did not toll the time for filing a notice of appeal because a Rule 52(b) motion (which allows the court to amend its findings or make additional findings and amend the judgment accordingly) was not a proper motion in the context of dismissal for failure to join a necessary party, and the rule was not designed to provide a backdoor for making late amendments to a complaint. As for the amended post-dismissal order, which subsumed the post-dismissal order, plaintiff's notice of appeal was timely filed within 30 days of the effective date.

2. Civil Procedure—dismissal for failure to join a necessary party—Rule 52(b) motion—improper motion

In an appeal from three orders entered in a negligence action—a dismissal order (for failure to join a necessary party), a post-dismissal order, and an amended post-dismissal order—the trial court did not abuse its discretion in denying plaintiff's Civil Procedure Rule 52(b) motion to amend the dismissal order. Because the dismissal order was based on plaintiff's failure to join a necessary party, the trial court was not required to make findings of fact; furthermore, plaintiff's motion essentially requested reconsideration and sought permission to amend the complaint to add a necessary party, which is not relief authorized under Rule 52(b).

Appeal by Plaintiff from order entered 7 June 2022, *nunc pro tunc* 20 May 2022, by Judge Lindsey L. McKee in New Hanover County District Court. Heard in the Court of Appeals 25 April 2023.

John Reints, Plaintiff-Appellant pro se.

Cranfill Sumner LLP, by Steven A. Bader, Jason R. Harris, and Ryan L. Bostic for Defendant-Appellee.

RIGGS, Judge.

John Reints (Plaintiff) appeals an amended order entered 7 June 2022, *nunc pro tunc* 20 May 2022, (hereinafter, "Amended Post-Dismissal Order") in New Hanover County District Court. The Amended Post-Dismissal Order denied Plaintiff's motion to amend the trial court's earlier order granting WB Towing, Inc.'s (Defendant) motion to dismiss for failure to join a necessary party (hereinafter, "Dismissal Order"), entered 28 March 2022. Plaintiff also appeals this Dismissal Order and three of Plaintiff's issues presented on appeal arise out of the Dismissal Order. However, this Court does not have jurisdiction to consider the Dismissal Order, and we dismiss issues I, II, and IV, which arise out of that order. Further, we affirm the Amended Post-Dismissal Order.

I. FACTUAL AND PROCEDURAL HISTORY

On 3 August 2020, the 30.5-foot sailboat *Neriad*, owned by the Amphitrite Celestial Navigation Society ("the Society"), ran aground in the marsh near Wrightsville Beach, North Carolina, during Hurricane Isaias. Plaintiff, a member of the Society, discovered the boat in the marsh on 8 August 2020 and contacted Defendant to request assistance ungrounding the vessel. Defendant met Plaintiff at the location where *Neriad* was grounded to assess the boat's situation.

With Plaintiff's assistance, Defendant made multiple attempts with two towboats to tilt *Neriad* upright and pull the vessel into deeper water. While attempting to pull *Neriad* into deeper water, the force from the towline broke *Neriad's* mast. Ultimately, Defendant was unable to move *Neriad* from where it was grounded.

On 23 November 2021, Plaintiff filed a claim in New Hanover County small claims court alleging Defendant negligently broke the mast of *Neriad* when it attempted to unground the vessel. Plaintiff signed the complaint indicating that he was acting on behalf of the Society. According to Plaintiff, the cost of repairing the mast exceeded the market value of *Neriad*; therefore, the damage resulted in a constructive loss. The claim was heard in small claims court on 14 December 2021 and the magistrate entered an order on 20 December 2021 in favor of Defendant.

Plaintiff appealed the order to New Hanover County District Court on 28 December 2021 and filed an amended complaint on 18 January 2022. On 25 January 2022, Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) and (7). Defendant alleged that Plaintiff was not the real party-in-interest because he did not own the vessel. Plaintiff alleges he is a member of the Society, an unincorporated association that owns the vessel and, therefore, according to N.C. Gen. Stat. § 59B-7(e), he can make a claim on behalf of the Society. On 21 March 2022, the trial court heard arguments on the motion and granted the motion to dismiss without prejudice under Rule 12(b)(7) for failure to join a necessary party—the owner of the vessel. The trial court clarified that the ruling would not preclude a claim by the owner of the vessel if filed within the statute of limitations. The trial court entered the Dismissal Order in this matter on 28 March 2022.

On 1 April 2022, Plaintiff filed with the trial court an "objection to the order entered on 25 [sic] March 2022." ("Objection"). In this filing, Plaintiff argued that he had not been allowed a reasonable time for ratification of the action or joinder of the real party in interest as allowed by Rule 17 of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 17 (2021). However, Plaintiff did not request a remedy in his filing. On the same day, Plaintiff also filed a motion to amend the order pursuant to N.C. R. Civ. P. 52(b), in which Plaintiff requested that the court set aside the order granting the motion to dismiss to allow Plaintiff additional time to file and serve ratification of the claim by the real party in interest. (hereinafter, "Rule 52(b) motion to amend Dismissal Order")

The trial court held a hearing on 16 May 2022 to consider the Rule 52(b) motion to amend Dismissal Order. In that hearing, Plaintiff argued that the trial court did not allow reasonable time after the hearing on the motion to dismiss for ratification by the real party in interest. Defendant argued that Plaintiff was put on notice when Defendant filed its motion to dismiss that Plaintiff needed to join the vessel owner as a real party in interest; the two months between the motion and the hearing provided Plaintiff reasonable time to have the Society ratify the claim. Additionally, Defendant argued that the trial court no longer had jurisdiction to allow substitution or joinder of a party once the case was dismissed. The trial court noted that because the litigation dated back to late 2021, there was "ample opportunity" to add or substitute a party.

On 20 May 2022, the trial court entered an order dismissing the Rule 52(b) motion to amend Dismissal Order and Objection. (Hereinafter, "Post-Dismissal Order"). Plaintiff made an additional motion for findings of fact and conclusions of law on 20 May 2022. On 7 June 2022,

the trial court entered the Amended Post-Dismissal Order, *nunc pro tunc*, with an effective date of 20 May 2022, adding a denial of Plaintiff's motion to reconsider the Post-Dismissal Order.

On 9 June 2022, Plaintiff entered a notice of appeal designating the Dismissal Order, the Post-Dismissal Order, and the Amended Post-Dismissal Order.

II. ANALYSIS

A. Appellate Jurisdiction

[1] As a threshold issue, we must determine whether Plaintiff's notice of appeal was timely and properly conferred jurisdiction on this Court such that we can consider the merits of the issues presented in his appeal. After careful consideration, we hold that this Court has jurisdiction as to the Amended Post-Dismissal Order, which subsumes the Post-Dismissal Order, but does not have jurisdiction as to the Dismissal Order.

In order to confer jurisdiction on this Court, litigants appealing from trial court decisions must comply with Rule 3 of the North Carolina Rules of Appellate Procedure. *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Id.* To comply with Rule 3, the notice of appeal must be timely, which requires that the notice is filed within thirty days of entry of the judgment. N.C. R. App. P. 3(c) (2023). However, when a party makes a proper motion for relief pursuant to Rules 50(b), 52(b), or 59 of the Rules of Civil Procedure within ten days of entry of the order or judgment, the thirty-day period for taking appeal is tolled until entry of an order disposing of the motion. N.C. R. App. P. 3(c)(2)-(3).

In Plaintiff's notice of appeal, he designates three orders entered by the trial court: (1) the Dismissal Order; (2) the Post-Dismissal Order; and (3) the Amended Post-Dismissal Order. Because the Amended Post-Dismissal Order substitutes, as a legal matter, for the Post-Dismissal Order, we need only to address the jurisdiction of the Amended Post-Dismissal Order and the Dismissal Order.

1. Jurisdiction for the Dismissal Order.

First, we address whether this Court has jurisdiction over the Dismissal Order entered 28 March 2022. The notice of appeal was entered on 7 June 2022, more than thirty days after this Dismissal Order was entered—thus, the notice of appeal was not timely under N.C. R.

App. P. 3(c). Plaintiff argues that he filed a timely motion under Rule 52(b) of the Rules of Civil Procedure, which tolled the time for filing a notice of appeal until the trial court entered the Post-Dismissal Order. Plaintiff is correct that a *proper* motion for relief under Rule 52(b) of the Rules of Civil Procedure does toll the thirty-day period for taking an appeal. N.C. R. App. P. 3(c)(3). However, to determine if the motion is proper such that it actually tolls the time for entering a timely notice of appeal, we must consider whether the motion requested relief provided by Rule 52 of the Rules of Civil Procedure.

The analysis used to determine whether the Rule 52(b) motion is properly made and thus tolls the time for appeal essentially tracks the analysis required to address the merits of one of Plaintiff's issues on appeal: whether the trial court abused its discretion in denying the Rule 52(b) motion to amend Dismissal Order. Our conclusion that the Rule 52(b) motion to amend Dismissal Order did not toll the time for entering a notice of appeal will likewise lead us to the conclusion, below, that the trial court did not abuse its discretion when it denied the motion.

To understand why Plaintiff's Rule 52(b) motion was not proper under Rule 52 and did not toll the time for entering appeal, we must first look to the purpose of Rule 52. The primary purpose of this rule is to ensure that the trial court documents factual findings and conclusions of law so that the appellate court has a correct understanding of the factual issues determined by the trial court. *Parrish v. Cole*, 38 N.C. App. 691, 694, 248 S.E.2d 878, 879 (1978). However, a trial court is only required to make findings of fact and conclusions of law on a motion "when required by statute . . . or requested by a party." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113, 223 S.E.2d 509, 510 (1976); N.C. R. Civ. P. 52(a)(2) (2021). If a party wants the trial court to amend the findings prior to appeal, Rule 52(b) allows a party to make a motion, not later than ten days after entry of judgment for the court, to request that the trial court *amend its findings or make additional findings*. N.C. R. Civ. P. 52(b) (2021) (emphasis added). If the court makes or amends its findings, the court *may* amend the judgment accordingly. *Id.* (emphasis added).

When a trial court grants a dismissal for failure to join a necessary party, that dismissal is not an adjudication on the merits, and thus findings of fact are not necessary or even warranted. N.C. R. Civ. P. 41(b) (2021). In dismissing for failure to join a necessary party, the trial court is not acting as a fact finder and resolving factual disputes; the trial court is only saying that all the parties *necessary* for the litigation have not properly been brought into the litigation yet.

There are two problems with Plaintiff's motion. First, Plaintiff's motion for amended order pursuant to N.C. R. Civ. P. 52(b) did not request that the court make additional findings or amend the order based upon additional or amended findings. The Rules of Civil Procedure did not require the trial court here to make findings of fact to resolve the motion to dismiss for failure to join a necessary party. At the time the trial court was considering that motion to dismiss, neither Plaintiff nor Defendant requested that the trial court make factual findings.

Second, Plaintiff's motion requested that the trial court set aside the Dismissal Order to allow him additional time to file ratification by the necessary party in interest. A ratification at this stage would have only functioned as an amended complaint after the trial court dismissed the case and lost jurisdiction. This Court has held that amendment of the complaint after dismissal under Rule 12(b)(6) is not permitted as a matter of right. *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987). We discern no difference that would allow amendment of the complaint as a matter of right after dismissal under Rule 12(b)(7). Rule 52(b) was not designed to provide a backdoor to late amendment of a complaint. We thus hold that Plaintiff's Rule 52(b) motion was not authorized under the Rule and therefore, did not toll the time for making a notice of appeal.

For this reason, we must dismiss as untimely Plaintiff's issues on appeal I, II and IV, which arise out of the Dismissal Order.

2. Jurisdiction over the Amended Post-Dismissal Order.

Second, we address the Amended Post-Dismissal Order. In entering the Amended Post-Dismissal Order, the trial court added a denial of Plaintiff's motion to reconsider to the denial of Plaintiff's motion to amend the Dismissal Order and Objection, presumably to ensure that all motions in this matter were resolved. The court entered the order "*nunc pro tunc* 20 May 2022",[1] meaning that the Amended Post-Dismissal Order had the same effective date as the Post-Dismissal Order and took the place of the Post-Dismissal order.

In accordance with Rule 3 of the Rules of Civil Procedure, Plaintiff filed his notice of appeal on 9 June 2022, within thirty days of the effective date of the amended order. Therefore, we hold that this Court has jurisdiction over the Amended Post-Dismissal Order.

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1. A *nunc pro tunc* order is an entered order with retroactive effect.

B. Denial of Rule 52(b) motion to amend the Dismissal Order.

[2] Based upon our jurisdiction over the Amended Post-Dismissal Order, we turn our consideration to the only issue on appeal arising out of this order, which is whether the trial court abused its discretion when it denied this Rule 52(b) motion to amend the Dismissal Order. Relying upon our prior analysis on the propriety of this Rule 52(b) motion *supra*, we hold that the trial court did not abuse its discretion when it denied Plaintiff's request to amend the Dismissal Order.

Because Rule 52(b) uses permissive language such that the trial court *may* amend its findings or *may* amend the judgment accordingly, the rule allows the trial court to exercise its discretion. N.C. R. Civ. P. 52(b) (emphasis added). Therefore, we consider an appeal of a Rule 52 motion for an abuse of discretion. Where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court relied upon proper evidence to support its judgment. *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987) (citations and quotations omitted). As previously discussed, the trial court here was not required to make findings of fact for an order granting a motion to dismiss, and the parties did not request findings at the time of the hearing.

Plaintiff does not provide, and we do not find, case law wherein a Rule 52(b) motion for an amended order is appropriate, without any initial findings of fact or conclusions of law, to set aside a trial court's dismissal for failure to join a necessary party. As discussed above, Plaintiff's motion for amended order essentially requested reconsideration and, effectively, sought permission for him to amend his complaint to add a necessary party. As a general rule, once a judgment is entered, amendment of the complaint is not allowed unless the judgment is set aside or vacated under Rule 59[2] or 60. *Chrisalis Props., Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 89, 398 S.E.2d 628, 634 (1990).

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2. Alternatively, Plaintiff, in his briefing, not in his motion before the trial court, invokes Rule 59 as a basis for his motion for amended judgment. *See Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981) ("A motion is properly treated according to its substance rather than its label."). Plaintiff argues that the order granting the motion to dismiss was based upon an error in law, which is grounds for relief identified in Rule 59 of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 59 (a)(8) (2021). However, this Court has held that Rule 59 does not apply to pre-trial rulings. *Doe v. City of Charlotte*, 273 N.C. App. 10, 18, 848 S.E.2d 1, 8 (2020).

Thus, in denying a motion not authorized under Rule 52(b) and one that sought relief that is generally precluded in this posture of litigation, we hold the trial court did not abuse its discretion when it denied Plaintiff's Rule 52(b) motion to amend the Dismissal Order. Accordingly, we affirm the ruling of the trial court.

III. CONCLUSION

After review of the issues, this Court does not have jurisdiction over the Dismissal Order. We, therefore, dismiss all issues on appeal associated with that order. Additionally, we affirm the trial court's order denying Plaintiff's motion to amend the Dismissal Order.

DISMISSED IN PART, AFFIRMED IN PART.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
MARCUS D. GEORGE

No. COA23-62

Filed 18 July 2023

Criminal Law—guilty plea—Anders review—discrepancy in Information—remand

After defendant pleaded guilty to charges of possession with intent to sell and deliver heroin, possession with intent to sell and deliver cocaine, and two counts of resisting a public officer, where defendant's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), the appellate court concluded that the trial court did not err by not instituting a competency hearing sua sponte because there was no indication that defendant lacked the capacity to enter his guilty plea; in addition, defendant's ineffective assistance of counsel claims were dismissed without prejudice to permit defendant to pursue a motion for appropriate relief in the trial court. However, the appellate court's independent review revealed a discrepancy in the Information in one of the file numbers which, although it may have been a scrivener's error, raised the potential issue of whether defendant validly waived his right to indictment by a grand jury. Therefore, the matter was remanded for

the trial court to ensure and clarify that there was a valid Information, including waiver of indictment, in that file number.

Appeal by Defendant from Judgments entered 3 May 2022 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Nicholas R. Sanders.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant; and Marcus D. George, pro se.

HAMPSON, Judge.

Factual and Procedural Background

Marcus D. George (Defendant) appeals from Judgments entered 3 May 2022 upon Defendant's guilty plea to Possession with Intent to Sell and Deliver Heroin, Possession with Intent to Sell and Deliver Cocaine, and two counts of Resisting a Public Officer. The Record before us tends to reflect the following:

On 3 May 2022, pursuant to a plea arrangement, Defendant entered guilty pleas to Possession with Intent to Sell and Deliver Heroin, Possession with Intent to Sell and Deliver Cocaine, and two counts of Resisting a Public Officer.

The State provided a factual basis, stating in relevant part: On 8 December 2018, Deputy Mitchell with the Wayne County Sheriff's Office observed a Jeep driven by Defendant make a left turn without executing a turn signal. Deputy Mitchell did not initiate his blue lights but followed the vehicle until the vehicle parked in front of a residential property. Defendant did not exit the vehicle upon parking. Deputy Mitchell approached the vehicle and asked for permission to search the vehicle; Defendant consented. In the center console, Deputy Mitchell found a clear plastic bag that contained a brown substance that he believed to be heroin based on his training and experience. Deputy Mitchell attempted to detain Defendant, but Defendant ran away. Defendant was ultimately apprehended and arrested. Defendant stipulated the brown substance was heroin.

On 12 April 2021, around 12:51 a.m., officers with the Goldsboro Police Department noticed an individual walking in the middle of the

road. One of the officers exited his patrol vehicle and approached the individual identified as Defendant. The officer asked for consent to search Defendant, and he consented. The officer located a large bulge in Defendant's pocket. Defendant began to reach for the bulge, and when the officer did not allow him to reach into his pocket, Defendant "pushed off" and ran. Defendant was apprehended and detained. Several bags containing a powdered substance were found in his pockets. Defendant stipulated the powdered substance was cocaine.

When asked by the trial court, Defendant offered nothing as to the factual basis. The trial court accepted Defendant's plea and consolidated the charges into two Judgments entered 3 May 2022. The trial court orally sentenced Defendant to two consecutive sentences of 20 to 33 months each.[1]

Acting consistently with the requirements set forth in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), Defendant's appellate counsel advised Defendant of his right to file written arguments with this Court and provided Defendant with the documents necessary for him to do so. She then filed an *Anders* brief with this Court stating she was unable to find any meritorious issues for appeal, complied with the requirements of *Anders*, and asked this Court to conduct an independent review of the record to determine if there were any identifiable meritorious issues therein. Defendant filed a *pro se* "Supplemental Brief" on 6 March 2023.

Issues

The dispositive issues on appeal are whether: (I) the trial court erred in failing to institute a competency hearing *sua sponte*; (II) the Record is sufficient to review Defendant's ineffective assistance of counsel (IAC) claims on direct review; and (III) our independent review of the Record reveals any further issues.

Analysis

I. Lack of Competency Hearing

In his *pro se* brief, Defendant contends the trial court erred in failing to order a mental examination of Defendant. We disagree.

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1. The written Judgment entered on 3 May 2022 in 18 CRS 55019 imposed a sentence of 20 to 22 months of imprisonment. On 20 June 2022, the Department of Corrections identified the discrepancy between the Written Judgment and oral sentencing. On 28 June 2022, the trial court entered an amended Judgment imposing a sentence of 20 to 33 months of imprisonment.

N.C. Gen. Stat. § 15A-1002 provides in relevant part:

> The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed. When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed.

N.C. Gen. Stat. § 15A-1002(a), (b)(1) (2021). The trial court has a "constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating the accused may be mentally incompetent." *State v. Heptinstall*, 309 N.C. 231, 236, 306 S.E.2d 109, 112 (1983) (citations and quotation marks omitted).

In the case *sub judice*, the capacity of Defendant was not questioned by any party. Further, in accepting Defendant's plea, the trial court extensively inquired as to Defendant's mental capacity and understanding of the proceedings. The trial court engaged in the following colloquy with Defendant:

> [THE COURT:] Are you able to hear and understand me?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: Do you understand that you have the right to remain silent and that any statement you make may be used against you?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: At what grade level can you read and write?
>
> [DEFENDANT]: Twelfth.
>
> THE COURT: Did you graduate high school?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: Are you now consuming -- using or consuming alcohol, drugs, narcotics, medicines, including prescribed medications, pills or any other substances?
>
> [DEFENDANT]: Just medicine.
>
> THE COURT: And the medicine I see you said something about yesterday. Whatever medication you take --

[DEFENDANT]: Yes, sir.

THE COURT: Does that help you function better or does it impair your ability to think clearly in any way.

[DEFENDANT]: No, it helps me function better.

THE COURT: It's helpful. All right. So do you believe your mind is clear and do you understand the nature of the charges and do you understand every element of the charge?

[DEFENDANT]: For the most part.

THE COURT: Well, um . . . you probably need to do a little better than that, um . . . are you --

[DEFENDANT]: Well, you said we were going to talk about that, you know.

THE COURT: Well, I am, but let -- let's see . . . well, what are you -- let's just touch on that real quick. You're pleading to possession with intent to sell and deliver heroin. Do you have any question about what that is?

[DEFENDANT]: No, sir (negative indication).

THE COURT: Okay. You're pleading to resisting a public officer. Any question about what that is?

[DEFENDANT]: (Negative indication).

THE COURT: You're pleading to possession with intent to sell and deliver cocaine. Do you have any question about what that mean, that charge means?

[DEFENDANT]: (Negative indication).

THE COURT: And you're charged again with resisting a public officer in that case. And of course we'll go through the factual basis on these, but as you look at that do you understand what those charges are, because that's what you're pleading to in particular, do you understand the nature of the charges and what they're about, possession with intent to sell and deliver controlled substance, and do you understand every element of these charges?

(No audible response from [Defendant])

THE COURT: Is that yes? You feel good about that?

> [DEFENDANT]: Yes, sir.
>
> THE COURT: In your review with him, [defense counsel], do you think he does?
>
> [DEFENSE COUNSEL]: Yes, your Honor.

On the Record before us, there is no indication Defendant lacked the capacity to enter his plea. Thus, there was not "substantial evidence before the court indicating the accused may be mentally incompetent." *Id.* Therefore, the trial court did not err in failing to institute a competency hearing *sua sponte*. Consequently, we affirm the trial court's Judgments.

II. Ineffective Assistance of Counsel

Defendant also raises various IAC claims. In general, claims of IAC should be considered through motions for appropriate relief and not on direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments defendant must move for appropriate relief pursuant to G.S. 15A-1415"). A motion for appropriate relief is preferable to direct appeal because in order to

> defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. [O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance. Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of representation.

State v. Buckner, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations and quotation marks omitted). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). However, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's

right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

In order to prevail on an IAC claim, Defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for IAC claims under N.C. Const. art. I, §§ 19, 23). Here, we are unable to decide Defendant's IAC claim based on the "cold record" on appeal. *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citation omitted). We thus conclude, "further development of the facts would be required before application of the *Strickland* test[.]" *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citation omitted). Therefore, we dismiss any IAC claims, without prejudice, to permit Defendant to pursue a motion for appropriate relief in the trial court.

III. Independent Review

Our review of the Record on Appeal reveals a discrepancy in the Information in file number 18 CRS 55019 alleging Possession of Heroin with Intent to Sell and Deliver and Resist, Delay, or Obstruct a Public Officer. Specifically, in the Record before us, on the last page of the Information containing the Prosecutor's signature and Defendant's signature waiving his right to indictment the file number "18CR55019" is manually crossed out and replaced by a handwritten file number which is not entirely legible but includes "18 CRS __8079."[2] While this may be a scrivener's error, our independent review of the Record at least reveals this potential issue of whether Defendant validly waived his right to indictment by a grand jury specifically in file number 18 CRS 55019. *See State v. Willis*, 285 N.C. 195, 201, 204 S.E.2d 33, 37 (1974) (the trial court "acquires jurisdiction of the offense by valid information, warrant, or indictment."); *see also* N.C. Const. art. I, §. 22 ("Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases."); N.C. Gen. Stat. § 15A-642(c) (2021)

2. The Information itself contains a number of handwritten revisions including the file number listed on the other pages. These other pages, however, all reflect the file number 18 CRS 55019.

("Waiver of indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information."). Consequently, we remand this matter to the trial court to ensure and clarify there is, in fact, a valid Information, including waiver of indictment, in file number 18 CRS 55019.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Judgments and dismiss any claims for ineffective assistance of counsel without prejudice to Defendant's right to file a motion for appropriate relief in the trial court. Additionally, this matter is remanded to the trial court to ensure a valid Bill of Information was, in fact, filed in 18 CRS 55019 including Defendant's waiver of indictment.

AFFIRMED IN PART; DISMISSED WITHOUT PREJUDICE IN PART; REMANDED.

Judges FLOOD and RIGGS concur.

STATE OF NORTH CAROLINA
v.
DARVIN MAX HOLLIDAY

No. COA22-852

Filed 18 July 2023

Constitutional Law—right to counsel—trial strategy—decision not to call out-of-state witness—no absolute impasse

The trial court did not err at the start of a drug trafficking trial by denying defendant's request to substitute counsel where the disagreement between defendant and his counsel over whether to call an out-of-state witness to testify at trial—a matter of trial tactics, which are generally within the attorney's province—did not rise to the level of an absolute impasse that would have rendered defense counsel's representation constitutionally ineffective and where there was no basis for the court to order defense counsel to call the witness.

Appeal by defendant from judgment entered 6 May 2022 by Judge Jacqueline D. Grant in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State.

Ryan Legal Services, PLLC, by John E. Ryan, III, for defendant-appellant.

ZACHARY, Judge.

Defendant Darvin Max Holliday appeals from a judgment entered upon a jury's verdict finding him guilty of trafficking in fentanyl by possession. On appeal, Defendant argues that the trial court erred by failing to instruct defense counsel to call an out-of-state witness where Defendant and his attorney had reached an "absolute impasse" regarding the issue. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

At approximately 4:00 a.m. on 6 December 2020, Officer Ian Casey of the Cornelius Police Department observed Defendant and Allie Meadows parked at the Microtel Hotel in Cornelius, North Carolina. As Defendant and Meadows exited the car and walked toward the hotel, Officer Casey approached and asked whether the car in the hotel parking lot belonged to them. Defendant stated that he owned the vehicle, but after determining that the vehicle's license plate did not match its registration, Officer Casey detained the couple. While talking with Defendant and checking his identification, Officer Casey observed a red tube in the driver's side door compartment, which Defendant claimed contained "nothing[.]" Officer Casey asked to search the vehicle and Defendant consented, providing Officer Casey with the keys to the locked car.

During the vehicle search, Officer Casey discovered three small packages inside of the red tube, which he suspected contained illegal drugs. Officer Casey arrested Defendant but permitted Meadows to leave in the car. The packages were later determined to contain various illicit substances, including methamphetamine and fentanyl.

On 3 May 2022, this matter came on for trial in Mecklenburg County Superior Court.[1] Just prior to jury selection, Defendant asked to address the court regarding his dissatisfaction with his appointed counsel:

1. Defendant initially faced multiple charges arising from the events of 6 December 2020. On the morning of trial, however, the State announced its decision to dismiss three of Defendant's pending charges and to proceed solely on the superseding indictment in

> [DEFENDANT]: I think that I might have been a little bit misrepresented here because I didn't know that you could subpoena the girl that was with me[, Meadows,] that it was her heroin, and I didn't know, so she's not here today.
>
> THE COURT: Okay. All right. And is that -- are you wanting her to testify?
>
> [DEFENDANT]: Well, she should be here because it was hers. It was in my vehicle, but it was her heroin. And she was with me that night, but they let her drive off. She didn't have her drivers license or nothing, but they let her drive off in [the] vehicle, which my plates were on the vehicle, but it wasn't my vehicle.

The trial court then asked to hear from defense counsel, Michael Kolb. Mr. Kolb acknowledged that, at some point during the case's pendency, he and Defendant had discussed "[w]hether or not it would be a good idea to subpoena" Meadows, but Mr. Kolb determined that she "would not be a good witness" for Defendant. According to Mr. Kolb, the issue was not broached again until trial, when Defendant informed Mr. Kolb "that he wished for [Meadows] to be . . . subpoenaed on it, though that was not [Mr. Kolb's] understanding that he was insisting on it." Mr. Kolb further explained: "[F]or reasons of trial strategy, I have not done that, but [Defendant] does not agree with that today."

Defendant explained that Meadows told him that she was willing to testify that the drugs were hers, but that he had not spoken with her in a month and was not sure that she would answer his call. Defendant was also unsure that Meadows would voluntarily travel from her home in West Virginia to testify in court in Charlotte "because she did get in some trouble for some heroin again." In addition, Defendant conceded that the last time he was in court, at the 28 March 2022 calendar call, he had not discussed with Mr. Kolb the issue of whether Meadows would testify.

The State noted that Defendant had also neglected to raise, at any time prior to trial, Defendant's apparent dissatisfaction with counsel, or Mr. Kolb's failure to subpoena Meadows.

The trial court informed Defendant that Mr. Kolb did not have the power to subpoena a witness from outside the state. The court then attempted to clarify Defendant's desired remedy, inquiring whether he sought to replace Mr. Kolb as his attorney:

---

20 CRS 100389, charging Defendant with trafficking in fentanyl by possession of more than four but less than 14 grams.

THE COURT: And understanding that you just spoke with your attorney, and if you need to speak with him further about the willingness to reach out to [Meadows] to see if she's voluntarily willing to come down, *are you then comfortable proceeding with Mr. Kolb as your attorney*? I can't tell exactly what you're asking me because it's sort of one of these, here's what I wanted him to do, but he hasn't done.

[DEFENDANT]: Right.

THE COURT: But it may be a little bit of misunderstanding of what his powers were to begin with, and so that's why *I'm trying to get -- seek clarification of exactly what you're asking me.*

. . . .

THE COURT: . . . I was trying to figure out when you were talking about -- you started off by saying this female that you wanted to be called as a witness and you were -- you had wanted her to be subpoenaed and she wasn't and that's why I just wanted to make you aware because it sounds like that's what you were upset about.

MR. KOLB: And, Your Honor, she can be voluntarily asked to be here, but again, we still have the problem of I don't really want her, but he does.

THE COURT: Correct. And that I will let y'all discuss privately, but understanding that we can't compel her to come here --

[DEFENDANT]: I do understand that. Yes, I do.

THE COURT: -- is that *are you comfortable then allowing Mr. Kolb to continue representing you*? You guys can discuss whether or not it's a good idea to ask her to come down here since she has those other charges against her, and your attorney can explain to you how one's credibility if they take the witness stand can be impeached. And so *are you okay with Mr. Kolb -- are you still wanting Mr. Kolb to represent you in this matter?* And then you guys can discuss, you know, whether or not you want to reach out to her to see if she would voluntarily come or not.

> [DEFENDANT]: *No*, *ma'am*, *I would exactly maybe like to get a hold of another attorney* or, you know, I've got a friend that would probably represent me . . . I would rather, you know, get another attorney to represent me because he has misrepresented me, you know, I think that he has.

(Emphases added).

The trial court again asked whether Defendant was moving to substitute counsel, and Mr. Kolb explained the extent to which Defendant had mentioned his desire to retain new counsel:

> THE COURT: Okay. And so are you seeking to retain your own counsel?
>
> [DEFENDANT]: Yes, ma'am.
>
> . . . .
>
> MR. KOLB: Just to let you know, while he has not been -- Mr. Holliday has always been extremely polite to me and everyone he's been around, there's not any bad blood up here at all. He has told me a few times that he has spoken -- when I say a few times, this week and earlier, that he has spoken to other attorneys about his case, which I prefer he not, because that throws --
>
> THE COURT: Correct.
>
> MR. KOLB: -- off some other things. But he hasn't hired them, but I will tell you he has not shown up today with -- first time I've ever heard that he might be hiring somebody and that is only really come up since the previous calendar call, which April --
>
> [DEFENDANT]: Yes, sir.
>
> MR. KOLB: Early April, whatever the last calendar call was, that's when he first brought it up. He hasn't hired anybody. He did talk about that he might do that, he's thinking about it, so I will let the Court know while he hasn't hired anyone, I've not ever heard from anyone. It was brought up before today but only at that last time.

In opposing Defendant's motion, the State expressed concerns that Defendant had "not gone the extra step to hire his own counsel," and argued that "coming in on the day of trial to ask for new counsel and argue

about trial strategy amount[ed] to nothing more than a delay tactic[.]" The trial court requested that Defendant provide the contact information of the attorneys with whom he had communicated concerning representation. After speaking with those attorneys, the court confirmed Defendant's basis for seeking to substitute counsel:

> THE COURT: . . . [W]hat you've indicated or what I've heard from you about why you were seeking to replace Mr. Kolb and substitute in and retain counsel was really a difference -- a disagreement about trial strategy, this one particular witness that you wanted -- you wanted her to be called as a witness, and Mr. Kolb does not believe that is a good idea.
>
> [DEFENDANT]: Yes, ma'am.
>
> THE COURT: I did not hear any other reason for which you were seeking to substitute counsel for Mr. Kolb. It sounds like he's communicated with you, you've discussed your case, may not necessarily agree over complete trial strategy, but he's communicated with you, you've been here for your --
>
> [DEFENDANT]: Oh, yeah, he's been a great lawyer, but, like I said, we just -- I just disagreed with a couple things myself. It wasn't that he was a bad attorney. It was just -- I just thought I was misled, you know, because of the court --

The trial court then denied Defendant's "motion to substitute counsel":

> THE COURT: . . . [Y]ou haven't actually retained them, and so the Court is concerned that to just allow this -- this case has been pending for over two years, that that would just [obstruct] and delay justice in this case for the proceedings going forward.
>
> So the Court is going to -- unless Mr. Kolb has any additional arguments he wishes to make, the Court is going to deny . . . [D]efendant's motion to substitute counsel. And the Court finds that in this case that Mr. Kolb is an experienced attorney, he appears to be competent, and the dissatisfaction in this case by [Defendant] was really over trial tactics and specifically calling a -- one witness who resides in West Virginia as a witness in this case. And that being the nature of the disagreement, the Court does

> not find that nature, a disagreement over trial tactics, renders Mr. Kolb to be incompetent or ineffective to represent . . . [D]efendant. Likewise, . . . [D]efendant has had several months since this case has first been placed on the trial calendar to retain private counsel, including and most recently, the March 28, 2022, trial calendar date where . . . [D]efendant has had an opportunity to retain private counsel and that while there may have been some phone calls to different attorneys, no attorney was specifically retained and had been paid whatever they would require as a retainer fee to represent [Defendant].
>
> So based on all of that, the Court finds that there is no legal basis or reason to replace Mr. Kolb, and for those reasons, the Court is denying [Defendant]'s motion or what will be treated as a motion to substitute counsel.

The trial proceeded as scheduled, and on 6 May 2022, the jury returned its verdict finding Defendant guilty of trafficking in fentanyl by possession. The trial court entered judgment upon the jury's verdict, sentencing Defendant to an active term of 70 to 93 months in the custody of the North Carolina Division of Adult Correction. Defendant gave oral notice of appeal in open court.

Discussion

On appeal, Defendant argues that "the trial court erred by failing to instruct [Mr.] Kolb to call Meadows as a witness when it was clear that [Mr.] Kolb and [Defendant] had reached an absolute impasse." Specifically, Defendant asserts that the trial court's failure "to either appoint substitute counsel or to instruct trial counsel on the impasse between the client and his attorney violated the constitution." We disagree.

A criminal defendant's right to counsel is enshrined in the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991).

Of course, the Sixth Amendment's protections notwithstanding, "[n]o person can be *compelled* to take the advice of his attorney." *Ali*, 329 N.C. at 403, 407 S.E.2d at 189 (emphasis added) (citation and internal quotation marks omitted). Indeed, "[t]he attorney-client relationship rests on principles of agency, and not guardian and ward." *Id.* (citation omitted).

At trial, "tactical decisions—such as which witnesses to call, which motions to make, and how to conduct cross-examination—normally lie within the attorney's province." *State v. Brown*, 339 N.C. 426, 434, 451

S.E.2d 181, 187 (1994), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995). "However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control . . . ." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. This is the "absolute impasse" rule.

In *Ali*, our Supreme Court instructed that "[i]n such situations, . . . defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Id.*

Where the trial court is aware that the defendant and counsel have reached an absolute impasse on a tactical matter, it is reversible error for the court to allow the attorney's decision to prevail over the defendant's wishes. *State v. Freeman*, 202 N.C. App. 740, 746, 690 S.E.2d 17, 22 (2010), *disc. review improvidently allowed*, 365 N.C. 4, 705 S.E.2d 734 (2011) (per curiam); *see id.* at 746–47, 690 S.E.2d at 22 ("The denial of [the] defendant's *Ali* right to make tactical decisions regarding the use of peremptory challenges is analogous to the erroneous denial of a peremptory challenge. The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused . . . . Defendant is entitled to a new trial." (citation and internal quotation marks omitted)).

Significantly, however, not all tactical disagreements between a defendant and his or her attorney rise to the level of "absolute impasse." First and foremost, a defendant cannot compel his attorney to violate the law. *See Ali*, 329 N.C. at 403, 407 S.E.2d at 189 (providing that an "attorney is bound to comply with her client's *lawful* instructions" (emphasis added)); *State v. Williams*, 191 N.C. App. 96, 105, 662 S.E.2d 397, 403 (2008) (concluding that defense counsel "could not have lawfully complied with [the d]efendant's requests" where he "essentially concede[d] racially discriminatory intent in his recommendations . . . regarding the exercise of peremptory challenges"), *appeal dismissed and disc. review denied*, 363 N.C. 589, 684 S.E.2d 158 (2009).

And "[n]othing in *Ali* or our Sixth Amendment jurisprudence requires an attorney to comply with a client's request to assert frivolous or unsupported claims. In fact, to do so would be a violation of an attorney's professional ethics[.]" *State v. Jones*, 220 N.C. App. 392, 395, 725 S.E.2d 415, 417, *disc. review denied*, 366 N.C. 389, 732 S.E.2d 474 (2012).

Furthermore, no actual impasse exists, and *Ali* does not apply, when the record fails to disclose any disagreement between the defendant and counsel with respect to *trial tactics*. *See, e.g.*, *State v. McCarver*, 341 N.C.

364, 385, 462 S.E.2d 25, 36 (1995) ("[W]e find no indication in the record of 'an absolute impasse' between the client and the defense team as it concerned trial tactics. At no time did [the] defendant voice any complaints to the trial court as to the tactics of his defense team."), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996); *Williams*, 191 N.C. App. at 104, 662 S.E.2d at 402 ("[E]ven though the foregoing evidence undoubtedly demonstrates an absolute impasse between [the d]efendant and defense counsel as concerned the necessity . . . that [the d]efendant stand trial at all, the evidence does not demonstrate an impasse *as it concerned trial tactics*." (citation and internal quotation marks omitted)).

In the instant case, Defendant asserts that the trial court erred by failing to instruct Mr. Kolb to subpoena Meadows where Defendant and Mr. Kolb had reached an "absolute impasse" regarding whether to call Meadows to testify. According to Defendant, Mr. Kolb's "unwillingness" to do so, as evinced by Mr. Kolb's decision not to "timely move[ ] the court for a certificate and order of attendance" for Meadows, together with the trial court's "failure to properly instruct" Mr. Kolb, "deprive[d Defendant] of his right to control his own defense." We disagree.

Preliminarily, we note that the parties agree that Mr. Kolb did not have the authority to subpoena Meadows, an out-of-state witness. It is also evident that while, in theory, Meadows's presence may have been secured pursuant to the Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings ("the Act"), N.C. Gen. Stat. § 15A-811 *et seq*. (2021), the trial court was not *obligated* to instruct Mr. Kolb to commence proceedings pursuant to the Act, particularly given the untimeliness of Defendant's complaint. *See State v. Cyrus*, 60 N.C. App. 774, 776, 300 S.E.2d 58, 59 (1983) (reasoning that while "the officers and the court have a duty to see that [a] defendant has an opportunity for securing material witnesses" under the Act, "[t]hey are placed under no burden to demand that [the defendant] do so").

Here, the record reflects that although Defendant and Mr. Kolb had previously discussed whether to call Meadows as a witness, Mr. Kolb did not understand that Defendant was *insisting* on Meadows's presence until the first day of trial, when Defendant raised the issue prior to voir dire. By that point, Defendant's case had been pending for over two years. We therefore conclude that Defendant failed to timely notify the trial court—as well as the State and his own attorney—that he wished to seek to compel Meadows's attendance at trial via the procedures set forth by the Act. *See id.* ("It is . . . true that the right to compulsory process is a fundamental right and that neither our statute nor the Constitution prescribes time limits within which to exercise that right. It is equally true, however, that rights can be waived.").

Moreover, contrary to Defendant's argument on appeal, Mr. Kolb's failure to "timely move[ ] the court for a certificate and order of attendance" does not demonstrate the existence of an absolute impasse between Defendant and counsel. Rather, Defendant merely presents a disagreement with his appointed attorney over trial tactics, one that counsel believed had been resolved well before trial.

As Mr. Kolb explained to the trial court, he had previously determined that Meadows "would not be a good witness for" Defendant's case, due to "reasons of trial strategy"—including the fact that Meadows "would be subject to impeachment on cross-examination." Nonetheless, upon learning of Defendant's concerns, Mr. Kolb agreed to discuss the matter further with Defendant, despite the attorney's misgivings as to whether Meadows's appearance would be in Defendant's best interest. This does not indicate a deadlock. *Cf. Williams*, 191 N.C. App. at 103, 662 S.E.2d at 402 ("[The d]efendant certainly disagreed with defense counsel's advice regarding the jury selection, but specific disagreement did not rise to the level of an absolute impasse because [he] ultimately deferred the decision to defense counsel.").

And although Defendant argues that "[d]iametric opposition like that depicted in the record between Mr. Kolb and [Defendant] cannot be construed as anything but an absolute impasse[,]" he ultimately "makes no argument rooted in law that an impasse existed, besides using conclusory terms." *State v. Curry*, 256 N.C. App. 86, 98, 805 S.E.2d 552, 559 (2017).

Consequently, Defendant has failed to demonstrate the existence of an absolute impasse. We therefore conclude that the trial court did not err by failing to instruct Mr. Kolb to call Meadows as a witness.

Finally, we briefly respond to these arguments in the context of Defendant's motion to substitute counsel. As Defendant acknowledges on appeal, in arguing before the trial court, he "was unable to clearly vocalize the true issue," which he now articulates as the "absolute impasse" issue of which we have already disposed. However, at trial, Defendant characterized the relief he sought as substitution of counsel, stating that "I would exactly maybe like to get a hold of another attorney or, you know, I've got a friend that would probably represent me . . . I would rather, you know, get another attorney to represent me because [Mr. Kolb] has misrepresented me[.]" Regardless of its characterization, Defendant's argument lacks merit.

A "trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would

amount to denial of [the] defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded [the] defendant his constitutional right to counsel." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). "[A] disagreement over trial tactics generally does not render the assistance of the original counsel ineffective." *Id.*; *see also State v. Gary*, 348 N.C. 510, 514, 501 S.E.2d 57, 61 (1998) (concluding that the trial court properly denied the defendant's motion to substitute counsel where the defendant's claim of ineffective assistance of counsel arose out of his attorney's decision "not to subpoena certain witnesses whom [the] defendant claimed would have provided alibi testimony").

Here, after explaining that Meadows could not be subpoenaed, the trial court repeatedly sought clarification from Defendant that substitute counsel was the remedy he desired. Defendant responded affirmatively in each instance. Defendant then provided the trial court with contact information for several attorneys from whom he had purportedly sought representation; but after the first attorney failed to immediately recognize Defendant and declined to represent him, the trial court determined that it would not "delay this trial again" and denied Defendant's motion to substitute counsel. Defendant did not revisit the issue of Meadows's attendance, but rather proceeded to trial with Mr. Kolb as his attorney.

To the extent that Defendant now challenges the trial court's denial of his motion to substitute counsel, he offers no distinct reason or supporting argument in his brief, beyond those we have already addressed and soundly rejected. Accordingly, this issue is abandoned. *See* N.C. R. App. P. 28(b)(6); *see also*, *e.g.*, *State v. Ambriz*, 286 N.C. App. 273, 292, 880 S.E.2d 449, 466 (2022) (declining to address the defendant's bald contention that certain of the trial court's findings were "incomplete, unsupported, or incorrect[,]" and concluding that because he "made no substantive argument regarding th[o]se findings, he . . . waived any challenge" on appeal).

Conclusion

For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges GORE and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
WANG MENG MOUA, DEFENDANT

No. COA22-839

Filed 18 July 2023

1. Appeal and Error—right to appeal—denial of suppression motion—guilty plea—no benefit conferred—notice of intent to appeal not required

Where defendant pleaded guilty to multiple drug offenses as charged—and therefore his plea was not made as part of a plea arrangement with the State and conferred no benefit—he was not required to give notice to the State of his intent to appeal from an order denying his motion to suppress. However, the appellate court noted that, given the unsettled state of the law regarding the notice requirement under these circumstances, it had granted defendant's petition for a writ of certiorari by separate order so as to reach the merits of defendant's appeal.

2. Search and Seizure—traffic stop—unlawfully extended—consent to search vehicle invalid—judgment vacated

Defendant's traffic stop for speeding was unlawfully extended and he was illegally seized for purposes of the Fourth Amendment where the investigating officer continued questioning defendant after the purpose of the stop had concluded—signified by the officer returning defendant's license and registration to him and giving him a verbal warning for speeding. There was no reasonable suspicion to extend the stop where, after determining that defendant was on active probation but had no active warrants, the officer asked to talk to defendant outside of the car and reached inside to unlock and open the door, and, once the two men were standing by the back of the car, the officer returned defendant's documents—at which point the stop's mission was over—and asked defendant about his probation status and whether he had anything on his person or in his car. Under these circumstances, a reasonable person would not have felt free to leave and, therefore, defendant's subsequent consent to search the vehicle was not freely and voluntarily given. The trial court's order denying defendant's motion to suppress evidence of drugs found in the vehicle was reversed and defendant's judgment for multiple drug offenses was vacated.

Appeal by Defendant from Order entered 15 March 2022 by Judge Lisa Bell and Judgment entered 2 May 2022 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Tirrill Moore and Special Deputy Attorney General Kristin J. Uicker, for the State.

BJK Legal, by Benjamin J. Kull, for the Defendant.

RIGGS, Judge.

Defendant Wang Meng Moua appeals the order denying his motion to suppress evidence which was entered prior his guilty plea for trafficking in methamphetamine by transport, trafficking in methamphetamine by possession, and keeping or maintaining a vehicle for keeping or selling methamphetamine. Mr. Moua argues he has an appeal of right under N.C. Gen. Stat. § 15A-979(b) (2021), even though he did not notify the court and the prosecutor of his intent to appeal prior to his entry of a guilty plea. But on the chance that this Court concluded he did not have a statutory right of appeal, Mr. Moua also submitted a petition for writ of *certiorari* to consider the merits of his claim. We granted *certiorari* review in our discretion under separate order.

After review of the record, we hold that the search was not consensual, and accordingly, we reverse the denial of the motion to suppress and vacate the judgment.

I. FACTS & PROCEDURAL HISTORY

At 12:59 a.m. on 5 December 2019, Sgt. Garrett Tryon and Officer J. Housa, with Charlotte-Mecklenburg County Police Department, initiated a traffic stop of Mr. Moua, for speeding on North Tryon Street near the Interstate 85 connector in Mecklenburg County. Sgt. Tryon stopped Mr. Moua, who was driving with a passenger, on a side street and told Mr. Moua that he had paced him at fifty miles per hour in a thirty-five mile per hour zone on North Tryon Street. Sgt. Tryon asked Mr. Moua for his license and registration, and he also asked the passenger to provide his license. Both Mr. Moua and his passenger cooperated and provided their identification; both Sgt. Tryon and Officer Housa were calm and professional in executing the stop, which was recorded on bodycam.

Sgt. Tryon went back to his vehicle and ran the information through different law enforcement databases while Officer Housa stood by the passenger door of Mr. Moua's car, shining his flashlight into the vehicle. After about two minutes of checking, Sgt. Tryon learned that Mr. Moua was on active probation and had prior charges; however, Mr. Moua did not have any active warrants. Sgt. Tryon then returned to Mr. Moua's car and said, "Sir come out and talk to me real quick." As he was speaking to Mr. Moua, Sgt. Tryon reached through the open window, unlocked and opened the door.

As soon as Mr. Moua walked to the back of the vehicle, Sgt. Tryon handed back Mr. Moua's license and registration. Sgt. Tryon had the following conversation with Mr. Moua:

> SGT. TRYON: Come over here. Here is your stuff back, man. Um. Look. You gotta slow down. 35 is 35, right? I get it, North Tryon used to be, like 55, like three years ago. You've been living out here for a while?
>
> MR. MOUA: Yeah.
>
> SGT. TRYON: All right. Um. I see you got some charges in the past, you're on probation.
>
> MR. MOUA: Yeah.
>
> SGT. TRYON: You squared away? You straight now?
>
> MR. MOUA: Yeah.
>
> SGT. TRYON: All right. You been checking in?
>
> MR. MOUA: Oh yeah.
>
> SGT. TRYON: Are you unsupervised or –?
>
> MR. MOUA: Supervised.
>
> SGT. TRYON: Supervised. Out of Mecklenburg County or –?
>
> MR. MOUA: Ah it's Cabarrus.
>
> SGT. TRYON: Cabarrus County. Cool. Hey, man, you have anything on you or in the car –
>
> MR. MOUA: No.
>
> SGT. TRYON: –that I should be worried about?
>
> MR. MOUA: No.

SGT. TRYON: You wouldn't mind if I check, right?

MR. MOUA: Ya, go ahead.

SGT. TRYON: Mind if I pat you down really quick?

MR. MOUA: Ya.

Sgt. Tryon performed a pat down that did not uncover any contraband. After the pat down, Sgt. Tryon began to search the vehicle; meanwhile, Mr. Moua smoked a cigarette on the side of the road. Within fifteen seconds of initiating the search, Sgt. Tryon noticed a bag sticking out from under the driver's seat containing a white powdery substance. After discovering the bag, Sgt. Tryon walked over to Mr. Moua, placed him in handcuffs, and then continued to search the vehicle.

On 16 December 2019, Mr. Moua was indicted on one count each of trafficking methamphetamine (more than 200 but less than 400 grams) by transport, trafficking methamphetamine (more than 200 but less than 400 grams) by possession and keeping or maintaining a vehicle for keeping or selling methamphetamine. On 26 April 2021, the State filed superseding indictments on the two trafficking counts to lower the mass of methamphetamine to more than 28 but less than 200 grams.

Mr. Moua moved to suppress the evidence obtained during the search. The trial court heard this motion on 10 March 2022. During that hearing, Sgt. Tryon testified that he typically asks people to get out of the vehicle either for officer safety or privacy reasons. He testified that in this case, he asked Mr. Moua to step out of the vehicle so that he could ask him about his probation away from the passenger. Additionally, Sgt. Tryon testified that in his experience, owner-operators are more likely to consent to a search of the vehicle when they are separated from their vehicle. During his testimony, Mr. Moua's counsel asked Sgt. Tryon about his reason for questioning Mr. Moua about his probation; Sgt. Tryon testified that it was "a conversation piece." Sgt. Tryon testified that, in his opinion, the purpose of the traffic stop concluded when he returned Mr. Moua's driver's license and registration.

After the motion to suppress hearing, the trial court issued an order denying the motion to suppress. In that order, the court made twenty-one findings of facts, including:

> 8. Upon re-approaching the [D]efendant, Sgt. Tryon requested the [D]efendant step out of the vehicle to speak with him, which the [D]efendant consented to doing. Sgt. Tryon said it was common practice for him and officers to

> ask occupants out of their vehicles during traffic stops for safety and privacy purposes.
>
> 10. Almost immediately upon the [D]efendant and Sgt. Tryon getting to the back of the [D]efendant's vehicle, Sgt. Tryon returned all of the documents back to the [D]efendant and the two briefly discussed the [D]efendant speeding and Sgt. Tryon gave him a warning for the speeding.
>
> 11. *After concluding the purpose for the stop*, Sgt. Tryon engaged in a consensual conversation with the [D]efendant about his probation and asked for consent to search his car and person.
>
> 12. The [D]efendant freely and voluntarily gave consent for Sgt. Tryon to search his car and person.

The trial court also made twelve conclusions of law, including:

> 4. Almost immediately upon stepping out of the vehicle, Sgt. Tryon handed the [D]efendant his documents back and gave him a verbal warning for speeding.
>
> 5. At that point in time, this [c]ourt finds the reason for the traffic stop was concluded. The following conversation and actions after were a consensual encounter between Sgt. Tryon and the [D]efendant. A reasonable person in the [D]efendant[']s position would have felt free to leave or free to refuse to cooperate at that point and terminate the encounter.
>
> 12. In viewing the totality of the circumstances and the evidence before this [c]ourt . . .. Sgt. Tryon returned the [D]efendant[']s documents to him almost immediately and the traffic stop concluded once Sgt. Tryon handed the [D]efendant back all of his documents and gave him a verbal warning for speeding. The conversations and actions beyond that point were consensual in nature. Thereafter, the [D]efendant was no longer seized, the [D]efendant[']s Constitutional rights were not violated within the meaning of the Fourth Amendment, and the [D]efendant[']s consent to search his vehicle and person was freely and voluntarily [sic].

After the denial of his motion to suppress, Mr. Moua subsequently pleaded guilty as charged to all charges on 2 May 2022. Mr. Moua did not

seek nor secure any agreement with the prosecutor to reduce or dismiss the charges. At the plea and sentencing hearing, the State submitted, as a factual basis for the plea, the gallon-sized Ziploc bag which Sgt. Tryon found under the seat containing 194.21 grams of methamphetamine. The State indicated that after Sgt. Tryon completed the search of the car he read Mr. Moua his Miranda rights, and then Mr. Moua confessed that the methamphetamine in the vehicle was his; neither event appears on the video recording of the stop. Mr. Moua did not indicate his intent to appeal the motion to suppress prior to pleading guilty, and neither the colloquy nor the plea transcript asked Mr. Moua if he wished to reserve any rights to appeal or enter a conditional plea. However, Mr. Moua made an oral notice of appeal on the record during this sentencing hearing.

II. ANALYSIS

Mr. Moua argues that he has the right to appeal the denial of the motion to suppress upon entry of his guilty plea according to N.C. Gen. Stat. § 15A-979(b) (2021). Generally, notice of intent to appeal is required to ensure the right to appeal under the statute; however, this Court held in *State v. Jonas*, that notice of intent to appeal is not required when a defendant does not negotiate a plea agreement and simply pleads guilty as charged. *State v. Jonas*, 280 N.C. App. 511, 516, 867 S.E.2d 563, 567 (2021), *review allowed*, *writ allowed*, 876 S.E.2d 272 (2022). The ruling in *Jonas* is currently stayed; therefore, Mr. Moua also filed a petition for writ of *certiorari*. In our discretion, we granted his petition for *writ of certiorari* under separate order.

On appeal, Mr. Moua argues that at the time he gave consent to search his car, he was unlawfully seized, and therefore, his consent was invalid. We agree.

A. Appellate Jurisdiction

[1] In North Carolina, a defendant's right to pursue an appeal from a criminal conviction is a creation of statute. *State v. McBride*, 120 N.C. App. 623, 624, 463 S.E.2d 403, 404 (1995). Generally, a defendant who pleads guilty does not have a statutory right of appeal. *See* N.C. Gen. Stat. § 15A-1444(e) (2021). However, the General Assembly has, by statute, allowed a defendant to appeal an adverse ruling in a pretrial suppression hearing despite the defendant's conviction based upon a guilty plea. *State v. Reynolds*, 298 N.C. 380, 395, 259 S.E.2d 843, 852 (1979). According to N.C. Gen. Stat. § 15A-979(b), an order denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment where the defendant pleads guilty. N.C. Gen. Stat. § 15A-979(b) (2021). This statutory right to appeal is

conditional and not absolute. *State v. McBride*, 120 N.C. App. 623, 624, 463 S.E.2d 403, 404 (1995).

The North Carolina Supreme Court has held that when a defendant intends to appeal from a denial of a motion to suppress pursuant to N.C. Gen. Stat. § 15A-979(b), they must give notice of their intent to the prosecutor and the court *before plea negotiations are finalized*, or they will waive the appeal of right provisions of the statute. *State v. Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853. The Court reasoned that the plea-bargaining table is not a "high stakes poker game;" it is much closer to arm's length bargaining. *Id.* Therefore, it would be inappropriate for defendants to keep their intent to appeal a secret during negotiation to get the benefit of the bargain and then surprise the prosecution with an appeal of the conviction. *Id.*

In December 2021, this Court addressed the notice requirement in the context of a unilateral guilty plea given absent any bargaining with the State. This Court held that where a defendant does not plead guilty pursuant to a plea arrangement with the State, the defendant is not required to give notice of intent to appeal prior to the plea of guilty to invoke his statutory right to appeal. *State v. Jonas*, 280 N.C. App. 511, 516, 867 S.E.2d 563, 567 (2021). The Court reasoned that the concerns the Supreme Court was addressing in *Reynolds* are not present in a scenario where a defendant is not receiving any benefit of a plea agreement; the State has not been "trapped into agreeing to a plea bargain only to later have [d]efendant contest that bargain." *Id.* We agree with this analysis.

Jonas, however, was stayed by our Supreme Court on 21 December 2021. *State v. Jonas*, 380 N.C. 301, 865 S.E.2d 886 (2021). Whether the mandate in a stayed decision is binding precedent is unclear in North Carolina jurisprudence. Mr. Moua points to *Hunnicutt v. Griffin*, which says that a case becomes binding upon filing. *Hunnicutt v. Griffin*, 76 N.C. App. 259, 263, 332 S.E.2d 525, 527 (1985). Thus, *Hunnicutt* would suggest that the rule in *Jonas* confirms Mr. Moua's right of appeal. In contrast, the State argues that according to *State v. Gonzalez* a stayed case does not have precedential authority. 263 N.C. App. 527, 530, 823 S.E.2d 886, 888 (2019). In *State v. Gonzalez*, though, this Court addressed a conflict in precedent between several Court of Appeals decisions and declined to follow the stayed case because it conflicted with prior precedent. *Id.*

Strictly speaking, *Jonas* does not conflict with the ruling in *Reynolds*; the latter did not address the type of unilateral guilty plea in the former. *Jonas* only clarifies the universe of scenarios in which the

Reynolds notice requirement applies. Further, at the time of the plea and sentencing hearing in this case, the Supreme Court had not issued an opinion in *Jonas*.

The facts in this case are similar to *Jonas*. Mr. Moua did not negotiate any plea agreement with the State, and he did not receive any benefit from the State. The State argues that even when a defendant does not negotiate a plea with the State, a defendant is still required to provide notice of intent to appeal in addition to the notice of appeal. At oral argument, the State asserted that even without a plea agreement, Mr. Moua needed to give notice of *intent to appeal* as he was pleading guilty "prior to pronouncement of sentence" *in addition* to giving notice of appeal at the conclusion of the hearing to meet the requirements under *Reynolds*. We fail to see any meaningful value to the State in requiring a defendant, who is unilaterally pleading as charged, to provide notice of intent to appeal as he enters his plea in addition to providing notice of appeal only a few minutes later in the same hearing.

However, because *Jonas* has been stayed by the Supreme Court, we considered Mr. Moua's petition for writ of *certiorari* as an alternate and appropriate basis for our review. In light of the unsettled law in this area, and our ultimate holding, we granted *certiorari* under separate order to consider the merits of his appeal.[1]

B. Motion to Suppress

[2] Mr. Moua argues that his consent to search the car was not voluntary because, at the time he gave consent, he was unlawfully seized under the Fourth Amendment. He challenges several findings of fact—which the trial court used to support the denial of the motion to suppress—as unsupported by competent evidence and argues that several findings of fact are in reality conclusions of law that this Court should review *de novo*.

After review, we agree that Mr. Moua was unlawfully seized when the police asked for consent to search his car. Based upon the totality of the circumstances, a reasonable person would not have felt free to terminate this encounter and a search of the car was not within the scope of the original stop. Therefore, his consent was not voluntary and the motion to suppress was erroneously denied. While we hold that the trial court had competent evidence upon which to base its findings of fact, the trial court comingled conclusions of law with findings of fact. Accordingly, we consider those conclusions of law *de novo*.

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1. Judge Murphy dissented from this grant of *certiorari* in the order and would have found jurisdiction existed on the grounds described *supra*.

1. Standard of Review

This Court's review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings, in turn, support the ultimate conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Where the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and binding on appeal. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735–36 (2004). The trial court's conclusions of law are reviewed *de novo*. *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005).

When a trial court's findings comingle findings of facts with conclusions of law, we give appropriate deference to the findings of fact and review the portions of those findings that are conclusions of law *de novo*. *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009). The North Carolina Supreme Court has defined findings of fact as statements of what happened in space and time. *State v. Parisi*, 372 N.C. 639, 655, 831 S.E.2d 236, 247 (2019). A conclusion of law, however, requires the exercise of judgment or the application of legal principles to the facts found. *State v. McFarland*, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014) (internal quotes and citation omitted). Therefore, when statements identified as findings of fact required the trial court to exercise its judgment or apply law to come to a determination, those statements are considered as conclusions of law.

2. Findings of Fact

Mr. Moua specifically challenges the trial court's finding of fact 10 that Sgt. Tryon had given Mr. Moua a warning for speeding as unsupported by evidence. The finding states that: "Almost immediately upon the [D]efendant and Sgt. Tryon getting to the back of the [D]efendant's vehicle, Sgt. Tryon returned all of the documents back to the [D]efendant and the two briefly discussed the [D]efendant speeding and Sgt. Tryon gave him a warning for speeding."

However, the competent evidence presented at the motion to suppress hearing supports this finding. The video footage of the incident, which was introduced as evidence during the motion to suppress hearing, shows that Sgt. Tryon said to Mr. Moua "You gotta slow down. 35 is 35, right? I get it, North Tryon used to be, like 55, like three years ago." The bodycam footage provided the trial court with competent evidence as to what Sgt. Tryon said and the statement plainly put Mr. Moua on notice to slow down and desist from going faster than the current

speed limit on North Tryon Street. Accordingly, we hold that the trial court had competent evidence upon which to make the finding of fact that Sgt. Tryon gave Mr. Moua a warning. However, the key issue, which we discuss later, is whether this warning is sufficient, under the totality of the circumstances, to communicate to a reasonable person that the purpose of the stop had ended, and the person was free to terminate the encounter.

Additionally, Mr. Moua challenges finding of fact 13 that Mr. Moua "freely and voluntarily" consented to the search by arguing that the finding is actually a conclusion of law. The "question of whether consent to a search was in fact voluntary or was the product of duress or coercion, expressed or implied, is a question of fact to be determined based upon the totality of the circumstances." *State v. Hall*, 268 N.C. App. 425, 429, 836 S.E.2d 670, 674 (2019) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 863 (1973)). Here, the competent evidence does not support the finding of fact that Mr. Moua "freely and voluntarily" consented to the search. Mr. Moua had just been separated from his vehicle through a show of force by Sgt. Tryon, where Sgt. Tryon had reached through the car window, unlocked and opened the car door. Sgt. Tryon was questioning Mr. Moua behind the car about his probation status with the State while his partner was shining his flashlight in the car. Sgt. Tryon presented the questions in a rapid-fire manner which quickly transitioned into a request to search the car. Based upon the totality of the circumstances, this finding of fact is not supported by competent evidence.

3. Conclusions of Law

Additionally, Mr. Moua argues that the trial court comingled findings of facts with conclusions of law. Specifically, Mr. Moua asserts that findings of fact 11 and 12—that the stop concluded prior to Sgt. Tryon's request to search and the request came during a "consensual" conversation—are actually conclusions of law. These items appear in the order as both findings of fact and conclusions of law. The ultimate conclusion of the trial court was that the purpose of the traffic stop ended when Sgt. Tryon returned Mr. Moua's documents, and the ensuing conversation was consensual; therefore, when Mr. Moua gave consent to search the car it was voluntary and consensual because a reasonable person would feel free to leave or refuse to cooperate. We review these conclusions *de novo*. *See State v. Reed*, 257 N.C. App. 524, 530, 810 S.E.2d 245, 249, *aff'd*, 373 N.C. 498, 838 S.E.2d 414 (2020) (explaining that while a traffic stop only concludes and becomes consensual after an officer returns the detainee's paperwork, the governing inquiry is whether under the

totality of the circumstances, a reasonable person in the detainee's position would believe they are free to leave). *See also State v. Icard*, 363 N.C. at 308, 677 S.E.2d at 826 (stating that whether an officer's actions amount to a show of authority is a conclusion of law).

4. Consent to search was not valid

On appeal, Mr. Moua argues that when he gave consent to search his car, he was still "seized" within the meaning of the Fourth Amendment because the traffic stop was unlawfully extended. Therefore, his consent was invalid. We agree.

The Fourth Amendment to the U.S. Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." *United States v. Mendenhall*, 446 U.S. 544, 550, 64 L. Ed. 2d 497, 507 (1980). Similarly, the North Carolina Constitution, Article 1, Section 20 guarantees the right of people to be secure in their person and property and free from unreasonable search. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

When a party gives consent to a search while they are seized *or* when the bounds of an investigative stop have been exceeded, the consent is invalid. *Florida v. Royer*, 460 U.S. 491, 501, 75 L. Ed. 2d 229, 239 (1983) (emphasis added). Stopping an automobile and detaining its occupants constitutes a "seizure" within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979). A traffic stop is permitted when an officer sees a motorist committing a violation or when the officer has a reasonably articulable suspicion that there is criminal activity afoot. *State v. Heien*, 226 N.C. App. 280, 286, 741 S.E.2d 1, 5 (2013). Generally, the allowable duration of police inquiry in the traffic-stop context is determined by the seizure's "mission"—e.g., to address the traffic violation that warranted the stop or to attend to related safety concerns.[2] *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 673 (2017).

The return of documents would render further interaction voluntary and consensual only if a reasonable person under the circumstances

2. The State submitted a Memorandum of Authority presenting cases that justify the request for a motorist to exit the car during a traffic stop for safety concerns. The State did not advance that argument at the trial court level or in its appellate brief. The Rules of Appellate Procedure do not allow parties to add additional arguments through a Memorandum of Additional Authorities. N.C. R. App. P. 28(g) (2022). The scope of appeal is limited to issues presented in the briefs. N.C. R. App. P. 28(a).

would believe that they are free to leave or disregard the officer's request for information. *Heien*, 226 N.C. App. at 287 (citing *State v. Kincaid*, 147 N.C. App. 94, 99, 555 S.E.2d 294, 299 (2001)). Once the purpose of the traffic stop has concluded, there is nothing that precludes a police officer from asking questions of a citizen; however, the interaction must be consensual and devoid of a show of authority or force on the part of law enforcement in order to avoid becoming a seizure within the scope of the Fourth Amendment. *United States v. Mendenhall*, 446 U.S. at 552, 64 L. Ed. 2d at 508.

Here, it is undisputed that the initial traffic stop was lawful. However, the scope of detention for this traffic stop, "must be carefully tailored to its underlying justification." *State v. Morocco*, 99 N.C. App. 421, 427–28, 393 S.E.2d 545, 549 (1990) (quoting *Florida v. Royer*, 460 U.S. at 500, 75 L. Ed. 2d at 238). Sgt. Tryon had the authority to stop Mr. Moua for speeding when he paced Mr. Moua driving fifty-five miles per hour in a thirty-five mile per hour zone. Beyond determining whether to issue a traffic ticket for the infraction, the reasonable duration of a traffic stop may include ordinary inquiries incident to the traffic stop including checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. *State v. Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (2017) (citing *Rodriguez v. United States*, 575 U.S. 348, 355, 191 L. Ed. 2d 492, 499 (2015)). Sgt. Tryon completed all these tasks. He ran the driver's information through different law enforcement databases. After about two minutes of checking, Sgt. Tryon learned that Mr. Moua did not have any active warrants.

When Sgt. Tryon returned the documentation to Mr. Moua and gave him a verbal warning about speeding, the authority for the seizure ended. Sgt. Tryon needed reasonable articulable suspicion of a crime to extend the stop beyond that point and the State has not argued that reasonable articulable suspicion existed to extend the traffic stop. *See Rodriguez v. United States*, 575 U.S. at 354, 191 L. Ed. 2d at 498; *See also State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (holding that when the original purpose of the stop has been addressed, there must be grounds that provide a reasonable and articulable suspicion to justify further delay), *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008).

Therefore, to determine whether the encounter was unlawfully extended, as Mr. Moua argues, or a voluntary encounter, as the State argues, we consider whether, based upon the totality of the circumstances, a reasonable person would have felt free to leave prior to the request to search. In a scenario where a reasonable person would feel free to

leave, the encounter after the documents were returned would be a voluntary encounter, and the consent may be valid. *State v. Heien*, 226 N.C. App. 280, 287, 741 S.E.2d 1, 6 (2013). However, if the seizure was unlawfully prolonged, then consent was invalid. *Rodriguez v. United States*, 575 U.S. at 351, 191 L. Ed. 2d at 496. Neither the subjective beliefs of law enforcement nor those of the defendant is dispositive of the question of whether a defendant is seized within the meaning of the Fourth Amendment; instead, the appropriate inquiry is whether a reasonable person would believe they are free to terminate the encounter. *State v. Freeman*, 307 N.C. 357, 360, 298 S.E.2d 331, 333 (1983).

The return of the documents is not a bright line that automatically and inarguably turns a seizure into a consensual encounter. We must consider the return of the document in the context of the entire encounter. Moments before the return of the documents, Sgt. Tryon had made a show of authority to remove Mr. Moua from his vehicle and instructed him to stand behind the vehicle. The video shows that Sgt. Tryon did not phrase his direction as a question, instead directing, albeit politely: "Sir come out and talk to me real quick." Further, Sgt. Tryon reached into the car, unlocked, and opened the door, further suggesting that whether to exit the vehicle was not up to Mr. Moua. The second uniformed police officer was still standing by the passenger side of the car, shining his flashlight into the car. Sgt. Tryon did not tell Mr. Moua that the purpose for the traffic stop had concluded or even ask if he could question him about other topics. During the motion to suppress hearing, Sgt. Tryon testified that he removed Mr. Moua from his car, not for safety reasons but for privacy reasons and because people are more likely to consent to a search when they are separated from their vehicle.[3] No written citation or warning was issued, nor was there any indication from Sgt. Tryon that the traffic stop had ended. Sgt. Tryon immediately began questioning Mr. Moua about his probation status and whether he was compliant with the terms of his probation—questions directly implicating Mr. Moua's continued supervisory relationship with the State.

In the United States, the social contract that underpins our system of government is one premised on the fact that we cede the absolute nature of some of our individual rights in order to secure group safety and order. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 45

3. Although this fact may be viewed as one reflective of the subjective intent of Sgt. Tryon, which we have identified as not part of the Fourth Amendment analysis, we think it provides context for how certain patterns and practices are employed in attempts obtain consent that may impact how reasonable people perceive their ability to withhold consent.

L. Ed. 2d 607, 615 (1975). That agreement creates an inherent power differential between law enforcement and citizens. Even if Sgt. Tryon intended to have a consensual conversation with Mr. Moua, we must objectively consider whether a reasonable person who is being questioned about their probation status on the side of a dark road in the middle of the night after being pulled out of their vehicle by a uniformed police officer would feel free to turn his back on the officer, walk back to their car, and drive away. After a review of the totality of this four-minute and forty-second encounter, we hold that a reasonable person in this situation would not have felt free to terminate the encounter even after the police officer returned his driver's license and registration four minutes and twelve seconds into the encounter. Therefore, the seizure was not rendered consensual by the return of the documents, the request to search was during an unlawful extension of the traffic stop, and Mr. Moua's consent to search was invalid.

In its brief, the State argues that the encounter between Sgt. Tryon and Mr. Moua was consensual based upon *United States v. Mendenhall*, 446 U.S. 544, 64 L. Ed. 2d 497 (1980). However, the facts in *Mendenhall* are distinguishable from the facts in this case. In *Mendenhall*, two plainclothes officers, who did not have any visible weapons, approached the defendant in the Detroit Metropolitan airport concourse during the morning. *Id.* at 555, 64 L. Ed. 2d at 510. The officers requested, not demanded, to see the defendant's identification. *Id.* The Court held that the officer's conduct *without more* was insufficient to find a constitutional infringement. *Id.* By contrast, the instant case presents those facts that would convert *Mendenhall* into a constitutional infringement. Here, the uniformed police officers displayed, although they did not draw, weapons. The encounter occurred on a dark street, largely deserted, in the middle of the night. Further, in a show of authority, Sgt. Tryon reached into the window, unlocked and opened the car door, and told Defendant to get out of the car—essentially taking away any option for Mr. Moua to decline to follow Sgt. Tryon's instructions. Sgt. Tryon's conduct was sufficient to establish that a reasonable person would not feel free to terminate the encounter.

The State also points to *State v. Kincaid* and *State v. Heien* to support their contention that a reasonable person would have felt free to terminate this type of encounter. The State's argument is not persuasive. In *State v. Kincaid*, the police officer specifically told the defendant the reason for the stop had concluded, and the officer asked if he could question the defendant on another topic. *State v. Kincaid*, 147 N.C. App. at 100, 555 S.E.2d at 299. Here, Mr. Moua was not told that

the reason for the stop had concluded, and Sgt. Tryon did not ask to question him on other topics. In *State v. Heien*, this Court held that a short encounter after the return of the license was consensual. 226 N.C. App. 280, 289, 741 S.E.2d 1, 6 (2013). However, the defendant in *Heien* was not the driver of the automobile, and the police officer told the driver that he was free to leave before asking the defendant, who was the passenger and owner of the vehicle, for consent to search the vehicle. *State v. Heien*, 214 N.C. App. 515, 516, 714 S.E.2d 827, 828 (2011) *rev'd*, 366 N.C. 271, 737 S.E.2d 351 (2012). Here, Sgt. Tryon never told Mr. Moua that he was free to leave. Thus, we find the facts here render *Heien* largely inapplicable.

As to the appropriate remedy, the State, for the first time at oral argument,[4] argued that even if this Court reversed the order denying the motion to dismiss, we should not vacate the judgment because it is based upon a guilty plea. However, the Legislature specifically created the right to appeal a denial of the motion to suppress from a guilty plea or a conviction, and the right does not exist until there is a guilty plea or conviction. N.C. Gen. Stat. § 15A-979(b). This Court only gains jurisdiction to consider the denial of the motion to suppress when the trial court entered a final judgment. *State v. Horton*, 264 N.C. App. 711, 714, 826 S.E.2d 770, 773 (2019). The plain language of the statute controls, and it explicitly provides relief after a guilty plea. Therefore, the appropriate remedy is to vacate the judgment and remand.

Based upon the totality of the circumstances, we hold that the seizure was unlawfully extended, and Mr. Moua was not engaged in a consensual conversation with law enforcement. A reasonable person would not have felt free to terminate this encounter, rendering Mr. Moua's consent invalid. Therefore, we hold that he was unlawfully seized under the Fourth Amendment, and the consent to search the vehicle was not freely and voluntarily given.

III. CONCLUSION

Upon careful consideration of the issues presented, we hold that at the time the police officer asked for consent to search his car, Mr. Moua was unlawfully seized under the Fourth Amendment and did not, as a matter of law, freely and voluntarily give consent to the requested search. Therefore, the search violated his Fourth Amendment rights.

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4. As previously noted, the addition of new arguments not contained in the brief is a violation of the North Carolina Rules of Appellate Procedure. It was improper for the State to raise this new argument at oral argument because it was not included in their brief.

Accordingly, we reverse the order denying the motion to suppress, vacate the judgment, and remand for further proceedings before the trial court.

REVERSED AND VACATED.

Judges MURPHY and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
OEUN SAN

No. COA22-664

Filed 18 July 2023

1. Appeal and Error—notice of appeal—motion to suppress—underlying criminal judgment—petition for certiorari

In a criminal case in which defendant entered an Alford plea to trafficking in methamphetamine and other related charges, and where the trial court denied his motion to suppress evidence seized from a traffic stop, defendant's petition for a writ of certiorari was granted to allow review of the trial court's criminal judgment. Defendant properly notified the court and the prosecutor during plea negotiations of his intent to appeal the denial of his motion to suppress, but, when giving his oral notice of appeal after the court's judgment was entered, defendant failed to mention that he was appealing from both the denial of his motion and from the judgment. Nevertheless, defendant's intent to appeal from both orders was apparent from context, and the State did not object on appeal to defendant's petition for certiorari.

2. Search and Seizure—motion to suppress—finding of fact—traffic stop—police inquiry extending the stop—timing of dog sniff in relation to the inquiry

In a prosecution for trafficking in methamphetamine and other charges arising from a traffic stop, where an officer stopped a car in which defendant sat as a passenger, asked the driver to exit the vehicle, issued the driver a warning citation, and then asked the driver if she had any drugs or weapons inside the vehicle, competent evidence supported the trial court's finding that law enforcement conducted an open-air dog sniff around the vehicle "simultaneously to

[the officer] asking [the driver] to exit her vehicle and explaining the warning ticket to her." Importantly, when read together with other findings, this finding clearly reflected that the dog sniff occurred before the officer extended the traffic stop beyond its mission by asking the driver about items inside her car. Because the finding was both internally consistent and consistent with the court's other findings, the court properly relied on this finding when denying defendant's motion to suppress evidence seized during the stop.

3. Search and Seizure—motion to suppress—probable cause—warrantless search following traffic stop—validity of dog sniff

In a prosecution for trafficking in methamphetamine and other charges arising from a traffic stop, where an officer stopped a car in which defendant sat as a passenger, asked the driver to exit the vehicle, issued the driver a warning citation, and then asked the driver if she had any drugs or weapons inside the vehicle, the trial court properly denied defendant's motion to suppress evidence seized from the vehicle after law enforcement conducted an open-air dog sniff around the car. Firstly, the court's legal basis for denying defendant's motion was clear enough to allow appellate review of the court's ruling. Secondly, the court properly relied on a probable cause standard when ruling on the motion because, even though the underlying issue was whether the dog sniff was valid, the ultimate question for the court was whether law enforcement had probable cause to conduct a warrantless search of the vehicle based on the dog sniff. Finally, the court's findings supported a conclusion that the dog sniff was conducted while the officer spoke with the driver and before the officer prolonged the stop beyond its mission (by asking the driver about other items inside the car), and therefore the findings established that the traffic stop was not unlawfully prolonged on account of the dog sniff.

Appeal by Defendant from Judgment entered 11 January 2022 by Judge James M. Webb in Randolph County Superior Court. Heard in the Court of Appeals 24 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kelly A. Moore and Special Deputy Attorney General Martin T. McCracken, for the State.

Benjamin J. Kull for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Oeun San (Defendant) appeals from the denial of a Motion to Suppress and a subsequent Judgment entered upon Defendant's *Alford*[1] plea to Trafficking in Methamphetamine, Selling or Delivering a Schedule II Controlled Substance, and two counts of Possession of a Firearm by a Felon. As part of the plea agreement, the State agreed to dismiss a number of other charges. Relevant to this appeal, the Record before us tends to reflect the following:

Defendant was charged with thirteen separate counts arising from four separate alleged offense dates. The first offense date was 15 May 2018, stemming from a traffic stop. As a result of this stop, Defendant was charged with Trafficking Methamphetamine by Possession, Trafficking Methamphetamine by Transportation, Conspiracy to Trafficking Methamphetamine by Possession, Conspiracy to Trafficking Methamphetamine by Transportation, Possession of a Firearm by a Felon, and Possession with Intent to Sell or Deliver Methamphetamine. The second offense date was the following day, 16 May 2018, as a result of a search warrant-based search of Defendant's home. This search resulted in Defendant being charged with Trafficking Methamphetamine by Possession, Conspiracy to Trafficking Methamphetamine by Possession, Keeping/Maintaining a Dwelling for Keeping/Selling a Controlled Substance, and Possession with Intent to Sell or Deliver Methamphetamine. The final two offense dates were 22 October 2019, when Defendant was charged with Selling/Delivering Methamphetamine and Conspiracy to Sell Methamphetamine, and 23 October 2019, when Defendant was charged with an additional count of Possession of a Firearm by a Felon. The State subsequently dismissed the charge of Keeping/Maintaining a Dwelling for Keeping/Selling a Controlled Substance.

On 30 April 2019, Defendant filed a Motion to Suppress alleging the search of the vehicle during the 15 May 2018 traffic stop and the 16 May 2018 search of his residence were in violation of both the United States and North Carolina Constitutions. Defendant's Motion to Suppress was heard on 26 July 2021. At the outset of the hearing, the State announced it consented to the suppression of evidence of drugs seized from Defendant's home resulting from the 16 May 2018 search warrant. As a result, the parties proceeded only on the issue of whether evidence seized as a result of the 15 May 2018 traffic stop should be suppressed. Defendant contended the traffic stop was impermissibly prolonged

1. *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L. Ed. 2d 162 (1970).

beyond the mission of the traffic stop without reasonable suspicion or consent. At the conclusion of the hearing, the trial court took the matter under advisement. Defendant provided notice that in the event the Motion to Suppress was denied, he intended to appeal the denial.

On 24 September 2021, the trial court entered its written Order denying the Motion to Suppress the evidence seized at the 15 May 2018 traffic stop. The trial court made the following—largely unchallenged—Findings of Fact:

> 1. That on May 15, 2018 Detective Richard Linthicum with the vice narcotics unit of the Randolph County Sheriff's Department ("Linthicum") received information that the [D]efendant was in possession of a large amount of methamphetamine. Linthicum described the provider of the information as a confidential and reliable informant; however, the Court heard no evidence as to this person's reliability, and no evidence corroborating the information.
>
> 2. That after receiving the information, Linthicum and other officers attempted to locate [D]efendant and conduct surveillance. Linthicum located [D]efendant and a female, later identified as Jamie Little, driving a Ford Edge at the Dixie Suds Laundry . . . .
>
> 3. Linthicum and Detective Hammer were in an unmarked Ford 150 [sic] truck parked at the Midtown Dixie gas station, and Linthicum noticed the Ford Edge parked next to a wall at the laundry. He noticed [D]efendant and Ms. Little going back and forth from the vehicle to the laundry.
>
> 4. The Ford Edge left the laundry and parked beside Linthicum's truck at the gas station, Ms. Little attempted to go in the gas station but it was closed.
>
> 5. The Ford Edge left the gas station and Linthicum followed them . . . .
>
> 6. That Linthicum noticed the Ford Edge cross the double center line when the vehicle turned left off of Highway 311 onto Stout Road, and he radioed this information to [Deputy] Kyle Cox ("Cox"), also with the Randolph County Sheriff's Department, who was driving a marked patrol vehicle, to conduct a traffic stop on the vehicle. Linthicum pulled over on the side of the road to allow Cox to pass him to make the traffic stop. Linthicum saw Cox initiate

the stop and the Ford Edge stopped, and then Linthicum continued traveling on Stout Road and waited for further instructions.

7. That Cox initiated the traffic stop on the Ford Edge, the vehicle stopped[,] and Cox went to the driver's side of the vehicle, and told Ms. Little the reason he stopped her and asked for her driver's license and registration. Ms. Little gave her driver's license and registration to Cox.

8. That Cox went to his patrol vehicle, and ran a records check on Ms. Little and the vehicle, which took three to four minutes. Cox recognized [D]efendant as the passenger in the vehicle.

9. That Cox then requested Ms. Little exit the vehicle so he could explain the warning citation to her, which is Cox's routine procedure. Cox and Ms. Little walked behind the Ford Edge and in front of Cox's patrol vehicle. Cox explained to Ms. Little the warning citation while standing in front of the patrol vehicle, and asked Ms. Little if she had any questions. After Cox returned Ms. Little's documents, he then asked Ms. Little if there was anything in the vehicle that he needed to know about including guns, drugs, bombs, large amounts of U.S. currency or any other weapons. That Ms. Little said she had a gun on the seat. However, based on testimony from the other officers involved, they were not aware of this information until after the search of the vehicle.

10. That Detective Joshua Santiago and Detective John Lamb[e] with the Randolph County Sheriff's Department, Vice Narcotics Unit ("Santiago" and "Lamb[e]"), also arrived on scene. Santiago and Lamb[e] had previously been informed of the information that [D]efendant had a large amount of methamphetamine. Santiago is a certified K-9 handler of K-9, Lizzy. Lizzy was certified on cocaine, methamphetamine, heroin and marijuana.

11. That Santiago noticed Ms. Little sitting in the driver's seat of the Ford Edge when he and Lamb[e] arrived on scene. He then spoke to Cox, and Cox informed Santiago he was writing Ms. Little a warning ticket and he was going to get Ms. Little out of the vehicle to explain the warning ticket to her.

> 12. When Cox got Ms. Little out of the vehicle, Santiago asked Lamb[e] to get [D]efendant out of the vehicle due to Santiago readying to deploy Lizzy. While Cox and Ms. Little were in front of Cox's patrol vehicle, Santiago deployed Lizzy to complete an open air sniff around the vehicle.
>
> 13. That although Cox asked Ms. Little a question about whether she had anything in the vehicle he needed to know about after he returned her driver's license and registration and gave her the warning ticket, this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her.
>
> 14. Lizzy sat, which is a passive alert, at the area of the front passenger door.
>
> 15. Based on Lizzy's alert, the vehicle and containers within the vehicle were searched.

The trial court then concluded: "Based upon a totality of the circumstances the [c]ourt concludes that the Defendant's [M]otion to [S]uppress for lack of probable cause should be denied."

On 11 January 2022, Defendant and the State entered a plea arrangement. Defendant entered an *Alford* plea to: Trafficking Methamphetamine by Possession and Possession of a Firearm by a Felon both arising from the 15 May 2018 offense date; Selling/Delivering Methamphetamine from the 22 October 2019 offense date; and Possession of a Firearm by a Felon from the 23 October 2019 offense date. The State agreed to dismiss all other pending charges. The trial court consolidated the four charges into a single judgment and sentenced Defendant to an active prison term of 70 to 93 months and imposed a $50,000 fine. Defendant's trial counsel announced in open court: "We had a motion to suppress. I gave notice in advance that if the motion was denied, we intend to give notice of appeal to the Court of Appeals. It was denied on September 24th of 2021, therefore we're giving notice of appeal for denial of that motion to the Court of Appeals."

Appellate Jurisdiction

[1] As an initial matter, Defendant filed a Petition for Writ of Certiorari in this Court in the event we deem his oral Notice of Appeal insufficient to preserve his appeal from the trial court's Judgment. "An order . . . denying a motion to suppress evidence may be reviewed upon an appeal from . . . a judgment entered upon a plea of guilty." N.C. Gen. Stat.

§ 15A-979(b) (2021). However, a defendant must (1) notify the prosecutor and the trial court of his intention to appeal during plea negotiations and (2) provide notice of appeal from the final judgment. *State v. McBride*, 120 N.C. App. 623, 625-26, 463 S.E.2d 403, 404-05 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996).

Here, Defendant, through trial counsel, complied with only one of the two required steps to preserve his appeal from his guilty plea. Defendant complied with step 1 by notifying the prosecutor and trial court of his intent to appeal the denial of the Motion to Suppress prior to his plea being accepted. However, after Judgment was entered, trial counsel gave oral Notice of Appeal but specified the appeal was from the denial of the Motion to Suppress and failed to state the appeal was from the Judgment rendered by the trial court. As such, Defendant has lost his right to appeal from the Judgment entered by the trial court. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010) (dismissing appeal where defendant gave written notice of appeal "from the denial of Defendant's motion to suppress," but did not specify the judgment itself).

Nevertheless, in the context of this case, we discern Defendant's intent to appeal from both the Motion to Suppress and the Judgment. Indeed, for its part, the State contends Certiorari is unnecessary as the State does not seek dismissal of the appeal. In our discretion, and in aid of our jurisdiction, we allow Defendant's Petition and issue our Writ of Certiorari. *See* N.C. Gen. Stat. § 7A-32(c) (2021).

Issues

The issues on appeal are whether: (I) Finding of Fact 13, that "the open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her," is supported by competent evidence in the Record; and (II) the trial court's Findings of Fact support its Conclusion: "Based upon a totality of the circumstances . . . Defendant's [M]otion to [S]uppress for lack of probable cause should be denied."

Analysis

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citation and quotation marks omitted). The trial court's conclusions of law, however, are reviewed de novo. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)

(citation omitted). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002) (citations omitted).

I. Finding of Fact 13

[2] Defendant challenges only one of the trial court's Findings of Fact: Finding 13. In Finding of Fact 13, the trial court found:

> That although Cox asked Ms. Little a question about whether she had anything in the vehicle he needed to know about after he returned her driver's license and registration and gave her the warning ticket, this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her.

In particular, Defendant contends the portion of the Finding that "this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her" is unsupported by the evidence, self-contradictory and illogical, and further contradicted by Finding of Fact 12. We disagree.

First, there is competent evidence in the Record to support the trial court's Finding. Defendant focuses exclusively on Deputy Cox's written report. This report on its face indicates Deputy Cox had concluded the stop by issuing a warning ticket and asked Ms. Little if there was anything in the car Deputy Cox should know about like weapons, contraband, or large sums of currency. The Report further states "Detective Santiago *then* deployed his canine Lizzy . . . [.]" However, Defendant's reliance on Deputy Cox's report ignores other testimony and evidence, including Detective Santiago's testimony. Detective Santiago testified when he arrived on the scene to handle Lizzy while she conducted the open-air sniff, Deputy Cox was in the process of issuing the warning ticket and told Detective Santiago he was going to ask Ms. Little to step out of the car so he could explain the warning ticket to her. Once Deputy Cox asked Ms. Little to step out of the car to explain the warning ticket, Detective Santiago asked Detective Lambe to remove Defendant from the car, so Lizzy could be deployed. Detective Santiago also testified that as he went to retrieve and deploy Lizzy, he briefly overheard the conversation between Deputy Cox and Ms. Little when Deputy Cox was still explaining the warning ticket. Lizzy conducted her open-air sniff while Deputy Cox and Ms. Little were still having their conversation. Detective Santiago's testimony was also consistent with his written

report. Further, Detective Lambe testified when Deputy Cox asked Ms. Little to step out of the car, Detective Santiago asked Detective Lambe to remove Defendant from the car also, so Lizzy could be deployed. Detective Lambe's written report reflects "Deputy Cox had [Ms.] Little whom was driving the vehicle step out to explain the warning citation while Detective Santiago deployed K9. Before doing so I asked the male passenger to step out of the vehicle . . . ." This evidence, taken in the light most favorable to the State on appellate review, supports the finding "this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her." *See State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) ("The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." (citations and quotation marks omitted)).

Second, Finding of Fact 13 is not illogical or internally inconsistent. Defendant argues it is logically impossible for the open-air sniff to have started precisely simultaneously to both Ms. Little being asked to exit the vehicle and the warning ticket being explained to her—as those were two separate occurrences. Defendant reads the Finding too narrowly. Rather, when read in context, it is apparent that the trial court, in this Finding, is acknowledging the evidence that after Deputy Cox finished his explanation, handed over the warning citation, and returned Little's license and registration, he *then* asked about items in the car—which could be seen as extending the traffic stop after its mission was completed. The trial court, however, goes on to clarify that the open-air sniff was initiated prior to Deputy Cox's inquiry. In other words, the open-air sniff was occurring prior to the stop arguably being extended beyond its mission.

Third, Defendant contends Finding of Fact 13 is contradicted by Finding of Fact 12. To the contrary, Finding of Fact 13 is perfectly consistent with Finding of Fact 12. Finding of Fact 12 states: "When Cox got Ms. Little out of the vehicle, Santiago asked Lamb[e] to get [D]efendant out of the vehicle due to Santiago readying to deploy Lizzy. While Cox and Ms. Little were in front of Cox's patrol vehicle, Santiago deployed Lizzy to complete an open air sniff around the vehicle." Defendant's argument, again, rests on an overly narrow focus on the trial court's use of the term "simultaneously" in Finding of Fact 13. However, Finding 12 reflects that Santiago began the process of deploying Lizzy when Ms. Little got out of the vehicle and Detective Lambe removed Defendant; Lizzy *then* performed the sniff while Deputy Cox and Ms. Little were in front of the patrol vehicle.

Thus, the trial court's Findings, read together, reflect that the sniff was, in fact, undertaken during the same time frame as Ms. Little getting out of the car and Deputy Cox explaining the warning citation to her. Therefore, Finding of Fact 13 is supported by evidence in the Record and is consistent with itself and the trial court's other Findings. Consequently, Finding of Fact 13 may, in turn, also be relied on to support the trial court's Conclusions.

II. The Trial Court's Conclusion of Law

[3] Defendant further challenges the trial court's Conclusion of Law: "Based upon a totality of the circumstances, the [c]ourt concludes that the Defendant's [M]otion to [S]uppress for lack of probable cause should be denied." Defendant contends the trial court's Conclusion fails to articulate any rationale for its decision to deny the Motion to Suppress. Defendant further argues the trial court misapprehended the law applicable to traffic stops and warrantless dog-sniffs by relying on "a probable cause" standard. Finally, Defendant—relying on *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L. Ed. 2d 492 (2015)—contends, even applying the correct standard, the trial court's Findings of Fact do not support its Conclusion of Law.

First, Defendant contends the trial court's Conclusion of Law is insufficient for appellate review because it fails "to provide the trial court's rationale regarding why" it denied the Motion to Suppress.[2] When ruling on a motion to suppress following a hearing, a judge "must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2021). As Defendant notes, our Court has observed:

> When a trial court fails to make all the necessary determinations, *i.e.*, findings of fact resolving disputed issues of fact and conclusions of law applying the legal principles to the facts found, "[r]emand is necessary because it is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, *and*, *then based upon those findings*, *render a legal decision*, *in the first instance*, as to whether or not a constitutional violation of some kind has occurred."

State v. Faulk, 256 N.C. App. 255, 263, 807 S.E.2d 623, 629 (2017) (emphasis added) (quoting *State v. Baskins*, 247 N.C. App. 603, 610, 786

2. Defendant actually raises this argument as an argument in the alternative should we reject his other arguments. For our purposes, however, we first review whether the trial court made a conclusion of law adequate for appellate review before reaching Defendant's more substantive arguments.

S.E.2d 94, 99 (2016) (citations and quotation marks omitted)). Here, however, the trial court made generally unchallenged Findings of Fact and "based on those findings" did "render a legal decision." *Id.* Indeed, in *State v. Aguilar*, we recently concluded a substantively identical conclusion of law was reviewable, particularly when taken in context of the findings of fact and prior trial court proceedings, "because the trial court here explained that probable cause supported the search based upon the totality of the circumstances in the findings." *State v. Aguilar*, 2022-NCCOA-903, ¶ 28, 882 S.E.2d 411, 423. Here, the trial court was tasked with ultimately determining whether law enforcement officers had probable cause to search the vehicle as a result of a valid dog-sniff. This is clear from the trial court's Findings of Fact as well as the proceedings reflected in the hearing transcript. While additional conclusions outlining the analytical steps undertaken by the trial court would certainly be more helpful in our review, here, we are able to discern the basis of the trial court's ruling and conduct our review.

Relatedly, Defendant further argues the trial court's Conclusion of Law constitutes a misapprehension or misapplication of the law, because—Defendant asserts—the real issue is not whether the dog-sniff provided probable cause to search the vehicle without a warrant but rather whether the dog-sniff itself was permissible as part of the traffic stop. As such, Defendant contends the trial court erred in applying a "probable cause" legal standard in its Conclusion rather than analyzing whether the dog-sniff occurred during the original mission of the traffic stop or was otherwise supported by reasonable suspicion of other criminal activity under *U.S. v. Rodriguez*.[3] While we agree with Defendant that the underlying issue is whether the dog-sniff—which led to the warrantless search—was validly conducted in the course of the traffic stop, we disagree the trial court's Conclusion of Law reflects a misapprehension of law.

To the contrary, the ultimate question for the trial court was whether there was probable cause to conduct the warrantless search of the vehicle primarily based on the positive alert from the dog-sniff, which necessarily required the trial court to first consider the validity of

3. For its part, the State contends there was probable cause to initiate the search based on the totality of the circumstances including a tip from a confidential, reliable informant, knowledge of the firearm in the vehicle, and knowledge of Defendant's prior criminal history. None of these circumstances, however, are supported by the trial court's Findings. To the contrary, the trial court expressly made no findings about the reliability of the informant; the officers conducting the search were not aware of the firearm until after the search; and there is no finding regarding Defendant's prior history.

the dog-sniff.[4] Nevertheless, "[a]ssuming arguendo that the trial court's reasoning for denying defendant's motion to suppress was incorrect, we are not required on this basis alone to determine that the ruling was erroneous." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citing *State v. Gardner*, 316 N.C. 605, 342 S.E.2d 872 (1986)). "A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." *Id.* (citing *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)). "The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *Id.*

Ultimately, Defendant argues the trial court's Findings cannot support a determination the dog-sniff was validly conducted during the traffic stop consistent with Fourth Amendment jurisprudence. Specifically, pointing to *Rodriguez*, Defendant contends the Findings—and in the absence of any finding of reasonable suspicion of other criminal activity—do not support a conclusion the dog-sniff was conducted prior to the completion of the original mission of the stop. As such, Defendant asserts the trial court's denial of the Motion to Suppress should be reversed and the trial court's Judgment vacated.

The Fourth Amendment of the Constitution provides the right of the people to be secure in their persons and protects citizens from unreasonable searches and seizures. U.S. Const. amend. IV.; *see also* N.C. Const. art. I, § 20; *State v. Garner*, 331 N.C. 491, 506-07, 417 S.E.2d 502, 510 (1992). These protections apply to "seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citation omitted). "Thus, a traffic stop is subject to the reasonableness requirement of the Fourth Amendment." *State v. Reed*, 373 N.C. 498, 507, 838 S.E.2d 414, 421-22 (2020). "A traffic stop may become 'unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.' " *Id.* at 508, 838 S.E.2d at 422 (alteration in original) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 837, 160 L. Ed. 2d 842, 846 (2005)).

In *Rodriguez*, the Supreme Court of the United States clarified:

> [a] seizure for a traffic violation justifies a police investigation of that violation. . . . [T]he tolerable duration of police

4. In the absence of a valid dog-sniff, the trial court may well have determined there was no probable cause to perform a warrantless search of the vehicle on the facts before it.

> inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.

575 U.S. 348, 354, 135 S.Ct. 1609, 1614, 191 L. Ed. 2d 492, 498 (2015) (citations and quotation marks omitted).

However, the *Rodriguez* Court also acknowledged: "the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention." *Id.* Nevertheless, a traffic stop " 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket." *Id.* (quoting *Caballes*, 543 U.S. at 407, 125 S.Ct. at 837). "The seizure remains lawful only 'so long as [unrelated] inquiries do not measurably extend the duration of the stop.' " *Id.* at 355, 135 S.Ct. at 1615 (quoting *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S.Ct. 781, 788, 172 L. Ed. 2d 694, 704 (2009)). "An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.*

Applying *Rodriguez*, the North Carolina Supreme Court recognizes: "Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to [the traffic] stop." *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (citation and quotation marks omitted) (alteration in original). "These inquiries include checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* (citation and quotation marks omitted). "In addition, 'an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely[,]' " including conducting criminal history checks. *Id.* at 258, 805 S.E.2d at 673-74 (citations omitted). Officer safety "stems from the mission of the traffic stop"; thus, "time devoted to officer safety is time that is reasonably required to complete that mission." *Id.* at 262, 805 S.E.2d at 676. "On-scene investigation into other crimes, however, detours from that mission." *Rodriguez*, 575 U.S. at 356, 135 S.Ct. at 1616. Moreover, "traffic stops remain[ ] lawful only so long as [unrelated] inquiries do not *measurably* extend the duration of the stop." *Bullock*, 370 N.C. at 262,

805 S.E.2d at 676 (alterations and emphasis in original) (citation and quotation marks omitted).

Relevant to this case, this Court, applying *Rodriguez*, has recognized: "The [*Rodriguez*] Court specifically held that the performance of a dog sniff is not a type of check which is related to an officer's traffic mission." *State v. Warren*, 242 N.C. App. 496, 499, 775 S.E.2d 362, 365 (2015), *aff'd per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016). "Therefore, under *Rodriguez*, an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop." *Id*. Indeed, the United States Supreme Court had previously concluded "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not." *Caballes*, 543 U.S. at 408, 125 S.Ct. at 837.

In this case, the trial court's Findings demonstrate the dog-sniff was undertaken prior to the completion of the mission of the traffic stop. In particular, the trial court found:

> 11. That Santiago noticed Ms. Little sitting in the driver's seat of the Ford Edge when he and Lamb[e] arrived on scene. He then spoke to Cox, and Cox informed Santiago he was writing Ms. Little a warning ticket and he was going to get Ms. Little out of the vehicle to explain the warning ticket to her.
>
> 12. When Cox got Ms. Little out of the vehicle, Santiago asked Lamb[e] to get [D]efendant out of the vehicle due to Santiago readying to deploy Lizzy. While Cox and Ms. Little were in front of Cox's patrol vehicle, Santiago deployed Lizzy to complete an open air sniff around the vehicle.
>
> 13. That although Cox asked Ms. Little a question about whether she had anything in the vehicle he needed to know about after he returned her driver's license and registration and gave her the warning ticket, this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her.

Crucially, these Findings tend to establish the dog-sniff was undertaken during the process of Cox explaining the warning ticket to Ms. Little and

prior to Cox asking the question potentially unrelated to the mission of the stop. As such, the trial court's Findings support a determination the traffic stop was not prolonged by, or for, the dog-sniff.

Thus, the trial court's Findings support a determination the dog-sniff which led to the search of the vehicle was validly conducted during the time reasonably required to complete the mission of the traffic stop. *See Rodriguez*, 575 U.S. at 354, 135 S.Ct. at 1609. Therefore, the trial court properly concluded "Based upon a totality of the circumstances"—including the validly conducted dog-sniff—"the Defendant's [M]otion to [S]uppress should be denied." Consequently, the trial court did not err in denying Defendant's Motion to Suppress.

Conclusion

Accordingly, for the foregoing reasons, we affirm both the trial court's Order denying the Motion to Suppress and the Judgment entered upon Defendant's *Alford* plea.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
JAMARKUS MESHAWN SMITH, DEFENDANT

No. COA22-880

Filed 18 July 2023

1. Homicide—murder by torture—child victim—acts constituting torture—starvation—physical and sexual abuse

The State presented substantial evidence in a prosecution for first-degree murder by torture from which a jury could conclude that defendant committed acts of torture upon his minor daughter by engaging in a pattern of the same or similar acts over a period of time that inflicted pain and suffering seemingly for the purpose of punishment, including that, after the victim had been in the sole care of defendant for nine months while the victim's mother was deployed overseas, the victim lost a significant amount of weight and had no appetite and, after her mother returned, was withdrawn and would almost never eat in defendant's presence. Further,

defendant beat the victim with his hands and belt and withheld water as punishment for her failure to eat, and, when the victim was taken to a hospital the day before she died, her body showed signs of prolonged and recent physical and sexual abuse in addition to severe malnutrition.

2. Homicide—murder by torture—proximate cause—child victim—pattern of abuse—starvation—pneumonia

The State presented substantial evidence in a prosecution for first-degree murder by torture from which a jury could conclude that defendant proximately caused his minor daughter's death and that her death was reasonably foreseeable based on the facts where, despite defendant's argument that the victim's death from pneumonia aggravated by starvation was unrelated to his conduct and instead resulted from new and independent causes, the evidence showed a causal chain between defendant's extended pattern of physical and sexual abuse and the victim's loss of appetite, starvation, and extremely weakened condition that led to her contracting pneumonia, and ultimately dying.

3. Evidence—expert testimony—murder by torture—child victim—cause of death

In a trial for first-degree murder by torture of a child victim and related sexual offenses, there was no plain error in the admission of testimony from two expert witnesses—the deputy chief medical examiner who conducted the autopsy of the victim and a developmental and forensic pediatrician who gave testimony on fatal child maltreatment and sexual abuse—on the issue of the victim's cause of death. Although both experts made comments related to what defendant's intentions were when he committed his abusive acts against the victim, the experts' beliefs and opinions were sufficiently based on the evidence before them. Further, even if the testimony had been excluded, the jury likely would have reached the same result given the weight of the evidence of defendant's guilt.

Appeal by defendant from judgment entered 2 August 2021 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 23 May 2023.

Marilyn G. Ozer, for defendant-appellant.

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

FLOOD, Judge.

Defendant appeals from a jury verdict finding him guilty of, *inter alia*, first-degree murder on the basis of torture. Defendant contends the trial court erred when it (1) denied his motion to dismiss on the basis that proximate cause could not be proven by the State's evidence and (2) admitted testimony from two of the State's experts. We disagree and hold the trial court did not err.

I. Factual and Procedural Background

The Record tends to show the following facts: On 19 April 2012, J.S.[1] was born to Octavia Bennet-Smith ("Ms. Smith") and Jamarkus Smith ("Defendant"). In May 2014, Ms. Smith, a then-active-duty member of the military, was deployed overseas for nine months, leaving J.S. in the exclusive care of Defendant. Prior to Ms. Smith's deployment, J.S. was a perfectly healthy, chubby baby who would eat any food put in front of her, but upon Ms. Smith's return from deployment on 15 February 2015, she discovered that J.S. was "really tiny, skinny, skinny." Ms. Smith also found J.S. would only eat when encouraged, but she would do so in a very "slow" manner and almost never when she was around Defendant. Neither Defendant nor Ms. Smith took J.S. to the doctor, despite her diminishing physical state.

In the months following Ms. Smith's return from deployment, J.S.'s physical state continued to diminish, and she showed little sign of an appetite except when encouraged to eat by her mother; even then, she ate slowly. Ms. Smith bought several weight-gain supplements for J.S. in an effort to help her reach a healthy weight. While Ms. Smith was at work, Defendant would tell her that he sat with J.S. while she ate, but J.S. still showed no sign of gaining any weight.

In the summer of 2015, J.S. went on a family vacation for a week with Ms. Smith's sister. Ms. Smith and Defendant did not attend the family vacation. When J.S. returned from the trip, Ms. Smith observed that she was "happier" and "had more of an appetite" after her time away from Defendant. Upon return home, however, J.S.'s health began to decline once again. Despite encouragement from Ms. Smith, J.S. rarely ate. When J.S. refused to eat, Defendant regularly resorted to violent disciplinary measures, such as beating J.S. with his belt or hands. In some instances, Defendant would force J.S. to perform pushups, run

1. A pseudonym is used in accordance with N.C. R. App. P. 42(b)(3).

sprints, and climb up and down a high chair as punishment for her lack of appetite.

By September 2015, J.S. had lost what weight and energy she had gained on vacation, and was "smaller . . . more withdrawn[,] and . . . just not the same." J.S. was "playful," "chatty," and "talkative" when around Ms. Smith, but would become closed off when Defendant was nearby. Defendant told Ms. Smith he believed this was because J.S. saw him as the "disciplinarian," while Ms. Smith was the "playful" parent. By November 2015, J.S. was even smaller, and, while she was playful with Ms. Smith, J.S. would not "interact" with Defendant. Defendant would also only willingly engage with J.S. when asked to by Ms. Smith such as when she was "sleepy" after work and would ask Defendant to "take" J.S. By this time, J.S. was also observed as having less control over her bladder and bowels; Ms. Smith noted that J.S. would no longer tell anyone she had to "go potty" and would soil herself wherever she was sitting. Defendant would spank J.S. as punishment for these accidents.

30 November 2015

On 30 November 2015, Ms. Smith returned home from work to find J.S. in a chair watching television with Defendant. When Ms. Smith greeted J.S., J.S. got up and slowly moved towards Ms. Smith. Defendant, seeking to discipline J.S. for her slow movement, "grabbed [J.S.] by her arm . . . and . . . popped [J.S.] on the behind" with his belt. The force of Defendant's blow caused J.S. to pitch and fall forwards, but since Defendant was holding her wrist, J.S. could not extend her arm to prevent her fall. She fell and hit her face into the floor, prompting a nosebleed.

Later that night, while the family was eating dinner together, J.S. hardly ate and complained of being thirsty. Ms. Smith proceeded to fill a "coke bottle" with water for J.S. Defendant, however, objected, claiming that he and Ms. Smith should not reward J.S. for being disobedient by not eating. Defendant proceeded to beat J.S. with his belt to discipline her.

The next morning, Ms. Smith went to work where she received texts from Defendant asking her why J.S. was "walking funny." Defendant later called Ms. Smith, exclaiming that "something's wrong with [J.S.][;] I think she's dying." Ms. Smith immediately left work and arrived home to find J.S. unconscious and naked from the waist down while Defendant frantically splashed water onto her face in an effort to revive her. As the two attempted to resuscitate J.S., Ms. Smith also noticed a bruise on J.S.'s inner thigh. Ms. Smith questioned Defendant about it who, when pressed, yelled "I got to get to South Carolina, my mama going to protect

me." Upon entering the ambulance, Ms. Smith asked the emergency technician to "perform a kit . . . a sexual assault kit on [J.S.]."

Admittance to the Hospital and Death

J.S. was admitted to the hospital with a body temperature of merely 88 degrees; generally, a healthy body temperature for a child of J.S.'s age is 97.4 degrees. J.S.'s emergency care team observed that since J.S.'s body had "no muscle mass [and] no subcutaneous fat," it was virtually impossible for her to retain body heat. J.S.'s body mass index "was around 12" meaning she was "so profoundly underweight that it was not surprising that she might not survive." As J.S.'s care team struggled to save her life and bring her core temperature up, they noticed a series of injuries that seemed indicative of a pattern of "physical and sexual" abuse. This included "large chronic and acute tearing of [J.S.'s] anus," with visualization of the intestines and active bleeding, and "extensive bruising" on her "labia and . . . inner thighs." Further, J.S.'s hips appeared to be "chronically forced outward" such that the emergency personnel "could not get them to go straight." J.S. had contusions across her entire body and hemorrhaging under the skin on her limbs and torso, as well as a periosteal hemorrhage in the skull.

Ultimately, J.S. was pronounced dead at 11:11 a.m. on 1 December 2015. Her cause of death was reported as "acute and organizing bilateral bronchopneumonia in the setting of malnutrition, neglect and sexual abuse." J.S.'s autopsy did not reveal any bacteria or pathogen that could have caused pneumonia. Instead, the attending physician identified atelectasis—the inability to properly breathe deeply—as the cause of the pneumonia. Atelectasis may develop in malnourished children because their bodies become "so weak" that they cannot properly draw breath.

Trial and Expert Testimony

The Fayetteville Police Department arrested Defendant on 1 December 2015 based on their belief that he had committed assault resulting in serious physical injury on a minor; committed a "lewd and lascivious act" upon J.S., a minor; and "killed J.S. with malice aforethought." A Cumberland County Grand Jury indicted Defendant on 13 March 2017 for first-degree murder, felony child abuse inflicting serious physical injury, felonious child abuse-sexual act upon a child, taking indecent liberties with a child, and two counts of sexual offenses against a child by an adult.

At trial, Dr. Timothy Hartzog ("Dr. Hartzog"), the emergency physician who led J.S.'s care team, provided testimony regarding his observations of J.S.'s injuries and condition while she was in the hospital. He first

noted that, upon her admission to the hospital, J.S. looked "extremely ill, had the markings of a child that was extremely malnourished, [and] ha[d] been subjected to abuse, physical[] and sexual." Dr. Hartzog considered J.S.'s lack of muscle mass and subcutaneous fat as indicative of a pattern of "malnutrition," and explained that her body lacked the ability to retain heat as a result. Dr. Hartzog stated that, in his expert opinion, the active bleeding on J.S.'s anus at the time of her admission evidenced some sort of traumatic event that happened mere "hours before [the] visit." He further testified that J.S.'s inability to lie with her legs straight was most likely the result of something that "chronically forced [J.S.'s] hips apart and wide to get access to her perineum."

The State elicited testimony from two more experts: Dr. Kimberly Janssen ("Dr. Janssen"), the deputy chief medical examiner who performed J.S.'s autopsy, and Dr. Sharon Cooper ("Dr. Cooper"), a developmental and forensic pediatrician who offered expert testimony on fatal child maltreatment and sexual abuse. Though both witnesses testified regarding the nature of J.S.'s death, neither of them had pretrial access to the investigative reports; they had access only to the autopsy report. Defendant did not object to the testimony of either of these expert witnesses at trial.

During her testimony, Dr. Janssen testified extensively about the autopsy she performed, before summarizing her findings and concluding that J.S.'s cause of death was "acute and organizing bronchopneumonia," and that "malnutrition contribute[d] to the death" because a healthy child could have fought off a pneumonia infection. She further stated that "the abuse [and] neglect in this case raises [] the manner to the level of homicide."

Dr. Cooper testified that when a child is "emaciated and malnourished" in the way that J.S. appeared, their mistreatment must be the product of "more than neglect," and that the mistreatment must have been a "willful" act. Dr. Cooper testified at length about the nature of the injuries indicated in the evidence: J.S.'s head and hands were disproportionate to the rest of her body; J.S.'s contusions and cuts did not seem consistent injuries typical of a fall; J.S.'s body was covered in contusions consistent with chronic and severe blunt force trauma; and J.S. had bruising all over her genitalia. Dr. Cooper stated that, in some of the worst situations, children may begin to starve in response to psychological trauma from abuse. Finally, Dr. Cooper echoed Dr. Janssen's findings and, based on her examination of the medical evidence, identified starvation and malnutrition as J.S.'s cause of death. On cross-examination, Dr. Cooper admitted she had access only to the medical records and

autopsy report, and she had not been provided information about Defendant and Ms. Smith's efforts to get J.S. to gain weight.

At the close of the State's evidence, Defendant moved to dismiss the charge of first-degree murder by torture, alleging that the State's evidence did not adequately show "Defendant had . . . intentionally withheld food or hydration sufficient to cause death," meaning that Defendant could not have proximately caused J.S.'s death. The trial court denied Defendant's motion, and a jury subsequently found Defendant guilty of felonious child abuse inflicting a physical injury, felonious child abuse by committing a sexual act, indecent liberties with a child, two counts of statutory rape, and first-degree murder on the basis of torture. Defendant was sentenced to life in prison without parole for the conviction of first-degree murder and to an additional prison sentence of 300 to 420 months at the expiration of his life-sentence for the sexual offenses.

Defendant timely appealed from the trial court's rejection of his motion to dismiss the first-degree murder charge.

II. Jurisdiction

An appeal lies of right directly to this court from any final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Analysis

On appeal, Defendant argues the trial court erred by (1) denying his motion to dismiss, alleging the State's evidence did not sufficiently indicate that Defendant's conduct was the proximate cause of J.S.'s death, and (2) impermissibly allowing testimony from the State's expert witnesses. For the reasons stated below, we disagree and conclude there was no error.

A. Defendant's Motion to Dismiss

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citations and internal quotation marks omitted).

2. Substantial evidence regarding Defendant's torture of J.S.

[1] In reviewing Defendant's motion to dismiss the charge of first-degree murder by torture, we begin by examining whether Defendant's conduct was torture. We hold that it was.

"Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence of (1) each essential element of the offense charged . . . and (2) of [the] defendant's being the perpetrator of such an offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "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, 265 S.E.2d 164, 169 (1980).

"First-degree murder by torture requires the State to prove that the accused intentionally tortured the victim and that such torture was a proximate cause of the victim's death." *State v. Pierce*, 346 N.C. 471, 492, 488 S.E.2d 576, 588 (1997) (citation and internal quotation marks omitted). Our Supreme Court defines torture as "the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure." *State v. Anderson*, 346 N.C. 158, 161, 484 S.E.2d 543, 545 (1997) (citation omitted). Said course of conduct is "the pattern of the same or similar acts, repeated over a period of time, however short, which establish[es] that there existed in the mind of the defendant a plan, scheme, system, or design to inflict cruel suffering upon another." *Id.* at 161, 484 S.E.2d at 545. "The presence or absence of premeditation, deliberation, and specific intent to kill is irrelevant in determining whether the evidence is sufficient for first-degree murder by torture." *State v. Lee*, 348 N.C. 474, 489, 501 S.E.2d 334, 344 (1998) (citation and internal quotation marks omitted).

Here, several facts were presented that "a reasonable mind might accept as adequate to support" the conclusion that Defendant tortured J.S. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169. For example, the Record demonstrates that, at some point after Ms. Smith deployed, J.S., while in the sole care of Defendant, lost her appetite and a significant amount of weight. Upon Ms. Smith's return, J.S. would eat slowly, but only if Ms. Smith was feeding her and hardly ever in the presence of Defendant. By this time, Defendant had begun to beat J.S. with his hands and belt, seemingly under the pretense of disciplining her for various infractions, including her lack of appetite. As punishment, Defendant forced her to exercise and would withhold water if she didn't eat. The Record further indicates that, beyond a violent and physical approach to discipline, Defendant was sexually assaulting J.S. It is probable that, combined, such psychological trauma resulting from the abuse contributed to J.S.'s malnutrition. By the time J.S. was admitted to the hospital, she had no

subcutaneous fat and was profoundly underweight. Her hips had been so chronically forced outwards that they would not lie straight, she had bruising around her genitalia, and a build-up of scar tissue and acute tearing in and around her anus. At the time she was admitted to the hospital, J.S. was also actively bleeding from her anus, which medical experts believed was indicative of penetrative trauma that had happened at most, hours before.

There is no doubt Defendant's cruel and depraved conduct constituted torture. Beating J.S. with a belt, forcing her to exercise, withholding water, and sexually assaulting her is clearly "a course of conduct . . . which intentionally inflict[ed] grievous pain and suffering upon [J.S.]," and it was seemingly done "for the purpose of punishment." *See Anderson*, 346 N.C. at 161, 484 S.E.2d at 545. Far from isolated incidents, Defendant's acts can accurately be described as a "course of conduct." *Id.* at 161, 484 S.E.2d at 545. There is clearly a "pattern of the same or similar acts, repeated over a period of time," as the evidence tends to show that Defendant regularly and commonly resorted to beating J.S., forcing her to exercise, and withholding water, and expert medical testimony at trial tends to show that the sexual abuse was chronically occurring. *See id.* at 161, 484 S.E.2d at 545. Accordingly, we hold that the State satisfied its evidentiary burden to show that Defendant's actions constituted torture. *See Lee*, 348 N.C. at 489, 501 S.E.2d at 343–44.

3. Proximate Cause

[2] Defendant contends that, even if his violent physical and sexual abuse of J.S. constituted torture, it was not the proximate cause of J.S.'s death. To support this, Defendant argues J.S. actually died of pneumonia aggravated by her state of starvation. According to Defendant, the pneumonia and starvation were "new and independent cause[s]" that were not the "result of any of [Defendant's] acts." We disagree.

The doctrine of proximate causation exists across the law as a limiting factor, designed to prevent liability from reaching too far back along a causal chain and applying to parties who cannot truly be said to be responsible for a harm done. *See*, *e.g.*, *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 1318, 117 L. Ed. 2d 532 (1992) ("Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."); *see also* W. Page Keeton et al., *Prosser and Keeton on Torts* § 41, at 264 (5th ed. 1984) ("Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.").

A proximate cause is one in,

> (1) which, in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

State v. Hall, 60 N.C. App. 450, 454–55, 299 S.E.2d 680, 683 (1983). For the purposes of proximate causation, "the act of the accused need not be the immediate cause of the death[;] [the accused] is legally accountable if the direct cause is the natural result of his criminal act." *State v. Minton*, 243 N.C. 716, 722, 68 S.E.2d 844, 848 (1952).

First, Defendant's contention that there is no causal chain connecting his torturing J.S. to her starvation and pneumonia is unsupported by the evidence. The Record indicates J.S. did not lose her appetite or struggle with eating until she was left in Defendant's sole custody for nine months. The Record further shows that when she was only around Ms. Smith, J.S. would eat, albeit slowly and with plenty of encouragement. The facts in the Record reveal that in the summer of 2015, J.S. went on a family trip without Defendant and returned happier, more energetic, and with more of an appetite. To that end, J.S. also behaved differently when away from Defendant: she was more energetic and talkative. Finally, J.S.'s pneumonia infection was not an independent cause; expert testimony indicated that atelectasis—the inability to properly breathe deeply—both caused and limited J.S.'s ability to fight off her pneumonia.

Contrary to Defendant's assertion, J.S.'s starvation was not an independent cause sufficient to break the causal chain between Defendant's torturous abuse of J.S. and her heartbreaking death. Instead, the evidence demonstrates that J.S.'s loss of appetite and subsequent starvation were the product of Defendant violently physically and sexually abusing her. The Record evidence and trial testimony illustrate a toddler who lost her appetite as a result of the psychological trauma she suffered from Defendant's abuse.

Medical evidence indicates that Defendant sexually abused J.S. for an extended period of time and that J.S. did not lose her appetite until she was left in the exclusive care of Defendant. The evidence also tends to show that J.S.'s starvation caused her pneumonia. J.S. did not develop

pneumonia from some chance encounter with a pathogen. Instead, J.S. contracted pneumonia because her body was too weak to properly draw breath as a result of her state of deathly malnourishment.

Far from being unfortunate and independent causes, J.S.'s starvation and pneumonia are the "natural result" of Defendant's "criminal act[s]" of violently and sexually abusing J.S. *See Minton*, 243 N.C. at 722, 68 S.E.2d at 848. Accordingly, there was no break in the causal chain.

Second, Defendant characterizes his treatment of J.S. as little more than "non-fatal assaults," which he could not have "reasonably foreseen" would result in J.S.'s death. Defendant's argument that J.S.'s death was not reasonably foreseeable is unsupported by the evidence or law.

We begin by noting that our inquiry is not whether Defendant could have reasonably foreseen the death, but whether a "person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed." *Hall*, 60 N.C. App. at 455, 299 S.E.2d at 683.

Here, there was a relationship between Defendant's abusive acts and J.S.'s starvation and exceedingly diminished physical state. Defendant chronically physically and sexually abused J.S., his daughter, to the point that she lost her appetite and would not eat. Her loss of appetite led to J.S. becoming dangerously malnourished and starved, a condition that subsequently led to J.S. contracting pneumonia, and ultimately dying.

A "person of ordinary prudence" would have reasonably foreseen that continuing to perpetuate a cycle of physical and sexual abuse that already seemed to be causing the victim to starve would produce an injurious result, if not death. *See id.* at 455, 299 S.E.2d at 683. J.S.'s death was the "probable" result of Defendant's abuse. *See id.* at 455, 299 S.E.2d at 683. Accordingly, we hold that J.S.'s death was foreseeable "under the facts as they existed." *See id.* at 455, 299 S.E.2d at 683.

Because J.S.'s death was the "natural result" of Defendant's "criminal act[s]" (*see Minton*, 243 N.C. at 722, 68 S.E.2d at 848), and a "person of ordinary prudence" would conclude that J.S.'s death was the "probable" result of her abuse (*see Hall*, 60 N.C. App. at 455, 299 S.E.2d at 683), J.S.'s death completed the causal chain that began with her abuse and torture at the hands of Defendant. Defendant is, therefore, properly responsible for the harm done, and, thus, we hold there was no error in the trial court's denial of Defendant's motion to dismiss. *See Williams*, 362 N.C. at 632–33, 669 S.E.2d at 319.

B. The State's Expert Testimony

[3] "[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Normally, "the trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005). "In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Plain error arises when an error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and internal quotation marks omitted).

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Under the North Carolina Rules of Evidence, an expert witness may testify if: "(1) [t]he testimony is based upon sufficient facts or data[,] (2) [t]he testimony is the product of reliable principles and methods[, and] (3) [t]he witness has applied the principles and methods reliably to the facts of the case." N.C. R. Evid. 702. "Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. R. Evid. 704.

Defendant challenges Dr. Janssen's testimony that the level of "neglect" in J.S.'s death "raises [] the manner to the level of homicide." Defendant, however, did not object or file a motion *In Limine* following Dr. Janssen's testimony. Defendant likewise challenges Dr. Cooper's testimony that the mistreatment of J.S. must have been a "willful" act, but similarly failed to object at the time of the testimony. Accordingly, Defendant did not preserve the admission of the expert testimony under Rule 702 as an issue for appellate review. *See* N.C. R. App. P. 10(a)(1). We, therefore, review the admission of the testimony for plain error and, for the reasons explored below, do not find any.

Under the plain error rule, there must first have been error committed. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. We see no evidence in the Record that this testimony was not "based upon sufficient facts or data," or that it was not "the product of reliable principles and methods." *See* N.C. R. Evid. 702. Dr. Janssen and Dr. Cooper each testified as to their beliefs and opinions about J.S.'s death. Though they both made comments that related to Defendant's state of mind, their comments were sufficiently based on the facts and evidence before them.

If error was committed, however, then under the plain error rule this Court considers whether "absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. In this case, the jury probably would have reached the same verdict even without the challenged testimony. Dr. Janssen and Dr. Cooper merely testified that, based on the evidence before them, J.S.'s starvation and death did not appear consistent with a death solely caused by neglect. There is no evidence that the jury misunderstood the testimony and instead thought that the two experts were testifying as to Defendant's actual mental state. As we have previously explained, it does not matter whether Defendant intentionally starved J.S., as the starvation was clearly the product of Defendant's intentional abuse and was obviously made worse by Defendant's continued actions.

Accordingly, even if the trial court had excluded Dr. Janssen and Dr. Cooper's testimony, the jury probably would have reached the same result given the sheer weight of the evidence. As such, we affirm the trial court's order. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

V. Conclusion

After careful review, we conclude: the trial court did not err when it denied Defendant's motion to dismiss, as the State's evidence amply supported proximate causation of the child's death, and the trial court properly admitted the testimony of expert witnesses. For the foregoing reasons, we affirm the trial court's rulings and the jury verdict.

NO ERROR.

Judges HAMPSON and RIGGS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JULY 2023)

BLIZZARD v. JOYNER No. 23-43	Pasquotank (20CVD370)	Affirmed
IN RE A.G.L. No. 22-891	Watauga (20JT41)	Affirmed
IN RE A.L.C.H. No. 22-1061	Iredell (20JT141)	Affirmed
IN RE D.P. No. 22-809	Rutherford (21JA119)	Affirmed
IN RE D.W. No. 22-849	Watauga (19JT53)	Affirmed
IN RE E.J-K. No. 22-861	Guilford (21JA402) (21JA403) (21JA404)	Affirmed
MANZOEILLO v. PULTEGROUP, INC. No. 21-722	Durham (21CVS2278)	Reversed in Part; Affirmed in Part
MENDEZ v. MENDEZ No. 22-647	Catawba (20CVD1054)	Affirmed in Part, Vacated in Part, and Remanded
ROMAN CATH. DIOCESE OF BROOKLYN, N.Y. v. TIGHE No. 22-905	Mecklenburg (21CVS13272)	Affirmed
STATE v. BANKS No. 22-317	Yancey (18CRS50127) (19CRS409)	Dismissed
STATE v. BELFIELD No. 22-769	Nash (19CRS50811)	Vacated and Remanded
STATE v. BONDS No. 22-920	Pasquotank (18CRS50893)	No Error
STATE v. DOVER No. 20-362-2	Rowan (16CRS52274-75) (19CRS1637)	No Error
STATE v. HINES No. 22-824	Lenoir (14CRS51201)	Dismissed.

STATE v. MITCHELL No. 22-749	McDowell (18CRS51290)	No Error
STATE v. RASAY No. 22-908	Anson (17CRS51639) (17CRS51642) (17CRS923)	No error in part; vacated and remanded in part

HEADNOTE INDEX

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

Notice of appeal—timeliness—applicable deadline under Rule 3(c)—An appeal from an equitable distribution order was dismissed as untimely where defendant did not—as required under Appellate Rule 3(c)(1)—file her notice of appeal within thirty days after the trial court entered the order. Although defendant did file her notice of appeal exactly thirty days after plaintiff served her a copy of the order, which would have made defendant's notice timely under Appellate Rule 3(c)(2), plaintiff served the copy of the order within the three-day window prescribed by Civil Procedure Rule 58 (the calculation of which included only business days, pursuant to Appellate Rule 6(a)), and therefore Appellate Rule 3(c)(1) governed the timeliness of defendant's notice of appeal. **Thiagarajan v. Jaganathan, 105.**

Petition for writ of certiorari—denial of motion to suppress—intent to appeal—Where defendant clearly intended to appeal from the trial court's order denying his motion to suppress, as evidenced by his counsel's announcement in open court about defendant's intent, but lost his right to appeal because he failed to appeal the trial court's judgment entered upon his guilty plea, the appellate court granted defendant's petition for writ of certiorari to review the suppression order. **State v. Furtch, 413.**

Preservation of issues—fatal defect in indictment—general motion to dismiss—In defendant's appeal from his conviction for aiding and abetting possession of a firearm by a felon, the appellate court presumed, without deciding, that defendant's general motion to dismiss for insufficiency of the evidence at trial preserved for appellate review his argument that the indictment was fatally defective. **State v. Gunter, 45.**

Right to appeal—denial of suppression motion—guilty plea—no benefit conferred—notice of intent to appeal not required—Where defendant pleaded guilty to multiple drug offenses as charged—and therefore his plea was not made as part of a plea arrangement with the State and conferred no benefit—he was not required to give notice to the State of his intent to appeal from an order denying his motion to suppress. However, the appellate court noted that, given the unsettled state of the law regarding the notice requirement under these circumstances, it had granted defendant's petition for a writ of certiorari by separate order so as to reach the merits of defendant's appeal. **State v. Moua, 678.**

Timeliness of appeal—dismissal orders—tolling—Rule 52(b) motion—In an appeal from three orders entered in a negligence action—a dismissal order (for failure to join a necessary party), a post-dismissal order, and an amended post-dismissal order—the Court of Appeals lacked jurisdiction to consider the merits of the dismissal order because plaintiff filed his notice of appeal more than thirty days after the dismissal order was entered, thus making the appeal untimely pursuant to Appellate Rule 3(c). Plaintiff's Civil Procedure Rule 52(b) motion did not toll the time for filing a notice of appeal because a Rule 52(b) motion (which allows the court to amend its findings or make additional findings and amend the judgment accordingly) was not a proper motion in the context of dismissal for failure to join a necessary party, and the rule was not designed to provide a backdoor for making late amendments to a complaint. As for the amended post-dismissal order, which subsumed the post-dismissal order, plaintiff's notice of appeal was timely filed within 30 days of the effective date. **Reints v. WB Towing Inc., 653.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

CHILD CUSTODY AND SUPPORT—Continued

CIVIL PROCEDURE—Continued

discretion in denying defendant's Rule 60 motion for relief from the dismissal order without addressing defendant's request to amend her counterclaims. However, because the order dismissing defendant's counterclaims included extensive factual findings that went beyond a mere recitation of undisputed facts forming the basis of the court's decision, the court did abuse its discretion in denying defendant's Rule 52(b) motion requesting that the court amend the order to remove those improper findings. **Maynard v. Crook, 357.**

Summons—timeliness—motion to dismiss—Where plaintiff filed his complaint "for restorative justice" and failed to cause a summons to be issued within five days pursuant to Civil Procedure Rule 4(a), the action abated. Because defendant thereafter filed a motion to dismiss before plaintiff caused a summons to be issued, the action was not revived and the trial court did not err by granting defendant's motion to dismiss. **Payin v. Foy, 195.**

CLERKS OF COURT

Removal proceeding—constitutional interpretation—disqualification versus removal—In a proceeding to remove respondent from serving as county clerk of superior court pursuant to N.C.G.S. § 7A-105 (which provides for suspension or removal based on willful misconduct), a panel of the Court of Appeals noted its disagreement with a prior appellate opinion in the same case which interpreted Article VI, section 8 of the North Carolina Constitution as authorizing removal of a superior court clerk and thereby erroneously (in the current panel's view) effectuated section 7A-105 as a procedural mechanism for disqualification under Article VI. By contrast, the current panel would interpret the same constitutional provision (which is titled "Disqualifications for office") as only authorizing disqualification, as differentiated from Article IV, section 17 (titled "Removal of Judges, Magistrates, and Clerks") which by its plain language specifically authorizes removal and, thus, is the only constitutional provision for which 7A-105 was intended to be a procedural mechanism for removal of clerks. **In re Chastain, 271.**

Removal proceeding—corruption or malpractice—multiple incidents—considered in the aggregate—In a proceeding to remove respondent from serving as county clerk of superior court, there was no prohibition on the trial court's application of the corruption or malpractice standard for disqualification—under Article VI, section 8 of the North Carolina Constitution—by considering multiple incidents of alleged misconduct in totality rather than individually in isolation. **In re Chastain, 271.**

Removal proceeding—corruption or malpractice—sufficiency of findings—evidentiary support—In a proceeding to remove respondent from serving as county clerk of superior court based on multiple incidents of misconduct where respondent exceeded the scope of her authority and undermined the administration of justice and the authority of other judicial officials, the trial court did not err in entering an order permanently disqualifying respondent from office pursuant to Article VI, section 8 of the North Carolina Constitution where its challenged findings of fact were supported by competent evidence, and where those findings in turn were sufficient to support the court's conclusions of law (aside from a portion of one ultimate finding that did not affect the outcome). **In re Chastain, 271.**

Removal proceeding—corruption or malpractice—willful misconduct—egregious in nature—In a proceeding to remove respondent from serving as county clerk of superior court, the trial court properly entered an order permanently disqualifying respondent from office where its conclusion that respondent acted in a

EVIDENCE

Disclosure of evidence by State—untimely disclosure—sanctions—exculpatory value of evidence—In defendant's trial for charges arising from allegations that he assaulted his girlfriend, the trial court did not abuse its discretion by denying defendant's motion for a mistrial premised on the State's late disclosure of discoverable material under N.C.G.S. § 15A-910 where defendant failed to identify any exculpatory value in the recorded jail phone calls. In addition, pursuant to the statute, even when a disclosure violation occurs, sanctions are not mandatory. The appellate court did not consider defendant's arguments regarding evidence that was admitted without objection. **State v. Mahatha, 52.**

Expert testimony—methodology—estimated vehicle speed during car crash—In a prosecution for second-degree murder and other crimes related to a hit-and-run car crash, the trial court did not abuse its discretion in allowing a state trooper, testifying as an expert in accident reconstruction, to estimate the speed of defendant's car at the moment defendant crashed the car into another vehicle, killing two people. The circumstances of the accident made it impossible to calculate the car's exact speed using either of two established scientific tests, and therefore the trooper relied on a crash reconstruction exercise with circumstances resembling those of the crash involving defendant; it was permissible for the trooper—without giving a specific speed—to compare the two crashes and opine that defendant's car was driving above the applicable speed limit based on the trooper's observations and knowledge about the speed and force needed to cause the kind of damage done to the crash victims' vehicle. **State v. Taylor, 581.**

Expert testimony—murder by torture—child victim—cause of death—In a trial for first-degree murder by torture of a child victim and related sexual offenses, there was no plain error in the admission of testimony from two expert witnesses—the deputy chief medical examiner who conducted the autopsy of the victim and a developmental and forensic pediatrician who gave testimony on fatal child maltreatment and sexual abuse—on the issue of the victim's cause of death. Although both experts made comments related to what defendant's intentions were when he committed his abusive acts against the victim, the experts' beliefs and opinions were sufficiently based on the evidence before them. Further, even if the testimony had been excluded, the jury likely would have reached the same result given the weight of the evidence of defendant's guilt. **State v. Smith, 707.**

Hearsay—child neglect and dependency proceeding—statements by child to social workers—residual exception—statement by party opponent—An order adjudicating a mother's oldest child as neglected and her two younger children as neglected and dependent was reversed and remanded where the trial court had based multiple factual findings on inadmissible hearsay statements made by the middle child to social workers (regarding altercations between the child and the mother). The statements were inadmissible under the residual hearsay exception (Evidence Rule 803(24)) because the court did not enter any findings showing that it had considered the different circumstances under which the exception would apply. Additionally, the court erred in admitting the statements under the hearsay exception for statements made by a party opponent (Rule 801(d)), since only the mother—not the child who made the statements—was a party opponent to the petitioner-complainant in the proceeding. Furthermore, the mother showed that she was prejudiced by the court's error where, absent the improperly admitted hearsay evidence, the record did not support the court's adjudications. **In re A.J., 632.**

EVIDENCE—Continued

Hearsay—exception—recorded recollection—Rule 403 analysis—murder trial—witness's police interview—photo lineup identification—In a first-degree murder prosecution arising from a fatal shooting, the trial court did not err by admitting a video of a witness's police interview into evidence along with her photo lineup identification of defendant, as both constituted recorded recollections falling under the hearsay exception in Evidence Rule 803(5). The interview occurred only two days after the shooting, and therefore the witness spoke to police while her memory of the events was still fresh. Both the interview and the lineup identification correctly reflected the witness's knowledge where, although she denied remembering most of the interview and did not testify that her statements to police were correct, she also did not disavow her statements and even testified that "I told [police] the truth if I talked to them." Additionally, she identified her signature and initials on the pre-trial identification paperwork, and acknowledged identifying defendant during the lineup. Finally, because the evidence was highly probative of defendant's motive for shooting the victim, the court did not abuse its discretion in admitting the evidence over defendant's Rule 403 objection. **State v. Smith, 233.**

Hearsay—recorded recollection—foundation—examined and adopted—eyewitness drunk, legally blind, and suffering from short-term memory issues—In a prosecution for felony cruelty to an animal arising from the fatal shooting of a dog, the trial court committed plain error by admitting written hearsay as substantive evidence where the eyewitness who gave the statement (dictated to his son because the eyewitness could not read or write) was drunk (at the time of the shooting and at the time he made the statement), legally blind, and suffered from short-term memory issues. The eyewitness's signature on the statement was insufficient to establish the necessary foundation to admit the hearsay statement under Evidence Rule 803(5) because the statement was not read back to the eyewitness at the time it was transcribed so that he could adopt it when the matter was fresh in his memory, the eyewitness's in-court testimony contradicted his written statement, and the eyewitness could recall the events described in the written statement. Because the improperly admitted hearsay statement was the only evidence definitively identifying defendant as the person who shot the dog, the error had a probable impact on the jury's verdict and therefore required a new trial. **State v. Hocutt, 562.**

Lay testimony—reckless driving—identity of driver—no personal observation—curative instruction—In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road and near which defendant was discovered trapped under a fence, although a trooper's testimony that he believed defendant was the driver of the truck was inadmissible because the trooper did not personally observe defendant driving, there was no reversible error where the trial court gave the jury a curative instruction to disregard the opinion testimony. Even assuming that the instruction was insufficient, defendant could not demonstrate that the trooper's testimony prejudiced him because he failed to object to other evidence of the trooper's belief that defendant was the driver. **State v. Burris, 535.**

Murder trial—witness identifications of defendant—lay opinion testimony—that witnesses were forthcoming and unequivocal—plain error analysis—In a first-degree murder prosecution, where witnesses to a fatal shooting had identified defendant as the shooter to law enforcement, the trial court did not commit plain error by allowing the detectives who interviewed the witnesses to testify that the witnesses were "forthcoming" and "unequivocal" when they identified defendant. Lay testimony concerning a witness's demeanor does not constitute an improper

SEARCH AND SEIZURE—Continued

affidavit accompanying defendant's motion to suppress did not contain facts supporting the motion, the trial court properly exercised its discretion when it elected to address the merits of the motion rather than summarily denying it. **State v. Furtch, 413.**

Traffic stop—extension—inquiries incident to stop—in support of mission— In a drugs prosecution, the trial court properly denied defendant's motion to suppress drugs found in his vehicle during a traffic stop where the court's challenged findings about the distance traveled by an officer to catch up to defendant's vehicle and the amount of time the officer took to conduct a pat-down of defendant's person were supported by competent evidence. Further, the court's conclusions of law that the searches of defendant's person and vehicle after defendant was stopped for following another vehicle too closely and driving erratically did not impermissibly extend the stop since they were conducted in the ordinary course of inquiries incident to the stop and were permitted as precautionary measures to ensure the officer's safety. Likewise, a K-9 sniff for drugs that was unrelated to the reasons for the traffic stop did not unreasonably prolong the duration of the stop. **State v. Furtch, 413.**

Traffic stop—unlawfully extended—consent to search vehicle invalid—judgment vacated—Defendant's traffic stop for speeding was unlawfully extended and he was illegally seized for purposes of the Fourth Amendment where the investigating officer continued questioning defendant after the purpose of the stop had concluded—signified by the officer returning defendant's license and registration to him and giving him a verbal warning for speeding. There was no reasonable suspicion to extend the stop where, after determining that defendant was on active probation but had no active warrants, the officer asked to talk to defendant outside of the car and reached inside to unlock and open the door, and, once the two men were standing by the back of the car, the officer returned defendant's documents—at which point the stop's mission was over—and asked defendant about his probation status and whether he had anything on his person or in his car. Under these circumstances, a reasonable person would not have felt free to leave and, therefore, defendant's subsequent consent to search the vehicle was not freely and voluntarily given. The trial court's order denying defendant's motion to suppress evidence of drugs found in the vehicle was reversed and defendant's judgment for multiple drug offenses was vacated. **State v. Moua, 678.**

Warrantless blood draw—impaired driving—unconscious driver—exigent circumstances—In a prosecution for driving while impaired and reckless driving based on a single-vehicle accident involving a pickup truck that had run off the road, there were sufficient exigent circumstances to justify a warrantless blood draw where defendant was found unconscious near the vehicle with severe injuries and extensive bleeding, defendant smelled of alcohol and there were open beer cans inside and outside the vehicle, the responding trooper spent an hour investigating and securing the scene while defendant was transported to a hospital for medical treatment, and defendant was still unconscious when the trooper arrived at the hospital. Therefore, there was no reversible error in the admission of the results of the blood draw into evidence. **State v. Burris, 535.**

SENTENCING

Prior record level—out-of-state convictions—classification—substantial similarity—The trial court did not err when sentencing defendant (for possession of a firearm by a felon) as a prior record level V after the court made a finding

SENTENCING—Continued

that defendant's out-of-state felony convictions were substantially similar to North Carolina offenses and could be classified accordingly. The trial court reviewed the prior convictions in open court and fully executed the sentencing worksheet with its finding of substantial similarity, and defendant presented no evidence to overcome the presumption of regularity. **State v. Legrand, 572.**

Prior record level—proof of prior convictions—copy of records maintained by Department of Public Safety—In sentencing defendant for first-degree felony murder and possession of a firearm by a felon, the trial court did not err in its calculation of defendant's prior record level where the State satisfied its burden to prove defendant's prior convictions by submitting a printout of the computerized criminal record maintained by the Department of Public Safety, as permitted pursuant to N.C.G.S. § 15A-1340.14(f). **State v. Miller, 429.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the child—dispositional factors—likelihood of adoption—not dispositive—The trial court did not abuse its discretion in concluding that termination of a mother's parental rights in her minor son was in the child's best interests, where clear, cogent, and convincing evidence supported the court's factual findings regarding two statutory dispositional factors: whether termination would aid in accomplishing the child's permanent plan of adoption, and the bond between the mother and her child. A likelihood of adoption (also one of the statutory factors) is not dispositive as to a best interest determination, and therefore—even if the record lacked current, relevant evidence indicating a likelihood of the child's adoption—the court's decision was not manifestly unsupported by reason. **In re D.C., 30**.

Grounds for termination—failure to make reasonable progress—sufficiency of evidence—nexus between case plan components and conditions that led to child's removal—The trial court properly terminated a mother's parental rights in her son for failure to make reasonable progress in correcting the conditions that led to his removal from the home (N.C.G.S. § 7B-1111(a)(2)) where the court's findings of fact were supported by clear, cogent, and convincing evidence, and where there was a sufficient nexus between the case plan components that the mother failed to comply with and the conditions resulting in the child's removal. Specifically, the evidence showed that the mother willfully failed to participate in parenting classes and individual counseling sessions that her case plan required her to complete, and the main purpose of those two case plan components was to help the mother acknowledge why her son was removed from the home. **In re D.C., 30.**

Personal jurisdiction—summons-related defect—waiver—general appearance by counsel—The trial court had personal jurisdiction over respondent mother in a termination of parental rights proceeding where, although there was no evidence that a summons had been issued or served on respondent and respondent did not appear at the termination hearing, any defect in service of process was waived because respondent had actual notice of the hearing (after having been personally served with the termination petition and two hearing notices) and her counsel made a general appearance on her behalf at the hearing. **In re M.L.C., 313.**

Standard of proof—Rule 60(a) motion—substantive modification to original order—The trial court abused its discretion by granting petitioner-mother's Rule 60(a) motion to amend the court's original order, which terminated respondent-father's parental rights in his child, to add the correct standard of proof to the